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DIRECT AND INDIRECT DISCRIMINATION: A DEFENSE OF THE DISPARATE IMPACT MODEL

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The status of indirect discrimination is ambiguous in the current literature. This paper addresses two contemporary and related debates. First, for some, indirect discrimination is not truly a distinct kind of discrimination, but it is simply a legal construct designed to address distributive inequalities between groups. Second, even if one accepts that indirect discrimination is a distinct type of discrimination, the connection between the two kinds of discrimination, direct and indirect, is debated. For some, they are distinct act-types, while for others, indirect discrimination should be conceived as a side effect of prior cases of direct discrimination. In this paper, I argue that indirect discrimination is a distinct act-type that can take place without being connected to prior instances of direct discrimination.

1. Introduction

Contemporary liberal legal systems typically recognize that some public and private bodies have a duty not to discriminate. Further, they typically distinguish between instances of direct and indirect discrimination and adopt anti-discrimination laws tackling both kinds. Roughly, direct discrimination deals with cases of unequal treatment, while indirect discrimination deals with inequality of results. More precisely, cases of direct discrimination identify cases where disadvantageous treatment is based on the belief that a person possesses some trait P, while in cases of indirect discrimination, a facially neutral action discriminates on the basis of some trait Q, but the fact that a person possesses trait P is causally linked to that person being treated in a disadvantageous manner under Q.[1] As such, direct and indirect discrimination are sometimes seen as two distinct act-types aiming to grasp two different ways in which one group can be disadvantaged relative to another.

However, the status of indirect discrimination is debated in the current literature. For some, indirect discrimination is not truly a distinct type of discrimination, but simply a legal construct designed to address existing distributive injustices between relevant social groups.[2] Further, even if one accepts that indirect discrimination captures a distinct act-type, the connection between the two kinds of discrimination is debated. For some, they are independent of one another, while for others, indirect discrimination is secondary in the sense that it is a side effect of prior cases of direct discrimination.[3]

This article addresses both debates and argues that indirect discrimination is a distinct act-type and that it can take place even if it is not connected to prior cases of directly discriminatory treatment. Following a discussion of how both concepts are usually distinguished, I will examine Benjamin Eidelson's criticism of indirect discrimination. He maintains that this concept is dubious because indirect discrimination is in fact used to either identify cases reducible to direct discrimination or capture cases that are not discriminatory *per se*. In response, I argue that we do have strong intuitions supporting the identification of some kinds of indirect disadvantageous treatment as discriminatory even if they are not reducible to instances of direct discrimination.

Second, I argue that both types of discrimination are independent of one another and need not be ordered temporally. That is, I posit that indirect discrimination can exist by itself and need not be a side effect of prior instances of direct discrimination. Following a critical analysis of Lippert-Rasmussen's conception of indirect discrimination, which holds that indirect discrimination is a "side effect" of direct discrimination, I argue that the relation between them does not have to be unilateral and that indirect discrimination can come first. This paper therefore aims to clarify how one should understand the status of indirect discrimination and its relation to its direct counterpart.

2. Indirect Discrimination: A Concept Defined by Contrast

2.1 Indirect Discrimination—The Purpose Model

Indirect discrimination is best understood in contrast with direct discrimination. Roughly, the latter occurs when a given measure, policy, or action explicitly distinguishes between two classes of people.[4] This kind of treatment is *prima facie* wrong when this distinction is connected to disadvantageous treatment on proscribed grounds. An action is directly discriminatory if one treats a person A worse than a person B on the basis of a trait that A has, or is believed to have, but B doesn't (or is believed not to have), and this differential treatment should be prohibited if this very trait should not be taken as a basis for differential treatment.[5] In contrast, indirect discrimination aims to capture cases where a certain group suffers from a disadvantage that is brought about by facially neutral actions,

policies, or measures that do not explicitly distinguish between two groups on proscribed grounds.[6] As Oran Doyle points out, there are at least two models of indirect discrimination: the purpose model and the disparate impact model.[7]

The purpose model covers cases where a facially neutral measure is adopted with a discriminatory intent. Here, a measure is indirectly discriminatory in that it is facially neutral, but the underlying goal of the measure is to discriminate against a certain protected group.[8] For instance, one can think of the use of literacy tests during the Jim Crow era to prevent African Americans from voting. A facially neutral measure, literacy, was used to support a discriminatory, racist aim. Though this model can be useful in practice to identify cases of direct discrimination where a discriminatory intent cannot be demonstrated,[9] it is doubtful that this approach can give an account of indirect discrimination that highlights its particularities. Indeed, these instances appear to be cases of direct discrimination where the discriminator has a discriminatory intent. As such, the purpose model can be seen as a subspecies of direct discrimination that concentrates on the underlying intent or biases of the discriminators. A contemporary variant of this understanding of discrimination put forth by Benjamin Eidelson is discussed below, but it is useful to consider first the second model of indirect discrimination to highlight its (for now, potential) distinctive characteristics.

2.2 Intentions, Disadvantages, and Groups

The disparate impact model identifies cases where "a facially neutral measure . . . impacts more harshly on one group than on another."[10] Following this model, there is neither intent to disadvantage a given group nor any obvious bias against the group that is linked to the measure.[11] In contrast with direct discrimination where there is an explicit or intentional distinction between groups, indirect discrimination is simply characterized by a disproportionate impact on a given group as a consequence of a neutral action. Consequently, while direct discrimination is concerned with differential treatment creating a certain disadvantage, indirect discrimination deals with inequality of results.[12] This kind of discrimination shifts our attention from the intentions and the objectionable mental states that discriminators might have, to focus on the burden imposed by a certain action, policy, or measure on a given group.[13]

It is important to specify what kinds of disadvantages are relevant. Three main points are worth highlighting here. First, the disadvantages suffered can be of different kinds. Courts have typically recognized that disadvantages may be political (evidenced by the numerical strength of a group, the quantity and quality of actual representation, and the nature and degree of attention paid by institutions to the group), sociocultural (usually indicated by the prevalence of prejudice against or stereotypical assumptions about members of a certain group), material (broadly understood to include economic indicators, access to education and employment, freedom from private and public violence, health, and so on[14]), or, more often, a

complex combination of these different facets of disadvantage.[15] This notion of disadvantage is shared by both direct and indirect discrimination.

Second, not just any disadvantage is sufficient to say that an individual or a group is discriminated against, either directly or indirectly. To take an example presented by Lippert-Rasmussen, it can be important to adopt a definition of discrimination that does not allow for any local disadvantages of otherwise advantaged groups to count as instances of discrimination. He takes the example of outlawing foxhunting, which would create a local disadvantage for the British upper class.[16] For him, stating that this is a kind of discrimination is counterintuitive because one has to take into account how this group is globally advantaged relative to others and, I would add, because one also has to take into account how this disadvantage can be balanced against other valuable goods, like the protection of ecosystems or of animals. What this example shows is that this scenario is not wrongful because it does not unjustifiably disadvantage the British upper class. The foxhunting ban brings about a local disadvantage for a given group, but it could be said that it is not a wrongful disadvantage because it is neither morally problematic nor unjustifiable. Some instances of group disadvantage are not wrongful and may even be beneficial, all things considered. To take another example, affirmative action programs can arguably be considered as justified instances of local disadvantages for some because they aim to correct past disadvantages to ensure that all groups are equally well-off in a given society.[17]

These considerations should ensure that not just any disadvantage counts as discriminatory, which would amount to erasing the particular stringency attached to this concept. What is the wrong-making feature of discrimination is in and of itself a highly debated issue that cannot be considered in full in the context of this paper.[18] However, a promising way to approach the question of the wrong-making feature of indirect discrimination is to focus on the justifiability of group disadvantages.[19] Following this argument, the presence of a particular group disadvantage might be understood as a strong or a weak equalisandum claim. The distinction between strong and weak equalisandum claims, introduced by G. A. Cohen,[20] is useful here to argue that the presence of a group disadvantage is not necessarily sufficient to state that a given norm or rule is unjust, because the disadvantages it entails should be balanced against other rights or socially valuable goods.

For Cohen, equalisandum claims specify what "people should be rendered equal in"; while strong claims are uncompromising and state that "people should be as equal as possible in the dimension it specifies," weak equalisandum claims allow for more nuanced claims.[21] As Cohen writes, "[a] qualified or *weak equalisandum* claim says that [people] should be as equal as possible in some dimension but subject to whatever limitations need to be imposed in deference to other values."[22] Some disadvantages could be considered legitimate if they are justified by some other important value. For instance, a global ban on foxhunting could be legitimate

even if it disadvantages some groups like the British upper class because the aim to protect endangered populations of foxes is comparatively more valuable, all things considered. The disadvantage imposed on the upper class could be sufficiently minimal compared to the benefits of the measure to render it not, in fact, discriminatory (or rather, not discriminatory in the relevant sense since it is not an unjustified instance of discrimination). As such, the two kinds of discrimination aim to capture unjustifiable disadvantages that are best construed as strong equalisandum claims or weak equalisandum claims that are compelling, all things considered. Accordingly, disadvantages affecting the fundamental democratic or human rights of individuals or groups appear unjustified in all cases, and a facially neutral measure affecting individuals in these respects would be discriminatory and give rise to a strong equalisandum claim.

However, other instances of discrimination might be open to more debate depending on the disadvantages they create and depending on what other rights they affect. As Hugh Collins argues, this ensues from the fundamental importance of considering the rights of all implicated parties. As he writes,

> the right of the claimant such as an employee, tenant or student is to be treated equally or with equal respect by private actors with regard to important aspects of well-being that are often articulated in the form of social and economic rights such as the rights to work, to education, to shelter and to subsistence. The opposing right of the employer, the landlord, the educational institution or the shopkeeper or other kind of defendant is a general liberty, which may include freedom of contract, and more particularly the freedom to conduct a business. . . . [The] function of a justification defence is to balance these rights against each other.[23]

Of course, some fundamental rights are more resistant to trade-offs than others, but some will require a balancing act between the rights of the claimants and the rights of the defendants, depending on the rights that are affected and the extent to which they are affected. Consequently, if a neutral employment practice has a negative impact on one group in society, but this practice is unavoidable and necessary to the employer's purpose, and its purpose is itself legitimate, then it might be a misfortune, but it should not count as an instance of indirect discrimination. Consequently, not just any kind of disadvantage should be considered discriminatory, either directly or indirectly, but only the subset corresponding to unjustifiable disadvantages imposed on a given group.

Thirdly, when considering indirect discrimination, one inevitably needs to use a group-based approach when measuring the disadvantage suffered. On the contrary, it is usually possible to compare individual cases when confronted with instances of direct discrimination (for example, how a racialized person was treated in a particular case in comparison with a non-racialized person). When considering that the notion of indirect discrimination deals with questions of differential impact, one needs to focus on groups more generally.[24] The question of what

groups should be included in anti-discrimination laws is itself highly debated. This point will be clarified in section 4 below, but here, it is helpful to mention that most legal conceptions of discrimination list some groups that should be protected against discriminatory treatment.[25]

Different strategies can be adopted to try to trace the line between relevant and irrelevant groups. Three main approaches exist in the contemporary literature. First, the sociohistorical approach argues that the relevant groups are those who were historically disadvantaged and were denied equal status, subjugated, or exploited in a given society.[26] While this approach may be intuitively appealing, it struggles with novel cases of discrimination. It cannot consider an act discriminatory until after the effects of discriminatory treatment lead to significant disadvantages.[27] Consequently, it tends to be considered insufficiently sensitive to distinguish between the relevant and irrelevant groups.

Another influential approach is the immutable grounds approach. The basic rationale here is that individuals should not be disadvantaged for characteristics that cannot be changed or that are unchosen, such as race or sex. However, this approach also has important limits. Notably, it tends to be biased toward *corporeal* grounds at the expense of *non-corporeal* or *social* grounds (like religious status, linguistic identity, marital status, etc.), which are arguably more easily changeable or more easily hidden from sight.[28] To curb these problems, the proponents of this approach usually argue that they aim to capture *effective* immutability. A trait is considered effectively immutable when "changing the trait would impose significant personal costs" (where the costs are not only economic but also psychological and social).[29] This understanding of effective immutability is thus often taken to also encompass fundamental individual choices—choices that are central or tend to be central to a person's identity.[30] Consequently, this approach can be understood broadly to include corporeal and significant social grounds like religious identity, marital status, or sexual orientation.

Nonetheless, this approach is sometimes criticized because it is overly broad. Lippert-Rasmussen notably argues that the relevant groups are only socially salient groups. For him, "a group is socially salient if *perceived* membership of it is important to the structure of social interactions across a wide range of social contexts."[31] He takes discrimination law to apply only to groups that are already salient in a given social structure and in (at least) some social contexts.[32] He argues that this conception of the relevant group for the concept of discrimination is warranted since, first, it reflects the fact that "almost all groups on whose behalf the charge of being discriminated against is voiced are socially salient groups" (taking as examples women, elderly people, people with disabilities, gays and lesbians, and ethnic and racial minorities)[33] and because it can explain the difference between group discrimination and kinds of idiosyncratic differential treatment.

To support this latter point, Lippert-Rasmussen imagines a case where a single employer is more inclined to hire applicants with green rather than brown or blue

eyes. Though this characteristic is unchosen, he argues that we might be reluctant to consider this practice as a kind of discrimination precisely because eye color is not a socially salient characteristic though it is an unchosen corporeal characteristic.[34] This idiosyncratic differential treatment, though it might be morally wrong, is unlikely to seriously harm the disadvantaged party. Consequently, given that indirect discrimination is concerned with group disadvantage, Lippert-Rasmussen contends that it is warranted to narrow our focus to socially salient groups. For the time being, I will remain agnostic on which approach is preferable until section 4, where I argue that this approach also fails to capture some cases that should count as instances of discrimination. I will propose to adopt a fourth approach, notably defended by Tarunabh Khaitan, that focuses on the relative disadvantages between cognate groups.

To recapitulate: So far, we have three components that define indirect discrimination. From the discussion above, following the disparate impact model, we obtain the following (tentative) definition: an act is indirectly discriminatory against a certain group, P, if (1) it reflects no bias on the part of the discriminator against members of P on account of them being members of P or any intent to discriminate against members of P (*the no-intention condition*);[35] (2) it unjustifiably disadvantages one group relative to another relevant contrasting group (*the relative disadvantage condition*);[36] and (3) P can be considered as a group in the relevant sense (*the group condition*). All three are necessary to identify cases of indirect discrimination.

3. Is Indirect Discrimination Secondary?

3.1 Indirect Discrimination as a Parasitic Concept

Some could be tempted to add a fourth condition specifying the particular contexts in which indirectly discriminatory actions can arise. More specifically, one could be tempted to clarify the possible connections between direct and indirect discrimination to detail how the two concepts interact with one another. An influential way to understand the connections between the two is to say that indirect discrimination is dependent or parasitic on instances of direct discrimination. This position is forcefully defended by Lippert-Rasmussen. He maintains that while it is conceivable to have direct discrimination without indirect discrimination, the inverse is not.[37] Indirect discrimination is, for him, temporally secondary because it is caused by prior cases of direct discrimination.[38] In Tarunabh Khaitan's words, following this understanding,

> direct discrimination is the original sin, one that creates the systemic patterns that differentially allocate social, economic, and political power between social groups. These patterns *then* manifest themselves in further acts of direct and indirect discrimination. Indirect discrimination is 'secondary', in this sense, because it comes about *because of*, and *after*, widespread acts of direct discrimination.[39]

To support this fourth condition, Lippert-Rasmussen imagines a society where direct discrimination does not exist and has never existed and where there are nonetheless some inequalities between socially salient groups. This, for Lippert-Rasmussen, poses an important challenge. He asks: "How [can] we identify those that are being subjected to indirect discrimination and those that are worse off than other groups for some other reason?"[40] For him, a possible answer to this challenge is to say that any inequality between the relevant groups (i.e., socially salient groups in his sense) is an instance of indirect discrimination, while other inequalities between individuals or non-socially salient groups would simply not count as instances of discrimination. However, Lippert-Rasmussen responds to this position by arguing that we can imagine a situation where the inequality between two comparable socially salient groups came about in a completely random way. He proposes a lottery scenario where one discriminates against all persons who are randomly assigned even numbers, and, coincidentally, most of the people assigned even numbers are women. Assuming that this society is untainted by sex discrimination, for Lippert-Rasmussen, this case would presumably not count as an instance of indirect discrimination.[41] Otherwise, one would have to say that any disadvantage between two socially salient groups is indirectly discriminatory, which, for Lippert-Rasmussen, amounts to dissolving the special stringency attached to discrimination; for him, to say that something is the result of indirect discrimination should be, all things being equal, more objectionable than something being the result of a random procedure.[42]

Therefore, he adds a fourth condition to the three identified above: "It must be the case that (i) there has been, or presently exists, direct discrimination against the group being subjected to indirect discrimination; and (ii) that the indirect discrimination is suitably related to these instances of direct discrimination."[43] As such, not just any act qualifies as indirect discrimination, but only acts that "perpetuate disadvantages resulting from past or present direct discrimination."[44] Consequently, indirect discrimination is "parasitic" on direct discrimination in the sense that it is possible to have instances of direct discrimination without instances of indirect discrimination, but no instances of indirect discrimination without direct discrimination. This position, however, struggles with some cases where it does seem reasonable to argue that indirect discrimination comes first, as will be discussed below.

Before considering counterarguments, it is important to mention that even if indirect discrimination is parasitic on instances of direct discrimination, they can remain two distinct act-types. Indirect discrimination can remain sufficiently different from direct discrimination to be considered a distinct kind of discrimination. Indeed, Lippert-Rasmussen maintains that these two kinds of discrimination are conceptually distinct.[45] Their distinction boils down to a different understanding of the way the disadvantageous treatment is connected to a person having a given property P (or to the belief that the person has that property). For Lippert-Rasmussen,

direct discrimination is characterized by the following causal link: "(i) X treats Y worse than Z by ϕ-ing because (X believes that) Y has P and (X believes that) Z does not have P if, and only if, the thought that Y, and not Z, has P is part of X's direct, motivating reason for ϕ-ing."[46] In contrast, indirect discrimination occurs if and only if "(ii) the fact that Y, and not Z, has P causally explains X's ϕ-ing and this in turn is causally explained by the fact that people with P are often treated worse than those without P in the sense given in (i)."[47]

Therefore, for Lippert-Rasmussen, the two kinds of discrimination should be conceptually exclusive: a particular case of discrimination is necessarily either directly discriminatory against a given socially salient group or indirectly discriminatory.[48] In that sense, indirect discrimination truly aims to identify a distinctive kind of discriminatory acts where

> rules, institutions, and practices . . . have different impacts on different groups not only because, or perhaps not at all because, people following these rules, manning these institutions, or engaging in these practices are biased against members of the adversely affected groups or otherwise treat people from different socially salient groups differently.[49]

In short, following Lippert-Rasmussen's account, indirect discrimination is conceptually distinct from direct discrimination since it relies on a distinct explanatory mechanism, yet it is dependent on direct discrimination since direct discrimination remains the "original sin" allowing for later instances of indirect discrimination.

3.2 Is Indirect Discrimination a Distinct Kind of Discrimination?

Different challenges can be directed toward this last point according to which indirect discrimination is a distinct act-type. Further, one could also question the claim that indirect discrimination cannot happen independently of direct discrimination, a question considered in the next section. But first, it is enlightening to consider whether the "disparate impact" model presented up to now, with its four characteristics, is compelling. A forceful counterargument is presented by Benjamin Eidelson. His conception of indirect discrimination is in line with the "purpose model" mentioned above. He argues that cases of indirect discrimination are in fact either reducible to instances of direct discrimination or are distributive injustices that are not instances of discrimination *per se*.[50] He defines discrimination according to two conditions. For him, there is discriminatory treatment when

(1) X treats Y less favorably in respect of W than X treats some actual or counterfactual other, Z, in respect of W; and

(2) a difference in how X regards Y P-wise and how X regards or would regard Z P-wise figures in the explanation of this differential treatment.[51]

This definition entails that indirect discrimination as understood under the disparate impact model is not a valid category. Eidelson's definition entails

that discrimination cannot happen if an agent is unbiased or has no intent to discriminate.[52]

To develop his argument against indirect discrimination, Eidelson maintains that disparate impact discrimination corresponds either to instances of what he calls "second-order direct discrimination" or to instances of distributive injustices that are not cases of discrimination *per se*.[53] First, second-order discrimination identifies cases where someone intentionally discriminates against P by using another trait Q or another measure that has a special connection to P, or cases where a rule-setting procedure is stacked against a certain group from the start.[54]

To illustrate these latter instances of second-order discrimination, Eidelson takes the example of Anatole France's satyr when he praised "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."[55] The point here is that while the laws treat poor and rich alike, and are thus facially neutral, the disproportionate burden that they impose on the poor is powerful evidence regarding how they came about, and suggests discrimination based on wealth in the dimension of how people's interests are valued in the rule-setting process. The laws treat the poor in a disadvantageous manner, and this disadvantageous treatment is based, for Eidelson, on how the legislators regard poverty. That is, the legislators were presumably biased against the poor, which led them to disregard their interests and promote the interests of the rich in the rule-setting procedures.

For Eidelson, these kinds of cases are reducible to cases of direct discrimination; there is nothing novel here that justifies resorting to a new kind of discrimination.[56] Second-order discrimination is reducible to an instance of direct discrimination since it differs simply from (first-order) direct discrimination "in the dimension of how the rules for some further determination are set," where the aim is to disadvantage some people or where some people are treated worse in the rule-setting process, thus explaining how the rule came to be biased against them.[57] As such, direct discriminatory treatment based on "how X regards Y P-wise" remains the conceptual spring explaining how the disadvantage came about.

However, this criticism is not fatal to the approach defended so far. This does not seem contrary to an account of discrimination, like the one presented above, which recognizes that direct discrimination entails a reference to the intent, the biases, or the beliefs held by a given discriminator. Following this account, it seems that one could agree that these kinds of discrimination are reducible to instances of direct discrimination.[58] Yet, as mentioned, Eidelson also argues that other instances of "indirect discrimination" that do not fall under cases of second-order discrimination are best understood as cases of distributive injustices that are not cases of discrimination *per se*. He argues that disparate impact accounts identify a moral fault that may be similar to actual cases of discrimination but, for him, this similarity is not sufficient to say that it is an instance of discrimination, given that his second criterion is not satisfied.[59]

On this second point, Eidelson argues that disparate impact accounts identify rules that disproportionately burden members of some group in a context where the rules "fail to satisfy a special standard of justification."[60] For him, this kind of indirect discrimination is, in fact, more concerned with questions of distributive injustices between groups that are unfair and unjustifiable rather than questions of discrimination properly understood; it simply picks up cases where some rules disproportionately and unjustifiably burden members of some groups relative to others through an otherwise neutral provision, criterion, or practice.

3.3 The Limits of Eidelson's Account

Contrary to Eidelson's account, I argue that there remain kinds of disadvantageous treatment that should count as instances of discrimination even though they are not reducible to cases of direct discrimination. The notion of indirect discrimination can thus occupy a middle position between random distributive inequalities and directly discriminatory treatment. An example can be helpful to illustrate this middle position. Following an example used by Deborah Hellman based on the real-life case of *United Papermakers*, one can imagine the following situation:[61] A company used to segregate job categories so that the better paid and more skilled jobs were only opened to white employees. Consequently, black employees were relegated to comparatively worse jobs. Then, once this segregation was no longer legally allowed, the company opened all jobs to all applicants. However, as Hellman writes, "[the company *maintained*] its seniority policy which provides that when an opening in a particular job arises, candidates with the most seniority in the particular job-type are favored."[62] Consequently, the disparity between white and black employees was maintained by a pre-existing seniority policy despite official desegregation.

Here, interestingly, following Eidelson's approach, this should not count as a case of discrimination since this rule could be imagined to be completely neutral: even before segregation was illegal, every employee could have agreed that this rule was justified (since it is only after the anti-segregation law was passed that this policy became—indirectly—discriminatory). Consequently, it does not necessarily imply a bias or an intent to discriminate on the part of the employer or even a biased rule-setting procedure. Eidelson could respond that what is wrong with this case is that the seniority rule creates a distributive injustice by creating a problematic threat to equality of opportunity by maintaining race segregation, but, following his position, it cannot count as an instance of discrimination.[63] Yet, this case seems to imply more than a simple random distributive inequality between two cognate groups.

In contrast, the definition of indirect discrimination developed in section 1 would classify this seniority rule as (indirectly) discriminatory: it is facially neutral, it does not necessarily presuppose any bias or discriminatory intent from

the discriminator, and yet it relevantly disadvantages a typically protected group. Further, it is relevant to consider this case as an instance of discrimination since it captures something important about what occurs: it is an instance of disadvantageous treatment that is, at least *prima facie*, wrongful, as it targets a group that is usually recognized as a group that should be protected against significant social disadvantages.[64] It is not simply any random distributive inequality between two given groups, but it is a threat to equality of opportunity of an already disadvantaged group because it reproduces the disadvantages of the (officially illegalized) past segregation. In that sense, though it is not directly discriminatory, it is not just like any other distributive imbalance between two given groups. This difference is captured by the notion of indirect discrimination but cannot be accounted for by Eidelson's position.

4. Beyond Social Salience: The Importance of Making the Invisible Visible

Following the *United Papermakers* example, it seems warranted to refer to indirect discrimination as a distinct kind of discrimination and, as the example used above shows, it seems particularly reasonable to do so when an instance of indirect discrimination can be causally linked to a temporally prior instance of direct discrimination. As such, Lippert-Rasmussen's conception of indirect discrimination, which adds a temporal connection from direct to indirect discrimination could appear warranted. However, this unilateral temporal connection between the two kinds of discrimination can be reassessed. In fact, the understanding of indirect discrimination as being parasitic on direct discrimination is problematic because it misses some cases that should be seen as discriminatory. It is indeed arguably possible to identify some cases where indirect discrimination precedes direct discrimination.[65]

This challenge notably comes from an example presented by Oran Doyle. He takes the example of discrimination against gay men to show that the linear sequence from direct discrimination to indirect discrimination is, in some cases, doubtful and could even be reversed.[66] He argues that indirect discrimination against gay men by the criminalization of "anal sex and the reservation of partnership recognition to opposite sex couples" came before any recognition of sexual orientation as a social phenomenon.[67] He writes:

> So perfect was that public indirect discrimination that there was little need for private discrimination (whether direct or indirect) or indeed for public direct discrimination: the indirect discrimination has led gay men to deny their existence, both to themselves and to others. Direct discrimination against gay men is arguably a later phenomenon, arising only where decriminalization has led to the self-identification of gay men against whom it is possible to target one's acts of direct discrimination.[68]

Following Doyle's argument, this counts as indirect discrimination since we have an apparently neutral and universal provision that does not seem to necessarily rely on an intent to discriminate against a given group. Yet it puts this group at a particular, significant disadvantage compared to others.[69] The main point here is that this instance of indirect discrimination arose even before the self-identification of gay men as a group and, as such, before the possible recognition of this group as a socially salient group that could have been targeted by acts of direct discrimination.[70]

However, one could doubt that this case should count as an instance of discrimination in the first place. For example, Lippert-Rasmussen could respond that this is an instance of disadvantageous treatment against some individuals, but that since gay men were not a socially salient group in this case, they could not have been targeted by discriminatory actions. Thus, it might be morally wrong and fundamentally unfair, but it is not an instance of discrimination. Interestingly, authors subscribing to the immutable grounds approach to discrimination might argue in response that it is an instance of discrimination because it unduly disadvantages individuals in an area that is a fundamental choice. This approach could state that the choice of one's sexual partner is a fundamental choice. Therefore, a defender of this approach could easily claim that unduly disadvantaging some individuals by aiming to constrain their effectively available choice of sexual partners is discriminatory regardless of social salience. Which groups are considered to be relevant for discrimination law will affect whether it is possible to consider this case as indirectly discriminatory or not.

I posit that this case interestingly highlights a potential limit to a conception of groups based on social salience since this approach is unable to consider cases of discrimination that hinder the emergence of groups as socially salient groups. In what follows, I argue that a fourth approach, which insists more on the disadvantage imposed on a group relative to another, is preferable to a conception based on social salience or effective immutability, and that it allows conceptualizing indirect discrimination as a distinct act-type that is not parasitic on previous instances of discrimination. Accordingly, Lippert-Rasmussen's fourth characteristic of indirect discrimination will be rejected.

4.1 Intersectionality and the Open-Endedness of Grounds

To support this argument that the case presented by Doyle should be considered to be an instance of discrimination, it is instructive to consider the intersectional critique of the immutable grounds approach developed by Nitya Iyer[71] and Kimberlé Crenshaw[72] to delve into the question of which groups or grounds should be protected by discrimination law. The main criticism these authors raise against the immutable grounds approach is that it fails to grasp complex and obscured social identities. Iyer argues that

> no matter how long or inclusive the list of protected grounds or characteristics, the mechanical, categorical, or category-based, approach to equality embedded in such a structure obscures the complexity of social identity in ways that are damaging both to particular rights claimants, and to the larger goal of redressing relations of inequality.[73]

For Iyer, focusing on certain immutable or effectively immutable characteristics leads to suppressing the fact that categorization is always a normative exercise: creating categories is always a function of the categorizer's choice and, as such, categories should be seen as elastic and fluid rather than rigid.[74] Social categories should be taken to express relationships and comparisons between different ensembles of individuals rather than to pick out intrinsic and immutable traits.

In connection with discrimination law, Iyer highlights that to take immutable grounds as the basis for protection against discriminatory practices is problematic because it struggles to acknowledge that different social identities and characteristics can intersect to create novel social identities and experiences. It forces claimants to present their own diverse experiences in light of the officially recognized grounds, which can force them to distort their own lived experiences.[75] Crenshaw concurs on this point and argues that focusing on immutable grounds as the basis for protection against discrimination is problematic, especially when combined with a single-axis framework treating the different grounds of discrimination as mutually exclusive categories.[76] As Crenshaw shows, this exclusive approach erases the complex experiences situated where different grounds intersect, like at the intersection of race and gender.[77]

These issues associated with the immutable grounds approach to discrimination raise important questions about which groups, if any, should then be taken to be relevant from the perspective of discrimination law. For instance, Iyer appears to reject the possibility of identifying particular groups as being relevant for discrimination law. For her, any list of grounds will always be incomplete because all social identities can intersect with one another to create new and unique social experiences.[78] This is substantial in that it questions the very possibility of a shared social identity on which one could base social groups, since every individual could potentially occupy a unique social position. It also raises the question of what place remains for indirect discrimination since it necessarily targets groups.

However, rejecting the normative value of groups altogether might not be the best way to address the challenges posed by complex and obscured social experiences. As Natalie Stoljar argues, the intersectionality critique of the immutable grounds approach does not entail that we should reject groups entirely.[79] It may remain possible to modify the immutable grounds approach to appropriately integrate the challenges raised by complex social identities, under the condition that a more elastic, fluid, and open-ended conception of groups be adopted. This seems to be the position taken by Crenshaw. She appears to be more sympathetic

to the continued relevance of groups though she highlights that one should be sensitive to how different identities can intersect to create new experiences of discrimination and how some social experiences remain obscured by a rigid understanding of groups. She writes that

> to say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world. On the contrary, a large and continuing project for subordinated people . . . is thinking about the way power has clustered around certain categories and is exercised against others. This project attempts to unveil the processes of subordination and the various ways those processes are experienced by people who are subordinated and people who are privileged by them.[80]

This alternative approach to groups allows us to recognize that social categories exist, at least in the sense that they tend to structure the social reality in which individuals evolve, all the while being open to a more fluid and flexible conception of groups that should allow for the emergence of new groups in accordance with a changing social reality.

4.2 Beyond Social Salience and Effective Immutability: Putting Disadvantages First

Yet these considerations still seem to point toward a conception of social groups as socially salient groups, or at least they do not seem to be incompatible with it. After all, if social categories structure the lives of individuals, then it could seem reasonable to assume that the relevant groups for discrimination law should be socially salient. For instance, Stoljar remains sympathetic to the social salience approach proposed by Lippert-Rasmussen.[81] For her, though the comparator is in a position to create the categories used to capture a given disadvantage, they should still focus on the relevant groups by considering different questions, such as these: "Is the adversely affected group already a victim of historical disadvantage?" "Are group members currently socially vulnerable to stereotyping, social prejudice, and/or marginalization?" "Does this distinction expose them to the reasonable possibility of future social vulnerability to stereotyping, social prejudice, and/or marginalization?"[82]

However, insisting on socially salient groups might miss a fundamental input from the intersectional critique of discrimination, which was briefly mentioned above: discrimination law should be critical of the status quo and should aim to illuminate and bring forth otherwise obscured undue disadvantages. What stands out from the intersectional critique of discrimination law is not only that every exercise of comparison is a normative exercise, but also that we should be attentive to how norms, policies, or laws subordinate some individuals while privileging others. This process, however, can take place even if a certain group is not socially salient. To insist on socially salient groups might unduly exclude

these situations where a social context disadvantages a group and simultaneously prevents its emergence as a socially salient group precisely due to the disadvantage that is imposed on the group. Following this fundamental input from the intersectional account and its insistence on protection to the possibility of future social vulnerability, on obscured social experiences, and on the importance of unveiling processes of subordination, a certain tension arises with an insistence on social salience. Indeed, following an intersectional framework, one should be attentive to the invisible, to social experiences that are shared by some individuals but that are obscured from sight because current categories fail to allow for the proper articulation of these disadvantages and to allow for the creation and articulation of new social groups based on the historical and contextual position of some individuals.[83] A group being historically and contextually disadvantaged compared to another group does not necessarily entail that a group is socially salient.

This is clear in Doyle's example: In this case, sodomy laws had a significant impact on an ensemble of individuals in such a way that they prevented the emergence of this group as a socially salient group. In the case of discrimination against gay men, the sodomy law not only significantly disadvantaged gay men, but it also relied on the idea that this practice was intrinsically immoral and that those engaging in these practices are morally corrupt, an idea that presumably fed the biases and stereotypes that play a significant explanatory part in the directly discriminatory practices that followed.[84] The fact that the group "homosexual men" was not socially salient in that this group was not, according to Doyle's example, affirmed as a distinct group with a particular social identity in such a way that the perceived membership in that particular group could affect how one was treated (since this group was not yet socially constituted) is of little relevance once the focus shifts from social salience to the impact of given measures on some groups of individuals who share an oppressive social experience.

From there, it might be puzzling to answer the question of which groups should be considered by discrimination law. First, social salience is problematic because it is insufficiently sensitive to obscured social experiences that cannot be properly articulated from within a contextual understanding of groups. Second, the immutable grounds approach appears insufficiently attuned to the fundamentally social and relational nature of discrimination law in that it aims not to capture disadvantages linked to intrinsic characteristics, but to capture how social categories, rules, norms, and laws disadvantage some groups compared to others by clustering power and privilege around certain positions. Fortunately, another approach, notably put forth by Tarunabh Khaitan, could provide a way out of this apparent gridlock. Khaitan proposes to simply understand the relevant groups as picking out characteristics or attributes that persons have (i.e., grounds) that can be used to separate individuals into at least two different cognate groups[85]—that

is, groups distinguished on the basis of different particular orders (e.g., male or female) relative to one universal order (e.g., sex).

Interestingly, this understanding of groups allows for a very inclusive conception that does not require group members to even be aware of being members of a certain group. As Khaitan writes,

> it may be noted that the cognate groups condition understands 'groups' loosely and should not be read to imply that the 'group' needs to possess any solidarity, coherence, sense of identity, shared history, language, or culture. . . . [Group] 'members' do not even have to be consciously aware that they belong to this group.[86]

This lack of awareness of even the group's existence allows us to move beyond social salience and to refocus discrimination law, and indirect discrimination in particular, around the question of disadvantages and the burdens socially imposed on certain groups compared to their cognate group(s). Of course, not just any group disadvantage should count as discriminatory. As discussed above in section 2.2, not just any local or non-recurring disadvantage should count as discriminatory given the stringency typically attached to this concept.[87]

To reuse the vocabulary used above, this exemplifies the idea that discrimination law, including indirect discrimination, captures either a strong or weak equalisandum claim. Strong equalisandum claims aim to protect fundamental rights or entitlements in which individuals should be made as equal as possible. Weak equalisandum claims are more nuanced claims that can be used to balance the rights and entitlements of different parties.[88] This requirement aims to capture the idea that no one should be unduly disadvantaged according to an irrelevant trait that should not be the reason to disadvantage a person relative to another because the first possesses some trait P, or because some trait P is strongly correlated to another trait Q. In other words, anti-discrimination law should aim to protect groups and individuals from disadvantages springing from normatively irrelevant grounds.[89] That is, these grounds should not be used to constrain the rights and entitlements that are typically recognized in individuals. The balancing act that has to take place between the rights of the claimants and the rights of the defendants should aim to ensure that the rights of all parties involved are similarly effectively recognized, respected, and equally protected to ensure that no one is unduly disadvantaged due to characteristics they possess or that are assigned to them.[90]

To sum up, it thus appears that approaches grounded in social salience and in effective immutability suffer from some shortcomings that warrant a more inclusive understanding of the relevant groups and of when provisions against indirect discrimination are warranted, that is, when a significant advantage gap obtains between two cognate groups, and that this advantage gap is shown to be grounded in normatively irrelevant characteristics. For instance, go back to the *United Papermaker* case discussed at the end of section 3. It would be possible to

argue both that the seniority policy in fact contributes to pervasively disadvantage black employees relative to white employees and that the seniority rule itself was not essential to the allocation of promotions or demotions. As such, the court was in a position to order the company to review its process of promotion and demotion to equalize job opportunities between the two cognate groups.[91] The same can be said of Doyle's example; sodomy laws unjustifiably imposed a significant burden on gay men even if they had not been (according to the example) the target of directly discriminatory measures. What matters is the burden imposed on a certain ensemble of individuals relative to its cognate group and whether this burden is justifiable or not.

5. Conclusion: Do We Still Need Direct Discrimination?

To recapitulate, following the discussion above, it appears that indirect discrimination possesses at least three necessary components. An action is indirectly discriminatory under the following conditions:

(1) A set of individuals P suffers from a normatively unjustifiable advantage gap relative to a relevant cognate group S (*the relative group disadvantage condition*).

(2) P is disadvantaged by a facially neutral measure Q, and measure Q does not ensue from an intention by some actor R to disadvantage said group P (*the no-intention condition*).

(3) The causal link explaining why group P is disadvantaged is that it shares at least one characteristic X that is being discriminated against and is strongly connected to P (*the indirect correlation condition*).

This definition captures the paradigmatic cases of indirect discrimination. For instance, the case of *United Papermakers* described above and the example presented by Doyle both seem to be adequately captured by this definition.

In closing, however, it is interesting to revisit the connection that exists between direct and indirect discrimination in light of the proposed definition above. Notably, one could wonder if the notion of direct discrimination is still useful. Why not simply define discrimination as undue disadvantages affecting groups relative to a cognate group regardless of the intentions of the discriminator? This might sound counterintuitive, but it is not ridiculous. Most notably, this could be supported by the contemporary evolution of discrimination law in different Western jurisdictions. As Sandra Fredman shows, the boundary between direct and indirect discrimination is increasingly seen as rather fluid in different jurisdictions, including the UK, the European Court of Human Rights, and Canada, notably due to the difficultly of demonstrating wrongful mental-states on the part of a discriminator.[92]

It could even be possible to go further and argue that the very notion of direct discrimination is in fact derivative of the paradigmatic concept of indirect discrimination. This position is notably defended by Tarunabh Khaitan. In his book, interestingly, he casts "direct discrimination in the image of indirect discrimination."[93] For him, indirect discrimination is the paradigmatic case of discrimination law. This has interesting implications for how he defines both. Instead of distinguishing between both based on the intent of the discriminator, as was proposed above, he proposes to distinguish between both based on the composition of the set of the individuals affected by a discriminatory measure.

He distinguishes between both kinds of discrimination in this way: "Discrimination is direct when the adversely affected set V is constituted *entirely* by members of a protected (or cognate) group" and "[indirect] discrimination occurs when members of P constitute V *disproportionately*."[94] Indirect discrimination thus appears to be the paradigmatic instance of discrimination because what matters is whether a certain group tends to be disadvantaged by a certain measure, while direct discrimination here only captures these cases where a measure disadvantages *only* the members of a certain protected group. Interestingly, this would turn the argument presented in this paper on its head. It could allow the argument that direct discrimination may capture special cases where a measure affects only members of a particular group, but interestingly it would not entail any new notion of discrimination or any new normative concepts; only the composition of the affected group V matters here. This approach to direct discrimination is notably used in the UK where direct discrimination can be demonstrated without any proof of an intention to discriminate.[95]

However, I contend that it is preferable to resist this move and to maintain a distinction between the two concepts to argue that they are two different act-types—that they are actions relying on two distinct mechanisms. Following the position defended here, while to identify an instance of indirect discrimination, one simply needs to establish a correlation between a neutral measure and a disadvantage ultimately relying on normatively irrelevant grounds, direct discrimination, as mentioned above, relies on a causal relation between the beliefs, intentions, or the mental states of a discriminator, which motivates treating some individuals worse than others on the basis that they belong (or that the discriminator believes they belong) to a certain group.[96] This approach is notably preferred in the United States, where demonstration of direct discrimination has to provide evidence of an intention to discriminate or a "suspect classification" following race or sex, for instance, that would be used when applying a rule or reaching a decision.[97]

It can remain relevant to distinguish between the two act-types to capture the idea that a disadvantage can arise in different ways and this will impact its wrong-making features. Take the example of a misogynist employer who just happens to be particularly ineffective in his discrimination. He tries to discriminate against women in his hiring policies but, for some reason, he happens to only exclude men.[98] Under

Khaitan's definition, this action would be directly discriminatory against men. Even more surprising, it could be indirectly discriminatory against men if the employer were to predominantly affect men. As such, this framework leads to counterintuitive conclusions and misses what is primarily problematic about this case. What is discriminatory here is not only the impact of the measures used, which would lead to perhaps permissible differential treatment against a privileged group, but also the blameworthy intentions of the discriminator. Accordingly, it seems warranted to at least remain open to the possibility that direct and indirect discrimination differ in this fundamental aspect to keep the important distinction of how a certain action is wrong. Indeed, here, the discriminator himself appears blameworthy and liable to compensation for his wrongful actions, while indirect discrimination, following the argument developed in this paper, aims to capture situations where a rule can have a negative impact even if no actors are blameworthy.

In sum, this paper aimed to explore the conceptual differences between direct and indirect discrimination. I argued that it is best to understand these concepts as referring to two distinct act-types that can obtain independently of one another. Indirect discrimination thus appears as a distinct act-type that aims to capture situations where an advantage gap arises between two cognate groups and where this gap is ultimately grounded in normatively irrelevant characteristics.

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NOTES

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1. Lippert-Rasmussen, *Born Free and Equal?*, 26.

2. Hellman, "Indirect Discrimination and the Duty," 1. Of course, this does not mean that indirect discrimination, understood as a pure legal construct, would be useless. Some authors explicitly recognize that even then, this concept could be useful to tackle distributive injustices between groups or to help overcoming difficulties in proving direct discriminatory treatment given that proving a discriminatory intent or purpose is notoriously difficult. On this point, see also Collins and Khaitan ("Indirect Discrimination Law," 25–27).

3. For a more general overview of the different current positions, see Collins and Khaitan ("Indirect Discrimination Law").

4. Doyle, "Direct Discrimination, Indirect Discrimination," 537–38.

5. Lippert-Rasmussen, *Born Free and Equal?*, 15. This definition could be more precise since it could be considered overly broad. However, it can suffice here simply

to highlight the main typical difference between direct and indirect discrimination. The question of what grounds or traits should be taken to be illegitimate for discriminatory treatment will be discussed below. It would also be relevant to flag that this definition is not necessarily consistent with its use in every legal system. This characterization is closer to how the United States has come to distinguishing between direct and indirect discrimination on the basis of intentions. In contrast, the UK has eschewed intention in its definition of direct discrimination. As Khaitan and Collins write, in the UK, "direct discrimination is usually defined as the adoption of a ground for decision that will exclude 100 per cent [*sic*] of the protected group, but none of its cognate and comparative group. It follows that indirect discrimination applies where the exclusionary effect of the practice or rule is less than 100 per cent [*sic*], but is disproportionate in comparison to cognate groups" ("Indirect Discrimination Law," 20). I put this question aside for the moment, but I come back to this different way to define direct discrimination in the conclusion.

6. Altman, "Discrimination."

7. Doyle, "Direct Discrimination, Indirect Discrimination," 537–38.

8. Doyle, "Direct Discrimination, Indirect Discrimination," 538.

9. For an illustration of this approach, see, for instance, Washington v. Davis 426 US 229 (1976).

10. Doyle, "Direct Discrimination," 538.

11. Doyle, "Direct Discrimination," 538.

12. Lippert-Rasmussen, *Born Free and Equal?*, 56.

13. For Lippert-Rasmussen, the presence of any bias renders an action directly discriminatory. (Here, Lippert-Rasmussen includes intentions as well as objectionable mental states under this notion of bias. Consequently, biases are understood in a broad sense here.) Lippert-Rasmussen, *Born Free and Equal?*, 59–61.

14. On this point, see also Sen (*Inequality Reexamined*); and Regents of the University of California v. Bakke 438 US 265 (1978), 395–96.

15. Khaitan, *Theory of Discrimination Law*, 51–56. In his study, Khaitan considers the justification of the practice of discrimination law in the United States, Canada, India, South Africa, and the UK to highlight the similarities and the shared aspects between these different jurisdictions. As such, the claim that different aspects of disadvantage are widely recognized is warranted by the practice of discrimination law. However, the question of whether some disadvantages are worse or morally worse than others is left aside here.

16. Lippert-Rasmussen, *Born Free and Equal?*, 62.

17. Lippert-Rasmussen, *Born Free and Equal?*, 155.

18. For a useful recapitulation of contemporary debates on this issue, see notably Alexander ("Is Wrongful Discrimination Really Wrong?").

19. A similar position is presented by Hugh Collins, though he focuses more on how these considerations arise from an analysis of current human rights and discrimination law practices. See Collins ("Justice for Foxes").

20. Cohen, "On the Currency," 908.

21. Cohen, "On the Currency," 908.

22. Cohen, "On the Currency," 908.

23. Collins, "Justice for Foxes," 269–70. More precisely, Collins proposes to use a double proportionality test aimed at the point where the interference with the relevant rights of both the claimant and the defendant is minimized as far as possible "without totally eliminating respect for the rights of each party." This test should aim "to protect as much of each party's right as may be possible without tolerating a disproportionate interference with the right of the other party" (Collins, "Justice for Foxes," 271–72). This test should accordingly aim to protect the fundamental rights and interests of all implicated parties.

24. Khaitan, *Theory of Discrimination Law*, 75.

25. For example, the EU legislation lists gender, age, religion, sexual orientation, and ethnicity. See Thomsen ("Stealing Bread," 300).

26. Thomsen, "Direct Discrimination," 25.

27. Thomsen, "Direct Discrimination," 25.

28. Khaitan, *Theory of Discrimination Law*, 75. On the limits of this immutable grounds approach, see also Sunstein ("Anticaste Principle," 2443); and Kessler ("Attachment Gap," 371).

29. Khaitan, *Theory of Discrimination Law*, 59.

30. Khaitan, *Theory of Discrimination Law*, 59.

31. Lippert-Rasmussen, *Born Free and Equal?*, 30; emphasis added.

32. Lippert-Rasmussen, *Born Free and Equal?*, 31.

33. As Lippert-Rasmussen himself recognizes, this understanding of the relevant group seems to only exclude "genetic discrimination," that is, the use of genetic information by insurance companies to discriminate against people who were unlucky in the genetic lottery. However, he argues that this kind of discrimination is not truly an instance of discrimination (though it might be unjust) since it does not concern a socially salient group (Lippert-Rasmussen, *Born Free and Equal?*, 33).

34. Lippert-Rasmussen, *Born Free and Equal?*, 33.

35. This is a slight reformulation of Lippert-Rasmussen's own no-intention condition. See Lippert-Rasmussen (*Born Free and Equal?*, 69).

36. Lippert-Rasmussen, *Born Free and Equal?*, 68.

37. Lippert-Rasmussen, *Born Free and Equal?*, 74.

38. Lippert-Rasmussen, *Born Free and Equal?*, 74. It may be important to highlight that this doesn't necessarily imply that one is more or less morally condemnable than the other. For Lippert-Rasmussen, this definition, in itself, is morally neutral and is not sufficient to say that it grounds morally condemnable indirect discrimination. The moral standard to evaluate discrimination and the definition of discrimination itself are distinct. As such, here, we concentrate more on the identification of these acts than on their moral evaluation.

39. Khaitan, "Indirect Discrimination," 38; emphasis in original.

40. Lippert-Rasmussen, *Born Free and Equal?*, 70.

41. Lippert-Rasmussen, *Born Free and Equal?*, 70. Lippert-Rassmussen is notably influenced by Matt Cavanagh on this point. This author states that the effects of indirect discrimination can be brought about by other causes, thus pointing toward the same conclusion. That is, indirect discrimination is a particular kind of disadvantageous treatment that further disadvantages socially salient groups who are or have been directly discriminated against. See Cavanagh (*Against Equality*, 199).

42. Lippert-Rasmussen, *Born Free and Equal?*, 70.

43. Lippert-Rasmussen, *Born Free and Equal?*, 70. He offers an alternative formulation of the condition that goes as follows: "(iv) The disadvantages referred to in (ii*) would not have occurred in the absence of past or present direct discrimination by the agent of the relevant act or policy against G." (He calls this condition the causal condition.)

44. Lippert-Rasmussen, *Born Free and Equal?*, 70.

45. Even though, for him, they both are instances of group discrimination (Lippert-Rasmussen, *Born Free and Equal?*, 73).

46. Lippert-Rasmussen, *Born Free and Equal?*, 38.

47. Lippert-Rasmussen, *Born Free and Equal?*, 38.

48. It is worth mentioning that Lippert-Rasmussen adds a fifth and final condition to his definition. He adds: "(v) it satisfies my definition of group discrimination" (Lippert-Rasmussen, *Born Free and Equal?*, 73). In that respect, he offers a complete portrait of discrimination considering that group discrimination will be divided in two, mutually exclusive kinds of discrimination: direct discrimination (which, for Lippert-Rasmussen, is necessarily a type or group discrimination) and indirect discrimination.

49. Lippert-Rasmussen, *Born Free and Equal?*, 36.

50. Of course, that is not to say that the two models cannot coexist. However, what is interesting with Eidelson's theory is that *all* instances of indirect discrimination are either reducible to cases of direct discrimination or are not instances of discrimination in the relevant sense.

51. Eidelson, *Discrimination and Disrespect*, 17.

52. On this point, see notably Lippert-Rasmussen ("Benjamin Eidelson, Discrimination and Disrespect," 452).

53. Nonetheless, Eidelson is not against the use of laws to correct these second "indirect" discriminatory actions, but he maintains that they are best understood as "redistributive programs." See Eidelson (*Discrimination and Disrespect*, 67–68).

54. Eidelson, *Discrimination and Disrespect*, 41.

55. France, *Red Lily*, 95, quoted in Eidelson, *Discrimination and Disrespect*, 42.

56. Eidelson, *Discrimination and Disrespect*, 18.

57. Eidelson, *Discrimination and Disrespect*, 43.

58. Lippert-Rasmussen, ''Benjamin Eidelson, Discrimination and Disrespect," 452.

59. Eidelson, *Discrimination and Disrespect*, 13.

60. Eidelson, *Discrimination and Disrespect*, 13.

61. See United States v. Local 189. 1968, United Papermakers & Paperwork, 282 F. Supp. 39; and Hellman ("Indirect Discrimination and the Duty," 10).

62. Hellman, "Indirect Discrimination and the Duty," 10; emphasis added.

63. Eidelson, *Discrimination and Disrespect*, 55.

64. Deborah Hellman develops a similar argument, but she relies more on the wrongness of discrimination. See Hellman ("Indirect Discrimination and the Duty," 14–15).

65. This point is highlighted by Khaitan. See Khaitan ("Indirect Discrimination," 38).

66. Doyle, "Direct Discrimination, Indirect Discrimination," 549.

67. Doyle, ''Direct Discrimination, Indirect Discrimination," 549. Initially, this argument was directed against John Gardner's position, developed in Gardner ("On the Ground of Her Sex[uality]"). In this paper, Gardner argues that indirect discrimination is secondary to direct discrimination in that it is the "discriminatory side-effect of some decisions as well as the discriminatory grounds on which they were reached" (Gardner, "On the Ground of Her Sex[uality]," 182). Therefore, Gardner develops a view that is similar to Lippert-Rasmussen, since both believe that indirect discrimination is "parasitic" on direct discrimination.

68. Doyle, "Direct Discrimination, Indirect Discrimination," 549.

69. Doyle, "Direct Discrimination, Indirect Discrimination," 539.

70. Doyle, "Direct Discrimination, Indirect Discrimination," 549. For Doyle, indirect discrimination is accordingly best seen as being concerned with actions that have a pervasive impact undermining the equal respect that is owed to all individuals as individuals. His article is, however, rather unclear about what this entails about the definition of indirect discrimination and about how we should conceive of the relevant groups for anti-discrimination measures. The following sections aim to support and flesh out Doyle's intuitions presented in this case.

71. Iyer, "Categorical Denials," 179–207.

72. Crenshaw, "Demarginalizing the Intersection," 139–66; "Mapping the Margins," 1241–99.

73. Iyer, "Categorical Denials," 181.

74. Iyer, "Categorical Denials," 183–84.

75. Iyer, "Categorical Denials," 193.

76. Crenshaw, "Demarginalizing the Intersection," 140.

77. To support these points, Crenshaw notably uses the case studies of *DeGraffenreid v. General Motors*; see *DeGraffenreid v. General Motors Assembly Div., Etc.*, 413 F. Supp. 142 (E.D. Mo. 1976), in contrast with the case *Moore v. Hughes Helicopters, Inc.*, a Division of Summa Corporation, 708 F.2d 475 (1983). See Crenshaw ("Demarginalizing the Intersection," 140ff.).

78. Iyer, "Categorical Denials," 181.

79. Stoljar, "Discrimination and Intersectionality," 68–80.

80. Crenshaw, "Mapping the Margins," 1296–97.

81. Stoljar, "Discrimination and Intersectionality," 69.

82. Stoljar, "Discrimination and Intersectionality," 76.

83. Stoljar, "Discrimination and Intersectionality," 75. This point is interestingly highlighted by Stoljar, though she remains sympathetic to the conception of socially salient groups. As such, an important disagreement between Stoljar's interpretation of the intersectional framework and the one offered here is that, here, I argue that putting disadvantages first and questionning the status quo can demand to create new social categories or to consider groups of individuals even if they are not (yet) constituted as a socially salient group.

84. Weeks, *Sex, Politics and Society*, 122–25. On the importance of stereotypes and biases and their potential explanatory role in discriminatory actions, see Moreau ("Moral Seriousness," 123–48).

85. Khaitan, *Theory of Discrimination Law*, 29.

86. Khaitan, *Theory of Discrimination Law*, 30.

87. Khaitan, on his part, argues that the relative disadvantage must be abiding, pervasive, and substantial to count as discriminatory (*Theory of Discrimination Law*, 31). He writes: "It must be abiding in the sense that it must be likely to manifest itself over a certain length of time. The disadvantage must be pervasive in the sense that it should not normally be limited to a single, discrete sphere of human activity, but pervade several aspects of our lives. . . . Furthermore, disadvantage must be substantial in the sense that it should be likely to be more than an inconvenience" (*Theory of Discrimination Law*, 36). The qualifiers are supposed to convey the idea that "discrimination law concerns itself only with relative group disadvantage of some seriousness and pervasiveness" (*Theory of Discrimination Law*, 36). In contrast, I prefer to focus on equalisandum claims and the notion of justifiability to capture the idea that the relevant group disadvantages covered by discrimination law to try and specify the conditions under which a given disadvantage can be taken to be sufficiently substantial to say that it is discriminatory. Accordingly, the approach proposed here might be more inclusive than Khaitan's approach in that it is conceivable that a disadvantage might be unjustifiable even if it is not pervasive or abiding, notably when we focus on direct discrimination. However, when considering indirect discrimination, it seems like both approaches should yield similar results in that a disadvantage, to be felt indirectly by a whole group, should be more than a simple idiosyncratic differential treatment.

88. Here, it would be important to mention that the position proposed here departs from Khaitan's own understanding of the motivating reasons behind discrimination law by adopting a more egalitarian conception. For Khaitan, "our concern for relative group disadvantage [in anti-discrimination law] springs not from the ideal of equality but from the desirability of a state of affairs where each person is free to pursue a good life" (*Theory of Discrimination Law*, 130). He maintains that the goal of anti-discrimination is that all have secure access to (1) negative freedom, (2) "an adequate range of valuable opportunities," and (3) self-respect (*Theory of Discrimination Law*, 92). However, as implicitly proposed in this article, anti-discrimination laws and rules appear to be particularly effective means to promote equality between groups by tackling norms, rules, or laws that have unduly inegalitarian impacts on some particular groups (or an important subset of members of

a given group). As such, it can be warranted to see anti-discrimination laws as a way to foster equality even if other kinds of programs, like redistributive programs, might be necessary to obtain full equality between all individuals and groups. However, this point concerns anti-discrimination law more generally and would take us too far from the main topic of this article. For more detailed argument and deeper analysis of Khaitan's argument on this point, see notably Lippert-Rasmussen ("Discrimination, Freedom," 909–15); Hellman (Review of *A Theory of Discrimination Law*, 476–78); and Ferreira (Review of *A Theory of Discrimination Law*, 249).

89. As Khaitan shows, effective immutability is often used as a proxy by courts to capture this idea of normative irrelevance (Khaitan, *Theory of Discrimination Law*, 56–60). However, as transpired above in the discussion about the intersectional criticism of immutable grounds, I am more skeptical than Khaitan on the appropriateness of this approach to grounds to define and circumscribe the grounds of discrimination due to its exclusionary potential. If one insists on the *prima facie* wrongness of discrimination based on immutable characteristics or areas typically associated with fundamental choices, it may be that, in some situations, other grounds might qualify as normatively irrelevant grounds for discrimination. To take a trivial scenario, imagine a context where important industries, like high-tech industries, eccentrically decide to cease hiring fans of the Montréal Canadiens in upper management. This eccentric decision is then propagated in other spheres of employment such that fans of the Canadiens do have less hiring opportunities due to arbitrary and normatively irrelevant stereotypes. Though this scenario is unlikely, I contend that it would count as an instance of discrimination, while it is unclear at best if it would be considered as such by tenants of the immutable grounds approach. What matters on the approach here proposed is if the advantage gap between fans of different franchises of the NHL is significant and if the disadvantage relies a normatively irrelevant ground, not whether or not being a fan of a particular sports team is a fundamental choice or not (nor on whether or not it is a socially salient ground).

90. It might be interesting to come back to Lippert-Rasmussen's lottery scenario discussed above in section 3.1. This is interesting notably to consider if then any group disadvantage, even those produced by random procedures, would count as discriminatory. To go back to his example, the answer that seems warranted here is that it depends on the disadvantage that is imposed on women in this case. For instance, let's suppose that political offices are distributed randomly within a certain group, and it turns out women are severely underrepresented after the sortition. Here, it appears that this disadvantage might be sufficient to say that the apparently neutral rule has discriminatory results and that it would be warranted to modify it to ensure parity between the genders. However, if the burden itself is produced by a combination of random factors in such a way that it cannot be associated with one particular norm, policy, or action, then it might be unfair and might necessitate redistributive measures to equalize the situation of different groups, but it cannot be said to be discriminatory even if it is unfair.

91. United States v. Local 189. 1968, United Papermakers & Paperwork, 282 F. Supp. 39.

92. Fredman, "Direct and Indirect Discrimination," 31–56.

93. Khaitan, *Theory of Discrimination Law*, 164.

94. Khaitan, *Theory of Discrimination Law*, 157; emphasis in original.

95. Collins and Khaitan, "Indirect Discrimination Law," 20. See notably *Bull and Bull v. Hall and Preddy* [2013] UKSC 73, [2013] 1 WLR 3741 [189].

96. This, of course, mirrors the position of Lippert-Rasmussen outlined above in section 3.1. Lippert-Rasmussen, *Born Free and Equal?*, 70.

97. Lippert-Rasmussen, outlined above in section 3.1. Lippert-Rasmussen, *Born Free and Equal?*, 20–21.

98. This example is presented by Lippert-Rasmussen. See Lippert-Rasmussen ("Discrimination, Freedom, and Intentions," 916).

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