

Achieving social mobility: the role of equality law

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Abstract

Since it came into office in 2010, the British Coalition Government has shown concern over the nation's declining social mobility, highlighted in *Opening Doors, Breaking Barriers: A Strategy for Social Mobility*, which identifies the private/state education divide at the root of the problem. However, despite this educational inequality and segregation, successive governments have not seen equality law as a tool of redress. This may be because by tradition, distributive inequalities are dealt with only by *political* initiatives. The purpose of this article is to question this 'tradition' and evaluate whether using equality law in Britain as part of a social mobility agenda is justifiable, especially in education.

The article concludes that *discrimination* law, based on school background, could play a significant part in employment, but technical issues make this less likely in education. However, a public sector equality duty extended to education could have a significant impact.

Introduction

Since it came into office in 2010, the Coalition Government has shown concern over Britain's declining social mobility, highlighted by its publication of *Opening Doors, Breaking Barriers: A Strategy for Social Mobility*.¹ In the meantime, the Minister for Education acknowledged his concern that social mobility was worse than in any comparable country.²

This concern is not unique to the Coalition Government. The previous (New Labour) Government voiced similar concerns. And, nowadays, all the main political parties agree that Britain needs more social mobility.³ But an interesting change of policy towards social mobility appears to have come with the Coalition Government. New Labour focussed on social inclusion, that is, trying to bring those with no stake in society at least onto the bottom rung of the ladder.⁴ However, the Coalition has shifted the focus somewhat to the top of the ladder, and the domination of the top jobs by the private schools. The Conservative Minister for Education has identified the private/state education schism as the focus for attention. At various times he has declared that a problem at the heart of English education is 'inequality';⁵ the private schools' domination of public life was 'morally indefensible',⁶ that England's 'dark secret' was 'one of the most stratified and segregated education systems of any developed nation', and as well as the ethical objections, this waste of talent was 'economic madness' in an increasingly competitive world.⁷

Having identified the principal problem as private school students' being disproportionately represented in the nation's top jobs, the Government wanted to raise standards in all schools, narrow the attainment gap, and raise aspirations in state schools.⁸ To these ends, it proposed, *inter alia*: only funding teacher-training for graduates with at least a 2:2 degree;⁹ special help for disadvantaged schools and pupils;¹⁰ and 'impartial' career advice on further and higher education, and apprenticeships, with an aim to provide high profile, inspirational speakers.¹¹

Whilst these are laudable initiatives may narrow the gap, they fall well-short of *closing* the gap, and will leave some inequalities unaddressed. The teacher-training initiative does not bar the *recruitment* and retention of less-qualified teachers. Moreover, the policies make no comparison with more tangible signs of quality, such as private school funding, teacher qualifications and pay, and staff/student ratios. And whilst help for disadvantaged schools and pupils is welcome, its aspiration can only be to bring those up to the standard of the average state school, which the document itself acknowledges is inadequate and part of the problem.¹² The careers initiative is again welcome, with the added discipline of a *destinations measure* to monitor its success.¹³ But much will turn on the values of this measure.

At the heart of the shortfall is the Government's reluctance to equalise, or even integrate, the state and private systems. Whilst *Opening Doors* is happy to compare the *outcomes* of state and private schools, and laud the 'world class' standing of the private sector,¹⁴ it fails to compare and contrast their *practices*, which are more likely to be at root of the diverse outcomes and inequality. It is apparent that the rhetoric identifying the problem – *inequality, segregation* - is not realised in any of the initiatives. This coincides with the legal shortfall: the absence of any equality law to address what would seem to be its natural targets: inequality and segregation. This may be because by tradition, distributive inequalities are dealt with only by *political* initiatives.

The purpose of this short article is to question this 'tradition' and evaluate whether the Government's reluctance to use equality law as part of its social mobility agenda is justifiable, especially in education. To do this, it is necessary first, to explore the underlying values of the social mobility agenda, and second, whether equality law is suitable to address social immobility and education inequality, and whether it is on a par with established grounds (sex, race, religion, age etc.) to be readily integrated into the current equality law framework. Third, it considers, in brief, the potential impact of some equality laws - direct and indirect discrimination, positive action, and the public sector equality duties - in some key areas: employment recruitment, university admissions, and school recruitment.

1. Social Mobility, Merit, and Education

Although affording it an 'economic dimension', the Coalition Government considers social mobility principally a matter of *fairness*, one of three core values, along with freedom and responsibility.¹⁵ Thus, social mobility can be considered as a matter of *fairness* or *economic efficiency*, or both, presenting ethical and economic justifications for advancing social mobility. Inherent in these is a notion of merit: talent should not be frustrated by inferior life chances, such as schooling. Both the ethical and economic aspects are considered below in turn, but it will be seen that they often coincide.

(1) The Ethical Dimension to Social Mobility

Received wisdom is that social mobility has an ethical basis; it is 'wrong' that children born to uneducated, unenlightened, or non-wealthy, parents, have inferior life-chances. On these lines, according to the Coalition Government, a commitment to fairness brings 'a strong ethical imperative to improve social mobility', and this means that 'the circumstances of a person's birth' should not 'determine the life they go onto lead.'¹⁶ Underpinning a policy

with an ethical imperative may give it credibility, but it can also bring uncertainty. Consider these three possibilities of the ethics underpinning social mobility and merit.

(a) *Luck – you cannot choose your parents*

As an ‘ethical’ ideal, meritocracy is not entirely free from uncertainty. The received wisdom is that by rewarding a person on their innate abilities, we eschew privilege. And by privilege, we mean the luck of birth and the parents that went on to buy that privilege and pass on their know-how and contacts. But is there not just as much luck involved with the innate abilities of a person, normally determined pre-birth? This also is something over which the person has no control. Some abilities may run in the family, so there is the luck – not of the parents’ wealth – but of their innate abilities, with the further uncertainty of them being passed on genetically. There are other factors, such as the luck of the parents’ conduct during pregnancy: an expectant mother may have smoked and drunk, or have taken narcotics, damaging the child’s innate abilities before it is born. This suggests that there is an ethical reason to redress the bad luck.

However, a realisation of that principle could mean Government intervention on a scale at odds with modern liberal values. ‘Solutions’ could involve eugenics,¹⁷ including widespread forced sterilisations and marriages ‘arranged’ by the state. Many would argue that ‘ironing out’ these differences would produce a sterile society, drained of variety and the vicissitudes of life, while many parents would argue that they are better placed to choose each other as partners for sound reasons of compatibility. Meanwhile, any ‘compensation’ would involve a ‘levelling down’ of performance standards and pay, as job applicants are treated according to what abilities *they would have had*; this, ironically, would degrade the competitive market economy, and is at odds with any economic justification for a meritocracy.

Thus, as well as being practically problematic, a notion of social mobility cannot not include *all* those deprived of abilities because it is at odds with prevailing Western ethical, cultural and economic values.

One cannot leave this theme without discounting a tempting parallel with disability discrimination law, which requires employers, educators, providers of services (among others) to make ‘reasonable adjustments’ for a person’s disability, suggesting that a degree of economic inefficiency is acceptable where justice demands. However, disability law has the advantage of being able to define its class by an absolute measure (*ability to carry out normal day-to-day activities*).¹⁸ By contrast, a pure ‘luck-based inability’ would be measured by establishing the abilities the individual *would have had*, but for the bad luck, which is a relative assessment and a practically impossible task.

A second parallel can be made with disability discrimination *theory*. The *social* theory argues that the problem is not a person’s abilities, but society’s infrastructure and attitudes. A rare example of this realised in law is where severe disfigurements are be treated *as if* they substantially affected the person’s functional abilities,¹⁹ even though the disfigurement – say, a birthmark on the face - had no adverse functional effect. Here, the problem identified is not the birthmark, but society’s reaction to it. Using similar logic, it is arguable that for merit, the problem is the high value placed on innate ability. Western societies have created an economic system that values (or purports to value) competition, merit, and personal achievement; it is these societal values that put those with fewer innate abilities at the disadvantage. The meritocrat values personal fulfilment and achieving potential. A contrary

view would see this as a wasteful use of energy, with the meaningless goal to accumulate a list of achievements to be carved into a gravestone. Rest in peace instead. Again, this is too contrary to existing Western values to gain traction.

All this indicates that any ethical basis lies elsewhere. Given that the preponderance of top jobs are occupied by the privately educated, perhaps an ethical basis lies in the *privilege* provided by private education or the notion of separate schooling being inherently *unequal*.

(b) Merit and 'unethical' privilege

If, contrary to the above proposition, we assume a person's innate abilities are to be judged from the moment of birth, then the focus shifts to the education system and how it nurtures these abilities. After considering the matter in some depth, one-time Conservative Education Minister, George Walden, concluded that Britain operated an 'apartheid system' of education.²⁰ This may be overstating the case somewhat. It is not an omnipresent racial segregation violently enforced by the police state. Nonetheless, the segregating barriers are formidable. In addition to the cultural deterrents for an ordinary boy or girl to attend one of Britain's public schools, there is the financial barrier. By 2010 prices, average school fees for were £12,558 per year,²¹ whilst the average wage, *before* deductions, was £23,660.²² Simple maths (deduct e.g. tax, national insurance, pension contribution, rent or mortgage payments, household bills, transport costs, etc.) informs us that the average family cannot *choose* to educate its children privately. So much so, the prospect is unthinkable. For those on the minimum wage (say, £12,064 pa),²³ or unemployed, the prospect is laughably unthinkable.

Does this unequal state of affairs present an ethical challenge? Well, private school pupils enjoy superior staff/student ratios, are more likely to be 'fed' into the most prestigious universities,²⁴ and the conversion rate into top jobs disadvantages the non-wealthy. To aggravate matters, evidence suggests that persevering with the segregated system is actually *damaging* the state sector. As school fees rise above inflation, to keep up with ever-increasing education demands of the economy,²⁵ more and more of the best teachers are drawn from the state to the private sector.²⁶ The privileged do not enjoy their benefits in isolation. A high price is being exacted from the nation's majority to fuel the minority's benefits. This is an unattractive aspect of the educational privilege in Britain. It suggests that a fairer distribution of these benefits would not be the 'politics of envy', but an ethical matter of probity, justice, and fairness (as well as economic efficiency).

(c) Segregation and inequality

Suppose the 'unethical privilege' (above) were redressed. Thus, state schools, having enticed a fair proportion of the best teachers, and matched their private counterparts in all other indicators (such as class sizes), produced comparable exam results. Simple maths suggest that more private school pupils should be destined for lower paid jobs, manual work, apprenticeships, or a life on benefits.

In this scenario, logic suggests that private education would dwindle away as no parent would pay twice²⁷ for same thing. However, this logic is not compelling. It is perhaps more logical that independent schools, keen to retain or even enhance their kudos, will endeavour to offer something over and above the tangible indicators. In Britain of course, that would be the 'cultural capital' personified by Britain's private schools (such as confidence, self-esteem,

accent, manners, dining etiquette, deportment, and connections),²⁸ which will have a residual value beyond the apparent worth of qualifications, and feed respective senses of superiority and inferiority. Thus, even in this scenario, with all other things equal, the state school graduate, attending an upper class dinner, would still be distinguished as the lonely antithesis of the etiquette of the room.²⁹ Likewise, the Old Etonian will encounter similar difficulties on the factory floor or labouring on a building site.

Other factors contribute. First, the cost³⁰ of private education render it practically out of reach to the Non-wealthy, whose situation is – for all practical purposes - immutable. Second, although the law does not mandate the segregation, it does facilitate and support it, most notably by the charitable status afforded to private education.³¹ These factors can only drive home a deep sense of inferiority, which extends to a person's 'citizenship' and 'status in the community'. Such people are less likely to take part in civic life, such as sitting as a magistrate, standing for the local council, or voting in elections.³² Indeed, it was these factors that underpinned the outlawing of racially segregated education in the United States, famously, in *Brown v Board of Education*.³³ This suggests that segregation per se, contributes to the problem. Of course, this essential problem of inferiority can be associated just as readily with mere 'privilege', as outlined above. The point here is that even if formal privilege were swept away, this problem would persist.

It may seem curious to claim that a *majority* group is loaded with a sense of inferiority. But the statistics, notably the aspirations to the top universities,³⁴ tend to bear this out. This is not as odd as it seems. Privileged minorities, such as the Royals and Aristocracy, have survived for centuries, whilst South African apartheid operated against the majority. Sometimes, it seems, people chose identity over improvement.³⁵

This suggests that a sense of inferiority would persist even when all other tangible school indicators were comparable. The sense of inferiority would extend into a person's 'citizenship' and 'status in the community'. Such people are less likely to take part in civic life, such as sitting as a lay magistrate,³⁶ standing for the local council, or voting in elections.³⁷ This suggests that while the segregated school system exists, privilege and inequality cannot substantially be eroded.

Of these three ethical considerations, the first can be dismissed for falling foul of prevailing Western values, and being practically unworkable. The second and third arguments share a similar definition of merit, and similar aims of children reaching their potential and contributing (and being rewarded) accordingly in adult life. The distinction is between the means to achieve these aims, with the third asserting that private school privilege can never be eroded whilst the private/state dichotomy persists. Before attempting any sort of judgment over these two arguments, there is another – economic - dimension, to consider.

(2) The Economic Dimension to Social Mobility

'Whatever the goals of a community may be, they are most likely to be achieved when the individuals most capable of performing the tasks that promote those goals are allowed to do so. Such efficiency, it may be argued, requires a system that selects the ... ablest.'³⁸

That proposition, underpinning an 'equality of opportunity' policy, rings hollow whilst the nation provides inferior education and aspirations for the vast majority of its population.

Employers have to pick the ‘ablest’ from a pool of talent drawn from a tiny minority of its ‘community’. Research shows that a more highly-skilled workforce could add four per cent to Gross National Product.³⁹ By its nature privilege is anti-competitive, damaging the market economy, and international competitiveness.⁴⁰

For Western democracies, the link between education and the economic performance is becoming ever more important. Private schools have been aware of this for many years, shifting their emphasis to academic achievement. As such, in the past 20 years, school fees have doubled in real terms and parents – conscious of the ever-increasing need for academic achievement - have been willing to pay.⁴¹

What this shows is that if *merit* is to be cherished for ethical and economic reasons, it must be based on a person’s innate abilities from birth, and cannot be fully realised with a privileged, and segregated, education system.

There is no doubt that notions of merit, fairness and economic efficiency inform the Government’s social mobility agenda. However, there is no evidence that (despite the Education Secretary’s rhetoric) that desegregation is on this agenda. In any case, domestic discrimination law is not the ideal vehicle to dismantle the segregated school system, as no single defendant could be held responsible. This is a matter state policy and any *legal* challenge must be at a ‘constitutional’ level, the mostly likely here being under the European Convention on Human Rights, which is beyond the scope of this paper.⁴²

2. Is Equality Law Suitable To Address Social Immobility?

To clarify the argument, it is necessary to clarify the problem, and to see how far it is a necessary consequence of the market economy.

(1) Social Mobility and Education

Research suggests that in Britain social mobility is static, if not in decline.⁴³ In other words, children are more likely to replicate their parents’ achievements and aspirations, rather than participate fully in civil life and a competitive market economy. The following statistics show part played by education.⁴⁴ Bear in mind that only about seven per cent of children are privately educated.⁴⁵

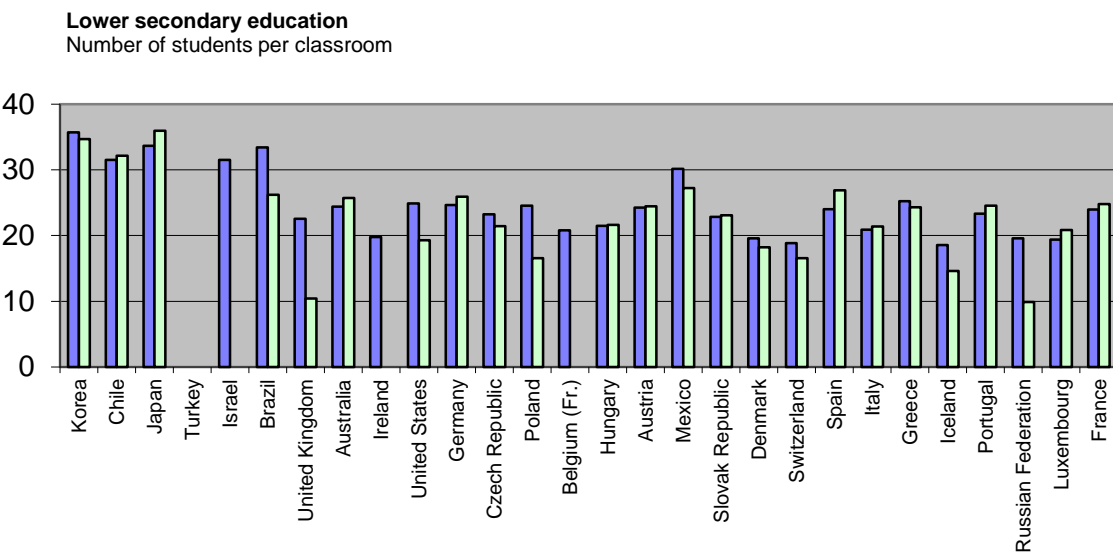
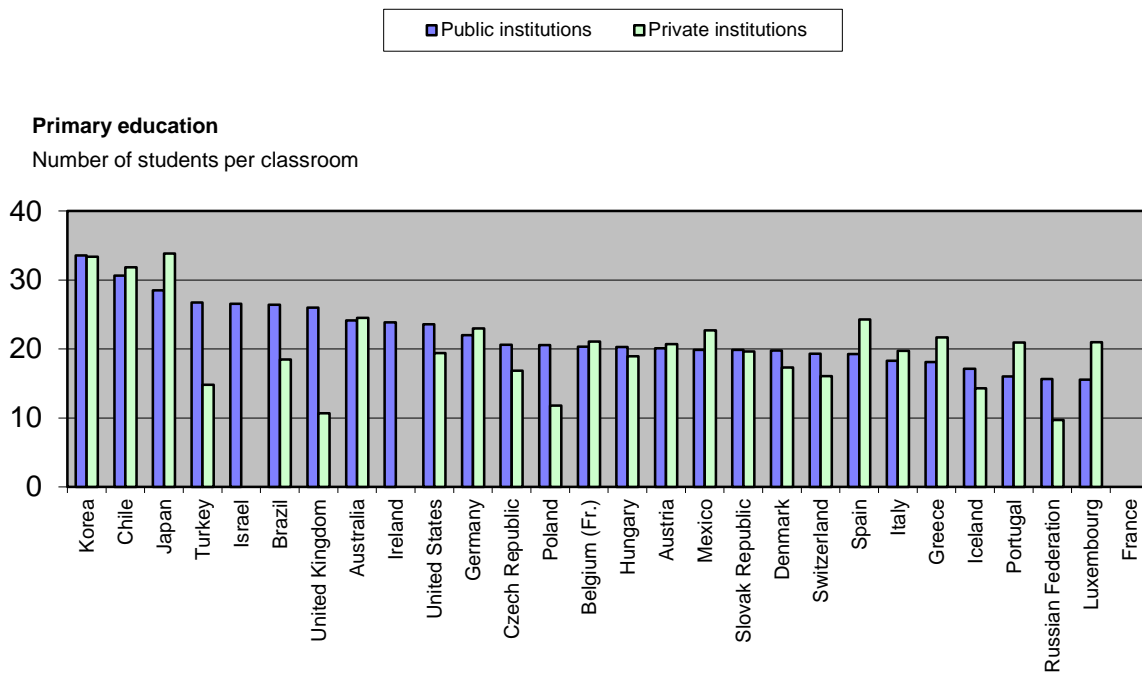
The new coalition cabinet, when formed in May 2010, contained 29 ministers, 18 of whom (62 per cent) were privately educated.⁴⁶ In 2009, the Sutton Trust reported that some 70 per cent of the senior judiciary, 68 per cent of the leading chambers, and 55 per cent of partners in the ‘magic circle’ solicitors’ firms, were privately educated.⁴⁷ Recently, the Sutton Trust found that half of ‘medics’⁴⁸ were privately educated.⁴⁹ Similar findings can be found elsewhere. In 2000, for instance, of those admitted to medical schools in the UK, over 80% were from social classes 1 or 2 (from 5 social classes).⁵⁰ The Sutton Trust has found that 54 per cent of top journalists and 54 per cent of chief executive officers of FTSE 100 companies⁵¹ were privately educated. Government research found that for army *officer* training (at Sandhurst), private schools were over-represented, making up 42.3 per cent of the

2011/2012 graduates.⁵² The journey from school to a top job normally will be via a top university. Private school students are 55 times more likely to win a place at Oxbridge and 22 times more likely to go to a top-ranked university than the poorest students at state schools.⁵³

This peculiarly British problem is recognised by the Coalition (as noted above),⁵⁴ which points out that the influence of parental income on the income of children in Britain is among the strongest in the Organisation for Economic Co-operation and Development (OECD) countries: ‘The impact of parental income is over one and a half times higher in Great Britain than in Canada, Germany, Sweden or Australia’.⁵⁵

The contrast can be seen also in broader educational indicators. Between 2000 and 2009, 15-year-olds in the UK have fallen from 4th to 16th in international rankings in science, from 7th to 25th in literacy and from 8th to 28th in maths.⁵⁶ In a global economic context, Britain’s top-heavy allocation of education resources is outstanding. The OECD has found that the UK spends about half per pupil on its state schools in comparison with some 29 other nations, ranging from Hungary, Australia, the United States, Korea, and Mexico.⁵⁷ Two further OECD reports illustrate what this means in the classrooms. The first highlights a discrepancy in class sizes, with private school classes about half that of their state counterparts. In a global context, this discrepancy is the widest in the survey. As the chart below vividly demonstrates, the United Kingdom has by far the widest discrepancy of the 28 nations surveyed, and is less egalitarian, for instance, than Turkey, Portugal, Mexico, Chile, and even the United States.⁵⁸

Chart D2.3. Average class size in public and private institutions by level of education (2004)



The second report, on student/teacher ratios for secondary schools, presents a similar picture. For the state sector, whilst the OECD average was 13.4 (students per teacher), the United

Kingdom could only manage 15.7. By contrast, the UK's ratio for the private sector was 7.5, bettering by far the OECD *private* school average of 12.1.⁵⁹

These figures show that that Britain has an exceptional coincidence between wealth and education, a coincidence that persists individual life chances. Overall, it is clear that Britain is labouring under a severe, widespread, and exceptional problem of inequality in education, which in turn feeds its problem of social immobility. The next question is whether equality law could address these problems.

(2) *The Basis of Existing Equality Law*

The first question is whether the characteristic of 'school background' is analogous to the present protected characteristics (of sex, race etc.), thus making it rather straightforward simply to add this to the existing equality law framework. The 'mischief' behind our sex and race discrimination legislation may sit comfortably under the banner of 'institutional and societal disadvantage', but within that broad definition, the issues relating to gender and race are quite distinguishable. In Britain, Caribbean and Asian immigration prompted the race relations legislation.⁶⁰ Meanwhile, a quite different history is associated with the subordination of women.⁶¹

There are geographical considerations as well. The European Commission considered the 'mischief' behind the Race Directive was Europe's 20th Century wars and conflicts, with the Directive contributing to the consequent 'fight against racism'.⁶² In the United States, the Civil Rights Act 1964 was rooted in a history of slavery and segregation. Thus, not only do race and gender have distinguishable issues to address, race issues are distinguishable according to geography and timing.

A banner of 'institutional and societal disadvantage' is even less accurate when considering the backgrounds to the other dedicated legislation, covering disability, sexual orientation, religion *and* belief, and age. For all these characteristics, the Framework Directive states:

'Discrimination ... may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.'⁶³

And for older people in particular, the Directive was needed 'to increase their participation in the labour force.'⁶⁴ At face value, these reasons imply that the problems with discrimination on these grounds were unemployment (especially for older people), poor living standards, economic and social division, and restrictive free movement. Not only are these bases fragmented, they contain contradictions. For instance, a study of age discrimination law in the United States revealed that the chief beneficiaries were middle-class white males,⁶⁵ which suggests that age discrimination does not sit comfortably under the banner of 'institutional and societal disadvantage', and, by favouring this sub-class, it may *disfavour* non-whites and women. Another instance is the 'clash of rights' between sexual orientation and religion, demonstrated by a growing body of case law.⁶⁶

Any notion of a co-ordinated or common theme is further undermined, not only by the inclusion of age, but by the fortuitous nature and timing of respective political campaigns. For instance, despite a long history of slavery, followed by a century of institutionalized

segregation, it took a single speech - Martin Luther King's 'I have a dream' - to move President Kennedy to foster the Bill that would become the Civil Rights Act of 1964.⁶⁷ In the UK, the daughter of the Minister for Disabled People drew huge public support by leading a campaign that embarrassed a reluctant government to introduce the Disability Discrimination Act 1995.⁶⁸ The EU's equal pay law was enshrined in the original Treaty of Rome at the insistence of the French: as France was the only country with an equal pay law at the time, French *employers* (not workers nor feminist groups) campaigned for its inclusion in the Treaty to avoid unfair competition from other member states.⁶⁹ Gender was introduced into the Civil Rights Act 1964 as a wrecking amendment, the proposer believing that Congress would never vote for it.⁷⁰

A broader aspect of timing relates to changing values. As some judges maintain, statutes entrenching fundamental rights are living instruments, to interpreted according to the values of the day.⁷¹ It took just 60 years for the US Supreme Court (in *Brown v Board of Education*⁷²) to reverse its opinion that racial segregation was Constitutionally equal,⁷³ noting, that the value *equality* cannot be judged in isolation or frozen in time.⁷⁴ Since *Brown* was decided in 1954, mainstream Western society has recognised as unjust the disadvantages suffered by women, religions, beliefs, homosexuals, transsexuals, the elderly, and those with disabilities. Sometimes, values may be driven by changing *circumstances*. In recent years, for instance, an increase in obesity, along with glamour, celebrity, and 'body image', there are concurrent arguments for legal protection against 'fattism'⁷⁵ and 'lookism'.⁷⁶

If there were a notion underpinning the more recent grounds (and arguments), it is the rise of individualism, which readily transposes Martin Luther King's famous saw, that people should be judged by the content of their character, rather than the colour of their skin.⁷⁷ The West's shift from collective to individual values is graphically demonstrated in the UK by the decline of trade union membership and corresponding increase in individual employment rights, and the passing of the Human Rights Act 1998.⁷⁸ More particularly, if one delves into the foremost theories underpinning discrimination law, ranging from formal equality, equality of opportunities, to equality of outcomes, the dominant theme explaining existing equality law is 'equality of opportunities'. It is common for the phrase to introduce equality legislation.⁷⁹ It is a mantra of political rhetoric, and of employers signalling their compliance with existing equality legislation.

In recent years the circumstances are that the value of education has increased greatly and the competitive market economy has prevailed, whilst social mobility has waned and the wealth gap widened. Meanwhile, individualism and equality of opportunities demand that people have a right to participate *fairly* in this economy. All this coincides with Coalition's professed values of fairness and economic efficiency, which are to be realised, it says, by equality of opportunities.⁸⁰

The increasingly competitive market economy, rise of individualism and the value of fairness all coincide to suggest that a 'right' to social mobility, and in particular, for the state-school educated to compete *fairly* in the market economy, is a right on a par with existing grounds considered apt for dedicated equality law (such as sex, race, religion, age, etc.).

4. The New Law

No doubt, the drafting of an anti-discrimination law centred on school backgrounds would present new challenges. But this not a reason to abandon the project. The later generations of

protected characteristics, such as disability (1995),⁸¹ sexual orientation,⁸² religion⁸³ (2003), and age (2006),⁸⁴ each presented new challenges to the drafters and the courts.

Assuming the political will existed to introduce 'school background' as a protected characteristic within the existing equality law framework, the first question is technical, should it adopt a symmetrical model? Once that is resolved, the second question is how far it could contribute to the social mobility agenda. It was noted above⁸⁵ that the social mobility agenda aspires to equality of opportunities, achieved mainly through equality in education. It does not extend desegregation.

(1) Symmetrical or asymmetrical?

Most domestic discrimination law models can be classed symmetrical or asymmetrical. The symmetrical model dominates, which provides for equal treatment of women and men, blacks and whites, Jews and atheists, gay and straight, and so on. However, the law provides some asymmetrical models, notably for pregnancy,⁸⁶ disability,⁸⁷ and positive action,⁸⁸ where the disadvantaged group is singled out for protection, with no corresponding protection for non-members of the group in question.

In the related context of social inclusion, Sandra Fredman has argued that discrimination on socio-economic grounds should be couched in non-symmetrical terms⁸⁹ because it 'risks the possibility of challenges by better off people against programmes specifically designed to benefit poor people.'⁹⁰ This argument has force in the education context, where the many initiatives would become vulnerable to equal treatment claims by the privileged. Perhaps the most vivid and controversial of these is the lowering of A-level grade requirements for state school applicants, an initiative taken by a few universities.⁹¹ Such an initiative could be challenged by private schools and/or their pupils as *unequal* treatment based on school background.⁹²

On the other hand, a symmetrical model has political and economic advantages. Politically, affording protection to rich and poor, privileged and underprivileged, would undermine typical criticisms using the 'politics of envy' and 'class war' slogans. If an economic goal of social mobility is to utilise a broader pool of talent, permitting discrimination *against* the privileged is likely to keep them away from the less attractive jobs (where they might face prejudice), then logic dictates that a disproportionate amount of the less privileged will remain in these jobs. As noted above,⁹³ social mobility has to work two ways.

Ideally then, the best of both models is required. Fredman advocates that the definition 'socio-economic disadvantage' (provided by the not-in-force section 1 of the Equality Act 2010) resolves the problem in that context, with the rider that the inclusion of the word *disadvantage* excludes symmetrical claims by the better off. Such a formula would not facilitate the two-way street envisaged above in the context of school background. So, another solution is required. Of the asymmetrical 'exceptions' noted above, just one – positive action – relates to Fredman's concerns. Positive action is permitted at domestic, EU,⁹⁴ and European Human Rights⁹⁵ levels. The domestic and EU versions actually accompany the symmetrical direct discrimination formulas. The Equality Act 2010, for instance, simply disapplies any contradictory parts of the Act where positive action falls within specified limits.⁹⁶ This is discussed in more detail below.⁹⁷

Thus, the upper class schoolboy should be protected from discrimination on the factory floor, whilst a university may proceed with its attempts to secure a proportionate number of state school entrants, despite their generally lower A-level grades, without fear of legal attack by private schools.

This second question requires a consideration of how this discrimination law might operate in the contexts of work, school and university.

(2) *Employment Recruitment*

The Government's social mobility agenda is largely informed by the under-representation of state-school graduates in the top jobs. It is reasonable to assume that one strand of this agenda would be the outlawing of employment discrimination against state school graduates. It does not take much imagination to envisage some obvious cases:

- Online application forms providing only private schools as an option.⁹⁸
- A pattern of hiring/promotion favouring private school graduates.⁹⁹

There are likely to be some less obvious cases. An employer may express a preference for a particular private school (say, his Alma Mata). This lies somewhere between hiring from family or friends (permitted¹⁰⁰) and hiring only those who share the employer's characteristic¹⁰¹ (generally not permitted¹⁰²). The notion of old school chums working together sounds less romantic when recast as 'old school tie' nepotism, especially when it occurs in highly paid employment. Further grey areas will produce difficulties. A privately-educated employer may prefer the presentation skills of one candidate over another, unaware that his reason was the more familiar accent of candidate over - what he considered - the vulgar alternative. Such an employer may also have been impressed with the private-school candidate's grammar, deployment of Shakespearean metaphors, and references to the Classics, and correspondingly dismayed with another's split infinitives and misplaced prepositions. Other issues might centre on the soft skills (see above)¹⁰³ associated with private schools, say, confidence, leadership, and so on.

These reactions could mask a simple homophilic tendency (of selecting/trusting those socially similar¹⁰⁴), which is thus replicated throughout the business. Of course, logic dictates that favouring one group *disfavours* another, and in this case would directly discriminate against state-school graduates. Such cases may present difficult issues of proof, but no more so than existing 'borderline' or apparently nebulous cases. As the House of Lords has observed, sex and race discrimination claims 'present special problems of proof ... since those who discriminate ... do not in general advertise their prejudices: indeed, they may not even be aware of them.'¹⁰⁵

Should the employer's reactions be formalised to some degree, such scenarios may be expressed as (prima facie) *indirect* discrimination.¹⁰⁶ This is likely to occur where the employer claims that the presentation skills, confidence, and leadership were job-related characteristics, and applied equally to state and private school candidates. Here, a prima facie case might depend on, say, the improbability of being taught grammar (and/or Latin) in a state school, and then whether the employer's preference is genuine and necessary. One

danger for employers here would be for those hiring staff to deal directly with clients. Those at the top end of any particular market are likely to express a need for their staff to identify with its clients. This argument, rather than defending indirect discrimination, risks admitting *direct* discrimination, if identifying with clients is a mere pretext to hire only those from (certain) private schools. The straightforward ‘customer preference’ defence, akin to claiming ‘I’m not a racist, but my customers prefer white girls’, would perpetuate the stereotypes that the law was designed to eradicate. Further, for other protected characteristics, it has been roundly rejected by the courts.¹⁰⁷ Thus, any such defence would have to be tailored to the skills required, rather than the type of school attended. Even so, unless convincing, where the batch of skills coincides with the classic private-school prototype, it may well be found to be a mere pretext for direct discrimination.

If employers elect on merit, expressed as the best qualified, the impact of such a law may only be marginal, although not necessarily insignificant. As highlighted above, the root of the problem lies at the education level, before any employer decision-making occurs. If all employers – of their own volition or by the force of law - recruit the best qualified candidates, and the private schools produce the best qualified candidates, then the bulk of social mobility problem is likely to remain. What little research there is suggests that employers already recruit largely on ‘merit’. A study of the most apparently elitist of professions, the bar of England and Wales, found a close relationship between ‘merit’ and recruitment: ‘...education, measured as university attended and attainment at university and in the BVC was the most powerful predictors of gaining pupillage.’¹⁰⁸ This seemingly exonerating finding does expose a potential flaw in the recruitment to top jobs. It is unsurprising that the best universities were considered to be Oxford and Cambridge. There may be a case against an Oxbridge bias if it cannot be shown, all other things being equal, that an Oxbridge candidate is better qualified than other university graduates who performed equally well. This argument applies also on a wider basis, where employers choose from a broader range of what is commonly accepted as ‘good’ universities either ranging from the ‘Russell Group’¹⁰⁹ through to post-92 ‘new’ universities, or a perhaps more scientific approach based on the various league tables. The essential weakness here is that the reputations and league tables tend to indicate which university provides the best education for *students*, but not necessarily which (if any) provides the best *employees*. If a student from a top-ten university achieves a 2:1 honours, there is a logic that suggests that her counterpart from a university some 100 places lower in the league tables was a whole lot brighter to have achieved his 2:1. The point is that the logic of preferring candidates from ‘top’ universities should be tested: if the preference for a ‘top university’ adversely affects state school students, it should be objectively justified.

A second flaw associated with the ‘best qualified’ approach lies in the nature of the job. If the qualifications required are not *necessary* to do the job, and tend screen out state school graduates, then the practice is vulnerable to a classic claim of indirect discrimination, epitomised in the seminal US case *Griggs v Duke Power*.¹¹⁰ That said, the impact is unlikely to be major, as qualifications are necessary for many, although not all, of the top jobs.

Although compelling employers to objectively justify these preferences is likely to have only a limited *direct* impact on social immobility, it might indirectly produce some wider benefits. Under such a mandate, employers will become more objective in their decision-making. This in turn will send out a signal to a broader audience, raising awareness of the issue, not least upon schools and parents, that privilege will not trump merit. This ought to provide more state-school children with hope and the consequent incentive and ambition. Beyond that, the public’s expectation – as clients and customers – that certain professionals ought to be ‘posh’

should revise into something more rational and objective, which turn would feed back into employer's recruitment strategies.

Overall, subjecting employers to anti-discrimination legislation is likely to make a significant contribution, some of which is indirect, to the social mobility policy. The focus now shifts to education, beginning with higher education.

(2) Higher Education

Assuming that those in the top jobs are predominantly university-educated, and within that, from the elite universities,¹¹¹ the obvious stage for scrutiny is the universities' selection processes. The usual practice of preferring good A-level grades will tend to favour private schools, which, on the whole, outperform the state schools by this measure, and is certainly the excuse used by universities with an unbalanced state/private school cohort.¹¹²

At present, universities have the freedom to experiment, explore, and tailor their admissions requirements to an optimum. Yet the vast majority do not do this, sticking to the 'pure A-level' requirement. (One particular driver of this is Britain's university league tables, most of which include A-level entrance requirements as an indicator of quality.) This inertia signals the need for legal intervention.

Assuming a particular pure A-level admissions policy requirement is shown to adversely affect state school graduates, the university's most likely argument would be that the policy is objectively justified as the best indicator of degree performance. What is absent from this argument is a recognition that A-level grades, if taken in isolation, are not the optimal predictor of degree performance, even though they may be the single most reliable predictor. In legal terms, it might be *reasonable* to use them alone, but not *necessary*. Research suggests that, at degree level, state school children out-perform their private school counterparts arriving with comparative (or better) A-level grades.¹¹³ As such, it is likely that the university would have to show that their state and private school students perform comparatively, for instance, by showing that in a particular subject, A-level grades alone are the most reliable predictor of degree performance.

It does not necessarily follow that a broader admissions policy is a guarantee against discrimination. For example, a department may use interviews to complement the A-level requirements. This *could* ameliorate the arbitrary nature of a 'pure A-level' policy, by favouring state school applicants in borderline cases. But it is double-edged,¹¹⁴ carrying a 'face-fits' or homophilic (social similarity) risk of preferring students with whom the panel most easily identify, and/or who best replicates previous cohorts.¹¹⁵

Thus, a more reliable policy ought to begin with monitoring the relationship between A-level grades, schools attended, and degree performance. If this reveals a pattern of state school students outperforming their private school counterparts (all other factors being equal), it would support a proportionate adjustment in favour state school applicants. In time, with more data and experience, this might be refined, with a further adjustments on, say, school-by-school and subject-by-subject bases.

There is a technical issue here. Assuming the proposed law were symmetrical,¹¹⁶ any adjustment apparently favouring state schools, no matter how justified, would be facially

discriminatory against private schools, and as such be vulnerable to a challenge of direct discrimination from private school applicants. This would leave universities walking a tightrope, with a pure A-level policy vulnerable to indirect discrimination, yet any adjustment to objectively justify and avert such claims is likely to attract a direct discrimination claim.¹¹⁷ More generally, it would inhibit departments from exploring and experimenting various admissions policies, enabling them to tailor their requirements to an optimum. The irony is that at present most do not do this, and a discrimination law dedicated to forcing their hand, would in fact *prevent* any action. As such, a statutory provision would be required permitting (and defining) positive action. This is discussed below.

(3) Schools

Below university level, schools tend use a broader range of indicators for selection, including ability to pay, academic potential (measured by previous school performance and/or entrance exams), interviews, and catchment area. Any of these can indirectly discriminate against state school children, although, as the age range descends from Sixth Form, through Senior, Prep and Nursery levels, there is a corresponding reduction of potential to discriminate on the basis of the applicant's school background. However, there may be a corresponding tendency to select on the basis of the school(s) attended by the *parents*. If the existing formula of direct discrimination were adopted, outlawing, say, 'less favourable treatment because of educational background' (omitting the possessive adjective '*his* educational background'), it would be broad enough to cover this.¹¹⁸

At sub-university level, a discrimination law centred on educational background, whilst consistent with the social mobility agenda, is likely only to make a significant contribution at Sixth Form level, perhaps tapering somewhat at Nursery level.

Here, it becomes apparent that the specific problem of educational privilege is more closely related to wealth, rather than school background. The logical conclusion is legislation outlawing discrimination by schools on the basis of *wealth*, which would be realised as an ability to pay fees.¹¹⁹ Of course, such a regime, in isolation, would see the financial ruin of most – if not all – of Britain's private schools. Thus, discrimination law, at least in isolation, is not a solution, which would be political in nature.¹²⁰ Discrimination law, based on school background, could complement the political initiatives on social mobility. But, as will be seen below, this limited impact may not be enough to warrant its inclusion.

(4) Positive Action

A major contribution the social mobility agenda would be through university admissions. As noted above, any adjustment of A-level grade requirements favouring state school graduates runs the risk of directly discriminating against the private school graduates. As such, a proviso permitting positive action would be required. Again, for the sake of consistency and ease of administration by those bound, this discussion is based on existing definitions of positive action.

The general formula is provided by section 158 of the Equality Act 2010, which in turn is informed by EU law.¹²¹ It applies to all fields within the Act, such as education, the provision of services, and some aspects of employment, save that it does *not* apply where s.104

(election candidates) or s.159 (work recruitment and promotion) applies.¹²²

Section 158(1) provides three triggers and corresponding aims that may be pursued. If a person ‘reasonably thinks’ that either:

- (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic (‘disadvantaged’),
- (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it (‘different needs’), or
- (c) participation in an activity by persons who share a protected characteristic is disproportionately low (‘underrepresented’).

Accordingly, s.158(2) permits action which is a proportionate means of achieving the aim of:

- (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
- (b) meeting those needs, or
- (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

Section 158(2) provides the EU-derived principle that the means used in pursuit of the aim would have to be ‘proportionate’. The first thing to note here is that the positive action under discussion here applies only to (higher) *education*, and not the job market per se. It is more concerned with equality of opportunity than equality of results, and so is more likely to be proportionate.¹²³

For the policy itself, any adjustment of A-level grades for state school applicants would have to be no more than necessary to achieve the aim, in this case, fair representation. An adjustment informed by a ‘best predictor’ principle¹²⁴ is very likely to be proportionate, if for no other reason, it would have no impact on quality other than improving it. Of course, in the early years of such positive action, the policy may not prove to be entirely accurate. But s.158 is broad enough to accommodate some experimentation. For instance, if a particular course shows state school graduates out-performing their private school counterparts (with the same A-level grades) by, say, ten percentage points on their final year average grade, the university can only estimate what adjustment is required. It would take several years to see the results of just one round of recruitment, and several more years (and perhaps tweaks) for the figures to become constant and reliable. And even then, assuming the social mobility policy is working, the private/state school performance gap ought to be closing. Further, courses and methods of assessment will be changing, and new ones will come on stream. This means the state/private A-level grade profiles are liable to constant change, and so universities would have to react, not only to their internal ‘performance’ figures and course changes, but also to the constantly changing external situation. In addition, positive action policies generally require periodic review because of their transitional nature. ‘Otherwise, such forms of positive discrimination may, in the long run, create entrenched rights even when the original conditions justifying

them are no longer present'.¹²⁵ Thus a genuine attempt, based on sufficient data, ought to prove proportionate, even if proved not to be entirely accurate.

One difficulty here is, at EU level, case law is hostile to a straightforward tie-break between equally qualified candidates,¹²⁶ *a fortiori* where a *lesser* qualified applicant is preferred, which is what would happen under this policy.¹²⁷ In a sense, it is arguable that where, say, two applicants, one state, one private, each have 3 'B' grades, the state school applicant will be preferred. Reduced to this, it appears to be a tie-break, because of two equally-qualified applicants, one is preferred because of a 'protected characteristic'. But this is misleading, because the policy has redefined what is meant by 'qualified'. This is not just a matter of semantics. Under this policy, the best qualified applicants are those predicted to perform the best at degree level. This is reflected in s.159, which permits tie-breaks in the employment field, where two candidates were *as qualified as* each other, rather than *equally qualified to*: 'Formal qualifications are only one way in which a candidate's overall suitability may be assessed.'¹²⁸ The phrase envisages a broad range of factors in this equation, such as experience, aptitude, physical ability, or performance during an interview or assessment. Where one candidate may have a better aptitude, another may be *as qualified as* him because she has superior experience. This logic translates readily to a university's admissions policy.

Apart for the 'best predictor' principle, there are other moderating factors. The state school applicant would not be preferred 'automatically and unconditionally'.¹²⁹ The private school applicant could be a mature student whose life experience overrides other factors. There may be too few applicants from the state sector, thus permitting more private school applicants to be accepted. Thus, the policy, limited by the 'best predictor' rubric could be proportionate to the aim of achieving a fair representation of state school graduates.

A 'best predictor' policy is just one means of admitting more state school graduates. It is particularly safe because of its association with quality. But s.158 ought to permit other schemes, even where there is an impact on quality, as long as the benefits are not outweighed by this impact. Without the 'best predictor' limit, the other moderating factors could well render a preference for state school applicants proportionate, although the ECJ has shown hostility to moderating factors which are not unambiguous, transparent and 'amenable to review'.¹³⁰ As such, moderating factors applied with, say, an Admissions Tutor's discretion (i.e. subjectively) are unlikely to satisfy this requirement. On the other hand, a rule filling empty places with private school applicants would appear to validate an otherwise suspect scheme.¹³¹ It follows that an extreme policy that dropped all A-level requirements and recruited by quota would be very unlikely to satisfy scrutiny.¹³²

(5) *The Problem with the Symmetrical Model in Education*

Suppose a university department, having adopted a best predictor model, achieves its goal of a fair representation of state school students (93 per cent of its cohort). Also, suppose that the model proved to be a better predictor of degree performance than the previous 'pure A-level' policy. Now, the department wishes to maintain the policy as a more accurate predictor of degree performance. The problem with this aim is that it has nothing to do with positive action, and so would be exposed to a claim of direct discrimination from private school applicants. And if it reverts to the pure A-level policy, it risks an *indirect* discrimination claim from state school applicants.

There are some ways round this. The same policy could have another or concurrent aim: to prevent the state/private profile slipping back to its unbalanced state before the commencement of the positive action. This has the flavour of positive action, but still carries the problem that state school graduates are no longer under-represented on the course. As such, the trigger (under-representation) permitting the policy no longer exists. It would, of course, be rather perverse if the department were compelled by anti-discrimination law to revert to the pure A-level policy until state school graduates were – once again – under-represented. But this need not be so. There may still exist under-representation in the job market, especially one fed by the course in question. If this were a medical or law degree, the job market is fairly quantifiable. Other degrees may feed a broader range of jobs. But general statistics showing under-representation in relevant professions should be an adequate trigger, albeit, one step removed.¹³³

This is only a partial solution. Once the job-market representation becomes fair, then the department has the same problem. A second solution lies in looking beyond the triggers in s.158, but remaining consistent with EU principles. The three main equality directives each provide for positive action with the aim of ‘ensuring full equality in practice’.¹³⁴ Thus, it would seem that once equality were achieved, to *ensure* it, would cover a policy designed to prevent inequality returning, or arising in the first place.¹³⁵

A third solution lies again in positive action, but this time beyond the EU stricture of ‘ensuring equality’. Case law in the United States permits positive action under the equal Protection Clause, if it is to serve a ‘compelling interest’ and is narrowly tailored to achieve that goal. (These correspond roughly to ‘legitimate aim’ and ‘proportionality’.) In *Grutter v Bollinger*¹³⁶ the University of Michigan’s Law School included in its admissions policy the School’s commitment to diversity, which was to contribute to the Law School’s character and the legal profession. It made special reference to African-American, Hispanic and Native-American students, who otherwise may not be included in meaningful numbers. Accordingly, the School admitted a ‘critical mass’ of underrepresented minority students. Quotas were not used. The Supreme Court sanctioned this admissions policy.¹³⁷

Although the US Supreme Court is generally wary of positive action, its ‘compelling interest’ rubric is broader than s.158’s three triggers, or the EU’s ‘ensuring equality’ principle. In *Grutter*, the goal was *diversity*, rather than *equality*. Further, this goal may have been at a cost of academic standards (strictly defined), although no more than necessary.¹³⁸ Thus, if the UK were to adopt a broad positive action exception, permitting such aims as achieving social (class) *diversity*, university departments would have more leeway with their admissions policies. The goal of ‘ensuring equality’ suggests some equivalence of academic standards (by A-level grades and/or degree performance), whereas a goal of *diversity* permits more flexibility in strict academic standards.

Again, these are incomplete solutions. It may be that state school graduates have always been fairly represented on a particular course and its relevant job market. There would be no need for further diversity. And so, where the ‘best predictor’ policy has the sole aim of optimising degree performance, and is facially discriminatory, positive action provisions cannot save it from a charge of direct discrimination. At this point, where principle seems exhausted, it is tempting to introduce a ‘pragmatic’ exception: here to ring-fence best predictor policies. But this would allow universities to ignore other legal imperatives to improve the representation of state school students, thus undermining the purpose of the legislation: where that best predictor happens to favour private schools, we are back to square one.

It would seem that the problems stemming from the symmetrical formula of direct discrimination are not resolvable fully with the positive action rubric, no matter how broadly drafted. This leaves several alternatives. First, abandon the symmetrical formula, and instead use an asymmetrical one, enabling only state school victims to sue for discrimination in higher education. The main advantages to a symmetrical formula¹³⁹ are in the employment field, and so its abolition here will not have a major impact. But an inconstant structure would cause confusion, which tends to leave the law rather discredited, and so less effective. Second, abandon the symmetrical formula throughout the fields of application. This loses the considerable advantages in the employment field. Third, abandon discrimination law for higher education altogether, giving academic freedom to admissions policies. No 'shelter' of positive action would be required when devising admissions policies. The problem here is that hitherto, universities have rarely used this freedom, doggedly adhering to the pure A-level grade formula. A fourth possibility would be to afford direct discrimination a general objective justification defence, following the model for age discrimination.¹⁴⁰ This would afford some leeway to an admissions policy, but it does not guarantee certainty. There could be challenges 'testing' the objective justification of a variety of policies, producing a raft of fact-sensitive case law of little precedential value. The implications for the employment field would be far more serious, with employers pleading, among others, the 'customer preference' defence, thus maintaining the private school domination of certain professions and undermining the purpose of the law.

None of these options appear particularly palatable, but they may be better appreciated in context of a parallel public sector equality duty.

(6) Public Sector Equality Duty

Whatever the choice of possibilities (above), it would be logical to enact a 'public sector equality duty' similar to the existing public sector equality duty.¹⁴¹ The present 'general duty' is set out by EA 2010, s.149:

'(1) A public authority must, in the exercise of its functions, have due regard to the need to-

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

This duty applies to Higher Education.¹⁴² In contrast to the individual rights, it is enforceable only by the Equality and Human Rights Commission,¹⁴³ following an 'assessment' of compliance.¹⁴⁴

Of the duty itself, the tone was set in *Secretary of State for Defence v Elias*:¹⁴⁵

‘It is the clear purpose of [the equality duty] to require public bodies ... to give advance consideration to issues of ... discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. ... In the context of the wider objectives of anti-discrimination legislation, [the equality duty] has a significant role to play.’¹⁴⁶

On the other hand, ‘due regard’ is not a duty to achieve a *result*. It meant:

‘the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.’¹⁴⁷

Section 149(6) reminds authorities that complying with the duties ‘may involve treating some persons more favourably than others’ thus permitting (lawful) positive action.¹⁴⁸

If being of a ‘state school background’ were added as a protected characteristic, this duty would suggest, at the least, *in advance* of the setting of requirements (typically the A-level grades) for the next intake, reviewing state/private balance for each course, and, where there is an imbalance, evaluating the possibilities of alternative admissions requirements, designed to improve the balance. The countervailing factor would be the time and expense of this. However, as one obvious model (‘best predictor’) has been used for over a decade at university at least, and which has published its data,¹⁴⁹ the task should be relatively straightforward. In time, as records and statistics build, and the probability of specialist software becoming available, the process should become close to automatic. Given the relatively modest countervailing factors, the ‘due regard’ duty alone ought to compel universities to take these steps, at the least, on an annual basis.

Of course, where favouring state school applicants would entail a fall in quality, a university could argue this to be an overwhelming countervailing factor. Here, universities may have more discretion. Nonetheless, under this duty, universities should consider ‘soft’ policies of positive action (permissible by s.158), such as such as targeting more state schools in recruitment.¹⁵⁰ This ought to mean no more than reallocating resources, rather than spending more.

If this general duty proved inadequate, the Government has power to impose specific duties. Section 153 of the Equality Act 2010 authorises a Minister of the Crown, Welsh Minister, or Scottish Minister to impose specific duties on a relevant public authority, which includes schools and further and higher education institutions. However, the Coalition Government introduced a new ‘light touch’ approach, moving away from what it considered a process-driven top-down model, to a localised and transparent one.¹⁵¹ Those authorities covered will set their own targets (at least one ‘equality objective’),¹⁵² rather than have them set by central government. Other than that, they need do no more than ‘publish information to demonstrate its compliance’ with the general duty.¹⁵³ The Welsh and Scottish executives have gone a little further, showing that the specific duties need not be limited to the English version. As they

stand, the English duties could do little but compliment to the general duty. However, there remains potential to target university admissions with more specific requirements.

If combined with asymmetrical discrimination law (options one or two, above), university departments would enjoy some freedom to explore and experiment, being free of the main threat, a direct discrimination claim by private school graduates. If there were no *discrimination* law binding universities' admissions (option three), the need to eliminate discrimination etc. (s.149(1)(a)) is rather diminished. But departments would enjoy the maximum freedom in admissions, confined mainly by the need to advance equality of opportunity between state and private school graduates. Under option four, departments risk direct discrimination claims and complexity of structuring policies to comply with an uncertain objective justification test. Whatever option were in place, the obligation to advance 'equality of opportunity' (s.149(1)(b)) between state and private school graduates would remain highly relevant.

Overall, it would seem for the sake of consistency, clarity and public support, and the limited impact of discrimination law at school level, it would be better to confine discrimination law to the employment field, but places education under the equality duty. This reserves the most academic freedom in admissions policies, especially for the purpose of academic quality. It lacks the compulsion that should come about under the threat of legal challenges of discrimination, typically to the 'pure A-level' policies, but goes further than merely *permitting* universities to reconsider their admissions policies in light of the social mobility agenda (something, so far, they have failed generally to do). Where private school graduates are over-represented on courses, universities would be *obliged* to consider the impact of an admissions policy, to collect data, and adjust their admissions policies, certainly where it would have no adverse impact on quality.

CONCLUSION

The statistics support the British Government's concern over the lack of social mobility in Britain and its relationship with the state/private education divide, a problem unmatched in any other comparable nation. In addition to economic efficiency, the increasingly competitive market economy, rise of individualism and the value of fairness all coincide to suggest that a 'right' to social mobility, and in particular, for the state-school educated to compete *fairly* in the market economy, is a right on a par with existing grounds considered apt for dedicated equality law (such as sex, race, religion, age, etc.). Thus, the 'tradition' of confining distributive inequalities to political initiatives can no longer be justified. However, no Government initiative goes so far as suggesting that the school system should be desegregated, only that the gap between them should be reduced. That said, equality law clearly can make a significant contribution towards this goal.

The areas examined, employment recruitment and educational admissions, suggest that (direct and indirect) *discrimination* law has a significant part to play in employment, but technical issues make this less likely in education. However, a public sector equality duty extended to education could have a significant impact in university admissions.

¹ HM Government, Cabinet Office (April 2011) < www.cabinetoffice.gov.uk/resource-library/opening-doors-breaking-barriers-strategy-social-mobility > accessed 13 August, 2012. See also a series of Reports by the Independent Reviewer of Social Mobility and Child Poverty (Alan Milburn), including *A Report on Access to Professional Careers* (May 2012) and *University Challenge: How Higher Education can advance Social*

Mobility (Oct 2012). < <http://www.cabinetoffice.gov.uk/content/independent-reviewer-social-mobility-and-child-poverty>> Panel on Fair > accessed 17 November 2012.

² Michael Gove, *The Times*, 11 May 2012.

³ In addition to Government statements (nn.1-3, above), see Conservative Party, 'Invitation to Join the Government of Great Britain: The Conservative Manifesto 2010' (Conservative Party 2010) 51; Liberal Democrats, 'Liberal Democrat Manifesto 2010' (Liberal Democrats 2010) 6; Labour Party, 'The Labour Party Manifesto 2010: A future fair for all' (Labour Party 2010) Ch.3.

⁴ See e.g. *Preventing Social Exclusion*, Social Exclusion Unit, Cabinet Office (March 2001) < http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/publications_1997_to_2006/preventing.pdf > accessed 15 January 2013.

⁵ Speech to the Conservative Party Conference, The ICC, Birmingham, 9 October 2012.

⁶ *The Times*, 11 May 2012.

⁷ Speech to the Conservative Party Conference, The ICC, Birmingham, 9 October 2012.

⁸ *Opening Doors*, n.1, pp.35-41.

⁹ *Ibid.*, para.3.8.

¹⁰ *Ibid.*, paras.3.6 - 3.31.

¹¹ *Ibid.*, paras.3.32 - 3.40. A particular strand of the policy is to help more state-school graduates into university. To this end, the Universities Minister has claimed: The Government has asked HEFCE and OFFA (Office of Fair Access) to develop a shared strategy for promoting access which maximises the impact of all the spending by Government, HEFCE and institutions. OFFA has agreed 150 access agreements for 2013/14. The National Scholarship Programme will start this autumn with £50 million of Government funding raising to £150 million by 2014-15, with matched funding from institutions. A Government Student Finance and College Tour visited 2,150 schools, colleges, sixth forms and academies in England, with 86 per cent of parents stating the tour had provided them with the information they needed to help their children make a decision about applying for university. David Willetts, responding on 18 October 2012 to Milburn's *University Challenge* Report (see n.1). < <http://news.bis.gov.uk/Press-Releases/David-Willetts-comments-on-Alan-Milburn-s-report-University-Challenge-How-HE-can-advance-social-mobility-681d9.aspx> > accessed 26 November 2012.

¹² *Ibid.*, para.3.17.

¹³ *Ibid.*, paras.3.24 – 3.35.

¹⁴ *Ibid.*, para.3.17.

¹⁵ *Opening Doors* (n.1, above).

¹⁶ *Ibid.*, p 11.

¹⁷ *Cf* euthenics, the science of improving living conditions to better the human race and make people more efficient.

¹⁸ EA 2010, s.6: '(1) A person (P) has a disability if- (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

¹⁹ EA 2010, Sch.1, para.3.

²⁰ George Walden, *We Should Know Better: Solving the Education Crisis* (Fourth Estate; First Trade edition, 16 Sep 1996) pp.1 and 30 et al.

²¹ £4,186 per term. This overall figure includes boarding and non-boarding, and ranges from junior to sixth-form. For the figures, broken down, see Independent Schools Council Census 2010, p.7. < http://www.isc.co.uk/Resources/Independent%20Schools%20Council/Research%20Archive/Annual%20Census/2010/2010_AnnualCensus_ISC.pdf > accessed 5 February 2013.

²² May-July 2010, Office for National Statistics, 'Labour Market Statistics, LMS September 2010' < <http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/lms-september-2010/index.html> > For an up to date account, see <http://www.ons.gov.uk/ons/index.html>, click on 'Labour Market'; under 'Publications' click 'Labour Market Statistics'; and the PDF file is on the right of the page.

²³ Based on a 40-hour week. At the time, the national minimum wage was set at £5.80 per hour. National Minimum Wage Regulations 1999, SI 1999/584, reg.11, as amended by SI 2009/1902. It is now £6.08 (SI 2011/2345, reg.3. In force, October 1 2011).

²⁴ 'Less than half of state school teachers would advise their able students to apply to Oxbridge' Sutton Trust, April 27 2012, < <http://www.suttontrust.com/news/news/less-than-half-of-state-teachers-oxbridge/> > Accessed May 4 2012.

²⁵ F. Green, S. Machin, R. Murphy, and Yu Zhu (2008) *Competition for private and state school teachers*. CEEDP0094. Centre for the Economics of Education, London School of Economics and Political Science, London, UK., pp.2, 23-24. < <http://cee.lse.ac.uk/ceedps/ceedp94.pdf> > accessed 31 January 2013.

²⁶ *Ibid.*

²⁷ Through taxes *and* fees.

²⁸ Independent schools' normally advertise themselves as providing pupils with self-esteem, self-confidence, and leadership qualities. See e.g., www.isc.co.uk/schools/england > accessed 16 October 2012.

²⁹ Captured in GB Shaw's *Pygmalion* (1912), when Eliza Doolittle was introduced to the Eynsford-Hills, her conversation in a new affected accent was full of her old values, cumulating with the shocking 'Not bloody likely!'. (Act III.)

³⁰ This could be deduced from available statistics: On the last survey, average school fees for 2012 were £13,7884 per year, whilst the average wage, including bonus, before deductions, was £23,932. Simple maths (deduct e.g. tax, national insurance, pension, rent or mortgage, household bills, transport, etc.) informs us that the average family cannot *choose* to educate its children privately. See respectively: < Independent Schools Council Census 2012, p.11. < http://www.isc.co.uk/Resources/Independent%20Schools%20Council/Research%20Archive/Annual%20Census/2012/ISC_Census_2012_Final.pdf > and 'Labour Market Statistics, LMS June 2012' < <http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/june-2012/statistical-bulletin.html#tab-Earnings> > Both accessed 28 September 2012.

³¹ e.g. under the Charities Act 2006. It has been held that 'a charitable organisation which in practice excludes poor people remains a charity' so long as makes a de minimis provision for the poor: *R (Independent Schools Council) v Charity Commission for England and Wales* [2012] 2 WLR 100 (TCC), [228].

³² See e.g. Mori's findings that in the 2010 general election, 76% social class AB voted, falling to %55% for class DE. < www.ipsos-mori.com/researchpublications/researcharchive/poll.aspx?oltemId=2613&view=wide > accessed May 25 2012. More generally, see 'Social exclusion and political engagement Research report' The Electoral Commission (London, 2005) < http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/63835/Social-exclusion-and-political-engagement.pdf > accessed May 25 2012.

³³ 347 US 483 (1954), 493-494.

³⁴ See n.24.

³⁵ South Africa's Black Consciousness movement of the 1970's acknowledged a sense of inferiority, having as its principal goal the establishment of black dignity ahead of racial integration: 'As a prelude, whites must be made to realise that they are only human, not superior. Same with blacks. They must be made to realise that they are also human, not inferior.' S. Biko, *Boston Globe*, October 25, 1977. Steve Biko, its leader, urged (metaphorically) blacks to reject invitations by white liberals to 'come round for tea at home': S. Biko, *I Write What I Like* (Heinemann, South Africa, 1987) p.22. See also JL, Gibson, *Overcoming Apartheid* (Russell Sage Foundation Publications 2006), 79-82, considering a survey where one half of whites and one third of blacks considered that *in principle* apartheid was a good idea. Of course. most disfavoured its *implementation* in South Africa, and notions of racial hierarchy.

³⁶ The magistracy is overwhelmingly drawn from professional and managerial ranks, and 'disproportionately middle class, and almost certainly financially well-off, compared to the population at large': R. Morgan and N. Russell, 'The judiciary in the magistrates' courts', RDS Occasional Paper No 66 (Home Office, 2000), p viii and pp 13-17, paras 2.2-1-4.

³⁷ See e.g. Mori's findings that in the 2010 general election, 76% social class AB voted, falling to %55% for class DE. < www.ipsos-mori.com/researchpublications/researcharchive/poll.aspx?oltemId=2613&view=wide > accessed May 25 2012. More generally, see 'Social exclusion and political engagement Research report' The Electoral Commission (London, 2005) < http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/63835/Social-exclusion-and-political-engagement.pdf > accessed May 25 2012.

³⁸ W. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (CUP 1991), p.198

³⁹ At 2010 prices. See *Opening Doors* (above, n.1), p 11, The Sutton Trust, *The Mobility Manifesto* (2010), based on a model developed in Organisation for Economic Co-operation and Development, *The High Cost of Low Educational Performance: The long-run economic impact of improving PISA outcomes* (2010).

⁴⁰ For an economic appraisal of redistributing society's goods, see R. Bénabou, 'Meritocracy, Redistribution, and the Size of the Pie', in K. Arrow, S. Bowles, S. Durlauf (eds), *Meritocracy and Economic Inequality* (Princeton University Press, 2000).

⁴¹ F. Green, S. Machin, R. Murphy, and Yu Zhu (2008), (above, n.25), p.40.

⁴² See Connolly [2013] 2 EHRLR 000. Famously, in *Brown v Board of Education* 347 US 483 (1954) the US Supreme Court held that the 'separate but equal' racially segregated education system operated in some States was constitutionally 'unequal' under the equal protection clause of the 14th Amendment. By contrast, in *San Antonio v Rodriguez* 411 US 1 (1973) the Court refused to extend its reasoning to *wealth* inequality in education

(Allocation school funds according to the tax raised in the recipient school's district, thus affording – on the whole - the poorest children inferior education.)

⁴³ For the most extensive study here, see J. Blanden, P. Gregg and S. Machin, 'Educational Inequality and Intergenerational Mobility' in S. Machin and A. Vignoles (eds.) 'What's the Good of Education? The Economics of Education in the UK', (Princeton University Press, 2005). See: < <http://www.suttontrust.com/public/documents/2IntergenerationalMobility.pdf> > accessed 28 September 2012. This research is often cited by the Coalition Government's Universities Minister, David Willetts. See e.g. *The Times*, 29 September 2011, p.14; *The Class Ceiling* BBC Radio 4, September 1 2011 < <http://www.bbc.co.uk/programmes/b013qz77> > accessed 28 September 2012.

⁴⁴ There are no figures available for England alone.

⁴⁵ *Opening Doors* (n.1, above), p.5.

⁴⁶ Includes Cabinet Ministers and other Ministers attending Cabinet meetings. 'The Educational Backgrounds of Government Ministers in 2010', (21 May 2010), Sutton Trust: < www.suttontrust.com/research/the-educational-backgrounds-of-government-ministers-in-2010/ > accessed 5 February 2013.

⁴⁷ 'The Educational Backgrounds of Leading Lawyers, Journalists, Vice Chancellors, Politicians, Medics and Chief Executives' (March 2009) < <http://www.suttontrust.com/research/?filter=true&keyword=educational+backgrounds&category=&published=&year=> > accessed 5 February 2013.

⁴⁸ That is medics with positions on the Councils of the medical royal colleges or other national representative bodies. These Councils represent doctors at a national level for particular specialisms or for the profession as a whole. The figures were compiled for 100 Council members in 2007 and 100 Council members in 1987, each concluding that 51 per cent were privately educated. *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ See generally, D. Dorling, (2012) *Fair Play*, Bristol: Policy Press, p.122. The statistics are available at: < <http://www.sasi.group.shef.ac.uk/fairplay/Material.html> > click on 'Excel spreadsheet', scroll along bottom line for C14T1. See also C14F1 for breakdown by social class and ethnicity for years 1996-2000. accessed 28 September 2012.

⁵¹ 'The Educational Backgrounds of Leading Lawyers, Journalists, Vice Chancellors, Politicians, Medics and Chief Executives' (above, n.47).

⁵² *Fair Access to Professional Careers* (above, n.2), p.61.

⁵³ That is, those qualifying for free school meals. See Sutton Trust, 'Responding to the new landscape for university access' (December 2010). < <http://www.suttontrust.com/public/documents/access-proposals-report-final.pdf> > accessed 28 September 2012.

⁵⁴ 000

⁵⁵ In a survey of 12 nations, Britain fell behind only Brazil and the United States. See Blanden J, *How Much Can We Learn from International Comparisons of Intergenerational Mobility?*, Centre for the Economics of Education Discussion Paper III (2009), cited, *Opening Doors*, (above, n.1), para.1.15.

⁵⁶ OECD, *Programme for International Student Assessment 2009* (2010). This 'PISA' survey is carried out every 3 years, and the 2009 survey included 65 countries: < www.oecd.org/dataoecd/13/30/48578439.pdf > accessed 5 February 2013.

⁵⁷ See <http://stats.oecd.org/Index.aspx>, click on 'Education and Training', then 'Education and skills', then 'Expenditure by nature and resource category', then click on 'Service provider' on the top row for private/state options.

⁵⁸ Education at a glance 2006, Indicator D2: Class size and ratio of students to teaching staff, Chart D2.3. < www.oecd.org/dataoecd/6/46/37344912.xls > accessed 28 September 2012.

⁵⁹ *Ibid.*, Table D2.3.

⁶⁰ Home Office, *Racial Discrimination* (Cmnd 6234, 1975) pp.1-6.

⁶¹ See e.g. Home Office, *Equality for Women* (Cmnd 5724, 1974).

⁶² Commission, 'Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin COM COM (99) 566 final, Part II.

⁶³ Directive 2000/78/EC, Preamble (11).

⁶⁴ *Ibid.*, (8).

⁶⁵ See G. Rutherglen, "From race to age: the expanding scope of employment discrimination law" (1995) 24 *Journal of Legal Studies* 491, at 495.

⁶⁶ See e.g. *Preddy v Bull* [2012] EWCA 83 (appeal to the Supreme Ct pending); *Islington LBC v Ladele* [2009] I.C.R. 387 (EAT), [38] (Elias, J) affirmed [2010] 1 W.L.R. 955 (CA); *McFarlane v Relate Avon Limited* [2010] IRLR 196 (EAT), [18] (Underhill, J), upheld, joined cases, App No respectively, 51671/10 and 36516/10 (ECHR 15 January 2013).

⁶⁷ The speech was delivered on 28 August 1963, at the Lincoln Memorial, Washington D.C, United States. See J. Greenya, 'Rites of Passage: The Civil Rights Act of 1964,' *Washington Lawyer* March/April 2000 (www.dobar.org, search for 'Rites of Passage'); C. Whalen & B. Whalen, *The Longest Debate: a Legislative History of the Civil Rights Act* (Seven Locks Press Washington DC 1985).

⁶⁸ Respectively, Victoria and Nicholas Scott. See *The Times* 12 May 1994 & 21 May 1994; *The Independent* 12 May 1994.

⁶⁹ 'What is particularly striking about what we know of the debates and manoeuvres which produced Article 119 is the level of abstraction at which they took place. At no time are the interests of women considered even obliquely or the issues of social justice raised. The distance from the reality of work or any real struggle seems complete. However, the potential for a stronger implementation of equal pay was embedded in the history of the article and, paradoxically, in the history of the EC itself. It took activist women to realise these possibilities - and switch the debate from one of economic rationality to a demand for rights.' C. Hoskyns, *Integrating Gender*, (Verso London 1996), at 57.

⁷⁰ The proposer was the 80 year-old segregationist Democrat Howard Smith of Virginia. See Greenya, above n.67.

⁷¹ *Edwards v A-G of Canada* [1930] AC 124 (PC), at 136 (Lord Sankey). This seems a minority view in the US: *McCulloch v Maryland*, 4 wheat. 316 (Sup Ct 1819) 415, 424 (Marshall CJ); *Youngstown v Sawyer* 343 U.S. 579 (Sup Ct 1952) 682 (Vinson CJ); Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," 101 Harv. L. Rev. 1, 2, 5 (1987). Notable here is the changing attitude towards transsexualism by the ECtHR, seen in *Sheffield & Horsham v UK* (1998) *Goodwin v UK* (2002) EHRR 447.

⁷² 347 US 483, 492-493. See further text to n.33.

⁷³ See *Plessy v Ferguson* 163 U.S. 537 (1896).

⁷⁴ 347 US 483, 492-493: 'In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws'.

⁷⁵ See e.g. M. V. Roehling, 'Weight Discrimination in the Workplace: Ethical Issues and Analysis' (2002) 40 *Journal of Business Ethics* 177; R. M. Puhl and K. D. Brownell, 'Bias, Discrimination and Obesity' (2001) 9 *Obesity Research* 788.

⁷⁶ See e.g. A. Davis, 'Lookism, Common Schools, Respect and Democracy' (2007) 41 *Journal of Philosophy of Education* 811-27; J. Desir, 'Lookism: Pushing the Frontier of Equality by Looking beyond the Law' [2010] 2 *University of Illinois Law Review*, 629.

⁷⁷ Dr Martin Luther King's 'I have a Dream' speech, delivered 28 August 1963, at the Lincoln Memorial, Washington D.C, United States.

⁷⁸ See W. Brown, S. Deakin, D. Nash and S. Oxenbridge 'The Employment Contract: From Collective Procedures to Individual Rights', (2000) 38 *British Journal of Industrial Relations* 611; A. Pollert, 'The unorganised worker: the decline in collectivism and new hurdles to individual employment rights' (2005) 34(3) *ILJ* 217.

⁷⁹ See e.g. preamble to the Equality Act 2010; SDA 1975, and the explanatory note (6) to the Equality Act 2006. p.11.

⁸⁰ See *Opening Doors* (n.1): 'There is a strong ethical imperative to improve social mobility. But there is an economic dimension too. ... new opportunities for wealth and income are emerging. A fair society ensures that those opportunities are open to everyone' (p.11); '[P]articipating in learning ... boosts social mobility and increases future life chances and that more must be done to ensure that everyone, regardless of background, is able to take up these opportunities.' (p.53); 'Those who suffer disadvantage in the labour market - including ... those with no qualifications - should have equal opportunities to move on and up.' (p.55).

⁸¹ e.g. departing from the symmetrical model to require *different*, rather than *equal* treatment. More generally: '[I]t is without doubt an unusually complex piece of legislation which poses novel questions of interpretation. It is not surprising that different conclusions have been reached at different levels of decision. This state of affairs should not be taken as a criticism of the Act or of its drafting or of the judicial disagreements about its interpretation. The whole subject presents unique challenges to legislators and to tribunals and courts, as well as to those responsible for the day-to-day operation of the Act in the workplace.' *Clark v TGD t/a Novacold* [1999] ICR 951 (CA 954 (Mummery, LJ)).

⁸² e.g. Accounting for the requirement of marriage as a pretext for homophobia. See EA 2010, s.23(3), and *Preddy v Bull* [2012] EWCA 83 (appeal pending).

⁸³ Defining 'belief': *Grainger v Nicholson* [2010] IRLR 4 (EAT), [24]-[28]. See also the drafting of direct religious discrimination, and its 2 attempts to retain symmetry yet prevent an employer excluding everyone who

did not adhere to his religious belief. The first attempt excluded agnostics from protection: RB (Employment Equality) Regulations 2003 SI 2003/1660, reg 3(2), amended by Equality Act 2006, s.77. See now EA 2010, s.10.

⁸⁴ Uniquely among these groups, direct age discrimination is objectively justifiable. Also, defining groups for indirect discrimination presents a new challenge. See Equality Act 2010, Explanatory Note 37.

⁸⁵ See text to n.43.

⁸⁶ See e.g., EA 2010, s.13(6)(b).

⁸⁷ Ibid, s.13(3).

⁸⁸ Ibid, ss158-159.

⁸⁹ S. Fredman, 'Positive duties and socio-economic disadvantage: bringing disadvantage onto the equality agenda' (2010) E.H.R.L.R. 290.

⁹⁰ Ibid, 294.

⁹¹ See, e.g. a study of Bristol University's widening participation initiatives: A. Hoare, R. Johnston, 'Widening participation through admissions policy – a British case study of school and university performance' (2011) 36(1) *Studies in Higher Education* 21. For an affirmation of positive action in education (concerning Roma) under the ECHR, see *DH v Czech Republic* (App No) 57325/00 (2008) 47 E.H.R.R. 3, [181], [207].

⁹² For the hostile reaction of private schools to Bristol University's initiative, see e.g.: *The Guardian*, 5 March 2003 'Private schools boycott Bristol over selection'; *The Telegraph* 5 March 2003 'Private schools in Bristol boycott'; *The Independent* 6 March 2003, 'Does Bristol Pick the Best?'

⁹³ See under (c) *Segregation and inequality*, above.

⁹⁴ e.g. Treaty on the Functioning of European Union, Art.157(4); Council Directive 2006/54/EC (gender), Art.3; Council Directive 2000/43/EC, Art.5 (race); Council Directive 2000/78, Art.7(1) (Religion or belief, disability, age, and sexual orientation).

⁹⁵ *Stec v United Kingdom* (2006) 43 EHRR 47, [51]-[66].

⁹⁶ See e.g. EA 2010, s 13 (direction discrimination), and ss. 158 & 159 (positive action).

⁹⁷ Text to n.122.

⁹⁸ Alternatively, the form could contain only the best performing schools (according to the league table). This is likely to indirectly discriminate, and so would require objective justification.

⁹⁹ 'Old school tie' or 'His face fits'. In the context of race, see *King v Great Britain-China Centre* [1992] ICR 516 (CA).

¹⁰⁰ See e.g. *Coker v Lord Chancellor* [2002] ICR 321 (CA).

¹⁰¹ e.g. religion, race, or sexual orientation. See the US case *EEOC v Townley Engineering* 859 F 2d 610 (9th Cir 1988), where the employer made 'a covenant with God' that the company would be a 'would be a Christian, faith-operated business' and insisted that employees attend a weekly devotional service.

¹⁰² Employers may prefer certain characteristics only if it is necessary for the job (EA 2010, Sch.9, Pt.1, para.1). There are some other narrowly defined exceptions.

¹⁰³ Characterised as 'cultural capital'. See text to n.28.

¹⁰⁴ McPherson, M., Smith-Lovin, L. & Cook, J. 'Birds of a feather: homophily in social networks' (2001) 27 *Annual Review of Sociology* 415-444; and on perceived risk of selecting those not of the same social class, see Kanter, R. M. *Men and women of the corporation* (1977 New York, Basic Books).

¹⁰⁵ *Glasgow CC v Zafar* [1998] ICR 120 (HL), at 126 (Lord Browne-Wilkinson). See also *King v Great Britain-China Centre* [1992] ICR 516 (CA).

¹⁰⁶ In *R (E) v Governing Body of JFS* [2009] UKSC 15, [57] Lady Hale stated that 'Direct and indirect discrimination are mutually exclusive. You cannot have both at once.'

¹⁰⁷ *R v Birmingham City Council, ex parte Equal Opportunities Commission* [1989] 1 AC 1156 (HL), 1194, citing *R. v Commission for Racial Equality ex parte Westminster City Council* [1985] ICR 827 (CA). There may be some rare cases, where a certain school, or type of school, background is necessary for the job; these may be argued as a Genuine Occupational Requirement. See EA 2010, Sch.9, Part 1, para.1.

¹⁰⁸ A. Zimdars, 'The profile of pupil barristers at the Bar of England and Wales 2004-2008' (2010) 17(2) *International Journal of the Legal Profession*, 117. A. Zimdars, 'The competition for pupillages at the Bar of England and Wales (2000-2004)' (2011) 38 *Journal Of Law And Society* 575, at 596.

¹⁰⁹ The current members of the Russell Group are the

Universities of Birmingham, Bristol, Cambridge, Cardiff, Durham, Edinburgh, Exeter, Glasgow, Leeds, Liverpool, Manchester, Newcastle, Nottingham, Oxford, Sheffield, Southampton, Warwick, York; University College London, Queen Mary London, Queen's University Belfast, London School of Economics & Political Science, Imperial College London, King's College London. See further: < <http://russellgroup.ac.uk/our-universities/> > accessed 14 June 2013.

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¹¹⁰ 401 US 424, at 432 (Sup Ct 1971).

¹¹¹ Oxbridge and the Russell Group (see n.109). See e.g. the Sutton Trusts various surveys < <http://www.suttontrust.com/research/?filter=true&keyword=educational+backgrounds&category=&published=&year=> > accessed 5 February 2013.

¹¹² See Hoare and Johnston (2011), above n.91, and A. Zimdars, 'The profile of pupil barristers at the Bar of England and Wales 2004–2008' (2010) 17(2) *International Journal of the Legal Profession*, 117; A. Zimdars, 'The competition for pupillages at the Bar of England and Wales (2000-2004)' (2011) 38 *Journal Of Law And Society* 575, at 596.

¹¹³ See e.g. Hoare and R. Johnston (2011), above, n.91, esp. 31-32; 'The social composition and future earnings of postgraduates. Interim results from the Centre for Economic Performance at the London School of Economics' (March 2010, *The Sutton Trust*) ('comparing like-for-like students..., those educated at independent schools were 4% less likely to achieve a First or Upper Second class degree than otherwise similar students educated in state schools') < <http://www.suttontrust.com/research/the-social-composition-and-future-earnings-of-postgraduates/> >; C. Kirkup *et al* 'Use of an aptitude test in university entrance: a validity study Final Report' (3 December 2010, *The Sutton Trust*) p.28 ('a comprehensive student with grades BBB is likely to perform as well at university as an independent or grammar school student with grades ABB or AAB.') < <http://www.suttontrust.com/research/use-of-an-aptitude-test-in-university-entrance/> >; T. Ogg, A. Zimdars, A. Heath, 'Schooling effects on degree performance: a comparison of the predictive validity of aptitude testing and secondary school grades at Oxford University' (2009) 35(5) *British Educational Research Journal* 781 ('Private school students perform less well in final examinations [at Oxford University] relative to their GCSE results when compared with state school students'); *cf* R.Partington, 'Identifying and supporting Cambridge applicants' (2011, University of Cambridge) ('Given the same examination record at point of admission, students from the state and independent sectors have been equally likely to perform well in Cambridge.') < http://www.study.cam.ac.uk/undergraduate/teachers/presentations/supporting_applicants_v2.pdf > all accessed 31 October 2012.

¹¹⁴ '[Interviews] can be a driver for change in admissions patterns as seen with the school effects as well as a motor for preserving privilege through inertia (class, ethnicity and gender patterns)': A. Zimdars, 'Fairness and undergraduate admission: a qualitative exploration of admissions choices at the University of Oxford' (2010) 36(3) *Oxford Review of Education* 307, 319-320.

¹¹⁵ Research in the United States shows that applicants who are like previous students might be perceived less risky and more admissible, whilst less conventional applicants need to be exceptional rather than merely very good to gain admission: M. Stevens, *Creating a class: college admissions and the education of Elites* (2007, Boston, Harvard University Press). See also, McPhearson *et al* (n.104) and Kanter (n.104).

¹¹⁶ See above, '(1) *Symmetrical or asymmetrical?*', text to note.86.

¹¹⁷ See *R (on the application of E) v Governing Body of JFS* [2009] UKSC 15, [89]: '[A]n organisation which admitted all men but only women graduates would be engaged in direct discrimination on the grounds of sex.' (Lord Mance). Thus an organisation that admits all state school graduates with three B's, but only private school applicants with three A's would be engaged in discrimination because of school background.

¹¹⁸ See e.g. discrimination because of a third party's race (*Showboat Entertainment Centre v Owens* [1984] 1 WLR 384 (EAT)); harassment because of a worker's disabled baby (*Coleman v Attridge Law* Case C-303/06 [1998] 3 C.M.L.R. 27 (ECJ)).

¹¹⁹ A crude calculation could compare average net income (i.e. after living expenses) with average school fees. See text to n.21.

¹²⁰ See the Government-commissioned 1944 Fleming Report, which explored how private schools could be integrated into the state system: David Fleming, *Report on the Public Schools and the General Educational System*, (1944) London: HMSO. For an argument that the UK Government is in breach of the European Convention of Human Rights by presiding over the segregated school system, see Connolly [2013] EHRLR 000.

¹²¹ EA 2010, Explanatory Notes (512) state that 'proportionality' in s.158 represents current EU law.

¹²² EA 2010, s.158(4).

¹²³ Case C-158/97 *Badeck* [2000] IRLR 432, [51]-[55].

¹²⁴ See above, '(2) *Higher Education*'.

¹²⁵ *Poiaras Maduro AG in Case C-319/03 Briheche v Ministre de L'Interieur* [2005] 1 C.M.L.R. 4, [AG 51].

¹²⁶ Case C-450/93 *Kalanke* [1996] ICR 314.

¹²⁷ Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] IRLR 732 [53]-[56].

¹²⁸ The Government resisting such an amendment: Baroness Royall, Hansard, Official Report HL Vol. 717, No. 41, p.659 (9 Feb 2010).

¹²⁹ Case C-319/03 *Briheche v Ministre de L'Interieur* [2005] 1 C.M.L.R. 4, [23].

¹³⁰ Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] IRLR 732 [49]-[50].

¹³¹ See Case C-158/97 *Badeck* [2000] IRLR 432 [51].

¹³² In Case E-1/02 *EFTA Surveillance Authority v Norway* [2003] 1 C.M.L.R. 23 (EFTA Court) a policy of reserving certain jobs for women, without more, was not proportionate.

¹³³ See Case C-158/97 *Re Badeck* [2000] IRLR 432, [45]-[55]. (Half of training places reserved for women because of their under-representation in corresponding professions.)

¹³⁴ Council Directive 2006/54/EC (gender), Art.3; Council Directive 2000/43/EC, Art.5 (race); Council Directive 2000/78, Art.7(1) (Religion or belief, disability, age, and sexual orientation).

¹³⁵ Indeed, TFEU, Art.157(4) (gender) is more detailed than the directives (*ibid*), permitting only ‘measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to *prevent* or compensate for disadvantages in professional careers’. Emphasis supplied.

¹³⁶ 539 U.S. 306 (2003).

¹³⁷ *Cf Gratz v Bollinger* 539 US 244 (Sup Ct 2003), rejecting the University’s College of Literature, Science and the Arts’ policy of awarding each under-represented minority student 20 points (out of a total of 150) for admission. Candidates awarded over 100 points normally would be admitted. The selection here was too crude and not narrowly tailored to serve the goal of diversity.

¹³⁸ The majority’s approach in *Grutter* is now under challenge. In *Fisher v University of Texas* 631 F.3d 213 (5th Cir 2011), a differently constituted Supreme Court is being petitioned to rule that although the *aim* of diversity was permissible, the *Grutter* majority showed too much deference to the *means*. In *Fisher*, the vast majority of students were admitted purely on school performance, with a small cohort admitted on a ‘holistic’ basis, including socioeconomic status and race. For full details, see < <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html#CaseLaw> > accessed 14 June 2013.

¹³⁹ See, above, ‘(1) *Symmetrical or asymmetrical?*’ text to n.86.

¹⁴⁰ EA 2010, s.13(2).

¹⁴¹ EA 2010, s.1, provides a diluted ‘socio-economic disadvantage’ duty, but the Coalition have refused to bring it into force; < <http://www.homeoffice.gov.uk/equalities/equality-act/commencement/> > accessed 31 January 2013. For a discussion of its (more limited) potential, see S. Fredman ‘Positive duties and socio-economic disadvantage: bringing disadvantage onto the equality agenda’ (2010) E.H.R.L.R. 290.

¹⁴² EA 2010, sch.19, Pt.1.

¹⁴³ EA 2010, s.32.

¹⁴⁴ EA 2006, s.31. Details are provided by EA 2006, Sch.2

¹⁴⁵ [2006] 1 W.L.R. 3213 (CA). Heard under the equality duty imposed by RRA 1976, s.71.

¹⁴⁶ *Ibid*, [274].

¹⁴⁷ *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [31]. Emphasis original.

¹⁴⁸ See *R (Kaur) v Ealing LBC* [2008] EWHC 2062 (Admin).

¹⁴⁹ See e.g. A. Hoare, R. Johnston, ‘Widening participation through admissions policy – a British case study of school and university performance’ (2011) 36(1) *Studies in Higher Education* 21, and the references within.

¹⁵⁰ See the US case, *US v City of Warren, Michigan* 138 F 3d 1083 (6th Cir 1998), where jobs were advertised in predominantly white neighbourhoods.

¹⁵¹ Equalities Office, ‘Equality Act 2010: The public sector Equality Duty: Reducing Bureaucracy’, p.1, para.3. , < <http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/policy-review?view=Binary> > accessed 6 February 2013.

¹⁵² SI 2011/2260 (England), reg.3

¹⁵³ See SI 2011/2260 (England), reg.. See also SI 2011/1064 (Wales); and SI 2011/162 (Scotland).