I. A BRIEF EXCURSUS ON MARKETS AND DISCRIMINATION

The role of markets in promoting equal opportunity is illustrated by a study published in September 1988 which predicted that the demand for labor in the City of London banking sector would increase by 11,000 jobs over the five years between 1987 and 1992.1 During this period, the population of London is likely to remain stagnant. Where are the people going to come from to fill these jobs in banking and finance?

One answer is that industries which traditionally rely heavily on female employees will have to rely on women even more. It is not a coincidence, therefore, that suddenly, in the last year, a number of financial institutions have introduced career-break schemes to encourage women desiring families to remain with the firm. This practice is an example of policies encouraging female participation in the labor force, often at higher levels of management. Another example comes from the Midland Bank, which recently initiated a program for which people had been lobbying for years. It announced in early 1989 its intention to set up 30 work-place nurseries for the children of its staff.2

These developments are not the result of a particular desire for social justice or equality on the part of management in these industries. They reflect the conditions of the market in which these employers have to recruit labor.

The policy argument based on market economics is as follows. The capitalist entrepreneur should be required to recognize the economic merits of an equal opportunity policy. Classical market economists take the view that discrimination is inefficient in that it involves

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1 Finance Moves to Retain Women Employees, 441 INDUS. REL. REV. & REP. 2 (June 13, 1989).
the introduction of non-economic factors in making a judgment as to the hiring and dismissal of workers. Employers, in making their business decisions, should be required to refrain from the temptation of resorting to factors, such as race or sex prejudice, which are unrelated to labor efficiency. Capitalist efficiency, therefore, favors the introduction of an effectively implemented anti-discrimination law. 3

My theme, however, is not capitalist efficiency and discrimination laws. Rather, I want to address three separate but related topics. My remarks refer mainly to the situation in the United Kingdom, but I will also make some comparative comments on European Community and international law. This is the counsel of necessity, for it is evidently hopeless to try to describe on this occasion even the broad framework of British legislation on discrimination covering women, racial minorities, disabled, migrant workers, and so on.

I am going to focus on three different points. First, I want to highlight the differential impact of the European Community’s law on discrimination in different Member States. Second, I will illustrate the relative lack of impact of the law on discrimination, looking in particular at the area of anti-union discrimination which has so far received little attention. Third, another area which has been scarcely mentioned, but which has a particular resonance in the United Kingdom, is discrimination on grounds of religion. I want to inform you specifically about the experience in Northern Ireland and the legislation introduced to try to redress the discrimination practiced against Catholics.

II. Discrimination Law and Equal Pay for Female Workers in the European Community

As has been mentioned many times now, Article 119 of the Treaty of Rome applies to all Member States of the European Community. Yet, when one compares the situation regarding equal pay for men and women in the Member States, it is clear that the application in practice of the same law is very different. This fact has important implications for current social policy-making in the Community. Presently, a great debate exists over the introduction into the Community’s legal order of fundamental social and economic rights. Much of the recent debate has concerned the formulation of these rights. But in 3 BeneDictus & Bercusson, Labour Law: Cases and Materials, 191-240 (1987).
my view, application across the Community, in a uniform or harmonic way, of whatever rights are formulated, in the context of the very different social and industrial relations systems of the Member States, requires equal consideration in any debate over new fundamental social and economic rights. I want to illustrate the nature of this problem of application by looking at existing fundamental social and economic rights against discrimination and, specifically, the application of the law on equal pay in a number of European Community Member States.

Article 119 of the Treaty of Rome on equal pay is the most easily enforceable part of European Community law on sex discrimination. By virtue of its direct horizontal effect in all Member States, a formal harmonization of the law results across the Community. In addition to the provision in the Treaty of Rome, there is also Directive 75/117 on equal pay which each Member State must implement. For the most part, implementation has been achieved through the traditional means of legislation and judicial enforcement. The result has been to achieve a degree of formal harmonization of law among the Member States. However, considerable reservations about the reality of substantive harmonization of the right to equal pay as applied across the Community do exist. This fact will be illustrated here through an examination of a different aspect of implementation of Community law on equal pay: its impact on trade union activity in the field. One issue addressed is the extent to which harmonization of social and economic rights embodied in legal instruments of whatever kind at the European Community level could be achieved through collective bargaining in the Member States.

When one thinks of European collective bargaining, the temptation is usually to conceive of Europe as a geographical area, trade unions and employers' associations organized at the European level and collective agreements applying across the Community. The prospect of European collective bargaining in this sense is often discussed but generally dismissed as hopeless, apart from certain exceptional cases where multinational enterprises have set up European works councils or a very rare sectoral initiative, such as in agriculture.

When I think about Europe, a constant preoccupation at the European University Institute in Florence, there is no presumption against

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4 18 O.J. EUR. COMM. (No. L 45) 19 (1975).
diversity in favor of harmonization or uniformity. To this way of thinking, the objective of research into fundamental social and economic rights at the European level—such as that against discrimination—is to find a method of formulation and implementation of such rights across the Community in all its diversity. One method is that such rights be implemented, and their substantive content be given further definition, through national systems of collective bargaining. I want to try to demonstrate the difficulties of this method, as well as its potential, through a discussion of the Community law on equal pay.

The law on equal pay is a useful illustration because I think Britain has something to offer which probably is not apparent in other Community Member States. The most important piece of British legislation on equal pay is the Equal Pay (Amendment) Regulations 1983. These regulations provide that a woman can claim equal pay not only when she is doing equal work, work that is the same or broadly similar to that of a man, but also work that is completely different from that of a man, but which is deemed to be of equal value. A very complex procedure was established for determining whether a woman's work is of equal value to that of a man.

One interesting point to note is that although there have been in absolute terms a large number of claims—over 2,000 claims registered so far—this large figure is somewhat misleading. Of these claims, the National Union of Mine Workers, which is supporting a campaign for equal pay by female canteen workers in the mining industry, has backed some 800 claims. Furthermore, the Manufacturing, Science, and Finance Union has brought in addition 900 of these claims on behalf of speech therapists claiming equal value work with clinical psychologists. Therefore, although the overall number of claims is high, this number does not represent widespread use of the law through claims. Rather, it reflects relatively narrowly campaigns by unions for equal pay in specific industries. Nonetheless, the two examples I mentioned do illustrate that some trade unions have been active in promoting equal pay using the legislation.

This phenomenon deserves more attention than it has previously received. Equal pay legislation has been the object of a deliberate trade union strategy in the United Kingdom. It has been taken up, as I have indicated, using traditional litigation methods. More particularly, unions have attempted to implement the objectives of the legislation through collective bargaining. In this way, the European Community law on equal pay has had a degree of success which
reliance solely on traditional legal strategies such as litigation would have never achieved.

Before outlining the trade unions' strategy, it is important to highlight its significance in an European dimension. This strategy could be applied to fundamental rights in the European Community generally. Instead of focusing solely on litigation strategies and legal rights, consideration should be given to strategies involving the trade unions in different Member States. The unions' highly developed systems of collective bargaining could be exploited to implement effectively fundamental social and economic rights. Such rights are part of the daily diet of negotiators engaged in bargaining and are not the exclusive prerogative of traditional litigation strategies.

To return to the exemplar of trade union strategies on equal pay in the United Kingdom, close analysis of these union strategies demonstrates a great deal of divergence among different unions. Some unions have no national strategy for using the law on equal pay for work of equal value; nonetheless, they will allow local officials to use their initiative in exploiting the law to undertake equal value claims based on the enterprise or the work place. One should not underestimate the importance of allowing such initiatives given the specific quality of British industrial relations. The highly decentralized nature of the British collective bargaining system allows for local union officials to exercise a degree of discretion, which offers prospects of local enforcement of Community law on equal pay.

In contrast, other unions discourage or even prohibit their officials from pursuing equal pay claims. Although these are exceptional, interestingly enough, they include the National Association of Teachers in Further and Higher Education (NATFHE).

Still other unions have developed a deliberate national strategy to encourage and to coordinate local union claims. Three varieties of this type of strategy exist. First, some insist upon collective bargaining over equal pay first, and employ litigation only as a last resort. Second, some seek to integrate the threat of litigation into their collective bargaining strategy. Third, some adopt from the very beginning a test case strategy. The point I am making is that, in the United Kingdom, litigation is only part of a broader strategy of implementing anti-discrimination legislation. The objective of the fundamental right against discrimination is achieved also through a col-

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collective bargaining strategy. Once one turns to the situation in other countries, however, a combination of legislation, litigation, and collective bargaining similar to that exploited in the United Kingdom cannot simply be exported to other European countries. Their industrial relations systems are different.

In Italy, for example, very little pressure comes from the trade union movement in the area of equal pay because the trade unions do not believe in promoting equal pay as a policy. Rather, they favor a general "low pay" policy, rejecting a specific gender dimension to the problem of low pay. Italian trade unions campaign to support low paid workers generally. This may involve policies which have a greater impact on women, but these are not deemed to be part of an equal pay policy. An example is flat rate increases in collective agreements, as opposed to percentage increases. Percentage increases benefit the low paid less than a flat rate increase. Italian unions do try to tackle equal pay, but not directly through collective bargaining over wages. Their main efforts aim at combatting equal pay problems or sex discrimination problems through action directed at the labor market. Positive action programs are used to combat discrimination.

Many collective agreements in Italy prescribe positive action programs providing special opportunities to women for training and accessing jobs. The Italian unions try to promote higher paying jobs for women and, in this way, to reduce the degree of sexual segregation in the labor market. Their strategy thereby differs from the litigation strategy pursued by unions in the United Kingdom. One should note that in both cases inspiration is drawn from European Community law. In the case of the equal pay strategy of the British union, this is obvious. In collective agreements in Italy, one also finds many references to European Community instruments, particularly references to the 1976 Directive on Equal Treatment, often cited to support the limitation of positive actions.

The situation in the Federal Republic of Germany further illustrates the difficulties on the path towards a harmonized implementation of a fundamental right to equal pay in the European Community, already evident from the comparison of the strategies of the British and Italian unions. Pay bargaining in Germany takes place not at the enterprise but at the regional, national or sectoral level. Where wages are successfully negotiated at these levels and not at the level of the

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work place, it is very difficult to implement an equal pay strategy, based on direct comparisons between two workers of different sexes working in the same establishment allegedly doing the same work or work of equal value. The implementation of an equal pay policy through national or regional bargaining systems may be theoretically possible; however, this requires a sophisticated system of job evaluation. The only trade union, as far as I know, that has introduced any kind of job evaluation into its collective agreements on wages is IG Metall, which organizes metal workers in the Federal Republic.

An aspect of the German pay bargaining system is intriguing on this point. At the plant level, no pay bargaining occurs because, by law, plant-based works councils have no jurisdiction to negotiate. But, four to five hundred thousand *de facto* arbitrations take place each year at the plant level over the grading of workers in the trade union negotiated wage structure. This allows for a measure of plant level control over wages. Wage increases can be pushed through at the plant level, not through negotiating flat rate increases or percentage increases, but by upgrading the employees' job classification, thereby effectively obtaining a *de facto* wage increase. The question, to which I do not know the answer, is to what extent do or could work councils use this form of arbitration at the plant level as a means of either promoting or not promoting equal pay between men and women?

The Danish situation is completely different because Denmark is the only country that I know of in Europe with separate trade unions for each sex. That is to say, there is an all-female unskilled workers' trade union and an all-male unskilled workers' trade union. This separation has had very important implications, for example, concerning the willingness of the Danish trade union movement to organize what are in Europe frequently called "atypical workers".

The difficulty of this comparison may be highlighted by the problems I always have in persuading my Danish colleagues to adopt the concept of atypical workers. As far as they are concerned, part-time workers and other atypical workers are in fact the norm in Denmark. A higher proportion of people in Denmark work part-time jobs, casual jobs, temporary jobs, and so on, than work in what is elsewhere recognized as typical employment, namely full-time employment of indeterminate duration.

The Danish system is further complicated by the effective existence of two wage determination systems: the normal wage system, where the results of negotiations are what is actually paid; and the minimum wage system, where what results from negotiations is only a minimum
wage, which is usually increased by various bonus payments and premiums negotiated individually between workers and employers. The minimum wage system, bolstered by bonus payments, is often the vehicle for indirect sex discrimination because, not surprisingly, most of the bonuses tend to go to jobs held by males workers.

To summarize, a legal strategy addressing sex discrimination in employment can benefit considerably from integration with a collective bargaining system. However, a strategy which seeks to coordinate legislation against discrimination with collective bargaining must account for the very different industrial relations systems, as the experience of the Member States of the European Community demonstrates.

III. ANTI-TRADE UNION DISCRIMINATION

The second area I want to address is anti-union discrimination. Reference here is obligatory to several international instruments: the International Labour Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize (1948), Convention No. 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (1949), and Convention No. 135 concerning Protection and Facilities to be afforded to Workers' Representatives in the Undertaking (1971). Furthermore, the European Convention on Human Rights and Fundamental Freedoms (1950) and the European Social Charter (1961) both provide various protections against anti-union discrimination.

Not until 1971, however, with the Industrial Relations Act, did Great Britain actually introduce legislation giving employees the right to be trade union members and to take part in trade union activities. The relevant provisions are now found in the Employment Protection (Consolidation) Act 1978. This legislation contains provisions protecting against dismissal or any form of discipline or discrimination resulting from union membership or union activity. The law also provides employees with time off enabling them to take part in trade union activities and, for employees who are trade union officials, to take time off to carry out their union duties. This last provision is subject to amendment by a Bill now before Parliament.

In contrast to these legal provisions, both international and British, I want to bring to your attention some empirical research undertaken in 1987 on anti-union discrimination. This work focused particularly on the construction industry. It argues that, although overt anti-union

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discrimination is very infrequent, it is systematic at critical moments of challenge to management control. In other words, anti-union discrimination only arises when something important is at stake. As long as there is no conflict and no problem, one does not find anti-union discrimination.

Discrimination emerged in different forms in what was called the pre-recruitment stage and the post-recruitment stage. At the pre-recruitment stage, it took the form of screening. Employers in the construction industry were found to prefer systematically certain kinds of workers—those thought to be more reluctant to assert their trade union rights. Employers tended to prefer workers, selected on criteria of race, gender or age, perceived rightly or wrongly as being more reluctant to exercise trade union rights. An active blacklist was operating in the construction industry whereby workers, known to be trade union activists or militants, were systematically excluded.

The law protecting employees from anti-union discrimination was useless. This fact is demonstrated by a 1977 case which concerned a worker, a noted trade unionist, who was convinced that no large employer would give him a job because of his record of union activism. Using a false name and bogus references, he was finally hired by a foreman on a construction site who did not recognize the name. However, he was recognized one hour later by another foreman and thrown off the site. When this happened a second time, he claimed that he had been a victim of anti-union discrimination. He lost the case because no right against discrimination existed prior to employment. Employer maintenance of a blacklist is not against the law. There is no pre-employment protection. This is particularly important in light of the increasing use by employers of internal labor resources; in hiring recruits, employers rely on existing personnel who introduce and vouch for prospective employees. This operates as an indirect mechanism for keeping out workers regarded as unsound.

The second form of anti-union discrimination is post-recruitment. In Britain, the practice whereby workers are required to sign a declaration stating that they will not join a union no longer exists. But

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9 In proposals currently being put forward by the Government, consideration is being given to the possibility of extending protection against anti-union discrimination at the pre-recruitment stage.
dismissal of employees after they have been recruited for reasons of union activity still exists and takes two main forms. It may occur on an ad hoc basis where the employer decides that in a situation of conflict he is not going to tolerate certain union activity or union militancy and simply dismisses the worker concerned. This tends to be a practice found primarily in small firms. A small and, in personnel management terms, unsophisticated employer will resort to instant retaliation in a case of conflict. The second form has been called the "safe" method. An employer, confronted with a union militant or union activist who is causing him difficulty, does not seek instantly to dismiss the employee but adopts a series of other mechanisms. He prepares the grounds for an eventual dismissal based on a history of disciplinary misconduct: bad time keeping, poor work, and so on. Various forms of harassment are exercised against the worker, or the worker is transferred to less desirable work, or he is isolated in a certain work place, or he is surrounded by workers deemed more trustworthy so he can never mobilize work mates to support union action. The above-mentioned research on the construction industry demonstrated that employers will use these techniques even if they have to sacrifice other workers in order to justify the ultimate dismissal of the union activist. The employer will impose sanctions on non-union employees as well as unionists in order to protect the eventual dismissal from challenge on grounds of discrimination.

The law plays a very minor role in preventing this kind of pre- or post-recruitment discrimination. Generally speaking, surveys of the construction industry show that the law fails to deter employers, who regard it as an insignificant obstacle. The risk of complaint is very low. Any remedy that might ensue as a result of an anti-union discrimination complaint is regarded as a cheap price to pay. Union officials also do not regard the law as being of much help. In fact, they regard the law as positively undesirable because it effectively deters negotiations. If the union represents a union member allegedly dismissed for union activity, any litigation over the issue would effectively put a stop to negotiations with the employer over eventual reinstatement or settlement to the problem.

IV. DISCRIMINATION ON GROUNDS OF RELIGION

The last area I want to address is the very special problem of religious discrimination in Northern Ireland. Twenty-one years ago, in 1968, the civil rights movement reached Northern Ireland. It sought particularly to eliminate or at least protest employment discrimination
against Catholics. The constitution of Northern Ireland was amended in 1973 to prohibit direct discrimination against Catholics. Further legislation was passed in 1976 (the Fair Employment Act), and a special enforcement agency was set up in 1977. More than ten years later, the Catholic rate of unemployment for males in Northern Ireland is 35%, which is two and a half times the rate for Protestants. In other words, despite ten years of legislation, with an average of 100,000 job changes a year, the rate of Catholic unemployment is still much higher than that of Protestants. Religion remains the major factor determining recruitment.11

An authoritative report published in 1987 stated that the legislation had had little effect on the practices of employers. Employers continue to think that such discrimination is justifiable. They still resort to old established methods of informal recruitment. Investigations undertaken by the special Fair Employment Agency have had no impact beyond the immediate employer investigated. Employers have made no effort to monitor recruitment according to religion, and very few equal opportunity measures exist.

The point I want to emphasize, however, is that there has been, since the mid-80s, considerable development in this area. This development has come from an unexpected quarter, not normally considered in the context of anti-discrimination law. It is a result of a kind of non-traditional international law. I am referring to political pressure from the United States on Northern Ireland. This pressure, since the mid-80s, has given rise to serious proposals for reform, the McBride principles.

These principles incorporate the results of long-standing pressure brought to bear on American corporations and state and municipal governments with investments in Northern Ireland to insist upon certain positive action and anti-discrimination policies with respect to employment practices in Northern Ireland. The McBride principles, named after Sean McBride, assumed a serious dimension in the United States by July 1988. Last year, eight state governments passed legislation, including Massachusetts, where then Democratic presidential candidate Governor Michael Dukakis signed a bill which implemented the McBride principles.

This political development had a tremendous impact in Northern Ireland, so much so that in May of last year a White Paper was

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issued which contained considerable changes to the law. The White Paper sought to enforce equal opportunity through positive action policies, to impose monitoring requirements, to introduce a principle of contract compliance for government contracts, to ensure that certain quotas or targets were met, and to provide more effective remedies where the employer was found to have discriminated.

Experience does not make one optimistic about the success of even these new developments in the law. However, the experience of Northern Ireland is interesting as a legal strategy against religious discrimination—relying on transnational legal developments to create an impact on the domestic law of the United Kingdom. It is important to seek to develop new strategies in the attempt to make laws against discrimination more effective.