

Discrimination as an Individual Wrong

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Abstract: This paper argues that anti-discrimination rights are individual rights to be free from wrongful treatment and do not directly advance group-based interests or prohibit group-based harm. In light of this, a number of recurring accounts of the wrong of discrimination, particularly the wrong of indirect-discrimination, are unsustainable. Claims that indirect-discrimination is concerned with harm that is done to social groups or that laws prohibiting indirect-discrimination seek to reduce or eliminate advantage gaps between social groups must be rejected as inaccurate. While principles of non-discrimination and principles of affirmative action often operate harmoniously to foster respect for the moral equality of persons, they each have a general affinity with distinct ethical traditions: deontology and teleology respectively. As such, we should conclude that indirect discrimination provisions are examples of formal and not substantive equality. Where rights to non-discrimination conflict with telic equality goals, U.K. law protects the rights of the individual.

Keywords: Discrimination, Indirect Discrimination, Formal Equality, Substantive Equality, Affirmative Action

1. Introduction

When we prohibit acts of discrimination, what precisely is being done? Are we protecting individuals from wrongful forms of treatment? Are we attempting to promote the interests of certain social groups and transform society to reduce or eliminate advantage gaps that exist between those groups? Some argue that we are pursuing both of these aims and that these provisions are informed by multiple normative foundations.¹ Anti-discrimination rights are often portrayed as concerned with both the treatment of individuals and the 'relative treatment of groups',

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¹ See; Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015); Hugh Collins and Tarunabh Khaitan, 'Indirect Discrimination Law: Controversies and Critical Questions' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018) 29; Colm O'Connell, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 *International Journal of Discrimination and the Law* 7, 911-912.

mandating the prohibition of both harm to individuals and harm to groups.² In particular, indirect discrimination provisions, by requiring ‘disparate impact on the group’, are said to incorporate consideration of the relative status of social groups into anti-discrimination duties, even if they mediate these group-based concerns through individual rights.³ The claim here is not that principles of non-discrimination give rise to both individual rights and group rights. Rather, it is that certain forms of discrimination harm both individuals and social groups but that legal mechanisms mediate these harms through the lens of individual rights.⁴ In addition to this, because it focuses on the group harm, the prohibition of indirect-discrimination is said to further the aim of reducing or eliminating advantage gaps which exist between particular social groups in a way that the prohibition of direct-discrimination does not.⁵

Prohibitions on discrimination, operating within a deontological framework of individual rights, do not necessarily prohibit group-based harm; nor do they directly further the aim of reducing or eliminating advantage gaps between social groups. As such, indirect discrimination provisions are far more closely related to direct discrimination provisions than indirect discrimination provisions are to affirmative action provisions. Ultimately, acts of discrimination do not necessarily harm social groups even if they may (and often do) contingently harm those groups. This is not to say that there can be no legal measures to directly further telic equality goals. However, these measures cannot be contained within or entailed by rights to non-discrimination.⁶ Rather, they are best seen as associated with group *interests*, affirmative action, and the public sector equality duty.⁷

² Deborah Hellman, ‘Equality and Unconstitutional Discrimination’ in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013) 55. See also; Kenneth L Karst, *Belonging to America: Equal Citizenship and the Constitution* (Yale University Press 1989); Owen M Fiss, ‘Groups and the Equal Protection Clause’ (1976) 5 *Philosophy & Public Affairs* 107, 124.

³ Sandra Fredman, ‘Direct and Indirect Discrimination: Is There Still a Divide’ in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018) 47; Khaitan (n 1) 86–87.

⁴ See; Fiss (n 2) 124–127, 145–146; Khaitan (n 1) 137–8.

⁵ See; Khaitan (n 1); Tarunabh Khaitan and Sandy Steel, ‘Wrongs, Group Disadvantage and the Legitimacy of Indirect Discrimination Law’ in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018); Fredman, ‘Direct and Indirect Discrimination: Is There Still a Divide’ (n 3).

⁶ Khaitan draws a distinction between duties which are rights-generating (direct and indirect discrimination duties) and duties which are non-remedial; Khaitan (n 1) 143–145. This maps quite easily onto Holmes’ distinction between action-regarding and non-action-regarding anti-discrimination principles; Elisa Holmes, ‘Anti-Discrimination Rights without Equality’ 68 *The Modern Law Review* 175, 184. Note however, that Khaitan conceives of all discrimination law as pursuing telic equality goals such as the reduction or elimination of advantage gaps and, as such, would not accept the claim that non-discrimination rights are individual rights, unconcerned with group harm or the reduction of advantage gaps between different groups. This is so even though he grounds his conception within a liberty-based account and not an equality-based one; Khaitan (n 1) 113–115, 130–134.

⁷ Equality Act 2010 s 149. Similarly, Owen Fiss, in his analysis of the Equal Protection Clause of the US Constitution, argues that an anti-discrimination principle must be supplemented with a group-disadvantage principle in the interpretation of the clause specifically because an anti-discrimination principle fails to account for group interests: Fiss (n 2) 147–156.

I suggest that scholars have been mistaken to conceive of indirect discrimination provisions as signifying a shift within discrimination law away from accounts of individual wrong and the concept of formal equality towards duties to prevent harm to groups *qua* groups and to promote the concept of substantive equality and the advancement of group interests *qua* group interests. Principles of non-discrimination, including those prohibiting indirect discrimination, are conceptually distinct from principles of affirmative action. While they often operate harmoniously to foster respect for the moral equality of persons, they each have a general affinity with distinct ethical traditions: deontology and teleology respectively.

This does not necessarily mean that the status of social groups has no place within philosophical accounts of discrimination. It is entirely possible that group-based disadvantage becomes salient within discrimination theory when one is identifying which personal characteristics of an individual are protected as grounds for discrimination.⁸ Nevertheless, it is important to distinguish between the group disadvantage that might be necessary to identify a ground for discrimination and the claim that individual acts of indirect discrimination necessarily harm social groups *qua* social groups.⁹ Furthermore, it is important to distinguish between the identification of a ground of discrimination and the claim that prohibiting indirect discrimination advances group interests in reducing advantage gaps in a way that is meaningfully different from the prohibition of direct discrimination. It is one thing to say that people should not be treated less favourably because of their membership within a particular socially salient group, it is another thing entirely to say that treating an individual less favourably on this basis also treats the group that they are a part of less favourably or that the prohibition of this less favourably treatment necessarily advances substantive, telic equality goals.

This paper will begin by analysing the claim that discrimination necessarily harms social groups *qua* groups. It will be shown that, while discrimination may *wrong* individuals and, arguably, also groups, it does not necessarily *harm* social groups in the sense that those groups have been particularly disadvantaged by individual instances of indirect discrimination. The test for indirect discrimination

⁸ See for example; Khaitan (n 1) 31–38.

⁹ Incidentally, I take the position that this group disadvantage is a contingent but not necessary feature of a ground of discrimination. Following Lippert-Rasmussen, I argue that grounds of discrimination can be identified on the basis of the social salience of particular personal characteristics. See; Kasper Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (Oxford University Press 2013) 30–36; Kasper Lippert-Rasmussen, 'The Badness of Discrimination' (2006) 9 *Ethical Theory and Moral Practice* 167, 169; Harriet E Baber, 'Gender Conscious' (2001) 18 *Journal of Applied Philosophy* 53. This salience often arises as a result of historic or ongoing disadvantage faced by particular social groups, but it does not necessarily do so. We can imagine a situation where there is significant tension between two religious groups, manifesting bias, negative stereotypes and inequality laden attitudes while nevertheless both groups being comparably situated in terms of social and material advantage. In such a society, religion may still be a protected ground within discrimination law even if there are no advantage gaps between religious groups.

does not require that a provision, criterion, or practice put a social group at a particular disadvantage, just that it puts some persons who share a protected characteristic at a particular disadvantage. Of course, repeated, sustained, and widespread instances of discrimination may cumulatively harm social groups. However, discrimination can obtain where a social group has not been put at a particular disadvantage. Group harm is therefore not a necessary feature of discrimination, even if it may occur contingently.

From here, the connection between rights to non-discrimination and group interests in the reduction of advantage gaps will be explored. It will be shown that rights to be free from discriminatory treatment, because they are entailed by action-regarding, deontic principles, do not directly advance the kinds of telic equality goals that give rise to duties to reduce or eliminate advantage gaps. These goals are advanced by the positive duties associated with the public sector equality duty rather than by rights to non-discrimination. Affirmative action policies and positive duties to advance equality of opportunities are informed by group interests *qua* group interests. They are thus aimed at furthering the goal of reducing disparities between the social groups that they pertain to in a way that rights to non-discrimination, including rights to be free from indirect discrimination, are not.

Often, when discussing principles of non-discrimination and positive duties, a conceptual distinction between formal and substantive equality is invoked.¹⁰ While none of the above principles are strictly egalitarian, this distinction is useful so long as the philosophical commitments latent within each concept are clearly identified. Nevertheless, it will be shown that prohibitions on indirect discrimination, while commonly considered to be examples of substantive equality, in fact find their home within a framework of formal equality due to their emphasis on removing formal barriers and prohibiting wrongful forms of treatment. In contrast, principles of substantive equality are non-action-regarding, telic principles which focus on achieving a broadly redistributive goal that emphasizes some degree of parity in opportunities or outcomes as between certain socially salient groups.

It should be stressed that, notwithstanding the fact that none of the above principles are strictly egalitarian, this does not mean that anti-discrimination rights or affirmative action policies are not grounded within the value of equality.¹¹ Discrimination amounts to a violation of moral and legal equality, even if anti-discrimination rights do not seek to equalise anything.¹² However, while principles

¹⁰ See; Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) ch 1; Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal Of Constitutional Law* 712; Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59 *Cambridge Law Journal* 562; Sonu Bedi, 'The Scope of Formal Equality of Opportunity' (2014) 42 *Political Theory* 716; Courtenay W Daum and Eric Ishiwata, 'From the Myth of Formal Equality to the Politics of Social Justice: Race and the Legal Attack on Native Entitlements' (2010) 44 *Law & Society Review* 843.

¹¹ Cf Holmes (n 6).

¹² See; Hellman, 'Equality and Unconstitutional Discrimination' (n 2); Deborah Hellman, 'Two Concepts of Discrimination' (2016) 102 *Virginia Law Review* 895; Deborah Hellman, *When Is Discrimination Wrong?*

of non-discrimination and affirmative action are both informed by a commitment to treat persons with equal concern and respect, the way that they do so is quite different, informed by different conceptions of equality. Conceptions of formal equality operate within a broadly deontological framework, emphasising the rights of individuals to be free from certain forms of wrongful treatment, the removal of formal barriers, and the general pursuit of corrective justice. In contrast, I suggest that what distinguishes substantive equality from formal equality is an emphasis on broadly consequentialist or teleological frameworks, promoting the interests of social groups in the reduction or elimination of advantage gaps, and the general pursuit of distributive justice.

To the extent that equality of opportunities means the removal of formal barriers, this is not commonly associated with substantive equality, as evidenced by the fact that the prohibition of direct discrimination is not classed as furthering equality of opportunities even though it is clear that the removal of formal barriers does assist in increasing opportunities for those who were previously excluded by those barriers. Within the preview of a substantive equality framework, equality of opportunities demands more than simply the removal of barriers: using the metaphor of a race, the aim is to at the very least ensure that members of different groups have equal starting points, if not to ensure that there is parity in outcome. These goals simply do not fit well within a deontic framework of rights to be free from discriminatory treatment and are best conceived as contained only within provisions which entail positive duties to advance equality of opportunities as between groups. While the widespread vindication of non-discrimination rights can indirectly and contingently lead to the reduction of advantage gaps between certain social groups, the rights themselves do not take into account notions of group harm or group interest that underpin theories of substantive equality. If this is true, it may challenge attempts to provide unitary accounts of equality law frameworks, including not just anti-discrimination rights but also anti-harassment rights, anti-victimisation rights, reasonable accommodation duties, and affirmative action duties. In particular, it may challenge accounts which identify an overarching

(Harvard University Press 2011); Deborah Hellman, 'Indirect Discrimination and the Duty to Avoid Compounding Injustice' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); Kenneth Simons, 'The Logic of Egalitarian Norms' (2000) 80 BUL Rev 693. Cf Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537; Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton University Press 1990); Christopher Peters, 'Equality Revisited' (1997) 110 Harvard Law Review 1210; Christopher J Peters, 'Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis' (1996) 105 The Yale Law Journal 2031; Holmes (n 6); Khaitan (n 1) 113–115, 130–34; Sophia Moreau, 'In Defense of a Liberty-Based Account of Discrimination' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013); Sophia Moreau, 'What Is Discrimination?' (2010) 38 Philosophy & Public Affairs 143; Sophia Moreau, 'Discrimination as Negligence' (2010) 40 Canadian Journal of Philosophy 123.

purpose in the reduction or elimination of relative group disadvantage.¹³ Should deontic anti-discrimination rights be conceptually distinct from telic equality goals such as affirmative action, we must conclude that they necessarily pursue different legal ends using different legal means. Anti-discrimination provisions (as distinct from other aspects of equality law) do not pursue the reduction of relative group disadvantage, but rather the prevention of wrongful treatment suffered by individuals.¹⁴ As such, equality law, broadly construed, pursues at least two distinct ends: the prohibition of discriminatory treatment and the promotion of substantive equality. The upshot of this is that anti-discrimination rights may sometimes conflict with substantive equality goals, raising difficult questions concerning how one should resolve such a conflict.

2. *Indirect Discrimination, Comparative Disadvantage and Harm to Social Groups*

Indirect discrimination provisions, by focusing on the effects that facially neutral policies or practices have on social groups, are said to manifest a distinct shift towards group-based conceptions of harm. The nature of the harm of indirect discrimination is such that it is felt by individuals but calculated by reference to the impact that discriminatory treatment has or would have on some members of particular social groups.¹⁵ If a form of treatment puts or would put some members of one group at a particular disadvantage relative to some members of other groups distinguished by a protected characteristic, this establishes *prima facie* indirect discrimination, subject to a justification inquiry.¹⁶ Thus, if the State were to implement a requirement that applicants be over the age of twenty-eight to be eligible for employment as an executive officer in the Civil Service, this would place

¹³ See for example; Khaitan (n 1); Fredman, *Discrimination Law* (n 10) 130–9. Cf Patrick Shin, 'Is There a Unitary Concept of Discrimination?' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013).

¹⁴ It should be stressed that this analysis focuses on anti-discrimination rights as conceptually distinct from anti-harassment rights, anti-victimisation rights, rights to reasonable accommodation, or duties to engage in affirmative action. While these concepts are regularly addressed by a singular piece of legislation and all share a connection to the moral equality of persons, they pursue distinct legal ends and use distinct legal means. This paper argues that positive duties require consideration of group interests in the reduction of advantage gaps but that prohibitions on discriminatory treatment concern only wrongful treatment accorded to individuals, sometimes collections of individuals, but not necessarily social groups *qua* social groups.

¹⁵ Equality Act 2010, s 19; See also; *Griggs v Duke Power Co* (1971) 401 US 424; s 703 of Title VII of the US Civil Rights Act, 1991.

¹⁶ Note that the severity of the disadvantage in question will be relevant to determining if there is justifiability but, nevertheless, these are distinct inquiries. Khaitan (n 1) 180–92. It could be argued that the relative disadvantage or advantage of the group that the victim of discrimination is a part of may impact upon the justification analysis. However, the justification test is primarily a test of proportionality, looking to whether the policy in question can be rationally defended as a proportionate means of achieving a legitimate aim. Such an inquiry is likely to be unaffected by who the victim of discrimination is. It would be almost arbitrary to conclude that a specific policy is a proportionate means of achieving a legitimate aim when those put at a particular disadvantage are Christian, but it is not a proportionate means when they are women.

female applicants at a particular disadvantage compared to male applicants.¹⁷ Women are far more likely to take time off during their twenties to have children and thus to enter (or re-enter) the labour market when they were over the age of twenty-eight. In these circumstances, an unjustified age requirement would amount to indirect-discrimination on the basis of sex.¹⁸

References to ‘groups’ and ‘disadvantage’ here can be somewhat misleading. Gardner suggests that indirect discrimination looks to relative social disadvantage, assessed in relation to the disparities between two social groups, and reveals ‘institutional disadvantage’.¹⁹ This focus on social disadvantage is often seen as grounding indirect discrimination liability within a distributive justice framework.²⁰ However, the kind of disadvantage that is relevant for determining whether acts of discrimination have occurred does not pertain to whether groups are *generally* disadvantaged (socially, economically, culturally, etc.) but to the impact that a particular provision, criterion or practice may have on some members of some groups. So, for example, if a county council set a hiring criterion which required applicants to commit to working on Sunday mornings, this may put Christian employees at a particular disadvantage, even if Christians as a group are not disadvantaged relative to other religious groups within that society. As such, indirect discrimination is always concerned with disadvantageous treatment that is felt by some persons who share a protected characteristic as compared to others who do not share that characteristic, but it is not always concerned with relative group disadvantage generally.²¹

As mentioned above, it is, of course, possible that the identification of protected characteristics is dependent on the relative disadvantage faced by

¹⁷ *Price v Civil Service Commission* [1977] IRLR 291 (EAT). See also; *Edwards v London Underground (No 2)* [1999] ICR 494, CA. Developments in EU and UK law have resulted in the adoption of a ‘rule of thumb’ approach to identify particular disadvantage rather than a strict requirement to prove statistical disproportionality. See; Equality Act 2010, s 19(2)(b); Framework Directive 2000/78/EC, art 2(2)(b); *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15; *Wards Cove Packing Co v Atonio* 490 US 642 [1989]; C-237/94 *O’Flynn v Adjudication Officer* [1996] 2 CMLR 103.

¹⁸ Holmes argues that, in these circumstances, age should be seen as a proxy for sex. On this conception, tests for indirect discrimination are designed to broaden the range of characteristics protected by rights to non-discrimination rights. See; Holmes (n 6) 184. As Lady Hale notes, indirect discrimination provisions scrutinise ‘requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic’. *Homer v Chief Constable of West Yorkshire Police* [2012] EqLR 594, [17].

¹⁹ John Gardner, ‘Liberals and Unlawful Discrimination’ (1989) 9 *Oxford Journal of Legal Studies* 1, 4–5. See also; Christopher McCrudden, ‘Institutional Discrimination’ (1982) 2 *Oxford Journal of Legal Studies* 303.

²⁰ See; Christopher McCrudden, ‘Changing Notions of Discrimination’ in Stephen Guest and Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice* (ARSP Beiheft 21 1985); Fallon and Weiler, ‘Firefighters v Scotts: Conflicting Models of Racial Justice’ [1984] *Supreme Court Review* 1; Benjamin Eidelson, *Discrimination and Disrespect* (Oxford University Press 2015) 6, 67–68.

²¹ Khaitan would contest this point, arguing that discrimination against Christians is not a ‘paradigmatic’ case of discrimination. Khaitan (n 1) 31–38. This may be true. However, the point stands that, paradigmatic case or not, the test for indirect discrimination does not require proof of relative group disadvantage: it requires proof of disadvantageous treatment.

particular social groups.²² This is one of a number of competing explanations for why it is that certain characteristics are protected.²³ However, group disadvantage in that context is distinct from the kind of harm that discrimination entails. Furthermore, even if anti-discrimination rights arise by virtue of group disadvantage, the rights themselves would be individual rights to be free from wrongful treatment and would not necessitate any analysis of how particular social groups have been treated. The test for disadvantage within an indirect-discrimination framework does not require a claimant to prove harm to groups as a whole: disadvantage is calculated based on whether it puts or would put *some members* of a group at a particular disadvantage.²⁴ Using the above example, one must determine whether Christian *employees* would be put at a particular disadvantage relative to other employees, not whether Christians *as a group* would be disadvantaged. There is no requirement to prove that the provision, criterion, or practice actually affects the entirety of the group itself, nor that it affects groups *qua* groups. This can be seen when one examines the duty contained in the Equality Act:

a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if ... it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it.²⁵

There is no reference to harm to social groups as a whole here. All that is required is that some individuals who share a protected characteristic are put at, or would be put at, a particular disadvantage. This test is designed to identify circumstances where individuals are treated worse than others because of a protected characteristic, despite the treatment being facially neutral with regards to such characteristics. Thus, if an employer indirectly discriminated against their female employees, all that must be shown is that the employer's action would put female *employees* at a particular disadvantage relative to male *employees*; not that this action put women as a social group at a particular disadvantage relative to men as a social group.

²² Indeed, this forms the core of Khaitan's theory of discrimination law; *ibid*.

²³ Another prominent explanation is the immutability of protected characteristics. See; Kari Balog, 'Equal Protection for Homosexuals: Why the Immutability Argument Is Necessary and How It Is Met Note' (2005) 53 *Cleveland State Law Review* 545; Samuel Marcossan, 'Constructive Immutability' (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 646; Sharona Hoffman, 'The Importance of Immutability in Employment Discrimination Law' (2011) 52 *William and Mary Law Review* 1483. Cf. Jessica A Clarke, 'Against Immutability' (2015) 125 *Yale Law Journal* 2. Note that Clarke, while rejecting immutability, argues in favour of an account which emphasises the irrationality and bias of discrimination rather than group disadvantage. Social Salience could also explain why certain grounds are protected without necessarily requiring relative group disadvantage. See; Lippert-Rasmussen, 'The Badness of Discrimination' (n 9) 169; Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (n 9) 30–36.

²⁴ See; Noah Zatz, 'Disparate Impact and the Unity of Equality Law' (2017) 96 *Boston University Law Review* 1357.

²⁵ Equality Act 2010, s19(2).

References to adverse impact hypothesise how a particular provision, criterion, or practice might affect persons distinguished by a protected characteristic: if some persons who share a protected characteristic are disproportionately negatively affected, then there may be discrimination.²⁶ In these circumstances, we can say that a ground which would otherwise not be prohibited (say height) becomes prohibited because of the relationship it bears to a protected characteristic (say sex) such that, should it not be justified, disadvantageous treatment on the basis of the non-prohibited ground is treated as if it *were* on the basis of the protected characteristic.²⁷ As Holmes notes, the disparate impact test is not qualifying or altering a non-discrimination principle but determining its application.²⁸

Once again, it is imperative to clearly distinguish potential motivations for the implementation of anti-discrimination legislation from the forms of conduct which amount to discrimination. We cannot know what the pertinent reasons are for prohibiting discrimination until we have a sufficiently cogent account of what discrimination is. In order to establish discrimination, one needn't show that social groups *qua* social groups are actually affected by discriminatory practices. While it is certainly true that relative group disadvantage often coincides with certain wrongfully discriminatory acts, it is not the case that one is conceptually dependent upon the other.

This being said, the above interpretation is not likely to be accepted by some theorists in this area who ground their conception of indirect discrimination in group harm and relative group disadvantage. For example, Collins and Khaitan

²⁶ It is for this reason that those put at a particular disadvantage may be hypothetical, even if the victim must be an identified claimant. Importantly, the hypothetical victims of discrimination must be individuals in a sufficiently similar situation to the claimant. For example, the hypothetical employees must be employees of the employer in question. Reliance on hypothetical employees to establish particular disadvantage does not necessitate analysis of how the social group that the claimant is a part of has been treated or of how the social group is comparatively situated relative to other social groups. It is only a sub-set of the group that must be put at a particular disadvantage.

²⁷ Holmes (n 6) 184. Note that disability and age discrimination appear to be outliers within this context as there are a number of features of disability and age discrimination which set them apart from other forms of discrimination. In particular, while justification requirements generally only occur within indirect discrimination provisions, a directly discriminatory policy on the grounds of disability or age may be justified. For example, a refusal to hire the blind as pilots or truck drivers is not prohibited whereas a refusal to hire Jews would be. Indeed, it may be the case that impermissible cases of disability-based disadvantageous treatment occur only when they are arbitrary whereas most other cases of discrimination can be wrongful even when they are not arbitrary. See; Larry Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 *University of Pennsylvania Law Review* 149, 151; David Wasserman, 'Is Disability Discrimination Different?' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013); David Wasserman, 'Distributive Justice' in Anita Silvers, David Wasserman and Mary B Mahowald (eds), *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Rowman & Littlefield 1998); Mark Kelman, 'Defining the Antidiscrimination Norm to Defend It' (2006) 43 *San Diego Law Review* 735; Peter Singer, 'Is Racial Discrimination Arbitrary?' (1978) 8 *Moral Matters* 185. Cf Mary Crossley, 'Reasonably Accommodation as Part and Parcel of the Antidiscrimination Project' (2004) 35 *Rutgers Law Journal* 861; Pamela S Karlan and George Rutherglen, 'Disabilities, Discrimination, and Reasonable Accommodation' (1996) 46 *Duke Law Journal* 1.

²⁸ Holmes (n 6) 184.

argue that ‘indirect discrimination is always about groups: the question is whether a protected group is disproportionately disadvantaged by an action’.²⁹ Khaitan and Steel define indirect discrimination as ‘[a]n act, policy or practice that – while facially neutral- nonetheless has a disproportionate impact on a group protected by discrimination law (such as blacks or women)’³⁰ and argue that ‘the comparison required is between two groups’.³¹ McCrea notes that ‘the key issue in relation to indirect discrimination is group disadvantage’.³² Fredman stresses that indirect discrimination focuses on both ‘individual detriment as well as group impact’.³³ Hepple argues that indirect discrimination is concerned with ‘the adverse impact or effects on the group (eg women or an ethnic minority) to which B belongs’.³⁴ Blum argues that discrimination is wrong ‘in ways that wrong individuals *and also* in ways that wrong or harm groups’.³⁵ In some cases, theorists appear to recognise that indirect discrimination does not, in fact, harm social groups *qua* groups and that it usually harms only a sub-set of a group. This is particularly evident when analysis focuses on the difficulty of identifying the appropriate ‘pool’ of comparison.³⁶ However, it would be wrong to conclude from this that the issue is simply imprecise language; some theorists do endorse a group-harm (*qua* group-harm) account of indirect discrimination and others rely on group impact to ground indirect discrimination provisions within a substantive equality framework, repeatedly emphasising the transformative nature of those provisions and distinguishing them from direct discrimination provisions, which are seen as examples of formal equality.

Khaitan and Steel have recently engaged in some depth with the group harm condition set out above.³⁷ They argue that, in circumstances where it can be shown that a provision, criterion, or practice might put some persons at a particular disadvantage relative to other persons defined by a protected characteristic, one should conclude that the defendant’s act caused a particular disadvantage to a social group *qua* group and that the claimant suffered because they are a member of that

²⁹ Collins and Khaitan (n 1) 19. See also; *ibid* 15.

³⁰ Khaitan and Steel (n 5) 197–98.

³¹ *ibid* 199.

³² Ronan McCrea, ‘Squaring the Circle: Can an Egalitarian and Individualistic Conception of Freedom of Religion or Belief Co-Exist with the Notion of Indirect Discrimination?’ in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018) 156.

³³ Fredman, ‘Direct and Indirect Discrimination: Is There Still a Divide’ (n 3) 32.

³⁴ Bob Hepple, *Equality: The Legal Framework* (2nd edn, Hart 2014) 81. See also; McCrudden, ‘Changing Notions of Discrimination’ (n 20); McCrudden, ‘Institutional Discrimination’ (n 19).

³⁵ Lawrence Blum, ‘Racial and Other Asymmetries: A Problem for the Protected Categories Framework for Anti-Discrimination Thought’ in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013) 195–196.

³⁶ See; Khaitan (n 1) 75, 156–159; Collins and Khaitan (n 1) 14; Tarunabh Khaitan, ‘Indirect Discrimination’ in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2017); Fredman, *Discrimination Law* (n 10) 185–6. See also; *Jones v Chief Adjudication Officer* [1990] IRLR 533 [36]

³⁷ Khaitan and Steel (n 5).

group.³⁸ To explain this point, they invite us to consider two hypothetical scenarios arising from the imposition of a facially neutral test, passing which is a prerequisite for securing employment. In the first scenario, no particular racial group disproportionately failed the test. In the second, black candidates were only 25 per cent as likely as their white counterparts to pass the test. In these examples, Ifelmelu, a black woman, failed both times. They argue that in the first scenario, no claim for indirect discrimination could arise as Ifelmelu's failure is best explained by chance or luck. However, in the second scenario, they argue that, once chance has been ruled out, the most plausible conclusion to draw is that: (i) the defendant's act caused a particular disadvantage to blacks as a group and, consequently; (ii) Ifelmelu suffered some adversity because she is a member of that group.³⁹ Khaitan and Steel recognise that UK law does not require such group-harm to be proven.⁴⁰ However, they suggest that nevertheless, the best interpretation of anti-discrimination provisions is one which views them as taking these two presumptions as given in circumstances similar to the second scenario.

There is a disconnect here between the use of a theoretical framework which stresses disadvantageous treatment of social groups and a legal framework which is concerned only with wrongs to some members of some groups. It seems that the clearest way for us to resolve this difficulty is to note that, while individuals are wronged, the determination of this wrongdoing requires analysis of how particular policies, criteria, or practices might disadvantage members of different groups should those members be affected by the policy, criterion, or practice in question. Crucially, the victims of indirect discrimination are not social groups, defined as either all persons who share socially salient property P or as metaphysical entities distinct from their members. They are some members of those groups: the employees, applicants, customers, and so on, who are demonstrably impacted by the policies and actions in question. In light of this, the most plausible conclusion to be drawn from the second scenario is not that the test puts blacks as a group at a particular disadvantage. Rather, it is that this test puts black *applicants* at a particular disadvantage relative to white applicants.⁴¹

³⁸ *ibid* 203–4.

³⁹ *ibid*. Khaitan and Steel are quite explicit in stating that they view the second causal claim as entailed by the first and that the first claim pertains to what they refer to as the general duty not to harm a group which is protected by discrimination law (say, blacks) *as a group*. *ibid* 206.

⁴⁰ Indeed, Khaitan, in his previous work, stresses that the group comparison is limited by a choice of 'pool'. In this analysis, Khaitan notes that, while the comparison is between two groups, we will often come to different conclusions relating to whether a given policy disproportionately harms women dependant on what we choose as our relevant pool (the entire population of the jurisdiction, only the persons qualified for the job in question, or simply the workforce of the employer). Khaitan (n 1) 75, 156–159. This analysis appears to be consistent with my own arguments in as much as we agree that test for discrimination does not look to the impact upon women as a group and instead looks to the effect on some women. However, Khaitan goes further, stressing that, even if the legal tests do not require proof of harm to social groups *qua* groups, we should *presume* that this is exactly what discrimination does.

⁴¹ Of course, this disadvantage may be compounded by the fact that blacks as a group are already comparatively disadvantaged and may itself compound that disadvantage. See; Hellman, 'Indirect Discrimination and the

Indeed, this interpretation not only conforms with the tests set out in UK law, it is also necessary for Khaitan and Steel's later argument that the harm to groups accrues as a result of the knock-on effects of the harm to individuals.⁴² They claim that there is 'a direct correspondence between adverse effects on a sub-set of a group and on the group as a whole' and stress that the extent of this harm may be trivial or significant.⁴³ For example, an employer with a small workforce who indirectly discriminates against his female employees is, according to Khaitan and Steel, likely to only marginally harm women as a group. In contrast discriminatory laws are likely to have a significantly greater impact on a group. The argument can be summarised as follows: individual acts of indirect discrimination directly harm particular individuals (the employers, applicants, customers, and so on) and also produce knock-on effects which harm the group that those individuals are a part of *qua* social group. The more individuals who are directly harmed by an act of indirect discrimination, the greater the knock-on harm to the group. However, this argument contradicts Khaitan and Steel's previous argument that an act of indirect discrimination causes 'a particular disadvantage to blacks as a group' and that, consequently, the claimant suffered because of her membership within that group.⁴⁴

Khaitan and Steel repeatedly stress that the particular harm done to individuals is causally entailed by the general harm done to the group and also that the harm done to the group is the result of knock-on effects from the harm done to individuals. So, which is it? They 'take the assumption that there is some knock-on effect on the group as a whole to hold in most, if not all, cases'.⁴⁵ They then argue that the 'causal presumption in the particular duty, it should be obvious, hangs on the prior breach of the general duty'.⁴⁶ So, the particular harm to individuals is dependent on general harm to the group which is in turn dependant on knock-on effects produced by particularised harm to individuals. These claims are mutually incompatible. Using the example above, either the employment test harms blacks as a group and thus harms Ifelmelu because she is a part of that group, or the test harms black applicants such as Ifelmelu and also produces knock-on harms that affect blacks as a group. The group harm accrues either top-down or bottom-up; it cannot do both simultaneously.

We have already seen why the claim that indirect discrimination directly harms groups *qua* groups is incorrect. This leaves us with the second claim: that indirect discrimination harms individuals but produces knock-on effects which harm groups as a whole. This is entirely plausible in some circumstances. For example, where discrimination comes in the form of a legislative enactment.

Duty to Avoid Compounding Injustice' (n 12); Michael Selmi, 'Was Disparate Impact Theory a Mistake?' (2001) 53 UCLA Law Review 701, 704–06.

⁴² Khaitan and Steel (n 5) 206.

⁴³ *ibid.*

⁴⁴ *ibid* 203–4.

⁴⁵ *ibid* 206.

⁴⁶ *ibid* 207.

However, it is not clear at all how an act of discrimination against only a small number of individuals harms the group that they are a part of *qua* group. So, when a county council discriminates against Christian applicants via its hiring practices, it is unclear precisely how this will necessarily harm all Christians, either in that county or in the country as a whole. Khaitan and Steel rest their argument on the empirical claim that an employer's discrimination against two employees who are female has an effect on all women and thus contributes to making women as a group less free.⁴⁷ This seems extremely unlikely. Indeed, most forms of indirect discrimination plausibly harm only a small number of individuals either directly or through knock-on effects. It is unlikely that individual acts of indirect discrimination will necessarily have any effect, direct or otherwise, on people in another city on the other side of the country.

In contrast, Khaitan and Steel describe the harm of indirect discrimination with reference to the harm done to a groups opportunities.⁴⁸ Specifically, they argue that a victim is harmed because, where race becomes a factor in determining if they will get a job, their opportunities become rationally less attractive and so less valuable.⁴⁹ On this view, harm accrues not because Ifelmelu did not get the job, but because her chances of doing so have been reduced.⁵⁰ As such, Khaitan and Steel argue that Ifelmelu is harmed even if she was successful in obtaining employment, noting that '[s]ince autonomy requires the possession of a wide set of valuable options, the diminishment in the value of an option has an impact on an agent's autonomy'.⁵¹ Again, Khaitan and Steel premise these conclusions on particularly strong empirical claims arguing that '[e]ven if this loss to particular individuals may be small in some cases, the systemic effect on the group, many of whose members do not even apply, is often significant'.⁵²

The problem is that Khaitan and Steel present us with no evidence to support the claim that this individual loss of opportunities felt by three female applicants necessarily results in women as a group losing opportunities, or in the diminishment of the value of their opportunities. The fact that such harm would not need to be proven by a claimant reinforces the point that this is not a necessary feature of morally or legally impermissible discrimination, even if it may occur contingently. We can easily imagine circumstances where this knock-on effect has not occurred and where nevertheless there has been discrimination. As such, even if it were the case that many instances of indirect discrimination produce knock-on effects which

⁴⁷ This approach grounds Khaitan and Steel within a liberty-based conception of discrimination. See; Moreau, 'In Defense of a Liberty-Based Account of Discrimination' (n 12); Hellman, 'Two Concepts of Discrimination' (n 12); Khaitan (n 1).

⁴⁸ Khaitan and Steel (n 5) 208–10. See also; S. Moreau, 'What Is Discrimination?' (2010) 38 *Philosophy & Public Affairs* 143.

⁴⁹ Khaitan and Steel (n 5) 209–10.

⁵⁰ *ibid* 209.

⁵¹ *ibid* 210.

⁵² *ibid*.

diminish the value of opportunities at a group level, this group harm is not conceptually necessary for the existence of discrimination. Group harm is a contingent feature of discrimination, where it occurs at all.⁵³

However, discrimination does *wrong* individuals and may also wrong groups, even if it does not necessarily harm them. Lippert-Rasmussen has argued that we can distinguish disadvantageous treatment from treatment that causes harm.⁵⁴ For example, he argues that refusing to hire an applicant who is better qualified treats them disadvantageously even if, as a result of this rejection, she is successful in landing herself a better job.⁵⁵ Another example would be the discriminatory refusal to board a plane where the plane then crashed.⁵⁶ In these cases, the victim of discrimination has been wronged even though they have ultimately benefited from this wrongful treatment. As such, they have not been harmed all things considered, even if they may have been harmed in the instance of refusal. Conversely, you can treat someone advantageously while overall harming them if, by hiring them, despite a more qualified candidate applying, they unknowingly lose out on getting a much better job as a result.⁵⁷ Thus, Lippert-Rasmussen argues that one can experience disadvantageous treatment and be discriminated against even if, overall, one has not been harmed or may even benefit from the treatment itself.⁵⁸ So when we speak of less favourable treatment being a necessary feature of discrimination, it is the treatment itself that is wrongful (and often harmful), independent of the consequences which might arise from such treatment. As Hellman notes, the wrongness of discrimination is not reducible to the harm that one may inflict in discriminating, even though discrimination often does considerable harm.⁵⁹

Thus, for example, we can see that indirect discrimination might put Christian employees at a particular disadvantage and thus wrong them should this be unjustified (even if it does not ultimately harm them) but that it does not necessarily put Christians as a social group at a particular disadvantage relative to other religious groups. Furthermore, if we take an expressivist account of discrimination, grounded in the contention that discrimination is wrongful when it demeans or expresses attitudes of unequal moral worth, it is entirely possible for indirect discrimination to wrong social groups by expressing the attitude that the group *qua* group is inferior.⁶⁰ However, it should be stressed that whether this

⁵³ Although, some would argue that the denial of opportunities does not, in-and-of-itself, amount to sufficient harm to ground a justification for legal intervention. See; Gardner (n 19) 6. Of course, if the denial of opportunities does not ground justification, it is clear that the diminishment of the value of certain opportunities does not either.

⁵⁴ Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (n 9) 18.

⁵⁵ *ibid.*

⁵⁶ See; James Woodward, 'The Non-Identity Problem' (1986) 96 *Ethics* 804, 811.

⁵⁷ Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (n 9) 18.

⁵⁸ *ibid.* See also; John Gardner, 'Discrimination as Injustice' (1996) 16 *Oxford Journal of Legal Studies* 353.

⁵⁹ Hellman, *When Is Discrimination Wrong?* (n 12) 26–27.

⁶⁰ See; Hellman, *When Is Discrimination Wrong?* (n 12); Hellman, 'Indirect Discrimination and the Duty to Avoid Compounding Injustice' (n 12).

individual wrongful expression has an impact on social groups as a whole is contingent upon a number of variable factors including the scope of the discrimination, the institutional or social position of the discriminator, and the publicity of the expression.

Furthermore, Khaitan and Steel evidently do not endorse an expressivist account of discrimination. Their account is grounded within a liberty-based conception of discrimination and not equality- or dignity-based conceptions which can identify the wrong of discrimination in the action itself and not its consequences.⁶¹ As such, if they wish to claim that single instances of indirect discrimination put social groups at a particular disadvantage, they must establish some material harm that is done to the group's (and not merely some members) liberty interests. This focus on effects precludes any reading of their claim which would see it as focusing on expressive wrongdoing. Even if it did account for expressive wrongdoing, this is distinct from the claim that indirect discrimination necessarily puts social groups at a particular disadvantage.

3. Indirect Discrimination Provisions as Examples of Formal Equality

Discrimination is a form of treatment that wrongs and often harms individuals. This wrong is comparative in nature, primarily grounded within frameworks of corrective justice.⁶² As such, principles prohibiting discrimination are action-regarding, deontic principles which identify wrongful forms of conduct rather than non-action regarding, principles which mandate the distribution of some resource so as to achieve some form of telic equality.⁶³

Discrimination is sometimes characterized as a failure to distribute fairly.⁶⁴ While this is often true, it would be wrong to say that a right to be free from discriminatory treatment entails a right to have particular goods or resources distributed to you. A principle of non-discrimination precludes certain kinds of distribution to be sure, and in that sense can be said to be premised on avoiding distributive injustice. Nevertheless, a lack of fair distribution on its own is not sufficient to prove discrimination.⁶⁵ It is on this basis that Morris draws a distinction between corrective and distributive schemes, noting that 'corrective schemes

⁶¹ Khaitan (n 3) ch 5.

⁶² See; Aristotle, 'Nicomachean Ethics' in Jonathan Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press) II 1130a30-1131b25. For more on the comparative nature of discrimination, see; Hellman, 'Equality and Unconstitutional Discrimination' (n 2); Hellman, 'Two Concepts of Discrimination' (n 12); Lippert-Rasmussen, 'The Badness of Discrimination' (n 9) 168–69, 173.

⁶³ Elisa Holmes, 'Anti-Discrimination Rights without Equality' 68 *The Modern Law Review* 175. See also; Andrew J Morris, 'On the Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice' (1995) 15 *Oxford Journal of Legal Studies* 199.

⁶⁴ See for example; Gardner (n 58).

⁶⁵ Morris (n 63) 205.

generally require some element beyond mere disturbance of a distributive scheme before corrective rights and duties are implicated'.⁶⁶

Thus, in *R v Drybones*, the Canadian Supreme Court struck down a law which made it an offence for an aboriginal Canadian to be intoxicated when off a reserve.⁶⁷ The court held that a law creating an offence applying only to members of a particular race violated the guarantee of equality before the law contained within the Bill of Rights 1960.⁶⁸ While it is possible to see this as a form of distributive injustice in the sense that certain legal burdens were distributed unfairly, it would be odd to conclude that the prohibition of such discriminatory laws sought to promote a distributive aim of reallocating resources or advantages to aboriginal Canadians. If non-discrimination has a distributive element to it, it is not the kind of telic distributive goal that we regularly identify with principles of affirmative action or positive duties which seek to alter the composition of various social structures to be more diverse in terms of particular identity groups. Such a goal is exclusively distributive in nature, focusing explicitly on directing the allocation of a shared set of advantages and burdens across a given community.⁶⁹ A principle of non-discrimination may indirectly result in some degree of redistribution of this kind, but it is not the explicit aim of such principles, nor are such principles capable of independently ensuring this redistribution. Indeed, it may be the case that principles of non-discrimination manifestly preclude redistribution on the basis of protected characteristics.⁷⁰

Discrimination law frameworks regularly rely on a conceptual distinction between direct and indirect discrimination, where both forms of discrimination are said to pursue different aims and to be founded on different conceptions of equality. Direct and indirect discrimination are mutually exclusive and conceptually distinct, even if it is sometimes difficult identify where the boundaries lie.⁷¹ Often, this distinction is supplemented by reliance on another distinction between 'formal'

⁶⁶ *ibid.*

⁶⁷ (1969) DLR (3rd) 473.

⁶⁸ Specifically, s. 1(b) which protects the right of the individual to equality before the law and the protection of the law "without discrimination by reason of race, national origin, colour, religion or sex".

⁶⁹ Aristotle (n 62) II 1131a1, 22–28; Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 153–55. See also; Gardner (n 19) 9. Here, Gardner argues that distributive justice as a justification for state intervention focuses exclusively on patterns of advantage and disadvantage, not on further factors which go beyond the injustice of particular states of affairs and look to 'how, and by whose agency, they arose'.

⁷⁰ See; Barbara Havelkova, 'Judicial Scepticism of Discrimination at the ECtHR' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018); William Reynolds, 'Individualism vs Group Rights: The Legacy of Brown' (1984) 93 *Yale Law Journal* 995; O'Connell (n 1); Colm O'Connell, 'Justifying Discrimination Law' (2016) 36 *Oxford Journal of Legal Studies* 909.

⁷¹ See Lady Hale in *R (E) v Governing Body of JFS* [2010] 2 AC 72 [57]; Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA 1293 [117–118]: "The conditions of liability, the available defences to liability and the available defences to remedies differ". Cf Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide' (n 3).

equality and 'substantive' equality.⁷² This dichotomy is usually invoked to explain the inadequacies of prohibitions on direct discrimination (seen as examples of formal equality) and the necessity of prohibitions on indirect discrimination (seen as examples of substantive equality).⁷³ However, it is sometimes unclear precisely what theorists are accounting for when they distinguish between formal and substantive conceptions of equality. In particular, there is a certain degree of ambiguity when it comes to substantive equality which has seemingly come to be represent anything that might be described as 'true' equality or 'real' equality.⁷⁴ In this sense, substantive equality could be described by reference to what it is not (formal equality) rather than what it is. Such an approach is unsatisfying, however. There is clearly something which distinguishes formal from substantive conceptions of equality, beyond simply the idea that substantive equality is more normatively or politically desirable than formal equality. I suggest that formal equality is characterised by a focus on treatment and the attainment of corrective justice through the protection of individual rights. In contrast, substantive equality is focused on addressing group-based disadvantage and achieving parity of outcomes or opportunities as between social groups, through the transformation of social structures, the broadening of social inclusion, and the attainment of redistributive justice.⁷⁵ Formal equality, by focusing on the elimination of discriminatory treatment, is often critiqued for failing to account for disparities in group status. As a result, it is argued that the achievement of formal equality does little to advance 'the eradication of social disadvantage', a goal which is necessary for the achievement of substantive equality.⁷⁶

Substantive equality has gained political and legal prominence largely as a response to the perceived inadequacies of formal equality, and the inability of direct discrimination provisions to achieve the redistributive goal that is the aim of substantive equality. To encapsulate the thrust of this critique in a sentence: formal equality within an unequal society does little to close advantage gaps that exist between various social groups. To rectify this, substantive equality is focused, in one way or another, on bringing about social change such that inequalities as between

⁷² See; Fredman, *Discrimination Law* (n 10) ch 1; Nicholas Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24 *Oxford Journal of Legal Studies* 693; Barnard and Hepple (n 10); Catherine Albertyn, 'Substantive Equality' (2007) 23 *South African Journal on Human Rights* 209; Fredman, 'Substantive Equality Revisited' (n 10).

⁷³ Barnard and Hepple (n 10) 564; Hepple (n 34) 12–13, 24–29, 81; Fredman, *Discrimination Law* (n 10) 10.

⁷⁴ C Bourn and J Whitmore, *Anti-Discrimination Law in Britain* (3rd edn, Sweet & Maxwell 1996) 4–5. This is in contrast with formal equality which is often defined by reference to the principle that likes should be treated alike. See; Fredman, *Discrimination Law* (n 10) 8–14. However, I suggest that the operative principle here is not one which equalises treatment but one which prohibits wrongfully discriminatory treatment. See; Holmes (n 6). Note however that, while Holmes is correct that principles of non-discrimination are not strictly egalitarian in this way, they are nevertheless grounded within an equality-based framework and consequently can be described as principles of 'formal' equality should this distinction be in play.

⁷⁵ Fredman, *Discrimination Law* (n 10) 11–12.

⁷⁶ Bourn and Whitmore (n 74) 4–5.

groups is lessened or removed. It is this desire to bring about social change which is often associated with prohibitions on indirect discrimination. Indeed, many commentators have concluded that the introduction of these prohibitions into legal frameworks was done with the express aim of effecting distributive justice as between various social groups, manifesting a distinct shift in focus away from the corrective concerns of direct discrimination, and the formal conception of equality which informed them.⁷⁷ Thus, Hepple notes that 'indirect discrimination aims to achieve substantive equality' and associates it with 'a procedural notion of equality of opportunity'.⁷⁸ Similarly, Fredman argues that the concept of indirect discrimination attempts to address the 'redistributive and restructuring goals of equality'⁷⁹ by bringing to mind 'the graphic metaphor of competitors in a race' and 'asserts that true equality cannot be achieved if individuals begin the race from different starting points'.⁸⁰ As such, Hepple, stresses that '[t]he aim is to equalise the starting points',⁸¹ resulting in indirect discrimination provisions focusing on the 'redistribution of wealth and opportunities'.⁸²

Recently, Fredman has argued that substantive equality should not be collapsed into a single formula.⁸³ Rather, it should remain responsive to those who are disadvantaged by adopting a multi-dimensional approach with the aim to: 'redress disadvantage; address stigma, stereotyping, prejudice, and violence; enhance voice and participation; and accommodate difference and achieve structural change'.⁸⁴ This approach indicates that perhaps substantive equality is simply a collection of disparate normative positions and commitments. Nevertheless, it seems to me that there is a central thread which runs through all conceptions of substantive equality: a notable shift towards accounting for and advancing group interests *qua* group interests. These substantive equality goals manifest a distinct account of how one is to properly respect the moral equality of persons that moves away from deontic concerns that focus on treatment which wrongs persons towards a teleological approach which identifies certain interests that must be promoted and a

⁷⁷ See for example: Collins and Khaitan (n 1) 19, 29–30; Hepple (n 34) 12–13, 81; Moreau, 'What Is Discrimination?' (n 12) 144–45; Eidelson (n 20) 6, 67–68; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16, 20; Barnard and Hepple (n 10) 564. Note that Collins argues that social inclusion is aimed at combating persistent or absolute disadvantage that particular groups face as opposed to combating relative group disadvantage. Nevertheless, the goal is still broadly redistributive. See also; Fiss (n 2) 143; Gardner (n 19) 3–5, 8–11; Christopher McCrudden, David Smith and Colin Brown, 'Racial Justice at Work: Enforcement of the Race Relations Act 1976 in Employment' (1993) 2 Social & Legal Studies 111; Morris (n 63) 207–8; Richard J Arneson, 'Discrimination, Disparate Impact, and Theories of Justice' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013) 108–9.

⁷⁸ Hepple (n 34) 81, 25.

⁷⁹ Sandra Fredman, *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001) 23.

⁸⁰ Sandra Fredman, 'A Critical Review of the Concept of Equality in UK Anti-Discrimination Law' paras 3.10–3.16.

⁸¹ Hepple (n 34) 26.

⁸² Richard Townshend-Smith, *Discrimination Law: Texts, Cases and Materials* (Cavendish 1998) 262.

⁸³ Fredman, 'Substantive Equality Revisited' (n 10) 712.

⁸⁴ *ibid* 713–714.

state of affairs which must be striven towards. Within a substantive equality framework, the duty is to bring about the realisation of particular ends such as structural and cultural change, rather than a duty to refrain from treating persons wrongfully.

Bearing this in mind, the duty not to indirectly discriminate is best characterised, if we are using the metric of formal/substantive equality, as an example of formal equality, focused primarily on corrective rather than distributive justice, and the protection of individual rights rather than the promotion of group interests.⁸⁵ Within the context of indirect discrimination law, the classification of a provision, criterion, or practice as *prima facie* discriminatory will be determined based on the effects of that treatment. However, while indirect-discrimination looks to the effects of particular policies or procedures, this does not mean that focus has shifted from treatment to outcomes or opportunities in the sense that substantive equality envisages. Fundamentally, there has been no shift from corrective to distributive justice as might occur with the introduction of laws which entail positive duties or affirmative action policies.⁸⁶ The emphasis on the effects of conduct on members of particular groups results in increased forms of conduct being classed as discriminatory. It does not directly manifest anything in the way of redistribution, nor does it do much to increase the opportunities of particular social groups *qua* groups. It could, of course, *indirectly* contribute to redistribution or the increase of opportunities through the prohibition of wrongful conduct. However, this is a by-product of the removal of formal barriers, not a necessary feature. As such, a lack of redistribution does not invalidate the remedy offered for breach of the duty not to indirectly discriminate.⁸⁷

Indeed, this has caused some theorists to critique indirect discrimination for failing to achieve the transformative goals of substantive equality.⁸⁸ For example, Khaitan notes that '[t]he antidiscrimination duty, on its own, cannot close pervasive, abiding, and substantial advantage gaps between groups'.⁸⁹ Fredman, while stressing that the aim of laws prohibiting indirect discrimination is to equalise starting points, notes that, while opportunities are opened up, there is no guarantee that more women, or members of ethnic minorities will actually be in a position to

⁸⁵ Morris (n 63). Here, Morris argues that indirect discrimination law is coherent only when conceived through the lens of corrective justice. Specifically, '[t]o the extent that an interpretation strays from the corrective thesis, the law's features lose conceptual coherence and the law loses apparent efficacy towards any point.' *ibid* 208.

⁸⁶ This is of crucial importance. While it may be argued that there is a distributive element within the concept of discrimination law (Khaitan (n 5) 38–41), Affirmative action is necessary to achieve a broader distributive goal of closing advantage gaps. *ibid* 216, 222–224.

⁸⁷ Indeed, very often the remedy offered is simply the removal of the barrier in question. Some might see this as evidence of the institutional focus of indirect discrimination. However, this does not mean that these provisions should be classed as advancing a substantive equality framework any more than the prohibition of direct discrimination does seeing as direct discrimination provisions also remove barriers.

⁸⁸ See for example; Fredman, *Discrimination Law* (n 10) 180–3; Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide' (n 3) 49–50.

⁸⁹ Khaitan (n 1) 215.

take advantage of those opportunities.⁹⁰ Hepple similarly argues that, even though indirect discrimination laws advance equality of opportunities, this alone is not sufficient to achieve 'true' equality and affirmative action is therefore necessary to sidestep many of the limitations of indirect discrimination provisions.⁹¹ However, there is a central flaw in the above analysis: the assumption that the prohibition of indirect discrimination actually seeks to equalise starting points or opportunities. Principles prohibiting indirect discrimination do what all anti-discrimination principles do: they mandate the removal of formal barriers and the prohibition of wrongful forms of treatment. Prohibiting indirect discrimination removes more barriers than prohibiting direct discrimination does because there is a shift in focus from overt barriers to hidden barriers. This does not mean that prohibitions on indirect discrimination do anything other than remove barriers and prohibit wrongful forms of treatment. Sticking with our race analogy, principles of non-discrimination remove hurdles or handicaps during the race, but they do not equalise starting positions.

Laws prohibiting indirect discrimination do not do anything all that different from laws prohibiting direct discrimination; they certainly do not do anything so different that we could conclude that the prohibition of direct discrimination was a manifestation of formal equality while the prohibition of indirect discrimination was a manifestation of substantive equality. Indirect discrimination relies on disparate impact coupled with a justification test to determine the application of direct discrimination standards to conduct which would not ordinarily be classed as discriminatory. Any transformation of society that occurs as a result of indirect discrimination laws is that which would naturally occur in a system free of formal barriers. This is exactly the same kind of transformation which occurs as a result of the prohibition of direct discrimination.

Thus, we must conclude that the prohibition of discrimination, be it direct or indirect, is an individual right, which does not necessarily promote the interests of social groups. Nevertheless, the public-sector equality duty and the provision for voluntary affirmative action policies by private actors do recognise and advance the interests of particular social groups *qua* groups. However, where an individual right comes into conflict with a group interest, U.K. law vindicates the rights of the individual to be free from discriminatory treatment.

4. *Group Interests and Affirmative Action*

The introduction of public sector positive duties and permissible voluntary affirmative action policies within the private sector mark a distinct shift in focus away from the prohibition of wrongful forms of treatment contained within anti-discrimination duties towards a theoretical and political framework which takes into

⁹⁰ Fredman, 'A Critical Review of the Concept of Equality in UK Anti-Discrimination Law' (n 80) 3.12-3.16.

⁹¹ Hepple (n 34) 25-27.

account the interests of particular social groups *qua* groups. The focus is not on ensuring that individuals are free from wrongful forms of treatment; rather, the goal is to transform society such that advantage gaps between certain groups is lessened or eliminated or that those groups are not wronged or harmed by the policies or decisions of public bodies.⁹² Within U.K. law, there are two ways that this is attempted. The first is the public-sector equality duty which requires public authorities to have due regard to the need to advance 'equality of opportunity'. The second is the explicit setting out of permissible conduct that can be voluntarily engaged in should private bodies wish to assist in the reduction of advantage gaps between social groups. The Equality Act frames the public-sector equality duty as follows:

A public body must, in the exercise of its functions, have due regard to the need to –

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it...⁹³

The Act replaced earlier provisions for race, sex and disability, and also extends the duty to include age, gender reassignment, pregnancy and maternity, religion or belief, and sexual orientation.⁹⁴ In addition, there is a separate requirement on certain authorities to 'have due regard to the desirability' of exercising their functions 'in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage'.⁹⁵ This duty is quite onerous, the Act applies to any function of a public authority and imposes:

a heavy burden upon public authorities in discharging the public-sector equality duty and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude.⁹⁶

⁹² See; *ibid* 22; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008); S Alibertyn, 'Substantive Equality and Transformation in South Africa' (2006) 23 *South African Journal of Human Rights* 253; Khaitan (n 1) ch 8; Khaitan and Steel (n 5).

⁹³ Equality Act s 149(1).

⁹⁴ *ibid* 149(7).

⁹⁵ *ibid* 1(1).

⁹⁶ *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 [59].

However, while these duties are wide-ranging, they do not require public bodies to engage in ineffective or unfruitful actions where the needs identified in the Equality Act clearly do not arise.⁹⁷ Nevertheless, an authority should consider whether an impact assessment, along with other means of obtaining information, is required.⁹⁸ Positive duties have opened up new avenues for policy decisions to be challenged on the ground that they have failed to take into consideration the interests of particular social groups *qua* social groups. Thus, in the *Southhall Black Sisters* case, a decision to remove funding from an organisation which provided services to Afro-Caribbean and Asian women who are victims of domestic violence due to a change in policy which would instead fund a borough-wide service provider catering to all individuals irrespective of gender or ethnicity was held to be unlawful.⁹⁹ The reason for this was that the Council had failed to carry out a racial equality impact assessment when formulating this new funding criterion. If it cannot be shown that a decision maker has paid proper attention to each of the statutory considerations, a public authority may be in breach of the duty, even when 'there has on any view been very substantial compliance with these equality duties'.¹⁰⁰

Importantly, the statutory duty to have due regard to the need to advance equality of opportunities is not 'a duty to promote equality of opportunities between the appellants and persons who were members of different racial groups' and as such might not even be an example of substantive equality in the sense that it appears to pursue the goal of preventing harm done to social groups as a result of disadvantageous policies or practices rather than pursuing the goal of actually reducing or eliminating advantage gaps between those groups.¹⁰¹ In this context, 'due regard' is 'the regard that is appropriate in all the circumstances', including the way that a disadvantaged group is affected, but also including 'such countervailing factors as are relevant to the function which the decision-maker is performing'.¹⁰² As such, the duty is a procedural one to prepare and use equality impact assessments when making decisions or taking actions which might impact upon particular social groups. The public-sector equality duty is, as Endicott notes, 'a particularly intense, statutory form of the doctrine of relevant considerations'.¹⁰³ Because of this, if public bodies consider the group impact that their decisions or conduct has in circumstances where the duty to have due regard arises, their evaluation of the impact 'will only be treated as unlawful where it is "unreasonable or perverse"'.¹⁰⁴

⁹⁷ *R (Elias) v Defence Secretary* [2005] EWHC 1435 [96]; *R (Aspinall) v Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin) [123].

⁹⁸ *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) [89].

⁹⁹ *R (Kaur) v London Borough of Ealing* [2008] EWHC 2062 (Admin).

¹⁰⁰ *R (Hurley) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 [95].

¹⁰¹ *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 [31].

¹⁰² *ibid.*

¹⁰³ Timothy Endicott, *Administrative Law* (4th edn, Oxford University Press 2018) 294.

¹⁰⁴ *R (S) v Justice Secretary* [2002] EWHC 1819 [99].

The public sector equality duty has fundamentally restructured policy making by mandating that public authorities consider group interests where they are implicated. However, because this duty requires consideration of how policies effect groups, it arguably is really just an indirect discrimination test which has a particularly large 'pool' for comparison and may ultimately be unable to guarantee the reduction or elimination of advantage gaps, even if it ensures that public authorities must pay attention to the impact that their policies and actions have on particular groups. Nevertheless, it is evident that this duty necessarily requires consideration of the treatment of social groups and the interests of those groups *qua* groups whereas must duty-bearers must only account for the impact that their policies will have on a sub-set of the group. Public authorities are expected to take into account the impact that their policies will have on social groups *qua* groups because, as public bodies, they are subject to higher standards of conduct and are far more likely to affect entire groups.

In addition to the public-sector equality duty, sections 158 and 159 of the Equality Act set out what is permissible should a private body or individual seek to assist in the reduction or elimination of advantage gaps between groups. These provisions are permissive, not mandatory, and apply to all protected characteristics. Section 158 clarifies that the Equality Act does not prohibit a person from taking any action which is a proportionate means of achieving any of the follow three aims:

- (a) enabling or encouraging persons who share a protected characteristic to overcome or minimise a disadvantage connected to that characteristic;
- (b) meeting those needs of persons who share a protected characteristic that are different from the needs of persons who do not share it; or
- (c) enabling or encouraging participation in an activity where participation by persons who share that characteristic is disproportionately low.¹⁰⁵

For example, these measures could include targeting members of particular disadvantaged groups for the provision of additional training to enable them to gain employment.¹⁰⁶ Within the employment context, 'tie-breaks' in recruitment and promotion are permitted under the Equality Act to the extent that they are genuine tie-breaks and do not amount to automatic policies. Section 159 permits an employer to take a protected characteristic into account when deciding who to recruit or promote, where persons who have that characteristic generally suffer a disadvantage or are underrepresented as a group. The provision can only be used in genuine tie-break situations where the candidates in question are 'as qualified as' each other.¹⁰⁷ However, determination of what counts as equally qualified need not be confined to formal qualifications. The intention of the Act is that if an employer reasonably

¹⁰⁵ Equality Act s 158(2). See also; Hepple (n 34) 129–130.

¹⁰⁶ 'Explanatory Notes to the Equality Act 2010' para 511.

¹⁰⁷ Equality Act s 159(4)(a).

thinks that candidates are of a comparable standard, the protected characteristic can be invoked as a tie-break.¹⁰⁸ This approach is in line with the jurisprudence of the European Court of Justice, which allows for preference to be given where candidate have 'substantially equivalent merits'.¹⁰⁹

While the above provisions may not be sufficient to fully close advantage gaps between social groups, they are clearly grounded within a substantive equality framework in a way that deontic principles of non-discrimination are not. They constitute what McCrudden describes as 'an important, indeed radical, shift of regulatory philosophy in the area of equality legislation compared with what has gone before'.¹¹⁰ So, what exactly has shifted? The introduction of a positive duty to have due regard to the need to advance equality of opportunity is striking, particularly seeing as the correct definition of 'equality of opportunity' has been a topic of great contention within political and legal philosophy in recent decades.¹¹¹ However, while it is unclear what precisely is required to achieve equality of opportunity, positive duties evidently manifest a movement away from action-regarding, deontic principles of non-discrimination towards the achievement of *some* form of telic equality as between particular social groups. It is the desire to reduce or eliminate advantage gaps which exist between these groups, however that is done, that motivates these duties. The radical shift that occurred was the introduction of group interests *qua* group interests into equality law frameworks that had previously only dealt with individual rights to be free from discriminatory treatment.

Note that public authorities fulfilling their positive duties, and others who wish to take positive action on a voluntary basis, are limited by the principle of non-discrimination. As such, the use of a protected characteristic as a criterion for treating some more favourably than others is prohibited as discriminatory. Thus, quotas which exist on the basis of protected characteristics are unlawful and employers engaged in 'tie-breaks' must not have a policy of automatically treating persons with one characteristic more favourably than others.¹¹² It is here where we can see the greatest need for conceptual clarity. We can only identify instances of conflict between principles of non-discrimination and principles of affirmative action or positive duties if we recognise that non-discrimination is an individual right which does not include conceptions of group harm or group interest and that positive duties are grounded primarily in telic equality principles and group-based interests.

¹⁰⁸ 'Explanatory Notes to the Equality Act 2010' (n 106) para 518.

¹⁰⁹ Case C-407/98, *Abrahamsson v Fogelqvist* [2000] ECR I-5539.

¹¹⁰ C McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36 *Industrial Law Journal* 255, 266.

¹¹¹ See; Dworkin, *Sovereign Virtue* (n 12); John Rawls, *A Theory of Justice* (Revised edition, Harvard University Press 1971); Amartya Sen, *Inequality Re-Examined* (Clarendon Press 1992); Gerry Cohen, *If You're an Egalitarian, How Come You're so Rich* (Harvard University Press 2000); Bedi (n 10); Wojciech Sadurski, *Equality and Legitimacy* (Oxford University Press 2008).

¹¹² Equality Act s 159(4)(b).

Positive duties to advance equality were introduced into the U.K. legislative context as a result of criticisms which were levied against anti-discrimination laws for their failure to advance substantive or telic equality goals. As has been shown above, those same criticisms can be levied against principles prohibiting indirect discrimination because, even though there is a shift to focus on the effects of wrongful treatment, these principles are nevertheless still action-regarding, deontic principles which seek to remove formal barriers through the protection of individual rights, but do not manifest anything that resembles the conception of group-based social transformation envisioned by substantive equality.

It is important for our purposes to clearly identify the conceptual underpinnings and philosophical commitments latent within the concept of substantive equality as it is used within equality law scholarship. Substantive equality frameworks are not egalitarian in the sense that they do not, strictly speaking, require the equalisation of opportunities or outcomes if that equalisation is the result of ‘levelling down’: where persons are treated equally as badly as others or where there is an equalisation of opportunities or outcomes by removing benefits from the advantaged.¹¹³ Often the phenomenon of levelling down is explicitly associated with formal equality and the prohibition of directly discriminatory treatment.¹¹⁴ However, it can be levied against *any* egalitarian principle, where an egalitarian principle is defined as one which seeks to equalise some ‘thing’, be it treatment, opportunities, or outcomes. As Peters notes, this amounts to the claim that ‘sometimes a person should be treated *wrongly* simply because another, identically situated person has been treated *wrongly*’.¹¹⁵

This being said, it is unlikely that equal treatment of the sort just described would be a desirable policy to pursue. It would be almost impossible for the State (let alone other duty bearers) to treat everyone the same, indeed that seems quite undesirable. As such, we can distinguish between equal treatment and non-discriminatory treatment even though equal treatment is often evoked when referencing non-discriminatory treatment. It is often assumed that equal treatment *means* non-discriminatory treatment.¹¹⁶ Rather, equal treatment demands far more than the prohibition of discrimination. It requires that ‘likes’ are afforded the same treatment regardless of what that treatment is. Non-discrimination, on the other hand, is only focused on prohibiting actions which treat someone less favourably on

¹¹³ To use a well-known example, in the US case of *Palmer v Thompson* (1970) 403 US 217, the city of Jackson, Mississippi had segregated its swimming pools on the basis of race. When challenged on the grounds of racial discrimination, the city simply closed all of its swimming pools. This clearly removed the racial discrimination, but it in no way advanced substantive equality even though there was an equalisation of both treatment and outcomes.

¹¹⁴ See; Fredman, *Discrimination Law* (n 10) 9–10; Hepple (n 34) 55; Simons (n 12) 696.

¹¹⁵ Peters, ‘Equality Revisited’ (n 12) 1212.

¹¹⁶ Indeed, Colling and Khaitan lament the ‘paradox’ of indirect discrimination because it amounts to saying that a policy which treats people equally nevertheless discriminates against them and thus treats them unequally. Collins and Khaitan (n 1) 4.

the basis of a protected characteristics.¹¹⁷ One principle *mandates* consistency in action, the other *prohibits* certain wrongful actions.

Of course, a principle of non-discrimination can also level down in the sense that the removal of discriminatory treatment can be done by either treating everyone more favourably or by treating everyone less favourably. However, to the extent that substantive equality is truly egalitarian, it is most definitely vulnerable to the critique of levelling down. Thus, levelling down is an issue faced by both non-discrimination and egalitarianism. The levelling down objection might indicate that equalisation of any kind is not independently valuable, and that the inclusion of additional equality-based values are desirable.¹¹⁸ These values can be deontic anti-discrimination values or telic affirmative action values without being strict egalitarian values. It seems that principles of substantive equality, as they are described by scholars and advocates, are not, strictly speaking, egalitarian principles because they do not wish to equalise anything. Rather, they are principles which seek to take into account the interests of groups *qua* groups and consequently focus on reducing or eliminating gaps which exist between certain social groups by advancing the relative position of disadvantaged groups such that they are brought into parity with advantaged groups. In this sense they are far more associated with prioritarianism than egalitarianism and so descriptions of substantive or formal equality are primarily rhetorical in nature.¹¹⁹ We don't actually want equalisation when we speak of non-discrimination or substantive equality; we use the language of equality because it carries political weight. Equality, when used in this context, is a proxy for other, more nuanced, philosophical commitments.

We might conclude from this, as Holmes does, that principles of non-discrimination (as well as principles of substantive equality) are not actually connected to equality in any meaningful sense.¹²⁰ However, this would be a mistake. While these principles are not egalitarian in nature, where egalitarianism is defined by the desire to equalise some 'thing', it is clear that these principles are nevertheless grounded within the value of equality.¹²¹ Specifically, both the individual right to be free from discrimination and the group interest to reduce relative group

¹¹⁷ See; Holmes (n 6).

¹¹⁸ See; *ibid* 175; Simons (n 12) 717; Fredman, *Human Rights Transformed* (n 92).

¹¹⁹ Holmes (n 6) 191–192. See also; Westen, 'The Empty Idea of Equality' (n 12).

¹²⁰ Holmes (n 6) 187–194.

¹²¹ And not necessarily liberty. See; Hellman, *When Is Discrimination Wrong?* (n 12); Hellman, 'Equality and Unconstitutional Discrimination' (n 2); Hellman, 'Two Concepts of Discrimination' (n 12). Cf Moreau, 'In Defense of a Liberty-Based Account of Discrimination' (n 12); Moreau, 'What Is Discrimination?' (n 12); Khaitan (n 1); Khaitan and Steel (n 5). See also; Fredman, *Discrimination Law* (n 10) 33–4. This analysis may ostensibly be favouring an equality-based account of discrimination and affirmative action over a liberty-based account. However, as Moreau correctly notes, these accounts can be analysed at two levels: one which explains *what* we are entitled to, the other explains *why* they are entitled to it. Moreau, 'In Defense of a Liberty-Based Account of Discrimination' (n 12) 74–5. While one could account for the wrong of discrimination and the wrong of group-based inequality by reference to liberty claims, at a foundational level, these liberty claims are claims to *equal* liberty and are informed by a commitment to respecting the moral equality of those who differ with respect to certain characteristics.

disadvantage are informed by a commitment to respecting the moral equality of all persons, even if they are distinct methods of doing so. Indeed, determinations of equal moral worth are necessary for the intelligibility of the wrongness of discrimination; it is only once we recognise that differences in skin colour, or sex, or sexual orientation do not impact upon the moral status of individuals that we can explain why treating someone less favourably because of such differences amounts to a legal and moral wrong. If these differences did in fact affect moral status, then treating someone less favourably than another because they were of a different race would be perfectly morally permissible. Equally, the desire to reduce advantage gaps between particular groups is only intelligible once we recognise that membership within either of these groups has no impact upon the moral status of those members. It is for this reason that we can account for the desirability to reduce advantage gaps between blacks and whites or men and women as well as for the undesirability of attempts to equalise any gaps which may exist between murderers and non-murderers.

In light of this, we can conclude that, while principles of non-discrimination and principles of affirmative action are not egalitarian, they are still very much grounded within equality considerations. Ultimately, these principles relate to what treatment or conditions we are entitled to as moral equals operating within a legal system. While the use of labels such as 'Formal Equality' or 'Substantive Equality' may be primarily rhetorical in practice, a conceptual distinction still exists between principles of non-discrimination and principles of affirmative action. At its core, this distinction is between individual rights and group interests; formal equality pertains to individual rights to be free from both direct and indirect discrimination and substantive equality pertains to group interests to reduce or eliminate advantage gaps between particular social groups.

V. Conclusion

Modern anti-discrimination provisions are often characterised as hybrid concepts; built upon multiple normative foundations and seeking to pursue divergent aims and goals. The reason for this has been a continued insistence that certain aspects of indirect discrimination provisions rely on group harm and seek to achieve some redistributive goal such as the reduction or elimination of advantage gaps between particular social groups. This group-based conception of harm leads scholars to conclude that indirect discrimination provisions are examples of substantive equality, manifesting a movement away from the formal equality which is associated with the prohibition of direct discrimination. As this paper has shown, these assumptions are false. Principles of non-discrimination are examples of formal equality and formal equality only.

A right to non-discrimination is an individual right to be free from wrongful forms of treatment. Respect for group-based interests in redistribution are contained

within the public sector equality duty and the voluntary affirmative action provisions within the Equality Act. In this sense we can say that U.K. equality law can broadly be divided into two strands; one concerned with individual rights,¹²² the other with group-based telic equality interests. For the most part, these two strands work harmoniously, complementing each other by ensuring that those who consistently face discrimination are not only free from such harmful treatment, but that their group-based interests in advancing equality of opportunities is taken into account by public bodies in their administrative decision making.¹²³ However, these two strands may sometimes conflict.¹²⁴ Public or private bodies are prohibited from discriminating, even where the goal is to advance group interests in substantive equality. As such, quota systems or automatic policies in tie-break situations are not permitted under U.K. law. Where individual rights conflict with group interests, the rights of the individual are preferred.¹²⁵

Importantly, it could be argued that all positive actions are discriminatory in that they indirectly discriminate even where there is no quota or automatic policy. However, seeing as indirect discrimination includes a justification test, it is only legally problematic where affirmative action amounts to direct discrimination. There is a fine line, but a line nonetheless, between incorporating the need to advance group interests into decision making processes and basing a decision on a protected characteristic. Determining precisely when that line has been crossed is difficult but possible. Ultimately, such determinations will seek to identify where a provision, criterion, or policy can be reasonably said to be 'based on' or 'grounded in' a protected characteristic and when we can reasonably conclude that someone has been treated less favourably 'because of' or 'on the basis of' a protected characteristic. These questions turn firstly on whether affirmative action policies are

¹²² Including rights to not only non-discrimination but also non-harassment, non-victimisation, and reasonable accommodation.

¹²³ In this sense, we can say that there are distinct equality principles which are all informed by a respect for the moral equality of persons, but which envisage different ways one might respect that equality. Deontic formal equality principles ensure that equals are not treated less favourably on the basis of certain personal characteristics while teleolic substantive equality principles seek to transform social structures and promote the interests of social groups. When taken together, these divergent principles can offer a comprehensive account of how one should be respected as a moral equal where they might seem incomplete in isolation.

¹²⁴ When such conflicts arise, they cannot be resolved by appeals to moral equality as we have here a clash of interpretations regarding how best to treat people with equal concern and respect, similar to when utilitarians and deontologists disagree over how best to respect the equality of persons. Rather, to resolve these conflicts, one must look to other philosophical commitments latent within these principles. As Fredman notes, this is a clash of values not logic. Fredman, *Discrimination Law* (n 10) 2.

¹²⁵ Notwithstanding the requirement of non-discrimination, there is significant room for U.K. law to expand on the current substantive equality provisions without infringing upon individual rights. The public sector equality duty currently only requires public bodies to have *due regard* to the need to advance equality of opportunities. There is no explicit duty to actually advance group interests. Similarly, many of the affirmative action policies which are permitted at law could be made mandatory without infringing upon rights to non-discrimination so long as those measures do not result in a protected characteristic becoming the determinative factor in decision making.

always discriminatory policies and secondly on whether the advancement of group interests is sufficient to justify a breach of individual rights to non-discrimination.

On the first point, there is precedent to suggest that, where a policy uses a protected characteristic as one of several factors in decision making, such policies are not 'based on' protected characteristics and will consequently not amount to a breach of anti-discrimination rights.¹²⁶ On the second point, a determination that affirmative action policies are discriminatory may not be sufficient to negate or override the desire to advance substantive equality. Equality law frameworks which attempt to incorporate both non-discrimination rights and affirmative action policies will always have to strike a balance between the rights of the individual and the interests of the group. The Equality Act has indicated that affirmative action policies which incorporate protected characteristics but do not base decisions solely on those characteristics are not directly discriminatory, even if they may be examples of justified indirect discrimination. As such, U.K. law holds that some but not all affirmative action policies are unlawful and that, where a policy is directly discriminatory, the rights of the individual to be free from discrimination takes primacy over group interests in the reduction or elimination of advantage gaps.

Conceptual analysis of discrimination provisions has consistently identified group interests within anti-discrimination rights, implying that these rights advance both formal and substantive equality. In light of the arguments set out above, we can conclude that rights to non-discrimination, including the right to be free from indirect discrimination, are individual rights, grounded within formal equality, and which do not require proof of group harm or seek to advance group interests in the way that substantive equality envisages. The conflict within the U.K. context is between rights to be free from direct discrimination and a few specific affirmative action policies, not between differing requirements of non-discrimination principles, or between anti-discrimination rights and affirmative action policies in general. This conflict has thus far vindicated deontic anti-discrimination rights over and above telic equality interests. Whether this is the best way to strike that balance is clearly a topic of contentious debate. Before such debates can be resolved however, we need to be clear about the precise location of this conflict and to achieve that, it is important to account for the nature of discrimination as an individual wrong which may sometimes harm groups but which does not directly advance telic equality interests beyond the removal of formal barriers.

¹²⁶ See; *Regents of the University of California v Bakke*, 438 US 265 (1978); *Grutter v Bollinger*, 539 US 306 (2003)