

Complicating the ‘Holy Grail’, Simplifying the Search: A Critique of the Conventional Problematisation of Social Immobility in Elite Legal Education and the Profession

Abstract

This article challenges the conventional problematisation of and response to insufficient socio-economic diversity in elite legal education and the legal profession. I contend that the entrenched socio-economic stratification of admissions, the undergraduate experience, final degree classification, and career trajectories turns on elite institutions’ failure to recognise that education and educational proxies neither explain the core of socio-economic inequality nor are they the linchpin for improving social mobility. I draw on a case study of an elite UK university’s undergraduate Law programme. My argument proceeds in three parts. Firstly, I contend that justifiable commitment to ‘meritocracy’ continues to be unjustifiably implemented via the indeterminate critical values of ‘potential’ and ‘talent’, which undermines the meritocratic aim. Secondly, I explain how the inadequacy of the educational proxies employed for socio-economic disadvantage undermines the ability of targeted responses to achieve real improvements, and I call for the adoption of poverty-based proxies. Thirdly, I suggest that the search for mechanisms to increase diversity proceeds on the mistaken assumption that complex problems require complex solutions, which overlooks the transformative potential of ‘micro-adjustments’ or ‘nudges’. I propose both universal and targeted micro-adjustments, which focus on fostering a universal diversity of excellence; bringing disadvantaged students within the ‘community of practice’ to become expert in critical learning methods and assessment criteria; and enhancing disadvantaged students’ social and cultural capital.

Key words

Socio-economic disadvantage; meritocracy; micro-adjustments

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1 Introduction

In 2015, the Social Mobility and Child Poverty Commission described social mobility as ‘a new holy grail of public policy’.¹ Socio-economic inequality poses a critical dilemma for academics since class is performative.² Writing about class in overly simplistic terms risks entrenching social immobility. By contrast, embracing the complexity of the issues at stake risks analysis paralysis and over-complication or even abandonment of the search for satisfactory policy responses. This is driven by recognising critical difficulties with underpinning concepts, data, and methodologies. For example, there is no consensus on how to define and measure concepts such as ‘diversity’,³ and there is an ‘unexplain[ed] pay gap for the upwardly [socially] mobile’.⁴ This sits alongside a need for empirical consensus, which has been heightened by institutional and Government embrace of the necessity and desirability of evidence-based policy.⁵

This may in part explain why section 1(1) of the Equality Act 2010 is set to be ‘scrapped’⁶ before being brought into force. The subsection purports to impose a duty on

¹ Social Mobility and Child Poverty Commission, *State of the Nation 2015: Social Mobility and Child Poverty in Great Britain* (HMSO 2015) iv.

² Danny Dorling, ‘Thinking about Class’ (2014) 48: 3 *Sociology* 452-462, 454.

³ Dermot Feenan, ‘Measures of Diversity’, SLSA Blog Post, online: <<http://slsablog.co.uk/blog/blog-posts/measures-of-diversity-dermot-feenan/>> accessed 17 June 2016.

⁴ Daniel Laurison and Sam Friedman, *Introducing the Class Ceiling: Social Mobility and Britain’s Elite Occupations* (LSE Sociology Department Working Paper Series, 2015) 26.

⁵ For an excellent discussion of what this means, see Jeremy Hardie and Nancy Cartwright, *Evidence-Based Policy: A Practical Guide to Doing It Better* (OUP 2012).

⁶ See, for example, Amelia Gentleman, ‘Theresa May scraps legal requirement to reduce inequality’ (The Guardian, 17 November 2010), online: <<http://www.theguardian.com/society/2010/nov/17/theresa-may-scraps-legal-requirement-inequality>> accessed 21 May 2014.

particular public authorities, ‘when making decisions of a strategic nature’, to ‘have due regard to the desirability of exercising [its functions] in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage’. The duty may well have proven unworkable in practice⁷ and May correctly noted that ‘[y]ou can’t solve a problem as complex as inequality in one legal clause’.⁸

But progress cannot come from silence when, on any measure, social mobility has at best remained relatively static in recent decades.⁹ In recognition of the difficulties generalising even across elite professions,¹⁰ I adopt a case study approach and focus on social mobility in the legal context, which is marked by the lack of a ‘trickle up’ effect¹¹ together with Oxbridge dominance in recruitment,¹² particularly amongst the judiciary.¹³ The most recent Judicial Office statistics show that fewer than 1 in 5 judges in the High Court and Court of Appeal are female, whilst approximately 1 in 30 are Black, Asian, or Minority Ethnic (BAME).¹⁴ These statistics do not contain any socio-economic data. Notably, in his

⁷ Though note the further-reaching Protocol No. 12 to the European Convention on Human Rights (ECHR), which the UK has not ratified, has acted as a catalyst for the European Court of Human Rights’ development of its Article 12 ECHR jurisprudence. See Protocol No. 12 to the European Convention on Human Rights ETS No. 177; David Harris, Michael O’Boyle, Ed Bates, and Carla Buckley, *Harris, O’Boyle, and Warbrick’s Law of the European Convention on Human Rights*, 3rd ed (OUP 2014) 37 and ch 18.

⁸ BBC, ‘Theresa May shelves “equality duty” on councils’, online: <<http://www.bbc.co.uk/news/uk-politics-11771302>> accessed 28 December 2015.

⁹ John Goldthorpe, *Understanding – and Misunderstanding – Social Mobility in Britain: The Entry of the Economists, the Confusion of Politicians and the Limits of Educational Policy* (Barnett Papers in Social Research, 2/2012) (University of Oxford 2012) (discussing the ‘consensus; and ‘alternative’ views).

¹⁰ See Laurison and Friedman (n 4) 5.

¹¹ Rosemary Hunter, ‘Judicial Diversity and the “New” Judge’ in Hilary Sommerlad, Sonia Harris-Short, Steven Vaughan, and Richard Young (eds), *The Futures of Legal Education and the Legal Profession* (Hart 2015) 79-96, 93 (commenting on the judiciary in particular).

¹² The LETR highlights recent research findings of ‘a continuing and strong Oxbridge/pre-1992 university bias in recruitment’. See Legal Education and Training Review, *Literature Review: 7. Current Equality, Diversity and Social Mobility Issues* (SRA, BSB, and CILEX 2013), online: <<http://www.lettr.org.uk/wp-content/uploads/LR-chapter-7.pdf>> accessed 24 February 2015 [65]. Yet, the Social Mobility and Child Poverty Commission suggests that ‘accountancy and law are farthest ahead’ with having targeted strategies to improve social mobility. See Social Mobility and Child Poverty Commission, *State of the Nation 2015* (n 1) 106.

¹³ In 2014, the Social Mobility and Child Poverty Commission found that 75 percent of senior judges attended Oxbridge compared to 0.8 percent of the population as a whole. See Social Mobility and Child Poverty Commission, *Elitist Britain* (HMSO 2014), online:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/347915/Elitist_Britain_-_Final.pdf> accessed 28 December 2015, 10-11.

¹⁴ Judicial Office, ‘2014 – Judicial Diversity Statistics – Gender, Ethnicity, Profession and Age’, online: <<http://www.judiciary.gov.uk/wp-content/uploads/2014/07/courts-diversity-stats-2013-14.xls>> accessed 10 April 2015.

recent discussion of the ‘lack of diversity’ in the judiciary, Lord Sumption focused only on gender.¹⁵

Social mobility provides critical benefits not just for the affected individuals but for broader society. At the university level, the composition of the student body informs the potential for socio-economic diversity in terms of the student body to play a ‘disruptive’¹⁶ role that benefits all parties as an aspect of the diversity of excellence. This can undercut unconscious assumptions and biases held by students and tutors, and is particularly vital when carried into legal practice as it impacts on individuals’ ‘meaning-making’¹⁷ of their own socio-economic position. A socially-representative judiciary not only enables justice to be seen to be done, but may also be critical to justice being done, at least to the extent that we no longer believe in the idealised version of ‘perspectiveless’¹⁸ judges and judging. Having a diverse body of students and practitioners thus benefits all members of the cohort.¹⁹

For change to be meaningful, elite institutions need to lead the way. Building on work that focuses on elite professions,²⁰ my case study centres on undergraduate legal education at the University of Oxford. I concentrate on Oxford for four reasons: firstly, the

¹⁵ See Martin Bentham, ‘Rush for gender equality with top judges “could have appalling consequences for justice”’ (The Evening Standard, 21 September 2015) online: <<http://www.standard.co.uk/news/uk/rush-for-gender-equality-with-top-judges-could-have-appalling-consequences-for-justice-a2952331.html>> accessed 22 September 2015.

¹⁶ Erika Rackley, ‘What a Difference Difference Makes: Gendered Harms and Judicial Diversity’ (2008) 15: 1/2 *International Journal of the Legal Profession* 37-56, 38.

¹⁷ Natasha Kumar Warikoo and Christina Fuhr, ‘Legitimizing status: perceptions of meritocracy and inequality among undergraduates at an elite British university’ (2014) 40: 4 *British Educational Research Journal* 699-717, 713 (citing Stevens).

¹⁸ As discussed by Hilary Sommerlad, ‘Diversity, Merit, and the English Judiciary: The Lessons that Can be Learned from the Reform of Selection Processes, a U.K. Contribution’ (2013) 40 *City Square, Fordham Urban Law Journal* 94-107, 95. See also Erika Rackley, *Women, Judging and the Judiciary: From difference to diversity* (Routledge 2013) 165, 183.

¹⁹ Reay *et al* explain that

elite universities need non-traditional students just as much as the students need them. Both need the other in order to flourish, the students academically and the universities socially.

See Diane Reay, Gill Crozier, and John Clayton, ‘“Strangers in Paradise”? Working-class Students in Elite Universities’ (2009) 43:6 *Sociology* 1103-1121, 1116.

²⁰ See, for example, Louise Ashley, Jo Duberley, Hilary Sommerlad, Dora Scholarios, *A qualitative evaluation of non-educational barriers to the elite professions*, produced for the Social Mobility and Child Poverty Commission (HMSO 2015), online: <<https://www.gov.uk/government/publications/non-educational-barriers-to-the-elite-professions-evaluation>> accessed 28 December 2015.

continuing dominance of elite universities, especially Oxbridge,²¹ in entry to the legal profession; secondly, I suggest that it is in the progress and outcomes of disadvantaged students with the same elite stamp of approval as their more privileged peers that we can most easily make visible the causes and remedies of insufficient social mobility; thirdly, the complexity of the causes of social immobility means that reform proposals need to be sensitive to context and the undergraduate law degrees at Oxford and Cambridge have distinctive admissions criteria and assessment structures; and, fourth, deeper insight into the problematic can be gained by drawing on the body of empirical research into the fairness of the admissions process, which exists in relation to Oxford.²²

I focus on the undergraduate Law path into practice because, whilst those entering into legal careers from non-law backgrounds account for approximately half of all new solicitors and barristers,²³ studying Law as an undergraduate remains the most popular route into a legal career. I argue that we need to simultaneously complicate the search for the ‘holy grail’ whilst embracing the transformative potential of micro-changes. Seemingly small adjustments may have significant, beneficial, and complex effects on currently-entrenched social immobility.

2 The Indeterminate Values of Meritocracy

Warikoo and Fuhr found that Oxford students underpinned the legitimacy of their elite status by relying on the meritocracy of Oxford’s admissions process and its outreach work.²⁴ As a

²¹ (n 12)-(n 13) and corresponding main text.

²² Warikoo and Fuhr (n 17); Zimdars (n 32); Mountford-Zimdars (n 33); Nicola (n 48) and corresponding main text.

²³ Legal Education and Training Review, *Literature Review: 4. Education standards and entry to formal legal education* (SRA, BSB, and CILEX 2013), online: <<http://www.lettr.org.uk/wp-content/uploads/LR-chapter-4.pdf>> accessed 24 February 2015 [23].

²⁴ Warikoo and Fuhr (n 17) 700.

result, they argued that ‘the education system is a key site through which meritocracy is legitimated while simultaneously status is reproduced’.²⁵ In this section, I interrogate the roles given to ‘potential’ and ‘talent’, values which are employed to implement the meritocratic ideal in relation to admission to undergraduate Law at Oxford; appointment as a solicitor, barrister, or judge; and career progression generally.

(a) Admission to University: ‘Potential’

Oxford’s Admissions Office explains that applications are assessed absolutely against the selection criteria, and then relatively in terms of both ‘the quality of previous academic excellence and future potential...’.²⁶ There are five criteria that are assessed together to determine ‘academic promise’²⁷ for success in undergraduate Law at Oxford: the candidate’s LNAT performance; their achieved GCSE grades; their predicted or achieved A-level grades; their personal statement and references; and their interview performance.²⁸ All candidates are assessed holistically and contextually. In respect of the latter, admissions decision-makers are provided with candidates’ contextualised GCSE A* score²⁹ as well as seven ‘widening participation’ contextual markers.³⁰ A candidate receives an overall flag only if, in

²⁵ Warikoo and Fuhr, *ibid* 711 (citing Bourdieu and Passeron).

²⁶ Admissions Office, University of Oxford, ‘Assessment of your application’, online: <<http://www.ox.ac.uk/admissions/graduate/applying-to-oxford/after-you-apply/assessment-of-your-application>> accessed 28 December 2015.

²⁷ Faculty of Law, University of Oxford, ‘BA in Jurisprudence Admission FAQs’ <<https://www.law.ox.ac.uk/admissions/undergraduate/undergraduate-admissions-faqs-ba-jurisprudence>> accessed 9 November 2016.

²⁸ Discussed, *ibid*.

²⁹ Data is available only for applicants who took their GCSEs at schools in England, Wales, and Northern Ireland.

³⁰ There are three categories of flag: educational, residential, and care. In the 2015-16 admissions round, the OFFA1 flag was added alongside the OFFA flag. OFFA1 identifies schools in England that have sufficiently high attainment to make competitive applications but only limited progression to Oxford. OFFA identifies the latter, whether in terms of securing applicants or converting applications to offers. The other two educational flags are for pre-16 and post-16 below average performance of the candidate’s school. Oxford’s most recent analysis of its performance against those targets is discussed here: University of Oxford, *Agreement with the Office of Fair Access 2016-17* (University of Oxford), online: <https://www.offa.org.uk/agreements/OFFAF15_AA10007774%20Amended%20October%202015.pdf> accessed 10 January 2016.

addition to an educational marker, they also have either a care marker or a postcode marker.³¹

There is some evidence of accommodation in practice. Zimdars found that, at the admissions stage, private school-educated applicants were less likely to receive an offer due to

discounting for the private school context of their attainment.³² She argues that

the disadvantage in admission [for private school applicants] ... *adjusts* for [their] expected lower future attainment rather than *compensating* for some group disadvantage experienced by state school educated applicants in their prior education.³³

But data on degree classifications suggests such discounting may not go far enough. Zimdars notes that private school undergraduates from Oxford were less likely to graduate with a Class I degree than their 'state educated' colleagues.³⁴ Further, admissions data published by the Higher Education Statistics Agency implies the failure of current attempts to assess 'potential'. For students commencing undergraduate studies in 2013/14, 10.6% of those admitted by Oxford were from the four 'low' socio-economic classifications, as determined by parental occupation. That admissions rate is more than 50% below the 16.0% HESA benchmark.³⁵ 57.2% of those admitted by Oxford were from the state sector,³⁶ which is 24% below the HESA benchmark, second only to the University of Bristol in terms of underperformance.³⁷ But this headline statistic may suggest greater diversity than is in fact

³¹ Undergraduate Admissions Office, University of Oxford, 'Contextual data', online: <<http://www.ox.ac.uk/admissions/undergraduate/applying-to-oxford/decisions/contextual-data>> accessed 14 April 2015.

³² Anna Zimdars, *Challenges to Meritocracy? A study of the social mechanisms in student selection and attainment at the University of Oxford* (DPhil thesis, University of Oxford 2007) 356. See also Claire Crawford, *The link between secondary school characteristics and university participation and outcomes*, CAYT Research Report, DFE-RR353 (Department for Education 2014), whose analysis considers the broader university sector.

³³ Anna Mountford-Zimdars, 'Contest and Adjustment Sponsorship in the Selection of Elites: Re-visiting Turner's Mobility Modes for England through an Analysis of Undergraduate Admissions at the University of Oxford' (2015) 6: 2 *Sociologie* 157-176, 169 (emphasis in original).

³⁴ Zimdars (n 32) 356, 375-376.

³⁵ Higher Education Statistics Agency, *Widening participation of underrepresented groups (table T1a)*, online: <https://www.hesa.ac.uk/dox/performanceIndicators/1314_U9R5/t1a_1314.xlsx> accessed 28 December 2015. 10.6% comprised 235 students for the 2013/14 cohort, though the relatively small numbers involved should be noted.

³⁶ Higher Education Statistics Agency, *ibid.*

³⁷ *ibid.* See also the discussion in Social Mobility and Child Poverty Commission, *State of the Nation 2015* (n 1) 90-93.

present amongst admitted students. How many state sector-educated students were not from selective schools or catchment areas with high property values?

Responding to the evidence of insufficient accommodation for previous educational and other disadvantage, I argue that there are three ways in which this discretionary approach to assessing ‘potential’ entrenches social immobility. Firstly, there is unjustifiable over-reliance on metrics that relate to absolute attainment. Secondly, the importance of interview performance is unjustifiably exaggerated at the expense of the other criteria. Thirdly, there is a damaging reluctance on the part of institutions to be explicit about the justifiable need to accommodate applicants’ experienced disadvantage.

Research on diversity in higher education itself over-emphasises absolute attainment as an aspect of determining ‘potential’. Looking at admissions data for universities generally, Crawford and Greaves concluded that

the socio-economic gap in participation overall and at the most selective institutions is largely – but not entirely – explained by differences in background characteristics and prior attainment. Around 85% of the difference in participation overall and over 95% of the difference in participation at the most selective institutions is accounted for by the characteristics of young people at our disposal.³⁸

But treating the 95% difference in participation at Oxford as fully explained unjustifiably assumes the validity of an approach based on prior achievement alone. If ‘potential’ has any meaning, that assumption is open to question. Applicants’ contextualised GCSE A* scores are provided to admissions decision-makers to enable a relativised perspective on attainment, though Zimdars’ previously-discussed findings on overall degree classifications at Oxford imply that this contextualised data is insufficiently weighed in the balance. This is unsurprising given that its place within the discretionary assessment of ‘potential’ is only

³⁸ Claire Crawford and Ellen Greaves, *Socio-economic, ethnic and gender differences in HE participation*, BIS research paper no 186 (Department for Business, Innovation and Skills 2015) 9.

advisory and not quantified, and neither the predicted A-level results nor the LNAT scores are similarly contextualised.

Treating predicted A-level grades as a measure of ‘potential’ is particularly problematic because state school applicants are more likely than their private school counterparts to be predicted lower grades than they achieve,³⁹ and such predictions for state school applicants are less likely to be accurate.⁴⁰ Of the various absolute measures of ‘potential’, LNAT scores may be seen as the most justifiable, at least to the extent that the LNAT is ‘a test of aptitude rather than educational achievement’.⁴¹ But this is not to suggest that focus on LNAT scores alone would be a justifiable approach. LETR casts doubt on the LNAT Consortium’s claim that the LNAT does not test previous academic attainment.⁴² Further, whilst the Consortium’s published analysis shows little variation in performance based on school type, it does demonstrate more variation based on parental occupation.⁴³ Additional research is required before any conclusions regarding the statistical significance of such variations can be determined.

Of course, a contextualised admissions process is itself controversial, particularly in terms of alleged ‘private school prejudice’⁴⁴ and the concern that this may in fact penalise applicants from lower socio-economic groups, who are on scholarship at private school.⁴⁵

³⁹ See, for example, Boliver’s hypothesis on the impact of this disparity on application and acceptance rates. Essentially, she argues that this may in part explain why state school applicants appear to need to be better qualified than private school applicants to be as likely to apply and, when they have applied, to be as likely to receive an offer from a Russell Group university: Vikki Boliver, ‘How fair is access to more prestigious UK universities?’ (2013) 64: 2 *British Journal of Sociology* 344-364, 359.

⁴⁰ Nick Everett and Joanna Papageorgiou, *Investigating the Accuracy of Predicted A Level Grades as part of 2009 UCAS Admission Process*, Research Paper Number 37 (Department for Business, Innovation and Skills 2011) [1.2.4].

⁴¹ National Admissions Test for Law, ‘What Is LNAT?’, online: <<http://www.lnat.ac.uk/what-is-lnat/>> accessed 6 July 2016.

⁴² LETR, *Literature Review*: 4 (n 23) [41].

⁴³ Discussed in Legal Education and Training Review, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (SRA, BSB, and CILEX 2013), online: <<http://letr.org.uk/wp-content/uploads/LETR-Report.pdf>> accessed 24 February 2015 [5.68].

⁴⁴ See Anna Mountford Zimdars, *Meritocracy and the University: Selective Admissions in England and the United States* (Bloomsbury Academic 2016) chapter 8.

⁴⁵ Mountford Zimdars, *ibid.*

But this objection to contextualised data overlooks the fact that those pupils are more likely to nevertheless have strong contextualised indicators, whether GCSE A* score and / or a residential marker,⁴⁶ hence not be adversely affected by a relativised approach. We cannot remain neutral on the contextualisation debate, given that contextualising only one criterion means that the metricisation of absolute attainment flourishes as the measure of ‘meritocracy’.

Whilst interview performance is also just one criterion in admissions decision-making, individual tutors may weigh it more heavily in their holistic assessment of ‘potential’.⁴⁷ This allows tutors to compensate for applicants’ pre-existing disadvantage, yet available evidence suggests that there is no such beneficial impact in practice. Nicola found that there is a ‘relative homogeneity’ in Law interview scores across applicants from different school types.⁴⁸ Whilst she also reported finding that interview performance is not related to students’ socio-economic backgrounds,⁴⁹ she adopts her own definition here,⁵⁰ with the use of an overall ‘widening participation flag’ being the only potential means through which she draws on any poverty-related proxies.

The holistic, discretionary approach to admissions decision-making also risks over-emphasis on qualitative, impressionistic matters such as polish and presentation; as well as ‘cultural matching’⁵¹ and the persistence of the ‘long shadow of the members’ club’.⁵² Even

⁴⁶ (n 79) and corresponding main text.

⁴⁷ See, for example, Zimdars (n 32) 291 (discussing individual tutors varying in the weight they place on interview performance as an explanation for the discrepancy between candidates’ formal rankings and admissions decisions made in marginal cases) and 293 (discussing how the ‘strong-opinion mechanism appeared to give an increased weight to interview performance over other pieces of information’).

⁴⁸ Tara Nicola, *Measuring Success? The Predictive Validity of the Undergraduate Admissions Interview at the University of Oxford* (MSc thesis, University of Oxford 2015) 47. Whilst interviewees from private schools outperformed those from state schools, Nicola found that this was not statistically significant: 31.

⁴⁹ Nicola, *ibid* 31, 50.

⁵⁰ Nicola’s five socio-economic indicators are as follows: gender, age, overall widening participation flag, length of course, school type: *ibid* Table 5.4.

⁵¹ Lauren A Rivera, ‘Hiring as Cultural Matching: The Case of Elite Professional Service Firms’ (2012) 77: 6 *American Sociological Review* 999-1022.

⁵² Social Mobility and Child Poverty Commission, *State of the Nation 2015* (n 1) 84.

if tutors are able to be realistic about disadvantage, there is no opportunity to draw on the ‘potential’ for students’ success on the degree programme if they have been unable to reveal *sufficient* ‘potential’ in their prior examinations. In this way, the admissions process can be both fair and fail to meaningfully engage with the full implications of unequal educational opportunity.⁵³ Any suggestion of a remedial contextualised assessment of qualitative skills is undermined by the incommensurability that this would entail. Given that it is ‘astoundingly clear’ that there is no correlation between interview scores and examination outcomes at Oxford,⁵⁴ I suggest that the risk of negative unconscious bias outweighs the opportunity to compensate.

The failings of the interview process to sustain individualised, contextualised assessment of ‘potential’ suggest that, within the current regime, further recourse should be had to contextualised attainment data although, as I discuss below, the value of relying on such data is undermined by the difficulties with educational proxies. In any event, the opportunity to rely on such data is attenuated by Oxford’s lack of willingness to be explicit about the challenge of fair admissions in the context of socio-economic inequality. In 2016, Samina Khan, the current Director of Undergraduate Admissions and Outreach at Oxford, commented that applicants from disadvantaged homes or low-performing schools, who were predicted top grades, were ‘more likely to be looked at and shortlisted for an interview’.⁵⁵

This was then ‘qualified’ by a University spokesman, as follows:

The point about students from disadvantaged backgrounds getting extra consideration is related to our use of contextual flags to invite extra candidates to interview (not

⁵³ This concern is reinforced by the success of programmes such as King’s College London’s extended medical degree programme, which has lower admission standards and admits only students from particular socio-economically disadvantaged postcode areas: King’s College London, ‘Extended Medical Degree Programme: Overview’, online: <<http://www.kcl.ac.uk/prospectus/undergraduate/emdp>> accessed 5 July 2015.

⁵⁴ Nicola (n 48) 38.

⁵⁵ Irene Barker, ‘Deprived pupils “more likely” to get an Oxford interview’ (The Times Educational Supplement, 8 January 2016).

pushing out otherwise more qualified candidates) on the one hand, and making marginal decisions about candidates on the borderlines on the other.⁵⁶

These media statements highlight the discomfort attached to the recognition of accommodation for applicants' circumstances. The 'qualified' statement is itself problematic. Firstly, it does not reflect current practice, at least in Oxford Law undergraduate admissions, as the Faculty does not specifically set aside additional places for interview for such widening-participation candidates. Secondly, justifiable accommodation in marginal cases is difficult to effectively implement or measure in the Oxford context, as the necessity for judgment in admissions decision-making creates space for inconsistency. The lack of consistency arises between faculties and departments, across colleges and, even, between colleagues in the same subject at any one college.

Whilst my first criticism focused on the unjustifiable metricisation in terms of absolute attainment, my second identifies that the non-metricised element is at best neutral, and at worst further entrenches social mobility. Both problematic aspects flourish within Oxford's discretionary approach to implementing 'meritocracy' via assessment of 'potential'. Discretion gives space to silence on issues of socio-economic inequality. Yet, silence is not quiescent but performative of class, and the space the concepts of 'potential' and 'talent' give to issues that comprise the 'sticky floor'⁵⁷ of social immobility, strengthens the glass ceiling.

(b) Entrance into and Progression in the Legal Profession: 'Talent'

The same holds true in relation to the profession's focus on 'talent' as a benchmark at entry.⁵⁸ Law firms place significant weight on candidates' absolute, not contextualised, performance

⁵⁶ Javier Espinoza, 'Poor pupils "more likely" to get an Oxford interview, says head of admissions' (The Telegraph, 8 January 2016), online: <<http://www.telegraph.co.uk/education/educationnews/12089249/Children-need-to-be-coached-for-Oxbridge-from-age-11-says-head-of-admissions.html>> accessed 9 January 2016.

⁵⁷ Hunter (n 11) 93.

⁵⁸ Ashley *et al* (n 20) 6.

at A-level as an initial filter.⁵⁹ This undermines the extent of mobility attainable whilst at university.

Whilst studies suggest that students from lower socio-economic backgrounds can successfully adapt to university and achieve social mobility,⁶⁰ Ashley *et al*'s 2015 study of elite professions – law, accountancy, and financial services – in the UK concludes that

despite their efforts to improve social inclusion over the past ten to fifteen years, these elite firms continue to be heavily dominated at entry level by people from more privileged socioeconomic backgrounds. This can be attributed primarily to a tendency to recruit the majority of new entrants from a narrow group of elite universities, where students are more likely to have attended selective or fee-paying schools, and/or come from relatively affluent backgrounds.⁶¹

By contrast, Oxford reported that, for 2011-12 and 2012-13,

there was no evidence that those flagged with the overall widening participation flag ... differ significantly from those without the flag in terms of the probability of securing a professional or managerial level job.⁶²

Oxford's findings are less directly applicable to the legal profession than Ashley *et al*'s.

In necessarily relying on proxies for 'talent', Ashley *et al* explain that the qualitative attributes such as 'drive, resilience, strong communication skills and above all confidence and "polish" .. map[...] on to middle-class status and socialisation'.⁶³ Despite the fact that these non-academic skills are critical to career success, this overlooks the fact that assessing applicants on the extent to which they currently evidence such skills is unfair because of their socially-stratified acquisition, such as via informal work experience.⁶⁴

⁵⁹ As discussed by Andrew Francis, 'Legal Education, Social Mobility, and Employability: Possible Selves, Curriculum Intervention, and the Role of Legal Work Experience' (2015) 42: 2 *Journal of Law and Society* 173-201, 182-183.

⁶⁰ See, for example, Wolfgang Lehmann, 'Habitus Transformation and Hidden Injuries: Successful Working-class University Students' (2013) 87: 1 *Sociology of Education* 1-15. Within his larger discussion of success, however, Lehmann does note the wealth of evidence of the importance of class to professional careers, despite the expansion of education: 12. I further discuss this issue in section 4, below.

⁶¹ Ashley *et al* (n 20) 6.

⁶² University of Oxford, *Agreement* (n 30) [103].

⁶³ Ashley *et al* (n 20); see also discussion of previous research at note 2 and corresponding main text, 11.

⁶⁴ As discussed by Francis (n 59), especially 186-188.

(c) Conclusion

The Social Mobility and Child Poverty Commission describe ‘a truly meritocratic society’ as one in which the ‘best people’ are in the ‘best jobs’.⁶⁵ The foregoing analysis demonstrates the problematic reliance on ‘potential’ and ‘talent’ as the framing concepts to implement the search for ‘merit’ in admission to Oxford Law and being hired into solicitors’ firms and barristers’ chambers. Both of these concepts are as foundationally indeterminate as the meritocratic ideal to which they seek to give content. The idealised form of a truly meritocratic approach has been unjustifiably treated as capable of direct implementation through the neoliberal metricisation of the critical values of ‘potential’ and ‘talent’. The measurable aspects of attainment, ostensibly a way of looking beyond ‘cultural matching’,⁶⁶ have become Campbell’s law⁶⁷ for social mobility in higher legal education and entry into the legal profession.

Why do institutions remain wedded to the ‘myth’ of the ‘meritocratic narrative’⁶⁸ and refuse to abandon the entrenching indeterminacy of ‘potential’ and ‘talent’? At least part of the answer lies in uncertainty over how we define ‘diversity’ and what we believe that ‘diversity’ will achieve, hence how we should measure it. This is particularly fraught in the context of socio-economic diversity; as Laurison and Friedman explain, economists and sociologists hotly debate how we should measure social mobility, hence how to characterise the UK’s recent history.⁶⁹ In respect of the legal academy, Vaughan suggests that the ‘reasons why a diverse legal academy might be thought to be important should ... be self-

⁶⁵ Social Mobility and Child Poverty Commission, *Elitist Britain* (n 13) 16.

⁶⁶ See, for example, Rivera, ‘Hiring’ (n 51).

⁶⁷ Campbell reasoned:

The more any quantitative social indicator is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor.

See Donald T Campbell, ‘Assessing the Impact of Planned Social Change’ (Paper #8, Occasional Paper Series, December, 1976) reprinted: (2011) 7: 15 *Journal of MultiDisciplinary Evaluation* 3-43, 34.

⁶⁸ Sommerlad (n 18) 99 (citing Iris Marion Young).

⁶⁹ Laurison and Friedman (n 4) 2; see also Goldthorpe (n 9).

evident'.⁷⁰ Yet any such reasons are valuable only through their relation to the ideal of a 'meritocracy'. What is the 'holy grail'? The proxies we employ offer some insight into the legal academy and profession's current conceptualisation.

3 Inadequate Proxies for Socio-Economic Disadvantage

The imprecision of proxies for socio-economic inequality is a truism; any potential proxy would fail to capture its complex, multidimensional nature. This does not mean that we should not employ proxies. Such proxies are essentially the only means to contextually metricise class and avoid both the unjustifiable focus on absolute attainment and the indeterminacy of 'potential' and 'talent'. It also does not mean that we should abandon any systematic application of proxies. Such application does not of itself suggest that we have substituted the proxy or proxies for the underlying characteristic,⁷¹ here – 'merit'. If the correct proxy or proxies are selected, their systematic application makes realisation of a 'meritocracy' more likely than the outcome of indeterminate, non-systematic consideration. Thus, embracing the truism of the imprecision of proxies requires that we should employ proxies that most embody our core socio-economic 'diversity' concern.

(a) The Consequences of Reliance on Educational Proxies

Oxford Law's admissions decision-making emphasises educational proxies at the expense of poverty-related proxies. This is evident in the fact that the educational marker plays a

⁷⁰ Steven Vaughan, 'The state of the nation: diversity and the British legal academy' [2016] *The Law Teacher* 1-9 (advance online publication) 2.

⁷¹ Contra: Lisa Webley, 'What Empirical Studies Tells Us About The Legal Profession' (Professorial Inaugural Lecture, University of Westminster, 20 March 2013), online: <<https://www.youtube.com/watch?v=ixai0rliaRw>> accessed 1 Nov 2015.

linchpin role in an applicant's eligibility for an 'overall flag' for widening participation purposes;⁷² that the only relativised indicator relates to academic performance;⁷³ and that the published data on admissions focuses on educational background.⁷⁴ I argue that focus on the 'partial proxy'⁷⁵ of educational background is particularly problematic because it is unrepresentative in a way that has significant, unintended negative consequences. Of the available blunt measures for socio-economic inequality, educational proxies capture the core of disadvantage less successfully than available poverty-based measures. This can be demonstrated through the consequences of the current emphasis on educational proxies.

Firstly, data on degree outcomes derived from the use of educational proxies wrongly suggests no additional support is required in order for socio-economically disadvantaged students to thrive at university and in the legal profession. By contrast, poverty-related proxies highlight that, once admitted to Oxford, tutors cannot assume that students from poorer backgrounds will thrive. Targeted support, financial or otherwise, may well be necessary. Crawford found that, comparing students with similar levels of pre-university attainment, those from independent, selective state, and high-value-added state schools were significantly less likely to obtain a Class I or II.i degree than students from non-selective and low-value-added state schools.⁷⁶ As a result, she suggests that one might conclude that

[students] from non-selective or low-value-added state schools have higher "potential" than those from selective or high-value-added state schools or independent schools. This may, in turn, suggest that university entry requirements could be lowered for pupils from non-selective or low-value-added state schools in order to equalise the potential of all students being admitted to university.⁷⁷

⁷² (n 31) and corresponding main text.

⁷³ Namely, the contextualised GCSE A* score: (n 29) and corresponding main text.

⁷⁴ University of Oxford, 'Application Statistics 2015 entry: Applications by School Type', online: <https://public.tableau.com/views/UoO_UG_Admissions/SchoolType?%3Aembed=y&%3Adisplay_count=yes&%3AshowTabs=y&%3AshowVizHome=no> accessed 17 July 2016.

⁷⁵ See Social Mobility and Child Poverty Commission, *Elitist Britain* (n 13) 16.

⁷⁶ Crawford, *The link* (n 32) 54. HEFCE found similarly, 'for all but those with the very highest A-level grades', when engaging in the blunter comparison of degree outcomes for students who attended state and independent schools: HEFCE, *Differences in degree outcomes: The effect of subject and student characteristics*, September 2015/21 Issues paper (HMSO 2015) 5.

⁷⁷ Crawford, *ibid* 56.

But Crawford also found that students from ‘lower socio-economic’ backgrounds are more likely to drop out and less likely to graduate with a Class I or II.i degree.⁷⁸ In other words, the educational proxy suggests ‘potential’ for success on the degree programme when more direct consideration of individuals’ socio-economic circumstances does not.

Whilst current admissions decision-making at Oxford does include reference to two residential postcode markers alongside the linchpin educational marker,⁷⁹ that data itself may conceal relative success along socio-economic lines of students from the same deprived postcode area.⁸⁰ Once admitted to study Law, students from poorer socio-economic backgrounds receive no targeted academic or other skills-related support. Focusing on educational proxies thus further entrenches the ‘complex and seemingly intractable problem’ of the ‘yawning gap between the educational achievement of poor children and their more affluent peers’.⁸¹

Secondly, a critical aspect of the current anchoring of the outcomes gap is that reliance on educational proxies over-exaggerates progress in diversifying the student population and workforce along socio-economic lines, and underplays the extent of the problem to be addressed. The Judicial Appointments Commission’s ‘Diversity Support Initiative’ pilot,⁸² for example, determines whether an applicant comes from a ‘less advantaged social or educational background[.]’⁸³ based on ‘attend[ance at] a (non-fee

⁷⁸ Claire Crawford, *Socio-economic differences in university outcomes in the UK: drop-out, degree completion and degree class*, IFS Working Paper W14/31 (Institute for Fiscal Studies 2014) 24.

⁷⁹ The ACORN flag identifies the applicant’s postcode as one where residents are typically ‘financially stretched’ or living in ‘urban adversity’. The POLAR flag identifies the applicant’s postcode as one where young residents have the lowest rate of participation in Higher Education.

⁸⁰ On socio-economic variation within individual postcode areas: Joseph Rowntree Foundation summary of Andy Furlong and Alasdair Forsyth, *Losing Out? Socioeconomic disadvantage and experience in further and higher education* (Policy Press 2003), online: <<https://www.jrf.org.uk/report/socio-economic-disadvantage-and-experience-higher-education>> accessed 5 July 2015.

⁸¹ Emma Perry and Becky Francis, *The Social Class Gap for Educational Achievement: A review of the literature* (Royal Society of Arts 2010) 5.

⁸² Judicial Office, ‘Diversity Support Initiative: A New Route to the High Court – Pilot’, online: <<https://www.judiciary.gov.uk/about-the-judiciary/judges-career-paths/diversity-support-initiative/>> accessed 10 April 2015.

⁸³ Judicial Office, ‘Diversity Support’, *ibid.*

paying) state school or college’, or being ‘the first generation in their family to attend university’.⁸⁴ But this exclusive focus on education overlooks significant exceptions such as university applicants being on scholarship at fee-paying schools or attending non-fee-paying state schools whose admissions policies and catchment areas mean that their pupils often hail from significantly more privileged backgrounds than at more typical state schools.⁸⁵

Thirdly, the failure to recognise the inaccuracy of educational markers means the causes of lack of career progression are not redressed. HEFCE’s 2015 analysis of employment outcomes highlights that socio-economically disadvantaged students experience persistently lower professional employment rates than their more advantaged peers.⁸⁶ Rivera’s research further highlights that socio-economically disadvantaged students lose out competitively when compared to their most directly-related university student colleagues. Her analysis of workplace practices in the US led her to conclude that

rather than being a great leveller, a college or advanced degree – even one from a super-elite institution – does not guarantee entrance to the upper-middle or upper classes. Due to class-biased hiring practices, students’ socioeconomic backgrounds still matter in determining how far up the economic pyramid university graduates will rise.⁸⁷

⁸⁴ Judicial Office, ‘A New Route to the High Court: Support Programme – Application Form, online: <<http://www.judiciary.gov.uk/wp-content/uploads/2015/04/anewroutetothehighcourtsupportprogrammeform-1.doc>> accessed 10 April 2015.

⁸⁵ There is evidence that some non-fee-paying state schools are contributing to the stratification of pupils in state schools, either consciously or unconsciously. For example, in 2014 the Office of the Schools Adjudicator ruled against The Oratory School’s admissions policies on multiple grounds, though a number of these violations have since been quashed. See Office of the Schools Adjudicator, Determination of case ADA 2410, online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330614/ADA2410_The_London_Oratory_School.pdf> accessed 10 April 2015 and *R (on the Application of the Governing Body of the London Oratory School v The Schools Adjudicator* [2015] EWHC 1012 (Admin). Further, The Children’s Society’s recently reported on high uniform costs, which highlights the hidden exclusion of poorer children from some better-performing non-fee-paying state schools. See The Children’s Commission on Poverty, *The Wrong Blazer: Time for Action on Uniform Costs* (The Children’s Society 2015), online: <http://www.childrenssociety.org.uk/sites/default/files/The-Wrong-Blazer_-_Time-for-action-on-school-uniform-costs_-_The-Children%27s-Commission-on-Poverty_The-Children%27s-Society.pdf> accessed 10 April 2015.

⁸⁶ HEFCE, *Differences in employment outcomes: Equality and diversity characteristics* (HMSO 2015) [12]; see also the explanation of POLAR3 at [87].

⁸⁷ Lauren Rivera, *Pedigree: How Elite Kids Get Elite Jobs* (Princeton UP 2015) 274; see also related discussion: 274-276.

Britton *et al* found that the average student from the top 20% of households was earning approximately 25% more 10 years after graduation than the average student from the remaining 80% of households; the gap was 10% after accounting for institution and subject studied.⁸⁸ The indeterminacy of the critical value of ‘potential’ and ‘talent’ has necessitated reliance on proxies. Through excessive, sometimes exclusive reliance on educational proxies, socio-economic inequalities are given space to underpin hiring and progression decisions.

(b) The Value of Poverty-Based Proxies

In contrast to the linchpin role for educational proxies in ‘widening participation’ signalling in university admissions, there are a number of contexts in which poverty- and education-related measures are weighed equally to represent socio-economic disadvantage. One key poverty-related measure is eligibility for free school meals,⁸⁹ which is commonly combined with educational proxies to create a better overall picture of an individual’s circumstances in socio-economic terms. The Legal Services Board, for example, recommends eligibility for free school meals as one of three proxies for socio-economic background, together with school type and whether the individual is first-generation university.⁹⁰ This has been adopted by the Solicitors Regulation Authority.⁹¹

The Legal Services Board and the Solicitors Regulation Authority are engaged in tracking diversity, hence able to weigh the trio of considerations equally. Using proxies in

⁸⁸ Jack Britton, Lorraine Dearden, Neil Shephard, and Anna Vignoles, ‘How English domiciled graduate earnings vary with gender, institution attended, subject and socio-economic background’ (IFS Working Paper W16/06) (Institute for Fiscal Studies 2016).

⁸⁹ Eligibility criteria are published by HM Government: ‘Apply for free school meals’, online: <<https://www.gov.uk/apply-free-school-meals>> accessed: 6 July 2016.

⁹⁰ Legal Services Board, *Increasing diversity and social mobility in the legal workforce: transparency and evidence* (Legal Services Board 2011) [92] and subsequent textbox ‘LSB response’, which outlines the rationale for its preference for three combined measures. Ashley *et al* similarly adopt it as one of the same three proxies for social class, and employ it in their analysis of non-educational barriers to success in elite professions: (n 16) 8.

⁹¹ Solicitors Regulation Authority, *Diversity Profile of the Solicitors’ Profession 2015* (Law Society 2016) 22.

decision-making, however, inevitably requires prioritising one type of concern over others. Faced with that dilemma, I suggest that a poverty-related proxy, such as that of entitlement to free school meals, should operate alongside educational proxies but be given the critical linchpin role. If we need to rely on just one crude measure of disadvantage, it is more justifiable to focus on a poverty-related proxy than an educational proxy.

There are some examples from current practice of reliance on a poverty-related proxy alone. In its *Social Mobility Index*, the Sutton Trust draws on eligibility for free school meals alone in evaluating disadvantaged pupils' progress to university.⁹² This is important because focus on that measure can enable us to more accurately target disadvantaged individuals who need more support in order to thrive. As the House of Commons Education Committee noted in 2014, 'the [free school meal] "gap" exists in outstanding schools as well as inadequate schools'.⁹³ In his 2016 analysis of GCSE performance, Strand concludes that 'even if we improved all "inadequate" schools to the level of those judged "outstanding", we would still have an FSM gap, and of much the same size as we do today'.⁹⁴

This is not to suggest that a free school meal proxy is perfect. Boliver *et al* argue that it is

not ... the right measure to use, in the sense of what we would devise if we could. It is merely among the best of those actually available. It would still require considerable work ... to ensure that its use would create more justice than the injustices it would inevitably introduce.⁹⁵

In the context of working class children, the House of Commons Education Committee notes the criticisms of the free school meals proxy compared to a broader model of 'true' socio-

⁹² Sutton Trust, *The Social Mobility Index: Further Information* (Sutton Trust 2015) 6.

⁹³ House of Commons Education Committee, *Underachievement in Education by White Working Class Children*, First Report of Session 2014-15, HC 142 (HMSO 2014) [46].

⁹⁴ Steve Strand, 'Moderators of the FSM achievement gap: being more able or poor in an affluent school', paper presented at the British Educational Research Association conference, University of Oxford, 24 September 2014.

⁹⁵ Vikki Boliver, Stephen Gorard, and Nadia Siddiqui, 'Will the Use of Contextual Indicators Make UK Higher Education Admissions Fairer?' (2015) 5 *Education Sciences* 306-322, 311.

economic status: entitlement is lost if parents are eligible for working tax credits and not all those eligible register for it.⁹⁶ Yet, the Committee adopts it for pragmatic reasons because the relevant ‘data is readily available, has the advantage of being easy to conceptualise, and has been consistently collected for many years’.⁹⁷ Further, and as the criticisms reflect, the free school meal proxy generally results in false *negatives* only⁹⁸ whereas, as the exceptions discussed above highlight, educational proxies are more likely to generate *both* false positives and false negatives in identifying disadvantaged individuals. It is the latter that risks creating a misleading impression of the effectiveness of intervention and improvements in social mobility.

By contrast, Ashley *et al* suggest that applicants’ parents’ occupations is a more accurate measure of disadvantage as a proxy for social class, and recommend that it be adopted by elite firms.⁹⁹ To the extent that parental occupation may often directly target class and likely also indirectly target family income, it may be uniquely well-placed to combine the social and the economic aspects of disadvantage. But focus on parental occupation would be harder to implement since the data is less-readily available and, in some contexts, it would rely on self-report, and UCAS already collects this data on a voluntary basis. One can also imagine some exceptions. An ‘inventor’, for example, would be coded by UCAS as a professional occupation¹⁰⁰ yet their success and resultant wealth could vary dramatically.

⁹⁶ House of Commons Education Committee (n 74)[12]-[15]. See also Graham Hobbs and Anna Vignoles, *Is Free School Meals a Valid Proxy for Socio-Economic Status (in Schools Research)?* CEE DP 84 (Centre for the Economics of Education 2007); Graham Hobbs and Anna Vignoles, ‘Is children’s free school meal ‘eligibility’ a good proxy for family income?’ (2010) 36 *British Educational Research Journal* 673-690.

⁹⁷ House of Commons Education Committee, *ibid* [14].

⁹⁸ See Stephen Gorard, ‘Who is eligible for free school meals? Characterising free school meals as a measure of disadvantage in England’ (2012) 38 *British Educational Research Journal* 1003-1017 (discussing two missing groups of pupils).

⁹⁹ Ashley *et al* (n 20) 67.

¹⁰⁰ UCAS employs the Office of National Statistics’ Coding Tool to categorise occupations. See Office of National Statistics, ‘ONS Occupation Coding Tool’, online <http://www.neighbourhood.statistics.gov.uk/HTMLDocs/dev3/ONS_SOC_occupation_coding_tool.html> accessed: 9 November 2016.

Educational proxies, especially that of school type, include identifying disadvantaged students, who are most likely to *succeed* at undergraduate Law as long as they are not *multiply* disadvantaged by their economic background. Poverty-related proxies, by contrast, identify the majority of individuals most *in need* of additional support at university. Given that university admissions and hiring decisions will continue to be made before social scientists have refined the most representative proxy, the most justifiable approach, even if only interim, is to move from prioritising education to prioritising poverty measures.¹⁰¹

4 Micro-Adjustments Beyond Contextualised Attainment

The potential beneficial impact of additional support for socio-economically disadvantaged undergraduate Law students is a critical issue for further research because, if Goldthorpe's alternative view is correct, the extent to which educational policy can affect social mobility is 'far more limited' than usually assumed.¹⁰² If there is little that education can achieve in terms of true mobility, this strengthens the need to both abandon educational proxies for 'potential' and 'talent' as well as recognise that the indeterminacy of these two concepts fundamentally undermines their ability to implement the meritocratic aim.

In this section, I argue that Oxford Law, and elite university Law Schools generally, should respond to these critical difficulties in two ways: firstly, universal implementation of the *diversity of excellence*; secondly, the provision of additional, targeted non-academic support for socio-economically disadvantaged students, with a focus on integration into the 'community of practice' and the acquisition of cultural and social capital. I contend that both

¹⁰¹ Gorard (n 98) reaches a similar conclusion, though qualifies this by requiring the inclusion of data for the two missing groups he identifies.

¹⁰² Goldthorpe (n 9) 'Conclusions'.

reforms should be implemented via experimentation through ‘micro-adjustments’,¹⁰³ also known as ‘nudges’.¹⁰⁴

(a) The Methodology of Micro-Adjustments

The methodology of micro-adjustments represents bold, theoretically sound, and practical reform. In his leading account of successful change management, Kotter explains that small changes can act as critical catalysts and have dramatic impact.¹⁰⁵ Effective radical, cultural change may need to be implemented gradually.¹⁰⁶ I argue that this is especially the case here as an adequate response to class requires a fundamental revaluation of diversity and reconfiguration of how to evaluate excellence in light of socio-economic inequality. Gradual implementation via ‘radical incrementalism’ enables systematic testing so that ‘dramatic improvements ... are more likely to be achieved’.¹⁰⁷ Small reforms may be multi-layered and –faceted in their tackling of complex problems. Whilst reform through micro-adjustments is ‘relatively new’¹⁰⁸ in the university sector, ‘early results are promising’¹⁰⁹ and I draw on a number of such studies below.

(b) Universal Micro-Adjustments

¹⁰³ Anna Mountford-Zimdars, Duna Sabri, Joanne Moore, John Sanders, Steven Jones, and Louise Higham, *Causes of differences in student outcomes* (HEFCE 2015) iv.

¹⁰⁴ See, for example, Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin 2009). For the purpose of my analysis, I do not distinguish between the terms ‘micro-adjustment’ and ‘nudge’.

¹⁰⁵ See John P Kotter, ‘Leading Change. Why transformation efforts fail’ (Harvard Business Review, January 2007) 92-107.

¹⁰⁶ Michael J Gallivan, J Debra Hofman, Wanda J Orlikowski, ‘Implementing Radical Change: Gradual versus Rapid Pace’ (Center for Information Systems Research Working Paper No 271, 1994) 2, 18.

¹⁰⁷ David Halpern, *Inside the Nudge Unit: How Small Changes Can Make a Big Difference* (Penguin 2015) 291.

¹⁰⁸ Jill Frankfort, Ross E O’Hara, and Kenneth Salim, ‘Behavioral Nudges for College Success: Research, Impact, and Possibilities’ in Benjamin L Castleman, Saul Schwartz, and Sandy Baum, eds, *Decision Making for Student Success: Behavioral Insights to Improve College Access and Persistence* (Routledge 2015) 143-161, 155.

¹⁰⁹ Frankfort *et al*, *ibid*.

The first of my two proposed types of ‘strategically-connected micro-adjustments to drive cultural change’¹¹⁰ centres on fostering a universal diversity of excellence in how Oxford Law frames its admissions, curriculum, and assessment.

At the admissions stage, I argue that the ideal nudge would focus on attribute framing and entail rejection of the current construction of ‘contextualised admissions’¹¹¹ to the extent that it presents *absolute* attainment alongside contextual data and information. Instead, we should embrace the value of poverty-related proxies by *fully* contextualising admissions in the sense of making available to decision-makers *only* contextually-adjusted academic metrics and no indicators of absolute attainment for each candidate. The effect of reframing the attributes¹¹² on which to base evaluation and decision can be significant. In the consumer context, for example, Levin and Gaeth found that consumers provided more favourable taste evaluations to ground beef where it was labelled positively (‘75% lean’) rather than negatively (‘25% fat’).¹¹³ Might the combination of absolute and contextual data on university applications more negatively frame the applicant’s credentials than presenting their attainment only in fully contextualised form?

Whilst further research is required, this potential solution may be more theoretical than workable in any event: firstly, it would entail removing all reference to the applicant’s schooling from their UCAS application form and reference; secondly, it would create a critical dilemma for the LNAT Consortium that, as discussed,¹¹⁴ maintains that performance on the LNAT cannot be improved through preparation, such that contextualisation is neither necessary nor possible.

¹¹⁰ Mountford-Zimdars *et al* (n 103) iv.

¹¹¹ Supporting Professionals in Admissions, ‘What is contextualised admissions?’, online: <<https://www.spa.ac.uk/resources/what-contextualised-admissions>> accessed 5 June 2016.

¹¹² For an excellent introduction to attribute framing, see Irwin P Levin, Sandra L Schneider, and Gary J Gaeth, ‘All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects’ (1998) 76: 2 *Organizational Behavior and Human Decision Processes* 149-188.

¹¹³ Irwin P Levin and Gary J Geath, ‘How Consumers Are Affected by the Framing of Attribute Information Before and After Consuming the Product’ (1988) 15 *Journal of Consumer Research* 374-378.

¹¹⁴ (n 41)-(n 43) and corresponding main text.

An alternative micro-adjustment, which could be implemented within the current regime, would centre on consciousness-raising amongst those working in gatekeeper roles for entry to university and the legal profession. In the consumer context, Stango and Zinman found that awareness-raising of overdraft fees via survey-taking had a significant impact on individuals' actions in the following month, hence whether they incurred fees.¹¹⁵ In relation to admissions, I suggest there should be increased salience of two matters: firstly, the differential predictive value of educational and poverty-based proxies in relation to final degree outcome; secondly, the failure of the current model of contextualised attainment markers to capture the core of socio-economic inequality. I argue that we should use randomised controlled trials to examine the benefits of consciousness-raising amongst admissions gatekeepers. Any trials should also take into account that findings in other contexts imply that inclusion in any one-off admissions training may be insufficient¹¹⁶ and repeat informational interventions just before each admissions round may be required.

Through universal micro-adjustments in attribute framing at the admissions stage, a more diverse student population could then be exposed to the diversity of excellence in curriculum and assessment. In terms of the former, I argue that undergraduate legal education should be framed in socio-legal terms, which represents a fundamentally academic, liberal account of law to 'challenge[.] the status quo' and 'not simply equip students with the skills to leech off it'.¹¹⁷ Socio-legal course content can disrupt¹¹⁸ and enrich the social capital

¹¹⁵ Victor Stango and Jonathan Zinman, 'Limited and Varying Consumer Attention Evidence from Shocks to the Salience of Bank Overdraft Fees' [2014] *The Review of Financial Studies* 1-41.

¹¹⁶ Manoli and Turner found little to no long-term effects, but significant short-term effects in taxpayers' responses to informational interventions concerning their eligibility for Earned Income Tax Credit. See Dayanand S Manoli and Nicholas Turner, 'Nudges and Learning: Evidence from Informational Interventions for Low-Income Taxpayers' [2014] *National Bureau of Economic Research Working Paper No. 207818*, online: <<http://www.nber.org/papers/w20718>> accessed: 12 June 2016.

¹¹⁷ Andrew Sanders, 'Poor Thinking, Poor Outcome? The Future of the Law Degree after the Legal Education and Training Review and the Case for Socio-Legalism' in Hilary Sommerlad, Richard Young, Steven Vaughan and Sonia Harris-Short, eds, *The Futures of Legal Education and the Legal Profession* (Hart Publishing 2015) 139-168, 154.

¹¹⁸ (n 16) and corresponding main text.

of all students, thereby securing social advancement through the diversity of excellence. This is not to deny the value of doctrinal analysis, which ‘is what most often marks out what are perceived by one’s legal colleagues as “good lawyers” from “bad lawyers”’,¹¹⁹ but to emphasise the need to make explicit the vital role that law and legal research and teaching plays in broader society. My proposal is made more critical by the current ‘marketisation’ and ‘vocationalisation’¹²⁰ of the degree, which was further reinforced by the LETR.¹²¹ Were a more holistically socio-legal perspective adopted in the curriculum, this may reduce ‘subject gaps’¹²² in student performance, thus benefitting students who pursue commercial careers as well as those who do not.

For micro-adjustments at the admissions stage to underpin social mobility, careful consideration needs to be given to assessments. Achieving the diversity of excellence suggests that Oxford Law should move away from its ‘signature assessment’¹²³ of closed-book end-of-degree examinations to determine degree classification, and instead value other forms of assessment such as longer essays and dissertations, and oral presentations. Yet, specific consideration of social mobility concerns suggests the need for caution. Firstly, Zimdars’ work on Oxford degree outcomes indicates that students from state schools perform better when evaluated against its more homogenous, narrow definition of ‘merit’.¹²⁴ Secondly, doubts are raised by Crawford’s work on degree outcomes from elite universities more generally, where assessment methods are more diverse than at Oxford, particularly that

¹¹⁹ Christopher McCrudden, ‘Legal research and the social sciences’ (2006) 122 *Law Quarterly Review* 632-650, 633.

¹²⁰ As supported by some legal academics, e.g. Huxley-Binns (cited by Sanders (n 117)).

¹²¹ LETR, *Setting Standards* (n 43).

¹²² This describes the variation in student performance by subject area and can be valuably examined alongside the debate over any ‘gender gap’ in performance in particular subjects. See, for example, Jane Mellanby, Maryanne Martin, and John O’Doherty, ‘The “gender gap” in final examination results at Oxford University’ (2000) 91 *British Journal of Psychology* 377-390, and corresponding main text to (n 140).

¹²³ Paul Maharg, ‘Of Tails and Dogs: Standards, Standardisation and Innovation in Assessment’ (ALT Conference: Fifty years of assessment, London, January 2015), citing William M Sullivan, Anne Colby, Judith Welch Wenger, Lloyd Bond, and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007) 24 (adapting the growing reference to ‘signature pedagogies’).

¹²⁴ Zimdars (n 34) and corresponding main text.

students from non-selective and low value-added state schools do better, whereas students from lower socio-economic groups underperform those from higher socio-economic groups.¹²⁵

The first ground for concern can be straightforwardly addressed. The unrepresentative nature of educational proxies for socio-economic disadvantage means that we should not base decision-making about furthering social mobility on data drawn from these proxies alone. This is particularly true given Crawford's similar finding in respect of elite universities more generally, which suggests that there would be no unintended negative consequences for students from weaker educational backgrounds if assessment methods were to become more diverse.

A satisfactory response to evidence of the underperformance of disadvantaged students at elite universities more generally requires sensitivity to the context and disaggregating students' performance in situations of *imposed* diverse assessment methods from their performance where they *chose* to which one of various assessment methods they would be subject for any particular course. The latter is arguably a truer representation of the diversity of excellence, and elite universities generally should use disaggregated data on outcomes to inform their assessment frameworks. In any event, existing evidence of reduced performance by disadvantaged students at least in part reflects institutional failure to specifically target and support these students in terms of acquisition of academic and non-academic skills. It is to proposals for particular targeted responses that I now turn.

(c) Targeted Micro-Adjustments

¹²⁵ Crawford, *The link* (n 32), and discussion at corresponding main text to (n 760)-(n 77); Crawford, *Socio-economic differences* (n 78) and corresponding main text.

Crawford's findings in respect of the weaker degree results of students from poorer socio-economic backgrounds held true, albeit to a reduced extent, when their human capital was the same as that of those from wealthier backgrounds.¹²⁶ I suggest two types of targeted micro-adjustments as a response: firstly, tutors need to directly work with socio-economically disadvantaged students to bring them within the 'community of practice',¹²⁷ so that they are as expert in the learning methods and assessment criteria as their more privileged colleagues; secondly, tutors need to focus on enhancing disadvantaged students' social and cultural capital. These proposals would entail a cultural change in how tutors conceive their interactions with socio-economically disadvantaged students and a recognition that it takes more than fair admissions to achieve a 'meritocracy'.

In terms of the first type of micro-adjustment, I focus on approaches to learning and assessment practices and suggest three key nudges. Firstly, I contend that tutors should teach socio-economically disadvantaged students particular 'managerial' habits to adopt as 'self-regulated learners'.¹²⁸ The Education Endowment Foundation funds randomised controlled trials of interventions in education, and evaluates their cost and effectiveness in terms of academic advance.¹²⁹ In its work on teaching meta-cognition and self-regulation, the EEF has found a range of interventions to be low cost and 'have consistently high levels of

¹²⁶ Crawford, *Socio-economic differences* (n 78) 24.

¹²⁷ Berry O'Donovan, Margaret Price, and Chris Rust, 'Developing student understanding of assessment standards: a nested hierarchy of approaches' (2008) 13 *Teaching in Higher Education* 205-217, 208 (drawing on earlier work by Lave and Wenger).

¹²⁸ Barry J Zimmerman, 'Becoming a Self-Regulated Learner: An Overview' (2002) 41 *Theory into Practice* 64-70.

¹²⁹ For an introduction to the work of the Education Endowment Foundation, see Halpern (n 107) 283-287.

impact’,¹³⁰ as well as being ‘particularly beneficial for pupils from low income families’.¹³¹ Togerson *et al*’s findings on the beneficial impact of teaching self-regulated strategies for learning¹³² are particularly pertinent, though the EEF notes that ‘[t]here is no simple method or trick’ for determining the right level of support to enable students to become self-regulated learners.¹³³

Whilst the EEF does not directly target higher education, I argue that its findings suggest similar strategies may well be successful in this context. Beyond the EEF’s work, the value of such nudges is further reinforced by Reay *et al*’s finding that academically successful working-class students tend to be strongly self-regulating, and from an early age.¹³⁴ This nudge could be straightforwardly implemented by individual tutors, and need not be time-intensive given that teaching these skills in collaborative groups has been found to increase effectiveness.¹³⁵

Secondly, to reinforce self-regulating strategies, implementation intentions should be nudged. University-level studies and interventions, such as Persistence Plus¹³⁶ in the United States, have found that individuals are significantly more likely to reach a goal or complete a task if they commit to a specific time and place to work on it.¹³⁷ Individual tutors might ask their students to tell them where and when they will write their next essay, what they will be

¹³⁰ Education Endowment Foundation, ‘Meta-cognition and Self-regulation’, online <<https://educationendowmentfoundation.org.uk/resources/teaching-learning-toolkit/meta-cognition-and-self-regulation/>> accessed: 4 November 2016. For individual trials, see, for example, David Togerson, Carole Togerson, Hannah Ainsworth, Hannah Buckley, Clare Heaps, Catherine Hewitt, and Natasha Mitchell, *Improving Writing Quality: Evaluation report and Executive summary* (Education Endowment Foundation 2014); Cinzia Rienzo, Heather Rolfe, and David Wilkinson, *Changing Mindsets: Evaluation report and Executive summary* (Education Endowment Foundation 2015); Stephen Gorard, Nadia Siddiqui, and Beng Huat See, *Philosophy for Children: Evaluation report and Executive summary* (Education Endowment Foundation 2015); Pam Hanley, Robert Slavin, and Louise Elliott, *Thinking, Doing, Talking Science: Evaluation report and Executive summary*, updated (Education Endowment Foundation 2016).

¹³¹ Education Endowment Foundation, *ibid*.

¹³² Togerson *et al* (n 130).

¹³³ Education Endowment Foundation (n 130).

¹³⁴ Reay *et al* (n 19) 1108.

¹³⁵ Education Endowment Foundation (n 130).

¹³⁶ Discussed by Frankfort *et al* (n 108) 152-155.

¹³⁷ Frankfort *et al*, *ibid* 148.

doing immediately before they go to work on the essay, and so forth. More frequent prompts could be implemented by text messaging, though this would require institutional support. Further, in terms of the content of students' goals, Kurose's analysis of workplace studies suggests that 'setting *specific, high goals* tends to produce better performance outcomes than does setting vague and unchallenging goals'.¹³⁸ Tutors should actively work with their students to formulate particular targets at the top end of their possible performance range, as indicated by their results to date. Their college supervisory roles in respect of a small student body means that many Oxford tutors are particularly well-placed to engage in this type of micro-adjustment.

Thirdly, tutors should provide feedback that makes explicit assumed understandings of the 'hidden curriculum',¹³⁹ particularly strategies for success in assessment. These informational interventions are essential given that gender differences in degree classifications at Oxford have been shown to be more likely due to the nature of the assessment system than any individual differences between students.¹⁴⁰

In terms of the second type of micro-adjustment, aimed at developing disadvantaged students' social and cultural capital, I suggest two critical examples centred on social norms and social belonging interventions. Whilst it is important that socio-economically disadvantaged students carry forward the 'power of the past'¹⁴¹ to their future careers and thereby enhance the wider diversity of excellence in the legal profession, this needs to be balanced against increasing their social and cultural capital so as to improve both academic performance as well as longer-term hiring and promotion opportunities within the legal

¹³⁸ Charles Kurose, 'Motivation, Behavior, and Performance in the Workplace: Insights for Student Success in Higher Education' in Benjamin L Castleman, Saul Schwartz, and Sandy Baum, eds, *Decision Making for Student Success: Behavioral Insights to Improve College Access and Persistence* (Routledge 2015) 20-37, 21.

¹³⁹ Camille B Kandiko-Howson, 'Feedback to and from students' in Heather Fry, Steve Ketteridge, Stephanie Marshall (eds), *A Handbook for Teaching and Learning in Higher Education: Enhancing Academic Practice* (4th edn, Routledge 2015) 123-138, 124.

¹⁴⁰ Mellanby *et al* (n 122).

¹⁴¹ Jessi Streib, *The Power of the Past: Understanding Cross-Class Marriages* (OUP USA 2015) (used to explain the ongoing impact of one's socio-economic background).

profession. In Ashley *et al*'s evaluation of the non-educational barriers to the elite professions, one of the interviewees from an elite law firm commented that:

The academics are all very good these days, obviously, but . . . I'm very interested in people who've gone travelling, who've shown initiative, who've solved difficult situations in the past. You know, it's amazing some of the things people have done these days . . . So you are very much looking for people who've made the most of other opportunities.¹⁴²

Available resources are a necessary precondition to such opportunities. In concluding his analysis of social mobility, Goldthorpe reasons that

... attempts at increasing *equality of opportunity*, in the sense of a greater equality of mobility changes, would seem unlikely to be effective, whether made through educational policy or otherwise, unless the class-linked *inequalities of condition* on which class mobility regimes are founded are themselves significantly reduced.¹⁴³

This underlines the need for financial support for socio-economically disadvantaged students and entrants to the profession, such as pupils and new tenants at the Bar. But, in order to be able to make the most of available opportunities, disadvantaged students must also fully participate in the non-academic aspects of elite university life, and should be nudged to do so.

Outside of the education context, Thaler and Sunstein argue that '[i]f choice architects want to shift behaviour and to do so with a nudge, they might simply inform people about what other people are doing'.¹⁴⁴ I suggest that tutors should use social normative messaging to encourage their students from poorer socio-economic backgrounds to embrace the non-academic aspects of the elite university experience, such as attending black tie dinners, joining sports teams and societies, and travelling in the vacations. The Behavioural Insights Team found that individuals, who were late paying their taxes, were significantly more likely to complete their returns and pay what they owed if they had been told that 'the great

¹⁴² Ashley *et al* (n 20) 39.

¹⁴³ Goldthorpe (n 9) 'Implications for policy' (emphasis in original).

¹⁴⁴ See Thaler and Sunstein (n 104) 71.

majority' of other people complied, and that they were 'in the very small minority' who had not.¹⁴⁵

In this context, this requires tutors to suggest activities to their students together with a reminder of the range of extra-curricular activities in which their peers hired into elite professions have participated. It also entails tutors encouraging students not be discouraged from applying to solicitors' firms and barristers' chambers that explicitly seek to 'convey an impression of elitism and prestige'¹⁴⁶ by reminding them of other recently-graduated students who have been hired into and are thriving in those workplaces.

But social norms compliance may not go far enough. In her recent study of cross-class marriages, Streib found that individuals have more in common with a stranger of a similar social class than with their spouse of a different class.¹⁴⁷ Streib concludes her analysis of cross-class marriage by noting that 'scholars should not assume that the effects of social class on sensibilities are erased by shared educational and occupational experiences'.¹⁴⁸ Rather than individuals' sensibilities coming together over the course of their marriage, she found that individuals maintained their distinctive class-based disparate sensibilities.¹⁴⁹ This suggests that students of different class backgrounds may be more likely to simply co-exist together, rather than truly integrate, so that disadvantaged students cannot escape the 'sticky floor'¹⁵⁰ of social immobility and subsequent 'class-origin pay gap'.¹⁵¹

¹⁴⁵ Richard H Thaler, *Misbehaving: The Making of Behavioural Economics* (Penguin 2016) 336; see generally: 334-337; Halpern (n 107) 112-114.

¹⁴⁶ Ashley *et al* (n 20) 34.

¹⁴⁷ Streib (n 141). It is worth noting the American context of this research. 'Class' may need to be localised in its discussion, particularly given the BBC Lab UK's 2013 research that suggested the need to reclassify the British class structure into seven tiers: BBC, 'The Great British Class Survey – Results'

<<http://www.bbc.co.uk/science/0/21970879>> accessed 20 April 2015. For a detailed analysis, see Mike Savage, Fiona Devine, Niall Cunningham, Mark Taylor, Yaojun Li, Johs. Hjellbrekke, Brigitte Le Roux, Sam Friedman, and Andrew Miles, 'A New Model of Social Class? Findings from the BBC's Great British Class Experiment' (2013) 47: 2 *Sociology* 219-250.

¹⁴⁸ Streib (n 141) 194.

¹⁴⁹ Streib, *ibid* 191.

¹⁵⁰ Hunter (n 11).

¹⁵¹ Laurison and Friedman (n 4) 4.

Understanding why acquisition of social and cultural capital requires more than co-existence suggests the necessary response. On Bourdieu's account, 'habitus' comprises individuals' tendencies, which have been created through the interplay of agency and culture,¹⁵² the latter of which is informed by the class surroundings of their upbringing.¹⁵³ Individuals' actions – applicants, students, graduates, and tutors – are constrained unconsciously.¹⁵⁴ Even when students from lower socio-economic backgrounds make conscious decisions, their decisions are influenced by and grounded in their unconscious dispositions¹⁵⁵ formed through the social structures that sustain their class position.¹⁵⁶

Individuals' present and possible position in the distribution of power represents their 'capital'. Cultural capital flows from habitus¹⁵⁷ but can also contribute to its development.¹⁵⁸ In this context, cultural capital entails both the adaptive cognitive and socio-behavioural competencies to enhance academic and career outcomes.¹⁵⁹ The 'disruptive' aspect of socio-economic diversity highlights the transformative possibilities of integrating Bourdieu's analysis of power and capital with the dynamic interaction between the 'presage' and 'process' stages of Biggs' model¹⁶⁰ of student learning. Developing Biggs' account, the reciprocity between the 'presage' and 'process' stages of learning enables any negative impact of students' socio-economic background to be tempered over time.

¹⁵² Pierre Bourdieu, *Sociology in Question* (SAGE, 1993) 86-87. For discussion, see Jason D Edgerton and Lance W Roberts, 'Cultural capital or habitus? Bourdieu and beyond in the explanation of enduring educational inequality' (2014) 12: 2 *Theory and Research in Education* 193-220, 201; Reay *et al* (n 99) 1104-1105.

¹⁵³ Streib (n 141) 247.

¹⁵⁴ Though there is a debate over how much weight should be placed on this unconscious aspect: Edgerton and Roberts (n 152) 200.

¹⁵⁵ Edgerton and Roberts, *ibid* 201. Similarly, Francis frames discusses the limits of law students' employability and career choices in terms of how they see their possible selves: Francis (n 59) 197.

¹⁵⁶ On the importance of structural issues, see Perry and Francis (n 81) 9-11.

¹⁵⁷ Reay *et al* (n 19) 1104.

¹⁵⁸ Taking this point further, Edgerton and Roberts argue that embodied cultural capital and habitus are 'the same thing': (n 152) 207. For the purpose of this discussion, it is unnecessary to take a view on this issue.

¹⁵⁹ Annette Lareau and Elliot B Weininger, 'Cultural capital in educational research: A critical assessment' (2003) 32: 5/6 *Theory and Society* 567-606.

¹⁶⁰ John B Biggs, 'Aligning the Curriculum to Promote Good Learning', *Constructive Alignment in Action: Imaginative Curriculum Symposium* (4 November 2002).

Lehmann's longitudinal study of working class students who were successful at an elite university highlights 'the importance of immersion in the social life of the university as a precondition for their transformation of habitus'.¹⁶¹ As his study focused on students who had been both academically successful and fully immersed in student life, however, it is not clear whether social immersion is causative or merely correlative with the types of students who are academically successful. For micro-adjustments to transform socio-economically disadvantaged students' habitus and enhance their social and cultural capital, I argue that tutors need to take into account that habitus is resistant to change. This explains why incentives are 'poorly equipped to address this obstacle [of the impact of lack of "cultural match" on academic performance]'¹⁶² and suggests a critical role for social belonging interventions. In the US context, studies have shown that students' academic performance improves when they are exposed to older students' articulated struggles to fit in at university and how they overcame them,¹⁶³ particularly if they emphasised their particular backgrounds.¹⁶⁴

The adoption of such micro-adjustments in the context of elite UK universities requires a radical shift in institutional and individual tutors' approaches. Whereas admissions tutors at Oxford target disadvantaged students prior to admission via outreach and the use of contextualised data in the admissions process, these students are treated as simply part of the larger 'community of practice' once admitted. Enabling disadvantaged students to achieve their potential in terms of academic and career outcomes requires supporting them to

¹⁶¹ Lehmann (n 60) 7.

¹⁶² Nicole M Stephens and Sarah S M Townsend, 'How Can Financial Incentives Improve the Success of Disadvantaged College Students? Insights from the Social Sciences' in Benjamin L Castleman, Saul Schwartz, and Sandy Baum, eds, *Decision Making for Student Success: Behavioral Insights to Improve College Access and Persistence* (Routledge 2015) 63-78, 69.

¹⁶³ See, for example, Gregory M Walton and Geoffrey L Cohen, 'A question of belonging: Race, social fit, and achievement' (2007) 92: 1 *Journal of Personality and Social Psychology* 82-96.

¹⁶⁴ Nicole M Stephens, MarYam G Hamedani, and Mesmin Destin, 'Closing the Social-Class Achievement Gap: A Difference-Education Intervention Improves First-Generation Students' Academic Performance and All Students' College Transition' (2014) 25 *Psychological Science* 943-953.

internalise rather than simulate those sensibilities that belong to the larger ‘community of practice’. I suggest this is the most justifiable response to Goldthorpe’s critique of the limited extent to which educational policy can improve social mobility, though it is particularly challenging in the sense that even micro-adjustments risk socio-economically disadvantaged students feeling stigmatised by targeted support. Without targeted support, however, such students will be more vulnerable to the life-long effects of the ‘class ceiling’.

5 Conclusion

Oxford students do not recognise the unfairness of their own admissions system. Warikoo and Fuhr interviewed 46 current undergraduate students and found that they

believe in the fairness of the admissions process, while lamenting the lack of opportunities for educational advancement faced by some disadvantaged youth in British society.¹⁶⁵

Their belief in fairness was ‘[d]espite their understanding that many British youth do not have access to educational experiences that make Oxbridge an attainable goal’.¹⁶⁶ This damaging belief affects the legal profession generally as these students graduate and progress in their careers. Only with explicit rejection of education-based proxies for giving content to ‘potential’ and ‘talent’ can we seek to achieve the meritocratic aim and make clear that education does not lie at the core of socio-economic inequality.

In its 2015 Green Paper, the Department for Business, Innovation and Skills suggests that ‘[h]igher education is an important driver of social mobility’.¹⁶⁷ I have argued that elite university Law Schools can drive social mobility most effectively when they focus on

¹⁶⁵ Warikoo and Fuhr (n 24) 699.

¹⁶⁶ Warikoo and Fuhr, *ibid.*

¹⁶⁷ Department for Business, Innovation and Skills, *Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice*, Cm 9141 (HMSO 2015) [24]; see also ch 4.

enhancing all, and especially socio-economically disadvantaged students' social and cultural capital so as to integrate their disadvantaged students into the elite 'community of practice'.

But there are two grounds for caution. Firstly, in Reay *et al*'s study of working-class students at an elite British university, who successfully moved between their middle-class academic dispositions and their working-class background,¹⁶⁸ it was not the university experience that provided the critical means of disruption. What was essential for these successful students was that their versatility had begun to develop long before they came to university.¹⁶⁹ Somewhat pessimistically, the LETR concludes that,

[with the] complexity of disadvantage... there is no single or predominant barrier to access [to the legal profession], and there are unlikely to be "quick fixes" to a problem that is, in many respects, shaped by culturally ingrained and intergenerational patterns of disadvantage.¹⁷⁰

But the micro-adjustments advocated here represent a divisibility of innovation, implemented by experimentation in working with individual disadvantaged students, and by redefining how to give content to 'meritocracy'. Real social mobility appears possible, if fragile and difficult to achieve.

Secondly, there is growing evidence that improving gender and ethnic diversity may worsen socio-economic diversity. The LETR notes findings from other contexts and jurisdictions that 'favoured new (minority) entrants share much of the cultural capital of "insiders" – cultural capital that is largely reflective of a particular socio-economic status'.¹⁷¹ Bolton and Muzio argue that the increasing feminisation of the legal profession protects the status of the elite elements, principally the partners, by providing 'a reserve army of disposable labour on lesser terms and conditions'.¹⁷²

¹⁶⁸ Reay *et al* (n 19) 1105.

¹⁶⁹ Reay *et al*, *ibid*.

¹⁷⁰ LETR, *Literature Review*: 7 (n 12) [109].

¹⁷¹ LETR, *Literature Review*: 7, *ibid* [112].

¹⁷² Sharon C Bolton and Daniel Muzio, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the Legal Profession' (2007) 41: 1 *Sociology* 47-64, 50.

In combining both universal and targeted reform measures, my proposals avoid a diversity of excellence that inadvertently ingrains social immobility. But do micro-adjustments go far enough when weak reforms risk further entrenching an unjustifiable status quo?¹⁷³ Whilst the implementation I propose is gradual, the suggested cultural and conceptual changes are radical. To reject nudges as insufficiently transformative misses both the significance of this underlying cultural shift and that there is no available alternative once one recognises the damaging indeterminacy of ‘potential’ and ‘talent’ and the unrepresentative nature of educational proxies for ‘merit’. The holy grail of social mobility requires taking experimental, poverty-centred steps.

¹⁷³ Sommerlad (n 18) 99.