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AMERICAN AND BRITISH EMPLOYMENT DISCRIMINATION LAW: AN INTRODUCTORY COMPARATIVE SURVEY

*Robert N. Covington**

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I. INTRODUCTION

A. *Purpose, Scope, and Organization*

Age, alienage, ethnicity, race, religion, and sex lead to differential treatment of individuals the world over. Employment discrimination is felt most acutely in those industrialized nations where one's income level is the major determinant of so many other things: where one lives, what one wears, how one's children are educated. Concern over the social and economic consequences of employment discrimination has led to the development of new legal techniques on both sides of the Atlantic. The recent enactment in Britain of the Sex Discrimination Act, 1975,[1] and the Race Relations Act, 1976,[2] invites a comparison of those statutes and related developments with American law. This article seeks to provide the skeleton of such a comparison; fleshing out must await the rendering of decisions under the new British statutes as well as further interpretation of our own statutes. The perspective of this essay is American because of the greater volume of American case law, and the writer's American background. Hopefully, an examination of British efforts will enable us better to evaluate our own law.

A familiar organization scheme is employed: the comparisons are arranged according to the characteristic banned as a basis of discrimination—age discrimination first, then racial, ethnic and national origins discrimination lumped together, then sex discrimination, and finally religious discrimination. Since all prohibitions of preferential treatment are not contained in specific antibias statutes, there is a brief treatment of broader sources banning discrimination, such as the American Constitution and labor relations laws. Discussion of American decisions has deliberately been

1. 1975, c. 65 [hereinafter cited as SDA 1975].
2. 1976, c. 74 [hereinafter cited as RRA 1976].

limited to those which most sharply demonstrate a similarity or difference with British law. Other decisions are adequately discussed in a growing and readily available body of literature.

The term "introductory survey" in the title does not imply that this is the first time these laws have been compared. British writers in the field,[3] as well as Members of Parliament, have studied the American statutes and procedures assiduously. During the lengthy and acrimonious debate on the Race Relations Act, 1976, the American origins of certain proposals were mentioned both in praise[4] and in damnation.[5] The main reason for greater transoceanic borrowing by the British than by the United States is doubtless chronological. The first American employment discrimination legislation dealing with the problem broadly at a national level was Title VII of the Civil Rights Act of 1964,[6] which was strengthened by amendment in 1972. Our Equal Pay Act, forbidding sex discrimination in wage rates, was passed in 1963.[7] The British dates lag just slightly and are as follows: the Race Relations Act, 1968[8] (a 1965 statute did not deal with employment), the Equal Pay Act, 1970,[9] the Sex Discrimination Act, 1975,[10] and a strengthened Race Relations Act, 1976.[11] Although this suggests that there is an element of "catching up" in some of the British legislation, it is often catching up with other Common Market members, not with the United States. The timing of the enactment of the British laws is clearly a reflection of internal needs created by changed conditions. It does not reflect a desire to emulate Yan-

3. *See, e.g.*, B. HEPPLE, RACE, JOBS AND THE LAW IN BRITAIN 162-67 (1968) (a revised second edition in 1970 discusses the Race Relations Act, 1968, in a most helpful way); A. LESTER & G. BINDMAN, RACE AND LAW 83, 177-79, 205-06 (1972).

4. 914 PARL. DEB., H.C. (5th serv.) 1627 (1976).

5. *Id.* 1636, 1641 ("almost slavishly modelled on the American example").

6. 42 U.S.C. § 2000(e) *et seq.* (1970 & Supp. V 1975).

7. 29 U.S.C. § 206(d) (1970).

8. 1968, c. 71. For commentary, see the works cited in *supra* note 3.

9. 1970, c. 41 [hereinafter cited as EPA 1970].

10. 1975, c. 65. For general treatments, see D. WALKER, SEX DISCRIMINATION (1975); Creighton, *Enforcing the Sex Discrimination Act*, 5 Indus. L.J. 42 (1976); Newell, *Recent Legislation-Discrimination*, 6 Indus. L.J. 101 (1977); Pettman, *Employment Aspects of the Sex Discrimination Act* 1975, 18 MANAGERIAL L. VI-16 (1976); Richards, *The Sex Discrimination Act: Equality for Women?* 5 Indus. L.J. 35 (1976); Reid, *Women in Employment*, 39 MOD. L. REV. 432 (1976). The principal background document is the WHITE PAPER, EQUALITY FOR WOMEN, CMND. No. 5724 (1974).

11. 1970, c. 41. The principal background document is the WHITE PAPER, RACIAL DISCRIMINATION, CMND. No. 6234 (1975).

kee cousins for the sake of imitation. The selection of which American doctrine and practice to borrow is, on the whole, thoughtful and reasonable. In at least some instances, the time is now ripe for some American borrowing from the mother country.

B. *Economic Context*

A comparison of American and British population and work force statistics is difficult because the two nations do not utilize the same classification scheme. British census data are rarely broken down into racial groupings, for example; instead one must extrapolate from country of origin figures.[12] The 1950 estimates of Britain's non-white population range from 100,000 to 200,000,[13] less than .5 percent of the total population. By the 1971 census, immigration from the "New Commonwealth" countries (generally the West Indies, Africa, India, and Pakistan) and births raised these figures to 1.5 million non-white persons, or 2.7 percent of the total population.[14] Workforce participation rates of non-white males generally equal or exceed those of white males,[15] but the rates for non-white females vary widely according to country of birth. In 1971, for example, only 13 percent of the Pakistani women in Britain were working, whereas 53 percent of the West Indian women in Britain were working. Prior to the recent recession unemployment rates for non-whites and whites were similar, but the relative youth, inexperience, and lack of fluency in English (for those of Asian origin) led to predictions that a higher non-white unemployment rate may emerge. A 1974 PEP study indicates substantial underemployment of non-whites as compared to whites.[16]

The American situation differs from the British in several ways. The number of non-whites in the United States in 1970[17] was

12. *See, e.g.,* HEPPLE, *supra* note 3, at 12-19.

13. The first estimate appears in W. DANIEL, RACIAL DISCRIMINATION IN BRITAIN (1967); the second is in COMMUNITY RELATIONS 1974-75 Appendix 1. (1974-75 H.C. 466) (Annual Report of the Community Relations Commission).

14. *Id.* at Appendix 2, n. 4.

15. *Id.* at Appendix 7; *see also Racial Disadvantage—A PEP Report,* 84 DEP'T EMPL. GAZETTE 252-53 (1976).

16. D. SMITH, RACIAL DISADVANTAGE IN EMPLOYMENT: SUMMARY OF THE MAIN FINDINGS 5 (1974) (extract from PEP Broadsheet 544). The "skilled-unskilled" classification scheme used in the study (based on varying employer usage) is questionable, but even if one allows for errors of between 10 and 20%, the concentration of non-whites in unskilled jobs strongly suggests that many non-whites are working well below their capacity.

17. STATISTICAL ABSTRACT OF THE UNITED STATES 1975, Table 26.

25,138,000 (22,581,000 Negro; 2,557,000 other non-white) out of a total population of 203,211,926 (thus one-eighth are non-white). The Negro component is almost entirely indigenous; indeed, the net migration of Negroes from 1960 to 1970 was 85,000.[18] The United States is also home to a large number of foreign-born citizens (9,619,000 in 1970) and natives of foreign-born or mixed parents (23,956,000).[19] This "foreign stock" includes 3,581,000 persons of Spanish heritage, as well as other groups. For many of these people English is a second language.[20] Thus, both the numbers and proportion of potential discriminatees is much greater on this side of the Atlantic. This is demonstrated by American labor force participation rates in 1971, which were 81 percent for white males and 76 percent for non-whites. The gap was particularly wide for teenagers and workers between the ages of 45 and 54.[21] Average weekly earnings of black males in 1974 lagged behind those of white males by $49.[22] The April 1975 unemployment rate was 7.9 percent for whites and 13.8 percent for non-whites.[23]

While race, color, and ethnic group statistics reveal a greater likelihood of employment discrimination in the United States than in Britain, the status of working women in the two countries is remarkably similar. The number of male workers as compared with the number of female workers in Britain in June 1975 was 13,073,000 to 8,975,000[24] (a ratio of 1.45:1). In the United States in April of the same year the figures were 50,407,000 and 33,142,000[25] (a ratio of 1.52:1). The average weekly pay of women in Britain in April 1975 was £32.4; that of men, £48.1.[26] The American female was averaging $124 per week in 1974; the male, $204.[27] In both countries women tend to be concentrated in lower level clerical positions and are relatively under-represented in industrial pro-

18. *Id.* at Table 30.
19. *Id.* at Table 42.
20. *Id.*
21. U.S. BUREAU OF THE CENSUS, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES, (Current Population Rep., Ser. P-23, No. 42, 1971).
22. Bradshaw & Stinson, *Trends in Weekly Earnings,* MONTHLY LAB. REV., Aug. 1976.
23. STATISTICAL ABSTRACT OF THE UNITED STATES Table 571 (1975).
24. 84 DEP'T EMPL. GAZETTE 654 (unadjusted series) (1976).
25. STATISTICAL ABSTRACT OF THE UNITED STATES Table 586 (1975).
26. 84 DEP'T EMPL. GAZETTE 676 (1976).
27. STATISTICAL ABSTRACT OF THE UNITED STATES Table 590 (1975).

duction jobs.[28]

From this very brief review two hypotheses emerge. First, there is a clear racial disadvantage in both nations, but the problem is of greater scope in the United States. Accordingly, effective reduction of the impact of racial bias in the American employment sphere is likely to require more intense and prolonged effort. Second, since the female employment situation in the two nations is quite similar, the remedies for sex discrimination should perhaps also be similar. The best current American evidence indicates that the problem of persistently lower earnings for women is structurally different from the problem of lower earning rates for members of minority groups and is possibly less tractable.[29]

II. ANTIDISCRIMINATION DOCTRINES DERIVED FROM GENERAL LAW PROVISIONS

A. *The American Constitution and the British Concept of Natural Justice*

The written United States Constitution, which has no British equivalent, has had a considerable effect on employment discrimination. First, as a source of positive law, the Constitution forbids intentional discrimination by federal and state governments on the basis of race,[30] religion,[31] sex,[32] age,[33] and alienage.[34] Second, the

28. *See* 84 DEP'T OF EMPL. GAZETTE 637-38; STATISTICAL ABSTRACT OF THE UNITED STATES Table 589 (1975).

29. *See generally* Bradshaw & Stinson, *supra* note 22.

30. *See, e.g.,* Ethridge v. Rhodes, 268 F. Supp. 83 (E.D. Ohio 1967) (discrimination by contractors erecting a state building).

31. *See* Johnson v. U.S. Postal Service, 364 F. Supp. 37 (N.D. Fla. 1973) (no violation found; constitutional standard applicable).

32. Cleveland Bd. of Education v. LaFleur, 414 U.S. 632 (1974) (local government regulation requiring pregnant teachers to leave post without individual evaluation of ability to perform violates due process clause of 14th amendment). *See also* Davis v. Passman, 544 F.2d 865 (5th Cir. 1977) (staff of member of Congress; 5th amendment).

33. In *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307 (1976), the Court held that age classifications should be judged by the "rational basis" as opposed to the "strict scrutiny" test under the fourteenth amendment. A state law requiring retirement of police officers at 50 was found to have a rational basis.

34. Hampton v. Wong, 426 U.S. 88 (1976) (barring of aliens from federal civil service by lower level federal officials invalid); Sugarman v. Dougall, 413 U.S. 634 (1973) (prohibition of aliens from state civil service invalid). The Court, however, stated in *Hampton v. Wong* that under the Constitution the President or Congress may validly bar aliens from federal service. The President has done so. Exec.

Constitution is the source of power for congressional and Presidential antidiscrimination efforts and, thus, is the standard against which statutes and executive orders must be measured to determine whether the power has been excessively or improperly exercised.[35] Third, the Constitution limits the power of state and federal governments to promote invidious discrimination in private employment.[36] Finally, the Constitution sets out the skeleton of American federalism, making the United States Supreme Court the ultimate judge of whether state laws enacted to combat discrimination are permissible.[37] The importance of the United States Constitution should not, however, be overemphasized.

While judicial review of statutes on the basis of a written constitution does not occur in Great Britain, judicial interpretation of statutes, contracts of employment, and internal trade union rules goes on constantly. In the process of interpretation, concepts of natural justice operate like American constitutional principles. Two examples justify this observation. The first is *Roberts v. Hopwood,*[38] which now, thankfully, has been made obsolescent by the Equal Pay Act, 1970. *Roberts* involved a conflict between a local government council and a central government auditor. The local council was authorized by section 62 of the Metropolis Management Act, 1855, to employ "such . . . servants as may be necessary" and to pay these employees "such . . . wages as the Council may think fit." The auditor's powers and responsibilities under section 247(7) of the Public Health Act, 1875, included the power to "disallow any item of account contrary to law, and surcharge the same . . . ." The council decided in 1921 to pay all its workers in the lower pay ranges a minimum of £4 a week. The auditor surcharged the council £5000 on the ground that the £4 minimum (particularly as applied to male workers) was so inconsistent with

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Order No. 11,935, 41 Fed. Reg. 37,301 (1976). *See* Wong v. Hampton, 435 F. Supp. 37 (N.D. Calif. 1977) (finding the terms of the executive order constitutional).

35. Contractors Ass'n of E.Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

36. Ethridge v. Rhodes, 268 F. Supp. 83 (E.D. Ohio 1967); Todd v. Joint Apprenticeship Comm., 223 F. Supp. 12 (N.D. Ill. 1963), *vacated as moot,* 332 F.2d 243 (7th Cir. 1964), *cert. denied,* 379 U.S. 899 (1964) (discrimination in workforce erecting federal courthouse).

37. Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963) (state law prohibiting discrimination not pre-empted; pre-Title VII, now see the Civil Rights Act of 1964, §§ 706, 709, 42 U.S.C. § 2000(e)-5-8 (1970 & Supp. V 1975)).

38. [1925] A.C. 578 (H. L.).

general conditions in the labor market that it amounted to a gift of the rate-payers' money. The House of Lords upheld the auditor, finding that it was proper for the auditor to inquire into the reasonableness of pay scales and that the pay scale of £4 a week for females was appropriately regarded by the auditor as unreasonable. The opinion of Lord Atkinson includes these lines:

> In the sixth paragraph of Mr. Scurr's affidavit he states that "the Council have always paid such a minimum wage as they believed to be fair and reasonable without being bound by any particular external method of fixing wages, whether by trade union rates, cost of living, payments of other local and national authorities or otherwise." Nobody has contended that the council should be bound by any of these things, but it is only what justice and common sense demand that, when dealing with funds contributed by the whole body of the ratepayers, they should take each and every one of these enumerated things into consideration in order to help them to determine what was a fair, just and reasonable wage to pay their employees for the services the latter rendered. The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they put aside all these aids to the ascertainment of what was just and reasonable renumeration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour.[39]

One may compare the attitude of Lord Atkinson in *Roberts* with that of Mr. Justice Frankfurter in *Goesaert v. Cleary*,[40] upholding against an equal protection attack a Michigan statute forbidding the employment of barmaids other than members of the family of a bar owner. Of course, the American Court was being asked to enunciate a constitutional norm incorporating "feminist ambition" rather than to strike down state action incorporating such ambitions. Nonetheless, the parallel willingness to give a current societal attitude the force of law is striking. The second example concerns "adjective" rather than "substantive"[41] notions. In *Lawler v. Union of Post Office Workers*,[42] plaintiffs sought a decla-

39. *Id.* at 594.

40. 335 U.S. 464 (1948).

41. As usual, these terms are not wholly apt. For an arguably "substantive" limit on trade union power to expel members, see Bonsor v. Musicians Union, [1954] 1 Ch. 479 (C.A.). *See also* the opinion of Lord Denning in Edwards v. S.O.G.A.T., [1971] Ch. 354.

42. [1965] 1 All Eng. L. Rep. 353 (Ch.).

ration that their expulsion from a trade union was unlawful because the expelled persons were denied notice and an opportunity to be heard. The court held for the plaintiffs, finding that the principles of natural justice required notice and that the union rules were not inconsistent with notions of natural justice and should, therefore, be considered procedurally compatible with those principles.[43] There is a clear similarity between these principles and notions of "due process" developed in American constitutional litigation as applied (although less stringently) to unions under the Landrum-Griffin Act[44] and the doctrine of fair representation.[45]

B. *Collective Agreements and the Law of Unfair Dismissal*

The differences between American and British schemes for the legal regulation of industrial relations are numerous. Several of these are of particular importance to employment discrimination law. The two systems have markedly different approaches to collective bargaining agreements and the handling of grievances. In the United States, the agreement is of paramount importance; it is the "charter of industrial democracy," and its terms provide the nonstatutory standards by which an employer's treatment of an employee is judged.[46] Moreover, the binding interpretation and construction of these agreements is entrusted in most instances not to a tribunal created by law, but rather to an arbitrator whose source of power is the agreement itself. Unless the arbitrator drafting an arbitral award commits certain very serious errors,[47] the award is not only enforceable, but is also the subject of deference

43. The opinion takes note of a view that a set of union rules not contemplating the application of principles of natural justice would violate public policy. *Id.* at 360. *See also* the discussion of Edwards v. S.O.G.A.T., [1971] Ch. 354, in B. HEPPLE & P. O'HIGGINS, ENCYCLOPEDIA OF LABOUR RELATIONS LAW § 2-1254.

44. 29 U.S.C. §§ 401-531 (1970 & Supp. V 1975).

45. The doctrine of fair representation is discussed in sub-section C *infra.*

46. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy,* 9 U.C.L.A. L. REV. 360 (1962); *Symposium—Arbitration and the Courts,* 58 NW. L. REV. 466, 494, 521, 556 (1963).

47. *See,* 114 U. PA. L. REV. 1050 (1966). A more stringent standard is applied when the arbitrators' conflicts of interest are a basis for refusal of enforcement. *See* Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) (non-labor case).

by the National Labor Relations Board.[48] Pursuit of a grievance alleging discrimination in violation of a collective agreement requiring arbitration, however, does not preclude relief in an action filed under Title VII alleging the same misconduct. An arbitrator's award is not binding in a Title VII proceeding (although it may be received as evidence).[49] Nonetheless, many discrimination-based grievances are handled through the neutral arbitration device.[50] In Britain, on the other hand, an aggrieved employee most often bases his case on the individual contract of employment and not on the collective agreement. Indeed, a collective agreement is not legally enforceable in Britain unless it "is in writing and . . . contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforcible contract."[51] The extent to which the collective agreement is incorporated into the individual contract of employment is limited by statute[52] and by common law principles.[53]

The use of independent arbitrators for the resolution of grievances is much rarer in Britain than in the United States.[54] The most widely used "disputes procedures"—a term used more often than grievance procedures—generally follow a negotiating model rather than an adjudication model.[55] Moreover, the sharp distinction drawn in the United States between "interest arbitration" and "rights arbitration" is absent in Britain.[56] Much of the work done by labor arbitrators in the United States is done by Industrial

48. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). The Collyer doctrine has recently been limited in scope. *See* General American Trns. Corp., 94 LRRM 1483 (1977); Ray Robinson Chevrolet, 94 LRRM 1474 (1977).

49. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The time limit for filing a Title VII claim is not tolled during pursuit of an arbitration award. Int'l Union of Electrical Workers v. Robbins & Myers, Inc., 97 S. Ct. 441 (1976).

50. *See generally* M. STONE & E. BADERSCHNEIDER, ARBITRATION OF DISCRIMINATION GRIEVANCES (1974).

51. Trade Union and Labor Relations Act, 1974, c. 52, § 18(1) [hereinafter cited as TULRA 1974].

52. *See, e.g., id.* § 18(4).

53. *See generally* D. CRUMP, DIX ON CONTRACTS OF EMPLOYMENT 19-20 (4th ed. 1972); K. WEDDERBURN & P. DAVIES, EMPLOYMENT GRIEVANCES AND DISPUTES PROCEDURES IN BRITAIN 45-53 (1969). The enactment of the Contracts of Employment Act, 1972, c. 53, and of other recent statutes requires a cautious reading of these works.

54. *But cf.* The Employment Protection Act, 1975, §§ 3, 4, 10, which is indicative of a growing interest in the potential of neutral arbitration.

55. *See* R. HYMAN, DISPUTES PROCEDURE IN ACTION (1972) (engineering industry procedure); K. WEDDERBURN & P. DAVIES, *supra* note 53, at 75-111.

56. AARON, FORWARD to K. WEDDERBURN & P. DAVIES, *supra* note 53, at vi-vii.

Tribunals in Britain, because of the different scope of statutory rights of individual workers and the limited scope of British rights arbitration. The Industrial Tribunals were first instituted for a limited purpose—assessing employer levies under the Industrial Training Act, 1964.[57] Since then, however, the jurisdiction of these tribunals has been greatly expanded[58] so that typically any charge of unlawful dismissal not resolved by negotiation or conciliation may be brought before such courts. An industrial tribunal consists of a lawyer chairperson and two other persons "appearing . . . to have knowledge or experience of employment in industry or commerce" appointed by the President of Industrial Tribunals.[59] Proceedings are brought before such tribunals by a complaint[60] instituted by a written originating application.[61] Hearings are open and, as compared with an arbitration hearing in the United States, formal.[62] A tribunal may order re-engagement or reinstatement[63] and may make an award of compensation to the wrongfully dismissed person.[64] Appeal of legal questions is to the Employment Appeal Tribunal.[65] This tribunal includes both lawyer members (in this case High Court and Court of Sessions Judges) and lay members with special knowledge or experience in industrial relations.[66] Appeal from the Employment Appeal Tribunal on questions of law

57. 1964, c. 16 § 12.

58. *See* TULRA 1974, *supra* note 51, Sched. 1, part III, ¶ 16; B. HEPPLE AND P. O'HIGGINS, *supra* note 43, at §§ 1-070 to 1-071.

59. Statutory Instruments, 1971, No. 1660, *amending* 1965 No. 1101. A general practice of appointing one person from a management background and one person from a trade union background was interrupted in the early 1970's because of a temporary refusal by labor organizations to nominate potential members. Labor opposition to the labor relations policies of the Conservative government at that time was unusually intense.

60. TULRA 1974, *supra* note 51, Sched. 1, Part III, 17.

61. Statutory Instruments, 1974, No. 1386, Sched. Rule 1.

62. *Id.* at Rules 6-7. The hearings are nonetheless notably less formal than proceedings in the civil courts of general jurisdiction. For American procedures, see generally R. COULSON, LABOR ARBITRATION—WHAT YOU NEED TO KNOW (1973).

63. Employment Protection Act, 1975, c. 71 [hereinafter cited as EPA 1975]. As to the difference, *see* Morris v. Gestetner Ltd., [1973] 3 All Eng. L. Rep. 1168; EPA 1975 § 71(3), (5).

64. EPA 1975, *supra* note 63, §§ 72-76. The maximum award is presently £5200. EPA 1975, Sched. 16, part III, ¶ 17, *amending* TULRA 1974, *supra* note 51, Sched. 1, ¶ 20.

65. There are some cases in which appeal is to the High Court, but these are not likely to involve the types of discharges of interest here. *See* EPA 1975, *supra* note 63, Sched. 6.

66. For rules, see Statutory Instruments, 1976, No. 322.

is (by leave only) to the Court of Appeal (Court of Session in Scotland). The central administrative office for the Industrial Tribunal and the Employment Appeal Tribunal is in London, but to provide easier access, individual tribunals sit at sites mutually convenient to the members and to the interested parties.

The statutory provisions administered by these tribunals are numerous[67] and varied, both in subject matter (compare Docks & Harbours Act, 1966, § 51 (meaning of "dock work") with Employment Protection Act, 1975, § 46 (maternity pay rebates)) and level of specificity. This variety is similar to the United States situation where arbitrators' interpretations of clauses in collective agreements are highly varied.[68] The provisions of the Equal Pay Act, 1970, the Sex Discrimination Act, 1975, and the maternity provisions of the Employment Protection Act, 1975, administered by these tribunals are mentioned below. The statutory protection from unfair dismissal in the Trade Union and Labour Relations Act, 1974, as amended,[69] is relevant to discriminatory discharges generally. The critical language appears in paragraph 6 of Schedule 1:

> 6.—(1) In determining for the purposes of this Schedule whether the dismissal of an employee was fair or unfair, it shall be for the employer to show—
> (a) what was the reason (or, if there was more than one, the principle reason) for the dismissal and
> (b) that it was a reason falling within sub-paragraph (2) below, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.
> (2) In sub-paragraph (1)(b) above the reference to a reason which—
> (a) related to the capability or qualifications of the employee for performing work of the kind which he was employeed by the employer to do, or
> (b) related to the conduct of the employee, or
> (c) was that the employee was redundant, or
> (d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on

67. *See* note 58 *supra.*

68. *See* Note, *Discharge in the "Law" of Arbitration,* 20 VAND. L. REV. 81 (1966) (discussing discharge clauses). W. BAIER, DISCIPLINE AND DISCHARGE UNDER THE LABOR AGREEMENT (1972).

69. *See* TULRA 1974, *supra* note 51, § 1, Sched. 1.

that of his employer) of a duty or restriction imposed by or under an enactment.

(3) Where the employer has fulfilled the requirements of sub-paragraph (1) above, then, subject to paragraphs 7 and 8 below, the question of whether the dismissal was fair or unfair shall be determined in accordance with the following provisions of this paragraph.

(4) For the purposes of this Schedule the dismissal of an employee by an employer shall be regarded as having been unfair if the reason for it (or, if more than one, the principle reason) was that the employee—

(a) was, or proposed to become, a member of an independent trade union;

(b) had taken, or proposed to take, part at any appropriate time in the activities of an independent trade union; or

(c) had refused, or proposed to refuse, to become or remain a member of a trade union which was not an independent trade union.

(4a) In sub-paragraph (4) above, "appropriate time" in relation to an employee taking part in the activities of a trade union, means time which either—

(a) is outside his working hours, or

(b) is a time within his working hours, or hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in those activities;

. . . .

(5) Dismissal of an employee by an employer shall be regarded as fair for the purposes of this Schedule if—

(a) it is the practice, in accordance with a union membership agreement, for employees for the time being of the same class as the dismissed employee to belong to a specified independent trade union, or to one of a number of specified independent trade unions; and

(b) the reason for the dismissal was that the employee was not a member of the specified union or one of the specified unions, or had refused or proposed to refuse to become or remain a member of that union or one of those unions; unless the employee genuinely objects on grounds of religious belief to being a member of any trade union whatsoever in which case the dismissal shall be regarded as unfair.

(5a) [omitted] [defines "specified" union in terms of recognition procedures set out in EPA 1975 §§ 11, 12, 15].

(6) Any reason by virtue of which a dismissal is to be regarded as unfair in consequence of sub-paragraph (4) or (5) above is hereafter in this Schedule referred to as an inadmissible reason.

(7) Where the reason or principle reason for dismissal of an employee was that he was redundant, but it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer, and either—

(a) that the reason (or, if more than one, the principle reason) for which he was selected for dismissal was an inadmissible reason; or
(b) that he was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in his case, then, for the purposes of this Schedule the dismissal shall be regarded as unfair.
(8) Subject to sub-paragraphs (4) and (7) above, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee.
(9) In this paragraph, unless the context otherwise requires, references to a trade union include references to a branch or section of a trade union, and in relation to an employee—
(a) "capability" means capability assessed by reference to skill, aptitude, health, or any other physical or mental quality;
(b) "qualifications" means any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held; and
(c) any reference to redundancy or to being redundant shall be construed as a reference to the existence of one or other of the facts specified in paragraphs (a) and (b) of section 1(2) of the Redundancy Payments Act, 1965.[70]

Certain similarities to American law and practice are obvious. Subparagraph 4 is reminiscent of the protection of "concerted activity" afforded by sections 7 and 8 of the National Labor Relations Act.[71] Subparagraphs 1 and 8 remind one of the practice of American labor arbitrators, who put the burden of proof of reasonable cause for discharge on the dismissing employer. Subparagraph 7 doubtless first appears strange to American readers, for it involves "redundancy," a statutory concept not often found in the United States. The Redundancy Payments Act, 1965, § 1(2) provides:

(2) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to—
(a) the fact that his employer has ceased, or intends to cease, to

70. TULRA 1974, *supra* note 51, Sched. 1, ¶ 6, *as amended by* EPA 1975, *supra* note 63, Sched. 16, ¶¶ 11-12; Trade Union and Labor Relations Amendment Act, 1976, c.7, §§ 1(e), 3(5), 6.
71. 29 U.S.C. §§ 157, 158 (1970 & Supp. V 1975).

> carry on the business for purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.[72]

An employee dismissed by reason of redundancy is entitled to a redundancy payment from the dismissing employer (calculated in a somewhat complex fashion under the terms of Schedule 1 of the Act) for which the employer can receive partial reimbursement from a government-administered fund created by a payroll tax. Since Industrial Tribunals handle both redundancy payments and unfair dismissal complaints, it is possible to deal with the questions of proper selection for redundancy dismissal and proper compensation by a redundancy payment in a single proceeding.

The application of Schedule 1, paragraph 6, of the Trade Union and Labour Relations Act, 1974, can be illustrated for the purposes of the present discussion by two decisions. The complainant in *Blackman v. Post Office*[73] was hired in 1966 under special employment eligibility provisions adopted by the Post Office after negotiations with the Union of Post Office Workers (UPW). But for these provisions, developed in response to a shortage of workers, the complainant could have been considered for employment only if he had appropriate education credentials or had scored satisfactorily on a written examination. Because of the special provisions, he was hired on the basis of a much briefer examination and an interview. He could become a permanent worker if his work proved satisfactory and he passed a more extensive written examination within three attempts. The plaintiff failed to pass the examination three times (although his third score was close), but his work was satisfactory. The Post Office sought from the Union a relaxation of the rules so that the plaintiff (and others) could be continued. The Union refused and the plaintiff was dismissed. The dismissal was upheld as fair by an industrial tribunal, and this decision was upheld on appeal. The Post Office submitted three reasons as justification for the dismissal: the complainant's failure to pass the test was a reason "relating to capability;" the complainant's ina-

72. 1976, c. 52. *See also* EPA 1975, *supra* note 53, § 126(6).

73. 9 I.T. 122 (N.I.R.C. 1973). U.S. readers should note that "I.T." citations are to Report of the Decisions of Industrial Tribunals, published by the Department of Employment.

bility to present a passing score was "a reason which related to qualifications;" and the agreement between the Post Office and the UPW furnished "some other substantial reason."[74] The lower tribunal found for the employer on the first argument. The reviewing tribunal (then the National Industrial Relations Court, which for this limited purpose may be regarded as a predecessor of the Employment Appeal Tribunal) did not overrule this finding, but expressed doubt about it in view of the complainant's satisfactory performance. The reviewing bench found in the second and third arguments a sufficient basis for the outcome below. Even though collective agreements are often legally unenforceable, the appeals court felt they reflect serious efforts by interested parties to reach reasonable accommodations and should be given substantial weight by tribunals.[75] The *Blackman* situation is reminiscent of *Griggs v. Duke Power Co.*,[76] and of the continuing litigation and discussion in the United States about the validity of tests under Title VII of the Civil Rights Act of 1964. New British legislation incorporates at least a portion of the *Griggs* doctrine by making unlawful "indirect" or "unintended" discrimination through the use of qualifications that operate to bar a higher proportion of one race than another from job eligibility.[77] To this extent only, *Blackman* is obsolescent.

Blackman does not mean that an employer will prevail if he can offer any substantial reason for dismissal. After an industrial tribunal has found that reason for a dismissal exists it has the further duty (subparagraph 8) of weighing the total circumstances to decide whether a "reasoned" dismissal is also a "fair" dismissal. In *Hammond-Scott v. Elizabeth Arden, Ltd.*[78] the complainant was dismissed when her employer decided, in response to the worldwide trade slump, to close down a number of its salons, thereby eliminating the complainant's job. The tribunal found that the complainant had not been selected for redundancy unfairly. It also found that her employer had made efforts to locate another post for her and had sent requests to the employer's parent company

74. This language was then in the Industrial Relations Act, 1971, § 24(1)(b); now it appears in the Trade Unions and Labour Relations Act, 1974, *supra* note 51. *See* text accompanying note 70 *supra*.

75. 9 I.T. 122, 126 (N.I.R.C. 1973).

76. 401 U.S. 424 (1971).

77. See the discussion in section IV, A2 *infra*.

78. 10 I.T. 33 (N.I.R.C. 1976). *See also* Vokes, Ltd. v. Bear, 9 I.T. 85 (N.I.R.C. 1973).

in the United States. Despite these findings, the dismissal was found to be unfair.[79] The complainant was awarded substantial compensation. It is unlikely that she would have fared as well in the United States. As a manageress, she would probably not have been covered by a collective agreement and thus would not have been able to obtain a favorable arbitral award; and even if protected by one her ability to use her seniority effectively in this type of situation is doubtful. There is the possibility of a breach of contract action, the success of which would depend on demonstrating that service to age 60 was a term of the contract. There is also the Age Discrimination in Employment Act, a discussion of which appears later.

C. *Labor Relations Law*

The contrasting American and British views on the collective agreement and the use of Industrial Tribunals in Britain to do much that is done in the United States by arbitration are crucial differences the importance of which is nearly matched by the absence in Britain of precise equivalents of the National Labor Relations Act,[80] the Railway Labor Act,[81] and the Labor Management Reporting and Disclosures Act.[82] The three major weapons in the American antidiscrimination arsenal derived from these labor relations laws are: the power of the National Labor Relations Board to deny recognition to a union that engages in discrimination;[83] judicial sanctions to enforce the duty of fair representation (the judicially-imposed duty of a union to fairly represent all unit members);[84] and the powers of the NLRB to remedy unfair labor practices including invidious discrimination.[85]

Union recognition procedures in Britain involve two steps (when accomplished formally; voluntary recognition remains possible, as

79. 10 I.T. at 37.

80. 29 U.S.C. §§ 151-68 (1970 & Supp. V 1975).

81. 45 U.S.C. §§ 151-88 (1970 & Supp. V 1975).

82. 29 U.S.C. §§ 401-531 (1970 & Supp. V 1975).

83. *See, e.g.*, NLRB v. Mansion House Corp., 473 F.2d 471 (8th Cir. 1973); Bekins Moving & Storage Co., 211 N.L.R.B. 138 (1974); *but see*, Handy Andy, Inc., 228 N.L.R.B. No. 59 (1977).

84. *See, e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). This duty is owed to those represented, whether union members or not. Members' rights are derived from contract and from the "Bill of Rights" of Title I of the Labor-Management Reporting and Disclosures Act.

85. *See, e.g.*, Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

in the United States): (1) certification as an independent trade union, and (2) recognition for the purposes of collective bargaining. The decision-making power of the Certification Officer in the first step[86] is apparently limited to determining whether a trade union is truly "independent:"[87] *i.e.*, free of actual or potential employer domination or control.[88] Discriminatory practices by a trade union in response to an employer's desires could be evidence of a lack of independence. Only an independent trade union may refer a recognition issue[89] to the controlling agency, the Advisory, Conciliation and Arbitration Service,[90] which enjoys broad powers in recognition proceedings.[91] These powers would surely permit the Service to consult with representatives of minority groups present in the relevant work force, and to impose conditions for the purpose of

86. TULRA 1974, *supra* note 51, § 8, *as amended*; EPA 1975 §§ 7-9. *See* N. SELWYN, LAW OF EMPLOYMENT §§ 13.6-13.8 (1976).

87. TULRA 1974, *supra* note 51, § 30(1); EPA 1975, *supra* note 63, § 126(1).

88. *Compare* 29 U.S.C. § 158(a)(2) (1970). *See also* ILGWU v. NLRB, 366 U.S. 731 (1961).

89. EPA 1975, *supra* note 63, § 11. In the United States, the employer may do so only if a claim for recognition has been made to it by a labor organization. 29 U.S.C. § 159(c)(1)(B) (1970).

90. This service was statutorily created by EPA 1975, *supra* note 63, § 1. It was, however, functioning prior to that time.

91. EPA 1975, *supra* note 63, § 12(1), (4), (5), (6). Section 12 provides, in relevant part:

> (1) Subject to subsection (2) below, when a recognition issue is referred to the Service under section 11 above the Service shall examine the issue, shall consult all parties who it considers will be affected by the outcome of the reference and shall make such inquiries as it thinks fit . . . .
>
> (4) If the issue has not been settled and the reference not withdrawn the Service shall prepare a written report setting out its findings, any advice in connection with those findings and any recommendation for recognition and the reasons for it, or, where no such recommendation is made, the reasons for not making any recommendation.
>
> (5) A recommendation for recognition shall specify—
>
> (a) the employer or employees and the trade union or unions to which it relates;
>
> (b) the description or descriptions of workers in respect of which recognition is recommended;
>
> (c) whether the recommendation is for recognition generally or in respect of one or more specified matters;
>
> (d) the level or levels at which recognition is recommended.
>
> (6) A recommendation for recognition may be subject to such conditions, to be complied with on the part of the trade union, as the Service thinks fit, and any conditions will be set out in the report.

See also id. § 14(1) (power to consult with employees).

carrying out the public policies forbidding discrimination stated in the Race Relations Act, the Sex Discrimination Act, and so on. Whether these practices will develop remains to be seen. A recommendation for recognition is not self-enforcing. If disregarded, however, the failure to comply may ultimately be the subject of an award by the Central Arbitration Committee. The award is then incorporated into the appropriate individual contracts of employment, which are enforceable.[92]

For a brief period, from the fall of 1974 to the spring of 1976, there existed in the Trade Union and Labour Relations Act, 1974, a provision forbidding arbitrary exclusion or expulsion from a trade union, but this has now been repealed.[93] Section 12 of the Sex Discrimination Act, 1975, will forbid, as of January 1, 1978, discrimination against women by unions, not only by refusing admission to membership but also by "subjecting her to any other detriment." Section 11 of the Race Relations Act, 1976, similarly forbids discrimination by unions on the grounds of color, race, nationality, or ethnic or national origins. These sections create membership rights, enforceable through Industrial Tribunals, which equal or exceed those afforded by the doctrine of fair representation in the United States.[94]

The concept of the unfair practice ("unfair labor practice" in the United States, "unfair industrial practice" in Britain) and special tribunals to deal with such practices (the NLRB in the United States, the National Industrial Relations Court and related bodies in Britain) existed simultaneously in the two nations from August 5, 1971, until July 31, 1974, when the Trade Union and Labour Relations Act, 1974, took effect. That statute abolished the N.I.R.C. and, for the most part, repealed the British law of unfair practices, or at least the label. The Conservative government decision in 1971 to borrow, with considerable modification, the notion of the unfair practice is doubtless easier for Americans to understand than the British unions' fury over it. The addition of section 8(b) to the National Labor Relations Act is now 30 years behind us and only a relative handful of aging ideologues still speak with true rage about the Taft-Hartley Act. Perhaps, had the Tories been

92. *Id.* § 16(6)-(9).

93. Trade Union and Labour Relations Amendment Act, 1976, c.7, § 1(a).

94. There is, however, no precise equivalent of *Vaca v. Sipes*, 386 U.S. 171 (1967), for arbitrary treatment on grounds other than race, color, and sex, except insofar as the concept of "natural justice" provides one. *See* notes 38-45 *supra*, and accompanying text.

able to hold power for a decade, the concept would have taken root in Britain. At all events, the experiment is now ended, and for the present, American lawyers must search elsewhere for the rough equivalents of section 8 of the N.L.R.A.

The absence of a body such as the NLRB in the employment discrimination field appears to be relatively insignificant. After all, most of the NLRB decisions on such matters utilize essentially the same fair representation doctrine as that developed in the courts,[95] and for that doctrine one finds British statutory equivalents. Even in the absence in Britain of the investigative and prosecutorial activities of the Office of General Counsel, assistance in the development and prosecution of a complaint is still available under the Sex Discrimination Act, 1975, and the Race Relations Act, 1976,[96] much as it is in the United States under Title VII.[97] In America the availability of such assistance has not quieted the argument over whether multiple forums (in particular the NLRB) are required for the effective elimination of discrimination.[98] The validity of the arguments favoring multiple forums may be greater in one nation than in the other.[99] In the long run, the success of the work done by the British administering agencies as compared with that of the EEOC will provide the fairest basis for deciding which nation offers the more meaningful relief from discrimination.

III. PROHIBITIONS AGAINST AGE DISCRIMINATION

Discrimination against older workers has led to specific legislation in the United States, but not in Britain, although attempts have been made in the House of Commons to enact a remedial statute.[100] Older workers in Britain are somewhat more likely to be entitled to maximum protection under the Contracts of Employment Act, 1972, Redundancy Payments Act, 1965, and Employ-

95. *See generally,* ABA SECTION ON LABOR RELATIONS LAW, DEVELOPING LABOR LAW (C. Morris ed. 1971).

96. SDA 1975, *supra* note 1, § 74, 75; RRA 1976, *supra* note 2, §§ 65, 66.

97. 42 U.S.C. § 20003-5(f)(1) (Supp. V 1975).

98. *Compare* Gould, *Racial Protest and Self-Help Under Taft-Hartley: The Western Addition Case,* 29 ARB. J. 161 (1974) *with* Meltzer, *National Labor Relations Act and Racial Discrimination: The More Remedies The Better?,* 42 U. CHI. L. REV. 1 (1974). *See also* W. GOULD, BLACK WORKERS IN WHITE UNIONS chs. 7-9 (1977).

99. The data sketched briefly in section I(B) *supra* indicate the likelihood that instances of employment discrimination are likely to be more numerous—and thus more diverse—in the United States.

100. HEPPLE, *supra* note 3, at 41.

ment Protection Act, 1975, than are very young workers,[101] but to the extent that the protection afforded by these statutes is dependent on length of service rather than on chronological age, it would be wrong to assign an age-protection label to them.

The principal American statute, the Age Discrimination in Employment Act of 1967,[102] broadly prohibits discrimination by employers, employment agencies, or unions against persons at least 40 but less than 65 years old.[103] Enforcement of the Act is similar to enforcement of the Fair Labor Standards Act of 1938.[104] The Secretary of Labor is empowered to require the keeping of records necessary or appropriate for the statute's administration. He can conduct investigations of compliance with the Act's requirements whether or not there is a specific complaint of violation.[105] If the Secretary learns of a violation, he seeks to obtain voluntary compliance. Civil actions to enforce the statute may be brought either by the Secretary or by an aggrieved person, but an action by the Secretary terminates the right of an individual to bring such an action. Within 180 days of the alleged unlawful act, an individual must give at least 60 days notice to the Secretary of his intent to bring the action. During this period the Secretary is to seek voluntary compliance.[106] The Secretary's attempts at conciliation are mandatory, and failure to engage in such attempts

101. For example, under the Redundancy Payments Act, 1965, c. 62, the amount of payment reflects both age and length of service. For each year of employment between 18 and 21, the discharged worker is entitled to one-half a week's pay; for each year between 22 and 40, one week's pay; for each year between 41 and 64 (59 if female), one and one-half of a week's pay. However, entitlement ceases at 65 (60 if female).

102. 29 U.S.C. § 621-34 (1970 & Supp. V 1975). The more recent Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07 (Supp. V 1975) applies only to recipients of federal assistance. Its protections are not limited to the 40-65 age bracket. This is consistent with a 1974 change in the earlier act, 29 U.S.C. § 633(a) (Supp. V 1975).

103. 29 U.S.C. § 631 (Supp. V 1975). It is probable that age 70 will be substituted for age 65 this term of Congress.

104. *See* 29 U.S.C. § 626 (1970). The FLSA enforcement provisions are 29 U.S.C. §§ 216-17 (1970 & Supp. V 1975). *See also* Note, *Procedural Aspects of the Age Discrimination in Employment Act of 1967,* 36 U. PITT. L. REV. 914 (1975).

105. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

106. *See* Vaughn v. Chrysler Corp., 382 F. Supp. 143 (D. Mich. 1974). In a state with an anti-age discrimination act of its own meeting the standards of 29 U.S.C. § 633(b), notice must be given within the earlier of: (a) 300 days after the alleged unlawful practice; or (b) 30 days after receipt of notice of the termination of State proceedings. 29 U.S.C. § 626(d) (1970).

with sufficient vigor may result in a stay of proceedings brought by him, or even in denial of relief.[107] No more than a stay, if that, would be appropriate in an individual's action. Class actions are possible, but section 16 of the Fair Labor Standards Act[108] requires that any party plaintiff give consent in writing to be represented.[109] The volume of litigation under the Act does not yet permit many inferences about the level of proof that a plaintiff must present to establish a prima facie case.[110] Proof that age was not the only reason for an act resulting in the loss of employment or employment benefits by an individual in the protected class should be sufficient.[111] Once the plaintiff's prima facie showing has been made, it is for the defendant to demonstrate that one of the defenses provided by subsection 4(f)[112] is applicable. Subsection 4(f) reads as follows:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization—
> (1) to take any action otherwise prohibited under subsection (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or
> (3) to discharge or otherwise discipline an individual for good cause.

Subsection 4(f) creates four defenses, since clause (1) must be subdivided into the "bona fide occupational qualification" defense and the "differentiation based on reasonable factors other than age" defense. The latter is troubling. At first glance, it seems to say only that discrimination not based on age is lawful under the Act, which would be redundant. Perhaps it is to be used in cases in which the "factors" involved are secondary characteristics of

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107. Brennan v. Ace Hardware, 495 F.2d 368 (8th Cir. 1974).

108. 29 U.S.C. § 216(b) (Supp. V 1975).

109. *See, e.g.*, La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975).

110. *See generally*, Annot., 24 ALR Fed 808, 843 (1975).

111. *See* Wilson v. Sealtest Foods, 501 F.2d 84 (5th Cir. 1974).

112. 29 U.S.C. § 623(f) (1970). It is probable that sub-paragraph 2 will be eliminated or significantly amended during this term of Congress.

aging, such as baldness, which might be distressing to an employer operating a hair treatment salon. This interpretation is supported by the juxtaposition of this language with the bona fide occupational qualification language. The bona fide occupational qualification defense allows a limited consideration of age to differentiate among persons.[113] The "good cause" discharge or discipline defense is not as clear as might be desired. How is it to be applied in a situation in which an employee's conduct is marginally punishable? Consider the case of *Brennan v. Reynolds & Co.*,[114] which involved the discharge of a chronically tardy but fully competent receptionist by an employer who expressed a desire that her replacement be a younger person. The employer in *Reynolds* had so clearly shown a "good cause" that the court granted summary judgment. Had the case reached trial, the court would have confronted the task of allocating to one of the parties the burden of proving what the employer would have done to a tardy but younger receptionist.[115]

The remedies available for unlawful discrimination include compensatory damages, liquidated damages in the case of willful violation (not to exceed the compensatory damages), injunctive relief, and reasonable attorney's fees. In non-dismissal cases the protection afforded the older worker by statute in the United States puts him in a better position than his British counterpart. But in dismissal cases the reverse is true. Once a decision is made under the Age Discrimination in Employment Act that the employee was dismissed for "good cause," the case is closed with a ruling for the employer. There is no provision under the Act, or any other American statute that permits a court that has found good (nondiscriminatory) cause for discharge to go forward. An Industrial Tribunal in Britain, however, can judge whether that "good cause" has resulted in a "fair" discharge.[116]

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113. *See, e.g.*, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974) (refusal to hire drivers over 35 lawful), *cert. denied*, 419 U.S. 1122 (1975).

114. 367 F. Supp. 440 (N.D. Ill. 1973).

115. *See* Bishop v. Jelleff Associates, 398 F. Supp. 578 (D.D.C. 1974). A plaintiff may put in issue the question of whether an ostensible "good cause" is pretextual.

116. U.S. arbitration agreements do not confer such power. *See* note 68 *supra*. Note, however, that the British tribunal is not available to men at age 65 or to women at 60. See the critical opinion in Nothman v. Burough of Barnet, [1977] Indus. Rel. L. Rep. 398.

IV. PROHIBITIONS OF DISCRIMINATION ON THE BASIS OF RACE, COLOR, NATIONALITY, OR ETHNIC OR NATIONAL ORIGINS

The principal American statutes banning discrimination on the basis of race, color, and ethnic or national origins are the 1866 and 1871 Civil Rights Acts[117] (which also afford protection to aliens) and Title VII of the Civil Rights Act of 1964[118] (which also deals

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117. 42 U.S.C. §§ 1981-83 (1970).

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. 42 U.S.C. § 1981 (1970) (Equal Rights).

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. 42 U.S.C. § 1982 (1970) (Property Rights).

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1970) (Civil Action: Deprivation of Rights). [Note to non-U.S. readers: Section 1981 (Rev. Stat. § 1977) is derived from Act of May 31, 1870, 16 Stat. 144; which in substance re-enacts section 1 of Act of April 9, 1866, 14 Stat. 47, from which section 1982 also is derived. Section 1983 comes from an Act of April 20, 1871, 17 Stat. 13. Conventionally, one speaks of these provisions either by date of enactment (*e.g.*, an action under 42 U.S.C. § 1983 may be denominated as one "under the 1871 Act") or by section number in United States Code, rather than by the section number in Statutes at Large or Revised Statutes (*e.g.*, an action against a private employer will be called a "section 1981" action; one against a local government official a "section 1983" action).]

118. 42 U.S.C. §§ 2000e to 2000e-17.

Non-U.S. readers should note that the placement and numbering of this material in an already "crowded" title of United States Code tempts anyone writing about the statute to refer to provisions by their original section number rather than by United States Code section number. Section 701 is 42 U.S.C. § 2000e (1970 & Supp. V 1975), § 702 is 42 U.S.C. § 2000e-1 (1970 & Supp. V 1975), § 703 is 42 U.S.C. 2000e-2 (1970 & Supp. V 1975), and so on through section 718 which is 42 U.S.C. § 2000e-17 (Supp. V 1975). Unless otherwise stated, references are to the amended statute, and only U.S. Code citations are given herein.

The literature on Title VII is extensive. In addition to BNA and CCH services, which provide excellent coverage of current developments, see A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW (1971); A. LARSON, EMPLOYMENT DISCRIMINATION (1975); M. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION (1976); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976); M. SOVERN, LEGAL RE-

with discrimination based on sex or religion). Employment practices of government contractors are further governed by Executive Order 11,246.[119] The major British legislation is the Race Relations Act, 1976,[120] which replaces the Race Relations Acts, 1965,[121] and 1968,[122] the latter of which was the first to deal with employment discrimination.

A. *Title VII of the Civil Rights Act of 1964, Executive Order 11,246, and the Race Relations Act, 1976*

1. Those Owing Duties

Title VII covers employers of fifteen or more persons ("in each of twenty or more calendar weeks in the current or preceeding calendar year"), whether the employer is a private firm[123] or a state or local government.[124] The Race Relations Act, 1976, covers all private employers and virtually all government employers without regard to the number of workers.[125] Employment "for the purpose of a private household" is excluded.[126] The gap resulting from the exclusion of smaller employers in the United States is filled in many jurisdictions by state legislation,[127] although some state laws also have small employer exclusions. Relief is also available

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STRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966), Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments,* 20 ST. LOUIS L.J. 225 (1976) (note 29 lists a number of articles on Title VII).

119. 30 Fed. Reg. 12,319, 12,935 (1965), *as amended by* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967), Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969).

120. 1976, c. 74.

121. 1965, c. 73.

122. 1968, c. 71 [hereinafter cited as RRA 1968]. The two best commentaries are B. HEPPLE, RACE, JOBS AND THE LAW IN BRITAIN (2d ed. 1970) and LESTER & BINDMAN, *supra* note 3.

123. Coverage extends to private enterprises not usually thought of as "business" firms, but there is a broad exemption for religious groups. *See* 42 U.S.C. § 2000e-1 (1970 & Supp. V 1975); McClure v. Salvation Army, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff'd* 460 F.2d 553 (5th Cir. 1972), *cert. denied,* 409 U.S. 896 (1972) (pre-1972 amendment).

124. 42 U.S.C. § 2000e(a),(b) (1970). *See* United States v. City of Milwaukee, 395 F. Supp. 725 (E.D. Wis. 1975) (coverage of state and local government employees constitutionally valid).

125. The 1968 act had provisions postponing coverage of small employers. RRA 1968, *supra* note 122, § 8(1).

126. RRA 1976, *supra* note 2, § 4(3).

127. For a summary, see FAIR EMPL. PRAC. MAN. (BNA) 451:21 (1977).

against small employers under the early Civil Rights Acts (primarily section 1981).

A labor organization is covered by Title VII if it operates a hiring hall or has fifteen or more members,[128] and is, or seeks to act as, a bargaining representative. Thus, an employee social club or prayer group is not covered by Title VII. The British statute does not include a numerical threshold and covers certain union-like groups not covered (other than as employers or employment agencies) by Title VII. It provides: "11. (1) This section applies to an organization of workers, an organization of employers, or any other organization whose members carry on a particular profession or trade for the purposes of which the organization exists."[129] If this provision were transported to the United States, it would result in coverage of groups like the American Bar Association, possibly a chamber of commerce (although the lack of particularity of profession or trade might bar such a result) and, if one is willing to consider being a student a profession or trade, perhaps a chapter of the Black American Law Students Association. There seems little doubt that such a provision would be constitutional, either under the fourteenth amendment or the commerce clause. The 1866 Civil Rights Act now applies to at least some such groups.[130] Both statutes cover employment agencies without numerical exclusions,[131] although Title VII conceivably applies only to an agency serving an employer covered under the Act. Except for domestic staffing agencies, it is difficult to envision a successful employment agency dealing only with employers of fifteen persons or fewer.

The British statute also imposes duties on (1) partnerships of six or more, with respect to discrimination in tendering partner status and in treatment of partners;[132] (2) qualifying bodies, *i.e.*, those agencies controlling admission to various professions;[133] and,

128. 42 U.S.C. § 2000e(e) (1970).

129. RRA 1976, *supra* note 2, § 11.

130. *Compare* Runyon v. McCrary, 427 U.S. 160 (1976) (discrimination in admission of students by private school invalid under 42 U.S.C. § 1981) *with* Tillman v. Wheaton Haven Recreation Ass'n, 410 U.S. 431 (1973) (swimming pool club not truly "private;" availability of private club exception of Title II of Civil Rights Act of 1964, 42 U.S.C. § 2000a(e), in action under 1866 Act left open) *and* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (refusal of private club to serve Negro not invalid under 42 U.S.C. § 1983 as improper "state action" despite careful state regulation of club through alcoholic beverage control board; 42 U.S.C. § 1981 not utilized).

131. 42 U.S.C. § 2000e-2(b) (1970); RRA 1976, *supra* note 2, § 14.

132. RRA 1976, *supra* note 2, § 10.

133. *Id.* § 12.

(3) vocational training bodies.[134] Although none of these provisions appear in Title VII, four similar situations arise. First, a qualifying body acting under authority of state law is subject to a nondiscrimination duty under 42 U.S.C. § 1983.[135] Second, under Title VI of the Civil Rights Act of 1964 any training agency receiving federal funds assistance is liable to have its funding cut off if it engages in invidious discrimination. Third, training programs operated by employers or labor organizations subject to the Act are specifically covered by Title VII.[136] Last, section 1981 actions are available (in the opinion of the writer) to provide relief from racial discrimination in the admission and treatment of partners.[137]

2. Prohibited Conduct

The American and British statutes prohibit similar types of conduct.[138] The British statute includes definitions of terms which were left in the United States to judicial development.[139] The gap

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134. *Id.* § 13.

135. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

136. 42 U.S.C. § 2000e-2(d) (1970).

137. Since the partnership relationship is a contractual one, the applicability of 42 U.S.C. § 1981 seems clear. Problems of proof are likely, however, to make litigation rare. Moreover, the "at will" nature of most partnerships may make relief illusory. Large partnerships or those with substantial capital investment, however, could not utilize dissolution as an evasive tactic without incurring significant economic disadvantage.

138. *See* Appendix *infra.*

139. RRA 1976, *supra* note 2, provides:

1. (1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if—

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but—

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

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

(2) It is hereby declared that, for the purposes of this Act, segregat-

created by the absence of such definitions in Title VII was largely filled by the decision of the Supreme Court in *Griggs v. Duke Power Co.*[140] In *Griggs* plaintiffs attacked an employer requirement that new entrants into certain jobs have minimum education and testing credentials. On the surface, such a condition is "color blind" but it was demonstrable that far fewer blacks than whites in the relevant labor market area could present those credentials. The Court found the requirements to be discriminatory, and characterized them as "built-in headwinds."

The United States concept of "disproportionate impact" or "indirect discrimination" is generally equivalent to section (1)(b) of the British statute.[141] However, one must not assume that the fundamental similarity in doctrine will lead to an absolute identity in litigation outcome. To illustrate, consider the case of *A*, a black, who is refused employment because of an arrest record. *A* wishes to demonstrate that he has encountered an unlawful "built-in headwind." He is probably entitled to do so under both Title VII and the Race Relations Act, 1976. To carry his burden he must show that in the relevant labor market a disproportionately high number of blacks (as compared to whites) have arrest records.[142]

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ing a person from other persons on racial grounds is treating him less favourably than they are treated.

3. (1) In this Act, unless the context otherwise requires—"racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins; "racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls . . . .

(2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act. . . .

(4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

140. 401 U.S. 424 (1971). The "disproportionate impact" test is not determinative with respect to employment practices (of government) challenged solely on constitutional, as opposed to Title VII, grounds. A "rational basis" standard is to be used in such cases to decide whether the employment practice engaged in is lawful. Washington v. Davis, 426 U.S. 229 (1976). A disproportionate impact remains important even in these cases, however, as evidence of unlawful discriminatory intent.

141. *See supra* note 139.

142. *See* Carter v. Gallagher, 452 F.2d 315, 327 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Gregory v. Litton Systems, 316 F. Supp. 401 (C.D. Cal. 1970),

Thus, the ability of a complainant to make out a case of indirect discrimination is dependent upon the availability of relatively specific data. Population and arrest data, however, are maintained differently in the United States and Britain, so that results in particular cases may differ. Of course, it is also possible that within the United States the nature of the data in one labor market will call for a result different from that in another market. If in City *A*, 75 percent of both blacks and whites in the labor force have graduated from high school, while in City *B*, 50 percent of blacks but 80 percent of whites have graduated, then (assuming the city is the relevant labor market area in each case) a high school diploma requirement would discriminate against blacks in *B* but not in *A*. It remains to be seen whether the tribunals in both nations develop similar approaches in defining relevant labor market areas. Britain's size argues in favor of a more unitary approach than in the United States, yet this overlooks the strong sense of regionalism in Great Britain.

3. Permitted Discrimination

(a) *Discrimination Justified by Business Reasons.*—Discriminatory practices are permitted by both statutes in a limited number of cases. The British statute permits direct discrimination against a member of a racial group in four instances:

> Being of a particular racial group is a genuine occupational qualification for a job only where—
> (a) the job involves participation in a dramatic performance or other entertainment in a capacity for which a person of that racial group is required for reasons of authenticity; or
> (b) the job involves participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person of that racial group is required for reasons of authenticity; or
> (c) the job involves working in a place where food or drink is (for payment or not) provided to and consumed by members of the public or a section of the public in a special ambience for which, in that job, a person of that racial group is required for reasons of authenticity; or
> (d) the holder of the job provides persons of that racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group.[143]

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aff'd, 472 F.2d 631 (9th Cir. 1972). Conviction record use may also be suspect. *See* Green v. Missouri Pacific R.R., 523 F.2d 1290 (8th Cir. 1975).

143. RRA 1976, *supra* note 2, § 5(2).

Title VII does not include race or color in its bona fide occupational qualification section:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[144]

Presumably, by interpretation of the term "to discriminate," the American judiciary would allow a film maker to insist that one wishing to play the role of Abraham Lincoln appear to be Caucasian. Whether United States courts would accept the "ambience" concept of subsection 5(2)(c) in the British Act, or the compatibility concept of subsection 5(2)(d) is more doubtful.

Both statutes place on employers the duty of demonstrating that the secondary characteristics of race used by the employer in determining who to hire and promote are relevant. The British language "justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied" is simpler than that in section 703(h) of Title VII which provides:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action

144. 42 U.S.C. § 2000e-2(e) (1970). *But see* Morton v. Mancari, 417 U.S. 535 (1974) (holding that a statutory preference given Indians as employees of the Bureau of Indian affairs is not impliedly repealed by the extension of Title VII in 1972 to federal employment, and that such a preference is constitutionally valid). *See also* 42 U.S.C. § 2000e-2(i) (1970).

upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin . . . .[145]

Are employment practices not specifically referred to in section 703(h) unlawful per se if they have a disproportionate impact? This seems to follow from *Griggs'* expansive interpretation of discrimination. But one must remember that because the *Griggs* opinion involves an interpolation, it implies an interpolation for defensive purposes as well. Consider, for example, the case of a restaurant specializing in Mexican cuisine, located in El Paso, Texas. The restaurant needs a head chef. It advertises in the local press and national trade journals for an individual with five or more years of experience in preparing Mexican dishes. Assume that in the El Paso area the percentage of "Anglos" with such experience is 15 percent, that of "Chicanos" with such experience is 50 percent, and that of blacks (who are 15 percent of the work force) is negligible. The experience requirement is thus arguably discriminatory under *Griggs.* Moreover, the requirement is not listed in section 703(h). Is the restaurant in violation of Title VII? Probably not (although one can, of course, quibble about how many years of experience are truly required for a head chef position), for the courts are most likely to find that there is no refusal to hire "because of such individual's race," despite the effective exclusion of blacks and the disproportionate exclusion of "Anglos." To clarify the point, assume that the same restaurant needs a new assistant chef, to be trained in Mexican tortilla cooking. The newly hired head chef insists that he must have a person of Mexican extraction. Clearly an insistence on such extraction would be unlawful since the ability to learn to cook in the Mexican style is not so limited. In other words, an employer who insists that a new employee possess certain characteristics that are not evenly shared by racial groups does not violate Title VII if those characteristics are truly necessary for the performance of the work.

Are practices listed in section 703(h) per se lawful unless engaged in with specific discriminatory intent? So far as tests of ability are concerned, no. In *Griggs,* the Court found that the employer's ability tests should be regarded as tests "used to discriminate" unless it can be shown that the tests were necessary for the proper carrying on of the business. In the case of seniority systems, however, the application of section 703(h) is more difficult. In

145. 42 U.S.C. § 2000e-2(h) (1970).

International Brotherhood of Teamsters v. United States,[146] the Supreme Court stated that a seniority system which is otherwise bona fide is not unlawful solely because it perpetuates pre-Title VII discrimination. The Court's examination of the legislative history led it to conclude that the Congress did not intend to affect seniority rights which had "vested" prior to the effective date of the Act.

Judicial interpretation of Title VII has thus limited the availability of affirmative defenses to situations involving "business necessity" or bona fide seniority systems. Will the British "justifiable" come to mean the same thing? In overall thrust, probably yes. But there are a great many variations in employee selection procedures in both countries, and even in the United States there is widespread controversy about how great a showing of necessity is required in particular circumstances.[147] In the case of testing, one wonders whether "justifiable" in section 1(1)(b) of the Race Relations Act, 1976, is equivalent to "substantial reason of a kind such as to justify . . . dismissal" in paragraph 1(b) of paragraph 6 of Schedule 1 of the Trade Union and Labour Relations Act, 1974, the "unfair dismissal" definitional paragraph. If it is, the *Blackman* decision, discussed previously, employs a somewhat more lenient interpretation for British defendants than Title VII. Yet one must not assume that "justify" and "justifiable" are used identically in different contexts. There was, after all, little serious challenge to the practice of testing in *Blackman,* a challenge specifically invited by section 1(b) of the Race Relations Act, 1976. Also, the latter statute does not contain the definition of "reason" provided by the former: "related to the capability or qualifications of the employee . . . ." The absence of such a definition leaves the courts more free to develop a concept of justification.

(b) *Discrimination Required by Governmental Action.*—Both nations permit discrimination for reasons of national security.[148] The British statute further permits discrimination

(a) in pursuance of any enactment or Order in Council; or

146. 97 S. Ct. 1843 (1977). *See also* United Air Lines v. Evans, 97 S. Ct. 1885 (1977).

147. Consider, for example, the inability of federal agency representatives to agree on how to "test the tests," the E.E.O.C. insisting on criterion-related studies, O.F.C.C.P. and the Civil Service Commission arguing that other types of validation are often equally appropriate. *See* 41 Fed. Reg. 51,744 (1976) (O.F.C.C.P.); 41 Fed. Reg. 51,983 (1976) (E.E.O.C.).

148. 42 U.S.C. § 2000e-2(g) (1970); RRA 1976, *supra* note 2, §§ 42, 69(2), (3).

(b) in pursuance of any instrument made under any enactment by a Minister of the Crown; or

(c) in order to comply with any condition or requirement imposed by a Minister of the Crown (whether before or after the passing of this Act) by virtue of any enactment.[149]

Discrimination on the basis of nationality or period of residence in the U.K. by private persons pursuant to government regulations is also permitted.[150] Title VII does not cover discrimination against non-citizens,[151] and has no parallel provision.

(c) *Discrimination to Remedy Racial Imbalance.*—The notion of "fighting fire with fire" is translated in the employment discrimination field into several phrases: "affirmative action," "positive discrimination," "reverse discrimination," and the like. Neither statute directly imposes upon employers, labor organizations, or others a duty to engage in affirmative action.[152] However, both statutes envision the likelihood that affirmative action will be undertaken. This is done, however, in totally different ways. The permissive approach of the British act is illustrated in the provision for affirmative action by employers.[153] Training bodies may

149. RRA 1976, *supra* note 2, § 41.

150. *Id.*

151. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1972).

152. Section 703(j) of Title VII makes this explicit:

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any agency or labor organization, admitted to membership or classified by any labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1970). *See also* section 601, 42 U.S.C. § 2000d (1970).

153. RRA 1976, *supra* note 2, § 38(1) and (2) provide:

(1) Nothing in parts II to IV shall render unlawful any act done by an employer in relation to particular work in his employment at a particular establishment in Great Britain, being an act done in or in connection with—

(a) affording only those of his employees working at that establishment who are of a particular racial group access to facilities for training which would help to fit them for that work; or

afford training to persons of a particular group if it appears that few or no persons of that racial group were engaged in the work for which the training is appropriate during the prior twelve month period.[154] There are related provisions for labor organizations with regard both to membership and to the holding of posts within such organizations.[155] There is no provision empowering a tribunal, court, or government agency to require such a program.[156]

Affirmative action in the United States is a very different matter. Nowhere in Title VII or other statutes is affirmative action on a strictly voluntary basis specifically permitted. Attempts to devise and implement "private affirmative action" plans can lead to conduct that is unlawful because of a discriminatory impact (on whites or males for example).[157] There are, however, two situations in which affirmative action may be required. The relief that can be granted by a court in a Title VII case includes enjoining "such affirmative action as may be appropriate."[158] The courts have granted preferential job bidding rights to members of a victimized minority[159] to prevent the perpetuation of the effects of past wrongs. In extreme cases, temporary racial hiring quotas may be imposed.[160]

(b) encouraging only persons of a particular racial group to take advantage of opportunities for doing that work at that establishment where any of the conditions in subsection (2) was satisfied at any time within the twelve months immediately preceding the doing of the act.

(2) Those conditions are—

(a) that there are no persons of the racial group in question among those doing that work at that establishment; or

(b) that the proportion of persons of that group among those doing that work at that establishment is small in comparison with the proportion of persons of that group—

(i) among all those employed by that employer there; or

(ii) among the population of the area from which that employer normally recruits persons for work in his employment at that establishment.

154. *Id.* § 37.

155. *Id.* § 38(3)-(5).

156. *See* RRA 1976, §§ 56, 58-64.

157. *See generally* McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) (whites protected by Title VII and 42 U.S.C. § 1981); Weber v. Kaiser Aluminum Corp., 415 F. Supp. 761 (E.D. La. 1976); McAleer v. Am. Tel. & Tel., 416 F. Supp. 436 (D.D.C. 1976).

158. 42 U.S.C. § 2000e-5(g) (1970).

159. United States v. T.I.M.E.-D.C., 517 F.2d 299 (5th Cir. 1975).

160. *See, e.g.*, Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974), *cert. denied*, 419 U.S. 895 (1974). The concurring and dissenting opinions should be noted.

Imposed affirmative action can also occur in business transactions between contractors and the federal government. The agency charged with remedying employment discrimination by contractors is the Office of Federal Contract Compliance Programs (OFCCP). Easily the most widely known aspect of the work of the OFCCP is the "affirmative action plan."[161] The basic notion is a simple one: If a federal contractor is not utilizing the services of a reasonable number of minority workers, or is underutilizing those services, he must then seek to attract more minority employees and to employ their talents more fully. Translating this idea into a set of procedures and norms has proved difficult. The OFCCP regulations are contained in its Revised Order Number 4.[162] The obligation of a contractor to formulate a written plan is not dependent on a finding of past discriminatory practices, but on the size of the contract ($50,000 or more) and the employer's work force (50 or more persons). If these thresholds are met, then the contractor must first undertake a "utilization analysis," which takes into account eight factors:

> (i) The minority population of the labor area surrounding the facility;
> (ii) The size of the minority unemployment force in the labor area surrounding the facility;
> (iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;
> (iv) The general availability of minorities having requisite skills in the immediate labor area;
> (v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;
> (vi) The availability of promotable and transferable minorities within the contractor's organization;
> (vii) The existence of training institutions capable of training persons in the requisite skills; and
> (viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.[163]

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161. A good introduction is Nash, *Affirmative Action Under Executive Order 11,246,* 46 N.Y.U. L. REV. 225 (1971).

162. 41 C.F.R. Pt. 60-2 (1976). Substantial changes have recently been proposed by the Department of Labor. The primary purpose of these changes is to relieve smaller employers of some reporting requirements, simplify report forms, and encourage more employers to consider highly individualized program structures. 41 Fed. Reg. 40,340-61 (1976).

163. 41 C.F.R. § 60-2.11(b)(1) (1976).

Having thus determined the appropriate labor market area, the proper job classifications, the requisite skills for each job classification, the ratio of minority persons to majority persons with the relevant skills in the labor area, and the ratios in the classification categories of the actual work force, the contractor then compares these ratios and determines his "deficiency categories." At this stage the contractor must set "goals" for remedying any deficiencies. What is a "goal"? According to the OFCCP, a "goal" is "a percentage of the total employees in the job group and must be equal to the percentage of minorities or women available in the job group in the applicable labor market."[164] Since attaining such a goal overnight is hardly to be expected, timetables for reaching this ultimate goal and intermediate (lesser) annual goals are to be worked out by the contractor in light of such factors as labor force turnover rates. Predictably, this command to contractors to retool their slide rules for the purposes of social engineering has not been without its critics. But to date, it has survived attacks at the circuit court level charging (1) unconstitutionality because of lack of congressional action directly in its support (the closest approach in statute law is Title VI of the Civil Rights Act of 1964, which provides for cutting of federal assistance to programs which engage in discriminatory practices),[165] (2) inconsistency with the "anti-quota" provisions of Title VII, and (3) direct collision with the equal protection afforded by the fifth[166] and fourteenth amendments.[167] To date, the Supreme Court has avoided the constitutional questions[168] except in cases in which past discrimination is clear, so that the command to re-allocate educational opportuni-

164. O.F.C.C.P., Technical Guidance Memo at 3, *quoted in* Legal Aid Society v. Brennan, 381 F. Supp. 125, 137 (N.D. Cal. 1974).

165. *See* 42 U.S.C. § 2000d-3 (1970).

166. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that racial discrimination by a federal government instrumentality violates the fifth amendment despite the absence in that amendment of the "equal protection" language applicable to state governments under the fourteenth amendment); Davis v. Passman, *supra* note 32.

167. Contractors Assoc. of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) *cert. denied,* 404 U.S. 854 (1971).

168. It had been hoped that guidance would be provided by the Court in a case challenging an affirmative action admission program at a state-operated law school, but the case was held to be moot. De Funis v. Odegard, 416 U.S. 312 (1974). A medical school special admission program involving similar practices is before the Court in the present term. *See* Bakke v. Regents, 18 Cal. 3d 84, 132 Cal. Rptr. 680 (1976) *cert. granted,* 97 S. Ct. 1098 (1977).

ties was part of a judicial remedy.[169]

This criticism is easily illustrated. The XYZ Widget Company discovers in its utilization analysis that its 25 lathe operators are all white and, for the most part, related, coming from the second and third generations of a group of Polish immigrant artisans, who continue to keep one another's children informed of job openings at the plant. In the relevant labor area the proportion of qualified blacks to whites is 1:3. XYZ thus sets a goal of seven black lathe operators and, in light of a past turnover rate of one per year, agrees to achieve this goal in thirteen years. Each time a new job opening occurs, XYZ is confronted with four applicants: three Polish-Americans and one Black American. If pure random chance were to operate, the most likely work force composition at the end of year thirteen would be 21 or 22 whites and three or four blacks, short of XYZ's goal. The net result would be pressure on XYZ's personnel manager to discriminate against three or four of the Polish-Americans.

The Race Relations Act, 1968, contained a racial balance provision not carried forward in the new British statute.[170] The provision seemed to reflect a fear that some work places might "go all black" in the sense of developing an all-first-generation-immigrant employee force. This might in turn tend to delay the integration of immigrants into the general industrial society by isolating them in a sort of employment ghetto.

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169. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

170. Section 8 of RRA 1968, *supra* note 122, provides in part:

(2) It shall not be unlawful by virtue of either of those sections to discriminate against any person with respect to the engagement for employment in, or the selection for work within, an undertaking or part of an undertaking if the act is done in good faith for the purpose of securing or preserving a reasonable balance of persons of different racial groups employed in the undertaking or that part of the undertaking, as the case may be.

(3) In determining for the purposes of subsection (2) above whether a balance is reasonable regard shall be had to all the circumstances and, in particular, to the proportion of persons employed in those groups in the undertaking or part of undertaking, as the case may be, and to the extent, if any, to which the employer engages, with respect to employment in the undertaking or part of the undertaking, as the case may be, in discrimination of any kind which is unlawful by virtue of this Part of this Act.

(4) In subsection (2) above "racial group" means a group of persons defined by reference to colour, race or ethnic or national origins and for the purposes of that subsection persons wholly or mainly educated in Great Britain shall be treated as members of the same racial group.

4. Administering Agencies

Both nations have created administrative agencies responsible for overseeing the operation of the laws: the Equal Employment Opportunity Commission (EEOC) in the United States,[171] and the Commission for Racial Equality in the United Kingdom.[172] The responsibilities of the two bodies are similar: to engage in research and education;[173] to monitor employment discrimination, both in general and also with particular regard to the operation of the relevant statute, reporting to the appropriate legislative body;[174] to participate in enforcement of the appropriate statute;[175] and, to conduct investigations appropriate to their other duties.[176] The EEOC has one additional responsibility not given its British counterpart:[177] development of a system for the keeping of records, reports of employers, employment agencies and labor organizations.[178] Prior to 1976, the provisions of the Race Relations Acts, 1965, and 1968, were administered by the Race Relations Board, some of whose functions were similar to those of the new Commission for Racial Equality.

5. Enforcement Proceedings and Remedies

The enforcement procedures and remedies provided for by these statutes are largely peculiar to their subject matter. Major similarities include: (1) the individual's right under either statute to present his claim to a tribunal, despite inaction or adverse action by the administering agency;[179] and (2) possible support under either

171. 42 U.S.C. § 2000e-4 (1970).
172. RRA 1976 § 43.
173. 42 U.S.C. §§ 2000e-4(g)(4), (h), 2000e-8(b) (1970); RRA 1976 § 45.
174. 42 U.S.C. § 2000e-4(3) (1970); RRA 1976 §§ 43(1)(c), 46.
175. 42 U.S.C. §§ 2000e-4(g)(6), 2000e-9 (1970); RRA 1976.
176. RRA 1976 §§ 47-51.
177. *But see* RRA § 58(3) (empowering the CRE to require reporting of employment statistics by persons subject to a non-discrimination notice).
178. 42 U.S.C. § 2000e-8(c), (d) (1970). For a discussion of the effect of subsection (e), relating to public disclosure of information obtained, see Sears Roebuck & Co. v. Gen. Services Admin., 509 F.2d 527 (D.C. Cir. 1974) (information obtained by EEOC from Joint Reporting Committee not exempt from Freedom of Information Act disclosure). *See also* Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976) (portions of data supplied by government contractors under Exec. Order No. 11,246 not subject to disclosure); Chrysler v. Schlesinger, 412 F. Supp. 171 (D. Del. 1976) (company permitted to keep "manning table" information secret).
179. *See* Green v. McDonnell Douglas Corp., 411 U.S. 792 (1973) (EEOC failure to make finding on probable cause no bar to Title VII action by individ-

statute of an individual's claim by the administering agency either through assistance in the individual's action[180] or through the institution of formal proceedings by the agency itself.[181]

There are also notable differences: (1) the Commission for Racial Equality may itself issue a type of cease-and-desist order denominated a "non-discrimination notice"[182] whereas the EEOC has no such power;[183] (2) the first level of adjudication of an individual claim in Britain is an industrial tribunal, but in the U.S. it is a court of general jurisdiction;[184] (3) class actions in employment discrimination cases are common in the U.S., but virtually unknown in the U.K.;[185] (4) the range of affirmative relief available in the U.S. is broader than that in the U.K.;[186] and (5) the EEOC may seek judicial awards of back pay for victims of discrimination in its suits—the Commission for Racial Equality may not.[187]

An individual complainant seeking relief for himself or on behalf of another under Title VII commences by filing a charge with the EEOC within 180 days of the unlawful practice (if the individual has sought relief through a state antidiscrimination agency, this is lengthened to 300 days or within 30 days of the termination of state proceedings, whichever is earlier). The EEOC is then directed to engage in conciliation attempts.[188] (In the case of charges filed in a state with an antidiscrimination law, there intervenes a 60-day

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ual); Robinson v. P. Lorillard Co., 444 F.2d 791 (4th Cir. 1971) (EEOC finding of no probable cause not a bar to Title VII suit); RRA 1976 § 54(1).

180. 42 U.S.C. § 2000e-4(g)(1), (3), (6) (1970); RRA 1976 § 66.

181. 42 U.S.C. §§ 2000e-5(f), 2000e-6 (1970); RRA 1976 §§ 62-64.

182. RRA 1976 § 58.

183. Proposals to grant such power to the EEOC were rejected by the Congress in 1972. *See* S. REP. No. 415, 92d Cong., 2d Sess., 1521-57 (1972).

184. There may, of course, have been a finding of probable cause or no probable cause by the EEOC prior to the bringing of a Title VII action by an agency or individual. However, such findings are not prerequisite to the bringing of an individual action, and trial in the Federal district court is *de novo.*

185. Joinder of plaintiffs, however, is permitted. *See, e.g.,* Sharp v. Mogil Motors (Stirling) Ltd., [1976] INDUS. REL. L.R. 98.

186. *Compare* 42 U.S.C. § 2000e-5(g) (1970) *with* RRA 1976 § 56.

187. RRA 1976 §§ 63(1), (4), 64(1).

188. 42 U.S.C. § 2000e-5(c), (d) (1970). Because of the large volume of complaints filed, the agency's conciliation efforts have varied in quality. Inadequacy of conciliation efforts by the EEOC does not bar an individual's court action under Title VII, but does bar an action by the EEOC itself. *See* E.E.O.C. v. Container Corp. of America, 352 F. Supp. 262 (M.D. Fla. 1972). *But see* E.E.O.C. v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir. 1975). (EEOC not barred from bringing suit since the agency had substantially complied with statutory conciliation sections).

or 120-day period of reference to state authorities.)

If the conciliation efforts are not fruitful within 30 days, the EEOC (the Attorney General if the charged party is a government or political subdivision) may bring a civil action. The individual complainant(s) may intervene in such action, but the decision of an individual complainant to join is not essential to give the Commission standing, and a settlement between the individual complainant and the defendant does not require dismissal of the Commission's action.[189] If the Commission decides to dismiss the complaint, or if it has not conciliated the matter within 180 days of the filing of charges (or of expiration of a period of reference to state authorities), the Commission is then directed to so notify the complainant. The complainant then has 90 days within which to institute a civil action.[190] This may be a class action.[191] The EEOC may intervene in such an action.[192]

Under the British statute, an individual complainant need not go to the Commission for Racial Equality. He may, under section 54, choose simply to file his complaint with an industrial tribunal within three months of the alleged unlawful act.[193] This will ordinarily lead to an attempt at conciliation by a conciliation officer of the Advisory, Conciliation, and Arbitration Service. If conciliation is not attempted, or conciliation efforts do not succeed, the case goes on to trial. In practical terms it seems unlikely that the Commission will remain uninformed and uninvolved in the typical case. A complainant who is technically and financially able may choose to "go it alone," but many, probably most, will desire the help of skilled and experienced assistants. Aid, in the form of lawyers, investigators, and others, is available to an individual from

189. 511 F.2d 1352, 1361; E.E.O.C. v. Mississippi Federated Cooperative Services, 10 FEP Cases 942 (D. Miss. 1974). Similarly, an EEOC settlement does not prohibit an action by an individual who refuses the benefit of such a settlement. Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974).

190. *See* Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975) (90 day period commences on receipt of notice of right to sue rather than on receipt of notice that conciliation efforts failed).

191. *See* Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973) (Fed. R. Civ. P. 23(b)(2) applicable and preferable to 23(b)(3) because of nature of claim, nature of relief sought, and breadth of res judicata effect); Stewards v. American Airlines, 490 F.2d 636 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974) (Rule 23(b)(3) applicable because of opt-out provisions, which permit more adequate control of possible conflicts of interest among class members).

192. *See* E.E.O.C. v. Missouri Pac. R.R., 493 F.2d 71,75 (8th Cir. 1974).

193. RRA 1976 § 68(1).

the Commission, under section 66.[194] An application for assistance, the filing of a complaint with a tribunal, a tribunal award, or the receipt of information that a violation has arguably occurred may serve to trigger direct Commission action. If an aggrieved person is uninterested in monetary compensation (which can be obtained only by the individual's own pursuit of that remedy through an industrial tribunal) he may prefer to have the matter handled entirely by the Commission. Only the Commission is specifically authorized to complain of three particular types of misconduct: (1) discriminatory advertising;[195] (2) indirect discrimination by ordering others to act unlawfully;[196] and (3) pressuring others to discriminate.[197] The individual is also entitled to complain of specific discriminatory decisions affecting him even though one of these types of conduct is involved.

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194. Section 66 provides:

(1) Where, in relation to proceedings or prospective proceedings under this Act, an individual who is an actual or prospective complainant or claimant applies to the Commission for assistance under this section, the Commission shall consider the application and may grant it if they think fit to do so—

(a) on the ground that the case raises a question of principle; or

(b) on the ground that it is unreasonable, having regard to the complexity of the case, or to the applicant's position in relation to the respondent or another person involved or to any other matter, to expect the applicant to deal with the case unaided; or

(c) by reason of any other special consideration

(2) Assistance by the Commission under this section may include—

(a) giving advice;

(b) procuring or attempting to procure the settlement of any matter in dispute;

(c) arranging for the giving of advice or assistance by a solicitor or counsel;

(d) arranging for representation by any person including all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings;

(e) any other form of assistance which the Commission may consider appropriate,

but paragraph (d) shall not affect the law and practice regulating the descriptions of persons who may appear in, conduct, defend, and address the court in, any proceedings.

195. RRA 1976 § 29. *But see* Brindley v. Tayside Health Board, [1976] INDUS. REL. L.R. 364 (individual complaint allowed to proceed on basis of allegedly improper advertisement under similar language of Sex Discrimination Act, 1975).

196. RRA 1976 § 30.

197. RRA 1976 § 31.

In a fourth type of case, the Commission's enforcement powers even more clearly overlap those of individuals. Section 28 empowers the Commission to bring an action or to issue a nondiscrimination notice in the case of a "discriminatory practice." "Discriminatory practice" is defined as "the application of a requirement or condition which results in an act of discrimination which is unlawful by virtue of Part II . . . taken with section 1(1)(b) [the provision defining discrimination to include indirect discrimination] or which would be likely to result in such an act . . . ." To the extent that there has been an unlawful act giving rise to an individual right of action, the Commission's power to seek relief coincides with that of the wronged individual (although the relief available differs). Commission enforcement procedures are of two types—procedures leading to the issuance by the Commission of a nondiscrimination notice, and applications by the Commission to a tribunal for declarations or orders. The statute contemplates that the first type be grounded in a formal investigation with procedures similar to those in the courts.[198] A decision by the Commission to make an application to an industrial tribunal may stem from a formal investigation,[199] but such an investigation is not an absolute prerequisite. The scope of a nondiscrimination notice is laid out in section 58.[200] The propriety of any requirement in such a notice may be appealed to an industrial tribunal, which may quash or modify any term. The tribunal is empowered to review the correctness of findings of fact.

198. RRA 1976 §§ 48, 49(1), (2), (3), 58(5).

199. *See* RRA 1976 § 62.

200. Section 58 provides in part:

(2) If in the course of a formal investigation the Commission become satisfied that a person is committing, or has committed, any such acts, the Commission may in the prescribed manner serve on him a notice in the prescribed form ("a non-discrimination notice") requiring him—

(a) not to commit any such acts; and

(b) where compliance with paragraph (a) involves changes in any of his practices or other agreements—

(i) to inform the Commission that he has effected those changes and what those changes are; and

(ii) to take such steps as may be reasonably required by the notice for the purpose of affording that information to other persons concerned.

(3) A non-discrimination notice may also require the person on whom it is served to furnish the Commission with such other information as may be reasonably required by the notice in order to verify that the notice has been complied with.

Applications by the Commission to courts or industrial tribunals are dealt with in three sections of the statute. Section 62 applies to defendants who, in the five years preceding the application, have become subject to a nondiscrimination notice, or have been found to have committed an unlawful act in a proceeding brought by an individual under section 54. To obtain injunctive relief the Commission must show the court that there is a likelihood that the unlawful act will be engaged in. Section 63 permits the Commission to obtain declaratory (industrial tribunal) and injunctive (court) relief with respect to violations of sections 29 (advertising), 30 (instructing another to discriminate), and 31 (pressuring another to discriminate). Section 64 permits the Commission to seek relief other than back pay on behalf of a wronged individual who makes an application under the two preceding sections.

The relief available under Title VII is generally more generous than that provided by the Race Relations Act, 1976. Both statutes provide for back pay, but Title VII puts only a time limitation, rather than a monetary limit, on the amount to be awarded.[201] The "recommendation" relief given by section 56(1)(c) of the Race Relations Act seems pale when compared with the "affirmative action" remedy permitted by section 706 of the American statute. The British prohibitory injunctive relief under sections 62 and 63 is similar to relief available under Title VII, but the latter also affords mandatory injunctive relief. Only in the granting to the administering agency of the authority to issue a cease-and-desist order does the British statute appear more vigorous than its American counterpart.

B. *The Early Civil Rights Acts and British Tort Principles*

For many years, the early Civil Rights Acts were interpreted restrictively, but in 1968, the Supreme Court stated in *Jones v. Alfred H. Mayer Co.*[202] that 42 U.S.C. § 1982 forbids discrimination by private persons in the sale of property, and that this provision was neither repealed nor pre-empted by the enactment of the more specific prohibitions of discrimination in housing of the Civil Rights Act of 1968.[203] Since the wordings and legislative histories

201. *See* 42 U.S.C. § 2000e-5(g) (1970) (two years); RRA 1976 § 56(2).

202. 392 U.S. 409 (1968).

203. Pub. L. No. 90-24, Title VIII, 82 Stat. 81 (1968). *See also* 392 U.S. at 416 n.20.

of sections 1981 and 1982 are quite similar,[204] it was not surprising that soon after *Jones,* circuit courts of appeal announced the applicability of section 1981 to refusals by employers and unions to allow persons to enter into contracts of employment.[205] This was approved by the Supreme Court in 1975 in *Johnson v. Railway Express Agency,*[206] which described actions under section 1981 as "independent" of Title VII and of claims under the National Labor Relations Act. Enforcement of rights under this provision is through individual or class actions[207] brought by victims of discrimination against employers[208] or unions.[209] The available relief includes compensatory[210] and punitive damages,[211] injunctions,[212] and counsel fees.[213]

Section 1983 creates a cause of action for violation "under color of any statute, ordinance, regulation, custom or usage of any state or territory" of the rights and immunities of citizens. It thus provides that basis for individual and class actions enforcing the prohibitions of the fourteenth amendment against officials of state and local governments.[214] Injunctive relief is typical in these actions. Damages awards are sometimes barred by concepts of immunity.[215] Persons not holding public office may be proper parties

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204. *See* note 117 *supra.*

205. *See, e.g.,* Waters v. Wisconsin Steel Works, 427 F.2d 475 (7th Cir. 1970), *cert. denied,* 400 U.S. 911 (1970); Young v. Int'l Tel. & Tel., 438 F.2d 757 (3d Cir. 1971).

206. 421 U.S. 454 (1975). *See also* McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976) (42 U.S.C. § 1981 protects whites as well as non-whites).

207. *See, e.g.,* Logan v. Gen. Fireproofing Co., 309 F. Supp. 1096 (D.N.C. 1969).

208. 421 U.S. 454.

209. *See, e.g.,* Williams v. Local 19, Sheet Metal Workers Internat'l Ass'n, 59 F.R.D. 49 (E.D. Pa. 1973).

210. *See, e.g.,* Sanders v. Dobbs Houses, 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971).

211. 421 U.S. at 460.

212. *See, e.g.,* Rios v. Steamfitters Local 638, 326 F. Supp. 198 (S.D.N.Y. 1971).

213. *See, e.g.,* Tramble v. Converters Ink Co., 343 F. Supp. 1350 (N.D. Ill. 1972).

214. *See generally,* Monroe v. Pape, 365 U.S. 167 (1961) (non-labor case).

215. *See* Wood v. Strickland, 420 U.S. 308 (1975) (qualified immunity for government officials acting in good faith); Smith v. Losee, 485 F.2d 334 (9th Cir. 1973), *cert. denied,* 417 U.S. 908 (1974). The recent decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) held that the eleventh amendment does not prevent recovery of back pay and attorneys' fee in a Title VII action. As to section 1983 action, *see* 427 U.S. at 452.

in such an action if they are substantially engaged in the exercise of governmental power. An example would be union officials intimately involved with work force selection on a government building project.[216]

There is no British equivalent to sections 1981 and 1983. Hepple has suggested, however, that a common law norm similar to that of section 1981 might have developed in Britain but for the reluctance of the British judiciary to intrude in the enunciation of public policy.[217] He has also suggested[218] that the British courts might allow damages if a victim of discrimination could show that the victimization was the result of a conspiracy (between employers or between an employer and a trade union, for example). Since the new Race Relations Act specifically provides in section 53 that "[e]xcept as provided by this Act no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of this Act," the new statute is not likely to serve as the source of any new tort principle.

C. *Government Contractors*

Executive Order 11,246 requires that there be included in every government contract the following agreement:

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.[219]

Affirmative action programs adopted by employers with United States Government contracts are monitored by the Office of Fed-

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216. *See, e.g.*, Central Contractors Ass'n v. Local 46, IBEW, 312 F. Supp. 1388 (W.D. Wash. 1969).

217. B. HEPPLE, *supra* note 3, at 151-56.

218. *Id.* at 245.

219. Exec. Order No. 11,246, § 202, 3 C.F.R. 340 (1965).

eral Contract Compliance Programs (OFCCP) of the Department of Labor, as well as by individual contracting agencies. Each year during the period of contract performance the employer is required to report to the OFCCP data showing progress towards meeting the goals set out in its program. Failure to achieve goals may bring sanctions. The discretion of the OFCCP to refuse acceptance of a plan and to withdraw a contract is limited by a 1972 amendment to Title VII.[220] An individual employee or job applicant may file a complaint of discrimination treatment by a contractor with the OFCCP.[221] Sanctions include cancellation of existing contracts, debarment from future contracts, and recommendations to other agencies (the Department of Justice, the Equal Employment Opportunity Commission) to institute litigation against noncomplying contractors. It has been held that the Order does not give rise to an individual right of action against an employer for noncompliance,[222] but a writ of mandate has on at least one occasion been issued to require federal officials to enforce the Order's requirements.[223]

The White Paper which preceded introduction of the Race Relations Act, 1976, contains two paragraphs on the subject of government contracts that read as follows:

> 19. Since 1969 all Government contracts have contained a standard clause requiring contractors in the United Kingdom to conform to the provisions of the Race Relations Act 1968 relating to discrimination in employment and to take all reasonable steps to ensure that their employees and sub-contractors do the same.
> 20. It would be the intention of the Government when new legislation about racial discrimination is enacted to require a similar undertaking to comply with its provisions as a standard condition of Government contracts. The Government has considered whether its duty to take an active role to eliminate discrimination requires something additional. It would be an unacceptable burden to re-

220. 42 U.S.C. § 2000e-17. If a plan is accepted by a contracting agency, it is deemed accepted by the federal government unless OFCCP disapproves within 45 days. If a plan has been accepted for a specific facility and its terms are being followed by the contractor, then no denial, termination, or suspension of a contract is permitted except after a full hearing. *Id.*

221. Procedures for review of compliance appear in 41 C.F.R. part 60-60 (1976); procedures for sanction hearings appear in 41 C.F.R. part 60-30 (1976).

222. Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir. 1967). *But see,* Lewis v. Western Airlines, 379 F. Supp. 684 (N.D. Calif. 1974).

223. Legal Aid Society v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974). *See also* Castillo v. Usery, ____ F. Supp. ____, 14 FEP Cases 1240 (N.D. Cal. 1977).

quire all contractors to supply as a matter of form full particulars of their employment policies; but the Government cannot passively assume that a formal condition in a contract is all that is required. It is therefore intended that it should be a standard condition of Government contracts that the contractor will provide on request to the Department of Employment such information about its employment policies and practices as the Department may reasonably require.[224]

The assessment of the post-1969 situation by Colin Turpin appears accurate:

> The new contractual condition is of rather modest scope and effectiveness, although contractual sanctions are added to those provided by the Race Relations Act. The department may no doubt obtain an injunction against a contractor to compel the cessation of the unlawful practice, or in a particular case may be justified in determining the contract. Greater efficacy for the non-discrimination clause might have been achieved by a requirement of publication on the contractor's premises and at all places of recruitment maintained by the contractor, and in all advertisements for labour or staff of a prescribed statement that no racial discrimination would be applied in engagement of employees, terms and conditions of employment, promotion and other matters within the scope of the Race Relations Act.
>
> Here also the ultimate sanction available to the department is the exclusion of the firm from its approved lists. The Chancellor of the Exchequer (Mr. Roy Jenkins) said in a written answer in the House of Commons on 22 October 1969 that: "Government departments will be prepared to withhold contracts from firms practicing racial discrimination in employment."
>
> The government contract can be only an imperfect instrument for the enforcement of employment policies. The range of its operation, even in combination with other public sector contracts, does not cover all sectors of industry. The sanctions for breach of contractual conditions are not wholly dependable or effective means of securing compliance with policy. But as an auxiliary rather than a principal weapon of policy, and as a means of contributing by precept to the establishment of standards of conduct, the government contract has a role of no little significance.[225]

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224. Racial Discrimination, CMND. No. 6234, ¶¶ 19, 20.

225. C. TURPIN, GOVERNMENT CONTRACTS 258-59 (1972). *See also* Report of the Race Relations Board 1975-76. H.C. 3. In its final report before being displaced by the Commission on Racial Equality, the Board recommended toughening of contract antidiscrimination requirements.

D. *Government Employees*

Executive Order 11,478[226] forbids employment discrimination by United States government departments.[227] An aggrieved employee may complain of unequal treatment to the compliance officer appointed to the employing agency. In the event the resolution by the employing agency is unsatisfactory to the complainant, the matter may be appealed to the Civil Service Commission Board of Appeals and Review.[228] If the outcome still fails to satisfy the aggrieved, he or she may (under section 17 of Title VII, added in 1972) bring an action in federal district court. The Supreme Court recently held that this action is *de novo* (as in the case of private employers) rather than a review to determine whether administrative action has been arbitrary or capricious.[229] The rights provided by section 17 are the exclusive means for enforcing claims of discrimination by federal employees; the provisions of 42 U.S.C. § 1981 are not available.[230] Class actions are permissible,[231] but because of the nature of the administrative process prior to litigation, it is questionable whether many such actions will prove appropriate.[232] Available relief includes attorney's fees[233] and injunctive relief,[234] including an order directing an official to cease and desist from refusing the appointment of the aggrieved employee to a particular post.[235]

The prohibitions of the Race Relations Act, 1976, apply to gov-

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226. 34 Fed. Reg. 12,985 (1969).

227. Procedural rules for enforcement may be found in 5 C.F.R. part 713 (1972).

228. 5 C.F.R. §§ 713.231-.236 (1977).

229. Chandler v. Roudebush, 425 U.S. 840 (1976).

230. Brown v. Gen. Services Admin., 425 U.S. 820 (1976).

231. Sylvester v. United States Postal Service, 393 F. Supp. 1334 (S.D. Texas 1975). The contrary holding in *Archuleta v. Callaway,* 385 F. Supp. 384 (D. Colo. 1974) was based on a premise that trial was not to be *de novo.* In light of *Chandler v. Roudebush,* 425 U.S. 840 (1976), the reasoning in *Sylvester* is more appealing.

232. *Compare* Williams v. Tennessee Valley Authority, 552 F.2d 691 (6th Cir. 1977) *and* Eastland v. Tennessee Valley Authority, 14 FEP Cases 787 (5th Cir. 1977) *with* Simmons v. Schlesinger, 13 FEP Cases 1765 (4th Cir. 1976).

233. Reynolds v. Wise, 375 F. Supp. 145, 151-52 (N.D. Texas 1974).

234. Chambers v. U.S., 451 F.2d 1045 (Ct. Cl. 1971); Smith v. Kleindienst, 8 FEP Cases 752, 753 (D.D.C. 1974).

235. *See* Parks v. Dunlop, 517 F.2d 785 (5th Cir. 1975). The principal holding of the case, however, is that a preliminary injunction forbidding the appointment of another to the post in question during the pendency of the action should not be granted. *See* Rogers v. E.E.O.C., 403 F. Supp. 1240 (D.D.C. 1975).

ernment employment in Britain[236] "as they apply to employment by a private person . . . ." However, it is permissible to restrict employment "to persons of particular birth, nationality, descent or residence." Presumably, considerations of national security might lead to a directive that only U.K. citizens might be employed in some positions. The procedures to be followed in the event a case reaches the courts are those set out by the Crown Proceedings Act, 1947.[237] These are, in substance, identical to those used in cases involving only private parties.[238]

V. Prohibitions Against Sex Discrimination

The American statutes and orders forbidding employment discrimination on the grounds of one's gender are the same as those in the case of racial discrimination, except that (1) 42 U.S.C. § 1981 does not apply,[239] (2) the Equal Pay Act of 1963[240] is an additional prohibition of certain forms of sex discrimination, and (3) Title IX of the Education Amendments Act of 1972[241] provides an added measure of protection to those employed by education programs receiving federal assistance. The principal British provisions are the Equal Pay Act, 1970,[242] the Sex Discrimination Act, 1975,[243] and certain sections of the Employment Protection Act, 1975.[244]

A. *The Sex Discrimination Act, 1975, Compared to American Doctrine*

For most purposes of this brief survey, the employment discrimination provisions of the British Sex Discrimination Act, 1975, may be regarded as equivalent to the provisions of the Race Relations

236. RRA 1976 §§ 75, 76. They also apply to constables, who are not regarded as employees. RRA 1976 § 16.

237. 10 & 11 Geo. 6, c.44. Transfers of proceedings are treated differently under the RRA 1976, however, so that there is not removal to the High Court. RRA 1976 § 75(6)(7). This allows the expertise of the Industrial Tribunal to be employed in these cases.

238. *See generally* G. Williams, Crown Proceedings (1948); J. Smith, Crown Proceedings Act 1947 (1948).

239. Olson v. Rembrandt Printing Co., 375 F. Supp. 413 (E.D. Mo. 1974).

240. 29 U.S.C. § 206(d). *See generally* Ross & McDermott, *Equal Pay Act of 1963: A Decade of Enforcement,* 16 B. C. Indus. & Comm. L. Rev. 1 (1974).

241. 20 U.S.C. § 1681.

242. c.41.

243. c.65.

244. c.71.

Act, 1976, so that the comparisons between Title VII and the Race Relations Act, 1976, apply in an examination of Title VII and the Sex Discrimination Act, 1975. The Sex Discrimination Act, 1975, covers discrimination by employers,[245] trade unions,[246] qualifying bodies,[247] employment agencies,[248] and partnerships[249] in language very much like that of the Race Relations Act. Government agencies are also covered.[250] Enforcement by individuals is accomplished by presenting the matter to an industrial tribunal,[251] which may grant relief similar to that provided by the Race Relations Act.[252] The statute creates an administrative agency, the Equal Opportunities Commission,[253] whose duties,[254] enforcement powers,[255] and ability to provide individual litigants with help[256] are like those of the Commission for Racial Equality.[257]

The basic definition of sex discrimination is also a foreshadowing of the definition of racial discrimination.[258] The British statute,

245. SDA 1975, *supra* note 1, §§ 6, 9. Employers of five or fewer employees are not covered. SDA 1975 § 6(3).

246. *Id.* § 12.

247. *Id.* § 14.

248. *Id.* § 15.

249. *Id.* § 11.

250. *Id.* §§ 16, 17, 85, 86.

251. *Id.* § 63.

252. *Id.* § 65.

253. *Id.* § 53.

254. *Id.* §§ 54-61.

255. *Id.* §§ 67-73.

256. *Id.* §§ 74-75.

257. *See* text at Part IV(A)(5) *supra.*

258. The Act provides in relevant part:

> Sec. 1. (1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—
>
> (a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or
>
> (b) he applies to her a requirement or condition which he applies or would apply equally to a man but—
>
> (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
>
> (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
>
> (iii) which is to her detriment because she cannot comply with it.
>
> . . . .
>
> Sec. 2. (1) Section 1, and the provisions of Parts II and III relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.

unlike Title VII, explicitly prohibits discrimination on the basis of marriage.[259] The provision is a narrow one:[260]

> Sec. 1(2) If a person treats or would treat a man differently according to the man's marital status, his treatment of a woman is for the purposes of subsection (1)(a) to be compared to his treatment of a man having the like marital status.
> Sec. 2(2) In the application of subsection (1) no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth.
> Sec. 3(1) A person discriminates against a married person of either sex in any circumstances relevant for the purposes of any provision of Part II if—
> (a) on the ground of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex, or
> (b) he applies to that person a requirement or condition which he applies or would apply equally to an unmarried person but—
> (i) which is such that the proportion of married persons who can comply with it is considerably smaller than the proportion of unmarried persons of the same sex who can comply with it, and
> (ii) which he cannot show to be justifiable irrespective of the marital status of the person to whom it is applied, and
> (iii) which is to that person's detriment because he cannot comply with it.
> (2) For the purposes of subsection (1), a provision of Part II framed with reference to discrimination against women shall be treated as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.

Being "married" is the protected status under section 3, not "marital status;" discrimination against a single person would not be covered. Neither is being a parent protected under this language except to the extent that special benefits for pregnant women are "privileged" under section 2(2). Note also that the comparison required by section 3 is between persons of the same sex. Add to this the provision of section 5(3): "A comparison of the cases of persons of different sex or marital status under section 1(1) or 3(1) must be such that the relevant circumstances in the one case are

259. *See* Harper v. Trans World Airlines, 525 F.2d 409 (8th Cir. 1975) (employer discharge of woman employee following her marriage to co-worker, based on employer "anti-nepotism" rule, not invalid sex discrimination); Stroud v. Delta Air Lines, 544 F.2d 892 (5th Cir. 1977) (rule preferring unwed cabin attendants).

260. *See* D. WALKER, SEX DISCRIMINATION 6-7 (1976).

the same, or not materially different, in the other."[261] Now consider a case in which an employer refuses, as a matter of policy, to hire unwed mothers but does not refuse to hire unwed fathers. Does the statute make such a practice unlawful? Section 3 does not apply, for it protects the married only. Does section 1 apply? It would be necessary to show that the proportion of women who can present themselves as "non-unwed" parents is really "considerably smaller" than that proportion among men. If that can be done, then is unwed parenthood a "relevant circumstance" under section 5(3)? Moreover, what standard of relevance can be used other than ability to perform the work in question?

Thus far, Title VII's ban on sex discrimination has been applied both to discrimination on the basis of sex as a primary characteristic—for example, refusing to consider women for "strenuous" jobs,[262] excluding men from consideration as cabin attendants on air lines,[263] or assigning of men only to lucrative banquet work by a hotel's food catering operation[264]—and to discrimination on the basis of certain sexually secondary immutable physical characteristics, such as minimum height and weight requirements.[265] However, the Supreme Court recently upheld as lawful an employer's decision to provide temporary disability insurance for all employee disabilities other than disability resulting from pregnancy.[266] Some have thought that Title VII should also be viewed as prohibiting discrimination against those persons whose more readily alterable secondary sexual characteristics do not conform to a general societal expectation. Thus there are a number of cases involving males with long hair,[267] with the usual result being a holding for the employer provided that the employer's no-long-hair-for-males policy was part of a general policy requiring neatness in grooming. In one case an employer in the food preparation business required

261. RRA 1976 § 5(3).

262. *See, e.g.*, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

263. *See* Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950.

264. Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974).

265. *See* Smith v. City of East Cleveland, 520 F.2d 492 (6th Cir. 1975) (height requirement for police officers valid; weight minimum invalid); Gerdom v. Continental Air Lines, 8 EPD ¶ 9788 (C.D. Cal. 1974).

266. Gilbert v. Gen. Elec. Co., 97 S. Ct. 401 (1976).

267. The contrasting opinions in the *Willingham* case at the Court of Appeals level review the case law and opposing analysis well. Willingham v. Macon Tel. Pub. Co., 482 F.2d 535, *rehearing en banc* 507 F.2d 1084 (5th Cir. 1975).

that his male employees wear hats, and his female employees hairnets. Predictably, his refusal of hairnets for the males was held discriminatory.[268] Similarly, an attempt by an airline to maintain the loyalty of its male passengers by forbidding its female (but not its male) cabin attendants to wear glasses, and subjecting the females to maximum height and weight limits below those for males was held to be unlawful.[269] Presumably, however, a more even-handed chauvinism that would require manly,[270] handsome, slender males and feminine, beautiful, thin females might pass muster, but even that type of rule may impose more of a burden on one sex than on the other. A "no-marriage" rule applied to female (but not male) airline cabin attendants was held unlawful in *Sprogis v. United Air Lines.*[271] An antinepotism rule, facially neutral, could doubtless be shown in some cases to ban more members of one sex from job eligibility.[272] Whether the avoidance of conflicts of interest is a sufficient business reason for such a rule must be decided on an ad hoc basis.[273]

The bona fide occupational qualification provision of Title VII includes a provision incorporating by reference the "differential based on any . . . factor other than sex" doctrine of the Equal Pay Act of 1963. Otherwise, the discussion of the Title VII provision in section IV of this article is generally applicable. The lengthy, specific, British equivalent provides:

> Sec. 7(1) In relation to sex discrimination—
>
> (a) section 6(1)(a) or (c) does not apply to any employment where being a man is a genuine occupational qualification for the job, and
>
> (b) section 6(2)(a) does not apply to opportunities for promotion or transfer to, or training for, such employment.
>
> (2) Being a man is a genuine occupational qualification for a job only where—
>
> (a) the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of

268. Roberts v. General Mills, 337 F. Supp. 1055 (N.D. Ohio 1971).

269. Laffey v. Northwest Airlines., 392 F. Supp. 1076 (D.D.C. 1974).

270. *See* Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975) (Title VII does not bar private employer's policy disfavoring "effeminate" males).

271. 444 F.2d 1194 (7th Cir. 1971), *cert. denied* 404 U.S. 991 (1971).

272. *See* Harper v. Trans World Airlines, 555 F.2d 409.

273. *See* Satterwhite v. City of Greenville, 395 F. Supp. 698 (N.D. Texas 1975).

authenticity, so that the essential nature of the job would be materially different if carried out by a woman; or

(b) the job needs to be held by a man to preserve decency or privacy because—

(i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or

(ii) the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities; or

(c) the nature or location of the establishment makes it impracticable for the holder of the job to live elsewhere than in premises provided by the employer, and—

(i) the only such premises which are available for persons holding that kind of job are lived in, or normally lived in, by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men, and

(ii) it is not reasonable to expect the employer either to equip those premises with such accommodation and facilities or to provide other premises for women; or

(d) the nature of the establishment, or of the part of it within which the work is done, requires the job to be held by a man because—

(i) it is, or is part of, a hospital, prison or other establishment for persons requiring special care, supervision or attention, and

(ii) those persons are all men (disregarding any woman whose presence is exceptional), and

(iii) it is reasonable, having regard to the essential character of the establishment or that part, that the job should not be held by a woman; or

(e) the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and those services can most effectively be provided by a man, or

(f) the job needs to be held by a man because of restrictions imposed by the laws regulating the employment of women, or

(g) the job needs to be held by a man because it is likely to involve the performance of duties outside the United Kingdom in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman, or

(h) the job is one of two to be held by a married couple.

(3) Subsection (2) applies where only some of the duties of the job fall within paragraphs (a) and (g) as well as where all of them do.
(4) Paragraph (a), (b), (c), (d), (e), (f) or (g) of subsection (2) does not apply in relation to the filling of a vacancy at a time when the employer already has male employees—
(a) who are capable of carrying out the duties falling within that paragraph, and
(b) whom it would be reasonable to employ on those duties, and
(c) whose numbers are sufficient to meet the employer's likely requirements in respect of those duties without undue inconvenience.

There seems no reason to doubt that American doctrine will develop along generally similar lines. The norms provided by subparagraph (b) and (d) are reminiscent of factors considered in *Hodgson v. Brookhaven General Hospital.*[274] The concepts embodied in paragraphs (c) and (e) are inherent in the "business necessity" concept developing under Title VII, although what it is "reasonable to expect" of an employer under (c) and what "most effectively" means in (e) remain to be seen. Overall, the language of (c) and (e) seems susceptible to a reading creating a slightly broader exception than is anticipated in the United States. Paragraph (f) is a reflection of the difference between the more unitary British government and the American federal system. The "protective" legislation limiting women's hours and banning women from certain jobs has been state legislation in the United States and is preempted by Title VII if it "purports to require or permit the doing [of] any act which would be an unlawful employment practice . . . ."[275] The net result may be either to void the state law or to require an employer to provide males with the benefits mandated for females by the state law.[276] In both nations, such legislation is generally being repealed.[277]

274. 436 F.2d 719 (5th Cir. 1970) (hospital attendants performing "intimate" functions). *See also* Cianciolo v. Members, 376 F. Supp. 719 (E.D. Tenn. 1974); Garaci v. City of Memphis, 379 F. Supp. 1393 (W.D. Tenn. 1974) (massage facilities).

275. 42 U.S.C. § 2000e-7 (1970).

276. *Compare* Homemakers Inc. v. Div'n of Indus. Welfare, 356 F. Supp. 1111 (N.D. Cal. 1973) *aff'd* 509 F.2d 20 (9th Cir. 1975) *and* Kober v. Westinghouse Electric Corp., 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd,* 480 F.2d 240 (3rd Cir. 1973) *with* Potlatch Forests, Inc. v. Hayes, 318 F. Supp. 1368 (E.D. Ark. 1970), *aff'd,* 465 F.2d 1081 (8th Cir. 1972). *See* Note, 59 CORNELL L. REV. 133 (1973).

277. *See* J. Walstedt, *State Labor Laws in Transition: From Protection to*

Certain other provisions in the British act create exceptions similar in effect to those of the bona fide occupational qualification provision. Section 44 permits comparison of the "average" man to the "average" woman for the purposes of competitive sports. Section 45 provides:[278]

> Nothing in Parts II and IV shall render unlawful the treatment of a person in relation to an annuity, life assurance policy, accident insurance policy, or similar matter involving the assessment of risk, where the treatment—
>
> (a) was affected by reference to actuarial or other data from a source on which it was reasonable to rely, and
>
> (b) was reasonable having regard to the data and any other relevant factors.

The American doctrine on this matter is still being formed, but there are courts which have held that different contribution rates or benefits for the two sexes are unlawful.[279] Section 52 provides a national security exception (which surely would be involved only in the rarest case). Section 19 permits organized religious bodies to discriminate against the employment of women on the basis of doctrine. The first amendment to the United States Constitution no doubt requires the same result.[280] Section 20 creates an exception for midwives. The issue has not been raised in the United States, but *Brookhaven* indicates that the courts might be sympathetic to patients' preferences in this regard, without being bothered by the large number of male obstetricians and gynecologists.

B. *The Equal Pay Acts*

The British and the American Equal Pay Acts share the same narrow thrust. Each requires that employers pay persons of one sex

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Equal Status (1976) (a publication of the Women's Bureau, Employment Standards Administration, U.S. Department of Labor).

278. SDA, 1975 *supra* note 1.

279. *See* Rosen v. Public Service Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1975) (lower retirement benefits for males); Bartmess v. Drewrys Ltd., 444 F.2d 1186 (7th Cir. 1971), *cert. denied* 404 U.S. 939 (1971) (age of retirement different for males and females); Chastang v. Flynn & Emrich Co., 381 F. Supp. 1348, 1352 (D. Md. 1974) (early retirement forfeitures by males). Note also the contrast between the EEOC regulations, 37 Fed. Reg. 6836 (1972), 29 C.F.R. § 1604.9(b)(e) (equal benefits required), and the OFCCP regulations, 35 Fed. Reg. 8888 (1970), 41 C.F.R. § 60-20.3 (c) (equal contributions required). An "equal benefits" argument is made in Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1203 (1974).

280. *See also* 42 U.S.C. § 2000e-1 (1970 & Supp. V 1975).

at the same rates as similarly situated persons of the other sex for like work. Since such discriminatory treatment would doubtless also violate Title VII in the United States and the Sex Discrimination Act, 1975, in Britain, why have these separate laws? The reasons in each case seems to be to provide those discriminated against with a different range of remedies.[281] The additional protection afforded in the United States includes the generally broader employer coverage of the Equal Pay Act of 1963 as compared with Title VII;[282] an additional individual cause of action which may be pursued under the Fair Labor Standards Act;[283] and enforcement by the Department of Labor as well as by the EEOC.[284] In Britain, the greater protection follows from the fact that the statute inserts an "equality clause" into each contract of employment,[285] so that in any proceeding involving a contract of employment the individual is entitled to its benefits.

The substantive thrust of the British Act[286] may be broader than

281. Political realities may have made the enactment of the narrower provision an easier task legislatively. This inference is supported by the earlier enactment of the equal pay statutes.

282. In individual cases, it is possible that an exemption under § 13 of the Fair Labor Standards Act, 29 U.S.C. § 213, may result in an employer being subject to duties under Title VII, but not under the Equal Pay Act. Since most of those exemptions concern smaller employers, however, the broader coverage is usually that of the earlier act. *See generally,* Player, *Enterprise Coverage Under the Fair Labor Standards Act,* 28 VAND. L. REV. 283 (1975).

283. 29 U.S.C. § 216(b) (Supp. V 1975).

284. 29 U.S.C. §§ 216(c), 217 (Supp. V 1975).

285. EPA 1970 § 1.

286. Section 1(2) of the Equal Pay Act of 1970 provides:

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that—

(a) where the woman is employed on like work with a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated so as modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment—

that of the American.[287] The extra-wage issues that can be raised in Great Britain appear more numerous, although the term "wages" in the American statute is broadly defined, and includes, for example, the cost of food or lodging supplied by an employer.[288] Neither statute requires that an employer abandon "men only" or "women only" schemes; that is left to Title VII and the Sex Discrimination Act. One interesting remedial device available under the British statute has no American equivalent: "Where a collective agreement . . . contains any provision applying specifically to men only or to women only, the agreement may be referred by any party to it or by the Secretary of State" to the Central Arbitration Committee for amendment.[289] The Committee is a government-funded body which works independently of government direction.

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.

287. 29 U.S.C. § 206(d) provides:

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on any other factor other than sex; Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

288. *See, e.g.*, Walling v. Alaska Pacific Consolidated Mining Co., 152 F.2d 812 (9th Cir. 1945), *cert. denied*, 327 U.S. 803 (1946).

289. EPA 1970 § 3. For a discussion of the Central Arbitration Committee see generally B. HEPPLE & P. O'HIGGINS, ENCYCLOPEDIA OF LABOUR RELATIONS LAW 1-087,-088.

It is the successor to the former Industrial Court and Industrial Arbitration Board.

Most of the interpretations of the two statutes to date involve the question of what is "equal" or "like" work.[290] The outcomes in the two nations are markedly similar. Female stock clerks in both countries, to take one example, have succeeded in obtaining pay equal to that of males performing the same work in the face of arguments that the higher male pay was justified by broader experience (in the absence of a showing that the experience would have real significance in the job).[291] Part-time assignment of a male to perform supervisory work not done by a woman who otherwise did the same work as the male also has been held to justify a pay differential in both countries.[292]

The first reported British decision on one practice—red circling of a pay rate—renders a more favorable result than would be expected in the United States. The respondent employer in *Bedwell v. Hellerman Deutsch Ltd.*[293] employed both men and women to inspect the components it manufactured. Prior to the effective

290. The British statute (EPA 1970) is more detailed than the American, but the factors to be considered are fundamentally identical. Section 1 provides:

> (4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.
>
> (5) A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.

291. Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972); Sharp v. Mogil Motors (Stirling) Ltd., [1976] INDUS. REL. L.R. 132.

292. Peltier v. City of Fargo, 396 F. Supp. 710 (D.N.D. 1975); [1976] INDUS. REL. L.R. 132.

293. [1976] INDUS. REL. L.R. 98. The statutory provision principally relied upon is EPA 1970 § 1(3):

> An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his.

date of the Equal Pay Act, 1970, respondent had for some time classified the men doing this work as "inspectors" and included them in its weekly or monthly paid staff category (category III). The women who did the same work were denominated as "viewers" and were included in respondent's hourly paid category (category I). During the months preceding the effective date of the Act, respondents (with the help of hired consultants) conducted a job analysis which led them to a decision to include all those performing the inspection work in a hourly-paid rank (a new category I level called X3). However, respondent also decided that it would continue to pay the men already in its service as inspectors at a higher category III rate, and newly hired men and all women (including the "viewers") at the new X3 rate—thus "red circling" the rates of the eight male inspectors. The industrial tribunal found this red circling to be permissible under section 1(3) of the Act, as a variation "genuinely due to a material difference (other than the difference of sex)." The tribunal pointed out that the employer was making energetic efforts to comply with the Act, and not permitting red circling would complicate the development of new, fairer, general wage plans. The tribunal believed that the impact of the red circling could be expected to disappear completely as the "inspectors" retired. These factors led the United States Supreme Court to sympathize with the employer in *Corning Glass Works v. Brennan*,[294] but the Court was not deterred from holding that red circling which results in the perpetuation of more favorable treatment of even a small number of males as compared to females is unlawful under the American Equal Pay Act. As an application of specific statutory language, the *Corning Glass* outcome is readily defensible; a carry-over of a formerly lawful male preference is no less a male preference because of its origin.

C. *The Pregnancy and Maternity Provisions of the Employment Protection Act, 1975*

The extent to which the constitutional and statutory bans on sex discrimination in the United States affect pregnant women and the mothers of newborn children is still being defined. The Supreme Court has held that the due process clause of the fourteenth amendment forbids a government employment rule that requires pregnant teachers to leave work at the end of the fifth month of

294. 417 U.S. 190 (1974).

pregnancy.[295] The decision to terminate employment must be based on the ability of the individual to perform her duties, and not on a "conclusive presumption." Similarly, barring pregnant women from a state's unemployment compensation benefits program for a period beginning twelve weeks before anticipated birth and extending until six weeks after delivery because such women are not "available for work" (an eligibility condition under the program) was struck down by the Court.[296] However, omissions of pregnancy-based temporary disability from the coverage of otherwise broad disability benefits programs have been upheld against both fourteenth amendment and Title VII challenges.[297] At least one state antidiscrimination law has been interpreted to ban such an omission.[298]

The Employment Protection Act, 1975, is much more specific than Title VII. Section 34(1) treats as unfair the dismissal of an employee if the "reason . . . for her dismissal is that she is pregnant or is any other reason connected to her pregnancy." An employer charged with unfair dismissal may seek to defend the action on one of two grounds: that the employee can no longer work adequately; or that her continued employment would violate a duty imposed by law.[299] Moreover, if a pregnant employee is incapable of performing her normal work, and thus is potentially subject to dismissal, her employer must offer her another job which she is capable of performing if a vacancy exists.[300] Two additional rights are available to pregnant employees who continue to work "until immediately before the beginning of the 11th week before the expected week of confinement" and who have at "the beginning of that 11th week been continuously employed for a period of not less than two years," or who would meet these requirements but for an unfair dismissal. First, there is a right to maternity pay under

295. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

296. Turner v. Dept. of Employment Security, 423 U.S. 44 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

297. Gilbert v. Gen. Elec. Co., 97 S. Ct. 401 (1976) (private employer's program for its own workforce); Geduldig v. Aiello, 417 U.S. 484 (1974) (exclusion of maternity benefits from state disability insurance program valid).

298. Brooklyn Union Gas Co. v. Human Rights Appeal Board, 14 FEP Cases 42 (N.Y. 1976).

299. There appears to be some inconsistency between the latter and § 29 of the statute, which provides compensation to those suspended for medical reasons. *See* B. HEPPLE & P. O'HIGGINS, ENCYCLOPEDIA OF LABOUR RELATIONS LAW § 2-1534 at 2999/93-94. On the protections afforded generally, see Baker, *Employment Protection: Individual Rights*, 5 Indus. L.J. 65 (1976).

300. EPA 1975 § 34(2),(3).

section 36, and second, a right to return to work under section 48. The "maternity pay" is a modest sum, payable for six weeks as a supplement to social insurance benefits.[301] Failure to pay it may be the subject of a proceeding before an industrial tribunal. The right to return to work is a right to return before the end of the period of 29 weeks beginning with the week in which the date of "confinement" falls.[302] Failure to permit return is to be treated as a dismissal.[303] The right includes a return to one's former job, although if that job has disappeared due to redundancy, an alternative may be offered.[304]

The general intent of these provisions is clear: A pregnant employee is to be free to choose for herself whether and how long to continue working, and if she shows herself to be a "serious" member of the labor force by working throughout the first two-thirds of her term, she is to be given a chance to return to her job. How this will work out remains to be seen. For a substantial number of women performing physically taxing work, the prospect of staying on until eleven weeks before confinement surely must be unattractive. Yet a woman's decision to leave her post "by mutual agreement" with an employer who suggests to her that she is no longer performing adequately most likely will not be a "dismissal" within the meaning of section 34.[305] The "right to return" period is limited so that choice will probably be very difficult for many mothers and may well depend on factors beyond her control, such as the availability of good child care facilities in her community. However, it is an undeniable and substantial burden on the employer to have to find substitute workers to whom he can offer only nine months temporary work.

VI. Religious Discrimination Bans

In the United States, discrimination on the basis of religion is banned in public employment by virtue of the first and fourteenth amendments,[306] and in private employment by Title VII.[307] In Brit-

301. *Id.* § 37.
302. *Id.* § 48(1). The manner of exercising the right is given in § 49.
303. *Id.* § 50.
304. *Id.* § 48(4).
305. *See* Harvey v. Yankee Traveller Restaurant, [1976] Indus. Rel. L.R. 35.
306. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Leinster v. Engman, 10 FEP Cases 614 (D.D.C. 1974).
307. *See, e.g.,* Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *cert. granted,* 45 U.S.L.W. 3048 (1976).

ain, there is no equivalent, although there is a recently enacted statute applicable to Northern Ireland declaring such discrimination improper and creating the Fair Employment Agency to engage in conciliation and litigation.[308] As in the case of age discrimination, however, one should not conclude too readily that employees discriminated against in Britain for "religious" reasons are without redress. Discrimination that at first appears "religious" is often also (or instead) ethnic or national origin discrimination. Few anti-Semitic employers are likely to inquire into the level of orthodoxy of persons of Jewish parentage before refusing employment. Similarly, anti-Catholic and anti-Irish sentiments are likely to occur as a blend, as are anti-Indian and anti-Sikh. Where this is true, the presence of an element of religious bias should not make the provisions of the Race Relations Act, 1976, inapplicable.

The concept of unfair dismissal is likewise available as a remedy for religious bias. In the United States, the principal religious discrimination cases have involved discharge. Typically, the employee has been fired because he refused to work on Saturday, a holy day of rest for his faith. These firings have been found both lawful and unlawful by American courts. The pre-1972 amendment opinions seem to place the employer under a duty to seek an accommodation between his business rules (by different scheduling, usually) and the religious needs of the employee.[309] If this cannot be done—if, in other words, the needs of the business truly require Saturday work by the employee in question—then the employee must choose between job and creed. The statutory language adopted in 1972 accepted this approach:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer deomonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[310]

This provision was recently interpreted by the Supreme Court in *Trans World Airlines v. Hardison.*[311] A TWA employee, Hardison,

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308. The Fair Employment (Northern Ireland) Act 1976. For comment, see 6 Indus. L.J. 103-05 (1977). Northern Ireland Constitution Act 1973 § 17. The inclusion of religion in the Race Relations Act, 1976, was proposed in debate. 374 PARL. DEB. H.L., 115 (5th Ser.) (1976).

309. *See, e.g.,* Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd* 402 U.S. 689 (1970).

310. 42 U.S.C. § 2000e(j) (1970 & Supp. V 1975).

311. 97 S. Ct. 2264 (1977).

joined a sect that observes Saturday as a day of rest. His division of TWA was engaged in overhaul and maintenance work, operating 24 hours a day, every day of the year. Shift and job assignments for employees in the division were made pursuant to a seniority system established by a collective bargaining agreement. Eventually, Hardison was assigned a job and shift assignment that required Saturday work. He requested that an adjustment be made. The company refused to grant him a four-day workweek, because of added costs and because assignment of another person to Hardison's work would leave other operations short of staff. TWA agreed, however, to permit the union to seek a change of assignment for Hardison, but the union was unwilling to violate the seniority provisions of the collective agreement to do so. When Hardison did not appear for his assigned work, he was given a hearing and discharged for insubordination. Hardison then sued both TWA and his union under Title VII. The Court held that the discharge was lawful, reversing the contrary conclusion of the Eighth Circuit, which had decided that TWA should have pursued one of three alternatives: (1) permit Hardison to work a four-day week; (2) fill Hardison's Saturday shift from other competent personnel; or (3) arrange a "swap" between Hardison and other workers. The Supreme Court held that each of these alternatives would involve an "undue hardship" for the employer. The employer demonstrated that the first two alternatives would involve significant added costs in the form of premium pay. The third would require modification of an otherwise valid seniority system. "It would be anomalous," the Court reasoned, "to conclude . . . that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others . . . . Title VII does not require an employer to go that far."[312]

A parallel case in Britain suggests that similar reasoning will be used there. The discharged employee in *Esson v. London Transport Executive*[313] became a bus conductor for the respondent in 1967, at which time he was given the opportunity to learn the rules of his work, which included a provision that "there shall be no guaranteed rest days on Saturdays . . . ." In 1974, the employee rejoined the Seventh Day Adventist Church. Thereafter he refused to work when scheduled on Saturday. After warnings, he was dismissed. The Industrial Tribunal held for the respondent, stating:

312. 97 S. Ct. at 2275.

313. [1975] INDUS. REL. L.R. 48.

> For Mr. Esson to have had his way it would have been necessary for other members of the respondent's staff, if such could have been found, to work on Saturdays instead of having that day as a rest day. This would in our opinion have been wholly unreasonable unless it could be achieved by mutual agreement and there was no evidence that it could.

It should be noted that the nature of the work involved both in *Esson* and in *Hardison* clearly necessitated Saturday work by a large number of employees. The employer in *Esson* was also suffering a staff shortage at the time. These factors, briefly mentioned in the early paragraphs of the *Esson* opinion, are clearly important in determining what may be reasonably expected of an employee and his fellow workers.

VII. Conclusion

The newness of the British statute, the paucity of Supreme Court decisions in the United States, and the complexity of the social and economic problems involved make speculation about future developments dangerous and attempts at comparative evaluation even more dangerous. A few questions and observations, however, suggest themselves too clearly to be ignored. First, how will industrial tribunals and courts in Great Britain deal with the problems of proof likely to arise under the new statutes? What minimum standard must a complainant meet before an alleged discriminator must assert an affirmative defense? Enforcement of the employment sections of the Race Relations Act, 1968, by the Race Relations Board rarely took the form of litigation, primarily because few defendants would make open declarations that the reason Mr. X was preferred over Mr. Y was Mr. X's race.[314] Nothing in the British statutes would preclude the adoption of the allocation of responsibilities enunciated by the United States Supreme Court in the *Green* case:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from

314. *See Report of the Race Relations Board for 1973,* [1973-74] H.C. 144, at 40-41 (Case 3).

> persons of complainant's qualifications . . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection . . . . [B]ut the inquiry must not end here. While Title VII does not, without more, compel rehiring of [the employee] respondent, neither does it permit [the employer] petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.[315]

But the *Green* formula only established the minimum standard to be met by an aggrieved worker's presentation. The worker will obviously wish to make out his most convincing case. In a number of American cases, the most telling proof of discrimination against an individual black has been a statistical showing that a defendant has hired very few blacks compared to what might be expected considering local demography, or that a remarkably high proportion of blacks in a given plant occupy only the lowest-paid positions.[316] Will this evidence be admissible in Britain? Perhaps one should ask first whether it will be available. Such data is harder to come by there than in the United States. An attempt to require large employers to report on the racial composition of work forces failed in Parliament; only those under a nondiscrimination notice or subject to an investigation under section 50 may be forced to reveal such figures.[317] Moreover, labor force statistics published by the Department of Employment have not generally been broken down in terms of racial groups, although breakdowns by sex are frequent. But assuming for the moment that the data can be found, can it be introduced? Such evidence is admissible in a proceeding by the Commission for Racial Equality under section 62 ("persistent discrimination") since that provision directly ad-

315. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Much of the debate in the House of Lords on the Race Relations Act, 1976, centered on the placing of the burden of proof on the defendant. *See, e.g.*, 374 PARL. DEB. H.L. 115 (1976).

316. *See, e.g.*, Bolton v. Murray Envelope Co., 493 F.2d 191 (5th Cir. 1974) (use of statistical evidence of attempts to integrate work force by employer defendant); Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975) (setting out techniques to be used in evaluating such evidence); Parham v. Southwestern Bell Tel. & Tel. Co., 433 F.2d 421 (8th Cir. 1970) (reviewing other cases). *But see* Washington v. Davis, 426 U.S. 229 (1976) (in proceeding under fifth amendment, evidence of disproportionate impact of testing program insufficient to establish violation).

317. 914 PARL. DEB. H.C. cols. 1627-57 (1976).

dresses the general course of conduct of a party. The same reasoning may prevail under section 28 (discriminatory practice; enforced by the Commission fo Racial Equality). But whether the "Similar Fact" exclusionary rule[318] will be a bar to such statistical proof in a section 54 proceeding brought by an individual remains to be seen. Since such proceedings are before industrial tribunals rather than the High Court, some greater flexibility of attitude may prevail.

Second, one must wonder how the allocation of enforcement opportunities between individuals on the one hand and either the Commission for Racial Equality or the Equal Opportunities Commission will work out. The basic notion that the agencies seek to eliminate discrimination that is persistent or that has unidentifiable victims (as may be true in the case of advertising)[319] whereas the individual seeks redress for wrongs done to him is clear. The individual's case and the agencies' cases are inevitably going to be intertwined, however. For example, assume that an injunction has been issued against an employer at the instance of the Commission for Racial Equality under section 62 of the Race Relations Act, 1976. Subsequently, employee X complains that an act by the same employer is discriminatory and violates section 4 of the Act as well as section 28 and the injunction. The employee seeks relief under section 54 from an industrial tribunal, while the Commission seeks action by the county court that issued the injunction. What is the effect of section 62(2), which provides that:

> (2) In proceedings under this section the Commission shall not allege that the person to whom the proceedings relate has done an act falling within subsection (1)(b) or contravening section 28 which is within the jurisdiction of an industrial tribunal unless a finding by an industrial tribunal that he did that act has become final.[320]

At first glance, this problem is solved by sections 63 and 64, which permit the Commission to proceed before an industrial tribunal. There would be two complaints, the earlier supposedly that of the employee, the later that of the Commission. May the two be combined notwithstanding the employee's strenuous objection because of alleged Commission bias against him? Should this mean that the Commission must await the outcome of the individual's section 54 proceeding? And what if the two complaints are heard

318. *See* R. CROSS, EVIDENCE 310 (4th Ed. 1974).
319. *But see* Brindley v. Tayside Health Board, [1976] INDUS. REL. L.R. 364.
320. RRA 1976 § 62(2).

separately? What is the outcome if the individual refuses Commission aid before the tribunal and then "muffs" his case?

Overall the British enforcement procedures are simpler and easier to understand than the American procedures, under which remedial theories and potential forums are much more numerous. In neither nation, however, is the enforcement machinery so neat and tidy, because a discriminatory employment practice is like a rock tossed into a pond—the ripples move out rapidly. The wrongs done are to an individual and to the public (and in the United States possibly to a class, thus giving rise to a class action), but promoting male *A* instead of female *B*, for example, often creates rights and expectations in *A* making him as eager as his employer to avoid having the act of promotion undone. *A* is as fully entitled to his rights under his contract of employment as *B*. He is also entitled to fair representation by his trade union should the employer seek to undo the error unilaterally.[321] It is scarcely any wonder that individuals, unions, employers and enforcing agencies find that agreement that a wrong has occurred does not mean there will be agreement on how to right that wrong. The new British statutes resemble Title VII in ensuring that the enforcing agency cannot forbid the aggrieved worker from having his day in court. Conversely, a decision by an individual to drop or settle his claim does not preclude the agency from going forward on its own.[322] This change from the Race Relations Act, 1968, under which a decision by the Race Relations Board not to proceed ended the matter,[323] is a welcome recognition that even a benign bureaucracy can err. If

321. *See* Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976) (displacement of incumbent white males by blacks and females an improper remedy); Ringer v. Mumford, 355 F. Supp. 749 (D.D.C. 1973).

322. A prior industrial tribunal finding is a prerequsite to relief, however, RRA 1976 § 64 permits the Commission for Racial Equality to institute proceedings that could lead to such findings. In the United States, there is a possibility that settlement agreements negotiated by the EEOC and other agencies with large employers can have the effect of making individual relief less attractive. For example, claimant *A* may have reason to believe he can demonstrate a discriminatory failure to promote him as of January 1, 1975, while application to his case of a settlement agreement formula would result in a starting date for computing back pay as of July 1, 1975. Since *A* can get compensation based on this settlement agreement without litigation, he will be tempted to forego the chance to obtain the additional six months back pay. *See generally* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

323. *See* In re Salvarajan, [1975] INDUS. REL. L.R. 48 (Board decision not to proceed further upheld despite some imperfections in decision-making process).

errors are to be made, it is better that they occur openly in a public forum.

A third obvious question raised is whether the British decision to place conciliation attempts in the hands of the Advisory, Conciliation and Arbitration Service rather than the Commission for Racial Equality or the Equal Opportunities Commission is a better choice than the American decision to place both responsibilities (conciliation and prosecution) in the EEOC. There are sound reasons supporting both approaches. The information obtained during the investigatory stage of a conciliation proceeding[324] is of great value to the EEOC when it files suit. On the other hand, many potential defendants view EEOC "conciliators" as only lightly disguised adversaries and thus are disinclined to take their efforts seriously. On balance, it seems to this writer that the availability of a group of conciliation officers who will not condone any violation of the law but who are "neutral"—*i.e.*, not identified in any way with an adversary agency—is a good thing. This practice is likely to resolve simple matters more quickly. The United States should scrutinize it with great care.

A fourth question is whether it is better to have separate agencies for sex and racial discrimination. A single agency is likely to be more efficient since it permits multiple claims to be settled in one proceeding.[325] However, it is more difficult to assess the performance of an agency engaged in both tasks in order to determine its sense of urgency on behalf of one cause as contrasted with the other. As long as good "watchdogging" of the EEOC continues, the American scheme promises more coordination of effort and more cross-feeding of ideas from one problem area to the other.

A fifth question is whether the United States could utilize a quasi-judicial body like the industrial tribunal, particularly with respect to discrimination legislation. This is not wholly unlike the arguments in 1972 about whether to make the EEOC itself a decision-making body with an investigative wing similar to the NLRB General Counsel acting as prosecutor. The Congress chose not to create another specialized tribunal and left the cases in the federal district courts. The courts have proved to be appropriate forums for such matters, even in geographic areas where discrimi-

324. Various models for conciliation procedures and the relative advantages of each are discussed in Blumrosen, *Administrative Creativity: The First Years of the Equal Employment Opportunity Commission,* 38 GEO. WASH. L. REV. 695 (1970).

325. *See* RRA 1976 § 56(3).

nation had been practiced until recently under color of law. Arbitration in labor relations matters has served America well. For workers covered by collective agreements there is little need for a more expeditious forum.[326] But what happens to the worker who falls outside the protection of a collective agreement? If the EEOC backlog precludes vigorous pursuit by the agency, the next stage is a full-fledged judicial proceeding in a federal district court unless there is a meaningful state law remedy. This, of course, is the position of the unorganized worker in our country generally. His remedies include suits in state courts for breach of his employment contract, or suits in federal court under the Fair Labor Standards Act. For other matters he must rely on his own negotiating power and his relationship with his employer. Since we protect by law the choice not to organize, do we need to make it quite so drastic a choice?

A sixth question is whether the British were wise to enact specific provisions concerning maternity and pregnancy. The answer is clearly yes, although one may easily argue about the content of the provisions. If the pregnant woman is protected in her pregnancy by Title VII—and surely *Cleveland Board of Education v. LaFleur*[327] should mean that she is protected from invidious termination despite the outcome in *Gilbert v. General Electric Company*[328]—then both she and her employer need more certain guidelines for their conduct than "treat every case on its own." What is equal treatment of a pregnant woman as compared to a never-pregnant man? The possible arguments are numerous. Surely the Congress can better provide the outer limits within which individual decisions can be made than the courts.

These questions focus attention primarily on the actual and potential differences between the postures of the United States and Great Britain in combating discrimination. Although these differences are significant, there are strong substantive similarities. Both countries ban not only the blatant act of prejudice but also the facially neutral employment practice that has a discriminatory impact. It would be folly for either nation to ignore the opportunity to share precedent and experience and learn from the other.

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326. Especially if careful attention to footnote 21 in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), by an arbitrator makes the arbitral finding effectively final, is this true.

APPENDIX

TITLE VII

Conduct of Employers

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2003-2 (a).

Conduct of Trade Unions

Sec. 703

. . . .

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any indi-

RACE RELATIONS ACT, 1976

Conduct of Employers

4. (1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against another—

(*a*) in the arrangements he makes for the purpose of determining who should be offered that employment; or

(*b*) in the terms on which he offers him that employment; or

(*c*) by refusing or deliberately omitting to offer him the employment.

(2) It is unlawful for a person, in the case of a person employed by him at an establishment in Great Britain, to discriminate against that employee—

(*a*) in the terms of employment which he affords him; or

(*b*) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or

(*c*) by dismissing him, or subjecting him to any other detriment.

Conduct of Trade Unions

11. . . . .

(2) It is unlawful for an organisation to which this section applies, in the case of a person who is not a member of the organisation, to discriminate against him—

(*a*) in the terms on which it is prepared to admit him to membership; or

(*b*) by refusing, or deliberately omitting to accept, his application for membership.

(3) It is unlawful for an organisation to which this section applies, in the case of a person who is a member of the organisation, to discriminate

vidual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. 42 U.S.C. § 2000e-2(c).

Sec. 703

. . . .

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(b).

against him—

(*a*) in the way it affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or

(*b*) by depriving him of membership, or varying the terms on which he is a member; or

(*c*) by subjecting him to any other detriment.

14.—(1) It is unlawful for an employment agency to discriminate against a person—

(*a*) in the terms on which the agency offers to provide any of its services; or

(*b*) by refusing or deliberately omitting to provide any of its services; or

(*c*) in the way it provides any of its services.

Advertising

Sec. 704

. . . .

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment. 42 U.S.C. § 2000e-3 (b).

29.—(1) It is unlawful to publish or to cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do an act of discrimination, whether the doing of that act by him would be lawful or, by virtue of Part II or III, unlawful. [Part II contains the bans on employment discrimination.]

(2) Subsection (1) does not apply to an advertisement—

(*a*) if the intended act would be lawful by virtue of any of [several exclusions and exceptions provided by] sections 5, 6, 7(3), 10(3), 26, 34(2)(*b*), 35 to 39 and 41;

(*b*) if the advertisement relates to the services of an employment agency (within the meaning of section 14(1)) and the intended act only concerns employment which the employer could by virtue of section 5, 6 or 7(3) lawfully refuse to offer to persons against whom the advertisement indicates an intention to discriminate.

Retaliation

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. 42 U.S.C. § 2000e-3(a).

2.—(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—

(*a*) brought proceedings against the discriminator or any other person under this Act; or

(*b*) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or

(*c*) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or

(*d*) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act,

or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them.

(2) Subsection (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.