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Theories Of Employment Discrimination In The United Kingdom And The United States*

by Steven L. Willborn**

I. INTRODUCTION

Both the United States and the United Kingdom have accepted the law as an appropriate instrument for dealing with the problem of employment discrimination. In the United States, there are several federal statutes and literally hundreds of state and local laws that prohibit employment discrimination. In the United Kingdom, three statutes constitute the principal governmental response to the issue. The general approach to antidiscrimination legislation in the United States and the United Kingdom is quite similar. Both countries prohibit employment discrimination with broad statutory language, both establish agencies to administer the laws, both emphasize mediation and conciliation as a means of settling disputes, and both repose ultimate enforcement authority in the courts. These similarities are largely the product of an historical cross-

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3 Of the states, only Alabama, Louisiana and Mississippi do not have laws prohibiting employment discrimination. The vast majority of the states have at least two laws, one modeled after the federal Equal Pay Act of 1963, supra note 2, and one modeled after the federal Civil Rights Act of 1964, supra note 2. See S. Willborn, A Comparable Worth Primer 70 (1986); Dean, Roberts & Boone, Comparable Worth Under Various Federal and State Laws, in Comparable Worth and Wage Discrimination 238-66 (1984). Although I know of no comprehensive survey, there are also a great number of local laws prohibiting employment discrimination. See, e.g., 29 C.F.R. § 1601.74(a) (fifty-two county and municipal antidiscrimination agencies are recognized by the federal Equal Employment Opportunity Commission as "designated agencies" for procedural purposes).

fertilization. While the roots of U.S. law are found in English legal history, the roots of British discrimination law are found in recent U.S. legal history.

These general similarities, however, are overshadowed by an important and dramatic difference between the two countries: the laws in the United States, but not in the United Kingdom, are supported by a refined and mature legal theory of discrimination. In the United States, a jurisprudence has been and is being articulated which answers many of the difficult questions posed by antidiscrimination legislation and, more importantly, which provides a framework for addressing the still unanswered questions. In the United Kingdom, an employment discrimination jurisprudence has been very slow in coming and is still in a very immature state. This lack of theoretical development has been a major contributing factor to the current malaise in British discrimination law.

This article discusses this difference between the United States and the United Kingdom by examining the two basic models of discrimination used in the two countries. The article concludes by speculating on the reasons for the difference in theoretical development and by commenting on the message of this analysis for the United Kingdom and the United States.

II. Models of Discrimination

The United States and the United Kingdom share two basic models of discrimination. The first model encompasses the common understanding of discrimination. An employer discriminates by treating some people less favorably than others because of their race or sex. This type of discrimination is called direct discrimination in the United Kingdom and disparate treatment discrimination in the United States. The second model of discrimination is less obvious. An employer discriminates under this model by using an employment require-


6 The Equal Pay Act, 1970 and the Sex Discrimination Act, 1975 bear a close resemblance to their U.S. predecessors, the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. In the words of Lord Denning, "the English legislation is based a good deal upon the United States experience." Shields v. E. Coomes Ltd., [1978] I.C.R. 1159, 1167–68 (C.A.). See also H. Street, G. Howe & G. Bindman, Report on Anti-Discrimination Legislation 7–54 (1967). It should be noted at the outset that in one major respect British discrimination law has broken entirely from its U.S. origins. On the issue of equal pay for women, the British and U.S. approaches are quite different substantively and procedurally. A discussion of the issue is outside the scope of this article, but it should be noted that, although the British are attacking the equal pay issue more aggressively, British advances on this front are also being hampered by shortcomings in discrimination theory. See Willborn, Equal Pay for Work of Equal Value: Comparable Worth in the United Kingdom, 34 Am. J. Comp. L. 415 (1986).

7 The terms "theory" and "jurisprudence" are used in this article to refer to the policy and conceptual bases of discrimination law.

8 See Lustgarten, Racial Inequality and the Limits of the Law, 49 Modern L. Rev. 68 (1986).
ment which falls more harshly on one racial or sexual group and which is not required by business considerations. This type of discrimination is called indirect discrimination in the United Kingdom and disparate impact discrimination in the United States. Although the two countries share these basic models, the development of the models has differed dramatically. In the United States, the models have been refined into very sophisticated tools for attacking discrimination; in the United Kingdom, they remain fairly blunt instruments.

A. Direct Discrimination

A case of direct discrimination is an inquiry into the motivation for an employment decision. If the employer makes an employment decision because of an employee's race or sex, the decision is directly discriminatory. If the decision is made for any other reason, it is permissible. Persons claiming discrimination under this model face two imposing obstacles. First, proving motivation is an extremely difficult and subtle task. The "true" motivation for an employment decision is to be found only in the mind of the employer. But proving the state of the employer's mind at the time an employment decision is made is a delicate task. The employer wishes to avoid liability for employment discrimination, so his statements about his state of mind are less than reliable. Even if the employer is completely honest and forthcoming, social science research indicates that the employer may not be aware of subtle discriminatory influences affecting his decision.9 Second, persons claiming discrimination are handicapped in proving discriminatory motivation because virtually all of the relevant evidence is in the control of the employer.10 The task of the law, therefore, is to create an analytical structure which permits claimants to create an inference of direct discrimination in the face of these obstacles.

An analytical structure for considering individual cases of discrimination has been formulated in both the United Kingdom and the United States. The structure formulated in the United Kingdom has been rejected in favor of a relatively formless, ad hoc mode of decisionmaking, while the structure formulated in the United States has become an integral part of the law. The approach in the United Kingdom is best exemplified by the Industrial Tribunal and Employment Appeal Tribunal decisions in Khanna v. Ministry of Defence.11 In


Khanna, Mr. Khanna was an Indian who had been employed as a photographer by the Ministry of Defence for 15 years. In 1979, the post of principal photographer in his unit became vacant. Mr. Khanna was temporarily appointed to the position while a job search was conducted. Although Mr. Khanna applied for the position, it was given to a Mr. Spooner, a white man. Mr. Khanna commenced a discrimination proceeding. The Industrial Tribunal found that Mr. Khanna was more qualified than Mr. Spooner and hence, held that he had created an inference of discrimination which shifted the evidential burden to the Ministry of Defence to give some explanation for its decision. To meet its burden, the Ministry of Defence relied on the testimony of members of the hiring board that they had not acted with any racial motivation. The Industrial Tribunal concluded that although the considerations in the case were finely balanced, the ultimate burden of proof was on Mr. Khanna and hence, it held that his discrimination claim had failed. In deciding the case, the Industrial Tribunal articulated a structure for considering individual claims of discrimination such as Mr. Khanna’s. The structure initially requires the person claiming discrimination to create an inference of discrimination (most commonly through a comparison with a person of another race or of the opposite sex). Once this inference is created, the evidential burden is shifted to the employer to explain the nondiscriminatory reasons for the adverse decision. The ultimate burden of proof, however, remains on the one claiming discrimination. This structure was short-lived; the Employment Appeal Tribunal rejected it in favor of a formless mode of analysis. The Employment Appeal Tribunal said that the burden-shifting structure was “more likely to obscure than to illuminate the right answer” and that it would be better for Industrial Tribunals to “forget about” and “avoid” such concepts. Instead, Industrial Tribunals should “simply” decide whether discrimination has been proven after “looking at all the evidence as a whole.”

The analytical structure in the United States for individual cases of direct discrimination resembles, but is in significant respects different from, the structure forwarded by the Industrial Tribunal in Khanna. In the United States, Mr. Khanna could have raised an inference of discrimination by proving that he belonged to a racial minority, that he applied and was minimally qualified for

12 Id. at 658–59.
13 Id. The Employment Appeal Tribunal did articulate a structure that would require employers to give a “clear and specific” explanation for an employment decision after the “primary facts” had created an inference of discrimination. Id. The structure, however, must be read in light of the Employment Appeal Tribunal’s explicit rejection of the more formalized structure of the Industrial Tribunal and in light of the Employment Appeal Tribunal’s call for decisions based on “all the facts of the case.” Id. Moreover, the Tribunal made no attempt to define “primary facts” and, hence, gave no guidance on the nature of plaintiff’s prima facie case.
a job for which the employer was seeking applicants, and that he was rejected.\textsuperscript{14} This proof eliminates the two most common nondiscriminatory reasons for rejecting an applicant — no job opening and lack of qualifications — and hence, is sufficient to shift to the employer the burden of providing an explanation for the applicant’s rejection.\textsuperscript{15} In the United States, then, the burden of proceeding\textsuperscript{16} shifts to the employer even earlier than proposed by the Industrial Tribunal in \textit{Khanna}. In the United States, in contrast to \textit{Khanna}, the applicant need not present any evidence comparing his qualifications with those of the person selected for the job to shift the burden of proceeding. If the employer’s decision was based on the comparative qualifications of the applicants, it is the employer’s responsibility to raise the issue. After an inference of discrimination is created, the employer’s burden is to “articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”\textsuperscript{17} The employer does not have the burden of persuasion at this point — that burden remains on the applicant — but the employer does have the burden of forwarding a reason for the challenged decision. In \textit{Khanna}, the employer would have articulated two responses to the applicant’s \textit{prima facie} case: 1) Mr. Spooner was more qualified than Mr. Khanna and 2) those making the decision testified that they did not discriminate. The burdens of persuasion and proceeding would then shift back to the applicant to prove that these reasons are “pretext,” that they are not the true reasons for the decision. If the applicant satisfied the fact-finder that these were not the true reasons for the decision, as Mr. Khanna would be able to do in this case,\textsuperscript{18} he would prevail.

The analytical structure in the United States is preferable to the formless approach of the United Kingdom. Although the initial applicant and employer burdens are quite easy to satisfy,\textsuperscript{19} the first two stages of the U.S. structure serve to focus the issue in a manner that may not occur in the United Kingdom. In


\textsuperscript{16} U.S. employment discrimination law, and U.S. law in general, distinguishes between the burden of proceeding and the burden of persuasion. The burden of proceeding, which shifts to the employer after an applicant’s \textit{prima facie} case, is merely the burden of producing some evidence on a particular fact in issue. The burden of persuasion, which remains on the applicant throughout an individual direct discrimination case, is the heavier burden of persuading the trier of fact that the alleged fact is true. See \textit{McCormick on Evidence} 946–56 (E. Cleary ed. 3d ed. 1984).

\textsuperscript{17} McDonnell Douglas Corp. v. Green, 411 U.S. at 802. See also Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

\textsuperscript{18} Mr. Khanna would have been able to counter the employer’s responses because 1) the Tribunal found, contrary to the employer’s assertion, that Mr. Khanna was more qualified than Mr. Spooner and 2) a bare denial of subjective intention to discriminate is unlikely to satisfy the employer’s burden of articulating a legitimate, nondiscriminatory reason for the decision.

\textsuperscript{19} See B. \textsc{Schleif} \& P. \textsc{Grossman}, \textsc{Employment Discrimination Law} 1155–56 (1976).
the United States, the ultimate issue in the Khanna case would have been quite narrow: was Mr. Khanna more qualified than Mr. Spooner? In the United Kingdom, the ultimate issue proposed by the Employment Appeal Tribunal was very broad: viewing all the evidence as a whole, has discrimination been proven? The extent to which the U.S. structure focuses the issues is beneficial for three reasons. First, it leads to a more orderly and comprehensible presentation of evidence. The applicant need not respond to every possible nondiscriminatory explanation for an employment decision, but only to those explanations articulated by the employer. The employer chooses his turf and can tailor his evidence to the relatively narrow issue(s) presented; he need not respond to the flurry of allegations that might otherwise result. Second, the U.S. structure responds to one of the major obstacles facing applicants in direct discrimination cases — that virtually all of the evidence is in the control of the employer. The employer is not permitted to fight a guerrilla war by attacking the applicant's claims from an undisclosed position. Instead, because of the easy initial burden on the applicant, the employer is forced to disclose the alleged reason for his decision and to defend it. Third, the U.S. structure tends to minimize the discretion of decisionmakers. Although any effort to objectify legal decisionmaking is doomed, narrowly focused issues leave less room for the play of decisionmaker bias than do more broadly framed issues. The effort to minimize discretion is particularly important in the area of discrimination where prejudices, often unconscious, are the precise antithesis of the law's purpose. The explicit assumption of the British procedure — that the decisionmaker can "simply" decide whether discrimination has occurred — dangerously underestimates the subtlety of race and sex discrimination.

Differences in the analytical structures for considering individual cases of direct discrimination, however, are minor compared to differences in another aspect of the direct discrimination model. In the United States, an applicant can also prove direct discrimination by presenting statistical evidence that an employer has systematically treated one race or sex less favorably. U.S. law assumes that nondiscriminatory hiring practices will result in a work force that


21 See supra note 9.

reflects the racial and sexual composition of the community from which employees are hired. As a result, if an applicant can prove that an employer's work force has a significantly smaller proportion of blacks than the community from which the employer makes his hiring decisions, the inference is that the employer's hiring decisions are tainted by race discrimination. In a leading case, for example, a national employer employed no black long distance truck drivers in Atlanta or Los Angeles. In Atlanta, 22 percent of the population of the metropolitan area from which the company made its hiring decisions was black and 51 percent of the population of the city proper was black. In Los Angeles, the correlative figures were 11 percent and 18 percent respectively. The U.S. Supreme Court held that these figures were sufficient to create an inference of systemic direct discrimination. Once such a case is established, an inference of discrimination attaches to every hiring decision made by the company during the relevant time period. If an applicant proves that he applied for a job with the company, a finding of discrimination is appropriate unless the company can prove that it did not discriminate in that instance.

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24 The comparison is between the racial composition of the employer's work force (or, more likely, a portion of the employer's work force) and the racial composition of the community from which the employer makes his hiring decisions. The community from which the employer makes his hiring decisions will vary depending on the type of job under consideration. For a job which does not require special qualifications, the community may include all those seeking employment within a reasonable commuting distance of the employer. For a job which requires special qualifications, however, the community would include only those who meet the qualifications and live within the recruiting area of the employer. Thus, for a company that hires both janitors and brain surgeons, there would be two relevant comparison communities. For janitors, the community might be all those seeking employment within a reasonable commuting area. For brain surgeons, however, the community would probably be those qualified to practice as brain surgeons in the relevant jurisdiction. It is likely that the racial compositions of the two comparison communities would differ dramatically. See Hazelwood, 433 U.S. at 308 n.13.

25 Technically, most of the decisions in the case were transfer or promotion decisions, but that distinction makes no difference for the purposes of this illustration.

26 Teamsters, 431 U.S. at 337 n.17.

27 An applicant may also prevail by proving that, although he did not apply, he would have applied but for the employer's discriminatory practices.

28 A successful systemic direct discrimination case, then, substantially alters the allocation of burdens. In an individual case, the applicant must prove that 1) he applied for 2) a job opening 3) for which he was qualified and 4) that he was rejected. Once the applicant proves these elements, only the burden of proceeding shifts to the employer to articulate the reason for the decision to reject. After the employer articulates a reason, the burden of proceeding shifts back to the applicant to prove that the reason articulated by the employer was not the true reason for the decision. The burden of persuasion always remains on the applicant. In contrast, once systemic direct discrimination is proven, an applicant need only prove that he applied for a job to shift both the burdens of proceeding and persuasion to the employer. The employer must prove that there was not a job opening when the applicant applied, that the applicant was not qualified, or whatever other reason might have existed for the applicant's rejection. The inference of discrimination that is created by the use of statistics
The theory of systemic direct discrimination is based on probability theory. The classic example is coin flipping to determine whether a coin is fair. Probability theory would begin with an assumption about reality: if the coin is fair, one would expect the number of heads and tails to be approximately equal over time. If after a number of flips the number of heads and tails is not equal, the inference is that the coin is not fair. The theory of systemic direct discrimination also makes an assumption about reality: if hiring procedures are fair, one would expect the proportion of blacks in an employer's work force and in the qualified labor force to be approximately equal. If that assumption is not met over time, the inference is that the hiring procedures are not fair. Indeed, in the United States, the inference of discrimination created by this type of evidence is stronger than the inference created by an applicant's *prima facie* case in an individual case of direct discrimination.29

The theory of systemic direct discrimination is not to be found in British employment discrimination cases.30 No case finds an employer liable because of an inference of discrimination created by statistical evidence of a disparity between the racial composition of an employer's work force and that of the qualified labor force from which the employer hires. To the contrary, British courts have refused to allow discovery of this type of evidence because it is irrelevant 31 and have stated that undue reliance on such evidence would be clearly erroneous.32 The absence of the theory of systemic direct discrimination in British law is not based on restrictive language in the statutes,33 or on legiti-

persists throughout the case and attaches to the claim of the individual applicant, thus easing his burdens and increasing those of the employer.

29 In an individual direct discrimination case, an applicant's *prima facie* case shifts only the burden of proceeding to the employer; in a systemic direct discrimination case, an applicant's *prima facie* case shifts both the burden of proceeding and the burden of persuasion to the employer.

30 Although the theory has not yet found its way into judicial decisions, the Commission for Racial Equality has evidenced awareness of it. The Commission has included a very crude form of this analysis in its Code of Practice, but appears to limit its use to identifying situations in which positive discrimination is appropriate. COMMISSION FOR RACIAL EQUALITY, CODE OF PRACTICE 20 (1984). In addition, the Commission has used this type of analysis in its investigations. See, e.g., Beaumont Shopping Center, Report of a Formal Investigation (1985).


33 The basic language of the race and sex discrimination acts supports application of the theory of systemic direct discrimination. Both acts prohibit an employer from treating persons "less favourably" because of their race or sex. R.R.A., supra note 4, at § 1(1)(a); S.D.A., supra note 4, at § 1(1)(a), and the theory of systemic direct discrimination is merely one way of proving less favourable treatment. It is the U.S. law that contains language which seems to restrict application of the theory. Section 703(j) of Title VII, 42 U.S.C. § 2000e(j) (1982), provides that no employer shall be required "to grant preferential treatment to any individual . . . on account of an imbalance which may exist [between the] percentage of persons of any race . . . employed by any employer [and the] percentage of persons of such race . . . in the available work force." The U.S. Supreme Court has held, however, that this section does not limit application of the systemic direct discrimination model. International Brotherhood of
mate concerns about technical\textsuperscript{34} or remedial\textsuperscript{35} problems with the theory, or on any other articulated reason. The theory has simply not entered into the legal debate on antidiscrimination law.\textsuperscript{36} As a result, with virtually no debate and for no articulated reason, British law is deprived of an important legal weapon against discrimination, a weapon that is well-recognized and often used in the United States.

B. \textit{Indirect Discrimination}

A case of indirect discrimination is an inquiry into the effects and purposes of an employment rule or practice. In both the United Kingdom and the United States, a case of indirect discrimination has three stages. First, the applicant has the burden of proving that the proportion of women who can comply with a


\textsuperscript{35} Remedial problems arise because the theory creates an inference of discrimination that applies to a large number of potential discriminatees over a long period of time. At the time the finding of discrimination is made, it may not be possible to locate many of the discriminatees and any remedy to compensate them fully would have adverse effects on those who, although not actual discriminators, have benefited from the company's past discrimination. See Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984); Brest, \textit{Foreword: In Defense of the Antidiscrimination Principle}, \textit{90 Harv. L. Rev.} 1, 36–43 (1976). The unavailability of class actions in the United Kingdom may ease these problems, but in any event they have not been cited as a reason for rejecting or limiting the systemic direct discrimination theory.

\textsuperscript{36} The theory of systemic direct discrimination has been mentioned in the literature. In a 1980 casenote, an author remarked on the absence of the theory in the United Kingdom and on the failure of the courts to address the questions that might be raised by the theory. Note, \textit{Jalota v. Imperial Metal Industries: More Bonds for the Fettered Runner?} \textit{43 Modern L. Rev.} 215 (1980). A more detailed analysis was made in L. Lustgarten, \textit{Legal Control of Racial Discrimination} (1980), but, although I want to commend the author on his attempt to raise the issue, his understanding of U.S. law was quite shallow. To raise only one of many examples, the author stated that one can normally assume that since 50 percent of the population is female, that is the proper figure against which to compare an employer's record. \textit{Id.} at 50. But, of course, the proportion of the labor force which is female may be, and usually is, considerably less than 50 percent, and the proportion of the qualified labor force for a particular job may be considerably smaller (e.g., barrister) or greater (e.g., nurses) than 50 percent. Most commentators, however, do far worse than Mr. Lustgarten by failing to even broach the topic. \textit{See}, e.g., A. Lester & G. Bindman, \textit{Race and Law} (1972); B. Hepple, \textit{Race, Jobs and the Law in Britain} (2d ed. 1970). I think it is fair to say that the legal debate in the literature has largely ignored, or been oblivious to, the theory of systemic direct discrimination.
job requirement is considerably smaller than the proportion of men who can comply with it.\textsuperscript{37} For example, if an employer requires employees to be at least six feet in height, an applicant might prove disproportionate impact by presenting evidence that the requirement would eliminate 50 percent of all men and 95 percent of all women.\textsuperscript{38} The employer then has the burden of proving a business justification for the rule. In the example, the employer might prove that the employee must be at least six feet tall because the job requires him to reach objects on high shelves. If the employer proves a business justification for the rule, the burden shifts to the applicant to show a less discriminatory alternative. The applicant in our example might prove that stepladders could be used to reach the objects on high shelves with minimal cost and no loss in efficiency.

The British model of indirect discrimination, like the direct discrimination model, is unsophisticated and immature in comparison with the model in the United States. The problem is not that the British courts and commentators have given different answers than their U.S. counterparts to the questions posed by the model, but rather that the questions have remained largely unanswered, indeed unaddressed, in the United Kingdom.

A sophisticated and mature model of discrimination must begin with an acceptable theory. The theoretical basis of the indirect discrimination model is not intuitively obvious.\textsuperscript{39} Why should an employment criterion be illegal when it does not discriminate on its face and when it is not used with a discriminatory purpose? This issue has sparked a voluminous and heated debate in the United States. At least four distinct theoretical bases have been proposed.\textsuperscript{40} Under the intent theory, indirect discrimination is a branch of the direct discrimination tree; indirect discrimination is illegal because proof of it is sufficient proof of illegal motivation to create liability. Another theory, the past discrimination theory, contends that indirect discrimination is a mechanism for isolating and rectifying the continuing effects of past discrimination.\textsuperscript{41} The functional equiv-

\textsuperscript{37} S.D.A., \textit{supra} note 4, at § 1(1)(b)(i); R.R.A., \textit{supra} note 4, at § 1(1)(b)(i).

\textsuperscript{38} This is a hypothetical example. I have no idea of the actual percentages of men and women over six feet in height. \textit{See} Dothard v. Rawlinson, 433 U.S. 321 (1977).

\textsuperscript{39} In contrast, the theoretical basis of the direct discrimination model is intuitively obvious. As President Kennedy stated to the United States Congress in 1963: Race discrimination hampers our economic growth by preventing the maximum development and utilization of our manpower. It hampers our world leadership by contradicting at home the message we preach abroad . . . above all, it is wrong. President's Message to Congress on Civil Rights, 1963 \textit{PUB. PAPERS} 221, 222 (Feb. 28, 1963).

\textsuperscript{40} For a more thorough discussion of these theories, see Willborn, \textit{The Disparate Impact Model: Theory and Limits}, 34 \textit{AM. U.L. REV.} 799 (1985) [hereinafter cited as Willborn].

alence theory is the third and most influential theory. Under this theory, indirect discrimination is illegal because it is the functional equivalent of direct discrimination; both entail illegal employment criteria which are not accurate predictors of productivity and which are not within the control of the applicant. Finally, the statistical discrimination theory holds that indirect discrimination is illegal because it isolates a type of discrimination that has been articulated in the economic literature. In contrast to this vigorous search for a theoretical basis in the United States, the efforts in the United Kingdom have been limited to one commentator. The indirect discrimination model is generally applied mechanically and without a clear, or even a tentative, understanding of its underlying purposes and functions.

More prosaic implementation issues have also been addressed in the United States, but not in the United Kingdom. One issue that has arisen in the United States, for example, is whether there should be limits on the potential scope of the indirect discrimination model. Should the model, for instance, be available to white males who are disproportionately affected by an employment criterion? Or should it be available to challenge the use by employers of broad employment criteria, such as the use of market wage rates to establish the pay of employees? Indeed, in the United Kingdom, the most basic implementation issues have not been resolved at all, or have been resolved with standards that

41 Willborn, supra note 40.
43 The debate is as yet unresolved in the United States.
44 Commentators in the United Kingdom have discussed how the indirect discrimination model should be applied, but have not articulated a theoretical basis for the model. See supra note 36.
45 Some in the United States contend that the model should not be available to white males because the disproportionate impact does not arise from past discrimination. See, e.g., United States Comm'n on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination 17 n.20 (1981); Blumrosen, Affirmative Action in Employment After Weber, 34 Rutgers L. Rev. 1, 42–43 (1981); Chamallas, Evolving Conception of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle, 31 UCLA L. Rev. 305, 366–69 (1983). To the extent the past discrimination theory is accepted as the basis of the indirect discrimination model, this is undoubtedly correct. But to the extent any of the other theories are accepted, it is questionable. Thus, the United Kingdom is in a particularly poor position to consider these issues because it has not yet begun to articulate the theoretical basis of the model.
46 Since women as a group are paid less than men as a group, the use of market wage rates to establish the pay of employees is likely to have a disproportionate impact on women. Some courts in the United States have held that the indirect discrimination model should not be available to attack such broad employment criteria. AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985); Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), cert. denied, 105 S. Ct. 511 (1984).
are so vague as to leave the decisionmaker with virtually uncontrolled discretion. How much of a disparate impact is sufficient to meet the applicant’s initial burden? In the United States, the “four-fifths rule of thumb” is well-accepted, but there is also a great deal of discussion of more complex statistical methods of determining impact. In the United Kingdom, the case law is barren on the issue and there is very little discussion of it elsewhere. Should an employer be able to defend in an indirect discrimination case by proving that his employment practices overall do not have a disparate impact? In the United States, this issue has been definitively resolved after a great deal of debate. In the United Kingdom, the debate has not yet begun. What standards must the employer satisfy to meet its burden of proving business justification? Although this is an issue that must admit some decisionmaker discretion, various standards have been vigorously debated in the United States. There has been some discussion of the appropriate legal standard in the United Kingdom, but the latest decisions find the issue to be “largely in the discretion” of the Industrial Tribunal.

As with the direct discrimination model, the development of the indirect discrimination model in the United Kingdom has been very slow. The search for a theoretical basis for the model is still quite immature and many more basic implementation issues have not yet been addressed.

49 Uncontrolled discretion, as discussed earlier, is particularly dangerous in this area. See supra note 9.


52 As an example, assume an employer hires employees based on the results of interviews and a written test. A black applicant who was not hired proves that the written test has a disparate impact on black persons; he proves that 80 percent of all white persons taking the test passed it, but only 50 percent of all black persons taking the test passed it. Should the employer be able to defend by proving that the hiring process as a whole (that is, the interviews and the written test) do not have a disparate impact on black persons? Should he be able to defend, for example, by proving that 10 percent of all white and black persons who apply eventually get jobs?


III. Conclusion

Nearly two decades ago, the influential Street Report in the United Kingdom recognized that the mere enactment of antidiscrimination laws was "likely to be quite ineffective unless other factors [were] present."\(^{57}\) The author of this article agrees, but finds that a principal factor which is missing in the United Kingdom is ironically the very one the Street Report was to provide: a viable theoretical basis for the antidiscrimination laws.\(^{58}\)

The reasons for this theoretical shortcoming cannot be identified with great certainty. The shortcoming is not caused by the statutory language. The relevant statutes in the United Kingdom are very similar to those in the United States.\(^{59}\) Nor is it caused by differences in methods of statutory interpretation. Although statutory interpretation in the United Kingdom can be quite restrictive, more liberal methods have been gaining ascendency, particularly in the area of human rights and discrimination.\(^{60}\) Moreover, restrictive methods of statutory interpretation do not explain the failure of British commentators to forward and discuss theoretical issues. The shortcoming is not caused either by legitimate doubts about the theories propagated in the United States, for example, on doubts about the statistical emphasis of the U.S. theories.\(^{61}\) A theoretical basis for the British discrimination laws has not been considered and rejected; it has simply not yet been considered.

Having discarded these possible reasons for the theoretical shortcoming, one is left with two primary causes. First, it appears that there has been a lack of investment in this enterprise. Legal scholars, litigants, courts and others have not invested sufficient thought and resources in the articulation and development of viable theories of employment discrimination.\(^{62}\) Second, there may be

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\(^{58}\) The principal point of this article is not that the theories in the United States should be transplanted into the United Kingdom, see Kahn-Freund, On Uses and Misuses of Comparative Law, 37 MODERN L. REV. 1 (1974), or even that the British theories should resemble the U.S. theories. The point is that an employment discrimination jurisprudence is being adequately developed in the United States and is not being adequately developed in the United Kingdom and that such a jurisprudence is an essential component of an effective legal regime to combat employment discrimination.

\(^{59}\) See supra notes 6, 33.

\(^{60}\) If one looks back to the actual decisions of this House on questions of statutory construction over the last thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.


\(^{62}\) I say this with some hesitation because I fully recognize the difficulties of defining a "sufficient" level of investment. At the same time, however, the comparative levels of investment in the United States and the United Kingdom are dramatically different. The United States has unquestionably
procedural reasons for the shortcoming. British law does not permit representative class actions as they are known in the United States. This hinders theoretical development because, where group claims are procedurally restricted, fewer cases are likely to be brought based on group theories\(^{63}\) and those that are brought are less likely to be financially viable.\(^{64}\)

If this analysis is correct, the message to the British is mixed. To the extent that the slow theoretical development is due to a lack of investment, there is room for hope. Although time has been lost and the antidiscrimination effort has been damaged, it is not too late to invest. Current investment may yield relatively rapid returns because it can draw upon theoretical developments in the United States and elsewhere.\(^{65}\) To the extent, though, that the slow theoretical development is caused by procedural shortcomings, the prospect is not so hopeful. That roadblock to development is not likely to be removed by the current or any later Tory government and, indeed, even a Labour or Alliance government would be unlikely to authorize class actions.

The message to the United States from this comparison is more positive. Theoretical development is very difficult to assess, but at least in comparison with the United Kingdom, the degree of theoretical development in the United States has been adequate. Although there is still work to be done, particularly in developing a viable theoretical basis for the disparate impact model,\(^{66}\) there are no obvious roadblocks to that development as there are in the United Kingdom. Moreover, the message is positive because, although the existence of group-based claims has raised difficult issues, it is some comfort to discover that those same claims have, at least in comparison with the British experience, contributed to theoretical advancement.


\(^{63}\) Specifically, fewer cases are likely to be brought under the disparate impact and systemic disparate treatment theories of discrimination.

\(^{64}\) Individuals can bring claims based on group theories, but a class action mechanism permits the increased costs of these suits (for example, in gathering and analyzing statistical evidence) to be spread more broadly.

\(^{65}\) I am not claiming here that theoretical advancement alone will eradicate the malaise enveloping British discrimination law. Other changes are also necessary. I am saying, though, that a sound theoretical basis is an essential component of a viable legal regime to combat discrimination and that the development of such a basis is one of the steps that must be taken to revive this area of the law.

\(^{66}\) See Willborn, supra note 40.