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A Critique of Equality Legislation in Liberal Market Democracies

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ABSTRACT: This article argues that equality legislation not only fails to fulfil its promises, but also destroys the liberty that fuels economic progress. Legislative schemes in countries such as the UK and the US are increasingly being extended into new areas of human interaction by egalitarians who wish to "do something" about racial inequality within their own countries and in the global context as a whole. All jurisdictions committed to justice and fairness would accordingly be expected to have some form of equality legislation even if only for the purpose of sending the right moral signals about the commitment to doing what is right and creating the illusion of equality on the basis that it might help and it cannot hurt. The first part of this article argues that such equality schemes are neither harmless nor costless. The second part draws upon examples from UK law to argue that the legislative vision of equality is conceptually unsound and undermines fundamental tenets of the rule of law. These examples, although drawn from the UK's Equality Act 2010, reflect conceptual tools and legislative principles seen in all common law jurisdictions which have embraced the egalitarian principles of social justice and racial equity.

THE ILLUSION OF EQUALITY

Blind markets, like justice, care nothing for the race or ethnicity of market participants. The failure of free markets to be sensitive to racial identity is therefore perceived as an existential threat by those who seek their sense of humanity in being "recognized" and "validated" by others, who demand that their voices be "amplified"

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so that they may feel heard. Second-handers, as Ayn Rand (1963, 69) might have called the modern proponents of identity politics, derive their sense of self-worth by imposing themselves on others. They therefore deny the right of strangers whom they encounter in arm's length market transactions to ignore their personal identity dramas, and declare the silence of others to be "violence" against them. This article aims to offer some optimistic reassurance to the second-handers who are viscerally afraid of free markets, with a view to persuading them that upon closer inspection, individual liberty, fundamental human freedoms, and market participation will turn out to be the most effective paths to progress for all regardless of race or ethnicity.

Free markets will not offer everyone a sense of psychic safety or the promise that everyone will experience only pleasant encounters in the course of their daily transactions. Nor in this vale of tears will markets ever satisfy what Ludwig von Mises depicts as "inner, spiritual and metaphysical needs," the human yearning for "happiness and contentment" ([1927] 2005, xix). For that people must look elsewhere, perhaps to poetry, to music, or to the stars of the night sky. But free markets offer at least a path through which to pursue meaningful goals, make progress, be productive, earn a living, and engage in fruitful exchanges and interactions with others—a path to the material well-being and prosperity that all human beings desire.

A realistic understanding of free markets casts doubt on the expectation that equality legislation can equalize market opportunities. Inequality is said to reflect market failures which can be corrected through legislation designed to eradicate harmful inequalities. In that way equality law promises to go further than blind markets by recognizing personal identities, reversing historical and structural disadvantage, and meeting the psychic need for emotional safety in a world perceived to be hostile. By aiming to eradicate discrimination the law aims to turn the world into a giant safe space wherein nobody will feel offended by others or be overwhelmed by the challenges that arise from their differentiated position in life (Furedi 2018). The legislative framework accordingly constructs a set of equality "rights" not to be subjected to detriment by others, rights based on "the happy illusion that the constraints of scarcity do not really matter—that we will be able to magnify those rights without limitation while nobody need

pay the cost either directly or indirectly" (Epstein 2002, 3). In sum, equality legislation aims to implement what Thomas Sowell (1999, 2013) calls make-believe equality in an epic quest for cosmic justice.

Toward that glorified goal equality legislation in liberal market democracies marches on relentlessly, unhampered by doubts as to the worthiness of its pursuits, never breaking stride to reflect on the costs or the harmful implications for other liberal ideals and values or for the general welfare. Equality seems to be such a noble goal that there is little public taste in liberal market democracies for asking tough questions or holding legislators to account. Nor is any serious political attempt made to evaluate whether the legislation achieves anything that could conceivably be described as fairness or justice. In the legislative halls of liberal democracies unanimity reigns on the importance of equality as a policy goal. Its moral justifications are regarded as presumptively sound, and assumed to be settled beyond doubt or controversy. Yet this semblance of unanimous conviction operates in a context where reasonable people sharply disagree on the meaning and content of justice, and on the benchmarks by which progress in building a just society should be measured.

It is easy to declare legislative policy in favor of equality while ignoring the real impact of equality legislation. Many of the problems people now ridicule as "wokeness" or "political correctness on steroids" reflect a deeper malaise rooted in the failure to understand the value of economic freedom as a component of individual liberty. Rather than pursuing equality through classifying people by race and meticulously tracking racial outcomes, equality would be better protected through the common law procedural standards of reasonableness and fairness in public life. These standards are not directed at one special group at the expense of another, but apply in the same way to all. Private transactions, for their part, should fall entirely outside the framework of judicial oversight except in so far as they engage the common law of obligations—contract, property, and tort. The arguments in support of this regulatory approach are well substantiated in scholarly literature, most notably Richard Epstein's *Forbidden Grounds* (1992).

There are many classical liberal perspectives on social justice, ranging from quasi-Rawlsian perspectives (Tomasi 2012) to utilitarian analyses (Epstein 1999). The libertarian critique advanced in this article does not depend principally on a claim that the legislation

goes "too far," that it requires minor amendments to operate more effectively, or that its claim to legitimacy depends on extending it to serve more groups of people more fairly. For example, it is often argued in the UK that the main problem with the equality legislation is its failure to protect the poor, those in remote northern geographical locations, or poor white boys, the idea being that by encompassing all suffering groups within its protective fold the legislation will acquire legitimacy. This article takes a different approach, and aims to challenge the very notion of substantive equality that underpins the legislation. This article argues that justice demands formal equality, meaning equality before the law without regard to racial identity or other personal characteristics (Pardy 2019). In advancing that argument the analysis draws upon that conceptualization of libertarianism understood as "a discipline which touches closely on many other areas of the study of human action: economics, philosophy, political theory, history, even—and not least—biology" (Rothbard 1970, xvii).

What about the Problem of Discrimination?

Economic studies show that it is mistaken to treat discrimination as a robust explanation for racial disparities (Williams 2011; Higgs 1977). Sowell (2013) therefore argues that it would be no more sensible to claim that racial outcomes are determined by racial "discrimination" than it would be to claim that they are determined by racial "genetics." It is axiomatic that correlation does not prove causality. A correlation between race and lagging behind in wealth or attainment is not by itself evidence that discrimination is the *cause*, or even a primary cause, of such inequality. For example, if black students in the UK are underrepresented among students who take first-class honours at university, this is not by itself evidence that UK universities are institutionally racist. This presumption of institutional discrimination is debunked by studies showing that ethnic minority immigrants with higher levels of education often have better socioeconomic outcomes than the native population, while immigrants with lower levels of education often underperform compared to both the native population as well as other immigrants (Martin and Zimmermann 2009). This is not necessarily evidence that levels of education themselves dictate economic outcomes, but it shows that race and ethnicity do not supply the primary explanation for such outcomes. Indeed studies of immigrants' economic outcomes show ethnicity

to be a very weak indicator of economic progress compared to other factors such as the degree of economic participation and assimilation into native language and culture. For example, in the UK, West Africans, and Caribbeans are both classified as "black" but they exhibit striking variations in socioeconomic outcomes despite sharing the same experience of discrimination. Automatic conflation of inequality with race also fails to account for the racial groups or subgroups who achieve success despite being historically oppressed minorities; the experience of Japanese immigrants in the US or Chinese immigrants in the UK are well-known examples. Linking economic inequality to race also fails to account for social exclusion and poverty among those classified as "white," for example in the UK, where poor white boys lag behind almost all other groups in educational attainment (Commission on Race and Ethnic Disparities 2021).

What, then, can be said about reports of protesters marching to raise awareness of racial discrimination? Whatever else such demonstrations might show, they provide shaky foundations for legislative policy. The evidential cogency of "lived experience" in understanding social problems requires corroboration from objective evaluations because "knowledge is advanced if truth is established, which requires that all relevant evidence is taken into account and presented objectively" (Mieschbuehler 2018; McIntosh and Wright 2018). Reports of "lived experiences," where victims share "their truth" about the extent to which their lives are blighted by racism, reflect only one part of a complex reality. Lived experiences play an important methodological role in social science research but subjective accounts are not, in themselves, a comprehensive basis for understanding complex social and cultural phenomena, much less suitable for translation into legislative edicts.

Examples of lived-experience discrimination highlighted by the UK's Equality and Human Rights Commission (2019) include "racist name-calling, insults and jokes," "verbal abuse, exposure to racist material, exclusion and less obvious forms such as microaggressions," and, most shocking of all, some students being "nasty, very nasty" to others. But the challenge of feeling like an outsider traverses the boundaries of race and time. All people want to feel valued everywhere they go, and it is therefore sensible and right for institutions to work hard to make their members feel welcome, but the desire to make that happen

does not constitute a sensible legislative goal nor just cause to undermine fundamental freedoms. Institutions have expended much effort to "eliminate" racism by scrutinizing the thoughts, words, and even body language of those who may perhaps secretly harbor wicked thoughts about others; deciphering their unconscious biases; scrutinizing their Whatsapp chats; and scouring the annals of Twitter to see if they have said anything shocking there. Measuring socioeconomic progress should not be dependent on these types of specific interactions with a racist person in a specific job or any other set of specific interactions, but on overall life trajectories. Legislation cannot create a world in which nobody encounters unpleasantness from other human beings. Rather than waging war on alleged racists, it would be better to encourage the personal resilience and self-responsibility which are far more important markers of progress.

It is clear that discrimination *exists*—"nasty, very nasty" folk are everywhere to be found. But the universal desire to have a smooth path through life must be weighed against the impact of coercive legislation, which is too often introduced without considering whether it ought to be *unlawful* to be tactless, inappropriate, rude, or even insulting toward others. Hate speech laws and racially aggravated crimes have entrenched the idea that while bullying is wrong, racist bullying is worse; the racist element in itself represents an independent ground of wrongfulness under the law. It may be legitimate in some circumstances to decide that some types of conduct are so morally abhorrent that they should incur legal sanction as a way of signalling the importance attached by society to its shared moral ideals and values (Nozick 1989). As Epstein (1992) has argued, the distinction between public and private law is essential in defending the scope of individual liberty. Outside the criminal law, any decision to enforce *moral* values in fields of private law such as the law of contract should be subject to the closest scrutiny of its ethical foundations and the implications for individual liberty. It is one thing to prefer that people behave better toward each other, and quite another to adopt mandatory edicts governing private transactions, breach of which will deprive those who fail to comply of their liberty or livelihood. The evidence that one person has been nasty to another is not, by itself, evidence that legislative coercion is appropriate in this context.

Legal, Statistical, and Verbal Chicanery

The egalitarian ideology underpinning equality legislation justifies special treatment for disadvantaged groups on grounds that these groups are historically underprivileged and hence suffer from structural discrimination. The idea of structural discrimination is in turn justified by reference to statistical data based on racial disparities. Describing racism as "structural" or "institutional" means that it goes beyond individual intention or conduct and is instead emblematic of the very foundations of Western society. This concept of institutional racism is central to the "legal, statistical and verbal chicanery," which drives the "racism-discovery industry," which uncovers (or concocts) racism lying beneath statistical disparities and on that basis mounts discrimination claims for compensation (O'Shea 1999, 111–42). This industry thrives by lending disproportionate voice to "the paranoid, the hypersensitive, and the unscrupulous," heightening the sense of racial grievance, which in turn further swells the statistical data. In this climate reporting racism is encouraged; "whining and accusing others of reprehensible behaviour are rewarded, as is willingness to make a mockery or a racket of the law" (O'Shea 1999, 235).

The egalitarian ideal of equality encourages a vision of life as a zero-sum game where each group is threatened by the success of another group: a student of one race fails their exams *because* students of other races got all the good grades; workers of one race are low wage *because* those of other races are millionaires. This in turn encourages those who suffer socioeconomic disadvantage to become preoccupied with blaming others for their troubles, to avoid objective examination of the potential causes of their disadvantageous outcomes, and thus to avoid any personal responsibility. Sowell has demonstrated that this erroneous causal nexus derives its veneer of legitimacy from a "long tradition of intellectuals who more or less automatically transform differences into inequities and inequities into the evils or shortcomings of society" (Sowell 2013, 109).

This discourse ignores the vast array of causal factors influencing socioeconomic outcomes: ethnic origins, cultural attitudes, demographics, geography, history, among numerous other contextual factors. None of these factors is, by itself, deterministic, and as Robert Higgs (1977) points out, it may be difficult to assign a

percentage of influence to each causal factor in shaping the overall outcome. But the danger of becoming preoccupied with tracking the effects of race is that it implies an inability to influence the path of one's own life. What would be the point in a child from an ethnic background cultivating virtues of character such as industry and frugality if they are inevitably to be held back by discrimination, structural injustice, and The Man? Moreover, the very idea that it is possible for everybody to achieve success through effort and skill, to aspire to a better life, is undermined when success is attributed entirely to the privilege enjoyed by others, thereby implying that industry and commitment to achieving excellence in one's own endeavors are pointless.

Legislators around the world have now declared their commitment to building back better, forging a brave new world based on racial equity. The concept of equity shares much in common with the old racial segregation in that it exhorts people to interpret social interaction through the prism of race. The inherent paradox this entails is by now familiar: governments should track outcomes by reference to race to ensure that race no longer plays a role in shaping socioeconomic outcomes. As one Cambridge University professor advises, in order to support Black Lives Matter it should be emphasized that "White lives don't matter" and to that end our universities should "abolish whiteness" (Rawlinson 2020). In the discourse of "critical race theory" concepts like white toxicity, white privilege, white psychosis, white allyship, white fragility, and other unholy variations on a theme of "whiteness" promote what may be interpreted as a new language of "race speak," a language in which racism is repackaged as antiracism:

> In *Politics and the English Language* George Orwell said, "Political language is designed to make lies sound truthful and murder respectable, and to give an impression of solidity to pure wind." Race speak is the language of a politics committed to that sort of deceit. (Honeyford 2006)

From seemingly innocuous roots in legislation designed to enable fuller market participation, the antidiscrimination principle has expanded far beyond its initial application to education, health, and housing, to encompass all aspects of public life, intrude into private transactions, and transform language and social interaction. As David Bernstein (2018, 48–49) argues, this expansion is inherent in the very logic of the legislation:

> There is no natural limit to the scope of antidiscrimination laws, because the concept of antidiscrimination is almost infinitely malleable. Almost any economic behavior, and much other behavior, can be defined as discrimination. Whom people employ, befriend, marry, and love are all products of one sort of discrimination or another, including discrimination based on education level, discrimination based on family connection, discrimination based on looks, and discrimination based on personality. The obvious retort is that antidiscrimination laws should be limited to "real" discrimination. But there is no consensus as to what constitutes "real" discrimination, nor, not surprisingly, does there appear to be any principled definition that legislatures have followed.

The legislation thus chases endlessly after racial equality but never seems to arrive at its destination, nor even to secure agreement on how much equality must be achieved in order to declare the legislative quest accomplished.

The End of Formal Equality

Equalization policies reject equality before the law, on grounds that treating everybody equally would only give further advantage to those who already have an advantaged position in life. For luck egalitarians, being fortunate in the sense of being endowed with natural attributes, skills, or talents that others lack constitutes a source of unfairness and injustice because it is not deserved any more than those who are disadvantaged deserve their harsh lot in life (Hurley 2003). Thus productivity, success or good fortune are depicted as inherently unfair to those who are underprivileged (Segall 2007). If success is a matter of sheer good luck, then there is no reason why the lucky should keep their windfall while others languish in failure. The law plays its part by creating duties designed to equalize outcomes. As Bruce Pardy (2019) argues, the law has thereby abandoned the formal equality that sustains the rule of law:

> "[F]ormal equality" or "equality of application", lies at the heart of Western legal culture: All individuals should be subject to the same rules and standards; like cases should be treated alike; justice should be blind; the law should take no account of personal characteristics and should treat people as individuals rather than as members of groups…. "substantive equality" or "equality of outcome", is the opposite of the first: equality does not mean treating people the same but requires treating them differently so as to achieve equal or equivalent effects; justice should not be blind but should inquire into identities, capacities and practices; the law should make distinctions based upon group affiliation and treat people in proportion to their group's advantages and disadvantages, strengths and weaknesses.

Rejecting formal equality and choosing instead to level out life outcomes through substantive equality reflects a "revolt against the ontological structure of reality itself" (Rothbard [1974] 2000). It presumes that in the absence of discrimination the socioeconomic outcomes of all peoples, races, and cultures would be equal regardless of input or context. In reality diversity among human beings prompts people to value and pursue different ends and outcomes. They have different priorities, hobbies, values, preferences—different conceptions of the good. Reality dictates that different circumstances allow the creation of different opportunities which yield different outcomes. Life is not simply a matter of luck, whether good or bad. The reality of the human experience cannot be equalized without extracting an inordinate price.

SOME CONCEPTUAL PROBLEMS

It is often presumed that equality legislation is careful to limit its concerns to equalizing *opportunity* and not outcome. Two points may be made. First, equal opportunity is as elusive as equal outcome. As Murray N. Rothbard (1970, 1310) argues, "Man's inevitable diversity of location effectively eliminates any possibility of equalizing 'opportunity,'" and the same may be said of the innumerable other elements of diversity that characterize the human condition.

Second, closer inspection reveals that the very purpose of the legislation is to conflate opportunity with outcome. As O'Shea (1999, 235) argues:

> The effect of antidiscrimination laws—and, indeed, for many who understand this, the laws' very purpose—is not so much to protect members of a specified group from discrimination, from being treated less favorably than others because of their status (which nearly everybody agrees would be wrong and foolish), as to exempt them from the reasonable standards and requirements that apply to others.

This may be illustrated with reference to employment regulation in the UK. Drawing upon examples from the UK's Equality Act 2010 (hereafter the Equality Act), the discussion that follows shows how key tenets of the the rule of law are undermined by the pursuit of make-believe equality in employment, in the context of decisions about hiring, firing, and promotions.

Causation, Discrimination, and Objective Tests

Treating discrimination as the only, or the primary, cause of inequality leads equality law to rule out any inquiry into reasons for racial disadvantage or the motives or intentions behind an employer's decision. This poses particular difficulties in the context of disparate impact or indirect discrimination, where statistical disparities suffice to establish a discrimination claim without further contextual inquiry. In the UK the Equality Act defines indirect discrimination as a provision, criterion, or practice that puts the claimant in a disadvantaged position compared to those who do not share their protected characteristic. Where the relevant disadvantage is shown—for example, the disadvantage caused by failing tests set by the employer—the reasons for that disadvantage are irrelevant. If black candidates disproportionately fail a test compared to white candidates, that in itself establishes the disparate treatment. No inquiry need be conducted into the reasons for that failure.

This principle is strikingly illustrated by the case of *Essop v. Home Office*, a leading UK case in which a group of forty-nine government employees were awarded over £1 million in compensation for discrimination after failing a Core Skills Assessment. The race discrimination claim did not aver that the test itself was discriminatory, but merely presented uncontested evidence that the pass rate of ethnic minority employees was 40.3 percent of that of white employees. The Home Office contended that since an independent expert had confirmed the test itself to be fair, those who failed the test had to show the reason why they failed and had also to show that the reason for their failure was by its nature causally connected to their race. Why did they fail? That surely would be a matter within the claimants' knowledge. Did they fail because they were less well prepared? Less experienced? Or, dare it be stated, perhaps less able? Or did they fail because they were black?

Lady Hale when giving the ruling of the UK Supreme Court observed that "no one knows why" ethnic minority candidates had a lower pass rate than white candidates but held the reason to be irrelevant. She observed, correctly, that there could be many different reasons or "context factors" to explain these failures: genetic, social, traditional, historical, or cultural. However, she held the reason to be irrelevant. The legislation does not require a claimant to show the reason *why* members of their race suffered a disparate impact, in this case suffering lower pass rates than white

candidates. Suffice it that members of their race do in fact tend disproportionately to fail. It is also irrelevant, in a claim brought by those who have in fact failed, that some members of their race *do* pass the test. The reasons why some members of the same race pass and others fail were also declared to be irrelevant.

Legislation designed to close the attainment gap thus declares the reasons for the attainment gap to be irrelevant. Just mind the gap; never mind how the gap occurred. This illustrates Sowell's point about make-believe equality—the legislation aims to create the superficial appearance of equality by staffing public institutions with workers who reflect the same racial proportion as members of the wider public. This is perverse because the goal of the legislation is to eradicate racial discrimination, yet it creates a situation where the easiest way for an employer to satisfy equality legislation is by eschewing objectively fair tests and instead making hiring and promotions decisions by reference to race. Any reference point other than race exposes an employer to the risk that statistical disparities will naturally emerge, thereby substantiating a discrimination claim.

The safeguard against this perverse effect is said to lie in the defense of justification. It is open to an employer to defend a discriminatory provision, criterion, or practice, in this case the Core Skills Assessment, by arguing that the test is justified in the circumstances in order to achieve a legitimate goal: "the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end."[1] The legal test of justification is based on proportionality: "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"[2] The defense of justification therefore requires the employer to show that the test was "no more than is necessary" to achieve the stated goal, for example, showing that a core skills test, as currently designed, is "no more than is necessary" to ascertain eligibility for hiring or promotion. As will be seen later, in discussing the presumption of innocence, this opportunity to justify a discriminatory provision

[1] R (Elias) v. Secretary of State for Defence, [2006] EWCA Civ 1293.

[2] De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing, [1999] 1 A.C. 69, 80.

imposes a significant evidentiary burden on the employer. In practice, once a provision, criterion, or practice is held to be discriminatory most employers concede or settle the case rather than attempt to justify the measures. The justification test in effect requires the employer to establish that this was pretty much the only way to achieve the desired goal; clearly, if there was some other nondiscriminatory way to achieve the goal, then the discriminatory choice cannot be justified.

A good illustration of how the justification defense works may be seen in a subsequent case applying the approach in *Essop*, which concerned a claim for sex discrimination against a police dog unit run by three police constabularies in the UK (the Tri-Force). A female candidate claimed that fitness training tests known as the Long Walk and the Dog Carry were discriminatory against women.[3] She was required to carry a dog named Hulk, who weighed five and a half stones (seventy-seven pounds), uphill over a distance of seventy meters. She gave evidence that she simply could not do it: "I kept up with the boys who naturally run and walk at a faster pace. I dug deep, real deep…. Mentally (overcame some hurdles) … I could lift the dog but had nothing left to carry them … I just couldn't get the momentum." As a result she failed the test on grounds of "inability to carry a dog."

> She says she could not take more than a few steps carrying Hulk. She was then allowed to try two or three times with Fizz [who was eleven pounds lighter than Hulk], but couldn't get up the momentum to carry Fizz the distance. It did not help that Fizz had already been carried up the course and was wriggling. Her account is that it was her legs that did not work. She had pushed herself hard. [Sergeant] McCoy showed her how to use her legs to gain a better grip and momentum, but she tells us she had no energy or strength left. Her legs felt like jelly.

Like the case of *Essop* discussed above, the data showed that the average pass rate in this fitness training test was higher for men (98.8 percent) than for women (92.4 percent): "The average gender difference was 6.4 percent with several forces showing a gender difference of over 10 percent, the highest being 14.1 percent." The court therefore found that "women are under-represented as dog-handlers in all the forces," which satisfied the

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[3] *Kim-Louise Carter v. Chief Constable of Gloucestershire Constabulary*, Employment Tribunal Case No. 1400638/2017.

indirect discrimination test. The court drew the conclusion, based on "general knowledge," that women might find the test more demanding than men.

> We could rely on general knowledge. Women have different levels of strength and stamina from men. If that were not the case, men and women would compete on equal terms on the sports fields and they don't. Women perform differently on tests of speed, pace, distance—you can't watch a marathon or athletics events without knowing that. There are of course many women who can outperform many or most men, but it is the case that taking an overall view, women have lower physical achievement levels than men measured on those factors.

The question then arose whether the training policy was nevertheless justified. The police attempted unsuccessfully to justify the training as "no more than is necessary" to ensure that the dog handlers could in fact handle the dogs they would be required to handle in the typical conditions in which such handling would be required. The court held that the test was not justified, as it could not be shown that passing this particular test, with components such as carrying a heavy dog up a hill while scaling walls and running through muddy puddles "as fast as they could," was necessary in order to handle the dogs. A less physically demanding test would surely suffice for purposes of handling the dogs; the court thought that the need for such an "elite" test had not been established.

More significantly, the court criticized the police for attempting to justify the test: "It is unfortunate that Tri-Force sought in their defence to deflect attention from the indirect discrimination to the claimant's personal attributes, blaming her for a lack of fitness or confidence." Thus the attempt to justify indirect discrimination ended with the Tri-Force constabulary seemingly in the dock for having the temerity to suggest some plausible reasons why a recruit might fail a test, a defense castigated by the tribunal as unmeritorious. The only way that this justification would have worked in this case would have been to show that this particular test, precisely as framed, was the only way to ensure that the candidate can handle the dogs. If there was another way—for example, using smaller dogs that women could more easily carry—then the police would have to adopt the nondiscriminatory way in the future, as indeed they pledged to do following this case. One of the author's law students upon studying this case helpfully suggested that the police might use portable breeds of dogs designed to fit into a lady's handbag—perhaps pugs or miniature dachshunds—for ease of conveyance by

women, whom the court noted are "likely to need more rest and/or comfort breaks in between exercises" and likely "to be physically exhausted by having to maintain the pace of a man."

The Presumption of Innocence

The antidiscrimination principle has a vexed interaction with the presumption of innocence. The classic principle in common law jurisdictions is that "a defendant has the right to put the prosecution to proof, and should not be required to exculpate himself or otherwise disprove guilt just because he has been charged with an offence" (Ashworth 2002). This principle is commonly associated with criminal offenses, but it is also central to placing the burden of proof on the claimant in civil cases. The need for some form of substantiation is one of the key problems of antidiscrimination legislation, as "discrimination" based on the reasons for taking certain decisions is an amorphous principle that is rarely easy to prove. Decision-makers often struggle to articulate the reasons for their actions. In cases of direct discrimination there is rarely an explicit confession of racial animus, and in cases of indirect discrimination there is no animus at all but only a set of suspicious-looking statistical disparities. It is not surprising, therefore, that the legislation has found it necessary to shift a large part of the evidential burden to the defendant. The UK Equality Act provides that "[i]f there are facts from which the court could decide, *in the absence of any other explanation*, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred" (emphasis added).

The burden is therefore on the defendant to supply the requisite "other explanation" for the unequal outcome. The claimant begins by establishing a case, on a balance of probabilities, that the employer has been discriminatory. The burden then shifts to the employer to offer a plausible alternative explanation for his conduct, otherwise the court will presume that a situation that appears to be unequal is in fact discriminatory. In sum, if there is a prima facie case of discrimination, the burden shifts to the defendant to satisfy the court that the treatment was *not* discriminatory.[4] Like the "justification" defense mentioned earlier, much has been made of the need for the claimant to establish a prima

[4] Royal Mail Group Ltd. v. Efobi, [2019] EWCA Civ 18.

facie case—it is said that an innocent employer has nothing to fear from the reversed burden of proof because the claimant must first establish an arguable case. Unmeritorious claims that are unable to satisfy this preliminary requirement would be dismissed out of hand without putting the innocent employer to proof.

But this safeguard is weak, not least because the prospect of having to account for one's conduct to a court is onerous in itself, regardless of guilt or innocence. Lawyers must be hired, time taken off from work and other pursuits, and negative publicity fielded, regardless of how the case unfolds. More importantly, allowing claims to proceed if a prima facie case were established may be appropriate for small civil claims where sums of money are in dispute but is not an appropriate standard for contested cases with serious financial and reputational implications for the defendant. Putting the defendant to proof is usually acceptable only in situations where the evidence is easily established, for example, in cases of breach of contract where a defendant has agreed in writing to pay a sum of money which patently has not been paid. The clarity of prima facie cases does not apply to complex discrimination cases, where, for example, an applicant for a job is contesting whether the reason they were not hired is their race. Such a case is rendered even more complex when the discrimination is said to be unconscious. As will be seen later, in the discussion on unconscious bias, it is a tall order to prove that one does not harbour a bias of which one is alleged not to be conscious.

It was noted earlier that in disparate impact claims the defendant is permitted to justify a discriminatory measure. A few observations on the practical exigencies of satisfying the evidentiary burden are pertinent here in discussing the presumption of innocence. In disparate impact cases the claimant need not prove the existence of barriers to equal attainment; after all, the rationale for creating a category of disparate impact is precisely to target discrimination that is "hidden" and thus "not easy to anticipate or to spot," much less to prove.[5] The law presumes that hidden barriers exist because the results are unequal. Under the principle of "disproportionate group disadvantage" an individual member of a disadvantaged race can bring a claim derived from the disadvantage suffered by members of their race. The group disadvantage in itself raises an

[5] Essop v. Home Office, [2017] UKSC 27.

inference of indirect discrimination unless the employer is able to prove the contrary. For example, as shown in the case of *Essop v Home Office*, if racial minorities tend disproportionately to fail a test the employer is invited to show, if he can, that a candidate failed due to his own fault, such as lack of effort or lack of preparedness or even, dare it be said, lack of intelligence.

Clearly, this puts an employer in an awkward position. He is at this stage invited to offer a credible justification for a requirement that has already been ruled, on its face, to be discriminatory. In welcoming an employer to prove (if he can) that his discriminatory conduct is justified, Lady Hale adds helpfully that he should do so with confidence as "there is no shame in it." Lady Hale's remark only serves to highlight the embarrassment in offering what will appear to be, at best, an unmeritorious defense and, at worst, tantamount to an attack on the poor ethnic minority claimants, who are already suffering from multiple disadvantages and frequently weep in court, overcome with grief by the failures for which compensation is sought. Well might Lady Hale say that "there is no shame in it," but it is not an edifying spectacle, and the rational course at that stage is to settle the claim rather than mount a defense. There is also the risk to the employer that the very attempt to gather the evidence needed might itself constitute grounds for another discrimination claim. How would an employer go about proving that the complaining employee is so weak and unsatisfactory (or worse) that he surely deserved to fail? We have seen how that worked out for the Tri-Force constabulary which tried to suggest that a candidate's personal attributes had caused her to fail her tests, only to be criticized for attempting to blame her for her own failure when they could easily have resolved the matter by setting easier tests.

Why stop at setting easier tests? Abolishing tests altogether would ensure that nobody would have to suffer the ignominy of unequal outcomes. It is therefore perhaps worth making some observations about the value of objective tests in any society where merit counts for something. We have seen that in theory it is always open to an employer in disparate impact cases to show that a complainant was singularly lacking in merit, but in many cases, the employer is unlikely to have such evidence at hand: the reason why there is often a formal test or evaluation in the first place is that the employer does not know about the abilities

of the candidates, including their level of preparation, skills, or competence, unless he tests them. Yet the test itself, having a disparate impact, now calls to be justified, and justification can only be shown by reference to the claimant's lack of merit. In this way, by shifting the burden of proof to the employer, the legislation ultimately undermines the principle of decision-making based on merit. As seen in the Tri-Force case discussed above, equality legislation puts the employer in the position of "blaming the victim." The desire to avoid victim blaming is one of the main reasons why many egalitarians prefer to attribute failure to discrimination. If the employer is reluctant to establish lack of merit, then it is easier to get rid of such tests altogether. Yet, as Sowell shows, objective merit-based tests yield better outcomes for ethnic minorities by allowing the employer rationally to decide whether to take a hiring risk. Without an objective test the employer must take a chance in hiring unknown ethnic minorities with no guarantee that the decision will turn out to be wise, and with the added risk of incurring penalties for discrimination if they dare to fire the employee. The legislation that promises to protect the vulnerable candidate from discrimination ends up turning its protégé into a risky and expensive liablity.

State of Mind and "Unconscious Bias"

The UK Equality Act does not require evidence of intention or motive to discriminate. As explained by Lord Goff, the rationale is that the policy goals of the legislation would be defeated if any person accused of discrimination could simply assert that he did not intend to discriminate.

> The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned … is not a necessary condition to liability [as otherwise] it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy.[6]

Thus Lord Goff explained that having a "benign motive" would be no defense to direct discrimination as that would undermine the purpose of the legislation:

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[6] R v. Birmingham City Council, ex parte EOC, [1989] A.C. 1155.

> Such a conclusion seems to me to be consistent with the policy of the Act, which is the active promotion of equal treatment … whether or not the treatment is less favourable in the relevant sense … is not saved from constituting unlawful discrimination by the fact that the employer acted from a benign motive.[7]

Lord Browne-Wilkinson referred also to the reluctance of UK courts to inquire into motive or intention in cases where those concepts are highly contested.[8] Intention is always difficult to prove, but courts are faced with the need to ascertain motive and intention in many different types of cases, so it is difficult to see why the defendant's intention should not be made subject to judicial scrutiny in discrimination cases just as in any other type of legal case. It is a principle of basic fairness that the intention or motive of anyone accused of a legal wrong is pertinent to establishing liability, and exceptions for any form of strict liability should be restrictively construed.

The relevance of intention in the context of discrimination seems clear in the hypothetical examples postulated by Lord Goff, suggesting that discriminating against women based on "customer preference, or to save money, or even to avoid controversy" would be perfectly sensible motives for an employer but would not preclude liability for discrimination. Lord Goff was correct to observe that these reasons are not permitted by the legislation as a defense, but although he is right that changing this would defeat the point of the legislation as framed, there is a prior question to be asked: whether the point of the legislation is sound. Making a decision for such reasons is perfectly rational, depending on the decision-maker's view of the relevant circumstances, and such reasons should not be irrelevant to the imposition of legal liability. In any case it is problematic that in private contexts the employer should have to offer reasons for his decisions. In common law such reasons fall within managerial prerogative or contractual freedom and there is no *legal* duty to explain one's reasons for private decision-making (whether there is a moral duty to do so is an open question). Thus in addition to the problem of intention, there is an unjustifiable erosion of the boundary between public and private law.

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[7] James v. Eastleigh, [1990] 2 A.C. 751.

[8] Nagarajan v. London Regional Transport, [2000] 1 A.C. 501, 510.

In public contexts the message that individual intentions are irrelevant is reinforced by the official guidance in the UK on "mainstreaming" equality issues, which identifies abstract equality duties with which artificial entities and corporations should comply to promote equality. The guidance fails to acknowledge the onerous legal obligations thereby imposed on the individuals who work in those entities. For example, the notion of "institutional racism" encourages institutions to issue blanket confessions of guilt and shame, which obscures the costs and burdens of retribution and reparations to be borne by the individuals behind the corporate front. As personal intentions count for nothing, each policeman on the beat, each teacher in a classroom, each vicar in a parish church, must carry the burden of institutional shame so readily expressed in policy statements by leaders on behalf of individuals of whose contribution and sacrifices they know nothing and who personally have nothing of which to be ashamed. A striking example in the UK was observed when the archbishop of Canterbury, speaking in his role as leader of the Church of England, publicly lamented that the church is "deeply institutionally racist" and expressed his shame: "Personally, I am sorry and ashamed. I'm ashamed of our history and I'm ashamed of our failure" (Telegraph Reporters 2021). It was unclear what precisely he was ashamed of, given the lack of clarity surrounding the amorphous sin of institutional racism. The unspecific nature of institutional shame encourages such collectivist expressions of guilt with no regard to the personal impact on individuals trying to do their best on the front line. It may be that the very ability to shield specific individuals from personal moral responsibility is the precise reason why political leaders have embraced the notion of institutional shame so enthusiastically. When things go wrong, it could perhaps be said that "the institution" did it, in a sophisticated version of the timeless deflection defense known to children everywhere as "the dog ate my homework."

This disconnect between the actual state of mind of any individual person and culpability for institutional racism extends further to claims based on "unconscious" or "subconscious" bias symbolizing bias that we may presume to exist even in the absence of evidence for it. In *Nagarajan v. London Regional Transport* Lord Nicholls waxes eloquent on "subconscious motivation" being a natural phenomenon, giving no hint that this notion might be contestable:

> All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, *whether the employer realised it at the time or not*, race was the reason why he acted as he did.

More recently Lady Hale has said that "the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realise that he is doing so, but that is what he is in fact doing."[9] The concept of unconscious bias serves the function of allowing racism claims to be brought without the slightest shred of evidence of racism. There is no evidence, the courts intone, because it was unconscious. Regardless of whether all human beings have unconscious biases or not, the logically prior question is whether unconscious predilections should be the subject of legal sanction. The legislation thus overturns another central tenet of the rule of law: the importance of intention or state of mind in ascertaining legal culpability. Lord Browne-Wilkinson (dissenting) in *Nagarajan* was right to caution against taking this approach, observing that "any factor relied upon has to be consciously present in the defendant's mind. A matter which is not consciously taken into account by the defendant cannot in my judgment be a ground on which he acted."

Harassment and Microaggressions

Besides discrimination, the most common type of racial misdemeanor discussed in the workplace is harassment. The UK Equality Act defines harassment as "unwanted conduct" which violates the dignity of people with protected characteristics, or creates an environment which those with protected characteristics feel to be "intimidating, hostile, degrading, humiliating or offensive." Legal liability arises if they feel humiliated, and legislators regard this offense as a brilliant way for us all to signal that we are good people who do not wish to humiliate others. The UK Equality and Human Rights Commission (2019) treats this as a sound basis for prohibiting "microaggressions" as well, which it defines as

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[9] R (E) v. Governing Body of JFS, [2009] UKSC 15.

> brief, everyday interactions that send denigrating messages to [people of color] because they belong to a racially minoritised group. Compared to more overt forms of racism, racial microaggressions are subtle and insidious, often leaving the victim confused, distressed and frustrated and the perpetrator oblivious of the offense they have caused.

Relevant factors in deciding whether conduct amounts to harassment include the perception of the victim and whether it is reasonable for the conduct to have the effect alleged by the victim. As earlier observed, the motive or intention of the perpetrator is not relevant, nor need the perpetrator be aware that their conduct is unwanted. Many harassment claims involve banter, jokes, and off-the-cuff remarks. The definition of microaggressions explicitly envisages that the perpetrator is oblivious to having caused offense, for instance by asking the notorious question "Where are you from?," which is often intended as polite small talk but causes deep emotional distress to those who feel "othered" by the question. Thus everyday politenesses may amount to harassment if they rub the recipient the wrong way. Creating awareness of questions likely to cause distress then gives rise to mandatory workplace training designed to educate everyone on how to interact with each other. Such schemes may have the advantage of helping people to develop their social skills and smooth the course of social interaction, but the question for public policy consideration is whether their mandatory and coercive nature, and ultimately the institution of legal liability for social infractions, is proportionate even if the goals of the legislation are presumed to be sound.

The notion of harassment has further harmful effects. It institutionalizes an inordinate focus on trivial day-to-day social infractions as a source of grievance and injustice. The emphasis on victimhood as a basis for resource allocation pays no regard to the effects on other members of society. It is myopic to select one party for protection on grounds that they are "vulnerable" and then ignore completely the impact and implications for other members who are accused of breaking the law with misjudged efforts to be friendly, or whose demeanor is placed under constant scrutiny for evidence of unintended slights. It is in the context of harassment that some of the most problematic issues in relation to individual liberty have arisen, since, unlike discrimination, which focuses on specific detriment such as hiring and firing decisions, harassment is largely a matter of interpretation based on the presumed victim's perception. Legal liability arising from other

people feeling humiliated involves subjective evaluations that have major implications for the conduct of interpersonal relations, especially in light of the fraught nature of human communication and how easy it is to give offense unknowingly, by something as innocuous as adopting the wrong tone of voice.

CONCLUSION: THE LAW OF UNINTENDED EFFECTS

The interventions of antidiscrimination legislation are becoming increasingly intrusive. There seems no realistic prospect that the legislation will be scaled back, given that legislatures are busy debating ways to extend it even further to offer stronger "protection." By its own internal logic the legislation tends inexhorably to expand both the grounds which it covers and the circumstances in which liablity may be established. As Epstein (1992, 445–46) argued in *Forbidden Grounds*:

> The process has no logical stopping point. With the move from disparate treatment to disparate impact, the levels of external control quickly become intrusive…. By a process of degree the legal system thus backs itself into a corner. It will never allow any objections on the workability or economic consequences of discrimination law to lead to a reexamination of the basic rule. That initial decision is engraved in stone for reasons that are said to be moral are indeed unexamined…. On balance the antidiscrimination laws are a major social and intellectual mistake.

The legislation governs ever more intricate details of human interaction. It "balances away" individual liberty, including free speech and freedom of conscience. It undermines individual aspiration and disincentivizes self-improvement. It fuels the politics of envy, forms the habit of depicting other people's advantages as unfair, paints the world as a brutal and harmful place, and plunges those cast as victims of injustice into a hopeless spiral of despair and defeat.

These are largely symptoms of a deeper underlying problem rooted in legal duties to promote equality based on what are referred to in UK legislation as "protected characteristics," meaning personal characterisitcs which it would be unlawful to take into account in making decisions such as race or sex. UK legislation also imposes an institutional duty to ensure that nobody suffers from discrimination based on these characteristics. It is easy to mock institutions which issue blacklists of words that must not be uttered in order to avoid the risk of offending anyone, but such gestures are driven by the threat of legal sanction to which any institution that fails to promote

equality or fails to be proactive in tackling racial harassment may be exposed. Thus employers encourage white members of staff to befriend black colleagues with a view to offering the latter personal support for their vulnerable status at work, and at the same time discourage white members of staff from helping black colleagues as this may be construed as evidence of the unhappy "white savior complex." This illogical agenda is not some trivial manifestation of wokism gone mad, but reflective of a more serious institutional effort to keep on the right side of the law and avoid the pitfalls of "institutional racism" against which there is little meaningful scope to offer a defense. Similarly, universities seek to decolonise their curricula largely to show engagement with their equality duties. They enthusiastically promote an educational approach which deems it inconceivable that ethnic minorities might perhaps enjoy being exposed to Chaucer, but at the same time deem it perfectly acceptable to demand that white people should change their culture and identity. Studies of Greek and Roman literature are henceforth to center on studying Africa (where else?) in a desperate bid to replace Eurocentric studies with Afrocentric studies (Giusti 2021). The idea that British history might be central to understanding Britain or that Greek or Roman figures might be central to Greek and Roman literature is now to be understood, when one thinks about it in *precisely* the manner directed by equality activists, only as further evidence of imperialism, colonialism, and Eurocentric bias.

Equality legislation begins by defining race as a protected characteristic and before long its focus shifts to equality policies, targets, and quotas. There is little concern with whether any of it makes any sense, the costs of cultivating a victim complex among large swathes of ethnic minorities, the longer-term implications of fomenting a sense of grievance in relation to a world feared to be stacked up against them, or the significant financial, emotional, and opportunity costs incurred by those who devote their lives to the pursuit of egalitarian pipe dreams. An instructive example is the case of Natasha Sivanandan (Leach 2011), who devoted much of her life to seeking compensation for discrimination:

> Natasha Sivanandan has spent 25 years pursuing tribunal cases and has now secured her biggest victory with a £425,000 payout. Even her father, a distinguished campaigner against racism, has disowned her and accused her of bringing race relations into disrepute. The cases are said by experts to have cost public bodies more than £1 million in payouts, out-of-court settlements and court costs.

This unwholesome preoccupation has had tragic personal consequences. One of Sivanandan's colleagues remarked that "[s]he thinks the whole world is against her. She is an extremely intelligent and capable person who could have done anything she wanted, but unfortunately she has this extremely destructive streak that seems to have consumed her" (Leach 2011).

The legislative pursuit of egalitarian dreams undermines individual aspiration toward improvement and discourages self-reliance, self-responsibility, effort, resilience, and persistence. Yet policymakers give no thought to the loss of these virtues and the likely impact on society. They are intent on announcing that ethnic minorities can only succeed if the nice government favors them with "equity" payouts and special treats for their legally protected characteristics. This is no justice. Justice should be forward looking, based on general rules of fair process rather than equal results (Hayek [1973] 2013, 141).

It is true that fair process may fail to punish the racists, leading antiracists to exhort people to devote their lives to waging war upon racists by co-opting everyone into schemes that train them to be "actively antiracist." To those concerned that getting on with their own affairs and quietly ignoring the equality artisans may permit racists to run amok, let the life and times of Sivanandan be a salutary lesson. Racists will always be with us. There will always be some people who choose, unwisely, to limit their experience of the world to those of their own race. Some people do exhibit a propensity to bear ill will toward those who are different from them in some way. Some students and some employers are indeed "nasty, very nasty," as reported by the UK Equality and Human Rights Commission. Good luck to them all, it may be declared, and devil take the hindmost! May karma get them if it will, but it is neither reasonable nor realistic to pursue a legislative policy of forging a society in which not a single racist person exists. Leaving aside the fact that "racism" is a slippery concept, hopelessly subjective and malleable, the quest to purge society of every last racist is destroying liberty. By undermining the rule of law, it destroys the ethical and institutional foundations of liberal democracy. There is an alternative to the narrative of racial grievance and retribution, and that is to highlight the freedom and opportunity that abounds in free markets.

REFERENCES

Ashworth, Andrew. 2002. *Human Rights, Serious Crime and Criminal Procedure*. London: Sweet and Maxwell.

Bernstein, David E. 2018. "The Boundaries of Antidiscrimination Laws." In *The Cambridge Handbook of Classical Liberal Thought*, edited by M. Todd Henderson, 47–55. Cambridge: Cambridge University Press.

Commission on Race and Ethnic Disparities. 2021. *Commission on Race and Ethnic Disparities: The Report*. March 2021. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974507/20210331_-_CRED_Report_-_FINAL_-_Web_Accessible.pdf.

Epstein, Richard A. 1992. *Forbidden Grounds: The Case against Employment Discrimination Laws*. Cambridge, Mass.: Harvard University Press.

———. 2002. *Equal Opportunity or More Opportunity: The Good Thing about Discrimination*. London: Civitas.

Equality and Human Rights Commission. 2019. *Racial Harassment Inquiry: Survey of Universities*. Research Report No. 131. October 2019. Manchester, U.K.: Equality and Human Rights Commission. https://www.equalityhumanrights.com/sites/default/files/racial-harassment-inquiry-survey-of-universities.pdf.

Furedi, Frank. 2018. *How Fear Works: Culture of Fear in the Twenty-First Century*. London: Bloomsbury.

Giusti, Elena. 2021. "Centring Africa in Greek and Roman Literature, While Decolonising the Classics Classroom." In *Cambridge School Classics Project Blog*, accessed July 3, 2021. https://blog.cambridgescp.com/centring-africa-greek-and-roman-literature-while-decolonising-classics-classroom.

Hayek, Friedrich A. [1973] 2013. *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*. London: Routledge.

Higgs, Robert. 1977. *Competition and Coercion: Blacks in the American Economy, 1865–1914*. New York: Cambridge University Press.

Honeyford, Ray. 2006. "Education and Race: An Alternative View." *The Telegraph*, Aug. 27, 2006. https://www.telegraph.co.uk/culture/3654888/Education-and-Race-an-Alternative-View.html.

Hurley, Susan L. 2003. *Justice, Luck, and Knowledge*. Cambridge, Mass.: Harvard University Press.

Leach, Ben. 2011. "High Cost of Compensation Culture and 'Human Rights.'" *The Telegraph*, June 11, 2011. https://www.telegraph.co.uk/news/uknews/law-and-order/8570829/High-cost-of-compensation-culture-and-human-rights.html.

Martin, Kahanec, and Klaus F. Zimmermann. 2009. "International Migration, Ethnicity and Economic Inequality." In *The Oxford Handbook*

of Economic Inequality, edited by Brian Nolan, Wiemer Salverda, and Timothy M. Smeeding, 455–90. Oxford: Oxford University Press.

McIntosh, Ian, and Sharon Wright. 2018. "Exploring What the Notion of 'Lived Experience' Offers for Social Policy Analysis." *Journal of Social Policy* 48, no. 3: 449–67.

Mieschbuehler, Ruth. 2018. *The Minoritisation of Higher Education Students: An Examination of Contemporary Policies and Practice*. Oxford: Routledge.

Mises, Ludwig von. [1927] 2005. *Liberalism: The Classical Tradition*. Edited by Bettina Bien Greaves. Translated by Ralph Raico. Indianapolis, Ind.: Liberty Fund.

Nozick, Robert. 1989. *The Examined Life: Philosophical Meditations*. New York: Touchstone.

O'Shea, M. Lester. 1999. *A Cure Worse Than the Disease: Fighting Discrimination through Government Control*. Tampa, Fla.: Hallberg.

Pardy, Bruce. 2019. "Substantive Equality: Some People Are More Equal Than Others." Advocates for the Rule of Law, Feb. 6, 2019. http://www.ruleoflaw.ca/substantive-equality-some-people-are-more-equal-than-others/.

Rand, Ayn. 1963. "The Nature of the Second-Hander." In *For the New Intellectual: The Philosophy of Ayn Rand*, 68–71. New York: Signet.

Rawlinson, Kevin. 2020. "'Abolish Whiteness' Academic Calls for Cambridge Support." *The Guardian*, June 25, 2020. https://www.theguardian.com/education/2020/jun/25/abolish-whiteness-academic-calls-for-cambridge-support.

Rothbard, Murray N. 1970. *Power and Market: Government and the Economy*. Kansas City, Kans.: Sheed Andrews and McMeel.

———. [1974] 2000. *Egalitarianism as a Revolt against Nature and Other Essays*. 2d ed. Auburn, Ala.: Ludwig von Mises Institute.

Segall, Shlomi. 2007. "In Solidarity with the Imprudent: A Defense of Luck Egalitarianism." *Social Theory and Practice* 33, no. 2: 177–98.

Sowell, Thomas. 1999. *The Quest for Cosmic Justice*. New York: Touchstone.

———. 2013. *Intellectuals and Race*. New York: Basic Books.

Telegraph Reporters. 2021. "Archbishop of Canterbury Shares Prayer for Racial Justice and Equality." *The Telegraph*, Feb. 14, 2021. https://www.telegraph.co.uk/news/2021/02/14/archbishop-ofcanterbury-shares-prayer-racial-justice-equality/.

Tomasi, John. 2012. *Free Market Fairness*. Princeton, N.J.: Princeton University Press.

Williams, Walter E. 2011. *Race and Economics: How Much Can Be Blamed on Discrimination?* Stanford, Calif.: Hoover Institution Press.