DIVIDED BY A COMMON LANGUAGE: WHY THE BRITISH ADOPTION OF THE AMERICAN ANTI-DISCRIMINATION MODEL DID NOT LEAD TO AN IDENTICAL APPROACH TO AGE DISCRIMINATION LAW

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I. INTRODUCTION: A COMMON HERITAGE[**]

The Common Law

Combining two clichés, it is safe to say that the United Kingdom and the United States enjoy a "special relationship,"[1] yet one that is "divided by a common language."[2] Law is one of the areas in which both characteristics are openly exhibited.[3] So far as the 'special relationship' is concerned, all but one[4] of the legal systems in existence within the United States are based on

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[1] Winston Churchill, *Sinews of Peace Address* at Westminster College, Fulton, Missouri, March 1946 (more commonly called the *Iron Curtain* speech). According to a report in the *The New York Times Herald* in November 1945, Churchill had – in a speech that month – employed the same phrase to include Canada as well.

[2] Although this aphorism is usually attributed to George Bernard Shaw, no-one seems to be sure of the exact source. On the other hand, Oscar Wilde definitely did write in *The Canterville Ghost* (1887): "We have really everything in common with America nowadays except, of course, language."

[3] By way of example, the original, British spellings are retained in this article wherever U.K. laws are cited.

[4] Louisiana is the exception, with a system taken from the French, civil law, model.

the common law of England.[5] The substantive doctrines applied in both contracts and torts, for example, remain remarkably similar (even though the procedure for trying such cases in courts is often very different). Yet, at the same time, each of the fifty American jurisdictions[6] which have adopted the common law methodology has also developed the law in a number of directions which differ significantly from those traveled in the United Kingdom. For instance, the development of the doctrine of 'ultrahazardous activity,' which arose out of American interpretations of the well-known English torts case of *Rylands v. Fletcher*,[7] has no English analogue. Indeed, *Rylands* has essentially been emasculated in English law[8] to the extent that it has become little more than a historical curiosity. It is one among a number of doctrines of law of English origin which have been adhered to more strongly within the United States than within the United Kingdom. Another is the parol evidence rule in contracts: it is in rude health stateside,[9] but has long been in intensive care in Britain.[10] As is so often the case, it has been the converts who have held the faith more than the originators.

The Common Disfigurement of Slavery

Unfortunately, the common law systems of both the U.K. and the U.S. share a common heritage disfigured by one feature of which both countries are now rightly ashamed. Surely the biggest blot on the landscape of the common law was its impoverished view of the notion of discrimination. Valuing freedom of choice over the autonomy of whomever else is affected, the common law

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[5] Wales and Northern Ireland essentially had the English legal system imposed upon them; Scotland continues with its own unique legal system which boasts elements of both common and civil law.

[6] This group of fifty comprises forty-nine states (i.e., all except Louisiana) plus federal law.

[7] (1868) L.R. 3 H.L. 330.

[8] *See Cambridge Water v. Eastern Counties Leather* [1994] 1 All ER 53 (H.L.).

[9] *See e.g. MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostino, S.P.A.* 144 F.3d 1384 (11th Cir. 1998).

[10] *See* Law Commission, *Law of Contract: The Parol Evidence Rule* Cmnd. 9700 (London: H.M.S.O., 1986).

has seldom been prepared to entertain complaints of improper motives (whether conscious or subconscious) of the decision-maker, even though such choices often have the effect of significantly reducing the freedom of choice of others. Indeed, the very notion of 'discrimination' came, in the seventeenth century,[11] to mean the exercise of good taste or judgement.[12] Thus the common law in both the United Kingdom and the United States was content to tolerate and enforce the practice of slavery. The United Kingdom outlawed the slave trade (though not slavery itself) in 1807,[13] whereupon the British government sought to persuade other countries to follow suit. While this campaign of persuasion was for some – notably the indefatigable anti-slavery campaigner and British Member of Parliament, William Wilberforce – a matter of basic morality, perhaps the dominant motive for others was a desire to avoid the British colonies becoming uncompetitive if the trade were not stopped everywhere. The British Royal Navy declared that ships transporting slaves were essentially engaged in piracy and were therefore liable to be attacked and boarded. The United States responded by abolishing its own African slave trade from the beginning of the following year,[14] although it declined to carry out joint enforcement operations with the British, and (as in Britain and its colonies) slavery within the U.S. continued. Yet while the British Parliament went on to abolish slavery completely in 1833,[15] it took the Civil War and a Constitutional Amendment to accomplish the same thing and prohibit this barbaric practice in the United States.[16] The abolition of the slave trade was perhaps the last time that the United States took its lead on matters of anti-discrimination law from the United Kingdom.

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[11] T.F. Hoad (ed.), *The Concise Oxford Dictionary of English Etymology* (Oxford: O.U.P., 1996) p. 127.

[12] Della Thompson (ed.), *The Concise Oxford Dictionary* 9th ed. (Oxford: Clarendon Press, 1995) p. 386.

[13] Slave Trade Act 1807.

[14] "An Act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States" (Slave Trade Act 1808).

[15] Slavery Abolition Act 1833.

[16] Thirteenth Amendment (1865).

Women's Suffrage

Developments in anti-discrimination law over the next year century or so were dominated by the issue of women's suffrage. This was not, however, a period in which developments in one country could be said to have directly influenced those in the other. In the United States, indeed, this was instead a period in which federalism came to the fore. New Jersey's constitution, for example, granted the right of women to vote on the same terms as men in 1776, only for it to be taken away in 1807. Wyoming permitted women to vote in 1869.[17] Idaho, Colorado and Utah followed by the end of the century, but in many other states women's suffrage was assured only by the Nineteenth Amendment, which came into force in 1920. The dominant influence in the United Kingdom, by contrast, came from its colonies. Women in Ontario, Canada gained the right to vote in 1884; those in New Zealand in 1893; those in South and Western Australia in 1901. Women over the age of thirty gained the right to vote in the United Kingdom in 1918, but it was not until 1928 that women were granted the right to vote on the same terms as men.[18]

Broader Anti-Discrimination Legislation

Since the Second World War, however, anti-discrimination legislation in the United States and United Kingdom has consistently demonstrated the same close ties that characterized the common law before the passage of legislation on women's suffrage. But whereas it had formerly been the case that British common law – or, more accurately, the common law of England[19] – had shaped the laws of American states, the relationship between the two countries has essentially reversed

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[17] "An Act to Grant to the Women of Wyoming Territory the Right of Suffrage, and to Hold Office" from General Laws, Memorials and Resolutions of the Territory of Wyoming, Passed at the First Session of the Legislative Assembly, convened at Cheyenne, October 12th, 1869 (Cheyenne, 1870; Wyo 1 1869).

[18] Representation of the People Act 1928.

[19] *See supra* n. 5.

direction so far as recent statutory law has been concerned. In no field of the law has this been more conspicuous than in that of anti-discrimination law.

Generally speaking, the engine of anti-discrimination legislation in the United States has been the federal government rather than the individual states. The influence of the federal government beyond American shores has at times been so powerful in this area that it may even be appropriate to equate the relationship between American federal law and legislation subsequently passed within the United Kingdom[20] as akin to the relationship between federal law and that subsequently enacted in many U.S. states. It is certainly true that, for the last fifty years or so, new federal anti-discrimination laws adopted in the United States have often proved a decisive factor in shaping similar laws in the United Kingdom. The legacy of the 1960s Civil Rights movement, in particular, has certainly reached not only well beyond its own era but also well beyond the geographical boundaries within which that movement took place.

Part II of this article sketches the history of this relationship between anti-discrimination statutes in the U.S. and U.K., and looks at how certain pieces of legislation effectively created a template on which subsequent statutes were modeled. This process was accomplished within just a few years in the 1960s in the U.S., but was drawn out over a much longer period of time – lasting well into the 1970s – in the U.K. This discussion shows how the federal Civil Rights Act 1964 was effectively the source of anti-discrimination laws within the United Kingdom just as much as it has been within the United States. As will be

[20] Anti-discrimination laws generally apply throughout the U.K. in much the same way that federal legislation applies throughout the U.S. There have, however, been two exceptions to this general principle. Most significantly, discrimination on the grounds of religion (at least at work) has been outlawed in Northern Ireland since 1976 under the Fair Employment (Northern Ireland) Act. The Fair Employment (Northern Ireland) Act 1989 expanded this prohibition considerably, but discrimination on the grounds of religion was not made unlawful in mainland Britain until the issuing of the Employment Equality (Religion or Belief) Regulations 2003 (S.I. 2003, No. 1660). In Wales there is also limited protection for speakers of Welsh so far as public employers are concerned: see Welsh Language Act 1993.

explained, British laws of the 1960s and 1970s – designed to outlaw discrimination based on sex, race, marital status, and national or ethnic origin – were enacted which closely followed the U.S. approach. The Supreme Court's decision in the case of *Griggs v. Duke Power*[21] will also be shown to have played a seminal role in the development of British anti-discrimination law. Yet while age discrimination was prohibited within the U.S. by the federal Age Discrimination in Employment Act (A.D.E.A.)[22] within just three years of the Civil Rights Act, the U.K. chose not to follow suit and, in fact, only prohibited age discrimination in late 2006.[23] By that time it had already followed the U.S. lead in adding discrimination based on sexual orientation,[24] religious faith[25] and disability[26] to those forms of discrimination originally proscribed. The Disability Discrimination Act 1995, in particular, followed relatively soon after the Americans with Disabilities Act of 1990 and was consciously modeled on it.

Yet age discrimination seems to have been the last taboo. If outlawed earlier, it appears almost certain that British age discrimination law would have looked very similar to that in place in the U.S. In fact, however, age discrimination in the U.K. was prohibited only in late 2006, and both its history and substance demonstrate significant differences from its American counterpart. The rest of this article considers why the British anti-discrimination law template – despite its originally being fashioned self-consciously to mimic that in place in the United States – nevertheless required a somewhat different approach to age discrimination by the time that was eventually outlawed.

This article is therefore concerned with the general principles of the two bodies of age discrimination law in the U.S. and U.K. – and of anti-discrimination laws in both countries more

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[21] 401 U.S. 424 (1971).

[22] Age Discrimination in Employment Act 1967 (Pub. L. 90–202).

[23] Employment Equality (Age) Regulations 2006.

[24] Employment Equality (Sexual Orientation) Regulations 2003 (S.I. 2003, No. 1661).

[25] Employment Equality (Religion or Belief) Regulations 2003 (S.I. 2003, No. 1660).

[26] Disability Discrimination Act 1995.

generally – rather than with exhaustive discussion of the minutiae of detail. Many useful accounts of the respective laws have already been published elsewhere,[27] including a summary of the British provisions regarding age discrimination in an earlier volume of this very law review.[28] The discussion hereinafter proceeds by considering the fundamental elements of the respective anti-discrimination law templates within the U.K. and U.S., and then explains how each jurisdiction's age discrimination laws fit into that context. Part III thus looks at the principal elements of the A.D.E.A. of 1967. It notes, in particular, the fact that the A.D.E.A. protects only workers over 40, and discusses the controversy over whether claims for disparate impact discrimination should be recognized.

As indicated above, it was only on October 1, 2006 that legislation came into force in the U.K. which prohibited age discrimination. Part IV examines what took place during the thirty year period from the establishment of the British anti-discrimination law template in the mid-1970s until the passage of the Employment Equality (Age) Regulations 2006.[29] In particular, it shows how innovative strategies developed by plaintiffs' attorneys and, especially, by the Equal Opportunities Commission – the administrative agency responsible within the U.K. for upholding the sex discrimination laws – enabled some victims of apparent age discrimination to allege sex discrimination as an effective proxy. When this strategy seemed at last to be foundering, it was given new impetus from European sources: first by the laws of the European Union and its highest appellate court, the European Court of Justice (based in

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[27] See Barbara T. Lindemann & David D. Kadue, *Age Discrimination in Employment Law* (Washington: Bureau of National Affairs, 2003); John Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (Cambridge: Cambridge University Press, 2006); Malcolm Sargeant, *Age Discrimination in Employment* (Farnham: Gower, 2007); James Davies (ed.), *Age Discrimination* (Haywards Heath: Tottel, 2007).

[28] Helen Meenan and Graeme Broadbent, *Law, Ageing and Policy in the United Kingdom*, 2 J. Intl. Aging L. & Pol. 69 (2007).

[29] The Employment Equality (Age) Regulations (United Kingdom) S.I. 2006, No. 1031. The equivalent regulations for Northern Ireland are the Employment Equality (Age) Regulations (Northern Ireland) 2006 (S.I. 2006, No. 261).

Luxemburg); and then by the European Convention on Human Rights and the court which pronounces on its definitive interpretation, the European Court of Human Rights (based in Strasbourg, France). The main lessons to be taken from this concern the definition of discrimination as 'less favourable' treatment and the ever-increasing significance within British anti-discrimination law of the concept of indirect discrimination, which was itself originally modeled on the U.S. notion of disparate impact discrimination first mooted in *Griggs v. Duke Power*.[30]

Part V summarizes the statutory law finally enacted to prohibit age discrimination in the workplace within the United Kingdom. It will be seen that this has notable differences from the A.D.E.A. In particular, the concept of age discrimination is not restricted to protecting those over 40. Moreover, preferential treatment to those over 40 as against younger than 40 is itself prohibited. And indirect (or disparate impact) discrimination is expressly made just as unlawful as direct (or disparate treatment) discrimination. These fundamental distinctions from the American approach inevitably raise the question of how and why British anti-discrimination law, originally modeled so self-consciously on its American counterpart, developed its own anti-discrimination law template that effectively made adoption of the American approach to age discrimination impossible.

This is the issue which Part VI attempts to address. It dismisses the temptation simply to associate the substance of U.K. age discrimination law with the demands of European Union law on the grounds that this is to confuse cause and effect. Instead, it argues that – just as American courts nowadays adhere much more closely to original English common law than do their English counterparts – British legislation (and its interpretation by the courts) now adheres more closely to the original American model for anti-discrimination laws, established by the 1964 Civil Rights Act and *Griggs v. Duke Power*, than federal U.S. law currently does. Once again, it has turned out to be the convert which has demonstrated the more steadfast resolve.

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[30] 401 U.S. 424 (1971).

II. ESTABLISHING A TEMPLATE FOR ANTI-DISCRIMINATION LAWS

An Enforcement Agency

The Fourteenth Amendment of the United States Constitution, passed in 1868, requires that no State shall "deny to any person within its jurisdiction the equal protection of the laws." While this may be said to have established a 'floor of rights' below which it is impermissible to go, one of the many limitations of the Amendment is that it has nothing to say about the effects of decision-making by private entities. This was one of the many things that began to change as a result of the Civil Rights movement of the 1960s. The Civil Rights Act 1964[31] was originally intended to prohibit enforced racial segregation and discrimination in public schools,[32] public places,[33] public services,[34] voter registration,[35] and employment (although it did not apply to public employers until 1972).[36] Title VII of the Act, which dealt with employment, had the word 'sex' inserted, in the words of Rehnquist J (as he then was), "at the last moment,"[37] so that discrimination on such grounds was also banned. Section 703(a) thus made it unlawful for an employer 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 or employment, because of such individual's race, color, religion, sex, or national origin.

Discrimination on the grounds of sex was not something prohibited under the other Titles of the Civil Rights Act 1964.

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[31] Pub. L. 88–352, 78 Stat. 241 (July 2, 1964).
[32] *Id.*, Title IV.
[33] *Id.*, Title II.
[34] *Id.*, Title III.
[35] *Id.*, Title I.
[36] *Id.*, Title VII.
[37] *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63–64 (1986).

Indeed, its insertion into Title VII has often been seen as nothing other than an abortive, cynical attempt to derail the legislation by adding a more controversial provision so as to encourage more legislators to vote against the whole Act.[38] What those legislators could hardly have been expected to foresee – or even take an interest in – was the effect that this late amendment to the drafting of Title VII would have across the Atlantic. Yet, since then, this amendment has arguably turned out to hold at least as much significance within the United Kingdom as within the United States.

But that is to get ahead of the story. Just as in the United States, the immediate, pressing social problems in the United Kingdom related to matters of race and ethnicity. While civil unrest in the U.K. never reached the same scale as was experienced in some parts of the United States – perhaps at least partly due to the fact that ethnic minorities made up a far smaller proportion of the British population – racism and racial tension were nevertheless palpable. The issue came to a head with the notorious, so-called 'Rivers of Blood' speech delivered by the influential politician Enoch Powell, at the time the Conservative Member of Parliament for Wolverhampton South West. Powell agreed that all citizens should be equal before the law, but asserted that:

> This does not mean that the immigrant and his descendants should be elevated into a privileged or special class or that the citizen should be denied his right to discriminate in the management of his own affairs between one fellow-citizen and another or that he should be subjected to an inquisition as to his reasons and motives. . . .[39]

He argued that anti-discrimination laws would discriminate against the indigenous population and that their enforcement

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[38] *See e.g.* Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 L. & Inequal. 163 (1991).

[39] Speech delivered to a Conservative Association meeting in Birmingham on April 20, 1968.

would "risk throwing a match on to gunpowder."[40] Powell was, in other words, echoing the rhetoric of 'discrimination as choice' which had been prevalent during the era of slavery.

Against such an incendiary background, it is hardly surprising that other British politicians were hesitant to introduce wide-ranging measures prohibiting racial discrimination for fear of actually creating the very scenes – watched with horror on television news broadcasts in the U.K. – which had taken place in the United States. Private Members' Bills seeking to outlaw racial discrimination had been introduced into Parliament on a number of previous occasions from 1951 onwards, and yet all had ultimately been rejected. It was therefore in a very cautious spirit that the British Parliament finally did decide to undertake its first foray into this area, albeit that it undoubtedly took its cue from the U.S. Congress. Thus the U.K.'s Race Relations Act 1965[41] was of much more limited scope than the U.S. Civil Rights Act. Effectively, the 1965 Act covered only those issues dealt with in Title II of its American counterpart, and so sought merely to forbid discrimination on "the ground of colour, race, or ethnic or national origins"[42] in places of "public resort"[43] such as on public transport, or in restaurants, pubs and hotels (though shops and boarding houses were exempted). Refusing to serve someone on such grounds, doing so after an inordinate delay, or overcharging them, thus became unlawful acts, but only if there was *a course* of such discrimination and not simply one discrete act.[44] Moreover, anyone perpetrating such acts was not subject to either civil or criminal liability for doing so.[45] Any complaints of discriminatory conduct could not be made to the courts, but had to be made to local conciliation committees, whose job was to encourage a negotiated settlement between complainant and

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[40] *Id.*

[41] The Act did not extend to Northern Ireland except in one respect which is irrelevant for present purposes.

[42] Race Relations Act 1965, § 1(1).

[43] *Id.*, § 1(2).

[44] See Bob A. Hepple, *Race Relations Act 1965*, 66 Mod. L. Rev. 306, 308 (1966) at n. 13.

[45] Race Relations Act 1965, § 1(4).

alleged perpetrator.[46] These committees were overseen by a new body called the Race Relations Board (R.R.B.).[47]

This method of dealing with complaints of discrimination had itself been taken from the United States, where it had already been found wanting.[48] Indeed, it was the very lack of success of this model which had led to the passage of the Civil Rights Act. So, a year after it had begun to be abandoned in the U.S., it was adopted in the U.K.! Several commentators in Britain predicted that this approach would fail in the U.K. too, and called for legislation more like the Civil Rights Act. The highly respected employment lawyer, Professor Bob Hepple, commented that "it is remarkable that so many [other] powers which the U.S. commissions have found to be indispensable if they are to act effectively have not been conferred on their British counterpart."[49] The conciliation system did indeed turn out to be as ineffective in the U.K. as predicted, and was dismantled by the Race Relations Act 1976. The fact that the R.R.B. had no direct powers of enforcement meant that it too was doomed to failure.

Yet this whole approach has probably been accurately characterized as "a necessary concession to political pragmatism; in the absence of a requirement to attempt conciliation before resorting to enforcement in the courts, it is unlikely that this novel and controversial type of legislation would have been enacted".[50] Indeed, the establishment of the R.R.B. was in itself an important milestone along the path to the creation of a practicable British template for the enactment of all anti-discrimination laws. While it had clearly been modeled on the U.S. Equal Employment Opportunity Commission (E.E.O.C.), it would have been difficult to bring the R.R.B. into existence in the U.K. without the creation of the local conciliation committees. The E.E.O.C. had, after all, itself been created by Title VII of the Civil Rights Act 1964 and was thus concerned with matters of employment. Yet those were

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[46] *Id.*, § 2.

[47] Race Relations Act 1965, § 2.

[48] See Geoffrey Bindman, *The Law and Racial Discrimination: Third Thoughts* 3 Brit. J.L. & Socy. 110 (1976).

[49] Hepple, *supra* n. 44, at 311.

[50] Lord Lester of Herne Hill, Q.C., *Discrimination: What Can Lawyers Learn from History?*, Pub. L. No. 224, 225 (1994).

excluded from the ambit of the British Race Relations Act 1965 and so the R.R.B. required a different remit: if there had been no conciliation committees to oversee, there would have been no need for the R.R.B. at all. The very fact that it had been created established the basic principle that anti-discrimination laws require a dedicated administrative agency to oversee them and ensure that they are upheld. Moreover, the R.R.B. soon became one of the engines driving calls for further anti-discrimination legislation. In its first Annual Report in April 1967, for example, it argued for the Act to be extended to cover discrimination in housing, employment and financial facilities such as mortgages and car insurance.[51] Such legislation was soon forthcoming, in the form of the Race Relations Act 1968.[52] The R.R.B. thus showed that such bodies – modeled on the E.E.O.C. in the U.S. – could operate through campaigning work, even where they had no direct powers of enforcement. The latter powers were themselves also added by the 1968 Act.[53]

The Meaning of Discrimination

American readers may find this tortured British experience somewhat amusing. After all, even the Race Relations Act 1968 did not extend as far as the U.S. had gone four years earlier with its Civil Rights Act. But the revisiting of the issue in Parliament in order to pass new legislation even to get that far turned out to have unexpected long-term implications for anti-discrimination laws in the United Kingdom. Following the U.S. model, the Race Relations Act 1965 had not actually defined discrimination. Yet with the need to debate a new Bill in 1968, it had become clear to many commentators that this lack of a definition was a somewhat bizarre omission. After all, the notion of discrimination – and as an objectionable practice rather than in its former sense of being an exercise of good taste and judgement – was the very focus of this whole area of law. Moreover, at that time, British courts took

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[51] *Report of the Race Relations Board for 1966–7* (London: H.M.S.O., 1967), ¶¶ 21–28 and 61–67.

[52] This Act did not extend to Northern Ireland.

[53] Race Relations Act 1968, § 19.

the view that it was impermissible for them to discern the meaning of a statute by looking at the debates in Parliament and considered only the text of the legislation itself.[54]

Nevertheless, the Parliamentary draftsman found a suitable definition of discrimination unusually elusive. Thus the original text of clause 1 of the 1968 Bill merely said that "'discriminate' means discriminate on the grounds of colour, race. . . ."[55] Professor Hepple reported soon afterwards that:

> After this had been ridiculed as tautologous, discrimination was eventually defined as 'less favourable' treatment than that afforded to others. Some Members [of Parliament], showing little faith in judicial attitudes, feared that this might lead to a 'separate but equal' interpretation. With this in mind, the government accepted an amendment . . . declaring segregation to be 'less favourable' treatment.[56]

While it may not be readily apparent merely from reading this definition of discrimination, this settlement of what many individuals probably saw as little more than a series of tedious verbal quibbles has proved to be one of the most decisive factors

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[54] Courts in the U.K. have been prepared to consult Parliamentary debates only since the decision of the House of Lords in *Pepper v. Hart* [1993] 1 All E.R. 42. Even then, Lord Browne-Wilkinson, giving the judgment of the Court, insisted (at p. 66) that: "Experience in the United States of America . . . shows how important it is to maintain strict control over the use of such material." His Lordship therefore laid down a number of criteria to be satisfied before reference to Parliamentary debates could be made in court. Although there has not been uniform adherence to these conditions, it is generally acknowledged that only one case has had its outcome changed as a result of such references. The sole dissenter in *Pepper v. Hart*, the then Lord Chancellor, Lord Mackay, had argued that such references would achieve little except waste time and money. Most British lawyers would probably agree that this is what has, in fact, happened. See, more generally, Michael A. Zander, *The Law Making Process* 6th ed. (Cambridge: Cambridge University Press, 2004) pp. 161–175.

[55] Bill 128 (April 8, 1968).

[56] Bob A. Hepple, *Race Relations Act 1968*, 69 Mod. L. Rev. 181, 182 (1969). The provision in question was subsequently re-enacted as section 1(2) of the Race Relations Act 1976.

in the shaping of the British anti-discrimination law template. In fact, the definition of discrimination as constituting 'less favourable' treatment has come to be seen as the basis of all subsequent anti-discrimination laws in the U.K. Every other aspect of anti-discrimination law now pivots around this point. This is in stark contrast to federal U.S. legislation, which has never provided an express definition. Yet, ironically, the British came to their definition precisely because they were attempting to emulate the American model.

In many ways, the comparison between the two countries' approaches to the meaning of discrimination thus works as a mirror image of their respective approaches to constitutional law. The U.K. does not have a written constitution; the U.S. obviously does. So, unless an aspect of European Union law[57] or an Article of the European Convention on Human Rights and Fundamental Freedoms is implicated,[58] constitutional law in the U.K. is represented almost entirely by a combination of unwritten conventions and incremental case law. This means that the interpretation of important concepts in British constitutional law – and even the very identification of those important concepts – has had a tendency to evade precise definition and is therefore often in flux. A recent classic example of this was the marriage of the Prince of Wales, Prince Charles, to Mrs. Camilla Parker Bowles – despite the fact that the latter is a divorcée. Only seventy years earlier King Edward VIII had been forced to abdicate precisely because he had announced that he wished to marry the American, Mrs. Wallis Simpson, once she had obtained her divorce.[59] U.S. constitutional law, by contrast, must begin with the written text, a

[57] Incorporated into U.K. law under the European Communities Act 1972.

[58] Incorporated into U.K. law by the Human Rights Act 1998, which came into force on October 2, 2000.

[59] Allegations have been made more recently that there may have been other factors which led to the abdication, in particular the fact that Simpson was known to be having other affairs at the time, and the FBI's suspicion – apparently proved true during World War II – that she was passing British and American secrets to the Nazis.

point made all the stronger by the relatively recent rise of the school of interpretation known as originalism.[60]

As constitutional law scholar Philip Bobbitt has remarked, "the purposes of reducing legal arrangements to writing [are] . . . to reduce the discretion of the parties."[61] It is clear that the idiosyncratic constitutional arrangements in the U.K. constrain the British government much less than the checks which the written U.S. Constitution imposes on the U.S. government. The fact that the U.K. chose to adopt one basic, written definition of discrimination for all anti-discrimination laws has analogous implications. The British courts are not free to amend or create new definitions or forms of discrimination, as has proved possible in the U.S., where the meaning of discrimination has been left entirely for the judiciary to determine. The U.K. does, of course, have hard cases, where it is difficult to reach a judicial consensus as to whether the legislative test for discrimination has been met, but that is a far cry from requiring the judges actually to determine what that test is.

As will be seen in Parts IV and V, it was the fact that U.K. lawyers and legislators had become so accustomed to viewing discrimination as equivalent to 'less favourable' treatment that was one of the major reasons why the American approach to age discrimination could not be adopted in the U.K.

Different Forms of Discrimination

Yet even though the Race Relations Act 1968 now recognized that discrimination could be the result of just one act,[62] and even though it allowed aggrieved individuals to seek limited financial compensation in the courts (with the assistance of the R.R.B. if necessary),[63] the Act still otherwise fell far short of its

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[60] *See*, for example, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* ed. Amy Gutmann (Princeton: Princeton University Press, 1988).

[61] *Constitutional Interpretation* (Oxford: Basil Blackwell, 1991) p. 3.

[62] *See* Race Relations Act 1968, §§ 1–5, where the test in the 1965 Act that someone "practise discrimination" was replaced by the simple "discriminate".

[63] Race Relations Act 1968, § 19, 22.

U.S. counterpart,[64] the Civil Rights Act of 1964. Moreover, whereas the omission from the latter of protection for public employees was a deficiency that could be made good to some extent through pleading the Fourteenth Amendment to the U.S. Constitution instead,[65] the lack of a written constitution in the United Kingdom meant that government employers remained entirely free to discriminate. Indeed, the police retained this immunity from anti-discrimination law until as late as the year 2000.[66] The Labour Party, which had lost the 1970 election only to regain power in 1974, could see the need to strengthen the legislation so as to take it much closer to the U.S. model contained in the Civil Rights Act 1964. But there were still fears of a possible white backlash. Conveniently, the U.S. legislation itself offered a method of circumventing this perceived problem.

Utilizing the last-minute insertion of the word 'sex' into Title VII of the Civil Rights Act 1964, the new corpus of anti-discrimination law in the U.K. thus began not by proposing further amendments to the existing laws regarding race relations, but by attempting to tackle – for the first time outside the question of equal pay[67] – the issue of *sex* discrimination. This was seen as a much less contentious issue than racial discrimination; government strategists decided that it was safer to start with this topic and then move on to racial discrimination if the model adopted proved reasonably practicable.[68] The Sex Discrimination Act 1975 was thus born (and the Race Relations Act 1976, which copied it almost word-for word, duly followed). This 1975 Act built upon the lessons of the preceding Race Relations Acts and, among other things, established a body with powers of

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[64] An attempt to change the title of the legislation to the Civil Rights Act and thereby to broaden its substance was defeated in committee. See H.C. Standing Committee B, cols. 51–66; 83–85; 804–806.

[65] Unlike claims brought under Title VII of the Civil Rights Act, however, any claim of discrimination brought under the Fourteenth Amendment must prove disparate treatment; the Supreme Court held disparate impact theory to be inapplicable in *Washington v. Davis*, 426 U.S. 229 (1976).

[66] The immunity was abolished by § 1 of the Race Relations (Amendment) Act 2000.

[67] *See* Equal Pay Act 1970.

[68] *See* Jeanne Gregory, *Sex, Race and the Law: Legislating for Equality* (London: Sage, 1987).

enforcement much stronger than those which had been conferred on the R.R.B. This body was much more reminiscent of the E.E.O.C. in the United States, as was implied by its name, the Equal Opportunities Commission, or E.O.C.[69] Indeed, as suggested by the omission of the word 'Employment' from its name, the E.O.C.'s remit was actually somewhat wider than that of the E.E.O.C., since it extended to the enforcement of claims arising out of less favourable treatment on grounds of sex in connection with the provision of goods and services[70] as well as in employment.[71]

The Sex Discrimination Act 1975 was a much more comprehensive piece of legislation than either of the Race Relations Acts which had preceded it. Issuing instructions to discriminate,[72] pressuring someone to discriminate,[73] and "aiding unlawful acts"[74] were all made unlawful; employers were also made vicariously liable for any acts of discrimination committed by their employees in the course of their employment.[75] Going beyond the position in the United States,[76] this legislation also gave individuals their own direct right of access to the courts[77] or, in employment cases, to specialist tribunals,[78] each of which had

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[69] Sex Discrimination Act 1975, Part VI.

[70] *Id.*, Part III.

[71] *Id.*, Part II.

[72] *Id.*, § 39.

[73] *Id.*, § 40.

[74] *Id.*, § 42.

[75] *Id.*, § 41.

[76] An individual's right to claim compensation in the U.S. under Title VII was not granted until the Civil Rights Act 1991 – and, even then, only for claims of disparate treatment and not disparate impact: see 42 U.S.C. § 1981(a) (2000). Until then – and, for disparate impact claims, even now – recourse to court was/is for purely equitable relief.

[77] Sex Discrimination Act 1975, § 66.

[78] *Id.*, §§ 62–65. Industrial tribunals which, since the coming into force of § 1 of the Employment Rights (Dispute Resolution) Act 1998 are now called employment tribunals, are specialist courts set up to decide employment-related disputes arising under certain statutes. Their powers are set out in the Industrial Tribunals Act 1996 (as amended). Each tribunal consists of a legally-qualified chair – known as an 'employment judge' since schedule 8 of the Tribunals, Courts and Enforcement Act 2007 came into force on December 1, 2007 – and two lay representatives: one drawn from employers' organizations and one

the power to award compensation.[79] However, such awards were subject to arbitrary caps until the European Court of Justice decided in the second *Marshall* case[80] that any remedies must be sufficiently effective to deter employers from discriminating, and that British statutory restrictions fixing maximum levels of compensation and the award of interest were contrary to the law of the European Union. The caps were thus removed in 1993.[81]

The real significance of the Sex Discrimination Act 1975 was its identification of more than one form of 'less favourable' treatment. In fact, it identified three: direct discrimination,[82] indirect discrimination,[83] and victimisation.[84] Direct discrimination was stipulated as occurring when someone was treated less favourably on grounds of gender.[85] Victimisation involved someone's being treated less favourably either because of a prior complaint of discrimination (made in good faith)[86] or because of giving evidence in connection with such a complaint.[87] Neither of these provisions was particularly innovative. The definition of direct discrimination just restated what everyone had come to think of as constituting discrimination, while the prohibition of victimisation was obviously necessary, for otherwise victims and witnesses could too easily be deterred from

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representing trades unions. Experience has proven – perhaps counter-intuitively – that the decisions of these tribunals are usually unanimous. The decisions of such tribunals can be appealed to the Employment Appeal Tribunal (E.A.T.) and thence to the Court of Appeal and – ultimately and with appropriate permission – to the House of Lords.

[79] Sex Discrimination Act 1975, § 56, 57.

[80] Case C-271/91, *Marshall v. Southampton and South West Area Health Authority (No.2)* [1993] 3 C.M.L.R. 293, [1993] I.R.L.R. 445, [1994] ICR 893 (E.C.J.). The saga of the *Marshall* litigation is discussed in more detail *infra*.

[81] The Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (S.I. 1993, No. 2798), which came into force on November 22, 1993.

[82] *Id.*, § 1(1)(a).

[83] *Id.*, § 1(1)(b).

[84] *Id.*, § 39.

[85] *Id.*, § 1(1)(a). Although the Act is couched in language which implies that the primary victims of sex discrimination will be women, section 2 makes it clear that the Act applies just as much to men. In addition, section 3 prohibits discrimination against married persons (albeit only in employment).

[86] *Id.*, § 4(2).

[87] *Id.*, § 4(1).

coming forward. Indeed, readers familiar with U.S. anti-discrimination law will recognize that these two forms of discrimination are essentially identical to the concepts known in the U.S. as 'disparate treatment'[88] and 'retaliation.'[89] Nevertheless, it is worth pausing to note that those concepts were developed by courts in the U.S. whereas the U.K., which was taking its lessons in anti-discrimination law from its trans-Atlantic neighbor, once again chose to enshrine them in legislation.

The true innovation contained in the Sex Discrimination Act 1975 was its definition of 'indirect discrimination'. Here U.S. law made perhaps its greatest, if unwitting, contribution to anti-discrimination law in the United Kingdom. In the landmark U.S. Supreme Court case of *Griggs v. Duke Power Co.*,[90] the Court had been required to decide whether an employer was prohibited under Title VII of the Civil Rights Act 1964 from requiring a high school education or the passing of a standardized general intelligence test as a condition of employment in jobs whose performance did not require such levels of skill or intelligence, and where those requirements operated to disqualify Negroes at a substantially higher rate than white applicants.[91]

Under section 703(h) of the Civil Rights Act, it was not unlawful 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 upon the results [was] not designed, intended or used to discriminate because of race, color, religion, sex or national origin."[92] The Court therefore first had to determine whether the employer's policy had been adopted with an intent to discriminate against Negroes. It held, agreeing with the Court of Appeals, that there had been no such intent.[93] Instead, it was content to accept the evidence of a company vice president, to the effect that the objective had been to improve the

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[88] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977).

[89] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see now* 42 U.S.C. § 2000e-3(a).

[90] 401 U.S. 424 (1971).

[91] *Id.* at 425–426.

[92] 78 Stat. 255, 42 U.S.C. § 2000e-2.

[93] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

overall quality of the workforce.[94] But the Court went on to say, in the words of Burger C.J., that:

> good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.[95]

Since the evidence was that the qualifications which the employer insisted on were not a good predictor of an employee's ability to perform the jobs in question, their use could not be objectively justified. While that did not make the use of such tests unlawful in itself, the fact that their use had the effect of excluding a disproportionate number of Negroes from employment certainly did. Although the Court did not actually use the term, the notion of 'disparate impact' discrimination[96] had been born. In perhaps the most famous passage, Burger C.J. declared:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the jobseeker be taken into account. It has – to resort again to the fable – provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If

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[94] *Id.* at 431.

[95] *Id.* at 432.

[96] The terminology of 'disparate impact' and the precise conditions required to satisfy it were not set out until *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977). *See infra* n. 108.

> an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[97]

Griggs v. Duke Power Co. did not immediately resonate in the United Kingdom. Indeed, it seems that British lawyers barely knew of its existence, let alone its importance. The 1974 White Paper *Equality for Women*,[98] which outlined the government's proposed sex discrimination legislation, included no definitions of discrimination beyond victimisation and what came to be called direct discrimination. It is important at this juncture to emphasize that a failure to incorporate any notion of disparate impact theory into the definition of discrimination would have had a thoroughly debilitating effect on the Sex Discrimination Act which, unlike the U.S. Supreme Court, the British courts would have been powerless to overcome. The U.S. Civil Rights Act 1964 contained no definitions of discrimination whatsoever. After due consideration of the full implications of the Act's text and legislative history, it was therefore for the federal courts (and ultimately for the Supreme Court) to determine what constituted discrimination. As was explained earlier, the fact that no definition of discrimination had been put in writing gave the courts considerable discretion. In the United Kingdom, however, the very concept of discrimination was to be defined in the governing legislation itself. While any definition might be open to a degree of ambiguity in its interpretation by the courts in terms of its application to specific facts, judges faced with legislation which *did* contain a definition of discrimination would certainly not have been empowered to create their own. If Parliament had said that discrimination meant only either direct discrimination or victimisation, then the clear implication would have been that it did not mean anything else.

However, before the draft sex discrimination legislation was laid before Parliament, the Special Adviser who was responsible for the text, barrister Anthony Lester,[99] went on a

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[97] 401 U.S. 424, 431 (1971).

[98] Cmnd. 5724 (London: H.M.S.O., 1974).

[99] Now Lord Lester of Herne Hill, Q.C..

fact-finding trip to the United States with his boss, Home Secretary Roy Jenkins. As Lester admitted years later, it was only during this visit that he learnt of the importance of prohibiting disparate impact discrimination:[100]

> [W]e were mainly inspired by ideas from across the Atlantic. Indeed, the key concept of indirect discrimination, which is not to be found in the 1974 White Paper, was hastily included in the Sex Discrimination Bill, on the eve of its publication. The omission was made good as a result of a visit with the Home Secretary to the United States. We discovered, during the visit, that we had defined the concept of what discrimination means too narrowly in the White Paper. . . . [S]ection 1(1)(b) of the legislation was Parliamentary Counsel's version of the landmark judgment of the American Supreme Court in *Griggs v. Duke Power Co.*[101]

The person who impressed upon Lester and Jenkins the importance of *Griggs* was Louis H. Pollak, then Dean of the University of Pennsylvania Law School,[102] who went on to become a judge on the United States District Court for the Eastern District of Pennsylvania in 1978.[103] It seems likely that the facts of another case, about to be heard in the Supreme Court soon after Lester's and Jenkins's visit, had served to make Pollak's point particularly strongly. That case was *Albemarle Paper Co. v. Moody*,[104] where an employer had segregated its plant's departmental 'lines of progression' with the effect of reserving the higher-paying and more skilled lines for whites. The respective racial profiles of whole lines of progression persisted until 1968,

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[100] Lord Lester of Herne Hill, Q.C., *Discrimination: What Can Lawyers Learn from History?*, Pub. L. No. 224, 227 (1994).

[101] *Id.* at 227 (footnote omitted).

[102] Louis H. Pollak, *Discrimination in Employment: The American Response* 15–19 (London: Runnymede Trust, 1974).

[103] *See* Anthony Lester, Q.C., *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537, 550–51 (1988).

[104] 422 U.S. 405 (1975).

when the lines were reorganized under a new collective-bargaining agreement. The court found, however, that this reorganization left Negro employees 'locked' in the lower-paying job classifications. The formerly 'Negro' lines of progression had been merely tacked on to the bottom of the formerly 'white' lines, and promotions, demotions, and layoffs continued to be governed – where skills were 'relatively equal' – by a system of 'job seniority.' Because of the plant's previous history of overt segregation, only whites had seniority in the higher job categories.[105]

It would have been hard to think of a clearer instance of disparate impact discrimination after *Griggs* than *Albemarle*. The fact that the latter was litigated all the way to the Supreme Court only four years after *Griggs* demonstrated both how ingrained such institutional discrimination had become and how important it was to eradicate it. The fact that the U.K.'s legislators heeded Pollak's advice and prohibited disparate impact discrimination in the Sex Discrimination Act 1975 meant that it had authoritatively recognized the concept, so far as sex discrimination was concerned, even before the U.S. itself, where that view was not dispositively confirmed until the U.S. Supreme Court's decision in *Dothard v. Rawlinson*.[106]

The British Parliamentary draftsman's rendering of the meaning of disparate impact in the Sex Discrimination Act 1975 was as follows:

> In any circumstances relevant for the purposes of any provision of this Act . . . a person discriminates against a woman if . . . 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

[105] *Id.* at 409.
[106] 433 U.S. 321 (1977).

> (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.[107]

Such an amorphous concept needed a name: somewhat inconveniently, the Supreme Court had omitted to provide a suitable label in *Griggs* (and, did not, in fact, adopt the term 'disparate impact' until some years later.)[108] To distinguish it from overt discrimination, which was thenceforth redefined as 'direct discrimination,'[109] the draftsman came up with the term 'indirect discrimination.' Despite the section's "technical and crabbed language,"[110] which has been criticized as "a narrow and awkwardly-phrased expression of the idea of institutional

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[107] Sex Discrimination Act 1975, § 1(1)(b).

[108] The first use of the term 'disparate impact' by a federal judge occurred in 1973 in the United States District Court for the Northern District of Ohio. In *Smith v. City of East Cleveland*, 363 F. Supp. 1131 (1973), District Judge Thomas Lambros found (at 1145) that imposing a minimum height requirement on police force applicants had a disparate impact on women and therefore amounted to unlawful discrimination. The term 'disparate impact' was also used just over a year later by Judge Albert Engel in the Court of Appeals for the Sixth Circuit, in *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (1975), a case on age discrimination. Yet, five years after *Griggs v. Duke Power*, the Supreme Court had still not adopted this terminology and instead employed the terms 'discriminatory impact' and 'disproportionate impact' when giving judgment in *Washington v. Davis*, 426 U.S. 229 (1976). The first usage of the term 'disparate impact' by a Supreme Court Justice was by Stewart J in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977), where he provided a full explanation of what it meant and how it differed from 'disparate treatment'. The odd thing is that, just one month later, it had still not apparently seeped into the Court's consciousness. The majority opinion in *Dothard v. Rawlinson*, 433 U.S. 321 (1977) again talked solely of 'discriminatory impact' and 'disproportionate impact'. Only Rehnquist J (as he then was), who filed a very short opinion concurring in the result and concurring in part, used the term 'disparate impact,' and even then just once: see 433 U.S. 321, 338 (1977).

[109] Sex Discrimination Act 1975, § 1(1)(a).

[110] Lester, *supra* n. 100, at 227.

discrimination,"[111] the concept of indirect discrimination has proved to be of huge importance in British anti-discrimination law. Right from the beginning, British courts openly took their cue on its interpretation from *Griggs*.[112] Yet at the same time, the adoption of this concept marked the beginning of a big fork in the road of anti-discrimination law along which the two countries had been traveling.

So far as the United States is concerned, it has been noted that: "By and large, 'disparate impact' cases are fairly infrequent, as compared to cases alleging intentional discrimination."[113] Yet in the United Kingdom, it is indirect discrimination which has proved to be of far more significance than direct discrimination.[114] The British experience has, moreover, been replicated in other common law countries which also adopted the concept of disparate impact from the United States.[115] It is submitted that,

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[111] Laurence Lustgarten, *Racial Inequality and the Limits of Law*, 49 Mod. L. Rev. 68, 72 (1986).

[112] *See e.g. Steel v. Union of Post Office Workers* [1978] I.R.L.R. 288, 291 (E.A.T.); *Clarke v. Eley (IMI) Kynoch Ltd, Eley (IMI) Kynoch Ltd v. Powell* [1982] IRLR 482, 485 (E.A.T.).

[113] Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 Neb. L. Rev. 304, 314 (1992).

[114] The fact that this continues to be the case has been illustrated recently in *Allen and others v. G.M.B.* [2008] E.W.C.A. Civ. 810, where the Court of Appeal held that the striking of a deal by a trade union with a local authority as to terms and conditions of employment pursuant to a national collective agreement establishing a common pay and grading structure for all local authorities was indirectly discriminatory. The deal attempted to achieve compensation for some union members for past pay inequality as well as future pay and employment protection for all members. Although it involved the application of a provision, criterion or practice which applied equally to men, it operated to the detriment of a considerably larger proportion of women.

[115] *See*, for example, the ruling of the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624 (holding that the absence of sign language interpreters for patients consulting health care practitioners amounted, in and of itself, to *prima facie* indirect discrimination against deaf people); and that of the Constitutional Court of South Africa in *The City Council of Pretoria v. Walker* (1998) 3 S.A. 24 at ¶ 31, interpreting what was then § 8(2) of the Interim Constitution of the Republic of South Africa (essentially reproduced in § 9(3) of the Constitution of the Republic of South Africa): "The inclusion of both direct and indirect discrimination within

since the passage of the 1991 Civil Rights Act,[116] the availability of damages in cases of disparate treatment but not in cases of disparate impact has played a significant role in skewing the types of claims brought in the United States. Michael Selmi has commented, for example, that: "Many of the recent large class action claims have proceeded under an intentional discrimination theory, even though many of their core allegations sound in traditional disparate impact language."[117]

Selmi's own claim that, apart from written employment tests, "disparate impact theory has produced no substantial social change"[118] may thus be true within the United States but not beyond its shores. (Indeed, written employment tests have never been popular in the U.K. except in the civil service, although their use is now growing in the legal and financial sectors because of the influx of American-owned banks and law firms.) For example, the requirement upon which American courts have insisted, namely that detailed statistics be produced in order to determine the precise impact on different groups of specific employment practices, has been held by the British courts to be often of dubious value, given that many such statistics involve averaging and approximations.[119]

Bona Fide Occupational Qualifications

So far we have seen that the British template for anti-discrimination laws involves three elements: a definition of discrimination as 'less favourable' treatment, a recognition of 'indirect' discrimination as well as direct discrimination and victimisation, and the establishment of a public agency responsible for the oversight and enforcement of the legislation. It is completed by a fourth element: defendants need to be given

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the ambit of the prohibition . . . evinces a concern for the consequences rather than the form of conduct."

[116] 42 U.S.C. § 1981(a) (2000).

[117] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 736 at n. 142 (2006).

[118] *Id.* at 705.

[119] *See e.g. Jones v. University of Manchester* [1993] I.C.R 474 *per* Evans L.J. at 502 (C.A.).

the chance to show that any discrimination, whether it occurred directly or indirectly, might nevertheless be justified. In other words, the law needed to provide for a potential defense to the proof of a *prima facie* case. In accordance with what, by now, will have become a familiar pattern, it was again taken from the U.S. model laid out in Title VII of the Civil Rights Act 1964. There – having prohibited employment practices which discriminated against a person because of individual's race, color, religion, sex, or national origin – an exception was made whereby an employer could justify such a practice (and thus escape liability) if religion, sex or national origin had been used as a criterion amounting to a "*bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise".[120] The British legislation therefore needed to create a similar defense.

Another point of comparison here will also have a familiar ring to it. The Civil Rights Act left the meaning of "*bona fide* occupational qualification" (bfoq) undefined, and thus a matter for the courts. By contrast, British legislators – concerned about the common law's checkered history on the concept of discrimination – were not content to rely on the judiciary and so felt the need for a definition to be set out in the Sex Discrimination Act itself. In addition, both politicians and lawyers within the U.K. have become increasingly uncomfortable with the use of pig Latin.[121] Accordingly, whatever definition was formulated, the concept could not readily be labeled as a "*bona fide* occupational qualification."[122] Instead, section 7 of the Act talks of "*genuine* occupational qualification" (emphasis added).[123] There is a clear semantic difference between the two labels. The American version depends on *bona fides* – good faith. In other words, the defense of "*bona fide* occupational qualification" demonstrates an emphasis in federal U.S. anti-discrimination law

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[120] Civil Rights Act 1964, § 703(e)(1), (now § 2000e-2(e)(1)).

[121] Courts in the U.K. no longer, for example, grant *certiorari* to quash previous decisions; instead, they issue 'quashing orders': Civil Procedure Rules 1999, rule 54.1.

[122] Canada chose to keep the '*bona fide*' terminology when it adopted its own anti-discrimination laws: see Canadian Human Rights Act 1977, § 15.

[123] Sex Discrimination Act 1975, § 7.

on the motivation and state of mind of the employer, as does the fact that claims of disparate treatment have proved to be more popular in the U.S. than claims of disparate impact. The British version of the defense, by contrast, is not concerned with the state of mind of the employer at all; it is instead focused on the nature of the alleged occupational qualification, and whether it can be objectively justified. The motivation of the employer in adopting this criterion – whether good or bad – is thus irrelevant.

As it turned out, the U.S. Supreme Court in *Dothard v. Rawlinson* – the first case on sex discrimination to come before the Court under the Civil Rights Act – went beyond the limitations of the text and found that it was also persuaded by "the relevant legislative history . . . that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."[124] By adopting an approach to statutory interpretation entirely foreign to the British courts, the Supreme Court thereby effectively ensured that its approach amounted to an application of the Title VII defense more along the lines of what the British text already said. Seven years later the respected British barrister, David Pannick, Q.C., thus felt able to say:

> It would not seem that much turns on the fact that the 1975 Act validates discrimination where sex is a 'genuine' occupational qualification, whereas Title VII recognizes an exception in 'bona fides' cases. The language of section 7 is, however, preferable in avoiding any inference that the defence depends on the state of mind of the employer than the objective nature of the job in question.[125]

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[124] 433 U.S. 321, 334 (1977). *See also Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that the bfoq relates to the "essence" or "central mission of the employer's business," and that there must be no less-restrictive or reasonable alternative).

[125] David Pannick, *When is Sex a Genuine Occupational Qualification?*, 4 Oxford J. Leg. Stud. 198, 201–2 (1984).

Whether those proposing that the defense in the Sex Discrimination At 1975 should be a matter of objectively genuine qualifications really understood the subtle difference between that definition and the potentially narrower implications of the *bona fide* approach is, however, unclear. Home Secretary Roy Jenkins admitted that identifying exactly what constituted a genuine occupational qualification was "a difficult drafting job," but did not appear to find the label itself problematic.[126] This was really somewhat ironic, because the British definition actually made it much easier to stipulate acceptable criteria. The Sex Discrimination Act 1975 thus identified a number of circumstances where the use of a person's gender would amount to a genuine occupational criterion. Among the most important are the following:

> (i) where there is a genuine physiological requirement (other than physical strength or stamina);[127]
> (ii) for authenticity (such as casting a male actor to play the part of a man in a film);[128]
> (iii) because of decency or privacy (such as a female care assistant at a women's refuge);[129] or
> (iv) in the provision of personal services.[130]

Through the Sex Discrimination Act 1975, the U.K. thus forged a template for anti-discrimination laws with four, related elements. Discrimination was defined as 'less favourable' treatment; it encompassed 'indirect' discrimination as well as direct discrimination and victimisation; employers could mount a defense[131] of 'genuine occupational qualification' focused on the

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[126] 889 H.C. 517 (March 26, 1975).
[127] Sex Discrimination Act, § 7(2)(a).
[128] *Id.*, § 7(2)(a).
[129] *Id.*, § 7(2)(b).
[130] *Id.*, § 7(2)(e).
[131] There was some controversy as to where the burden of proof lay on this issue. It was finally resolved by regulation 5 of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (S.I. 2006, No.

objective requirements for a job and not on their own state of mind; and a specific public agency would be established to uphold and enforce the legislation. Each of these elements had been taken from, and were designed essentially to imitate, provisions in federal U.S. law.

III. AGE DISCRIMINATION LAW IN THE UNITED STATES

Origins

During the debates on what became the Civil Rights Act of 1964, proposals were made to include age among the list of prohibited criteria. However, those proposals were rejected on the grounds that there was no way to identify what age would be the appropriate yardstick. Representative Celler commented: "What age? Some men are old at 20. Others are young at 70. At what age would discrimination occur?"[132] Instead, Congress instructed the Secretary of Labor, Willard Wirtz, to investigate whether age discrimination was as prevalent as alleged and, if so, to make recommendations as to how it should be addressed.[133] The following year, Wirtz reported that ageism in employment was indeed a significant problem.[134] President Johnson took up the cause in his address on January 23, 1967, and urged Congress to take action. Congress duly obliged later that year by passing the Age Discrimination in Employment Act (A.D.E.A.).[135] The A.D.E.A. has three expressed aims: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help

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2660), which inserted a new section 63A into the Sex Discrimination Act 1975 to the effect that this was indeed an affirmative defense with the burden of proof on the defendant.

[132] Quoted by Constance Kleiner Hood, *Age Discrimination in Employment and the Americans with Disabilities Act: A Second Bite at the Apple*, 6 Elder L.J. 1, 3–4 (1998).

[133] Civil Rights Act 1964, § 715.

[134] U.S. Department of Labor, *The Older American Worker: Age Discrimination in Employment* (Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964, 1965) (available at www.thefederalregister.com/d.p/2006-08-11-E6-13138).

[135] Age Discrimination in Employment Act 1967 (Pub. L. 90–202).

employers and workers find ways of meeting problems arising from the impact of age on employment."[136] It answered Congressman Celler's question by specifying that the "prohibitions . . . shall be limited to individuals who are at least 40 years of age."[137]

Originally, the A.D.E.A. was overseen by the Department of Labor but, in 1979, that responsibility passed to the E.E.O.C.[138] Those claiming to have been victims of age discrimination in employment now usually have 180 days from the date of the alleged discrimination to file a charge with the E.E.O.C. (and/or the state agency in the state in which they were employed).[139] The E.E.O.C.'s role on receiving the charge is to "promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."[140] "If a satisfactory conciliation is not reached, the E.E.O.C. proceeds with suit in federal court. . . ."[141] If the aggrieved chooses to bring suit individually, that can be filed once 60 days have elapsed since the filing of the charge with the E.E.O.C., but such a suit "shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right" of the employee.[142] Unlike in the U.K., where the E.O.C. assists a claimant's action

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[136] *Id.*, § 2(b); 29 U.S.C. § 621(b).

[137] *Id.*, § 12(a)); 29 U.S.C. § 631(a). Originally, the legislation protected only workers aged between 40 and 65, but the upper age limit was removed in 1986, effectively abolishing mandatory retirement. See Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99–592, sec. 2(c), § 12(a), 100 Stat. 3342, 3342 (codified as amended at 29 U.S.C. § 631(a) (1994)).

[138] Presidential Reorganization Plan No. 1 of 1978.

[139] Age Discrimination in Employment Act 1967, § 7(d)(1); U.S. Code § 626(d)(1).

[140] *Id.*, § 7(d); 29 U.S.C. § 626(d).

[141] Bryan D. Glass, *The British Resistance to Age Discrimination Legislation: Is it Time to Follow the U.S. Example?*, 16 Comp. Lab. L.J. 491, 496 (1995).

[142] Age Discrimination in Employment Act 1967, § 7(c),(d); U.S. Code § 626(c),(d). *See also* Candis A. McGowan, *The ABCs of Title VII Class and Age Discrimination Collective Actions*, 25 Am. J. Trial Advoc. 257, 260 (2001).

only by agreement, employees in the U.S. have no formal ability to prevent the E.E.O.C. from taking up their case.

It has been suggested that "Congress's choice of age 40 for legislative protection [took account of] the experience of Congressman Pucinsky in the mid-1960s, who applied undercover for several jobs at factories at age 46, and was told that he could not be interviewed because it was company policy not to hire anyone over the age of 40."[143] In any event, the consistent theme – running through not just Pucinsky's experiences, but also Secretary Wirtz's report and President Johnson's speech – was that it was *older workers* who needed protection.[144] The A.D.E.A.'s prohibition on age discrimination reflected that concern and thus had three significant limitations. First, it did not protect anyone below the age of forty. Secondly, like Title VII but unlike Titles I to VI of the Civil Rights Act 1964, it applied only to matters of employment.[145] As Judge Tuttle noted in *Hodgson v. First Federal Savings and Loan Association*, "With a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex or national origin. . . .'"[146] Thirdly, as with the Civil Rights Act itself, nothing was said about disparate impact discrimination.

Younger Employees

It has always been clear that employees under the age of 40 are not protected by the A.D.E.A. But some commentators argued that analogies with Title VII of the Civil Rights Act meant that anyone over 40 would potentially have a claim even if treated less favorably on the grounds of his or her age than another person over 40. As Hartzler has explained:

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[143] Glass, *supra* n. 141, at 497.

[144] See *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236, 1242–3 (2004).

[145] The Age Discrimination Act 1975 extended the prohibition on age discrimination to all programs or activities receiving federal funding or assistance.

[146] 455 F.2d 818, 820 (5th Cir., 1972).

> The theory of reverse discrimination evolved under Civil Rights Act jurisprudence. For example, as between racial groups under Title VII, a non-minority plaintiff may successfully state a claim for relief when replaced by a minority worker. In this manner, Title VII plaintiffs have successfully challenged employer actions that indicate a preference for traditionally disenfranchised individuals. Due to the similarities between Title VII and the A.D.E.A., courts have frequently applied Title VII substantive case law to A.D.E.A. claims. Consequently, A.D.E.A. plaintiffs have attempted application of the Title VII discrimination theories to their age discrimination claims.[147]

The counter-argument to this is that a *reverse* age discrimination claim is not analogous to a reverse sex or race discrimination claim. Alleged victims of sex discrimination, for example, compare their position with individuals of the opposite sex. Alleged victims of racial discrimination compare their treatment with that meted out to individuals of a different racial or ethnic group. So, it was argued, this must mean that individuals aged 40 or over could claim the protection of the A.D.E.A. only if they were treated unfavorably as compared to those under 40, not if they were treated unfavorably in comparison with someone else over 40. The defendant employer in *O'Connor v. Consolidated Coin Caterers Co.* made just such an argument after it had dismissed the petitioner at age 56 and replaced him with a 40-year-old.[148] However, the Supreme Court held that there was no requirement that the petitioner had to be replaced by someone outside the protected class. It found that the "fact that one person in the protected class has lost out to another person in the

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[147] Kelly J. Hartzler, *Reverse Age Discrimination Under the Age Discrimination in Employment Act: Protecting All Members of the Protected Class*, 38 Val. U. L. Rev. 217, 229–230 (2003).

[148] 116 S. Ct. 1307 (1996).

protected class is thus irrelevant, so long as he lost out because of his age."[149]

Less than a decade later, however, the Supreme Court apparently abandoned this clarity of vision. In *General Dynamics Land Systems, Inc. v. Cline*,[150] a collective-bargaining agreement between petitioner General Dynamics and the United Auto Workers eliminated the company's obligation to provide health benefits to subsequently retired employees, except as to then-current workers at least 50 years old. Cline was one of a number of employees who objected because they were under 50 and so would have had no right to the benefits. These individuals were also over 40 and so were apparently protected by the Act. However, a majority of the Supreme Court had other ideas. Writing for the majority, Souter J remarked that "the 40-year threshold makes sense as identifying a class requiring protection against preference for their juniors, not as defining a class that might be threatened by favoritism toward seniors."[151] He noted with approval the fact that the District Court had called the claim one of "'reverse age discrimination,' upon which, it observed, no court had ever granted relief under the A.D.E.A."[152] Souter J took the view that the word 'age' bears different meanings in the A.D.E.A., depending on the context, and "that reference to context shows that 'age' means 'old age' when teamed with 'discrimination.'"[153] He even made the bizarre claim that "the provision of an affirmative defense when age is a bona fide occupational qualification[154] readily shows that 'age' as a qualification means comparative youth."[155] Unfortunately, the last statement is an utter *non sequitur*. Age could be a bona fide occupational qualification when it is a person's specific age that matters: hiring an actor to play a part because he is of about the same age as the character is a good example. Hiring anyone in a

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[149] *Id.* at 1310.
[150] 124 S. Ct. 1236 (2004).
[151] *Id.* at 1243.
[152] *Id.* at 1239–40.
[153] *Id.* at 1246.
[154] Age Discrimination in Employment Act 1967, § 4(f)(1).
[155] 124 S.Ct. 1236, 1246 (2004).

very different age range simply would not do, whether they were much older or much younger.

How Souter J's rhetoric managed to convince a majority of his colleagues remains a matter of conjecture. It certainly did not convince Thomas J, who adopted a much more straightforward approach. Indeed, Thomas J's opinion, in which Kennedy J joined, opens with the words: "This should have been an easy case."[156] In a judgment reminiscent of British judges before *Pepper v. Hart* was decided by the House of Lords in 1993,[157] he considered that there was no need to consider the "social history"[158] which led up to the passage of the A.D.E.A., and argued instead that the text of the Act should be given its natural meaning:

> The plain language of the A.D.E.A. clearly allows for suits brought by the relatively young when discriminated against in favor of the relatively old. The phrase 'discriminate . . . because of such individual's age' . . . is not restricted to discrimination because of relatively older age. If an employer fired a worker for the sole reason that the worker was under 45, it would be entirely natural to say that the worker had been discriminated against because of his age. I struggle to think of what other phrase I would use to describe such behavior. I wonder how the Court would describe such incidents, because the Court apparently considers such usage to be unusual, atypical, or aberrant.[159]

Disparate Impact

The issue of disparate impact age discrimination has proved to be just as controversial. Although "for over two decades after our decision in *Griggs*, the Courts of Appeals uniformly

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[156] *Id.* at 1249.
[157] [1993] 1 All E.R. 42. *See supra* n. 54.
[158] *Id.* at 1250.
[159] *Id.* at 1250.

interpreted the A.D.E.A. as authorizing recovery on a 'disparate-impact' theory in appropriate cases,"[160] this apparent uniformity of view was challenged in *Hazen Paper Company v. Biggins*.[161] A former employee alleged that Hazen Paper had dismissed him because of his age. It had apparently done so in order to prevent his pension benefits from vesting. The Supreme Court held that this was not a violation of the A.D.E.A. O'Connor J, writing for the Court, found that while pension status is often correlated with age, the "employee's age is analytically distinct from his years of service."[162] The A.D.E.A. would be implicated only if it were the former that had motivated the employer's decision, which the Court found not to be the case here. Again employing what Thomas J would, a year later in *General Dynamics* call a "social history" analysis,[163] the Court found that the concerns about negative stereotyping of older people, which had motivated the A.D.E.A., were not present when the reason for the dismissal was the employee's years of service. The Court indicated, however, that it would have taken a different view if the pension plan in question had depended on an employee's age rather than length of service. The Court also acknowledged that there may be instances where an employer uses pension status as a proxy for age and so develops a policy in order to flush out older employees. That would involve a dismissal motivated by age.

Interestingly, Thomas J joined a concurrence written by Kennedy J, who noted that the respondent:

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[160] *Smith v. City of Jackson*, 125 S. Ct. 1536, 1542–3 *per* Stevens J (2005). *See e.g. Holt v. Gamewell Corp.*, 797 F.2d 36, 37 (C.A.1 1986); *Maresco v. Evans Chemetics*, 964 F.2d 106, 115 (C.A.2 1992); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 372 (C.A.3 1987); *Wooden v. Board of Ed. of Jefferson Cty., Ky.*, 931 F.2d 376, 379 (C.A.6 1991); *Monroe v. United Air Lines*, 736 F.2d 394, 404, note 3 (C.A.7 1984); *Dace v. A.C.F. Industries*, 722 F.2d 374, 378 (C.A.8 1983), modified, 728 F.2d 976 (1984) (*per curiam*); *Palmer v. United States*, 794 F.2d 534, 536 (C.A.9 1986); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (C.A.10 1993) (assuming disparate-impact theory); *MacPherson v. University of Montevallo*, 922 F.2d 766, 771 (C.A.11 1991); *Arnold v. United States Postal Serv.*, 863 F.2d 994, 998 (C.A.D.C.1988) (assuming disparate-impact theory)).

[161] 113 S. Ct. 1701 (1993).

[162] *Id.* at 1707.

[163] *Supra* n. 158.

> has advanced no claim that petitioners' use of an employment practice that has a disproportionate effect on older workers violates the ADEA. As a result, nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII of the Civil Rights Act of 1964. . . . As the Court acknowledges . . . we have not yet addressed the question whether such a claim is cognizable under the ADEA,[164] and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.[165]

Judge Tuttle's recognition that, "With a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex or national origin'"[166] apparently did not necessarily mean that the application of the A.D.E.A. was identical to that of the Civil Rights Act itself. As the Supreme Court itself acknowledged twelve years later in *Smith v. City of Jackson*,[167] *Hazen Paper* was taken by several U.S. Courts of Appeals as authority for the proposition that disparate impact claims were not available under the A.D.E.A..[168] Indeed, in *Smith*, Kennedy and Thomas JJ – joined on this occasion by O'Connor J – reiterated their objections to the idea that a disparate impact claim could be brought under the A.D.E.A..[169] They were, however, in the minority. *Smith* involved a pay plan that aimed to attract more qualified police officers by making starting salaries competitive. Thus the City of Jackson gave proportionally higher salary increases to its less senior officers. The Court did not find the city liable for disparate

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[164] *Supra* n. 161 at 1706.

[165] *Id.* at 1710.

[166] *Hodgson v. First Federal Savings and Loan Association* 455 F.2d 818, 820 (5th Cir., 1972).

[167] 125 S. Ct. 1536 (2005).

[168] *Id.* at 1543.

[169] *Id.* at 1549.

treatment and, since disparate impact had not been pleaded, it was unable to rule dispositively on that point. Nevertheless, the majority did hold that disparate impact claims are cognizable under the A.D.E.A.[170]

Yet this general ruling was delivered with forked tongue. Writing for the majority in language that might have been taken straight out of the English case of *Francis v. British Airways Engineering Overhaul Ltd.* decided over twenty years before,[171] Stevens J found that:

> petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers . . . it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'[172]

Effectively, federal U.S. law on age discrimination in 2005 had regressed to a point that, as we shall see, English anti-discrimination law had reached back in 1982 but from which it had subsequently moved on.

This was confirmed in the very recent case of *Kentucky Retirement Systems v. E.E.O.C.*.[173] It concerned a disability retirement plan that imputed years of service to 'hazardous position' employees who were disabled before reaching the age of retirement. Under the retirement plan, an employee could retire and receive benefits either upon turning 55 or after 20 years of

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[170] *Id.* at 1540.
[171] [1982] I.R.L.R. 10 (E.A.T.). *See infra* n. 200.
[172] *Supra* n. 167 at 1545.
[173] 128 S. Ct. 2361 (2008).

service. If an employee became disabled before he was eligible, he would have years of service imputed to him so that he would become eligible for retirement benefits. However, an employee who became disabled after 55 – like the complainant – was not eligible for imputed years of service. Employee benefits were calculated by multiplying a percentage of the employee's pay by the years of service. Thus the complainant had been treated less favorably solely because he had become disabled after reaching the age of 55.

The plaintiff filed a claim with the E.E.O.C., which brought suit against Kentucky Retirement Systems. The E.E.O.C. alleged disparate treatment on the grounds that the retirement plan was facially discriminatory based on age. Citing *Hazen Paper*, the Court said that a plaintiff alleging disparate treatment cannot succeed unless the employee's age actually played a role in the employer's decision-making process. Since the Court held that the differential treatment was not motivated by age-related stereotyping, the Kentucky retirement plan was not contrary to the A.D.E.A. The narrowness of the Court's approach was demonstrated by the fact that the possibility that these facts might found a disparate impact claim was not even considered.[174]

IV. DEVELOPING AGE DISCRIMINATION LAWS IN THE UNITED KINGDOM

The British Anti-Discrimination Law Template

The significance of the Civil Rights Act of 1964 was not limited to prohibiting the forms of discrimination set out explicitly in its text. Just as important is the fact that its terminology and structure effectively created a template for every subsequent statute aimed at eradicating some form of discrimination. Thus, when the A.D.E.A. was passed in 1967, it was – as has been shown – seen to be very much on all fours with the Civil Rights Act, save for the insertion of the word 'age' at appropriate points instead of race or sex.

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[174] *Id.* at 2366.

As a much more limited measure than the ambitious Civil Rights Act, the British Sex Discrimination Act 1975 could not have been expected to perform the equivalent function of setting out the template for future anti-discrimination laws in the U.K.. Nevertheless, the subsequent thirty years has demonstrated that this is – more or less – precisely what it did. The template for British anti-discrimination law which that Act created has – as we have seen – four, related elements:

> (i) the establishment of a public agency (in that case, the Equal Opportunities Commission) responsible for the oversight and enforcement of the legislation;
> (ii) a defense of 'genuine occupational qualification' focused on the objective requirements for a job and not on the state of mind of the employer;
> (iii) a definition of discrimination as 'less favourable' treatment; and
> (iv) a recognition and definition of 'indirect' discrimination as well as of direct discrimination and victimisation.

The approach piloted by the Sex Discrimination Act 1975 proved sufficiently successful for the subsequent Race Relations Act 1976 to copy most of it almost verbatim.[175] Indeed, over twenty years later it could be said, without fear of contradiction, that the template had in the meantime undergone only relatively minor legislative updates.[176] This is not to say that the British template for dealing with discrimination claims proved to be perfect. On

[175] Thereby repealing the Race Relations Act 1968. The new agency operating under the aegis of this Act was called the Race Relations Commission: see Race Relations Act 1976, § 43.

[176] *See* Evelyn Ellis, *The Development of Sex Discrimination Law: From Aspiration to Reality*, 18 Holdsworth L. Rev. 139, 147 (1997).

the contrary, each of these elements was afflicted with an inherent structural defect, which will now be addressed.[177]

There were, for example, significant problems with some of the agencies involved in monitoring and upholding the anti-discrimination legislation. The Commission for Racial Equality (C.R.E.), which was responsible for upholding the race relations legislation,[178] had an extremely checkered history. Beset by internal feuding, its record was less than impressive to say the least. By contrast, however, the Equal Opportunities Commission, responsible for the sex discrimination legislation,[179] developed a reputation for thoughtful and innovative work,[180] and proved in fact to be the principal player in the subsequent development of age discrimination laws in the U.K. Partly to eradicate the problems besetting the C.R.E. and partly to overcome the fragmentation of the enforcement of anti-discrimination laws, the C.R.E. and E.O.C. were combined – together with the Disability Rights Commission[181] – into one body, known as the Equality and Human Rights Commission (E.H.R.C.),[182] which thus more closely resembles the E.E.O.C.

So far as the defense of 'genuine occupational qualification' is concerned, although it has been established that it is focused on the objective requirements for a job and not on the state of mind of the employer, the definition has proved defective in failing to identify from whose point of view these requirements are to be judged. It could simply be a matter for the employer, which might lead to idiosyncratic design of work practices which then make gender a job requirement.[183] On the other hand, it could reflect the manner in which current employees have chosen to go about doing the job in practice. In *Sisley v. Britannia*

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[177] *See* Gerald P. McGinley, *Judicial Approaches to Sex Discrimination in the United States and the United Kingdom – A Comparative Study*, 49 Mod. L. Rev. 413 (1986).

[178] Race Relations Act 1976, § 43.

[179] Sex Discrimination Act 1975, § 53.

[180] A. Lester, *Discrimination: What Can Lawyers Learn from History?*, Pub. L. No. 224, 230 (1994).

[181] This had been set up under the Disability Discrimination Act 1995.

[182] Equality Act 2006.

[183] *Timex Corporation v. Hodgson* [1982] I.C.R. 63 (E.A.T.).

Security Systems Ltd. an employer's refusal to hire a man as a security officer was upheld by the Employment Appeal Tribunal (E.A.T.)[184] on the grounds that the current employees – all women – were in the habit of removing their uniforms and resting on a bed in their underwear during quiet periods on a long shift.[185] Although it would have been possible to change into other clothes, or simply to continue to wear the uniform while resting (since the employer had not required that outer wear remain uncrumpled) these possibilities appear to have been overlooked. Alternatively, 'genuine occupational qualification' could be a matter of trying to second-guess what potential customers might prefer. *Wylie v. Dee & Co. (Menswear) Ltd.* involved the unsuccessful complaint of a woman who had been refused employment in a menswear shop on the grounds that she might have to take inside-leg measurements.[186] As David Pannick has pointed out, it appears that it was not necessary for a successful defense "for the employer to prove that men do or would so object, only that they 'might'."[187]

By contrast, the definition of discrimination as 'less favourable' treatment looks unproblematic. Yet the use of the comparative adverb 'less' was soon taken to mean that complainants had to compare their position to that of someone from (in sex discrimination cases) the opposite sex, or (in race relations cases) a different racial, ethnic or national group. This has regularly caused considerable difficulties. Perhaps the most notorious case occurred when a pregnant woman brought a claim of discrimination. In *Turley v. Allders Department Stores Ltd.* it was held that, because men do not get pregnant, there was no appropriate comparator.[188] Thus a majority of the Employment Appeal Tribunal – a specialist appellate employment law court –

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[184] The Employment Appeal Tribunal is, as its name implies, an appellate court (chaired by a High Court judge, flanked by one representative each from both employers' organizations and trades unions) which deals with appeals over employment-related disputes.

[185] [1983] I.C.R. 683 (E.A.T.).

[186] [1978] I.R.L.R. 103.

[187] David Pannick, *When is Sex a Genuine Occupational Occupation?*, 4 Oxford J. Leg. Stud. 198, 213 (1984).

[188] *Turley v. Allders Department Stores Ltd.* [1980] I.C.R. 66 (E.A.T.).

declared that: "When she is pregnant a woman is no longer just a woman. She is a woman, as the Authorised Version of the Bible accurately puts it, with child, and there is no masculine equivalent."[189] Without an equivalent man with whom to compare her treatment, it was impossible for the complainant to show that hers had been less favourable and her claim was therefore rejected.[190]

Thankfully, that view was soon abandoned by the E.A.T. itself[191] and has now been replaced by a rule that any unfavorable treatment of a woman because she is pregnant or because of the consequences of pregnancy results from a uniquely female factor and therefore automatically constitutes direct discrimination.[192] Yet that is clearly not what the text of the legislation itself dictated. It is, in fact, a conclusion which has been reached only because of a judgment of the European Court of Justice[193] which, under European Union law,[194] was able effectively to demand that the British courts relinquish "any pretence of refusing to distort the words of the statute."[195] As we shall see, this is by no means the only instance where a defect in British anti-discrimination law has been repaired by European jurisprudence.

It is for the complainant, not the tribunal or the defendant, to choose an appropriate comparator.[196] One problem inherent in

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[189] *Id.* at 70 *per* Bristow J.

[190] There is an American analogue to *Turley* in the form of *General Electric Co. v. Gilbert* 429 U.S. 125 (1976), where the U.S. Supreme Court held that a health insurance plan which provided for all disabilities except pregnancy was not based on gender. This was, the Court ruled, because both sexes were entitled to the same benefits; denying some women an additional benefit could not be discriminatory. The Court retreated somewhat from this position in *Nashville Gas Co. v. Satty* 434 U.S. 136 (1977), and the Pregnancy Discrimination Act 1978 was subsequently passed to make such treatment *prima facie* unlawful discrimination under Title VII.

[191] *Hayes v. Malleable Working Mens Club* [1985] I.C.R. 703 (E.A.T.).

[192] *Webb v. EMO Air Cargo (U.K.) Ltd. (No. 2)* [1995] I.R.L.R. 645 (H.L.).

[193] *Webb v. EMO Air Cargo (U.K.) Ltd.* [1994] I.R.L.R. 482 (E.C.J.).

[194] Equal Treatment Directive (76/207/EEC), Arts. 2(1), 5(1); Council Directive 92/85/EEC (Pregnant Workers Directive), Art. 10.

[195] Anne Morris, *The Death Throes of the Sick Man:* Webb v. EMO Air Cargo (UK) Ltd (No 2), 5 Web J. Curr. Leg. Issues (1995).

[196] *Ainsworth v. Glass Tubes and Components Ltd.* [1977] I.R.L.R. 74 (E.A.T.).

the requirement for a comparator was avoided by the precise wording of the definition of discrimination which – taking the Sex Discrimination Act as the model for all the anti-discrimination legislation – is said to occur if a man treats a woman "less favourably than he treats *or would treat* a man" (emphasis added).[197] This means that a complainant does not have to point to a man who was actually in the same position and yet received more favourable treatment: demonstrating how a hypothetical man would likely have been treated will suffice. Of course, this is much easier to do when there are currently men in similar positions, even if those men cannot themselves be used as comparators,[198] or when a woman is replacing or being replaced by a man. Where the workforce has been effectively segmented, so that one department is staffed almost exclusively by men and another by women, it is much more difficult to show what treatment any hypothetical comparator might have received. This was highlighted by a long-running equal pay dispute within certain supermarkets where women staffing checkouts sought to be treated equally with men working in warehouses.[199] Ironically, such segmentation of the workforce may occur precisely because of the stereotyping which is arguably at the root of much unlawful discrimination, yet has the effect of potentially immunizing those guilty of perpetrating those stereotypes from any effective legal action. This clearly could have major implications in respect of potential age discrimination claims, with older and younger employees being effectively segregated into different sections of the workforce.

In a similar vein, the definition of 'indirect discrimination' turned out to be unduly restrictive. It will be recalled that the definition in section 1(1)(b) of the Sex Discrimination Act 1975 stipulated that:

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[197] Sex Discrimination Act 1975, § 1(1)(a).

[198] *See e.g. Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

[199] *See Pickstone v. Freemans plc* [1989] A.C. 66 (H.L.).

> a person discriminates against a woman if . . . 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.

As a result, it was held in *Francis v. British Airways Engineering Overhaul Ltd.*[200] that an employer which drew up classifications of its workforce in such a way as to provide promotion opportunities for all sections except one dominated by women, it was held that those women could not succeed in a claim for sex discrimination because no requirement or condition had been imposed on them, as required by section 1(1)(b). The job just provided no opportunity for promotion; it was "simply a 'dead end job'."[201] Subsection (iii) exacerbated the difficulty. In *Watches of Switzerland v. Savell*,[202] a woman whose employer used mainly undisclosed, subjective criteria to decide upon promotions, had a her claim for sex discrimination rejected even though the tribunal which heard the claim agreed that she had been subjected to "unconscious bias".[203] Although she argued that the fact that the criteria had not been disclosed meant that she was unable to comply with them, the Employment Appeal Tribunal held that she was actually perfectly capable of complying: "there was nothing to indicate that she would fail to achieve promotion later because of her sex."[204] So subsection (iii) was inapplicable and her complaint failed.[205]

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[200] [1982] I.R.L.R. 10 (E.A.T.). Compare *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), *supra.* n. 167.

[201] *Id.* at 16.

[202] [1983] I.R.L.R. 141 (EA.T.).

[203] Decision of the industrial tribunal (at ¶ 55); quoted in *id.* at 147.

[204] *Id.* at 149.

[205] *Id.*

Again, both these interpretations have now been reversed because of the intervention of European Union law. A European Council Directive mandated a broader definition of indirect discrimination.[206] Article 2(2) required Member States to give effect to a definition of indirect discrimination which applies "where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex." This resulted in the drafting of an amendment to the Sex Discrimination Act 1975.[207] While the complainant still needs to demonstrate a detriment, there is no longer any requirement that she be unable to comply with the requirement imposed, and the nature of that "requirement or condition" has been relaxed to the much more general "provision, criterion or practice".[208] However, the ambit of this relaxed definition of indirect discrimination is restricted to discrimination at work or in vocational training.[209] In all other areas, the original definition is still controlling.[210]

Age Discrimination as Indirect Sex Discrimination

In addition to all these structural defects of the U.K.'s anti-discrimination law template, no legislation was forthcoming to prohibit age discrimination until 2006. Yet the efforts of the Equal Opportunities Commission meant that the concept of indirect sex discrimination came strongly to the fore as a workable proxy for age discrimination. The case that first demonstrated that this theory was viable was *Price v. Civil Service Commission*.[211] Indeed, it raised such a novel issue that no cases at all were cited in the judgment. Supported by the E.O.C., the 35-year-old applicant, a married woman with children, had answered a

[206] Council Directive 97/80/EC, December 15, 1997.

[207] Sex Discrimination Act 1975, § 1(2), as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (S.I. 2006, No. 2660), regulation 3.

[208] *Id.*

[209] Sex Discrimination Act 1975, § 1(3).

[210] *Id.*

[211] [1977] 1 W.L.R. 1417 (E.A.T.).

newspaper advertisement for candidates for the post of executive officer in the Civil Service. She was sent a booklet stating the conditions of appointment, one of which was that candidates should be "at least 17½ and under 28 years of age." She complained to an industrial tribunal that the Civil Service Commission was unlawfully discriminating against her on the ground of her sex, contrary to section 1(1)(b) of the Sex Discrimination Act 1975, in that (a) the condition imposing an upper age limit of 28 was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could do so, and (b) she was herself unable to comply with it. The industrial tribunal dismissed the complaint on the ground that the phrase "can comply with it" in section 1(1)(b)(i) was to be strictly construed as meaning physically able to comply, and that since the total number of men and women in the population was not very different, it was impossible to say that the proportion of women who could comply with the age requirement was considerably smaller than the proportion of men.

On appeal, however, a majority of the Employment Appeal Tribunal held that "can" in section 1 (1)(b)(i) of the Sex Discrimination Act 1975 should not be construed so as to mean 'theoretically possible' but had to be interpreted in context to see whether the condition could be complied with in practice.[212] Accordingly, the upper age limit of 28 had to be considered against the known fact that a considerable number of women aged between 25 and 35 were occupied rearing children. As a result, there were a certain number of women who could not comply with the condition because they were women.[213] However, the industrial tribunal which initially heard the case had not decided, as a matter of fact, whether that number was such that the proportion of women who could comply with the condition was "considerably smaller than the proportion of men who [could] comply with it" as required by the legislation. The Appeal Tribunal was therefore unable to reach a final determination of whether an instance of indirect sex discrimination had occurred, and instead remitted the case to be heard by a new tribunal with

[212] *Id.* at 1421.
[213] *Id.* at 1422.

the express instruction that it decide this point.[214] Crucially, however, it suggested that it was likely that the appropriate 'pool' of women or men available for comparison was the number of *qualified* men and women rather than the total male and female population.[215]

Price was given added weight by the decision of the E.A.T. two years later in *Steel v. Union of Post Office Workers*.[216] The complainant entered the employment of the Post Office in 1961 as a temporary, full-time post-woman. Before 1975 women could not attain permanent status. From September 1, 1975, in preparation for the coming into operation of the Sex Discrimination Act 1975, it was agreed with the union that thenceforth full-time post-women would be employed on the same terms and conditions as full-time postmen. In March 1976, the Post Office advertised a vacant 'walk'[217] in the office in Newport where the complainant worked. In accordance with normal practice to allot walks by seniority, the vacant walk was allotted to a Mr. Moore, who had become a permanent full-time postman on July 9, 1973, and therefore had two more years' seniority. The E.A.T. commented pointedly:

> Though the effect of the agreement has been to eliminate it for the future, the form of the agreement is such that its effects will linger on for many years. Thus in any competition for a walk for some years to come the most mature post-woman will be at a disadvantage compared with comparatively youthful postmen whose seniority will be greater albeit that their total years of service are considerably less. The Post Office accepts that this

[214] *Id.* at 1422G.

[215] *Id.* at 1422G.

[216] [1978] 1 W.L.R. 64.

[217] "A postal walk is the name given to the arrangement or round according to which a particular delivery is made in a particular district, and is the way in which duties are allotted to individual postmen. Though the enjoyment of a particular walk does not bring with it, directly at least, any financial advantage, some walks are preferable to others and it is an undoubted advantage to be able to obtain the walk of one's choice." *Id.* at 66.

> is the consequence of the agreement made with the union, but excuse themselves by saying that the results of which the complainant, and other women, complain flow from past acts of discrimination antedating the coming into effect of the Sex Discrimination Act 1975 ... In effect the attitude of the Post Office is the not uncommon one of supporting sex equality – but not yet. The attitude of the union is similar ... There is no doubt that the Sex Discrimination Act 1975 does not operate retrospectively, but some acts of discrimination may be of a continuing nature and it would seem to us to be in accordance with the spirit of the Act if it applied as far as possible to remove the continuing effects of past discrimination.[218]

Steel thus raised similar issues to those dealt with in the U.S. Supreme Court case of *Albemarle Paper Co. v. Moody*[219] at the very time when the British Sex Discrimination Act 1975 was being drafted. This makes the effective locking-in of the effects of past discrimination, supposedly in order to meet the requirements of the respective anti-discrimination legislation, doubly ironic. In *Steel* the E.A.T. went on to hold that the requirement that postal walks were awarded according to seniority was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could do so, within the meaning of section 1(1)(b)(i) of the Act, and that the requirement was to the complainant's detriment within section 1(1)(b)(iii). Accordingly, unless the Post Office could show that the requirement was justifiable irrespective of sex, there had been an act of discrimination against the complainant.[220] It dealt with this issue by going back to the U.S. Supreme Court case, which had acted as the catalyst for the prohibition of indirect sex

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[218] *Id.* at 67G.
[219] 422 U.S. 405 (1975); *see supra* n. 104.
[220] *Id.* at 68B, E-G.

discrimination in the United Kingdom, namely *Griggs v. Duke Power Co.*:[221]

> Although the terms of the Act there in question are different from those of the Sex Discrimination Act 1975, it seems to us that the approach adopted by the court is relevant. In other words a practice which would otherwise be discriminatory, which is the case here, is not to be licensed unless it can be shown to be justifiable, and it cannot be justifiable unless its discriminatory effect is justified by the need – not the convenience – of the business or enterprise.[222]

Price and *Steel* were quite revolutionary decisions in their day. Nevertheless, their implications were apparently overlooked less than a decade later. In *Huppert v. University Grants Committee and University of Cambridge*,[223] another case supported by the E.O.C., a 39-year-old woman who had had her job application rejected by the University of Cambridge because she was over 35 complained that she had been the victim of indirect sex discrimination. The job had been advertised because money had been made available to public universities throughout the U.K. by their central funding body, the (now-defunct) University Grants Committee (U.G.C.), which had specified that it be used for 'new blood' appointments of junior faculty aged 35 or below. Ms. Huppert was clearly qualified for the job in question because, after the initiation of proceedings, the University decided to appoint her in any event and the case against it was therefore dropped. The case against the U.G.C. proceeded. The industrial tribunal ruled that the fact that the funding policy was so inflexible as to permit no exceptions for female applicants who could show that their career had been delayed while they had a family meant that this was indeed a case of unjustified indirect sex discrimination.

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[221] 401 U.S. 424. (1971).
[222] [1978] 1 W.L.R. 64, 71.
[223] 3 *Equal Opportunities Rev*. 38 (1986).

Clearly neither *Price* nor *Huppert* involved any intent to discriminate against women, while the facts of *Steel* arose precisely because the employer was seeking (albeit half-heartedly) to avoid such discrimination. Yet the claimants were all successful in showing acts of indirect sex discrimination, emphasizing not only that indirect age discrimination focuses on the consequences rather than on the state of mind of the defendant, but also that such indirect sex discrimination could be an effective proxy for age discrimination claims. Yet the case that really brought to the fore the full implications of treating some instances of age discrimination as indirect sex discrimination was brought by another E.O.C.-supported applicant, Miss Helen Marshall. *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)* involved litigation which ran from June 1980 into the early 1990s.[224] It arose after Miss Marshall, a consultant surgeon,[225] had been forced to retire by the local health authority which employed her. It was common ground, so far as both British and European law were concerned, that this meant that she had been dismissed from her employment. The health authority had a policy of requiring its employees to retire when social security pensions become payable, and Miss Marshall had already been retained beyond this point.[226] At the time, the social security pensionable age was set at age 65 for men, but at age 60 for women. Miss Marshall felt that she continued to be highly competent and, indeed, the health authority had already exercised its discretion – as its own policy permitted – to allow her to remain in employment for two years beyond the normal, mandatory retirement age. It therefore seemed to her that her enforced retirement was a simple case of age discrimination, but the law at the time did not recognize such a form of discrimination as being unlawful. Instead she brought a claim of indirect sex discrimination, essentially alleging that a facially neutral requirement – namely retirement at pensionable age – had

[224] [1986] Q.B. 401 (E.C.J.).

[225] In the U.K., medical consultants are known as 'Mr.', 'Mrs.', 'Miss' or 'Ms' and not as 'Dr.'. The same is true of dentists.

[226] There neither was nor is a legally-mandated retirement age: social security pensions are simply deferred while someone continues in employment beyond regular retirement age.

been applied to her which had caused her a disadvantage. It might be said that she had been the victim of both institutional sexism and institutional ageism.

Yet even her claim of indirect sex discrimination faced two serious obstacles under English law. First, there was the limb of the indirect discrimination test which required that the requirement or condition be "such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it. . . ."[227] In fact, women could actually comply with the requirement to retire at pensionable age just as easily as men. Since she could not satisfy the demands of this statutory provision, domestic British legislation was unable to assist Miss Marshall's claim. As explained above,[228] it was not until 2001 that this defect in the legislation was rectified (and, even then, only in cases relating to employment or vocational training) to have the effect that the criterion need only disadvantage a substantially higher proportion of women than of men.[229] In any event, the Sex Discrimination Act 1975 also specifically barred claims arising out of a "provision in relation to . . . retirement."[230] English law was therefore again unable to assist her. Instead, Miss Marshall attempted to rely directly on a Directive of the European Union.[231]

Article 1(1) of Council Directive 76/207/E.E.C. provided that:

> The purpose of this directive is to put into effect in the member states the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working

[227] Sex Discrimination Act 1975, § 1(1)(b)(i).

[228] *Supra* n. 207.

[229] Sex Discrimination Act 1975, § 1(2), as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (S.I. 2006, No. 2660), regulation 3.

[230] Sex Discrimination Act 1975, § 6(4).

[231] Council Directive 76/207/E.E.C.

> conditions and . . . social security. This principle is hereinafter referred to as 'the principle of equal treatment.'

Article 5(1) of the Directive provided that: "Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex." Article 5(2) continued: "To this end, member states shall take the measures necessary to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished. . . ."

While this Directive undoubtedly covered the issue at hand,[232] there was another problem. As an instrument of public international law, European Directives are addressed only to Member States and are therefore enforceable by one country – or, more commonly, by the European Commission acting on behalf of the Union as a whole – against the country allegedly in default. While a nation may be in default of its international obligations imposed by such a Directive, the latter confers no rights on individuals. In *Marshall*, however, the European Court of Justice, to which the English Court of Appeal had referred the case for a definitive ruling on European law, decided to take an innovative approach. In a decision which would undoubtedly be labeled 'activist' in the United States, it emphasized its own jurisprudence which had held that a Member State should not be able to take advantage of its own non-compliance with European law.[233] Since the health authority was a public body,[234] and the Directive was expressed in sufficiently "clear and unconditional" terms,[235] it went on to hold that the Directive could override domestic English law and be enforced against the authority so as to enable Miss Marshall to obtain compensation.[236] Public employers guilty

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[232] [1986] Q.B. 401, ¶ 38.
[233] *Id.* at ¶ 49.
[234] *Id.* at ¶ 50.
[235] *Id.* at ¶¶ 52–55.
[236] *Id.* at ¶ 56.

of perpetrating age discrimination as a form of indirect sex discrimination could now be sued for so doing.

Essentially the converse issue arose in *Barber v. Guardian Royal Exchange*.[237] The normal pensionable age for employees at Mr. Barber's place of work was 62 for men and 57 for women. The pension scheme provided, however, that all members of the pension fund could claim an immediate pension if they were 'retired' by their employer at any time during the seven years before they reached the relevant age. Mr. Barber was dismissed for redundancy at the age of 52. He was not granted an immediate pension, which was instead deferred until he turned 62. If Mr. Barber had been a woman aged 52, he would have received an immediate pension. The case had added poignancy because Mr. Barber died while the proceedings were in progress, and the case was continued by his widow. On another reference from the Court of Appeal, the European Court of Justice adopted reasoning very similar to that in *Marshall* to decide that discriminating between men and women by providing for pension benefits to be payable on retirement at different ages was unlawful.[238]

Until the judgment in *Barber*, it had been conventional in the United Kingdom for men to have a retirement age of 65 while women had a retirement age of 60. *Barber* suggested that this state of affairs needed revision, and the matter was given added urgency when the trustees of a pension scheme, established by a group of companies which had just gone out of business, sought direction from the English High Court as to how to distribute the assets of the fund.[239] The High Court in turn referred the matter to the European Court of Justice, which held that from May 17, 1990 onwards, it was unlawful for male and female pension benefits to be provided at different retirement ages and that, until any scheme was amended to come into line with this ruling, male members of a pension scheme were entitled to be treated as if their normal retirement age was the same as that applicable to female members. In most case this meant that a *de facto* common

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[237] [1991] 1 Q.B. 344 (E.C.J.).
[238] *Id.* at ¶ 32.
[239] *Coloroll Pension Trustees Ltd. v. Russell* [1995] I.C.R. 179 (E.C.R.).

pensionable age of 60 was introduced.[240] Concerned that enabling men to take pensions several years earlier than had previously been the norm would cause an infeasible imbalance between those contributing to pension schemes through employment and those drawing benefits from them, the government introduced the Pensions Act 1995 to enable every scheme to equalize its pensionable ages, with such power of amendment backdated to May 17, 1990.[241] Most indeed took the opportunity not to reduce men's pensionable age to 60, but to raise women's pensionable age to 65.

The limits of viewing age discrimination as a form of indirect sex discrimination were demonstrated in *Secretary of State for Trade and Industry v. Rutherford (No 2)*.[242] The applicants were male employees dismissed by their respective employers when they were over 65. They were denied compensation in accordance with legislation that precluded such awards to those over pensionable age.[243] They claimed that this meant that they were victims of indirect sex discrimination in that the upper age limit provisions had a disparate impact on men because (i) more men worked beyond the age of 65 than did women, (ii) that such a disparity could not be objectively justified, and (iii) that European Union law meant that these statutory bars to compensation should be ignored. On appeal, however, the House of Lords ruled that the claimants were seeking to use the wrong comparators. The right approach was to compare the position of the men in question with women in work who were also 65. On this basis, it could be seen that the statutory bar to compensation applied to both sexes equally and so there was no indirect sex discrimination.

From European Union to European Convention on Human Rights

As *Rutherford* illustrates, even after the changes to pensionable age were made, apparent disparities between the

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[240] *Id.*
[241] Pensions Act 1995, § 62, 63(7).
[242] [2006] I.C.R. 785 (H.L.).
[243] Employment Rights Act 1996, § 109(1)(b), 156(1)(b).

sexes concerning other age-related entitlements continued to exercise the courts. Michael Matthews was 64 when, some time before the year 2000, he was refused a concessionary bus pass on the grounds that he was not of pensionable age. The pass would have been given to a woman. Finding European Union law unhelpful on this point because the latter dealt essentially with work-related matters, Matthews – backed on this occasion by the campaigning civil liberties group, Liberty – decided instead to make an application to the European Court of Human Rights.[244] He alleged infringement of his rights under the European Convention on Human Rights, specifically Article 14 (the prohibition of discrimination) and Article 1 of the First Protocol to the Convention (the protection of property). When, at a preliminary hearing, the Court held the case admissible, the British government caved in and brought forward new legislation. "[I]t appeared likely that the government would lose a discrimination case before the European Court of Human Rights and it therefore decided to equalise the age of men's eligibility with that of women."[245] The Travel Concessions (Eligibility) Act, containing just three sections, became law on February 26, 2002.

Human Rights Act 1998

The case of Michael Matthews was the precursor to another instrument in the delegitimization of age discrimination within the United Kingdom. In 1998 the U.K. Parliament had passed the Human Rights Act (H.R.A.), which incorporated the European Convention on Human Rights into English law. However, the H.R.A. did not take effect until October 2, 2000 and so came too late to assist Mr. Matthews. Whereas he had to go to the considerable difficulty – not to mention cost, defrayed in his case by Liberty – of lodging a complaint with the European Court of Human Rights in order to seek redress, anyone in the U.K.

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[244] *See* www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2000/bus-passes.shtml.

[245] House of Commons Library Research Paper 01/80, October 30,2001, www.parliament.uk/parliamentary_publications_and_archives/research_papers/research_papers_2001.cfm (last visited, Feb. 7, 2009).

wishing to bring a claim under the Convention on or after October 2, 2000 has been able to do so in the ordinary British courts.[246]

Nevertheless, the position regarding age discrimination was still by no means clear cut. Age discrimination is not mentioned explicitly in the Convention. Indeed, it is doubtful whether the concept was even contemplated at the time that the Convention was drafted, but what has come to be known in the United States as 'originalism' – a method of interpreting the Constitution or federal legislation which purports to give effect to the meaning that it was commonly thought to have at the time that it was passed – has never been the European style.[247] On the contrary, the European Court of Justice has emphasized that "the Convention is a living instrument which ... must be interpreted in the light of present-day conditions."[248] So the absence of any express mention of age discrimination in the Convention is by no means fatal to its ability to assist those claiming that they have suffered such discrimination. As the Matthews case illustrated, for these purposes the most significant part of the Convention is to be found in Article 14 of the Convention, which says:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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[246] Human Rights Act 1998, § 7, 8.

[247] It is therefore somewhat ironic to read one of the most prominent advocates of originalism claim that it is a civil-law approach: see A. Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in *A Matter of Interpretation: Federal Courts and the Law* ed. Amy Gutmann (Princeton: Princeton University Press, 1988). In fact, the civil-law dominated European Court of Human Rights has actively encouraged the practice of going beyond the formal rules to consider their indirect and practical effects. See, for example, *Adolf v. Austria* 4 E.H.R.R. 313 at ¶ 30 (1982); *Duinhof v. Netherlands* 13 E.H.R.R. 478 at ¶ 34 (1991).

[248] *Tyrer v. U.K.* 2 E.H.R.R. 1 at ¶ 31 (1979–80).

The really important words in Article 14 for present purposes are the last three: "or other status." The question that they posed was whether "other status" included age. Almost all the other categories listed in Article 14 concern ascribed or inherited characteristics rather than traits chosen voluntarily. On this basis age would appear to be covered, since it too is ascribed and is clearly not a product of choice. The inclusion of religion and political or other opinion, however, casts some doubt on this notion of "other status" as encompassing other forms of ascribed or inherited characteristics. This ambiguity was exacerbated by two other difficulties. The first is that, just like the Fourteenth Amendment of the U.S. Constitution, Article 14 is enforceable only against public bodies.[249] The second is that, *unlike* the Fourteenth Amendment of the U.S. Constitution, Article 14 does not create a free-standing right. It can be invoked only when another Article in the Convention or in one of the Protocols is also implicated. (This was the reason why Mr. Matthews had to invoke Article 1 of the First Protocol in his claim regarding a concessionary bus pass.)

Nevertheless, there was a considerable body of opinion which took the view that age discrimination was indeed caught by Article 14. In the month that the Human Rights Act came into force, the British Medical Association (B.M.A.) – the body which represents doctors in the U.K. – counseled those working in the National Health Service – the name for the socialized healthcare system in the U.K. – that:

> A 'blanket ban' on providing certain treatments on the ground of age, for example, may contravene patients' right to be free from torture, inhuman or degrading treatment (Article 3) and also their right to respect for private and family life (Article 8). ... An example of a breach of Article 14 could be rationing which appears solely based on age rather than evidence of effectiveness and benefit for the individual. Age discrimination falls within the ambit of Article 14, even though it is not mentioned

[249] Human Rights Act 1998, § 6.

> explicitly, because the list in Article 14 is not exhaustive and includes "other status". Clinical indicators demonstrating that older people in general benefit less from a certain treatment may not be accepted as a justification if such arguments are applied in a blanket way rather than treatment decisions being based on individual assessment. It is very unlikely, however, that health authorities and individual doctors could be seen as obliged to provide futile, ineffective or unproven treatment. It is important, therefore, that attention is paid to the individual circumstances of each case and the requirements of the individual patient.[250]

In a Parliamentary Written Answer on precisely this issue, the Parliamentary Under-Secretary of State at the Department of Health, Lord Hunt of King's Heath, accepted that Article 14 might outlaw such age discrimination, but refused to be definitively drawn on that point.[251] However, one of the most important features of both the B.M.A.'s advice and Parliamentary debate is that, since the Convention is to be treated as a 'living document,' once a significant body of individuals come to believe that Article 14 prohibits discrimination based on age, then that actually becomes the true interpretation.

Direct Discrimination Revisited

Gerald McGinley's gloomy prediction "that only the grosser forms of discrimination will be caught by the British Acts"[252] has thus turned out to be embarrassingly far off the mark. His further claim that "the United States approach is more likely to catch the subtler and more pervasive forms of discrimination in

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[250] See www.bma.org.uk/ap.nsf/Content/HumanRightsAct~relevant~article14.

[251] *Hansard* H.L. vol. 622, col. WA163 (March 1, 2001).

[252] Gerald P. McGinley, *Judicial Approaches to Sex Discrimination in the United States and United Kingdom – A Comparative Study*, 49 Mod. L. Rev. 413, 444 (1986).

the market place than will the British"[253] has largely proved to have got things the wrong way round. Strangely for an article published in the mid-1980s, McGinley made no mention at all of the *Marshall* litigation and relied far too heavily on data which were already out of date by the time of publication. Indeed, the tale of anti-discrimination law in the United Kingdom still had one more twist to come before age discrimination was prohibited.

The combination of repeated focus on indirect discrimination, greater exposure to European legal reasoning and the embracing of the European Convention on Human Rights eventually led to a fundamental reappraisal even of the hitherto unproblematic notion of direct discrimination. While the role of the decision-maker's state of mind so far as indirect discrimination had always been considered irrelevant, direct discrimination had always been considered an intentional wrong. This position had seemed to follow naturally from the fact that the U.K. expressly based its template for anti-discrimination law on both the Civil Rights Act of 1964 and on the judgment of the U.S. Supreme Court in *Griggs v. Duke Power Co.*. In *Griggs* it was, after all, accepted that the Supreme Court first had to determine whether the employer's policy had been adopted with an intent to discriminate against Negroes. It held, agreeing with the Court of Appeals, that there had been no such intent and so there could be no question of disparate treatment.[254] Only then did the question of disparate treatment enter into the equation. The Supreme Court clearly confirmed this approach when it insisted on looking into the motivation of the defendant employer in both *Hazen Paper Company v. Biggins*[255] and *Kentucky Retirement Systems v. E.E.O.C.*.[256]

Yet despite the fact that the U.K. based its template for anti-discrimination law federal U.S. law, the application of that template subsequently created a momentum of its own which, with considerable assistance from European institutions, took British law much further. By 2000 it had reached the point where

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[253] *Id.* at 445.
[254] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).
[255] 113 S. Ct. 1701 (1993); *supra* n. 161.
[256] 128 S. Ct. 2361 (2008); *supra* n. 173.

it could be asserted without fear of contradiction that even direct discrimination need not be intentional. This was confirmed, by a majority of 4–1, in the House of Lords in a case concerning alleged direct racial discrimination, *Nagarajan v. London Regional Transport*.[257] Lord Nicholls of Birkenhead explained:

> in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? . . . Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances. The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination . . . as distinct from indirect discrimination . . ., the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign. For instance, he may have believed that the applicant would not fit in, or that other employees might make the applicant's life a misery. If racial grounds were the

[257] [2000] 1 A.C. 501.

> reason for the less favourable treatment, direct discrimination . . . is established.[258]

Since the framing of direct discrimination in every U.K. anti-discrimination law instrument is virtually identical, it is clear that this approach is to be applied to all types of prohibited discrimination, even to age discrimination, which only became unlawful six years after *Nagarajan* was decided. It does not matter whether less favourable treatment occurs directly or indirectly, nor is it material what motivated that treatment. The relevant issues relate to conduct, not state of mind, and must be judged objectively in terms of their consequences. As Lord Browne-Wilkinson pointed out in his dissent in *Nagarajan*, this means that the perpetration of unlawful discrimination under English law has become "something akin to strict liability. . . ."[259]

In an article published in 1985, Steven Willborn argued that "Title VII has spawned two models of discrimination, but only one theory."[260] His two models were disparate treatment and disparate impact. His complaint was that, while the disparate treatment model could be explained on the basis that it is both immoral and uneconomic, the disparate impact model had suffered from a "theoretical vacuum"[261] which had led to inconsistencies in courts' reasoning in applying it. Unfortunately, Willborn attempted to fill this vacuum by recourse to dubious economic analysis, attributing disparate impact discrimination simply to market imperfections.[262] He labeled his view the 'statistical discrimination' theory.[263] But his whole analysis suffered from a fundamental flaw. He insisted on seeing both forms of discrimination purely from the point of view of the decision-maker.

As this discussion has shown, the history of anti-discrimination law in the United Kingdom has involved its

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[258] *Id.* at 511–2.

[259] [2000] 1 A.C. 501, 510.

[260] Steven L. Willborn, *The Disparate Impact Model and Discrimination: Theory and Limits*, 34 Am. U. L. Rev. 799, 800 (1984–85).

[261] *Id.* at 801.

[262] *Id.* at 814, 818.

[263] *Id.* at 814.

moving from a position where discrimination involved the application of good taste – judged from the point of view of the decision-maker – to a point where it is presumptively unlawful – judged objectively according to the consequences on those affected by the decisions taken. As the Constitutional Court of South Africa put it in *The City Council of Pretoria v. Walker*,[264] "The inclusion of both direct and indirect discrimination within the ambit of the prohibition ... evinces a concern for the consequences rather than the form of conduct." In other words, both direct and indirect discrimination in the United Kingdom (and often in other jurisdictions too) share the *same* theoretical underpinning. This is a rights-based approach: every person simply has the right not to be subjected to unjustified discrimination. Seen in this light, it was purely a matter of time before age discrimination was also finally made unlawful in its own right.

V. AGE DISCRIMINATION LAW IN THE UNITED KINGDOM

Employment Equality (Age) Regulations 2006

In 1995, one American asked whether it was now time for the United Kingdom to follow the United States in enacting age discrimination legislation.[265] He answered in the affirmative and commented that: "because of the United Kingdom's peculiar role in the European Union, it may choose not to follow the E.U.'s lead in the realm of social and economic legislation. This may be a competing or a cooperative force towards adoption of a statute such as the A.D.E.A…."[266] In the event, and as the preceding historical account suggests, he could scarcely have turned out to be more wrong. As already noted, age discrimination became definitively unlawful within the United Kingdom only on October

[264] (1998) 3 S.A. 24 at ¶ 31. *See supra* n. 115.

[265] Bryan D. Glass, *The British Resistance to Age Discrimination Legislation: Is it Time to Follow the U.S. Example?*, 16 Comp. Lab. L.J. 491 (1995).

[266] *Id.* at 536.

1st, 2006,[267] when it put into practice a new E.U. Equal Treatment Directive which mandated such regulations.[268]

Six months later, 972 claims had been lodged with employment tribunals.[269] This compared with 28,153 claims of sex discrimination; 3,780 of racial discrimination; 5,533 of disability discrimination; 648 of religious discrimination; and 470 claims of discrimination on grounds of sexual orientation.[270] Age discrimination claims thus made up 2.46% of the total number of discrimination claims during that period,[271] while claims of racial discrimination made up 9.56%, sex discrimination 71.17% and disability discrimination 13.99%. In the U.S., charges of age discrimination filed with the E.E.O.C. during the whole of 2006 represented 21.8% of all complaints of discrimination (as compared to 35.9% of claims relating to racial discrimination, 30.7% being of sex discrimination, and 20.6% of disability discrimination).[272] Although none of the seventeen cases which proceeded to a full hearing within that very short time-frame actually resulted in success for the claimant,[273] age discrimination claims were still very much in their infancy in the U.K.. Such claims can certainly be expected to rise both in absolute terms and relative to other types of discrimination claims.

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[267] S.I. 2006, No. 1031. The equivalent regulations for Northern Ireland are the Employment Equality (Age) Regulations (Northern Ireland) 2006 (S.I. 2006, No. 261). Although, as their name implies, both sets of Regulations are forms of secondary legislation, they have exactly the same force of law as an Act of Parliament. The reason for their being issued as Regulations is simply that section 2(2) of the European Communities Act 1972 provides for this as a quick means of passing laws which are intended to comply with European Directives.

[268] Council Directive 2000/78/EC.

[269] Employment Tribunal Service (E.T.S.), *Employment Tribunal and EAT Statistics (GB): 1 April 2006 to 31 March 2007* (London: H.M.S.O., 2007) p. 2.

[270] *Id.*

[271] Note that employment tribunals hear many claims which do not allege any form of unlawful discrimination, such as claims of unfair dismissal or of unauthorized deductions from wages.

[272] E.E.O.C., *Charge Statistics FY 1997 Through FY 2007*, http://www.eeoc.gov/stats/charges.html.

[273] E.T.S., *supra* n. 269 at 3. This contrasts with 56 claims which reached a settlement after conciliation, and a further 51 claims which were withdrawn for unspecified reasons.

Indeed, the first high-profile case has already been settled: Selina Scott, a 57-year-old nationally-known television newsreader, has recently received over £250,000 as part of an out-of-court settlement after the network that had apparently lined her up to provide maternity cover for the regular presenter – but which then subsequently overlooked her in favor of two other presenters, aged 28 and 32 respectively – apologized and caved in to her claim that the reason for her non-appointment was her age.[274] Moreover, there are predictions that the current economic crisis will lead to a mushrooming of age discrimination claims over the next year or so unless businesses are careful in developing appropriate criteria for selecting employees for redundancy.[275]

There are significant differences between the British Employment Equality (Age) Regulations 2006 and the American A.D.E.A., even though they are both said to apply only to work-related issues.[276] For example, the British Regulations cover employment agencies,[277] education and training organizations,[278] institutions of further and higher education,[279] bodies that award or certify qualifications,[280] trade or business organizations[281] in addition to potential,[282] actual[283] or former[284] employers (and no matter whether in the private or public sectors). In accordance with the overall anti-discrimination model, the Regulations

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[274] Urmee Khan, *Selina Scott Reaches Six Figure Settlement with Channel Five over Age Discrimination*, Daily Telegraph December 5, 2008.

[275] Rosie Murray-West, *Age Discrimination Claims to Rise as Redundancies Soar*, Daily Telegraph (December 29, 2008).

[276] The Employment Equality (Age) (Amendment No. 2) Regulations 2006 (S.I. 2006, No. 2931) extend the application of the Regulations to occupational pension schemes.

[277] Employment Equality (Age) Regulations 2006, regulation 21, www.ofmdfmni.gov.uk/draft_employment_equality_age_regulations-2.pdf, (last visited Feb. 7, 2009).

[278] *Id.*, regulation 20.

[279] *Id*., regulation 23.

[280] *Id.*, regulation 19.

[281] *Id.*, regulation 18.

[282] *Id.*, regulation 7.

[283] *Id.*

[284] *Id.*, regulation 24.

prohibit both direct and indirect age discrimination,[285] as well as victimisation[286] and the giving of instructions to discriminate.[287] Harassment on the grounds of age is also made unlawful,[288] as is aiding an act of discrimination.[289] Employers can be vicariously liable.[290] The standard affirmative defense of genuine occupational requirement is also available,[291] and again requires objective justification rather than a subjectively benevolent motive.

Reflecting some of the case law already discussed regarding indirect discrimination and the Human Rights Act, the Regulations also mandate employers to consider applications from employees who wish to continue working beyond the otherwise standard retirement age.[292] Nor is this a mere formality to which employers need pay only lip-service. The procedure which must be followed in order for an employer to fulfill the requirement to consider such an application is set out in considerable detail.[293] However, the Regulations do explicitly permit employers to set a default retirement age, so long as it is set at age 65 or above.[294] It therefore remains the position that employees will have to show a good reason for rebutting the presumption that they will retire at such age rather than employers' having to explain in each case why forced retirement is appropriate.

A challenge brought under E.U. law to the very concept of mandatory retirement ages, alleging that they conflict with the requirements of the new Equal Treatment Directive,[295] was

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[285] *Id.*, regulation 3(1).
[286] *Id.*, regulation 4.
[287] *Id.*, regulation 5.
[288] *Id.*, regulation 6.
[289] *Id.*, regulation 26.
[290] *Id.*, regulation 25.
[291] *Id.*, regulation 8.
[292] *Id.*, regulation 47.
[293] *Id.*, schedule 6.
[294] *Id.*, regulation 30.
[295] 2000/78/EC. This Directive does not cover sex or racial discrimination, already covered by the Equal Treatment Directive (76/207/EEC), but applies to religion or belief, disability, age or sexual orientation, as regards access to employment or occupation and membership of certain organizations.

recently brought before the European Court of Justice in a Spanish case, *Felix Palacios De La Villa v. Cortefiel Servicios SA.*.[296] That challenge was, however, unsuccessful because the Court held that Spain's default retirement age of 65 does not go beyond what is appropriate and necessary to achieve the legitimate aim of reducing unemployment.[297] Whether this conclusion is really sustainable is, however, open to doubt since the policy merely means swapping one person in employment for another or, as it has been described in the American context, "the shifting of the problem of insufficient jobs from one age group to another."[298] In any event, it remains unclear whether this judgment is applicable to the United Kingdom, since the U.K. government has never undertaken the sort of detailed analysis of the labor market that the Spanish government had done before introducing its default retirement age.[299] Indeed, the only official justification proffered for allowing employers to continue to impose their own mandatory retirement ages does seem quite weak:

> Whilst an increasing number of employers are able to organise their business around the best practice of having no set retirement age for all or particular groups of their workforce, some nevertheless still rely on it heavily. This is our primary reason for setting the default retirement age.[300]

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[296] C-411/05, [2007] E.C.R. I-8531.

[297] *Id.* at ¶ 58–75. The relationship between Directive 2000/78/EC and the Employment Equality (Age) Regulations 2006 reflects the fact that the European Court of Justice has used the terms 'proportionate' and 'appropriate and necessary' interchangeably. Thus Article 6(1)(a) of the Directive talks of justifiable means being "appropriate and necessary," whereas regulation 3(1) of the Regulations prefers the epithet "proportionate".

[298] Howard C. Eglit, *Is Compulsory Retirement Constitutional?*, 1 Civ. Lib. Rev. 87, 92 (1974).

[299] E.U. law operates what is called a 'margin of appreciation,' whereby it is permissible for the same over-arching rules to be implemented slightly differently in each Member State so as to accord with local customs, traditions and legal principles. *See e.g.* Case C-331/88 *R v. Minister for Agriculture, Fisheries & Food, ex parte Fedesa* [1990] E.C.R. 1–4023 at ¶ 13.

[300] Department of Trade & Industry, *Equality and Diversity: Coming of*

An English case on much the same point, brought by the charity Age Concern, therefore remains on the Court's docket awaiting resolution, although the Advocate-General's recent opinion suggest that the case is likely to be decided in the same way as *Felix Palacios*.[301]

Reverse Age Discrimination

There are currently thought to be several hundred cases which have been stayed pending the final judgment of the European Court in the Age Concern case. But disputes over pensions under the Regulations have raised other issues too. In *Bloxham v. Freshfields Bruckhaus Deringer*,[302] the defendant international law firm had been paying partners' pensions out of the firm's annual profits. Such payments were subject to a cap of 10% of total annual profits. This provoked a growing perception of "intergenerational unfairness."[303] As the ratio of retired partners to younger, active partners grew, the latter saw an ever greater proportion of the firm's profits being used to pay for retired partners' pensions while they themselves faced the prospect of the value of their own pensions being eroded because the expansion of the firm meant that the cap would soon come into play.[304]

After much consultation, Freshfields replaced the scheme with a less generous arrangement, which came into force in May 2006. Under transitional arrangements, partners over 50 could retire under the old scheme provided they did so before 31 October 2006. Those retiring between the ages of 50 and 54 would, however, receive a reduced pension. The complainant,

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Age – Consultation on the draft Employment Equality (Age) Regulations 2006 (London: H.M.S.O., 2005) at ¶ 6.1.14.

[301] *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-388/07: opinion of Advocate-General delivered September 23, 2008.

[302] ET/2205086/06 (unreported), judgment given October 9, 2007.

[303] *Id.* at ¶ 120.

[304] *Id.* at ¶ 130(1).

Peter Bloxham, former head of insolvency at the firm, had planned to retire at age 55 in March 2007, but decided instead to retire on 31 October 2006 at age 54 in order to retain the benefits under the original scheme, albeit that his pension was then subject to the stipulated reduction of 20%. He argued that this amounted to direct age discrimination. The employment tribunal which heard the case agreed,[305] but held that it was objectively justified. The attempt to provide a more financially sustainable pension scheme that reduced the intergenerational unfairness on younger partners was a legitimate aim,[306] while the 20% reduction of Mr. Bloxham's pension was entirely proportionate to that aim.[307] The tribunal effectively decided that, in order to eliminate a serious form of age discrimination of long standing, it will sometimes be necessary to treat others less favourably. To have held otherwise would have prevented necessary and worthwhile reform. Indeed, Freshfields had consulted widely[308] and taken expert advice,[309] yet no less discriminatory solution could be conceived.[310] Moreover, those affected were partners with a direct ability to influence the decision-making processes of the firm, and so were hardly in the position of junior employees with little or no voice in the way that it operated.

Bloxham has echoes of *O'Connor v. Consolidated Coin Caterers Co.*,[311] since both cases involve one person over 40 seeking to show that he has been the victim of age discrimination because he has been treated less favorably than another person over 40. Just as in the U.S., it is clear that British age discrimination law recognizes such claims and does not require that the comparator be someone aged under 40. Indeed, U.K. law goes much further. The protection from age discrimination is not restricted to those over 40. In fact, there is absolutely no minimum age at which age discrimination may be successfully claimed. In answer to the question that Representative Celler

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[305] *Id.* at ¶ 94, 96.
[306] *Id.* at ¶ 124.
[307] *Id.* at ¶ 130.
[308] *Id.* at ¶¶ 35–38.
[309] *Id.* at ¶ 29.
[310] *Id.* at ¶ 129.
[311] 116 S. Ct. 1307 (1996).

posed when it was first proposed to prohibit age discrimination in the United States: "At what age would discrimination occur?"[312] the United Kingdom has responded: "Any age"!

The recent case of *Galt v National Starch & Chemical Ltd.*[313] illustrates this well. The claimants had been dismissed for redundancy by the defendant company, and had received enhanced redundancy payments based on a policy which provided for three weeks' pay per year of service up to age 40 and four weeks' pay per year of service over 40. The claimants contended that this meant that the calculation of these payments favored older employees, so that they had been the victims of age discrimination. At the hearing the company accepted that the scheme treated the claimants less favourably by reason of their age,[314] so that the question for the employment tribunal was whether or not the scheme was objectively justified.[315] In order to show that it was, the company needed to show – as in *Bloxham* – that the discriminatory effect of the scheme represented a proportionate means of achieving a legitimate aim. In fact, the company argued in *Galt* that its aim had been to avoid unrest and to bring about an orderly and satisfactory closure of the site.[316] The tribunal accepted that this was capable of representing a legitimate aim,[317] but a majority held that this had not been the real purpose behind the policy.[318] The company also submitted, echoing the arguments behind the American A.D.E.A., that favoring older workers was legitimate since older workers found it harder to find new employment. The tribunal, however, was not prepared to accept this contention without evidence and, in any event, it again did not believe that the policy had been introduced or maintained for such a reason.[319] As the tribunal put it, "the disparate treatment … was *a consequence* of the actions of the Company; it was not meted out of itself to achieve the particular

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[312] *Supra* n. 132.
[313] ET/2101804/07 (unreported), judgment given November 27, 2007.
[314] *Id.* at ¶ 2, 11.
[315] *Id.* at ¶ 12.
[316] *Id.* at ¶ 5.
[317] *Id.* at ¶ 15.
[318] *Id.* at ¶ 23.
[319] *Id.* at ¶ 18.

goal."[320] It therefore followed that the claimants had suffered unlawful age discrimination and the case was re-listed for a hearing as to the appropriate remedy,[321] at which various awards of compensation were made.[322]

Younger Employees

The Employment Equality (Age) Regulations 2006 therefore protect young and old alike (although, somewhat anomalously, there is a lower national minimum wage for those under 18).[323] Claims for discrimination on the grounds of youth are therefore just as feasible as those on grounds of maturity. A particularly egregious example of discrimination on grounds of youth can be found in the case of *Wilkinson v. Springwell Engineering Ltd.*.[324] Miss Wilkinson was taken on by Springwell as an office administrator from January 3, 2007 for a probationary period of three months, though she was subsequently dismissed on March 16, 2007. She was 18 at the time and brought a claim of age discrimination. The tribunal found that she did not have a formal interview and took over the role from her aunt, with whom there was a period of overlap and from whom she received some instruction on her duties.[325] Although the employers argued before the tribunal that Miss Wilkinson's work was error-ridden, the tribunal could find no discernible difference in its quality in comparison to that of both her immediate predecessor and immediate successor.[326] She had been informed in February 2007 that she was doing 90% of her duties and that she would need to improve her work rate over the next few months, but there were no expressions of major concern as to her competence.[327] Yet Springwell asked another, older, administrator to cover some of Wilkinson's work. The tribunal found that:

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[320] *Id.* at ¶ 19.
[321] *Id.* at ¶ 25.
[322] ET/2101804/07 (unreported), judgment given February 20, 2008.
[323] Employment Equality (Age) Regulations 2006, regulation 31.
[324] ET/2507420/07 (unreported), judgment given February 25, 2008.
[325] *Id.* at ¶ 10.4.
[326] *Id.* at ¶ 10.2.
[327] *Id.* at ¶ 10.4.

> the respondents were assuming, on that basis, that a relationship between experience and age almost equating the same on the one hand, and lack of experience and incapability as equating to the same on the other, and therefore that there is a link between age and capability. They were thus making a stereotypical assumption to the prejudice of the claimant.[328]

On 16 March 2007 Springwell terminated Wilkinson's employment without notice and asked her to leave the premises immediately. Wilkinson alleged that she was told that she was "too young for the job." When sent the required pre-claim letter and an (optional) age discrimination questionnaire, the employers declined to answer for reasons which the tribunal found unintelligible.[329] It rejected the employer's defense that Miss Wilkinson had been dismissed for incapability and upheld her claim of age discrimination, based largely upon the aforementioned notion of age stereotyping.[330] It is noteworthy that whereas the U.S. chose to adopt a minimum age for age discrimination laws because of the stereotyping of older workers, this case demonstrates how age discrimination laws in the U.K. have expanded to proscribe the stereotyping of younger workers too. Thus the defense of genuine occupational requirement needs to be proven on a case by case basis in relation to young workers just as much as to those over 40. Simple assertions that a particular employee must be within a certain age range in order to carry out the job successfully will not suffice. So, having previously been earning £146.45 per week – and having worked at the firm for less than three months – Miss Wilkinson was awarded compensation totaling £16,081.12. In other words, she received more than ten times in compensation what she had earned during her brief employment. In its own way, Miss Wilkinson's award has done as much as the claim of the more

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[328] *Id.* at ¶ 10.5.
[329] *Id.* at ¶ 10.9.
[330] *Id.* at ¶ 12–14.

celebrated Selina Scott to bring age discrimination law to general attention.

Miss Wilkinson's case also serves to bring home a major distinction in the application of U.K. age discrimination law as compared to its U.S. counterpart. Since the former renders unlawful any act of discrimination which is based on age, no matter whether that be a matter of maturity or youth, it follows that it is equally impermissible for employers to adopt policies that favor one age group over another. So-called 'positive' discrimination – more commonly known as 'affirmative action' in the U.S. – is just as unlawful in British age discrimination law as 'stereotyping' discrimination, for the simple reason that it has the effect of favoring one section of the population at the expense of another. However, what is usually called 'positive action' in the U.K. – whereby a historically disfavored group is offered guidance and training to enable its members to compete on a level playing-field – is not simply permitted but encouraged.[331] Yet positive discrimination at the point of selection, promotion or other advancement is entirely unlawful, in the same way that discrimination against men is just as unlawful as discrimination against women,[332] and discrimination against a white person is just as unlawful as discrimination against someone of (say) Afro-Caribbean or Asian origin.[333]

Indirect Discrimination

Thus far the cases under the Employment Equality (Age) Regulations 2006 seem essentially to be mimicking the pattern of cases which followed the passage of the Sex Discrimination and Race Relations Acts in 1975 and 1976 respectively. The first cases to be heard have all been ones of direct discrimination, where the discrimination is explicit or overt (though, as under those Acts, it need not be intentional). If this pattern continues to

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[331] Employment Equality (Age) Regulations 2006, regulation 29. See also Sex Discrimination Act 1975, § 43, 47, 48; Race Relations Act 1976, sections 34, 37, 38.

[332] Sex Discrimination Act 1975, § 2.

[333] See Race Relations Act 1976, § 1, 3.

be played out over time, it is to be expected that the focus will subsequently move – unlike in the United States – to claims of indirect age discrimination. As under the amended provisions of the Sex Discrimination Act 1975 regarding indirect employment discrimination,[334] the test for indirect age discrimination involves complainants' being put at an unjustified disadvantage as a result of the application of a "provision, criterion or practice. . . ."[335] There is no requirement for claimants to show that they were subjected to a criterion with which they could not comply.

While it is always a little dangerous to speculate, two instances of potential indirect age discrimination already come to mind. One involves employers who require job applicants to complete online application forms. Figures from the Office for National Statistics show that in February 2006, 45% of those aged 55 or over in the U.K. (and 32% of those aged 45 to 54) had not used a computer in the previous three months (compared to 15% of those aged between 16 and 24).[336] Other figures show that only 61% of households currently have internet access. Any employer which does not permit applicants to complete the relevant forms by hand in the traditional manner is likely to run the risk of perpetrating indirect age discrimination against potential applicants aged (say) 55 or over who do not have internet access. Whether it would prove a successful defense to point out that such access is available free at every public library in the country remains, for the moment at least, a matter of conjecture.

So far as indirect age discrimination against the young is concerned, the increasing number of advertisements that claim that applicants must be graduates has echoes of *Griggs v. Duke Power Co.* itself.[337] So long as the nature of the employment really does demand graduate skills, knowledge or ability,

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[334] Sex Discrimination Act 1975, section 1(2), as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, regulation 3; *supra* n. 207.

[335] Employment Equality (Age) Regulations 2006, regulation 3(1)(b).

[336] *National Statistics Omnibus Survey* 'Adults who have used the internet in the 3 months prior to interview by sex/age (Great Britain)': www.statistics.gov.uk/StatBase/ssdataset.asp?vlnk=6929&Pos=3&ColRank=1&Rank=272.

[337] 401 U.S. 424 (1971).

employers will of course be able to rely on the defense of genuine occupational requirement. Otherwise, however, they run the risk of being found to have perpetrated indirect age discrimination on those aged under 21 (when most university students in the U.K. graduate).

VI. CONCLUSION

Two Models of Anti-Discrimination Law

Over thirty years ago, Peter Schuck argued that anti-discrimination law could be said to be predicated on the basis of one of two models (or a combination of both).[338] He identified them as the "nondiscrimination model" and the "allocative model"[339] and argued that:

> What most clearly distinguishes the nondiscrimination model from the allocative model is the different attitude implicit in each toward the use of particular attributes such as age to help shape social choice: the one, at least in its purest 'attribute-blind' form, is implacably opposed to such use; the other embraces such a use as a means of defining needs and informing the exercise of discretion.[340]

In other words, the allocative model is re-distributive: it seeks to allocate resources to protected classes of person, in order that they might overcome the present effects of past discrimination or other adversity.[341] The nondiscrimination model, on the other hand, is "a non-dynamic, non-distributive one."[342]

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[338] Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 Yale L.J. 27 (1979–1980).

[339] *Id.* at 38.

[340] *Id.* at 38–9.

[341] See e.g. Robert D. Bickel, *The Non-discrimination Principle and American Higher Education: Judicial Failure to Recognize the Present Effects of Past Discrimination*, 20 Ed. & L. 1 (2008).

[342] Ellis, *supra* n. 176 at 155.

A few years later, Barry Bennett Kaufman examined the legislative history of the A.D.E.A. in an attempt to ascertain "whether Congress intended the Act to embody the allocative model, the nondiscrimination model, or both."[343] He concluded that the legislative history was so sparse as to render a definitive conclusion impossible, and that such evidence as did exist was, in any event, equivocal.[344] Its history after enactment has been no clearer, since it began in 1967 with both lower and upper age limits (of 40 and 65 respectively), and then subsequently had the upper removed but not the lower. The maintenance of these limits is potentially consistent with the allocative model, in that it could encourage the shifting of resources to the protected class, while the removal of the upper limit implies a promulgation of the nondiscrimination principle, whose supporters consistently criticized those limits from the very beginning.[345] Kaufman then turned his attention to Title VII, and noted that the lack of a legislative definition of unlawful discrimination again made the identification of the underlying theory extremely problematic.[346]

It is submitted that this confusion of underlying purpose in U.S. anti-discrimination law has allowed the baleful influence of the old common law to reassert itself. Over twenty years ago, Professor Laurence Lustgarten – an American working at a British law school – compared anti-discrimination law in the United Kingdom unfavorably to that in operation in the United States. He attributed this to the "deadening influence of the common law" which was "brought into sharp focus by a comparison with American civil rights law ..."[347] American federal courts, he said, "do not see [their] task as one of subtle linguistic analysis, nor do they locate statutes in relation to pre-existing *legal* rules. Rather they treat major statutes as blueprints

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[343] Barry Bennett Kaufman, *Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act*, 56 S. Cal. L. Rev. 825, 838 (1982–1983).

[344] *Id.* at 841.

[345] *See e.g.* Myres S. McDougall, Harold D. Lasswell & Lung-Chu Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 28 U. Fla. L. Rev. 639, 649 (1975–76).

[346] *Id.* at 846–7.

[347] Laurence Lustgarten, *op. cit.,* n. 95, at 74 (1986).

of *social* policy."[348] That analysis must now be reversed, superseded by the simultaneous rise of a new school of statutory interpretation in each country.

In the United States, a movement towards textualism, championed by (among others) Supreme Court Associate Justice Antonin Scalia,[349] has seen the federal courts in the United States move towards the very approach formerly applied in the United Kingdom and so decried by Lustgarten. Thus the very absence of express, statutory definitions of such fundamental concepts as 'discrimination,' 'disparate treatment' and 'disparate impact' has meant that the courts have filled these voids with deadening equivocations which have served only to exacerbate the confusion of objectives behind federal anti-discrimination law. There is thus not even any consistency as to the degree of oversight to be applied in discrimination cases. So-called 'strict scrutiny' is applied to cases of alleged racial or religious discrimination,[350] but 'intermediate scrutiny'[351] is applied to cases of sex discrimination, which allegations of age or disability discrimination apparently merit only 'rational basis' review.[352] This might suggest that an allocative model is in play for racial discrimination, except that such prohibitions have been held to apply just as much to discrimination against whites as against any other racial or ethnic group.[353] On the other hand, measures which benefit under-represented groups at the point of decision-making may be tolerated,[354] but sometimes only if they adhere to a confusing formula,[355] and apparently only for another twenty years.[356] Similarly, those in the workplace who are over 40 years

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[348] *Id.* at 74.

[349] Antonin Scalia, *op. cit.*, n. 48.

[350] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006).

[351] *Craig v. Boren*, 429 U.S. 190 (1976); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

[352] See e.g. *Federal Communications Commission v. Beach*, 508 U.S. 307 (1993).

[353] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

[354] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[355] *Id.* at 335–41.

[356] *Id.* at 343.

of age apparently merit protection which those under 40 do not enjoy – again suggesting an allocative model at work in their favor – but, as a result of the deadening effects of the common law-style application of the very concept of discrimination, they are then easily denied occupational pension rights which are often the most important benefit which they enjoy. As Schuck predicted, this inadvertent combination of the models has "set policy adrift from its moorings …, for each model generates distinctive tendencies and implications that are at war with one another."[357]

The Rights Model

Over the same period, by contrast, British courts have become accustomed, in Lester's admiring phrase, to approaching statutory interpretation "purposively, rationally, and in the European way."[358] Indeed, it is clear that: "By the late 1980s, the European influence upon [the] most senior judges – the Law Lords and the Court of Appeal – was encouraging the development of a progressive and enlightened jurisprudence."[359] The United Kingdom has thus moved steadily towards an ever-stronger embrace of the nondiscrimination model, which is perhaps best summarized in the first sentence of Article 26 of the United Nations Covenant on Civil and Political Rights. This provides that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."[360] Of course, the right to equality before the law does not imply that every difference in treatment must be discriminatory. What it does mean is that no-one should be treated in a particular

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[357] *Supra* n. 338 at 84.

[358] Anthony Lester, 'Discrimination: What Can Lawyers Learn from History?' [1994] *Pub. L.* 224, 230.

[359] *Id.* at 232. See *Pickstone v. Freemans plc* [1988] I.C.R. 697 (H.L.); *Bromley v. H. & J. Quick Ltd.* [1988] I.C.R. 623 (C.A.); *Leverton v. Clwyd County Council* [1989] I.C.R. 33 (H.L.); *Hampson v. Department of Education and Science* [1989] I.C.R. 179 (C.A.), [1990] I.C.R. 511 (H.L.); *James v. Eastleigh B.C.* [1990] I.C.R. 554 (H.L.).

[360] International Covenant on Civil and Political Rights, U.N. G.A. Res. 2200A (XXI), December 16, 1966; entered into force March 23, 1976 (999 U.N.T.S. 171).

manner only because he or she is identified as a member of a particular social group. "A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26."[361] Or, as the European Court of Human Rights phrased it in its June 2002 judgment in *Willis v. the United Kingdom*: "[A] difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aims sought to be realised'."[362]

Yet this is arguably something that goes beyond the nondiscrimination model that Schuck had envisaged. Indeed, his bifold classification of anti-discrimination law into the nondiscrimination and allocative models fails to appreciate another distinction, noted by Alan David Freeman in the context of racial discrimination, that is even more fundamental.[363] The real lesson of the development of anti-discrimination law in the United Kingdom, culminating in the prohibition of age discrimination without upper or lower limits, is that the true distinction to be made is one of perspective. Is the alleged discriminatory act to be viewed from the point of view of the person making the decision, or from that of the person whom that decision affects? [364] Assuming an unrealistic degree of freedom of choice, the common law has always viewed things from the perspective of the decision-maker. The whole point of the American civil rights movement, however, was to re-focus public policy and the law on the situation of ordinary people who did not always enjoy significant autonomy. As its name implied, it sought

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[361] *S.W. Broeks v. The Netherlands* United Nations Human Rights Committee, Comm. No. 172/1984, May 12, 1999, at ¶ 13. One obvious instance where a difference in treatment will often be justified is where it accommodates someone with a particular disability. See, in the U.S., the Americans with Disabilities Act (A.D.A.) of 1990 and, in the U.K., the Disability Discrimination Act 1995 (which was expressly modeled on the A.D.A.).

[362] Eur. Ct. H.R., Appl. 36042/97, judgment given June 11, 2002, at ¶ 39.

[363] Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1977–1978).

[364] *Id.* at 1052.

a rights-based approach, focused on the position of those subjected to the treatment in question. The true rights perspective means, of course, that no-one should be subjected to unjustified discrimination, irrespective of whether that occurs intentionally, negligently, by complete accident or with the most benevolent of motives. Every instance of unjustified discrimination constitutes a rights violation. And every such instance should enable the victim to claim appropriate compensation.

This rights-based approach explains why restricting the ambit of age discrimination laws only to those aged over 40 could never have been tolerated. While the young may face different challenges in the workplace, they enjoy the same rights as their more mature colleagues. Similarly, it explains why the motivation and reasoning behind an act of direct discrimination are totally irrelevant: what matters is that someone suffered unjustifiably as a result of the use of inappropriate criteria. It also explains why the law must constantly be vigilant to ensure that instances of indirect discrimination (or disparate impact) are identified and rectified with vigor. The shame is that federal U.S. law currently either fails to live up to these objectives or equivocates in confusion. The picture of anti-discrimination laws on either side of the Atlantic shows two victories for the converts. While the U.S. continues to cling to the English common law, it is the United Kingdom's anti-discrimination law model that now reflects more accurately the aspirations behind the U.S. Civil Rights Act.