

# The Big Gap in Discrimination Law: Class and the Equality Act 2010

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## Abstract

Discrimination law, around the world and particularly in the UK, has largely ignored discrimination based on class. This article makes two main arguments. There is a specific argument: UK lawmakers should amend the Equality Act 2010 to introduce class as a 'protected characteristic' because class is a basis for discrimination. This article considers and rebuts common arguments that class is too difficult to define. There is also a more general argument: academics in discrimination law often sideline analysis of class and classism. Classism tends to be euphemised as a system of 'socio-economic disadvantage' that is unrelated to discrimination. This article discusses why that view is wrong. Without paying attention to class and classism, the law will continue to ignore a major form of discrimination and to miss how classism intersects with other forms of discrimination.

**Keywords:** Class; Classism; Equality; Discrimination; Protected Grounds

## 1. Introduction

*Classism is a form of discrimination.*

*We should use discrimination law to address classism.*

Having experienced classism, those two sentences are straightforward to me. But, looking at discrimination law in the UK and around the world,

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## “The Big Gap”

those sentences are controversial.<sup>1</sup> With some limited exceptions, discrimination law has overlooked classism. Despite the seriousness of classism, the UK Equality Act 2010 (EA) does not include class as a ‘protected characteristic’.<sup>2</sup> Mind the gap: classism is not a wrong known to discrimination law in the UK.

This means that, in discrimination law in the UK, a person has no claim based on class. Aside from attempting to squeeze claims into the existing protected characteristics, a person may have to resort to the law of unfair dismissal in employment contexts or, depending on the status of the defendant, some parts of judicial review.<sup>3</sup> Section 2 discusses the meaning of class and classism in more detail. In simple terms, class is a distinctive form of social, cultural and economic status. To illustrate discrimination based on class, consider some examples. The current law means that a person has no claim based on discrimination if an employer refuses to hire them, or dismisses them, because they:

- live or have lived in council housing;
- speak with an accent and/or dialect considered to be lower-class or ‘common’;
- attended a state school rather than a private school;
- have parents who did not attend university or other higher education;
- at one time received state welfare payments;
- do not have aristocratic heritage;
- have a name considered to be lower-class, ‘chavvy’ or ‘trashy’;
- were born, grew up and/or continue to live in a place considered to be lower-class.

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<sup>1</sup> Anne-Marie Mooney Cotter, *Class Act: An International Legal Perspective on Class Discrimination* (Ashgate 2011); Wayne Mackay and Natasha Kim, ‘Adding Social Condition to the Canadian Human Rights Act’ (2009) <<https://www.chrc-ccdp.gc.ca/eng/content/adding-social-condition-canadian-human-rights-act>> accessed 19 July 2020; Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Journal of Law and Feminism* 1, 3.

<sup>2</sup> EA, s 4.

<sup>3</sup> *Employments Rights Act 1996*, ss 94-97; *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25 [24]-[30].

The list goes on. The examples may be surprising. For some people, they may even be hard to imagine, perhaps because they are so arbitrary as reasons to treat someone unfavourably. However, difficult to justify as they are, they provide an insight into what classism means today.

The absence of class from the EA has more insidious consequences. While section 1 of the EA was intended to create a duty on public authorities to have ‘due regard’ to reducing ‘the inequalities of opportunity which result from socio-economic disadvantage’, it has never been brought into force (except, from April 2018, for devolved Scottish authorities).<sup>4</sup> In section 1, the EA gestured towards something like class; it has now left this behind. Meanwhile, the transformative potential of the ‘public sector equality duty’ in section 149 can’t directly address classism because it rests on a list of nine protected characteristics that omits class.

This omission matters for other reasons, too. The EA provides a model for organisations and their equality policies, even beyond the organisations that the Act legally binds. For many organisations, the default position is to adopt the list of protected characteristics. Further protections tend to be seen as a step beyond—possibly desirable, but not legally required. Some organisations have added class to their lists.<sup>5</sup> Many have not.<sup>6</sup> Because protecting class is optional, it depends on decision-makers including it voluntarily. In industries where classism is deeply entrenched (such as the legal and financial sectors), the lack of a legally compulsory framework fails those who suffer this form of discrimination.

Although some government materials mentioned class prior to the passing of the EA, there was very little discussion of class in the legislative process. In more recent times, awareness of the relevance of class to discrimination law has begun to grow.<sup>7</sup> Yet there is still no committed academic analysis of classism as a form of discrimination in the UK and,

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<sup>4</sup> Equality Act 2010 (Commencement No. 13) (Scotland) Order 2017, art 2; Government Equalities Office, ‘Equality Act Provisions: Commencement Dates’ (2015) <<https://www.gov.uk/guidance/equality-act-2010-guidance#equality-act-provisions-commencement-dates>> accessed 19 July 2020.

<sup>5</sup> Red Lion Chambers (2020) <<https://www.redlionchambers.co.uk/who-we-are/equality-and-diversity/>> accessed 19 July 2020; University of Sheffield (2020) <<https://www.sheffield.ac.uk/ssid/equality-and-diversity/policy>> accessed 19 July 2020.

<sup>6</sup> ‘The Advisory, Conciliation and Arbitration Service’s Template for Policies’ (2020) <<https://www.acas.org.uk/equality-policy-template>> accessed 19 July 2020; Network Rail (2020) <<https://cdn.networkrail.co.uk/wp-content/uploads/2019/06/Equality-diversity-and-inclusion-policy.pdf>> accessed 19 July 2020; University of Manchester (2020) <<http://documents.manchester.ac.uk/display.aspx?DocID=8361>> accessed 19 July 2020.

<sup>7</sup> Trades Union Congress, ‘Building Working Class Power’ (2019) <<https://www.tuc.org.uk/sites/default/files/2019-09/190904%20class%20report.pdf>> accessed 19 July 2020; Mark Lafferty, ‘Is a Ban on Classism at Work on the Cards?’ (2019-20) 206 *Employment Law Journal* 19-21; Leah Caprani, ‘Classism: The Unseen Prejudice’ (16 March 2020) *Law Society Gazette* 14.

## “The Big Gap”

specifically, of its proper place in the EA. In this article, I argue for two main outcomes. There is a specific outcome: UK lawmakers should amend the EA to introduce class as a protected characteristic. This specific outcome relates to a more general one. While the Indian Supreme Court has considered class under the broad constitutional right to equality, and while there has been wider discussion of poverty and ‘social origin’ in Canada, the UN and Australia, classism as a form of discrimination deserves more analysis.<sup>8</sup> In particular, discrimination lawyers regularly understand classism as ‘socio-economic disadvantage’ in a way that is unrelated to status-based discrimination.<sup>9</sup> This is mistaken. First, a convincing concept of discrimination rests on a certain severity of disadvantage, which means that we should not disconnect discrimination from issues of distribution. This appears clearly when considering how issues of distribution are key parts of other forms of discrimination, such as racism, misogyny and transphobia.<sup>10</sup> Second, if classism alone is labelled ‘socio-economic disadvantage’, it wrongly suggests those other forms of discrimination are not also systems of ‘socio-economic disadvantage’.

In Section 2, I consider the ‘what’ objection, which says that class is too hard to define for the purposes of discrimination law. I propose how best to define class so that it can be a protected ground.<sup>11</sup> In doing so, I argue that class represents a distinctive combination of social, cultural and economic capital. I also argue against using a definition that is narrower or more rigid than this, not least because class markers change. I then consider the alternative concepts of ‘socio-economic status’ and ‘social condition’, which emerge as incoherent. In Section 3, I argue that it is right to understand classism as a form of discrimination. Drawing on Khaitan’s theory of discrimination law, classism means that lower-class people are

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<sup>8</sup> *State of Maharashtra v Indian Hotel and Restaurants Association* (2013) 8 SCC 519 (Indian Supreme Court); Martha Jackman, ‘Constitutional Contact with the Disparities in the Word: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law’ (1994) 2(1) *Review of Constitutional Studies* 76; UN Special Rapporteur on extreme poverty and human rights, ‘Visit to the United Kingdom of Great Britain and Northern Ireland’ (2019) A/HRC/41/39/Add.1; Mooney Cotter (n 1) 79-80; International Labour Organization, ‘Q&As on Business, Discrimination and Equality’ (2012) <[http://www.ilo.org/empent/areas/business-helpdesk/WCMS\\_DOC\\_ENT\\_HLP\\_BDE\\_FAQ\\_EN/lang-en/index.htm](http://www.ilo.org/empent/areas/business-helpdesk/WCMS_DOC_ENT_HLP_BDE_FAQ_EN/lang-en/index.htm)> accessed 19 July 2020.

<sup>9</sup> Bob Hepple, ‘The New Single Equality Act in Britain’ (2010) 5 *The Equal Rights Review* 11, 21.

<sup>10</sup> Shreya Atrey, ‘The Intersectional Case of Poverty’ (2018) 18(3) *Human Rights Law Review* 411; Meghan Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart 2018).

<sup>11</sup> I mostly use the phrase ‘protected grounds’ because it focuses on the influence of discrimination within the decision-maker’s reasoning, rather than on a characteristic of the person being discriminated against; Iyiola Solanke, *Discrimination as Stigma* (Hart 2016) 5-6.

significantly more likely than others to suffer ‘abiding, pervasive and substantial disadvantage’ due to their class.<sup>12</sup> In Section 4, I discuss the real reasons why class is absent from the EA and from much of the scholarship about discrimination law. In Section 5, I suggest that a sophisticated version of intersectionality needs the concepts and language of class and classism. While classism often blends with other forms of discrimination, such as racism and homophobia, it remains a necessary concept to capture certain experiences. The list of examples, above, illustrates some of those experiences. Last, in Sections 6 and 7, I consider how my arguments relate to some features of the law in the UK: symmetry, positive action and indirect discrimination.

## 2. The ‘What’ Objection

### A. Defining Class

When I discuss class and discrimination law, there is a common response: isn’t class just too difficult to define? This is the ‘what’ objection and it goes as follows. Given different meanings of class, many people assume that it is too hazy to frame as a protected ground. Its terms—‘upper-class’, ‘upper-middle-class’, ‘middle-class’, ‘lower-middle-class’, ‘working-class’, ‘lower-class’—seem confusing. From this, they conclude that class cannot feature in discrimination law, unlike gender, race, sexual orientation and religion.

I understand the intuition. At first glance, some people find class harder to define than other well-established grounds. In part, this may be due to a persisting sense that gender, race, sexual orientation and religion are self-evident, innate or immutable, with no definitional difficulties.<sup>13</sup> This perception may also stem from the focus of media discussion on these grounds. In the UK Supreme Court, the most high-profile decisions about the EA have concerned: race and religion;<sup>14</sup> religion and sexual orientation;<sup>15</sup> and race, religion and age.<sup>16</sup> Sociological scholarship about class may influence this perception, too, since it brims with different

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<sup>12</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 155.

<sup>13</sup> For criticism of immutability, see Larry Alexander, ‘What Makes Wrongful Discrimination Wrong’ (1992) *University of Pennsylvania Review* 149, 151; Patrick Shim, ‘Is There a Unitary Concept of Discrimination?’ in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 163, 168-69.

<sup>14</sup> *R (E) v Governing Body of JFS* [2009] UKSC 15.

<sup>15</sup> *Bull v Hall* [2013] UKSC 73; *Lee v Ashers Baking Co* [2018] UKSC 49.

<sup>16</sup> *Essop v Home Office* [2017] UKSC 27.

## “The Big Gap”

models for understanding class.<sup>17</sup> With an assumed fragmentation of class in the legacy of the Thatcher, Blair and Cameron governments, the ‘what’ objection may reflect a reduction in how explicitly people use class to understand themselves and the world around them.<sup>18</sup>

Although the objection can be explained, it is false. For one thing, if disputes in scholarship were an obstacle to legal protection, we would be forced to repeal many laws. More importantly, class is no harder to define than two very familiar grounds of discrimination law: (i) race and (ii) religion or belief. Section 9(1) of the EA defines race as including ‘colour’, ‘nationality’ and ‘ethnic or national origin’. This is far from a precise definition. It is up to the courts and other decision-makers to determine what race means in practice.<sup>19</sup> Section 9(3) magnifies this vagueness: a racial group is ‘a group of persons defined by reference to race’ and ‘a reference to a person’s racial group is a reference to a racial group into which the person falls’. The circularity is blatant. But that has not been accepted as a reason to stop race being a protected ground. This is in spite of widespread acknowledgment that race, in the words of Stuart Hall, is ‘a politically and culturally constructed category’.<sup>20</sup> Even with these definitional challenges, the commitment to use the EA to combat racism prevailed.

The picture is more obscure when it comes to religion or belief. Section 10(1) provides that ‘[r]eligion means any religion and a reference to religion includes a reference to a lack of religion’. Section 10(2) moves to the even broader category of ‘belief’, which refers to ‘any religious or philosophical belief and a reference to belief includes a reference to a lack of belief’. Not only does section 10 deal with highly contested concepts, but it also defines them in terms of non-existence. Courts have had to flesh this out extensively. The *Grainger* test determines which beliefs the law should protect, incorporating tricky value-judgements, such as whether or not a belief is worthy of respect in a democratic society.<sup>21</sup> Courts have had to grapple with beliefs about environmentalism, wearing poppies in

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<sup>17</sup> Pierre Bourdieu, ‘The Forms of Capital’ in John Richardson (ed), *Handbook of Theory and Research for the Sociology of Education* (Greenwood 1986) 241; John Goldthorpe and Gordon Marshall, ‘The Promising Future of Class Analysis: A Response to Recent Critiques’ (1992) 26(3) *Sociology* 381; Owen Jones, *Chavs: The Demonization of the Working Class* (Verso 2011); Mike Savage et al, ‘A New Model of Social Class? Findings from the BBC’s Great British Class Survey Experiment’ (2013) 47(2) *Sociology* 219; Darren McGarvey, *Poverty Safari* (Picador 2016).

<sup>18</sup> Terry Nichols Clark and Seymour Martin Lipset, ‘Are Social Classes Dying?’ (1991) 6 *International Sociology* 397; David Monaghan, ‘Margaret Thatcher, and the Struggle for Working-Class Identity’ (2001) 29(1) *Journal of Popular Film and Television* 2.

<sup>19</sup> *Chandhok v Turkey* [2015] IRLR 195.

<sup>20</sup> Stuart Hall, ‘New Ethnicities’ in David Morley and Kuan-Hsing Chen (eds), *Stuart Hall: Critical Dialogues in Cultural Studies* (Routledge 1996) 442, 444.

<sup>21</sup> *Grainger plc and ors v Nicholson* [2010] IRLR 14.

November, democratic socialism and so-called ‘gender critical’ feminism.<sup>22</sup> A recent example is the case of *Casamijana Costa v The League Against Cruel Sports*, in which Postle J reasoned that ethical veganism was worthy of respect in a democratic society and warranted protection under the EA.<sup>23</sup>

Section 10’s case law shows why the ‘what’ objection is unconvincing. If lawyers can fight about ethical veganism being a legally protected philosophical belief, they can grapple with the definitional issues around class. Definitional difficulty has not been a serious obstacle to including a protected ground in the EA. This might seem specific to the EA. Yet, across the globe, many of discrimination law’s instruments stop short of formally defining their subject-matter. The preamble to the International Convention on the Elimination of All Forms of Racial Discrimination simply refers to ‘race, colour or ethnic origin’ and ‘racial differentiation’. Article 14 of the European Convention on Human Rights refers to a broad array of protected grounds, including ‘language, ... political or other opinion, national or social origin, ... birth or other status’. The relevant provisions in section 703(a) of Title VII of the US Civil Rights Act 1964 and article 2(1) of the International Covenant on Civil and Political Rights do no more to elaborate on their terms. Granted, there are some exceptions to this approach to definitions. In section 6(1) of the EA, disability provides one example of a more specific definition.<sup>24</sup> Still, it seems fair to conclude that the general position is that lawmakers don’t demand a rigid definition as a condition for something to be a protected ground. In many instances, it is left to the courts to define and develop the relevant protected ground(s).

Returning to the list of examples in Section 1, I suggest that each one is an example of discrimination on the basis of class—or, in one word, classism. The general position does not require me to state a rigid definition to justify my proposal. That said, even if they accept the general position as correct, judges and other decision-makers may want some

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<sup>22</sup> *ibid*; *Lisk v Shield Guardian Co Ltd* (2011) ET/3300873/11; *The General Municipal and Boilermakers Union v Henderson* (2015) UKEAT/0073/14/DM; *Forstater v Centre for Global Development* (2019) ET (Case No 2200909/2019) [92]-[93]; Alex Benn and Cormac Devlin, ‘The Maya Forstater Case and So-called “Gender Critical” Feminism’ (*OxHRH Blog*, 22 March 2020) <<https://ohrh.law.ox.ac.uk/the-maya-forstater-case-and-so-called-gender-critical-feminism-what-was-actually-decided-and-what-does-it-reveal-about-uk-discrimination-law/>> accessed 19 July 2020.

<sup>23</sup> *Casamijana Costa v The League Against Cruel Sports* (2020) ET (Case No 3331129/2018) [33]-[39].

<sup>24</sup> Irving Zola, ‘Towards the Necessary Universalizing of a Disability Policy’ (1989) 67 *The Millbank Quarterly* 401; Jerome Bickenbach et al, ‘The Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps’ (1999) 48 *Journal Social Science and Medicine* 1173.

## “The Big Gap”

clarification about what classism involves. To answer this, I combine an example-led approach with more theoretical guidance. Rather than demand a rigid definition, a more flexible approach is better suited to discrimination law, since class markers evolve. This approach might worry lawyers who are reluctant to leave these important questions to judicial development. But, as MacCormack explains, a more flexible approach to definition has considerable legal heritage: the Roman juristic community tended to regard a definition less as a *definitive* statement, in the modern sense, and more as a useful guideline or a convenient summary.<sup>25</sup> The idea of a useful guideline helps to guarantee context-sensitivity while also providing some direction for lawmakers. With this in mind, I aim to provide a guideline by drawing on the work of Pierre Bourdieu and Mike Savage.

Class is a status that depends on social, cultural and economic aspects of a person’s life. That is not to argue that class is always easy to identify—at least for those who haven’t suffered discrimination on the basis of it. Savage acknowledges the fluctuations in scholarship about class.<sup>26</sup> Developing Bourdieu’s understanding of class as a mixture of forms of ‘capital’,<sup>27</sup> Savage identifies the ‘social’, ‘cultural’ and ‘economic’ capital that class involves.<sup>28</sup> *Social* capital refers to the personal ties and networks that we develop or inherit.<sup>29</sup> *Cultural* capital refers to the extent to which other people consider that our interests and preferences are legitimate in the sense of being valued and respected.<sup>30</sup> *Economic* capital—perhaps the most familiar aspect of class and the one that courts would be most reluctant to address—refers to income and financial assets more generally. It is understood mainly in the context of a person’s geographical location and age group.<sup>31</sup> As with existing protected grounds, such as sexual orientation and race, class is hugely impactful in shaping how people live while also being the product of social, cultural and economic construction. Classism, by extension, refers to the systems of power that create and maintain inequality (including discrimination) based on class. Class and classism both vary according to their society. For example, when comparing class in the UK and US, there are some similarities (close links

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<sup>25</sup> Geoffrey MacCormack, ‘*Dolus, Culpa, Custodia* and *Diligentia*: Criteria of Liability or Content of Obligation’ (1994) 22 *Index* 189.

<sup>26</sup> Mike Savage, *Social Class in the 21<sup>st</sup> Century* (Pelican 2015) 26.

<sup>27</sup> Bourdieu (n 17).

<sup>28</sup> Savage (n 26) 46.

<sup>29</sup> *ibid* 158.

<sup>30</sup> *ibid* 95, 125.

<sup>31</sup> *ibid* 84.



to educational qualifications) and some differences (the UK's formal system of aristocracy).<sup>32</sup>

Bourdieu's framework, which Savage adapts, is not the only guideline. Many options exist.<sup>33</sup> It is not my aim to determine which framework is best in all contexts. However, when identifying a guideline for discrimination law, Savage's approach offers a strong option. By understanding class as involving different forms of 'capital', it emphasises how class diffuses across the aspects of our lives: our relationships with people, with material things, and with more abstract values, such as cultural prestige and stigma. At the same time, Savage's approach remembers that these aspects influence each another. He stresses how the value of social connections very often becomes economic value in the form of income and real estate.<sup>34</sup> Capital is a tool for emphasising the aspects of class, not for segregating them.

Although the 'what' objection is false, I can respond to the concerns that underlie it by adopting Savage's approach. Importantly, in order to address classism, the law doesn't need a rigid definition of class. That might seem contradictory. But, as Savage indicates, a rigid definition risks failing to capture this context-sensitivity; it also risks eroding the proper scope of legal protection. It illustrates why my list of examples in Section 1 deserves a broader guideline. On the one hand, this approach understands that class blends with other forms of discrimination, sometimes to the point that it makes no sense to try to analyse them separately.<sup>35</sup> On the other hand, it maintains that class is often distinctive in its language and in how it harnesses social, cultural and economic capital, as the list of examples shows. Therefore, in practice, a compelling guideline would combine Savage's approach with these kinds of examples.

While avoiding the language of class, the UN Committee on Economic, Social and Cultural Rights (CESCR) has considered terms including 'national or social origin' and 'economic and social situation' in article 2(2) of the International Covenant on Economic, Social and Cultural Rights. CESCR noted the broadness of these terms but gave examples: 'caste and analogous systems of inherited status', poverty, stereotyping, lack of access to high-quality education and healthcare.<sup>36</sup>

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<sup>32</sup> Reeve Vanneman, 'US and British Perceptions of Class' (1980) 85(4) *American Journal of Sociology* 769; Gordon Marshall, Stephen Roberts and Carole Burgoyne, 'Social Class and Underclass in Britain and the USA' (1996) 47(1) *The British Journal of Sociology* 22.

<sup>33</sup> See the literature at n 17.

<sup>34</sup> Savage (n 26) 90-92, 180.

<sup>35</sup> For one discussion of the issue of conceptual separation when analysing discrimination, see Alpa Parmar, 'Race and Ethnicity in the Criminal Justice Process' in Anthea Hucklesby and Azrini Wahidin (eds), *Criminal Justice* (OUP 2013) 267.

<sup>36</sup> Committee on Economic, Social and Cultural Rights, 'General Comment No 20 on non-discrimination' (2009) E/C.12/GC/20 [24]-[27], [34]-[35].

## “The Big Gap”

CESCR identified the strands of discrimination without using an inflexible definition. Even though modern legal approaches in the UK tend to encourage rigid definition, this is unnecessary. Discrimination law’s point, in this area, is not to provide an in-depth theory of class that categorises everyone into neat boxes. Instead, it is to protect those who suffer discrimination. For the most part, when it comes to the existing protected grounds, such as race and religion or belief, the less rigid approach is *already* the one that the EA takes.

### *B. Why Not ‘Socio-Economic Status’ or ‘Social Condition’?*

When faced with the idea of introducing class as a protected ground, you might say that it would be better to introduce ‘socio-economic status’ or ‘social condition’, similar to CESCR. Mainly outside of the UK, some academics have argued for these grounds.<sup>37</sup> In a sense, these proposals have much in common with my suggested guideline for class. They pay attention to wealth, professional status and educational qualifications.<sup>38</sup> These proposals are not more straightforward than class analysis, with the authors describing how various factors influence the meaning of this status or condition.<sup>39</sup> Despite the similarities, I find the language and concepts of ‘socio-economic status’ and ‘social condition’ as protected grounds to be incoherent.

To explain the incoherence, I draw on the Trades Union Congress’ (TUC) recent report on classism in the workplace. The report proposes that class should become a protected ground in the UK. On the whole, the TUC proposal is insightful, using examples of classism, such as not shortlisting a candidate because their postcode is in a poorer area or requiring an unpaid internship as a condition for being considered for a job.<sup>40</sup> However, though the TUC research provides a compelling range of reasons to protect class, the report uses ‘socio-economic status’ to refer to it. This appears with particular clarity when the proposal summarises the current law to mean that ‘socio-economic status remains outside the

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<sup>37</sup> Mackay and Kim (n 1); Sarah Ganty, ‘Socioeconomic Inequality as Misrecognition: What Role for Anti-discrimination Law in Europe?’ (2017) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3082951](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082951)> accessed 19 July 2020; Juan Carlos Benito Sánchez, ‘Towering Grenfell: Reflections around Socioeconomic Disadvantage in Antidiscrimination Law’ (2019) 5 Queen Mary Human Rights Review 1.

<sup>38</sup> Mackay and Kim (n 1) 21, 37; Ganty (n 37) 5-6, 32.

<sup>39</sup> *Mercer v Northwest Territories and Nunavut (Workers’ Compensation Board)* (2007) CHRR Doc 07-479 (Northwest Territories Human Rights Adjudication Panel) as discussed in Mackay and Kim (n 1) 31-32.

<sup>40</sup> TUC, ‘Building Working Class Power’ (n 7).

groups that are explicitly covered by domestic equality legislation'.<sup>41</sup> Even in an analysis devoted to classism, slipping into the language of 'socio-economic status' reinforces a false conceptual barrier between class and existing protected grounds. Are race, gender and sexuality not also forms of 'socio-economic status'? Clearly, they are. That is why I don't argue for 'socio-economic status' or 'social condition' to become a protected ground. These terms and concepts are so broad that they cover all existing protected grounds. A new ground of 'social condition' would suggest that race isn't a 'social condition'; one of 'socio-economic status' would suggest that gender and sexuality aren't either. In doing so, these terms and concepts tell us nothing about what makes my list of examples in Section 1 distinctive as examples of classism and not as, for instance, examples of homophobia.<sup>42</sup>

Consider the decision of the CEDAW Committee in *da Silva Pimentel Teixeira v Brazil* (2008).<sup>43</sup> Alyne da Silva Pimentel Teixeira was a poor, Afro-Brazilian woman who died during pregnancy because of Brazil's failure to provide proper, timely access to emergency obstetric care.<sup>44</sup> The CEDAW Committee found that Brazil had violated article 12(2) of CEDAW by failing to ensure that there was access to 'appropriate services in connection with her pregnancy'.<sup>45</sup> Here, the ways in which da Silva Pimentel Teixeira had been subjected to misogyny, racism and classism are essential to explain why she died. But the CEDAW Committee's language of 'socio-economic disadvantage', like 'socio-economic status' and 'social condition', is not detailed enough to describe these dimensions. Indeed, despite this insight, the CEDAW Committee failed to mention class (or poverty) in its recommendations. The language of 'socio-economic disadvantage' is wide enough to cover all the ways in which da Silva Pimentel Teixeira suffered, while shallow enough to gloss over them without understanding exactly why they affected her in her daily life. She was prevented from accessing safe healthcare by her lack of money, her lack of social connections, and the disregard for her because of her race, gender and class. These factors meant that she was not given access to an ambulance or a hospital with available space;<sup>46</sup> she was left in a hospital corridor by medical staff;<sup>47</sup> she was transferred without medical records

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<sup>41</sup> *ibid* 22.

<sup>42</sup> A similar problem arises when considering 'social origin' in art 14 of European Convention on Human Rights, in the Australian Human Rights Commission Act 1986, sch 1, art 1, and in the Fair Work Act 2009, s 351; *Merlin Gerin (Australia) Pty Ltd v Wojcik* [1994] VicSC 209.

<sup>43</sup> *Alyne da Silva Pimentel Teixeira v Brazil* (2011) CEDAW/C/49/D/17/2008.

<sup>44</sup> *ibid* [8.2].

<sup>45</sup> *ibid* [7.4].

<sup>46</sup> *ibid* [2.8].

<sup>47</sup> *ibid* [2.9].

## “The Big Gap”

after the medical staff did not bring them to the hospital;<sup>48</sup> and her mother was left to retrieve the records from a health centre herself.<sup>49</sup> Yes, these are forms of ‘socio-economic disadvantage’. But we should use more detailed tools to analyse them. Without the language and concept of class, we lose the ability to articulate how her treatment resulted from discrimination based on race, gender *and* class. This argument is not simply rhetorical. It helps to identify the specific systems of inequality present and to tailor solutions to them. ‘Socio-economic status’ or ‘social condition’ cannot do that without conflating all forms of discrimination under one unfocused heading.

### 3. *Classism as Discrimination*

Having discussed the concept of class and having defined it for the purposes of discrimination law, I now argue why the law is an appropriate tool to address classism. This involves two main issues, which are distinct but interlinked. First, there is the issue of how classism harms people. Second, there is the key issue of whether or not classism really fulfils the meaning of discrimination.

#### A. *How Classism Harms People*

For those who suffer classism, the first issue seems unnecessary: it should be obvious how classism harms people.<sup>50</sup> Yet, considering the confusion among politicians and lawyers, it appears that many people do not understand classism. Therefore, a brief outline of what makes it harmful may help.

When categorising harm in the context of discrimination, academics and courts use a variety of concepts, including stigma, prejudice, stereotyping, poverty, violence and indignity.<sup>51</sup> Sometimes, there is a division between (i) discrimination as misrecognition (which mainly refers

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<sup>48</sup> *ibid* [2.10].

<sup>49</sup> *ibid* [2.11] and [2.13].

<sup>50</sup> Access Bias in Britain <<https://www.accessbiasbritain.org>> accessed 19 July 2020; Ryan Fletcher, ‘Survey Shows Classism is “Alive and Well” in UK Workplaces’ *Unite Live* (21 June 2018); Sam Friedman and Daniel Laurison, ‘The Class Pay Gap: Why it Pays to Be Privileged’ *The Guardian* (London, 7 February 2019); Jessica Evans, ‘Just like Sexism and Racism, Classism Should Be Made Illegal’ *Metro* (London, 28 March 2019).

<sup>51</sup> Khaitan (n 12) 150; Denise Réaume, ‘Discrimination and Dignity’ (2003) 63 *Louisiana Law Review* 645, 672. For examples in the case law, see: *Quebec v A* [2013] 1 SCR 61 [169]-[170] (Canadian Supreme Court) and *Harksen v Lane NO and Others* [1997] ZACC 12 [50] (South African Constitutional Court).

to harms to a person's identity, such as stereotypes and stigmas) and (ii) inequality or disadvantage as maldistribution (which mainly refers to a person's access to resources, such as money, education and employment).<sup>32</sup> Using this division, it would be straightforward to argue that classism is a form of misrecognition. Consider a simple example. An interviewer in university admissions can hear a candidate's Birmingham accent. The interviewer also knows, from admissions data, that the candidate would be the first person in their family to attend university. Because of these two things, the interviewer considers the candidate to be unintelligent and refuses to give them a university place.

In a sense, this example shows the harm of misrecognition: the interviewer's decision-making rests on classist stigma. However, I echo Nancy Fraser's concern that separating the harm of misrecognition from the harm of maldistribution creates 'false antitheses'.<sup>33</sup> Class, with its well-known economic connotations, is a good illustration of why we should be careful when analysing harm in this way. Yes, in the example, the main *reason* for the discrimination is because of the stigma attached to the accent and the family's educational qualifications. Still, I think that it is inaccurate to reduce the *harm* to misrecognition. In truth, due to classist stigma, the interviewer associates a regional accent and a family's lack of higher education with low intelligence. That stigma stems from, among other things, lower-class people having less money and less access to higher education. In this way, the maldistribution of wealth and access causes stigma. But notice that the stigma also causes the maldistribution: the interviewer stops the candidate from attending that university, which may well affect the candidate's future employment and income. To understand the classism here, I think that we must pay attention to the cycle of misrecognition and maldistribution, with the two being co-dependent. It is not accurate to categorise the harm as *either* misrecognition *or* maldistribution.

Abstract discussion only gets us so far. Reality bears out these complexities. While it isn't necessary to categorise every claimant into a rigid class group for the purposes of discrimination law, groups are important when identifying the broader picture of harms. Here, I use 'lower-class' to refer, typically, to people in lower-income jobs or on state welfare, often without university education and with stigmatised accents. Even when lower-class people overcome the hurdles to access traditionally

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<sup>32</sup> Sandra Fredman, 'Recognition and Redistribution: Reconciling Inequalities' (2007) 23 *South African Journal on Human Rights* 214, 221.

<sup>33</sup> Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Nancy Fraser and Alex Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003) 7, 9; Fredman 'Recognition and Redistribution' (n 52) 221.

## “The Big Gap”

prestigious professions, such as law, medicine and finance, they are likely to earn, on average, seventeen per cent less than class-advantaged people. This is the case even when the lower-class people did far better at university.<sup>54</sup> Lower-class women are more likely to suffer sexual and other physical abuse in their childhoods than class-advantaged women.<sup>55</sup> Lower-class people in general, especially those who are black and brown, are much more likely to be subjected to police violence and to the criminal justice system than class-advantaged people.<sup>56</sup> Queer lower-class people in general are likely to become homeless and to experience violence.<sup>57</sup> The examples are many. They illustrate not only how classism blends with misogyny, racism and homophobia, but also how pervasively classism can harm people.

### *B. Why Classism Is Discrimination*

Classism harms people—that should be obvious by now. In response to this, you may say: though classism is harmful, that does not make it a form of discrimination. I have to do more to show why classism is *discriminatory*.

There are many ways to define discrimination. Tarunabh Khaitan’s approach has been influential in recent years. Khaitan advocates understanding discrimination partly by using the concept of disadvantage. For him, to decide what grounds discrimination law should protect, we should ask: because of their membership of a certain group, are members ‘significantly more likely to suffer abiding, pervasive and substantial disadvantage’ than non-members?<sup>58</sup> By defining discrimination as group-based and entailing a particular severity of disadvantage, Khaitan’s approach emphasises that discrimination is different from other things that people might label disadvantage in some settings, such as being a bad singer.

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<sup>54</sup> Daniel Laurison and Sam Friedman, ‘The Class Pay Gap in Higher Professional and Managerial Occupations’ (2016) 81(4) *American Sociological Review* 668.

<sup>55</sup> Alison Phipps, ‘Rape and Respectability: Ideas about Sexual Violence and Social Class’ (2009) 43(4) *Sociology* 667.

<sup>56</sup> Angela Davis, *Women, Race and Class* (Penguin 2019) 179-180; Parmar (n 35); Loraine Gelsthorpe, ‘Working with Women Offenders in the Community: A View from England and Wales’ in Rosemary Sheehan, Gill McIvor and Chris Trotter (eds), *Working with Women in the Community* (Routledge 2010) 127.

<sup>57</sup> TUC, ‘Housing, Homelessness and Young LGBT People’ (2016) <[https://www.tuc.org.uk/sites/default/files/Housing%20policy\\_0.pdf](https://www.tuc.org.uk/sites/default/files/Housing%20policy_0.pdf)> accessed 19 July 2020.

<sup>58</sup> Khaitan (n 12) 155.

Other approaches vary significantly.<sup>59</sup> There are two main reasons why I adopt Khaitan’s approach when it comes to assessing if classism is a form of discrimination. First, the approach has strong explanatory value. It makes sense of common protected grounds, such as race, sexuality, gender and disability, which each link to group-based disadvantage of this kind. Second, it has strong conceptual value. Khaitan captures why discrimination is distinctive as a systemic phenomenon, not simply as a set of unconnected, individual-to-individual harms. Rather than separating the concept of disadvantage from discrimination as other academics do, Khaitan understands severe disadvantage as built into the meaning of discrimination. When other understandings of discrimination focus more on individualism, they miss this system of group-by-group hierarchies based on a certain kind of disadvantage.<sup>60</sup>

Applying Khaitan’s approach, what does this mean for classism? I suggest that classism is responsible for disadvantage that satisfies his three criteria: ‘abiding, pervasive and substantial’. Classism involves pervasive disadvantage because of how thoroughly it affects people socially, culturally and economically. In the UK, classism runs throughout the systems of employment, formal education, criminal justice and many other aspects of people’s lives, as the findings in Section 3A illustrate. This helps to show why it also involves substantial disadvantage, because of how much of a difference it makes to people’s lives: it causes serious stigma, violence and material deprivation.

Last, classism involves abiding disadvantage. At first glance, this criterion may seem harder to satisfy. You could point to the idea that people can become rich and well-connected, so that they escape classism. This suggestion is familiar in the claims about ‘equal opportunity’ and ‘social mobility’ that fill politicians’ speeches.<sup>61</sup> However, it is not a compelling suggestion. I accept that rich and well-connected people can isolate themselves from suffering classism, even if they grew up lower-class. These people may even hide that part of themselves, disguising their family history, cultural interests and mannerisms, as well as their accent and other regional features. But that does not mean that classism goes away. As I understand Khaitan, disadvantage doesn’t stop being abiding just because some people may, exceptionally, avoid it. Similarly, to try to avoid

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<sup>59</sup> Kasper Lippert-Rasmussen, ‘The Badness of Discrimination’ (2006) 9 *Ethical Theory and Moral Practice* 167; Deborah Hellman, *When Is Discrimination Wrong?* (Harvard 2008) 29-36, 57; Sophia Moreau, ‘What Is Discrimination?’ (2010) 38 *Philosophy and Public Affairs* 143; Hanoch Sheinman, ‘Two Faces of Discrimination’ in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 28; Shin (n 13); Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* (OUP 2014); Benjamin Eidelson, *Discrimination and Disrespect* (OUP 2015).

<sup>60</sup> Hellman (n 59) 57.

<sup>61</sup> Jo Littler, *Against Meritocracy* (Routledge 2017) 27-28.

## “The Big Gap”

homophobia, queer people may hide their sexuality and change their mannerisms.<sup>62</sup> Homophobia is still abiding. We should know that because people do things to try to escape it. People may be able to isolate themselves from the disadvantage that classism entails, but the system of disadvantage abides.

In short, classism means that lower-class people are, using Khaitan’s formula, ‘significantly more likely to suffer abiding, pervasive and substantial disadvantage’ than other class groups. Understanding classism as something other than discrimination ignores how it is harmful in this systemic way.

### *4. Moving on from ‘What’: Unpacking Why Class Has Been Ignored*

If class is no harder to define than existing protected grounds for the purposes of discrimination law, and if classism is a form of discrimination, the absence of class from the EA raises other questions. The most pressing is this: what are the real reasons for ignoring class? I answer this by looking at the attitudes of politicians, academics and courts.

#### *A. Politicians*

Beginning with politicians, two themes emerge: (i) politicians’ understanding of discrimination; and (ii) politicians’ self-interest.

The first theme, in the context of the EA, offers the most documented explanation for ignoring class. In the legislative process that led to the Act, many politicians assumed that discrimination was ‘very different’ from disadvantage.<sup>63</sup> In a parliamentary debate about the socio-economic duty in section 1, politicians across the major political parties leant towards the idea that discrimination was ‘all about perpetrators and victims’, whereas ‘disadvantage’ was not.<sup>64</sup> Presumably, this captures a vague idea that discrimination is solely about individual-versus-individual scenarios whereas ‘disadvantage’, by implication, is something different, perhaps structural, perhaps a personal failing. More generally, whether due to

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<sup>62</sup> Kenji Yoshino, *Covering: the Hidden Assault on Our Civil Rights* (Penguin 2006); Kirsti Maltreud and Mari Bjorkman, ‘The Invisible Work of Closeting: A Qualitative Study about Strategies Used by Lesbian and Gay Persons to Conceal Their Sexual Orientation’ (2016) 63(10) *Journal of Homosexuality* 1339.

<sup>63</sup> PBC Deb (Equality Bill), 5<sup>th</sup> sitting, col 129 (John Penrose MP).

<sup>64</sup> *ibid.*



genuine ignorance or the framing of the debates, many politicians simply ignored classism. This may be because the EA was partly a consolidation of previous legislation.<sup>65</sup> Yet this explanation doesn't quite work: the EA still expanded the coverage of discrimination law, as in the case of sexual orientation.<sup>66</sup>

There is, however, a glimmer of hope in a report of the Equalities Review in 2007. The report analyses inequality due to 'socio-economic status and social class', gender, race and disability, though it only uses the concept of discrimination in relation to the last three.<sup>67</sup> Unfortunately, the 2007 proposals of the Discrimination Law Review then miss out class.<sup>68</sup> The government's response to the consultation on the Equality Bill also omits class, while a 2009 policy paper discusses 'social class' only in the context of a public authority duty.<sup>69</sup> With these documents' direct influence, it is not difficult to see why politicians ignored class. Despite the opportunity to develop discrimination law, lawmakers either forgot about class or assumed that it was irrelevant.

The second theme is prominent in politics today. Politicians may worry that protecting class would hamper their ability to implement certain policies. Some politicians' dismissive response to the report of the UN Special Rapporteur on extreme poverty and human rights may explain why.<sup>70</sup> If the political parties had even managed to acknowledge class as a possible protected ground in the legislative process of the EA, it would probably have been discarded. The failure to analyse class seems to be wrapped up in political convenience and vested interests against recognising the extent of classism. There are worries, as with other protected grounds, that protecting class would prevent certain key policies and require significant redistribution. Yet, to combat the full extent of discrimination on existing protected grounds, such as race and disability, lots of policies would have to be discarded in favour of deeper structural change.<sup>71</sup> These worries may be heightened in the UK, given the vast social,

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<sup>65</sup> Hepple (n 9) 12.

<sup>66</sup> *ibid* 13.

<sup>67</sup> The Equalities Review, 'Fairness and Freedom: The Final Report of the Equalities Review' (2007) 1, 26.

<sup>68</sup> Communities and Local Government, 'Discrimination Law Review: A Framework for Fairness: Proposals for A Single Equality Bill for Great Britain' (2007).

<sup>69</sup> The Equality Bill: Government Response to the Consultation (2008) Cm 7454; New Opportunities: Fair Chances for the Future (2009) Cm 7533.

<sup>70</sup> Robert Booth, 'UN Poverty Expert Hits back over UK Ministers' "Denial of Facts" (2019) *The Guardian* (London, 24 May 2019) <<https://www.theguardian.com/society/2019/may/24/un-poverty-expert-hits-back-over-uk-ministers-denial-of-facts-philip-alston>> accessed 19 July 2020.

<sup>71</sup> Zola (n 24); Sandra Fredman, 'Disability Equality: A Challenge to the Existing Anti-discrimination Paradigm' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart 2005) 199; Mathias Möschel, *Law, Lawyers and*

## “The Big Gap”

cultural and economic inequality that is closely linked with regional differences.<sup>72</sup> With the failure to implement the section 1 duty on socio-economic disadvantage, it is not difficult to see concerns about the way in which that duty could hinder policies that justify forms of inequality as necessary sacrifices to ensure a better standard of living for all.<sup>73</sup> It is not in some politicians’ interests to recognise class in the first place, even without considering the issues about the appropriate role of the courts that I discuss in Section 4C.

### *B. Academics*

Linking to the dissociation between socio-economic disadvantage and forms of discrimination, academics have also contributed to the exclusion of class. Little academic work focuses on the role of class in discrimination law, especially in the UK.<sup>74</sup> This is surprising given the awareness of class in other subjects.<sup>75</sup> One reason for this may be due to the people writing academic literature. As Angela Harris has observed in the context of feminist legal theory, many academics overlook how misogyny blends with classism and racism because those academics have always been—or, through their careers, have become—advantaged by classism and racism.<sup>76</sup> With professional membership of higher education institutions, there

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*Race* (Routledge 2014) 2.1.2; Judy Fudge, ‘Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution’ (2007) 23(2) *South African Journal on Human Rights* 235.

<sup>72</sup> Oxfam, ‘The True Cost of Austerity: UK Case Study’ (2013) <[https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/cs-true-cost-austerity-inequality-uk-120913-en\\_0.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/cs-true-cost-austerity-inequality-uk-120913-en_0.pdf)> accessed 19 July 2020; Women’s Budget Group, ‘The Female Face of Poverty’ (2018) <<http://wbg.org.uk/wp-content/uploads/2018/08/FINAL-Female-Face-of-Poverty.pdf>> accessed 19 July 2020; Andrew Carter and Paul Swinney, ‘The UK Towns and Cities with the Highest and Lowest Wages’ (*BBC News*, 2 May 2018) <[bbc.co.uk/news/business-43729508](http://bbc.co.uk/news/business-43729508)> accessed 19 July 2020; Social Mobility Commission, *Social Mobility Barometer: Public Attitudes to Social Mobility in the UK, 2019-20* <<https://www.gov.uk/government/publications/social-mobility-barometer-poll-results-2019>> accessed 19 July 2020.

<sup>73</sup> Adam Taylor, ‘Mayor of London Says Economic Inequality Can Be Good, and Some People Are Just Too Dumb to Succeed’ (*Business Insider*, 28 November 2013) <<https://www.businessinsider.com/boris-johnson-economic-inequality-is-good-2013-11?r=US&IR=T>> accessed 19 July 2020.

<sup>74</sup> If they address this area, academics tend to focus on poverty (n 10).

<sup>75</sup> Imogen Tyler, ‘“Chav Mum Chav Scum”: Class Disgust in Contemporary Britain’ (2008) 8(1) *Feminist Media Studies* 17; Anoop Nayak, ‘“Chavs, Chavettes and Pramface Girls”: Teenage Mothers, Marginalised Young Men and the Management of Stigma’ (2014) 17(10) *Journal of Youth Studies* 1330.

<sup>76</sup> Angela Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42(3) *Stanford Law Review* 581, 588, 591.

usually comes a level of social and cultural influence, alongside financial security.

There is something specific about the literature on discrimination law, though. While explaining the absence of class is complex, it seems to be a matter of intellectual heritage. In simple terms, the history goes like this. In the 1960s and 1970s, sociological and political writing discussed class widely.<sup>77</sup> However, by the 1980s and 1990s, some academics had raised the issue that class presumed a white, straight and masculine norm.<sup>78</sup> Class was often used in a way that excluded people of colour (whether queer or not), white queer people and white straight women.<sup>79</sup> Reacting to this, race, gender and queer analyses pushed for a new approach, called, often simplistically, ‘identity politics’.<sup>80</sup> These developments did not discard class, but they did mix together to minimise it.<sup>81</sup> Sociological and political scholarship then began to re-emphasise class in the 2000s, developing new, intersectional and more sophisticated approaches.<sup>82</sup> But academics in discrimination law, with few exceptions, appear to have missed the boat.<sup>83</sup>

The influence of scholarship has helped to create a climate of underestimation. Perhaps the academic work that most directly influenced the EA was the Cambridge Review by Bob Hepple, Mary Cousseay and Tufyal Choudhury.<sup>84</sup> The Labour government received the report favourably and its main supporter, Anthony Lester, introduced a Private Member’s Bill in 2003.<sup>85</sup> In the report’s one hundred and forty-seven pages of analysis and appendices, there is *one* reference to ‘social classes’.<sup>86</sup> Based on ‘consistency’ with the Human Rights Act 1998 and future European

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<sup>77</sup> Florence Sutcliffe-Braithwaite, *Class, Politics and the Decline of Deference in England, 1968-2000* (OUP 2018) 179; Caroll Seron and Frank Munger, ‘Law and Inequality: Race, Gender... and, of course, Class’ (1996) 22 *Annual Review of Sociology* 187.

<sup>78</sup> Beatrix Campbell, ‘Women: Not What They Bargained For’ (1982) *Marxism Today* (1982) 20; Lucy Robinson, ‘The Bermondsey By-Election and Leftist Attitudes to Homosexuality’ in Matthew McCormack (ed), *Public Men: Masculinity and Politics in Modern Britain* (Palgrave 2007) 168.

<sup>79</sup> Robinson (n 78); Daisy Payling, ‘“Socialist Republic of South Yorkshire”: Grassroots Activism and Left-Wing Solidarity in 1980s Sheffield’ (2014) 25(4) *Twentieth Century British History* 607.

<sup>80</sup> Eric Hobsbawm, ‘Identity Politics and the Left’ (1996) 1/217 *New Left Review* 43-44.

<sup>81</sup> Thanks to Max Shock who, in his DPhil thesis, discusses in detail the pattern in left-wing political writing that de-emphasises, but doesn’t disregard, class.

<sup>82</sup> Mike Savage, ‘The Fall and Rise of Class Analysis in British Sociology, 1950-2016’ (2016) 28(2) *Tempo Social* 57; Nancy Fraser, *Fortunes of Feminism: From State-managed Capitalism to Neo-liberal Crisis* (Verso 2013) 224-6.

<sup>83</sup> Compare the sociological literature (n 17).

<sup>84</sup> Bob Hepple, Mary Cousseay and Tufyal Choudhury, ‘Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation’ (2000).

<sup>85</sup> Hepple (n 9) 14.

<sup>86</sup> Hepple, Cousseay and Choudhury (n 84) 2.

## “The Big Gap”

Community directives, the report makes a general recommendation about what protected grounds should be in a single piece of equality legislation. Social origin, despite appearing in the European Convention on Human Rights, and class are both omitted.<sup>87</sup>

Elsewhere, in the work of the Equality and Human Rights Commission prior to 2010, class is not unheard of.<sup>88</sup> In their 2008 review of equality statistics, Sylvia Walby, Jo Armstrong and Les Humphreys refer to ‘socio-economic status (social class)’, though they note that it is ‘not one of the equality strands’.<sup>89</sup> After that, it all but disappears.<sup>90</sup> With some politicians championing the rhetoric of ‘meritocracy’, the language—if not the concept—of class has mostly been shunted from politics.<sup>91</sup> In reality, this shunting was ‘largely a political, not a sociological phenomenon’: class still plays a big part in how people understand each other, despite perceptions that Thatcherism permanently wiped away class identity.<sup>92</sup> However, in discrimination law, it was not just the doing of politicians. Academics also had a significant role in sidelining class.

Overall, this means that analysis of classism as a form of discrimination hardly appears in much of the scholarship about discrimination law. One example comes from the work of Sandra Fredman. In an exploration of her four-dimensional concept of substantive equality, Fredman makes no mention of classism.<sup>93</sup> It is not that Fredman ignores some of the substance of classism, as her other work shows.<sup>94</sup> She considers the place of socio-economic disparity, as distinct from racism, misogyny and related forms

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<sup>87</sup> *ibid* 42-43.

<sup>88</sup> Yaojun Li, Fiona Devine and Anthony Heath, ‘Equality Group Inequalities in Education, Employment and Earnings: A Research Review and Analysis of Trends over Time’ (2008) Equality and Human Rights Commission 23-4.

<sup>89</sup> Sylvia Walby, Jo Armstrong and Les Humphreys, ‘Review of Equality Statistics’ (2008) Equality and Human Rights Commission.

<sup>90</sup> There is no analysis of class or classism in Gary Fry, Sue Yeandle, Royce Turner and Andrea Wigfield, ‘Equality Statistics in Practice at a Local Level’ (2009) Equality and Human Rights Commission. There is one mention of ‘social class’ as an influence on public attitudes to human rights in Alice Donald, Philip Leach and Andrew Puddephatt, ‘Developing a Bill of Rights for the UK’ (2010) Equality and Human Rights Commission 70; and, more recently, no mention in the Equality and Human Rights Commission, ‘Preventing Sexual Harassment at Work: A Guide for Employers’ (2020). The Social Mobility Commission, in contrast, does discuss ‘social classes’: ‘Social Mobility Barometer’ (n 72).

<sup>91</sup> Littler (n 61) 58-59, 63-64, 67.

<sup>92</sup> Jon Lawrence and Florence Sutcliffe-Braithwaite, ‘Margaret Thatcher and the Decline of Class Politics’ in Ben Jackson and Robert Saunders (eds), *Making Thatcher’s Britain* (2012) 138; Monaghan (n 18).

<sup>93</sup> Sandra Fredman, ‘Substantive Equality Revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712.

<sup>94</sup> Sandra Fredman, ‘The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty’ (2011) 22 *Stellenbosch Law Review* 566.

of disadvantage.<sup>95</sup> Still, Catherine MacKinnon criticises Fredman for using ‘a bafflingly narrow concept of disadvantage’ here.<sup>96</sup> MacKinnon seems justified: as I noted in Section 2B, are racism, misogyny and other forms of discrimination not forms of ‘socio-economic disparity’, too? There is an unexplained concept of discrimination lurking in Fredman’s language, one that seems to disconnect discrimination from maldistribution. This seems odd, since Fredman has developed her concept of equality by unpicking the division between recognition and redistribution.<sup>97</sup> Yet MacKinnon is right to identify the linguistic problem and to note how it suggests a conceptual division.

It is not a linguistic quirk of Fredman, but part of a pattern in this area. In an early review of the EA, Bob Hepple makes a similar move: ‘social disadvantage is a complex, multi-dimensional problem with many causes not limited to discrimination’.<sup>98</sup> This indicates that Hepple accepts that at least one cause of social disadvantage is discrimination. But his work has not tried to analyse social disadvantage as a basis for discrimination, at least in the bizarre meaning of social disadvantage as excluding the social disadvantage that racism, homophobia and other forms of discrimination cause. Not only does this euphemise classism, but it wrongly separates it from the concept of discrimination altogether.

### *C. Courts*

Another aspect of the exclusion of class is the perception that discrimination law is not an appropriate tool to address classism. This perception stems from academic treatment of class as involving disadvantage or maldistribution that is unconnected to a form of discrimination. Because of this, there is an assumption that judges and other decision-makers would be unable to address class because it is purely an economic problem and, therefore, an issue for the political branches of government.

When it comes to courts and discrimination law, the first obstacle is the lack of a constitutional or statutory basis for protecting class. As I have mentioned, unlike some other jurisdictions, the list of protected characteristics in the EA is exhaustive. Although the Human Rights Act incorporates article 14 of the European Convention on Human Rights, which includes the unfocused phrase ‘social origin’, in practice that article

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<sup>95</sup> Fredman, ‘Substantive Equality Revisited’ (n 93) 734-5.

<sup>96</sup> Catherine MacKinnon, ‘Substantive Equality Revisited: A Reply to Sandra Fredman’ (2016) 14(3) *International Journal of Constitutional Law* 739, 743.

<sup>97</sup> Fredman, ‘Recognition and Redistribution’ (n 52) 221.

<sup>98</sup> Hepple (n 9) 21.

## “The Big Gap”

requires another right to be engaged and only applies to public authorities.<sup>99</sup> Plus, the ECtHR case law has not developed an understanding of class or classism.<sup>100</sup> Together, these features mean that no claimants have advanced class as a protected ground in the UK.

The second obstacle is the broader mistake of assuming that class is purely economic. Courts often seek to categorise issues as political or legal, reflecting vague ideas of the separation of powers. A notable example is the US Supreme Court’s decision in *San Antonio Independent School District v Rodriguez*. The judges decided that the school district’s funding system, which used local property taxes in addition to a minimum level of state funding, was compatible with the Fourteenth Amendment.<sup>101</sup> This was despite the clear disparities in educational standards. The majority reasoned that the US Constitution did not protect a fundamental right to education.<sup>102</sup> As a result, the funding system did not merit the higher standard of scrutiny appropriate to what US law appears to have deemed severe forms of discrimination.

In part, *Rodriguez* rests on a detail of legal heritage: the formulation of a protected group as ‘a discrete and insular minority’ in *US v Carolene Products*.<sup>103</sup> Using this formulation, the majority reasoned that people of lower wealth could not be such a group, being neither discrete nor insular.<sup>104</sup> *Rodriguez* also provides a more general lesson for the discussion of class. It indicates the worry that class would require courts to intensify their constitutional role, undercutting legitimate decisions of the executive and legislative branches of government. Indeed, Powell J’s judgment brims with a perception of the Supreme Court as lacking the justification to scrutinise the ‘infinite variables’ in education, especially when there was partial funding by the Texan legislature.<sup>105</sup> There has been similar reluctance in the UK. In *R (SG) v Secretary of State for Work and Pensions* and *R (DA) v Secretary of State for Work and Pensions*, the UK Supreme Court addressed whether or not welfare caps were indirectly discriminatory against women and then against single parents with young children.<sup>106</sup> In *SG*, the majority held that the welfare cap was not discriminatory against women, despite women being the vast majority of single parents. In particular, the majority categorised welfare funding as a

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<sup>99</sup> Human Rights Act 1998, s 6.

<sup>100</sup> *Steć v UK* (Case No. 65731/01) (European Court of Human Rights).

<sup>101</sup> *San Antonio Independent School District v Rodriguez* 411 US 1 (1973) 8-9, 62 (US Supreme Court).

<sup>102</sup> *ibid* 37.

<sup>103</sup> 304 US 144 (1938) (US Supreme Court).

<sup>104</sup> *Rodriguez* (n 101) 60.

<sup>105</sup> *ibid* 9, 24, 40-41.

<sup>106</sup> [2015] UKSC 16; [2019] UKSC 21.

‘political’ issue, not a ‘legal’ one.<sup>107</sup> In *DA*, the majority held that reducing welfare payments to below the threshold of poverty was not manifestly without reasonable foundation. It also reasoned that it had to give the political branches of government ‘appropriately generous ... leeway’.<sup>108</sup>

There are many problems with categorising issues as either political or legal.<sup>109</sup> There is some irony when considering that, nearly two decades before *Rodriguez*, the US Supreme Court declared segregation based on race in public education to be unlawful.<sup>110</sup> I accept that there are reasonable institutional concerns about unelected judges intervening in wide-ranging government policies, such as welfare spending.<sup>111</sup> That said, it is important to recognise that this tells us more about the perception of the role of discrimination law than it does about introducing class as a protected ground. As I accepted in Section 3A, class partly involves the misrecognition that courts seem to be comfortable addressing. It involves stigma, stereotyping, violence and prejudice, which are familiar concepts to courts in many jurisdictions.<sup>112</sup> If you believe that the role of discrimination law should be mostly limited to addressing misrecognition, then class shows little difference from existing protected grounds.

The challenge comes if you argue that the role of discrimination law is broader than this, addressing equality in all its dimensions, including, as Samuel Moyn puts it, ‘fair distribution’ of physical resources.<sup>113</sup> In some jurisdictions, courts have shown a much better understanding of the distributive aspects of discrimination. The Indian case law contains some limited examples in the context of class itself.<sup>114</sup> In *Indra Sawhney v India*, the Indian Supreme Court upheld a twenty-seven per cent reservation of government jobs for members of designated ‘backward classes’.<sup>115</sup> The judges relied on the wording of article 16(4) of the Indian Constitution, reasoning that it enabled the identification of backward classes not only on the basis of economic status, but also on the basis of caste. Drawing explicitly on the concept of class, labelling caste ‘nothing but a social class’, the Supreme Court did well to recognise that ‘caste, occupation, poverty

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<sup>107</sup> *SG* (n 106) [69].

<sup>108</sup> *DA* (n 106) [118].

<sup>109</sup> Veronika Fikfak, ‘Protecting Human Rights in Austerity Claims in the UK’ (2016) 8(2) *Hague Journal on the Rule of Law* 205, 219.

<sup>110</sup> *Brown v Board of Education* (1954) 347 US 483 (US Supreme Court).

<sup>111</sup> Nathan Brown and Julian Waller, ‘Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges’ (2016) 14(4) *International Journal of Constitutional Law* 817.

<sup>112</sup> See the examples in the case law in Canada and South Africa (n 51).

<sup>113</sup> Samuel Moyn, *Not Enough* (HUP 2018) 204.

<sup>114</sup> *Indian Hotel and Restaurants Association* (n 8).

<sup>115</sup> AIR 1993 SC 477 (Indian Supreme Court).

## “The Big Gap”

and social backwardness are closely inter-twined’.<sup>116</sup> Thanks to the strong constitutional recognition of casteism and the commitment to reservations, the Supreme Court saw itself as institutionally appropriate and engaged in more protective decision-making.

Concerns about institutional legitimacy have been advanced against almost every protected ground. They have arisen in the context of race and gender when it comes to equal pay.<sup>117</sup> Yet notice how a dichotomy forms when it comes to the prospect of class. On the one hand, courts often understand misogyny, ableism, transphobia, homophobia, racism and ageism as *status-based* discrimination, emphasising the ‘socio-’ part of ‘socio-economic disadvantage’ while minimising the ‘-economic’ part. Courts view the discrimination against the status groups that make up the existing protected grounds as mainly about misrecognition, such as stigma and prejudice.<sup>118</sup> On the other hand, when courts have addressed socio-economic disadvantage, apparently resembling something like class, the ‘-economic’ part takes over. There is little awareness of the cycle of misrecognition and maldistribution that I discussed in Section 3A.

This dichotomy shows the influence of academic presentation of issues of class as unrelated to discrimination. It also shows that class is not alone in posing these questions for discrimination law. If you understand discrimination on existing protected grounds in its full form, there are always economic issues. Class may carry more economic connotations, but that is because of a simplistic understanding of classism and of other forms of discrimination. The research shows the concentration of black and brown people in lower-class groups, as well as the particularly severe impact of poverty on women in all racial groups.<sup>119</sup> Economic issues exist throughout forms of discrimination, especially when forms of discrimination mix together as racism, misogyny and classism often do.

Overall, I accept that class contributes to the broader debate about how far discrimination law should allow courts to review economic policies. However, this is yet another bad reason to exclude class from discrimination law. It goes to the issue of the law’s thin concept of discrimination rather than to a unique challenge of class. In this sense, class offers an opportunity for courts. It helps to emphasise the cycle of misrecognition and maldistribution in many forms of discrimination.

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<sup>116</sup> *ibid* [83].

<sup>117</sup> Atrey (n 10); Meghan Campbell, ‘Capping Motherhood: Equality-Based Analysis of the UK Benefit Cap Cases’ in Martha Davis, Morten Kjaerum and Amanda Lyons (eds), *Research Handbook on Poverty and Human Rights* (Forthcoming).

<sup>118</sup> *SG* (n 106); *DA* (n 106).

<sup>119</sup> Sylvia Chant, ‘The “Feminisation of Poverty” and the “Feminisation” of Anti-poverty Programmes: Room for Revision’ (2008) 44 *The Journal of Development Studies* 165; Johanna Kehler, ‘Women and Poverty: the South African Experience’ (2001) 3 *Journal of International Women’s Studies* 41; Women’s Budget Group (n 72).



## 5. *Is Intersectionality the Answer?*

The attitudes of politicians, academics and courts come together to explain the absence of class from the EA and from much analysis of discrimination law. I have attempted to show why these attitudes do not justify that absence; I now move to consider other questions about class as a protected ground. I start with the question of how class relates to intersectional approaches to discrimination law.

Class, traditionally understood, has baggage. This relates to the intellectual history discussed in Section 4B. In short, there are two main concerns. The first is that class has disintegrated in the UK to the extent that we should not discuss it anymore. I have explored why this is false.<sup>120</sup> The second is that class represents a whitewashed concept, which, in turn, prioritises masculine, straight men.<sup>121</sup> While the first concern often features as a weak political device to ignore classism, the second represents a legitimate reluctance to use older concepts of class that fail to understand how it can be racial and gendered.

Co-opting classism to erase other forms of discrimination still happens today. In *The New Class War*, Michael Lind does a convincing job of identifying why many political parties ‘pretend that enduring, self-perpetuating social classes no longer exist’.<sup>122</sup> Lind provides a nuanced analysis of the intergenerational impact of class, noting, in one instance, the miserable finding that families with surnames deriving from William the Conqueror’s Norman French aristocracy still top the UK’s class hierarchy.<sup>123</sup> However, though he recognises the racially diverse and migrant nature of many lower-class people, Lind tries to use class to portray efforts to combat racism, misogyny and transphobia as the playthings of the ‘metropolitan elite’.<sup>124</sup> With examples like this, which misuse classism to trivialise other forms of discrimination, there is good reason to ask if the better solution would be to approach discrimination law in an intersectional manner, rather than to introduce class itself as a protected ground.

Although intersectionality is becoming more widely used, it is worth briefly setting out what it means. In relation to discrimination law, Kimberlé Crenshaw was the first to use the term, though much of its substance has long featured in the work of other authors, such as Audre

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<sup>120</sup> Lawrence and Sutcliffe-Braithwaite (n 92).

<sup>121</sup> Campbell (n 78).

<sup>122</sup> Michael Lind, *The New Class War* (Penguin 2020) 1.

<sup>123</sup> *ibid* 8 citing Gregory Clark and Neil Cummins, *The Son Also Rises: Surnames and the History of Social Mobility* (Princeton 2014).

<sup>124</sup> *ibid* 111.

## “The Big Gap”

Lorde and Angela Davis.<sup>125</sup> In her 1989 article, Crenshaw criticises how discrimination law restricts analysis to a single protected ground.<sup>126</sup> As black women have had to choose between a claim based on misogyny (understood from the perspective of white women) and one based on racism (understood from the perspective of black men), the distinctive experiences of black women have been ‘theoretically erased’.<sup>127</sup>

With ‘combined discrimination’ still yet to be brought into force in the EA, these problems persist.<sup>128</sup> As I understand it, two key features of intersectionality are as follows. First, intersectionality is not about *adding up* forms of discrimination as if they were numbers in mathematics.<sup>129</sup> It is about recognising the distinctive experiences of people who suffer intersectional discrimination, not simply the experiences that are similar to people who suffer ‘single-axis’ discrimination.<sup>130</sup> Second, it encourages us to focus on the people most severely disadvantaged by discrimination, who are usually those suffering intersectional discrimination.<sup>131</sup> Intersectionality, therefore, concentrates on identifying and dismantling structures of power.<sup>132</sup>

To explore class and intersectionality, I look at Shreya Atrey’s analysis of poverty and intersectionality in discrimination law. Atrey develops intersectional analysis in a way that is friendly to the arguments that I have set out so far. Atrey identifies the intersectional case of poverty without seeking to undermine the argument that poverty should be a protected ground itself. She explains poverty’s ‘dual intersectional character’.<sup>133</sup> In one sense, it is intersectional because it involves different dimensions of disadvantage. Poverty entails exclusion, lack of income and limited access to education. In another sense, it is intersectional because of how it relates to status groups. Poverty changes the experiences of people who suffer, for example, ableism, racism and/or misogyny.<sup>134</sup> In her analysis, she explores how poverty can be a consideration as part of the discriminatory context and a full concept of equality, which courts can examine in a claim based

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<sup>125</sup> Audre Lorde, ‘Scratching the Surface: Some Notes on Barriers to Women and Loving’ in Audre Lorde (ed), *Sister Outsider* (Penguin 2007) 35, 42; Davis (n 60) 179; Ange-Marie Hancock, *An Intellectual History of Intersectionality* (OUP 2016).

<sup>126</sup> Kimberlé Crenshaw, ‘Demarginalising the Intersection of Race and Sex’ (1989) University of Chicago Legal Forum 139.

<sup>127</sup> *ibid.*

<sup>128</sup> EA 2010, s 14.

<sup>129</sup> Crenshaw (n 126) 140; Sumi Cho, Kimberlé Crenshaw and Leslie McCall, ‘Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis’ (2013) 38(4) *Signs* 785.

<sup>130</sup> Crenshaw (n 126) 139.

<sup>131</sup> *ibid* 167; Cho, Crenshaw and McCall (n 129) 801.

<sup>132</sup> Cho, Crenshaw and McCall (n 129) 797.

<sup>133</sup> Atrey (n 10) 417.

<sup>134</sup> *ibid* 421.

on existing protected grounds.<sup>135</sup> I agree that awareness of poverty is crucial for an accurate system of discrimination law. Without it, the law loses a key tool to explain the full extent of discrimination. The law also loses a tool to outline the most effective solutions for the groups in question. Atrey uses the language of status groups, but, unlike other academics, she avoids sealing them off from socio-economic disadvantage. This is because Atrey pays attention to the material deprivation that membership of these groups often entails.

Having said that, I'm not sure about one of Atrey's comments. As noted, Atrey suggests that her argument offers alternative ways to consider poverty in discrimination law and 'does not undercut the debate over recognising poverty as a ground'.<sup>136</sup> Atrey assumes that she can provide a committed intersectional analysis, which includes poverty, without poverty as a protected ground.<sup>137</sup> I disagree with the use of 'poverty' instead of 'class', though this is a side issue that I address in Section 6. For the moment, I disagree with treating class or poverty only as a *consideration* in legal analysis and not as a protected ground. I suggest that an intersectional approach will always have major flaws without class or poverty as a protected ground.

Apply the problem that Crenshaw identifies, in the context of racism and misogyny, to intersectional cases that include classism or, more narrowly, poverty. In systems of discrimination law that use protected grounds, to ask claimants to choose one ground into which to squeeze their situation will always fail to represent that situation if it involves classism or poverty. An example of this problem arose in the Supreme Court of Canada's decision in *Gosselin v Quebec*, which Atrey discusses.<sup>138</sup> The case concerned a social assistance scheme in Quebec, which paid recipients who were under thirty years old roughly one-third of the amount paid to those who were thirty and over. The claimant sued to obtain reimbursement of the difference, which would have amounted to around \$389 million (plus interest) for all those affected.<sup>139</sup> It was argued, and adjudged, as a claim about ageism. The majority held that the government's use of age as a criterion targeted those younger people, with the aim that they would enter work-related training programmes, become 'integrate[d]' into the workforce and emerge as 'self-sufficient'.<sup>140</sup> As a whole, the case provides a good example of why the lack of a legal framework around classism and poverty impairs the quality of legal

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<sup>135</sup> *ibid* 414, 438.

<sup>136</sup> *ibid* 414.

<sup>137</sup> *ibid* 438.

<sup>138</sup> *ibid* 421.

<sup>139</sup> [2002] 4 SCR 429 [4] (Canadian Supreme Court).

<sup>140</sup> *ibid* [42].

## “The Big Gap”

analysis. McLachlin CJ struggled to articulate why the group was particularly disadvantaged. For example, McLachlin CJ observed that ‘young adults as a class simply do not seem especially vulnerable or undervalued’ or ‘particularly susceptible to negative preconceptions’.<sup>141</sup>

These observations show a warped analytical lens. The group was not merely based on age; it should not have been summarised as ‘young adults’. The case was not about young adults who were wealthy, having attended private schools and obtained highly paid jobs. It was about young adults *who were recipients of a social assistance scheme*. By contrast, Bastarache J provided much more accurate reasoning in his dissent: ‘we are not dealing with a general age distinction but with one applicable within a particular social group, welfare recipients’.<sup>142</sup> The majority’s singular focus on ageism obscured classism and, consequently, undermined the law’s accuracy and effectiveness. In light of this, you might say that Atrey’s analysis still works fine. If the majority had considered poverty—or, more precisely, welfare receipt—in *Gosselin*, it could have found discrimination on the basis of age. That may well be right; analysing that aspect would likely have improved the majority’s reasoning. However, as an analytical consideration, class or poverty would remain optional for judges. By contrast, rather than being at the discretion of a particular judge, the use of a protected ground would require any judge to engage with the core of the argument.

This effect on judges is not the only reason to say that we must do better than using class or poverty as just an analytical consideration. Two further reasons touch on the conceptual and strategic benefits. Conceptually, in grounds-based systems of discrimination law, treating class or poverty as an analytical consideration achieves only a skeletal version of intersectionality. In a system like the UK, the relationship between a ground and a consideration is hierarchical.<sup>143</sup> A ground is the foundation for the analysis, expressing itself as the gateway for claims and providing the key label for claimants to narrate their experiences. A consideration is not: it is an elaboration. It remains parasitic on a protected ground. This structure clashes with the idea that intersectionality should be at the centre of discrimination law, not being secondary or a mere ‘buzzword’.<sup>144</sup> In this way, intersectionality explains why we can have class as a protected ground *and* pay attention to how classism often blends with

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<sup>141</sup> *ibid* [33].

<sup>142</sup> *ibid* [235].

<sup>143</sup> Compare class and poverty in relation to the general right to equality in the Indian Constitution in *Indian Hotel and Restaurants Association* (n 8).

<sup>144</sup> Hillary Potter, *Intersectionality and Criminology* (Routledge 2015) 41.

other forms of discrimination.<sup>145</sup> Notice that intersectionality doesn't demand either of these further arguments: (i) that classism should only be addressed where other forms of discrimination are present; and (ii) that the law will be able to develop intersectionality properly without recognising class as a protected ground.

Consider the example of someone from Bradford, West Yorkshire, who applies for a job. The potential employer looks at her application form. He has heard stereotypes about Bradford being 'rough' and 'full of Pakistani people', which he supports by noting that the applicant has a common Pakistani surname. Not wanting that type of person to work for him, he throws away her application form. Here, racism and classism (or, to use Atrey's concept, prejudice about poverty) blend together in the employer's behaviour. It is not accurate to put them in a hierarchy, with race as the foundation and class or poverty as only a consideration—or the other way round. One is not secondary or supplementary. To do so would be too rigid and anti-intersectional. This is why it is wrong to think that treating class or poverty as only a 'consideration' in our concept of equality can be compatible with a sophisticated version of intersectionality. It also touches on why I rejected the idea of 'socio-economic status' or 'social condition' as a protected ground in Section 2B. In a system that uses protected grounds, you would have to either: (i) approach 'socio-economic status' and 'social condition' in a way that excludes race, sexuality and the other grounds; or (ii) accept that 'socio-economic status' and 'social condition' always cover the other grounds, therefore denying class any conceptual or linguistic distinctiveness. Both options are anti-intersectional.

Strategically, class provides advocates of discrimination law with a powerful tool to respond to its critics. A common criticism of theories of discrimination, in general, is that they oversimplify groups of people.<sup>146</sup> They essentialise groups, so that all black people in the UK are stereotyped as poor or that all women with Pakistani heritage in Bradford are stereotyped as subservient to their husbands. Without careful explanations of why intersectionality prioritises those who are likely to be the most disadvantaged, discrimination law risks alienating important voices, including those within protected groups. Class adds nuance to analysis. It helps intersectionality to explain its priorities and focus on the most vulnerable people within groups.

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<sup>145</sup> Karl Alexander, Doris Entwistle and Linda Olson, *The Long Shadow: Family Background, Disadvantaged Urban Youth, and the Transition to Adulthood* (Russell Sage Foundation 2014).

<sup>146</sup> Coretta Phillips, 'Negotiating Identities: Ethnicity and Social Relations in a Young Offenders' Institution' (2008) 12 *Theoretical Criminology* 313.

## “The Big Gap”

The conceptual and strategic benefits also address the worry about whether class makes analysis white, straight and/or masculine. In the example I have described, is class a shorthand for white poor people, excluding poor people with Pakistani heritage? It could be—if we talk about class *solely* when we talk about white people. To solve this, we need to talk about class more. We need to use it when analysing how discrimination towards a black family in Hartlepool, County Durham, without university education and in low-paying jobs, is likely to be different from discrimination towards a wealthy black family in Chelsea, London. That doesn't mean that those families have no shared experiences. But it does reveal that there are factors that make their experiences distinctive.

More broadly, there will be situations in which debating how to label discrimination becomes purposeless, since forms of discrimination—such as racism and classism—can be closely linked to the point of being inseparable.<sup>17</sup> Yet, rather than asking us to replace the concepts of race, class and gender with an unfocused label like ‘socio-economic status’, intersectional analysis encourages us to pay detailed attention to how these concepts interact. Instead of minding the gap, intersectionality can help discrimination law to close it.

### *6. More Harm than Good? Symmetry and Positive Action*

Aside from ‘socio-economic status’ and ‘social condition’, I have noted that academics tend to favour the concept of poverty over class.<sup>18</sup> For instance, Atrey defines poverty in a way that goes beyond merely tallying numbers in people's bank accounts: it relates to certain social, cultural and economic aspects of people's lives.<sup>19</sup> In this sense, it is similar to my understanding of class. That said, poverty is asymmetrical. Everyone falls into a class, whether they are advantaged or disadvantaged by classism, but not everyone is in poverty. Only those who are worst off in a society are considered to be in poverty.

The relationship between ‘class’ and ‘poverty’ sits in the wider debate about symmetrical protection in discrimination law. For instance, straight people, who do not suffer homophobia as queer people do, are able to claim discrimination on the basis of sexual orientation in the UK. Khaitan understands this symmetry as a way to minimise resentment about

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<sup>17</sup> Parmar (n 35); Crenshaw (n 126).

<sup>18</sup> See (n 10).

<sup>19</sup> Atrey (n 10) 417.

discrimination law, which avoids protected groups suffering more discrimination as a result.<sup>150</sup> For the purposes of this article, the more specific issue is whether we should use poverty instead of class to ensure that discrimination law offers the best level of protection that it can. The worry appears in recent concerns about plans to widen access to universities. The Headmasters' and Headmistresses' Conference (HHC) claimed that the plans were discriminatory against private-school students 'on the basis of the class they were born into'.<sup>151</sup> The HHC represents a system that is a staple of UK classism, charging tens of thousands of pounds per student per year and vigorously opposing the removal of private schools' charitable status.<sup>152</sup> In the words of one commentator, it is 'almost beyond parody'.<sup>153</sup> Unfortunately, for discrimination law, it is not just parody: there is a real danger that powerful individuals will misuse class as a protected ground in order to entrench classism. By allowing this, the law would protect discriminators and hinder efforts to prioritise those who *suffer* classism.

The danger is not new. It rests on the idea of formal equality, which assumes that we should reduce equality to sameness and aim to treat people in the same way, no matter how bad.<sup>154</sup> Symmetry is only one example. The US case law on affirmative action provides another. From the focus on attaining limited diversity rather than reducing disadvantage in *Regents of the University of California v Bakke* and *Fisher v University of Texas (II)* to the argument for colour-blindness in *Parents Involved in Community Schools v Seattle School District*, the cases show challenge after challenge to affirmative action in education.<sup>155</sup> Some people, advantaged by a form of discrimination, use litigation to hinder the law's ability to eliminate that discrimination. Taking the themes of symmetry and positive action in the UK in turn, I now address this problem.

## A. Class and Symmetry

In principle, at least, one proposal is simple and applies across all protected grounds. Use asymmetrical protection. Understand each

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<sup>150</sup> Khaitan (n 12) 179.

<sup>151</sup> 'HMC Urge Universities Not to Discriminate against Private Schools' Independent Education Today <<https://ie-today.co.uk/Article/hmc-urge-universities-not-to-discriminate-against-private-schools/>> accessed 19 July 2020.

<sup>152</sup> *Independent Schools Council v Charity Commission for England and Wales* (2011) UKUT 321 (TCC).

<sup>153</sup> Mark Walford, 'The Gross Hypocrisy of Private School Heads' *The Guardian* (London, 30 January 2020) <<https://www.theguardian.com/education/2020/jan/30/the-gross-hypocrisy-of-private-school-heads>> accessed 19 July 2020.

<sup>154</sup> Sandra Fredman, *Discrimination Law* (Clarendon, 2<sup>nd</sup> ed, 2011) 166, 177.

<sup>155</sup> 438 US 265 (1978); 579 US (2016); 551 US 701 (2007) (US Supreme Court).

## “The Big Gap”

protected ground according to Khaitan’s formulation of ‘abiding, pervasive and substantial disadvantage’. Under this approach, people who benefit from a form of discrimination based on a ground would not be able to claim discrimination using that ground. Class may be symmetrical, but classism is not. However, in practice, the picture is more complicated. Many politicians and interest groups could caricature asymmetrical protection of class—and other protected grounds—as social warfare and discrimination in itself. This leaves us with an unsatisfactory situation. Unless we change the EA’s wider symmetry (except for disability), we always risk distorting the understanding of discrimination as a particular kind of group-based disadvantage. As with the economic aspects of discrimination discussed in Section 4C, that is not a problem limited to class: it applies across the board.

In response, you might argue that poverty reduces the dangers of symmetry. For example, the UN defines the core of poverty to be ‘a denial of choices and opportunities, a violation of human dignity’.<sup>156</sup> The asymmetry could ensure that people do not misuse it if they are out of poverty. To this, I suggest two main reasons to prefer class. The most important reason is *protection-based*. While poverty is always an example of classism, poverty does not capture the full range of classism. Discrimination law should still protect a person from classism, even if they are out of poverty. In a workplace where an employee is paid below the average salary in this country, but above the poverty threshold, that employee can still suffer classism. Even in high-status professions, such as banking or law, classism is rife, though few bankers and barristers are in poverty. The law should protect anyone who suffers classism, *including* people who live or have lived in poverty. Poverty as a protected ground would not protect some people who suffer classism. By contrast, class (understood using Savage’s approach and Khaitan’s criteria) could protect all people in poverty and more.

The second reason is *connotation-based*. The language and concepts of class and poverty overlap. Nevertheless, different connotations exist. Class is often reduced to economic status, but class and classism, particularly in the UK, are familiar as involving snobbery, regionalism and accent bias, as well as particular attitudes in education and employment. These aspects remain part of everyday language, which could make class more accessible to judges and other decision-makers.<sup>157</sup> Although a thick definition of poverty is compelling, it does not have this role in everyday language.

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<sup>156</sup> UN Executive Heads, ‘Statement of Commitment for Action to Eradicate Poverty’ <<https://www.un.org/press/en/1998/19980520.eco5759.html>> accessed 19 July 2020.

<sup>157</sup> Lawrence and Sutcliffe-Braithwaite (n 92).



## *B. Class and Positive Action*

When discrimination law is strongly committed to creating transformation, symmetry is less of a problem. While, for example, some straight people might claim to have experienced discrimination on the basis of sexual orientation, there would not be widespread hindrance of programmes aimed at changing workplaces, universities and other organisations. Some jurisdictions have made more room for this than others. The general trend in South African decisions illustrates an understanding of discrimination law's transformative potential by using it to redress 'past exclusion, dispossession, and indignity'.<sup>158</sup> The Constitutional Court's reasoning has not always been convincing.<sup>159</sup> Still, it has shown an impressive ability to grapple with potential conflicting interests between protected groups, such as the complexities around promoting white women and promoting black men in *South African Police Service v Solidarity obo Barnard*.<sup>160</sup> Other jurisdictions acknowledge the importance of these transformative measures, particularly India's system of reservations.<sup>161</sup>

The UK's approach to positive action is less developed. Section 158(1) sets out that a person (P) must reasonably think that:

*(a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic;*

*(b) persons who share a protected characteristic have needs different from those of persons without the characteristic; or*

*(c) participation in an activity by persons who share a protected characteristic is disproportionately low.*

The three focal points are disadvantage, difference and participation. So far, it is promising. Section 158(2) sets out further conditions:

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<sup>158</sup> *Minister of Finance v Van Heerden* [2004] ZACC 3 [25] (South African Constitutional Court).

<sup>159</sup> *Minister of Constitutional Development v South African Restructuring* [2018] ZACC 20 (South African Constitutional Court); Nomfundo Ramalekana, 'Affirmative Action in South Africa: the Urgency of Accounting for Historically Entrenched White Privilege and Power' (*OxHRH Blog*, 13 July 2018) <<https://ohrh.law.ox.ac.uk/affirmative-action-in-south-africa-the-urgency-of-accounting-for-historically-entrenched-white-privilege-and-power/>> accessed 19 July 2020.

<sup>160</sup> [2014] ZACC 23 (South African Constitutional Court).

<sup>161</sup> *Ashok Thakur v Union of India* (2008) 6 SCC 1 (Indian Supreme Court).

## “The Big Gap”

*‘This Act does not prohibit P from taking any 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.’*

This framework offers the foundation for responding to worries about upper-class people, in particular those wealthy people who are privately educated, misusing class in order to undercut positive action. Section 158(2) would still enable educational decision-makers to prioritise class-disadvantaged people in their access initiatives.

There are, however, risks. As a matter of strategy, those decision-makers who currently use class as a measure to prioritise more disadvantaged applicants might find their efforts undermined by bad judicial interpretation of terms such as ‘proportionate’. More pressingly, in ‘recruitment and promotion’, section 159(4)(a) limits positive action to situations in which ‘A is as qualified as B to be recruited or promoted’ at the time of the positive action. Without a contextual interpretation of the phrase ‘as qualified as’, the EA puts a significant limit on the law’s transformative potential in employment—especially if the idea of qualification or merit is itself defined in discriminatory ways. As a protected ground, class would be subject to this provision, too. Once more, though, this is not a problem specific to class, but a problem for protected grounds across the board. The same logic applies to those decision-makers who might otherwise seek to address, for instance, homophobia, racism and/or misogyny in their recruitment processes. Rather than arguing *against* introducing class, it should make us argue *for* a contextual interpretation of qualification and merit, taking into account the discrimination that people have faced.

If there are these strategic hurdles, you might say that class, as a ground, would do more harm than good. As with the existing grounds, that is one of the dangers when viewing equality as sameness of treatment and using a superficial understanding of discrimination.<sup>162</sup> But it is vital not to forget the benefits of introducing class. As a matter of symbolism, it would send a clear message about understanding classism as discrimination, no longer

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<sup>162</sup> Albertson Fineman (n 1) 3.

ignored or presumed to be something else. In a country as closely connected with classism as the UK, that symbolic value should not be shunned. As a matter of more structural change, we should remember that the EA operates as a model for organisations. With class as a protected ground, workplaces would to have update their equality policies and write new guidance. The symbolic value would translate into structural value to ensure that organisations comply with the law. The key point, then, is not that my argument would reinvent the EA overnight as a refined, disadvantage-led approach to equality. It is, instead, that my argument offers symbolic and structural benefits that the law is missing.

## 7. *Class, Courts and the Danger of Watering Down*

Return to the list of examples that I outlined in Section 1. With class as a ‘protected characteristic’ in the EA, those examples would amount to discrimination in law. Worries about courts being unable to address classism are unconvincing when it comes to direct discrimination. Section 13(1) defines ‘direct discrimination’ as person A treating person B less favourably than others because of a protected characteristic. If B can show direct discrimination, the law does not allow A to justify their behaviour.<sup>163</sup> Because of this, direct discrimination prioritises the aspect of misrecognition that I mentioned earlier: it emphasises stereotypes and stigmas. Of course, courts are undertaking limited redistribution if they find direct discrimination, such as ordering the discriminator to pay compensation. Yet direct discrimination focuses on decisions explicitly based on a protected ground.<sup>164</sup> Class is easy to accommodate in this framework. If an employer dismisses a person because that person is lower-class, it would be direct discrimination. If an employer refuses to hire a person because that person lives on a council estate, a court would likely find that reason to be a ‘proxy’ for class and find direct discrimination.<sup>165</sup>

Indirect discrimination poses more of a challenge. Section 19(1) defines ‘indirect discrimination’:

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<sup>163</sup> EA 2010, s 13(1), subject to s 13(2) in relation to age.

<sup>164</sup> *JFS* (n 14); *Essop* (n 16)

<sup>165</sup> *Lee v Ashers Baking* (n 15) [25]; Alex Benn, “The UK Supreme Court and the Gay Marriage Cake: Is “Indissociability” Half-Baked?” (*OxHRH Blog*, 21 January 2019) <<https://ohrh.law.ox.ac.uk/the-uk-supreme-court-and-the-gay-marriage-cake-is-indissociability-half-baked/>> accessed 19 July 2020.

## “The Big Gap”

*A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.*

Section 19(2) provides further detail:

*For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—*

*(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

*(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

*(c) it puts, or would put, B at that disadvantage, and*

*(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

Bearing these provisions in mind, consider the TUC’s example of an unpaid internship.<sup>166</sup> Imagine that a London employer requires all applicants for a job to do a fortnight-long unpaid internship. On the one hand, a court could find this to be indirect discrimination in relation to class. The employer applies the criterion to all potential applicants. Some applicants, including B, work part-time in a supermarket and can’t do the internship, since they can’t afford the travel to, or the accommodation near, the employer’s offices. They know no-one near London that they could stay with. This means that those applicants, including B, are left without that job opportunity. However, there is evidence that the employer has the ability to provide online resources about their work. There is also evidence that the employer has enough money to pay applicants to do the internship if the employer converts it from a fortnight-long programme to a week-long programme, or if the employer offers slightly fewer internships a year. Therefore, though the employer has the legitimate aim of evaluating if B is dedicated to and suitable for the job, the criterion is not ‘a proportionate means’ of achieving that aim.

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<sup>166</sup> TUC, ‘Working Class Power’ (n 7).

On the other hand, it is easy to imagine courts watering down the standard of justification required. Hearing about the employer's financial constraints, a court might place a lot of weight on this aspect when interpreting the term 'proportionate'. While the court would acknowledge the exclusionary impact on class-disadvantaged applicants, it would still find that the criterion could be justified. The reasoning sounds familiar. It returns us to the perception of courts as inappropriate decision-makers when addressing the economic aspects of discrimination, as in *DA* and *SG*.<sup>167</sup> The protection of class in the context of indirect discrimination would be lip service.

To avoid the danger of watering down, academics and practitioners should emphasise two main points: (i) the economic aspects of discrimination in relation to the existing protected grounds, which is a straightforward interpretation of the courts' statutory mandate in the EA; and (ii) courts' legitimacy to address these aspects in the context of litigation. Taking the first point, the language of the EA supports this interpretation. The Act refers to 'disadvantage', 'needs', 'adjustment' and 'participation'.<sup>168</sup> It is littered with concepts closely linked to economic issues. Disadvantage may be about money and income; participation depends, in part, on money and income. Losing your job because of discrimination involves financial detriment to you. These are not difficult ideas, especially for judges who regularly calculate compensation. Judges should stress the economic aspects of discrimination as well as their co-dependent relationship with the social and cultural aspects. Shying away from them is shying away from the EA's specific mandate.

Taking the second point, courts are not asked to write the government's fiscal budget from scratch. Claims in discrimination law typically involve individual-to-individual litigation. If a court finds discrimination, it should not doubt its institutional legitimacy simply because there will be economic consequences. Parliament has assigned courts the role of the key decision-makers under the EA for a reason. Properly understood, that is to develop an intellectually rigorous and effective regime of discrimination law. It is not to shy away from discrimination when situations get complicated. Clearly, these questions involve controversial arguments about courts' roles and institutional appropriateness.<sup>169</sup> Ultimately, the point to remember is that courts'

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<sup>167</sup> *DA* (n 106) and *SG* (n 106).

<sup>168</sup> EA, s 19(2)(b), s 158(1)(b), s 20, s 158(1)(c).

<sup>169</sup> Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157; Carol Harlow, 'Public Law and Popular Justice' (2002) 65 *Modern Law Review* 1; Nicholas Bamforth, 'Courts in a Multi-layered Constitution' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart 2003) 278;

## “The Big Gap”

legitimacy comes from judicial expertise in identifying and developing legal principles, specifically, here, the meaning of discrimination. It doesn't come from warping that meaning because it will disrupt government policy or employers' arrangements. Courts in the UK often pride themselves, rightly or wrongly, on their intellectual rigour. Ignoring the economic aspects of any form of discrimination, or watering down the standard of justification for indirect discrimination, is not intellectually rigorous. It is muddled.

## 8. Conclusion

My specific argument is that class should be a protected ground in the EA. Its absence represents an incomplete and superficial understanding of discrimination. With no persuasive justification for that absence, and many good reasons to include class, lawmakers should amend the EA. My general argument is that, without analysing class and classism, discrimination law has a big gap. That gap prevents the law from achieving a sophisticated, intersectional approach to discrimination.

There are obstacles to introducing class as a protected ground, not least political opposition. Yet, with growing awareness of classism as a form of discrimination, it is becoming harder to deny its place in the EA and in discrimination law as a whole. It is naïve to think that amending the EA would erase classism in the UK, even if, as a protected ground, class could feature in the public sector equality duty. Only a much greater transformation would do this. But protecting class is a necessary part of that transformation. Lawmakers should do more than mind the gap: they should close it. We should be confident that:

*Classism is a form of discrimination.  
We should use discrimination law to address classism.*

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Christopher Forsyth and Mark Elliott, 'The Legitimacy of Judicial Review' (2003) Public Law 286.