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Wrongs, Group Disadvantage and the Legitimacy of Indirect Discrimination Law

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I. INTRODUCTION

IS INDIRECT DISCRIMINATION liability akin to an affirmative action programme or more like the tort of negligence?[1] Is it a redistributive measure or a corrective one?[2] Is it best characterised as 'public law' or 'private law'? Does it seek to protect groups or individuals? In this chapter, we will argue that liability for indirect discrimination occupies a middle ground between these supposedly settled legal categories, combining features of both items in each dichotomy. It is this seemingly unstable and somewhat unfamiliar middle position that partially explains the persisting doubts expressed regarding the legitimacy of indirect discrimination liability.[3]

An act, policy or practice that—while facially neutral—nonetheless has a disproportionate impact on a group protected by discrimination law

* We thank the participants at the Oxford workshop on indirect discrimination law and theory, and several other seminars and workshops were this paper was discussed. Special thanks to David Edmonds, Barbara Havelkova, Deborah Hellman, Colin Campbell, Sophia Moreau, Denise Reaume, Samuel Bagenstos and Hugh Collins. Thanks also to Ira Chadha-Sridhar for excellent research support.

[1] On indirect discrimination as affirmative action, see Justice Scalia's concurring opinion in *Ricci v DeStefano* 557 US 557 (2009) 594 which stated that 'disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes'. See also Benjamin Eidelson, *Discrimination and Disrespect* (Oxford, Oxford University Press, 2015) 39. On indirect discrimination as akin to tort, see Denise Réaume, 'Harm and Fault in Discrimination Law' (2001) 2 *Theoretical Inquiries in Law* and Sophia Moreau, 'Discrimination as Negligence' (2013) 40 *Canadian Journal of Philosophy* 123.

[2] See John Gardner, 'Discrimination as Injustice' (1996) 16 *OJLS* 353.

[3] *Ricci* (n 1), *Home Office (UK Border Agency) v Essop* [2015] EWCA Civ 609, [2016] 3 All ER 137.

(such as blacks or women) is prima facie indirectly discriminatory.[4] Once a claimant establishes prima facie indirect discrimination, the law allows the defendant an opportunity to *justify* her conduct, typically by showing that it is a proportionate means to achieve a legitimate objective. If the defendant fails to do so, the law typically grants declaratory, recommendatory and (sometimes) injunctive relief, but damages are allowed in extremely rare cases of indirect discrimination.[5]

In a previous work, one of us had argued that discriminatory acts (including indirectly discriminatory acts) are 'doubly wrongful', inasmuch as they have a *systemic* impact of exacerbating relative group disadvantage and a *particular* impact of making those subject to it suffer because of their normatively irrelevant (or, in some cases, normatively valuable) group membership.[6] It was suggested that discrimination law's systemic concern of eliminating relative group disadvantage (of a substantial, abiding and pervasive kind) was its overall point and purpose—the very raison d'être of discrimination law. But, such an overall purpose is compatible with many different implementation designs that could achieve it. The design of choice for discrimination law—or, the manner in which discrimination law distributes its rights and duties to achieve its overall purpose—is a personal-wrongs based approach, where certain acts by specified duty-bearers trigger the legal liability.[7]

In a generous and sympathetic review of this earlier work, Sophia Moreau admits that it is indeed a feature of discrimination law that it pulls in these two opposite directions: that, on the one hand, it cares about 'bettering the situation of these underprivileged groups', but at the same time its duties are mediated by 'personal wrongs', ie 'a personal duty upon the discriminator, a duty toward the particular person who is, for instance at risk of not being hired, or not being promoted because of an apparently discriminatory policy.'[8] She complains, however, that 'Khaitan does not himself explain how the two accounts fit together … Why should we suppose that both are always necessary, and that neither is ever independently sufficient.'[9]

In this chapter, we will show that the *personal wrongs* approach to indirect discrimination liability in Anglo-American jurisprudence needs the

[4] *Griggs v Duke Power Co* 401 US 424 (1971). On indirect discrimination more generally, see T Khaitan, 'Indirect Discrimination' in K Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Abingdon, Routledge, 2017) 30.

[5] Equality Act 2010 s 124(4) and (5).

[6] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford, Oxford University Press, 2015) 168.

[7] ibid 10.

[8] Sophia Moreau, 'Discrimination Law and the Freedom to Live a Good Life' (2016) 35 *Law and Philosophy* 511, 525. See also Colm O'Cinneide, 'Justifying Discrimination Law' (2016) 36 *OJLS* 909, 916.

[9] Moreau, ibid.

systemic functional goal of reducing relative group disadvantage in order to be legitimate. It is possible that that systemic goal may be achievable through other tools too (progressive taxation or social insurance, for example), but we make no claims with regard to those alternative possibilities in this paper, except to point out that law's reliance on personal wrongs as a distributional strategy when allocating rights and liabilities is ubiquitous in other contexts too. In section II, we will identify the two distinct duties—one general and the other particular—that underpin indirect discrimination. In section III, we will provide a conceptual restatement of British indirect discrimination law and identify the general and particular dimensions of this liability. This section will outline how the particular duty in indirect discrimination diverges from traditional causation-demanding private law liability for the tort of negligence, and how these divergences are justified given social realities and the general/distributive dimension of indirect discrimination liability. Section IV will show that despite the indirect discrimination liability being technically strict, it is to some degree avoidable, and at any rate, not unfair.

II. INDIRECT DISCRIMINATION AS DOUBLY WRONGFUL

Suppose that Garfner, who is a Sagittarian, loses out on several job offers because facially neutral selection criteria somehow disadvantage him on account of his zodiac sign.[10] Plausibly, this is unjust. Garfner is disadvantaged in virtue of a normatively irrelevant characteristic. We can call the moral duty not to disadvantage others on the basis of normatively irrelevant characteristics a *particular* duty owed to specific persons such as Garfner, who are wronged by its breach.

Compare Garfner with Ifemelu, who is black. If Ifemelu is disadvantaged by (facially neutral) selection criteria in virtue of her being black, she will be the victim of a breach of the particular duty. However, the agent who breaches this particular duty may breach a further duty. If Ifemelu belongs to a group which is severely disadvantaged vis-à-vis other groups, then the agent may also have contributed to the disadvantage of the group. This, in

[10] There is some evidence that suggests that school admissions that determine the class a child will be admitted to based on the month s/he was born in disadvantages children towards the lower end of the age spectrum in their class. S Weale, 'Are Children Born in the Summer Really at a Big Disadvantage?' *Guardian* (London, 14 October 2016) www.theguardian.com/world/2016/oct/14/what-happened-to-allowing-children-born-in-summer-to-start-school-later. So, it is plausible, that a 31 August cut-off would have a disparate impact on children with the star sign Leo. We are assuming, for the purposes of this example, that age is a facially neutral criterion—most jurisdictions that treat age as a protected characteristic are likely to see this as a case of direct age discrimination.

turn, may contribute to making members of Ifemelu's group less free.[11] We can call breach of this further duty not to contribute to relative group disadvantage the *general* duty owed not to anyone in particular, but generally to the group in question, or even to one's society—a duty whose breach is *wrongful* even if it wrongs no particular person.

As this comparison shows, while breach of the particular duty may entail breach of the general duty, this is not always the case. The logical space between these duties arises because the particular duty is insensitive to the distributive position of the victim, while a breach of the general duty is wrongful precisely in virtue of its contribution to unjust distributions. In the rest of this chapter, we will show that this doubly-wrongful nature of indirect discrimination is essential to our understanding of the general and particular duties it enforces.

A. Particular and General Duties in British Indirect Discrimination Law

Indirect discrimination is listed as a 'Prohibited Conduct' under the UK Equality Act 2010 and is defined under section 19(2) of that Act:

> a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Read alongside judicial pronouncements on indirect discrimination liability, clause (a) can be taken to establish the requirement that the provision, criterion or practice ('act', for short) is facially neutral, ie it is applied to all persons regardless of their race, sex or other protected characteristic (hereinafter, 'grounds'). Implicit in this clause is the requirement that the act must not intentionally be based on any of these grounds. Any discriminatory animus will make a case one of *direct* discrimination.[12]

In the complicated section 19(2)(b), notice first that the word 'puts' establishes a causation requirement: the act in question *puts* (or would *put*) the relevant persons at a particular disadvantage.

[11] For a full account of how membership of relatively disadvantaged groups affects the freedom of its members, see Khaitan (n 6) chs 4, 5.

[12] Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2016] 1 CMLR 14, [75]–[76], [95].

Next, if the relevant ground is race, 'persons with whom B shares the characteristic' could be black people, white people, non-whites (section 9(4)), South Asians, Poles (section 9(1)(b)), or any other racial group (section 9(2)(b) Equality Act 2010). The 'disadvantage' suffered by the group must be comparative: 'when compared with persons with whom B does not share [the characteristic]'. The comparison required is between two groups defined by the same protected characteristic: whites and Asians, Jews and non-Jews, men and women, wheelchair users and non-users, and so on.

Finally, the provision requires proof of 'particular' disadvantage. The term is borrowed from EU law (Article 2(2)(b) Framework Directive 2000/78/EC), and was intended as a claimant-friendly change from the original language requiring *disproportionate* impact (used, for example, in section 1(1)(b)(i) Race Relations Act 1976). As the Supreme Court has recognised:

> [T]he new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse … It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be.[13]

Whether framed as 'disproportionate impact' or comparative 'particular disadvantage', the requirement is essentially one of correlation. When those disadvantaged by an act *disproportionately* or *particularly* belong to a protected group (say women), clause (b) has been satisfied. It is also worth pointing out that if everyone disadvantaged by an act belongs to one protected group (women) and everyone advantaged or not affected by the same act belongs to another protected group defined by the same ground (here, men), British law treats the act as directly discriminatory, irrespective of whether there was any intention involved.[14] However, if all members of the disadvantaged group suffer, but so do some members of its cognate group, the discrimination is still *in*direct, albeit 'a form of indirect discrimination which comes as close as it can to direct discrimination'.[15] The law, therefore, recognises that indirect discrimination liability admits to degrees of severity—the greater the correspondence between the two sets of groups (those disadvantaged and advantaged by the act and those belonging to a protected group and its corresponding comparator group), the more disapproving is the law of the conduct in question.

[13] *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] 3 All ER 1287 [14].

[14] *Bull and Bull v Hall and Preddy* [2013] UKSC 73, [2013] 1 WLR 3741 [19]: 'I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification.'

[15] *Rodriguez v Minister of Housing* [2009] UKPC 52; [2010] UKHRR 144 [19].

To summarise, prima facie indirect discrimination in British law occurs when the following two requirements are satisfied:

— a causal connection between the defendant's facially neutral act and some adversity suffered by a set of persons;
— a significant correlation between membership of this set of adversely affected persons and membership of a *group* protected by discrimination law.

Our claim in this section is that prima facie indirect discrimination, in archetypal—but not necessarily all—cases, amounts to the breach of the general duty and the particular duty. To recap, the general duty is characterised as the duty to refrain from causing adversity to relatively disadvantaged (protected) groups.[16] The particular duty, we will claim, is the duty to refrain from causing disadvantage to a person because of her membership of that group, where such membership is morally permitted.

Before we clarify these duties, let us consider an example in order to understand the relationship between correlation and causation in this area of law. We choose as our exemplar case one where there is clear evidence of a significant correlation between group membership and the disadvantage, but no direct causal explanation.[17] We exclude cases where there exists a direct causal explanation—eg between a turban ban's impact on Sikhs or an inflexible working hours policy's impact on women—because they are theoretically easier to defend. This correlative—but not self-evidently causal—relationship is key to understanding the two duties. Imagine a facially neutral test, passing which is a prerequisite for a job, one that is not designed or administered with any discriminatory animus. In the first scenario, no particular racial group disproportionately fails the test, that is, the chances of one's passing the test do not correlate with her race in this case. In the second scenario, black candidates are only 25 per cent as likely as their white counterparts to pass the test, and this difference between the two groups is statistically significant. Technically, an outcome is 'significant' if it is improbable that it occurred by chance. Imagine also a black candidate, Ifemelu, who fails the test in both scenarios. We will look into when and why Ifemelu ought to be able to bring a claim when discussing the particular duty. For now, it suffices to notice that Ifemelu (or anyone else, for that matter) will have an indirect discrimination claim only in the second scenario.

[16] Most of the discussion in this paper is in relation to protected groups that suffer abiding, pervasive and substantial disadvantage in their societies. We take these to include women, racial minorities, gays and lesbians, transpersons, and disabled persons, among others. Whether, and when, socially dominant groups should be protected requires a separate argument: one of us has provided one such argument at Khaitan (n 6) 171–80.

[17] This closely tracks the facts of *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343. See also, T Khaitan, 'Indirect Discrimination Law: Causation, Explanation and Coat-Tailers' (2016) 132 *LQR* 35.

Our first scenario is what statisticians call the 'null hypothesis'—all else being equal, this is what one would expect. In our second scenario, the null hypothesis is disproved. In other words, the finding of a statistically significant difference between the two racial groups makes it improbable that the difference is down to chance or luck. The term 'improbable' is used advisedly. A finding of statistical 'significance', absent an explanation, cannot rule out chance, it can only make it highly improbable. This should not bother lawyers, who are used to working with proof on balance of probabilities. A significant correlation therefore points to *some* non-random cause of the disparity between the groups.

It is true that the law no longer requires a strict proof of statistical significance. But legal truths cannot be (and ought not to be) as fine-grained as scientific truths. Meeting scientific standards of truth imposes significant costs, both on adjudicatory institutions and on the parties (especially on the party that bears the burden of proof). To keep these costs manageable, law has to make a judgment about the probability and moral tolerability of false positives vis-à-vis false negatives. In criminal law, for example, false positives are anathema, and rightly so. It is morally much worse to convict someone who is innocent that to acquit someone who is guilty. This is why the burden of proof is typically on the prosecution and the standard of proof is very high.

In discrimination law, litigation takes place under conditions of significant resource and information asymmetry in favour of the defendant. The legal shift from the requirement of 'disproportionality' to that of 'particular disadvantage' is in light of the recognition of this asymmetry. The law no longer requires the claimant to prove statistical significance of the differential impact. But the claimant still needs to make a plausible prima facie case that the difference is unlikely to be random in order to establish *particular disadvantage*. It remains open to the defendant to rebut this prima facie case by showing that the disparity is indeed down to chance. The divergence from the exemplar case is down to how litigation operates in the real world. But this divergence does not take away the explanatory force of that case. Even the rule of thumb inquiry that the law now permits is still asking the same question: is the difference between the groups likely to be down to chance or not? This departure becomes more palatable because the typical claimant against indirect discrimination is expected to be a member of a relatively disadvantaged group. Thus, the systemic purpose of discrimination law supports the legal requirements for showing the breach of the particular duty.

Once chance is ruled out and the existence of *some* non-random cause of the disparity is established as a legal fact, discrimination law is best understood as *presuming* two causal claims:

(i) the defendant's act *caused* a particular disadvantage to blacks as a group (i.e. the general duty was breached), and

(ii) the claimant suffered some adversity *because of* her membership of her racial group (i.e. the particular duty was breached).[18]

Note that these are background presumptions that *we* are attributing to law, in order to put it in its best light. The doctrinal requirements for proving indirect discrimination that the law insists upon have already been outlined earlier in this section. The legal duty is unitary—do not discriminate indirectly without justification. The general and particular duties that we identify are two—related—moral duties that underpin the single legal duty. The law relies on the breach of the general duty to assume the breach of the particular duty as well. In other words, so long as the claimant is a typical member of the group, the second causal claim is entailed in the first. If the first claim is established, at least some members of the group suffered adversity because of their membership of the relevant group: the only remaining question is whether the claimant is one such member.

B. The General Duty

Before we make the entailment of (ii) in (i) clearer, a few further comments on the legal presumption in (i) are merited. We have seen that law's move from statistical proof to the rule-of-thumb standard of 'particular disadvantage' was justifiable because of the civil nature of the liability in discrimination law, and because of the information asymmetry that usually afflicts these cases. Such inferential reasoning, after all, is not unknown to tort law.[19] But there are other reasons too, which further support this legal presumption.

One of them is that the presumptions are rebuttable by the information-rich defendant.[20] It remains open to the defendant to show that despite the extant significant correlation, there is no 'particular *disadvantage*' caused to the group. In the example we are working with, assume that the defendant in question is an affirmative action employer who especially encourages black candidates to apply for the concerned job. If this is the case, it is plausible that more under-qualified black candidates end up applying

[18] These presumptions are made explicit in the Equality Act 2010 s 136(2): 'If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.' On shifting of the burden of proof to the defendant, see also *Hoogendijk v Netherlands (Admissibility)* (App no 58641/00) (2005) 40 EHRR SE22.

[19] See Sandy Steel, *Proof of Causation in Tort Law* (Cambridge, Cambridge University Press, 2015) ch 2.

[20] Equality Act 2010 s 138(4) recognises this information asymmetry by allowing a court to draw adverse inferences from a defendant's refusal to answer a question, or from his or her providing an evasive or equivocal answer.

for the job than under-qualified white candidates. This is likely to result in the correlation that we noticed. If the defendant can demonstrate any such benign explanation for the correlation, there is no *disadvantage* caused to the group. Then, the presumption of 'particular disadvantage' to the group will be rebutted.

The defendant can also challenge the finding of '*particular* disadvantage' by denying its particularity, despite the existence of significant correlation. She can do so, for example, in cases where the statistical outcomes are subject to the Simpson's Paradox. This Paradox was observed in graduate admissions at the University of California, Berkeley in 1973. Although the aggregate data did show a statistically significant bias against women candidates, closer inspection of the data revealed that women were much more likely to apply to departments which were more difficult to get into (for persons of either sex).[21] In such cases, the defendant can effectively show that by moving the analysis to a more specific level, the correlation demonstrating particular disadvantage disappears. There may be other similar avenues available to the defendant to challenge the prima facie case of particular disadvantage.

As soon as the defendant rebuts the first causal claim, the second—entailed—causal presumption is automatically rebutted. If the defendant fails to offer any such rebuttal, it seems fair to draw the most plausible conclusion from the correlation established by the claimant: that the defendant's act caused particular disadvantage to the group in question. This is because we already have very good reasons to rule out chance. If there is a benign explanation for the correlation, the defendant is best placed to offer it. If no such exculpatory explanation is forthcoming from the defendant, the weight of evidence implicates her. In such circumstances, to demand that the claimant prove not merely the correlation (and the consequent causation), but also explain the cause,[22] is asking for too much.

Furthermore, even after all this is established, the defendant still has the opportunity to *justify* her act under section 19(2)(d) by showing that it is a proportionate means of achieving a legitimate objective. Even if an employer's act is found to amount to unintentional indirect discrimination, declaration and recommendation are the preferred remedies under section 124 of the Equality Act, with damages permitted only exceptionally. The recommendation is likely to ask the defendant to change her discriminatory and unjustified policy so that it becomes non-discriminatory, or, if discriminatory, is a proportionate response to her legitimate objectives. The multiple legal presumptions against the defendant seem a lot less worrying when judged alongside a remarkably light-touch remedial scheme.

[21] P Bickel, E Hammel and J O'Connell, 'Sex Bias in Graduate Admissions: Data from Berkeley' (1975) 187 *Science* 398.

[22] As the Court of Appeal did in *Essop* CA (n 3) (later overruled by the Supreme Court).

We can now examine how the first causal claim relates to the general duty. What has been established in law is that the defendant's act caused a particular disadvantage to the relevant group qua group. In the second scenario, therefore, Ifemelu's group—blacks—was adversely affected *as a group*. The essential feature of the general duty breached by indirectly discriminatory conduct is that it adversely affects a group that is protected by discrimination law, qua its being a group and is wrongful for that reason. This claim assumes a direct correspondence between adverse effect on a sub-set of a group and on the group as a whole. The extent of adversity on the group because of an act of indirect discrimination may be trivial, or significant. An employer with a small workforce is likely to make only a minuscule impact on women as a group through indirect sex discrimination. But an indirectly discriminatory law of general application (say, the criminalisation of sodomy) could have pervasive and serious impact on the entire group (in this case, gay men).[23] We take the assumption that there is some knock-on effect on the group as a whole to hold in most, if not all, cases. This will suffice in order to justify the *general* claim that indirect discrimination breaches the general duty.

C. The Particular Duty

Now we can move to the particular duty entailed in the general duty. A discriminator [X] *wrongs* a particular person subject to indirect discrimination [Y] because X makes Y suffer some adversity because of her (morally permitted) membership of a protected group.[24] This is exactly what happens when the second causal claim—the claimant suffered adversity *because of* her membership of her group—is satisfied. The phrase 'because of' one's race etc is ubiquitous in discrimination law, and has given rise to much controversy.[25] Most of this controversy arises as 'these phrases can refer either to a) the reasons that guide the acts of agents or to b) factors that do not guide agents but do help explain why the disadvantageous outcomes of

[23] Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27 *OJLS* 537–53.

[24] Whether a person is allowed to bring a claim of indirect discrimination is related to, but not determined by, whether they suffered a relational wrong. There may be good institutional reasons for extending standing to those who did not suffer such wrong, or restricting it to a sub-group of those thus wronged, or allowing a regulator to bring a claim. See *CHEZ* (n 12). Indeed, the fact that most jurisdictions allow regulators and even third parties to bring antidiscrimination claims is a nod to our claim that a simple corrective justice framework that does not acknowledge its distributive impulses cannot fully explain the law.

[25] John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 *OJLS* 167; John Finnis, 'Directly Discriminatory Decisions: A Missed Opportunity' (2010) 126 *LQR* 491.

certain acts and policies fall disproportionately on certain salient groups.'[26] To be sure, the law does not require proof of a causal connection between the adversity suffered and the protected characteristic as a doctrinal matter: as the UK Supreme Court clarified in *Essop*, doctrinally the claimant only needs to prove a causal connection between the adversity suffered and the policy/criterion/practice in question.[27] The point we are making is a conceptual one—even when the law does not impose it as a causal requirement, it is best understood as assuming some such background connection.[28]

This second causal claim is entailed in the first for a simple reason. If the defendant caused some adversity to a group qua group, then it follows (short of any separate reason to believe otherwise)[29] that affected members of that group suffered because of their group membership. Indirect discrimination breaches a particular duty, inasmuch as it entails a *wrong* to these particular members of the group. In our first scenario, although Ifemelu herself failed the test, her group (blacks) had not suffered particular disadvantage as a group. For this reason, her failure could not be connected with her group membership. In the second scenario, however, Ifemelu fails as a member of a particularly disadvantaged group. Unless there is any reason to believe that she is an atypical member of the group, her failure can normally be attributed to her group membership. *In most cases*, therefore, we can infer that Ifemelu suffered because of her race. This causal presumption in the particular duty, it should be obvious, hangs on the prior breach of the general duty.

One might object to this claim by suggesting that Ifemelu suffers not *because of* her race, but because she is poor/less well-educated/less experienced/not mentored or coached for the test etc.[30] On the face of it, this objection seems plausible. On closer analysis, however, it fails. Consider first a different set of cases: say, a Sikh man is fired because he wears a turban, or a black woman is not hired because of her cornrows. In such cases, we would readily admit that they suffered because of their religion/race. This will be the case even if the employer would happily retain the Sikh man if he removed his turban, or hire the black woman if she straightened her hair. The immediate cause is proximate enough to the protected characteristic to

[26] A Altman, 'Discrimination' (Stanford Encyclopaedia of Philosophy, 2016) available at https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=discrimination. See further K Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford, Oxford University Press, 2014) 36–40.

[27] *Essop* UKSC (n 17).

[28] ibid 26.

[29] As the Supreme Court held in *Essop* UKSC (n 17) 32 'It [is] permissible for an employer to show that an employee has not suffered harm as a result of the [policy] in question.'

[30] We are grateful to Debbie Hellman for this objection, and to Denise Reaume for framing the response. See also Benjamin Eidelson, *Discrimination and Disrespect* (Oxford, Oxford University Press, 2015) 53f.

help us see the connection clearly. Our hesitation in cases where such a clear, single factorial, connection is absent is akin to the 'remoteness problem' that tort lawyers are familiar with: the underlying assumption behind the objection must be that the connection between poverty and race is somehow not close enough to establish a chain of causation, in the way that hair style and race might be. There is no conceptual distinction—other than remoteness—between the types of features (dress, hair-type, religious observance) that are readily admitted as racial and those (such as poverty, poor education, lack of influential connections and other social capital) that are not. It is not, for example, the case that one category is 'natural' and the other 'cultural' or 'chosen'. The impoverishing impact of salient characteristics such as race and caste is well-documented. We are not claiming that race is the only cause in this case; Ifemelu's poverty and poorer education may also have caused her failure, and are indeed likely to be a more proximate explanation of her failure than her race. That does not mean that race cannot be located lower down the chain of causes that led to her failure. Given the disproportionate rate at which black candidates failed the test, it is in fact very likely that race contributed to their failure in most cases. What is more, it is not even obvious that the connection between one's poverty and one's race is necessarily more remote than between a person's dress or hair-style and race. In fact, some scholars argue that the (material, social, political and educational) disadvantage faced by a group is part of the *requirement* a personal characteristic needs to satisfy in order to qualify for the protection of discrimination law.[31]

Another objection might be that the facts at hand are not sufficient to get to the second presumption that the claimant suffered some adversity because of her membership of her racial group.[32] All we know about the scenario under consideration is that black candidates are only 25 per cent as likely as their white counterparts to pass the test, that this difference between the two groups is statistically significant, and that Ifemelu is a black applicant who failed the test. The objection is that Ifemelu might have failed the test anyway, even in this second scenario. This would especially be the case if the pass rate (for everyone) is quite low: say, the ratio between the applicants to available places is rather large. At least in such cases, it may be argued, one cannot say that Ifemelu suffered *because of* her race.

The objection is a good one, but is based on the (mistaken) presumption that the only relevant adversity that Ifemelu suffers is actually failing the test.[33] Let us try to get inside Ifemelu's mind to see if she suffers in the

[31] Khaitan (n 6) ch 2; Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5 *Philosophy and Public Affairs* 107–77.

[32] We are grateful to David Edmonds for pressing this objection.

[33] Here, we diverge from the law, which acknowledges the difference between potential and actual disadvantage, but treats them—for pragmatic doctrinal reasons—as ultimately the same disadvantage, *Essop* UKSC (n 17).

case at hand because of her race. To avoid any suggestion that this thought experiment imports subjective feelings into indirect discrimination analysis, let us ask not what Ifemelu is *likely* to think or *actually* thinks, but what would be *reasonable* for her to think. Let us also go back in time when our reasonable Ifemelu is considering whether to apply for the job in question. As a reasonable person who does not much fancy wasting her time, she is likely to apply only if she considers her chances of getting the job to be at least plausible. If she knows that as a black person, the chances of her getting the job are 25 per cent lower than if she were white, this is sufficient for her to reasonably think that the likelihood of her getting the job depends, to some extent, upon her race. It is true that the plausibility of her getting this job will also depend, in addition to her race, on the overall success rate. Even so, a lower overall success rate in fact makes it *more* likely that Ifemelu, as a black applicant, won't get the job. If the job had a high success rate, Ifemelu's application may be plausible despite the statistical significance of race. However, the same significance in a job with a very low success rate is likely to lead Ifemelu to conclude that even making the application would be a waste of her time. This type of reasoning also explains that a lower success rate for vulnerable groups has a chilling effect on applications from its members, thereby frustrating the systemic objective of discrimination law to reduce relative group disadvantage. At any rate, whether, for that reason, Ifemelu chooses not to make the application at all, or whether, having made the application, she fails, she would have suffered (in part) because of her race.[34]

On this view Ifemelu suffers because of her race not in virtue, necessarily, of her not getting the job, but rather because her chances of obtaining the job have been significantly reduced. Although the absolute level of her chance of the job was already low, it is made even less likely by the policy in question. The disadvantage that Ifemelu suffers here can be conceptualised in at least two ways. Following Moreau's earlier work, we might conceive of it as an interference with Ifemelu's deliberative freedom.[35] Since Ifemelu's race affects her probability of success, it thereby becomes rationally salient in her deliberations. This analysis plausibly identifies a disadvantage in cases where the victim is aware of the effect her race has on her chances of obtaining the job. We are less persuaded of the force of the analysis where the victim is unaware. This is not because we believe one cannot suffer disadvantage without being aware of it. It is rather because the focus upon the victim's hypothetical deliberations, or the deliberative perspective of a rational or reasonable victim, in cases where the victim is not aware of the

[34] In fact, on this account, she suffers even if she eventually gets the job. That the law does not give her standing to bring a claim in such cases is a distinct policy choice.

[35] Sophia Moreau, 'What is Discrimination?' (2010) 38 *Philosophy and Public Affairs* 143–79. Moreau presents a different, if compatible, explanation in her contribution to this volume—our criticism is directed only at the earlier work cited here.

probabilities ex ante, seems somewhat to deflect from a more basic way in which the victim suffers disadvantage in these cases. Disadvantage is suffered in virtue of the fact that one of the victim's opportunities becomes rationally less attractive and so less valuable to her. Since 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. It seems clear that one's autonomy can be diminished without one's knowledge: if the conference organisers lock us in the room, without our knowledge, we have been deprived of our freedom to leave, even if this remains unknown to us.[36] Even 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.

We have therefore seen that, for most claimants, breach of the particular duty is entailed in the general one. Furthermore, several features of the law's regulation of indirect discrimination are in fact explained and justified because of the relationship between the two (moral) duties.

III. CULPABILITY IN INDIRECT DISCRIMINATION

In this part of the chapter we shift attention to another feature of indirect discrimination liability, namely, that indirect discrimination liability is strict. We argue that this strict liability in respect of indirect discrimination can be justified and that part of the justification lies in the doubly wrongful nature of indirect discrimination: the fact that particular acts of indirect discrimination typically involve the violation not only of the particular duty, but also the general duty, and more generally, the aim of reducing relative group disadvantage. The argument proceeds in three stages. First, we establish that indirect discrimination liability is indeed strict. Second, we address, and aim to refute, the objection that, if indirect discrimination liability is strict, it cannot be justified by the moral wrongs we claimed to underlie particular acts of indirect discrimination since moral wrongdoing requires culpability. Third, we set out positive justifications for strict indirect discrimination liability.

A. Strict Liability for Indirect Discrimination

In UK law, the indirect discrimination duty (section 19) is framed without an explicit culpability requirement: it requires no (potentially) blameworthy

[36] There may yet be a still more basic sense in which Ifemelu is harmed. It is at least arguable that merely being at risk of disadvantage is itself a form of disadvantage: see Sandy Steel, *Proof of Causation in Tort Law* (Cambridge, Cambridge University Press, 2015) ch 6. See, on the link between risk and autonomy, John Oberdiek, *Imposing Risk* (Oxford, Oxford University Press, 2017).

mental state such as intention or recklessness, nor is there an explicit negligence requirement.

The indirect discrimination duty appears, then, to be a *strict* duty. A strict duty is a duty whose breach is not contingent upon the prohibited conduct being done with fault. That is: it is liability which attaches to an agent, A, for X-ing regardless of any steps A took or could have taken to avoid X-ing and regardless of whether A knew or had reason to know whether A would X.[37]

It might be questioned whether section 19(2)(d) has the effect of introducing culpability considerations into the question of whether a person breaches their indirect discrimination duty or into the question of whether a person can justify or excuse their breach of that duty. If A could avoid being liable by demonstrating that A 'reasonably believed' that the means adopted were proportionate to achieving a legitimate aim, then it would follow that the absence of culpability would act as a valid excusatory condition. But demonstrating a reasonable belief in the proportionality of the means is clearly insufficient for it to be the case that A can show it to be a proportionate means. Showing that it *is* proportionate is obviously different from showing that one had a *reasonable belief* that it was proportionate.[38]

An objection to this view might be that the defendant's failure to *justify* a prima facie act of indirect discrimination makes her act culpable in the relevant sense. It is true that liability for indirect discrimination does not arise unless the defendant has failed to show that the act in question was a proportionate means of achieving a legitimate aim (or some such means-end justification). The absence of such justification may indeed point to the fact that the defendant might have been negligent or reckless. This is not, however, necessarily the case. The justification test is an objective means-end inquiry, and does not seek to smoke out any subjective mental state of the defendant. It is quite possible for a prima facie act of indirect discrimination to be unjustified and yet remain non-culpable.

B. Strict Liability and Non-culpable Wrongdoing

The valid point thus remains that the indirect discrimination duty can be breached *without any* fault. This may seem to challenge our view that the indirect discrimination duty is justified by the moral wrongs involved in particular acts of indirect discrimination: is it intelligible to say that a person

[37] This definition is drawn from J Gardner, 'Some Rule-of-Law Anxieties about Strict Liability in Private Law' in L Austin and D Klimchuk (eds), *Private Law and the Rule of Law* (Oxford, Oxford University Press, 2014).

[38] Although some earlier decisions did appear to incorporate a reasonable belief limitation here, see: S Fredman, *Discrimination Law* 2nd edn (Oxford, Oxford University Press, 2011) 193–96.

is a wrongdoer though they were not at fault in committing the wrong? In this part of the paper, we argue that plausible accounts of at least some moral wrongs do not, on analysis, embed a fault requirement. It does not, of course, follow that the law ought always to enforce these strict moral duties directly, without the interposition of a fault requirement.

It will be useful to set out here three different ways in which it might be claimed that considerations of culpability figure in the moral wrong of indirect discrimination.

(i) *Culpability as constituent of the wrong*. On this view, culpability is an essential part of the primary moral indirect discrimination *duty*; there could be no wrong of indirect discrimination without culpable conduct. Compare the moral wrong of negligence. On one view of this wrong, or of one species of it, it specifies a duty to have a certain attitude of care towards the interests of others. On that understanding, the wrongness of negligence cannot be specified independently of culpability. This view seeks to cast indirect discrimination liability as a classic private law wrong like the tort of negligence.

(ii) *Culpability as necessary for responsibility for a wrong*. On this view, while culpability may not figure in the existence of a primary moral duty to not commit indirect discrimination, it is essential in order to hold someone morally *responsible* for its breach. It may be, for example, that the insane are capable of breaching serious moral duties (not to kill, for example) and yet are not morally responsible for those breaches.

(iii) *Absence of culpability as an excusatory condition*. On this view, culpability does not figure in the primary moral indirect discrimination duty, but rather is relevant to whether the wrong was *excused*. A person can be morally responsible for a wrong despite being excused for it. For instance, a person might be excused for acting in the face of extreme provocation (in response, say, to domestic violence) and yet be morally responsible for their wrongdoing.[39]

i. Culpability as Constituent of the Wrong

Suppose A promises to have goods delivered to B by next Monday morning. A's supplier, C, who has always been reliable in the past, notifies A on Sunday evening that C will not be able to deliver the goods to B.

[39] A further role for culpability is: *Culpability as an aggravating feature of the wrong*. On this view, there can be non-culpable wrongs of indirect discrimination, but culpability enhances the blameworthiness of the wrong, perhaps rendering the wrongdoer liable to different normative consequences to non-culpable indirect-discrimination-feasors. This is less important to our present discussion which focuses on the legitimacy of liability *without* fault.

By breaching A's promise, A wrongs B. Plausibly A's wrong is non-culpable.[40] The idea that we can be under duties simply (not) to produce certain outcomes is morally intelligible, as Gardner explains, in virtue of the fact that our primary reasons are reasons *to succeed*. We have reasons to try not to run people over because we have reasons not to run people over. If we can have reasons to succeed in producing certain outcomes, why not *obligations* to succeed in producing certain outcomes?[41] The idea that one could have a moral duty to succeed in not disadvantaging others due to normatively irrelevant characteristics thus seems, in principle, morally intelligible.

It is also the case that, despite first appearances, prominent accounts of the moral wrong of indirect discrimination are compatible with its being a strict liability wrong. Consider, in this regard, what we can call the 'reasons-based' account of the indirect discrimination wrong, which endorses the first of the two interpretations of the 'because of' requirement that Altman identified: as indicating 'the reasons that guide the acts of agents'.[42] One version of this view states that wrongful indirect discrimination consists (partly) in an agent's causing relative disadvantage by *acting on* an illegitimate reason—a reason which bears some relation to a prohibited ground, such as race. Suppose that a university decides to accept applicants only from local regions because they sincerely believe this reduces the complexity of their admissions procedures. Suppose further that this has a disparate impact on racial minorities. Holmes, followed here by Fishkin, claims that, if this is a wrongful act of discrimination, it can be explained as such by conceiving of the policy (P) as a 'proxy' criterion for race: adopting P-like policies is likely to have a disparate impact on racial minorities.[43] Acting on reasons which bear a proxy relation to race-based reasons partakes of the illegitimacy of acting on the race-based reasons.

Whatever one thinks of the plausibility of this manoeuvre, it very significantly expands the concept of 'acting on a prohibited/illegitimate reason'. In particular, it seems that one can 'act on an illegitimate reason' on this view even where the ultimate reason why the proxy reason is illegitimate plays no causal role in the explanation of why one took the action. So even if the university would have adopted the same policy had the racial composition of the surrounding area been entirely different, it still seems to be the case, on this view, that it has acted on a prohibited reason here. Further, this account

[40] See further S Shiffrin, 'Enhancing Moral Relationships through Strict Liability' (2016) 66 *University of Toronto Law Journal* 353.

[41] See, in detail, J Gardner, 'Obligations and Outcomes in the Law of Torts' in P Cane and J Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré* (Oxford, Hart Publishing, 2001).

[42] Altman (n 26).

[43] E Holmes, 'Anti-discrimination Rights without Equality' (2005) 68 *Modern Law Review* 175, 184; J Fishkin, *Bottlenecks: A New Theory of Equality of Opportunity* (Oxford, Oxford University Press, 2014) 247.

requires no awareness of the relationship the proxy reason bears to the illegitimate reason—in short it requires no subjective or constructive knowledge as to why the proxy reason is indeed a proxy. As such, this divorces the reasons-account from any notion of culpability since it requires no awareness (or objective ability to be aware) of the wrong-making features of the act (namely, its connection to the effects on racial minorities in this example). Even expressive accounts which locate the wrongness of (some) acts of indirect discrimination in the, say, demeaning message communicated by acts of discrimination can accept that what is communicated by an action in a certain community could be wholly unknown to the communicator, who is reasonably unaware of the relevant linguistic or social conventions.

Moreau's earlier analysis of the wrong of discrimination might seem to imply a culpability requirement.[44] On her view, discrimination is wrongful in so far as it denies to a person their entitlement to certain deliberative freedoms, in particular freedoms to decide about aspects of one's life without pressure from one's normatively irrelevant characteristics. She describes the wrong as 'tort-like' and, more specifically, as 'akin to the tort of negligence'.[45] She denies that our entitlement is to suffer no adverse effects because of a normatively irrelevant characteristic. Instead, it is rather to suffer no adverse effects because of such characteristics *to the extent this can be reasonably demanded against others* who cause such effects:

> Adverse effect discrimination is not an act or practice that has the effect of excluding someone on the basis of a prohibited ground, but rather an act that excludes someone in circumstances where there is some reasonable way of accommodating this person short of undue hardship.[46]

Here, then, like the move to read culpability in the absence of justification, the primary indirect discrimination duty is one of reasonable accommodation. When an employer argues that its policy is justified on grounds of business necessity, it does not justify or excuse a wrong, but rather disputes its existence entirely.[47] While Moreau establishes wrongfulness, nothing here imports a requirement of culpability. An act is unreasonable (and, therefore, wrongful) on this view if it does not instantiate the right balance between the (legitimate) interests of the discriminator and the deliberative freedoms

[44] Moreau (n 35). For an earlier analysis along similar lines, but without the focus on deliberative freedoms in particular: D Reaume, 'Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination' (2001) 2 *Theoretical Inquiries in Law* 349.

[45] Moreau (n 1) 130.

[46] ibid, 134.

[47] Sometimes, though, Moreau seems to speak of the interference with (certain) deliberative freedoms as itself an infringement of a right without the need any balancing exercise, which suggests the balancing is best understood as a defence to the wrong, rather than a constituent element: see ibid 139, cf 140.

of the victim. But whether the economic interests of the business owner are more important than the deliberative freedoms of the victim is an objective question which holds independently of anyone's attitudes or knowledge. It is not surprising that Moreau is conscious of the need to allay concerns that her account involves strict liability. It does.[48]

In sum, then, since it seems unlikely that we should believe (i) in relation to indirect discrimination, (i) gives us no reason to conclude that the law departs from a plausible moral conception of the wrong of indirect discrimination.

ii. Culpability as Necessary for Responsibility for a Wrong

What about (ii) (ie culpability as necessary for *responsibility* for a wrong)? As a general matter, moral responsibility, at least in one important sense, can diverge from culpability. We can be morally responsible for our wrongful acts even though it would be inappropriate to *blame* us (and even though the act may itself not be *blameworthy*). Consider cases of agents who commit justified wrongs. If, in order to save the lives of passengers, the captain of a ship anchors the ship to a dock owned by another person without that person's consent during a storm, damaging the dock, the captain wrongs the dock owner, and is responsible for the wrong, but she is in no other way culpable.[49] Claim (ii) therefore seems generally untrue. It is also untrue as an explanation of indirect discrimination liability, as the law does not require proof of culpability as a precondition for making the defendant responsible for her actions.

iii. Absence of Culpability as an Excusatory Condition

Most, perhaps all, excuses involve denials that the (wrongful) act in question was blameworthy.[50] More specifically, excuses concede *responsibility* for the wrong, but deny that the wrong reflects badly, in some sense, upon the agent.[51] So when a person points to the fact that they committed a

[48] Even if, as Moreau suggests at one point, the causation requirement in indirect discrimination will involve considerations of foreseeability, this only goes to show that some degree of avoidability might be built into the indirect discrimination-wrong. But this need not imply that the agent was culpable. See the next section for the divergence between avoidability and culpability.

[49] cf *Vincent v Lake Erie Transportation Co* 109 Minn 456 (1910).

[50] Though some believe that blameworthiness is defined in terms of absence of excuse rather than the other way around. But see A Simester, 'A Disintegrated Theory of Culpability' in D Baker and J Horder (eds), *The Sanctity of Life and the Criminal Law* (Cambridge, Cambridge University Press, 2013) 183.

[51] See J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford, Oxford University Press, 2007) ch 6.

wrong because another threatened them with violence, they do not, or need not, deny that the wrong was their doing and that they can be called to account for it, but they do deny that they should be blamed for it. Similarly, if the next time I type 't' on the screen, due to some bizarre chain of causation an earthquake is caused, it would be inappropriate to *blame* me for this—I had no reason whatsoever to believe that this consequence would result. However, that one is excused only blocks an inference from *wrongdoing* to *blameworthiness*. It does not follow that one is relieved of any moral obligations arising out of one's wrong. In other words, only certain kinds of responses to one's wrongdoing are ruled out by the absence of culpability. For instance, it seems plausible that one could still be under moral obligations of repair. If this is so, as the law, at any rate, holds, in the case of the justified wrongdoer in tort law (the example of the sea captain), *a fortiori* in the case of the excused wrongdoer. Consequently, since the legal responses to the breaches of the indirect discrimination duty are not necessarily responses which express blame or which trace their rational source to blaming, the law need not be at variance with morality here. This would only be so if the legal responses to indirect discrimination necessarily communicated blame in circumstances where they have a genuine excuse. Although we do not deal with the question of justification, it may well be that the absence of culpability is a necessary condition for justifying indirect discrimination in law.[52]

C. Justifying Liability in the Absence of Culpability

Even if there can be moral responsibility without culpability, and even if the absence of culpability does not entail the absence of normative consequences for one's wrongdoing, strict legal liability for indirect discrimination still calls for justification.

This is for two reasons. First, there is a concern of fairness that agents should not be subject to legal liabilities for wrongs which they cannot avoid committing at the time of acting. If liability is imposed, as it is for indirect discrimination, without a requirement that it be reasonably foreseeable at the time of A's acting (at the time of breach of the duty) that the 'provision, criterion, or practice' puts (or would put) persons sharing B's characteristic at a disadvantage, then they are subject to liabilities which they may have no reason to believe will arise when they acted. Second, the ideal of the rule of law seems also to demand that people be able to assure themselves at the

[52] In fact, Canadian law has an explicit 'good faith' requirement as part of the justification exercise.

time of acting that their acts will not lead to legal liability.[53] In short, the ability to avoid the commission of a wrong seems to be required both by considerations of fairness and the ideal of the rule of law.

These are important concerns to which we offer two immediate responses. First, it might be said that a person *can* avoid breaching an indirect discrimination duty by avoiding entering into one of the legally recognised roles/statuses (such as that of an employer, a landlord and so on) to which the indirect discrimination duty attaches. So long as these roles are clearly identified and relatively limited in number, there is a degree of avoidability. It is true that liability will attach even in cases where there is no foreseeability of the likelihood that the practice in question will produce a disparate impact. But there is general knowledge that one of the abstract risks of setting criteria for the allocation of valuable resources is that the criteria one selects could produce a disparate impact. Although this avoidability comes at immense personal costs (entailed in avoiding otherwise legitimate occupations), and cannot seriously be recommended to anyone, this is still at considerable remove from holding a person responsible for the destruction of a plane which, by some miraculous causal path, happens when they pick up a lettuce in the supermarket. The risk of disparate impact is a known risk which attaches to the setting of criteria for the allocation of resources. The imposition of this risk will seem less unfair if we note that the duty-bearers in discrimination law (employers, landlords, retailers, service-providers) tend to be gatekeepers of valuable opportunities in our societies, and also usually the stronger party in the equation (in relation to their employees, tenants, consumers).[54]

Second, the degree to which avoidability considerations should be taken into account either within the legal definition of the indirect discrimination duty or as a matter of a defence to the breach of that duty is partly a function of the kind of consequences which attach to the breach. Obviously, if persons who breached the indirect discrimination duty were subject to *punishment*, there would be a need to provide a much greater degree of avoidability than the current law allows, and thus a much greater role for considerations of culpability within the definition of the wrong or defences to the wrong. But, as we have already observed, the current law does not even provide compensation as of right for unjustified breaches. An employer who innocently breaches their indirect discrimination duty is likely only to be subject to a declaration of breach and a recommendation to alter their policy so as to conform to their initial primary duty.[55]

[53] See J Gardner, 'Some Rule-of-Law Anxieties about Strict Liability in Private Law' in L Austin and D Klimchuk (eds), *Private Law and the Rule of Law* (Oxford, Oxford University Press, 2014).

[54] See Khaitan (n 6) ch 7 on duty bearers.

[55] See Equality Act 2010 s 124(5).

Apart from the possibility of avoidability and the fact that the degree of avoidability required is a function of the severity of the consequences imposed for the breach of a duty, there are three further reasons for believing that the imposition of strict liability for the breach of the indirect discrimination duty can be justified to persons subject to the duty, all things considered.

First, alongside the indirect discrimination duty, the law imposes other duties which help to mollify the strict liability nature of the indirect discrimination duty. Section 149(1) of the Equality Act 2010 imposes an obligation on public authorities to 'have due regard to the need to', inter alia, 'eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act'.[56] If an authority is to have 'due regard' to this need, this may require, or at least encourage, the authority to gather information about the potential effects of common policies or practices upon protected groups. This helps to establish a body of information about the likely effects of certain practices which others, including private individuals subject to the indirect discrimination duty, could potentially draw upon in making their own decisions. By improving the state of knowledge about the effects of certain policies on protected groups, this reduces the possibility that persons subject to the indirect discrimination duty will be caught off guard by its strict liability effect. At the very least, it seems inconsistent with obligation to 'have due regard' not to investigate further incipient signs of disparate impact.[57] Even if diligent information gathering prior to the adoption of a practice, criterion or policy fails to highlight potential disparate impact, reliable data should be available *after* such policy has been implemented. Furthermore, assuming that any claimant is likely to seek internal remedies in the first instance before going to the courts, *legal* liability for future breaches is almost always avoidable. Here, then, the broader goal of indirect discrimination law of reducing group disadvantage—expressed here in the section 149 duty—helps to justify the imposition of a strict liability in respect of the indirect discrimination duty.

Second, the strictness of the indirect discrimination duty provides incentives for duty-bearers to invest in information gathering to avoid liability. If the duty were limited to cases of reasonably foreseeable effects, duty-bearers would have less incentives to invest in information since they could avoid liability by showing that the information was not available to the

[56] Equality Act 2010 s 149(1)(a).

[57] cf *The Queen on the Application of Bapio Action Ltd v Royal College of General Practitioners, General Medical Council* [2014] EWHC 1416: 'Section 149 does not permit a person exercising public functions to identify the need to eliminate discrimination in one of the public functions it exercises and then do nothing about it', [31] (Mittering J). See further S Fredman, 'Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty' (2014) 43 *Industrial Law Journal* 349.

reasonable person. Of course, given the minimal remedial regime, the extra incentive provided is likely to be a relatively weak one. A finding of unjustified discrimination does have stigmatising implications for the defendant, and is not inconsequential. Even so, the law keeps the big guns locked up when it comes to deciding upon the appropriate remedy for indirect discrimination law, in part to mitigate the strictness of the duty. In fact, as our societies become more educated about indirect discrimination, a more robust remedial approach may well be legitimate at least in cases where the discrimination was reasonably foreseeable.

Third, defining the duty in a culpability-free manner, while taking considerations of culpability into account at the remedial stage, allows the law to provide clear guidance to duty-bearers, while also accommodating considerations of fairness to the latter.[58] Incorporating, for instance, a reasonableness standard into the definition of the primary duty would cloud the clarity of the law's message. It might be objected here that strict liability nature of the duty could cloud the law's message in a different way. It might lead to the impression that indirect discrimination is wrongful only in a technical, purely legal, sense.[59] This concern seems unjustified for two reasons. First, by associating culpable breaches of the indirect discrimination duty with potential (albeit unlikely) compensatory liability, the law still sends the message that breach of the indirect discrimination duty is a serious matter. Second, the strict liability nature of the wrong might actually signify how serious the interest in non-discrimination is to the law. In tort law, our most fundamental interests in bodily integrity and liberty are often protected by strict liability wrongs (eg in trespass to the person and false imprisonment). The fact that non-culpable infringements of these interests are *wrongful* is a reflection of the law's commitment to stringent protection of these interests, and especially to its systemic goal of eliminating abiding, pervasive and substantial relative group disadvantage.

In sum, then, the absence of culpability in the definition of the primary duty is defensible. Culpability is not required in order for the law to map onto the moral duty of refraining from committing indirect discrimination (i). Moral responsibility for a wrong does not entail culpability either (ii). To the extent that considerations of avoidability are relevant, there are opportunities to avoid breach of the strict indirect discrimination duty and, in any event, the level of avoidability required for responsibility varies with

[58] cf M Dan Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in the Criminal Law' (1983) 97 *Harvard Law Review* 625.

[59] cf P Shin, 'Liability for Unconscious Discrimination: A Thought-experiment in the Theory of Employment Discrimination Law' (NELLCO Legal Scholarship Repository) available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1070&context=suffolk_fp, 42 on unconscious bias, suggesting that recognition of liability for unconscious bias discrimination might have a negative effect on the law's message or perceptions thereof.

the harshness of the consequences attached to breach. Absence of culpability is not formally recognised as an excusatory condition (iii), but this is one way of understanding the general absence of significant normative consequences for the innocent breach. It may be noted that we have addressed unfairness concerns largely within the parameters of corrective justice. In doing so, we do not intend to deny the possibility that the distributive justice goals of indirect discrimination liability may, independently, offer sufficient justification for the imposition of this liability. In other words, an indirect discrimination regime that takes a more robust approach to damages may, nonetheless, be fair.

IV. CONCLUSION: WHY INDIRECT DISCRIMINATION LAW NEEDS THE SYSTEMIC ANALYSIS

In the preceding sections, we have seen that although the liability for indirect discrimination is comparable to a personal wrong, like the tort of negligence, there are important differences. Unlike negligence, where the law insists upon the proof of causation in every particular case, indirect discrimination presupposes such causation to exist in most cases and does not burden the claimant with establishing that her disadvantage was *because of* her group membership. Even when it comes to establishing that the group itself has suffered particular disadvantage, the law has relaxed the demanding statistical standards and settled for rule-of-thumb evidence as sufficient. Furthermore, unlike negligence law with a strict proximity requirement, the proximity of the claimant's race etc as at least a contributory cause is usually presumed. Even when the claimant suffers nominal harm, it is understood that the adverse effect on the group might still be significant: discrimination law therefore has no *de minimis* threshold. Further still, the tort of negligence can be established only after the claimant has proved that the defendant's conduct would, from the perspective of a reasonable person, foreseeably lead to the type of injury she has suffered. In indirect discrimination liability, although in many cases the disparate impact on the claimant's group would be foreseeable, this is not always the case, and is not something the claimant must establish in order to succeed. Indirect discrimination liability is strict and arises even when the defendant is not culpable. Finally, while the typical remedy in tort law is damages, this is not the case with indirect discrimination liability.

These differences suggest that indirect discrimination law employs a rule-of-thumb approach for determining liability, bearing in mind societal realities, especially the usually different status of the parties (including their differential access to relevant information), but tempers this rough justice approach with weak remedies. However, this rough justice approach in individual cases cannot be legitimate unless it was in service of some broader purpose, which we identify as the need to reduce and eliminate substantial, abiding and pervasive advantage gaps between groups defined by normatively irrelevant personal characteristics. The approach to causation provides a clear illustration. The fact that a statistically significant correlation triggers a rebuttable presumption that the practice is causally connected to group disadvantage goes beyond the causal presumptions normally applied by the common law of torts. Statistically significant correlation itself is not usually enough to establish general causation—that the agent in question *could* cause the harmful outcome in question. If indirect discrimination were simply concerned with correcting, or marking, the breach of the particular duty, it would be difficult to understand why it would not also follow the general approach in tort law. However, this becomes intelligible once indirect discrimination law's broader aim of reducing relative group disadvantage is borne in mind.

The bottomline is this: a false negative in indirect discrimination law (failing to detect wrongful indirect discrimination where it exists) is not simply a failure to correct an interpersonal wrong, it is potentially a failure to address a causal source of relative group disadvantage. In short, there can usually be presumed to be more at stake. It is the systemic purpose of discrimination law, which is ultimately geared towards securing to us certain key freedoms, that motivates the law's strong aversion to false negatives, even as it uses a personal-wrongs based approach to seek its systemic goal of eliminating relative group disadvantage.

This response was motivated by Moreau's challenge that the corrective justice dimension of discrimination law could bear all the justificatory burden of indirect discrimination liability. We have therefore shown how this cannot be, and that the distributive justice dimension is necessary. One might be tempted to provide the opposite critique—that distributive justice can do all the heavy lifting. They will also be wrong. Distributive justice cannot explain why the liability is interpersonal, attaches only to certain persons who are somehow implicated in the disparate impact their actions (are taken to) cause. A purely distributive justice approach would also lose out on the importance that we attach to fixing *moral responsibility* for acts of indirect discrimination by particular persons. Indirect discrimination liability draws upon both corrective and distributive justice requirements, and mimics aspects of private as well as public law. This, in itself, is no bad thing.