# The Moral Seriousness of Indirect Discrimination[*]

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## 1. *Common views about direct and indirect discrimination*

Twenty years ago, Canadian equality rights activists Sheilagh Day and Gwen Brodsky criticized the widespread belief that there are deep moral differences between direct and indirect discrimination. Many people, they noted, assume "that direct discrimination is more loathsome, more morally repugnant" than indirect discrimination "because the perpetrator intends to discriminate or has discriminated knowingly."[1] By contrast, they suggested, indirect discrimination, even when justifiably prohibited by law, is commonly held to be "innocent, unwitting, accidental, and consequently not morally repugnant." These assumptions about direct and indirect discrimination are still very much a part of our shared moral thought about discrimination; and they also linger within anti-discrimination law itself, purporting to justify certain features of these laws. The aim of this paper is to question these assumptions about the relative moral seriousness of the two forms of discrimination. I shall argue that indirect discrimination is often just as morally problematic as direct discrimination, and its agents, often just as culpable.

But first, we need to look more closely at these assumptions. What is it, exactly, that we commonly assume? We tend to assume that agents involved in acts of wrongful direct discrimination are generally more culpable than those who discriminate indirectly, even in cases where we agree that the indirect discrimination can justifiably be prohibited by law, and even in cases where we agree that it is morally impermissible. This is a judgment about the *culpability of the agent.* We also assume that acts of direct discrimination are, when wrong, seriously problematic from a moral standpoint. By contrast, we are less certain about the moral status of acts and policies that indirectly discriminate. Even if we agree that a government is justified in legally prohibiting policies that are indirectly discriminatory, we may wonder whether the policies are all morally impermissible; and even when we view them as morally impermissible, we may feel that they are rarely *as bad as* most cases of wrongful direct discrimination. We would probably hesitate before ever calling any indirectly

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[1] Sheilagh Day and Gwen Brodsky, 'The Duty to Accommodate: Who Will Benefit?' (1996) 75 *The Canadian Bar Review* 433, 457.

discriminatory policy "morally repugnant." This second set of judgments is about the *moral status of acts and policies*.

A set of parallel examples may help both to draw out these assumptions and to clarify the way in which the distinction between direct and indirect discrimination is commonly drawn. First, consider direct discrimination. In the U.K., it is defined as an act or rule that treats one individual less favourably than another "because of" a certain protected characteristic, such as race or sex or sexual orientation.[2] The most common way to demonstrate that such treatment has taken place "because of" a protected characteristic is to show that the agent *intended* to distinguish between this individual and others using this characteristic; but in cases where intent is difficult to prove or where the agent has something closer to an unconscious bias against members of this group, it suffices under U.K. law to show that the category of the individuals who are disadvantaged and the category of those who are correlatively advantaged "coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification".[3] In other words, direct discrimination seems to involve acts that –either consciously or unconsciously-- aim at disadvantaging certain individuals because they possess or are presumed to possess a certain characteristic. It is natural therefore to assume that the agents of direct discrimination are culpable. Consider, for instance, a case of direct discrimination that arose recently in Canadian sports: the Quebec Soccer Federation's explicit ban on turbans on the soccer field. In the wake of this ban, the Federation was accused of racism and insensitivity. Because the ban singled out a particular garment from a particular religion, in circumstances where there were no reasons to think that the garment in any way impeded the game, it is difficult to see how the Federation could have been motivated by anything but a combination of religious and racial prejudice. Their aim was to exclude Sikhs from the soccer field, simply because they disliked them. The Federation therefore seemed morally culpable, and the policy, morally repugnant.

By contrast, policies that are indirectly discriminatory are often adopted in the service of perfectly innocent or even commendable goals, but end up having unfortunate side effects on groups that share a protected characteristic. A practice or a rule is treated as indirect discrimination under the law if it disadvantages those who share a particular protected characteristic, but disadvantages them only in an indirect way –that is, if there is not a complete coincidence between the group disadvantaged by the rule and the group marked out by some protected characteristic, but the rule nevertheless works to disadvantage *more* of those who possess that protected characteristic than it does others. In such cases, the agent may not have deliberately tried to disadvantage the group in question, and may not harbour any unconscious

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[2] *Equality Act* 2010. This is admittedly a rather messy definition; but it is the legal definition, and since our concept of discrimination is so deeply shaped by our laws, I think it is appropriate to work with this definition rather than artificially imposing a more simplified one.

[3] As per Lady Hale in *Bull v. Hall* [2013] UKSC 73, citing with approval the E.U. interpretation of direct discrimination in *Bressol v Gouvernement de la Commaunité Française* (Case C-73/08) [2010] 3 CMLR 559, and *Schnorbus v Land Hessen* (Case C-79/99) [2000] ECR I-10997.

biases against them. And indirect discrimination is only prohibited under the law if it cannot be shown to be otherwise justifiable –or, as the U.K.'s *Equality Act* states, if it cannot be shown to be "a proportionate means of achieving a legitimate aim." In other words, there is often a good reason for acting in ways that disadvantage certain groups more than others, and it is only if that disadvantage seems, under the circumstances, to be excessive and unreasonable that the law treats the indirect discrimination as justifiably prohibited by law and potentially morally wrongful. Perhaps because indirect discrimination can occur without any overt or even unconscious prejudice on the part of the agent, and because there is usually some legitimate aim that the agent is acting in furtherance of, we tend to assume that agents who engage in indirect discrimination are less culpable, and their policies, less troubling.

Consider a case of indirect discrimination that is directly parallel to the above example of the Soccer Federation's ban on turbans. In the late 1980's, the Royal Canadian Mounted Police still had in place a policy requiring all officers to wear the "Stetson hat" as part of their dress uniform. Eventually, members of the Sikh community protested that this prevented Sikhs from becoming RCMP officers. Although this policy had the same exclusionary effect on Sikhs as the soccer ban did, it fell into the category of indirect discrimination. It did not explicitly single out any one group on the basis of their religion or on the basis of some item necessarily associated with that religion. Instead, it had a disproportionately disadvantageous effect on Sikh men because of their religion --and, one might add, a similar effect on other people of both genders and of other races, whose religion or creed required them to wear some other headwear. Unlike the Soccer Federation, the RCMP was not vilified by the public for the Stetson hat policy. There was, to be sure, a heated debate over whether continuing to require the kind of hat that would exclude Sikhs from the RCMP was really a proportionate means of promoting Mountie traditions, and it was eventually decided that it was less important to preserve the image of the rugged Mountie in his cowboy hat and more important to increase accessibility. But no one arguing on the side of accessibility seemed to feel as though the character of the head RCMP officers was questionable or as though the policy was morally repugnant. This may have been in part because we can all recognize the reason-giving force of tradition, even though we differ in our assessments of its relative weight. So it seems plausible to suppose that RCMP officers were not actually motivated by a hatred of Sikhs or a desire to exclude them. They had just accorded greater importance to tradition and hadn't thought so much about the effects of the policy on anyone else, in their single-minded focus on preserving their own traditions. Moreover, although the policy had unfortunate and disadvantageous effects on Sikhs, one might argue that it did not insult or demean them in the way that the explicit ban on turbans by the Soccer Federation did –perhaps because it didn't single out turbans, but rather prevented everyone from wearing any other substantial headwear.

I have tried to shed some light on our moral intuitions about the two different forms of discrimination. But it is not only in our ordinary moral thought that indirect discrimination is regarded as importantly different from direct discrimination. In American law, and to some extent also in British law, cases of indirect discrimination

are treated with a wariness that is not present in cases of direct discrimination --as though there is always a risk that indirect discrimination may (to borrow a distinction from Judith Shklar) parade as an "injustice" when in fact it constitutes a mere "misfortune," an unfortunate state of affairs in which someone suffers a disadvantage but has not thereby been wronged and has no special claim on anyone to rectify that disadvantage.[4] Under American law constitutional law, courts cannot find a violation of the 14th Amendment on the basis of "disparate impact": it is only disparate treatment, or direct discrimination, that is treated as violating an individual's right to equal treatment by the state. And although some statutes do prohibit disparate impact by private agents in certain contexts, such as employment and housing, these prohibitions are regarded in some circles with suspicion, as potentially violating the 14th Amendment themselves.[5] In Britain, indirect discrimination is treated as something that can and should be prohibited. But interestingly, the Court of Appeal recently placed additional explanatory burdens on alleged victims of indirect discrimination and expressed great concern over "coat-tailers" --members of disadvantaged groups who pretend to be victims of indirect discrimination when in fact they have not suffered disadvantage, such as "the childless golfer who complains about an inflexible working hours policy because it upsets her golfing schedule" or "the no-*kara* wearing Sikh steward who simply dislikes his airline's non jewellery policy".[6] One might be forgiven for wondering why, given the plethora of women who are genuinely disadvantaged by inflexible working hours and the number of Sikhs who do wear karas, we are so worried about hypothetical pretenders taking advantage of honest employers. I think it is probably the same moral intuitions at work here as we saw in my earlier examples of the direct and indirect exclusion of Sikhs. We tend to view the alleged discriminator in cases of indirect discrimination as essentially well-motivated and free of culpability, contributing to the disadvantage of others only accidentally; we view the policies as not intrinsically insulting or degrading; and we see that the disadvantages accrue to members of the minority groups not just because of the policies but also because of the unusual needs or habits of these minority groups. And so legal prohibitions on indirect discrimination seem to teeter dangerously on the edge of forcing innocent agents to subsidize the idiosyncratic needs or lifestyle choices of others.

As a Canadian, I confess to feeling some puzzlement, both at the depth of the mistrust of indirect discrimination in American and British law, and at the moral intuitions about direct and indirect discrimination that I have just tried to explain to you. In Canada, the idea that we can usefully draw a moral –or, for that matter, a

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[4] See Judith Shklar, 'Misfortune and Injustice' in her *The Many Faces of Injustice* (New Haven, Yale University Press, 1990) 51. Shklar distinguished between an "injustice", or a case in which one person has been wronged and has a claim on another person (or institution) to rectify that wrong, and a mere "misfortune", or a case in which one person suffers a disadvantage but has no such claim on anyone else that they rectify it. Shklar did not discuss this distinction in the context of discrimination; but I think it captures quite well our worries about indirect discrimination.

[5] See, for instance, Richard Primus, 'The Future of Disparate Impact' (2010) 108 *Michigan Law Review* 1341.

[6] *Home Office v. Essop* [2015] EWCA Civ. 609.

meaningful conceptual-- distinction between direct and indirect discrimination was rejected by our Supreme Court a few years after Day & Brodsky wrote the article that I began with.[7] Perhaps for this reason, and perhaps also because our Constitution grants explicit protection to affirmative action measures and our human rights statutes give tribunals quite extensive powers to impose very intrusive measures on private organizations to rectify unintentional disadvantages experienced by minority groups, Canadians are not now so suspicious of attempts to redress indirect discrimination. We are more used to thinking that there *is* something morally troubling about continuing to act in ways that disproportionately disadvantage certain historically stigmatized and underprivileged groups, regardless of the aims or intentions of the agent. I shall try, in the rest of this paper, to explore what this might be, and to answer some objections that might be made by those of you who think firmly that direct and indirect discrimination should be treated as morally different.

The argument of the paper runs as follows. In Section 2, I will look closely at a number of core cases of indirect discrimination, cases that are commonly prohibited by law. I will try to show that the agents in these cases are not plausibly thought of as lacking in culpability, and that the policies do seem morally problematic. Section 3 of the paper considers several general principles that someone might use to try to explain why acts of direct discrimination are generally more troubling from a moral standpoint than acts of indirect discrimination. I shall argue that on closer inspection, each of these principles appears inadequate. In Section 4 of the paper, I use the analyses of Section 2 and 3 to suggest that we can see both direct and indirect discrimination as involving a kind of negligence. I hope through these arguments to suggest that the picture we initially began with, of a deep moral difference between these two forms of discrimination, is mistaken.

Before I begin, however, I want to say something about my strategy in this paper. It might seem that an argument purporting to show that agents of indirect discrimination are negligent is, in a troubling sense, socially and political regressive. After all, one of the great achievements of prohibitions on indirect discrimination is that they focus us, not on the agent's intentions or deliberations, but on the *effects* of her policies on *disadvantaged groups.* It might look as though I am turning the clock back, urging that we focus ourselves once again on the agent's attitudes and ignoring the real moral significance of the various effects of discrimination on protected groups –their social exclusion and relegation to the status of second-class citizens, their lack of freedom or lack of access to important opportunities, the huge difference between their levels of well-being and the levels enjoyed by more privileged individuals. But this is not my aim. The harmful effects of indirect discrimination –both the direct effects on those who are excluded or disadvantaged by certain policies, and the more diffuse, long-term effects on the broader social groups that are defined by these traits—are deeply important, and any adequate account of why discrimination is unfair or wrongful must take them into consideration. In Section 4 of the paper, I shall explain how the view that I sketch out in this paper –of agents of indirect discrimination as negligent-- could

[7] See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3

be conjoined with an account of why discrimination is unfair that appeals to these very real effects of indirect discrimination.

If these effects on victims are so important, however, why should we bother to focus on the negligence of the agent at all? Because I think that we can only question the view that direct discrimination is more serious if we focus on the particular features of discrimination that lead people to hold this view –features like the agent, the agent's motivation, and the agent's deliberations. We could, to be sure, try to show that indirect discrimination just as serious as direct discrimination from a moral standpoint by pointing to the depth and pervasiveness of its effects on protected groups. But this would not really address the concerns of those who believe that direct discrimination is more serious and more culpable --because they are focussing not on the effects of discrimination but on the agent of discrimination. That is why, in this paper, I shall focus primarily on the agent as well.[8]

## 2. *Analyzing cases of indirect discrimination*

In this section of the paper, I want to analyze some ordinary cases of indirect discrimination –not, obviously, cases in which nothing seems to be problematic about the act or the policy, but cases of the kind that are commonly prohibited by law and in which we might say that the agent has acted wrongly. I want to look in some detail at the agents. Do they seem culpable? And if so, why? And I want to look at their actions or policies. Do they seem as morally troubling as some cases of obviously and seriously wrongful direct discrimination? I am going to use real examples rather than contrived ones, even though they will be somewhat messier, because I worry that contrived examples may inadvertently edit out some of the facts that make a difference to our moral judgments about these agents and their actions.

Acts of indirect discrimination frequently occur as part of a whole set of policies, practices and assumptions that together form what we call "systemic discrimination." So let us start by considering one common instance of systemic discrimination: the culture of sexual harassment within the military. Last year, an External Review of the Canadian Armed Forces revealed an environment in which harassment and assault of women and LGBTQ members have become so commonplace that they are regarded as normal and natural.[9] Some of the worst aspects of this culture involve *direct* discrimination: frequent use of sexualized language and sexual jokes targeting women's body parts; comments and posters proclaiming that a woman enters the army "to find a man, leave a man, or become a man"; and sexual assaults and date rape of

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[8] My own prior work has focussed on the effects of discrimination on protected groups, and my own account of why discrimination is unfair appeals to its effects on victims' freedom: see Sophia Moreau, 'What is Discrimination?' (2010) 38 *Philosophy and Public Affairs* 143.

[9] The Honourable Marie Deschamps, 'External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces' (*National Defence and the Canadian Armed Forces,* 27 March 2015) available: www.forces.gc.ca.

younger women by senior ranking officers. But these acts of direct discrimination have been allowed to continue in large part because they are sustained by a whole set of policies that are *indirectly* discriminatory and that work to silence women and LGBTQ members. These include: a practice of ostracizing recruits who speak up about any kind of problem; a complaints process that has no provision for confidentiality; a policy of documenting only serious physical injuries and no "lesser" injuries; and a training program that does not focus on appropriate behaviour towards others. These policies amount to indirect discrimination because, even though they are neutral on their face, they have a disproportionate impact on women and LGTBQ members in a culture in which these people are the most frequent targets of sexual abuse.

If we look at these cases of indirect discrimination within their context –that is, within the culture of sexual harassment that exists in the military, in which everyone is aware that such acts are occurring even if they think this is normal and natural-- it is difficult to view the members of the Armed Forces as less than seriously culpable. They have failed to do certain crucial things to stop the subordination of women and LGBTQ members --such as develop a proper training program, encourage victims of abuse to come forward, cultivate a culture of openness and honesty, and implement a confidential complaints process.[10] And they have failed to do these things, and failed to see the importance of doing them, presumably because they fail to see women and LGTBQ members *as equals*, as beings whose interests are as important, and deserve as much weight in their deliberations, as the interests of straight men. Surely this is a kind of failing that we regard as quite serious. I think we would also deem the policies themselves to be, under the circumstances, morally unacceptable –regardless of whether we think that it is an act's effects, or underlying intent, or expressive message that determines its moral status. These policies work to perpetuate the lower status of women and LGBTQ members and to encourage continued harassment of them. So they clearly have harmful effects. And occurring as they do within an organization in which everyone knows that women and LGBTQ members are treated as second-class citizens, these policies implicitly condone the subservient treatment of women and LGBTQ members, and so send a demeaning message. It is true that, if they had occurred within an organization that lacked a culture of sexual abuse, these same policies would

[10] One might object that if this behaviour appears to involve a moral failing on the part of the officers, that is primarily because the officers have what we might call an "institutional duty of care" to look out for the well-being of women and other minority groups in the Armed Forces –that is, a duty that is quite independent of anything to do with discrimination, and has to do with their role in the Armed Forces— and they have violated this institutional duty. In other words, any moral failing that we see in these officers has less to do with indirect discrimination and more to do with a failure to live up to a quite separate duty of care that they stand under, as senior officers. Although it is true that senior officers stand under separate institutional duties of care to look out for the well-being of younger recruits, I do not think that this explains all of our moral discomfort about this case. Even junior members of the Armed Forces –whom we can suppose have no such institutional obligations—would be behaving unacceptably if they showed such disregard of women and LGBTQ members, and such willingness to perpetuate these groups' subordinate status. Moreover, the moral failing that I am noting here is not just a failure *to look after* women and LGBTQ members: it is a failure *to see and treat them as equals.* That failure is not something we can capture in terms of a failure to fulfil an institutional duty to promote someone else's well-being.

not have amounted to indirect discrimination and might not have been morally problematic. But this is irrelevant for the purposes of evaluating their moral status in this context.

Indeed, when we look closely at this example, the moral failings involved in the indirectly discriminatory policies do not seem so very different from the moral failings involved in the acts of direct discrimination --the sexual jokes, the assaults, and the harassment. Those who engage in such acts of direct discrimination are likely either trying to put victims "in their place" because they think of them as inferior and want their victims to know it, or they are just "having a bit of fun" on the assumption that having fun at the expense of these groups is perfectly acceptable because women and LGBTQ members aren't "real" soldiers anyway. Either way, the agents are failing to see these groups as their equals: they are failing to take the harms suffered by these people as a reason to act differently, and they are failing to treat these people's aims and ambitions as seriously as they treat their own. So both those engaged in direct discrimination and those engaged in indirect discrimination in this case are failing to see others as equals: they are failing to give others the moral significance that they should be given in their deliberations.

Of course, those who engage in direct discrimination must, in addition, know that they are directly causing physical or emotional harm to the people whom they assault or harass. But indirect discrimination also harms these groups, and the members of the Armed Forces who continue to support the indirectly discriminatory policies must be aware that they are contributing to the harm that is suffered by these groups. They are just contributing to it in a less direct way, with the causal chain being somewhat longer and mediated by other factors –such as other policies, and other people's words and actions. Should this fact really make that much of a difference to our moral thought about direct and indirect discrimination?

One might object to this analysis on the grounds that I have failed to mention some important distinctions between the direct and the indirect discrimination in this case. First, one might argue that those who engage in direct discrimination are *aiming at harm* towards women and LGBTQ members, perhaps not as an end it itself, but certainly as a means to securing their power over these people. By contrast, those who enforce or fail to change the otherwise neutral policies are not aiming to harm anyone –they are simply *foreseeing harm as a side-effect* of their action or inaction, given the existing culture in the military. So one might argue that there is actually a deep moral difference between the two. Alternatively, one might object that those who are engaged in direct discrimination are *actively bringing about harm*, whereas those who are failing to change policies and training programs are simply *allowing harm to occur,* and this is the distinction that really explains the moral difference between direct and indirect discrimination. Thirdly, one might suggest that in all cases of indirect discrimination, the policies are not harmful in and of themselves –they are only harmful *given certain background conditions*. In most cases of indirect discrimination, these background conditions are only tangentially or remotely connected to the agent of indirect discrimination. By contrast, in cases of direct discrimination, the harm that

is done by the disadvantage or exclusion of a particular group is more immediate or direct. If the two forms of discrimination seem equally morally serious in this military case, this is only –or so our hypothetical objector might suggest—because we are assuming that the people who enforce the indirectly discriminatory policies are themselves contributing to the culture of sexual abuse and denigration, and so the disadvantage is more closely connected to them. But this is a special feature of this case, and not a general feature of cases of indirect discrimination.

I am going to put these three proposed principled explanations of the difference between direct and indirect discrimination temporarily aside: I will discuss them in Section 3 of the paper. But there is another objection that one might make to my analysis of discrimination in the Armed Forces, related to the last objection I mentioned above. One might argue that this is an unhelpful type of example to use when trying to assess the moral status of indirect discrimination, because the indirect discrimination in this case is so closely bound up with direct discrimination: the policies that amount to indirect discrimination in this example do so only because they help to condone and so to perpetuate direct discrimination against these same groups. So it might seem that in this type of case, indirect discrimination is morally serious, or as serious as direct discrimination, only because of its connection with direct discrimination. We need to examine some other cases of indirect discrimination if we are to show that this is not true.

What we require is an example of indirect discrimination by agents who are not themselves engaged in direct discrimination, and where the indirectly discriminatory policy works to impose disadvantage by some means other than encouraging or permitting agents to engage in acts of direct discrimination against these groups. So consider the physical fitness tests used for hiring in occupations that require considerable strength and stamina –such as fire fighters, forest fire fighters, or security guards. Some of the fitness tests used for these occupations have faced legal challenges in the U.S. and Canada, on the grounds that they hold everyone to standards that were originally based on male aerobic capacity and male fitness targets and are therefore much harder for most women to succeed at.[11] The tests do not amount to direct discrimination: there is no reference to gender in the application of the test, the tests are open to both men and women, and some women do pass them. However, as a group, women find it disproportionately harder to pass the tests than men, and it seems that this is because of their physique and aerobic capacities as women.

A second, and similarly structured example of "independent indirect discrimination" involves written tests for aptitude or intelligence that are used by some employers for purposes of promotion.[12] Some of these tests have been found to be very difficult for certain racial minorities to pass: the percentage of blacks or Hispanics that pass the tests, out of all of those who attempt it, is a much smaller percentage than the

[11] See, for example, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, supra note 6.

[12] See the facts in *Ricci v. DeStefano*, 557 U.S. 557 (2009)

percentage of Caucasians who succeed, relative to the number who attempt it. Often, this occurs in part because the questions on the test presuppose knowledge of certain kinds of life experiences and certain sorts of social interactions, of a sort that are more commonly had by Caucasian families than by these racial minorities. (In some cases, the disparity in success rates results also from direct discrimination: white employees are part of a social network from which minority employees are excluded, and senior employees within this network are happy to coach friends and family members but not minority candidates. So that this will remain an example of "independent indirect discrimination", let us suppose that this is not occurring).

In both of these cases, the tests would be legally prohibited only if there were alternative tests available that could successfully track aptitude for the job, while at the same time increasing the number of minority candidates who pass the test. For if there were such alternatives available, then the current tests would not amount to a "proportionate" way of achieving a legitimate aim. In other words, if there were tests that are just as accurate (or more so) at measuring the capacities that are really needed to succeed at the job in question --such as the aerobic capacity that one needs if one is to be able to climb a ladder and lift someone out of a burning building, or the general knowledge of people that one needs in order to motivate the employees under one's supervision—and if these alternative tests gave these groups a better chance of success than the current tests do, then, and only then, would the current tests amount to the kind of indirect discrimination that we regard as justifiably legally prohibited and potentially morally wrongful.

The availability of these alternative tests is important, because it makes a difference to what agents of potentially wrongful indirect discrimination are doing and failing to do when they persist in applying the current tests. They are continuing to use their original tests in circumstances where there are alternatives available that would harm the minority groups less, while disadvantaging the employer in only a relatively small way. In some of these cases, the employer realizes that there are alternative tests available but decides not to implement an alternative test, either for reasons of cost or simply out of laziness. In other cases, the employer does not know that there are alternative tests available, but has a vague suspicion that there might be, and avoids looking into this because it is easier to turn a blind eye. And in still other cases, it may never have occurred to the employer that the original test poses difficulties for certain minorities, because the employer doesn't often bother to think about minority employees as the kind of people who deserve to be promoted. Regardless of which particular motivation is involved, these employers' actions seem to manifest exactly the same failure to see others as an equal that we saw in the example of indirect discrimination in the armed forces. Here, it is a failure to see other people's interests as significant enough to outweigh the relatively small trouble or cost that would be involved in looking into a particular test's effects on this group, in searching for a

viable alternative, or in changing the test once an alternative is found.[13] It does not matter that the difficulties that women and ethnic minorities have in passing the current tests –because of their physique or cultural and educational background—are not themselves due to the organizations that use the tests. We can be culpable for failing to assign other people's disadvantage enough weight in our deliberations, even if we were not ourselves responsible for the underlying conditions that led these other people to be disadvantaged by our actions.

What this analysis shows, I think, is that in those cases of indirect discrimination where we think it is appropriately prohibited by law and potentially morally wrong, the agents *do* seem culpable, and the tests *do* seem morally problematic. And they seem even more so when we reflect that in many of these cases, part of the reason why the organization in question has not tried to look for or develop alternative tests has to do with a lingering stereotype. Perhaps it is the stereotype that women don't really belong in "rough" professions such as fire-fighting: they are too delicate, too emotionally fragile, and too distracting to men. Or the stereotype that racial minorities couldn't really cope with managerial positions: they lack initiative, they don't have their lives together, and anyway, they probably have an enormous extended family at home that would take their attention away from their job. I suggested earlier that the cases of indirect discrimination that we examined all involved a failure to see certain groups as equals. I think we often fail to see these groups as equals precisely because we see them through the lens of a stereotype –perhaps the same stereotypes that were once openly used to try to rationalize direct discrimination. By "stereotype", I mean a generalization about a trait --a trait allegedly possessed by, all or almost all members of a particular group—which we use as a justification for seeing members of this group as different from ourselves and often as less than fully capable. There may certainly be circumstances in which reliance on stereotypes is necessary and unproblematic;[14] but it does seem in many circumstances to add to the culpability of the agent.

Of course, if I am right about the way in which stereotypes figure in the motivation of agents of indirect discrimination, then this means that what I have called "independent indirect discrimination" is not completely independent of direct discrimination: both can be rationalized by stereotypes, and the same stereotypes that were once given as explicit justifications for direct discrimination can be used privately to try to avoid having to search for alternatives to policies that disproportionately disadvantage certain groups. This does not pose a problem for my argument: independent indirect discrimination is still "independent" in the sense that it does not impose disadvantage on minority groups by encouraging *other* agents to engage in *separate* acts of direct discrimination towards this group. And so my examples of

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[13] I've said "relatively small trouble or cost" because if the cost of altering a policy would be significant, then presumably the current test *would* be a "proportionate" way of achieving a legitimate aim and the case would therefore not be one of *wrongful* indirect discrimination.

[14] See Fredrick Schauer, *Profiles, Probabilities and Stereotypes* (Cambridge, Harvard University Press, 2003).

indirect discrimination still serve the purpose of helping to demonstrate that indirect discrimination can be seriously troubling from a moral standpoint.

If we turn back to the RCMP's Stetson hat policy –the example which, at the very start of the paper, I used to illustrate our common view that indirect discrimination is accidental, unwitting, and not culpable—I think we may now see it in a rather different light. I have tried to argue in this section of the paper that indirect discrimination, at least where it is prohibited by law and potentially a moral wrong, involves a failure to see others as equals, a failure to give their interests an appropriate weight in your own deliberations. But surely this failure is exactly what occurred when the RCMP single-mindedly focussed on the importance of having all Mounties wear the Stetson hat and gave little or no weight in their deliberations to the plight of Sikhs. When the Stetson hat was first adopted, no doubt there were very few Sikhs in Canada and probably none that aspired to be a Mountie. But once the Sikh community became established and it was brought to the RCMP's attention that their dress code prevented Sikhs from joining, the RCMP chose to turn a blind eye, giving more weight to the continuation of a dress uniform than to the needs of a large group of Canadians. Moreover, it is part of the purpose of this ceremonial unit of the police force to represent all Canadian people. For this reason, the RCMP were arguably under a special duty toward Sikhs, a duty to ensure that the police force was open to them and a duty to give their interests greater weight when thinking about how to balance tradition against accessibility. The RCMP was not in the position of a private club that could choose to value tradition and ignore the impact of its policies on others. Giving more weight to an exclusionary tradition than to an entire sector of the population that it is your job to represent does seem morally troubling. It is also demeaning. It sends the message that Sikhs are so unimportant that they are worth less than the macho image of the Mountie, and that they look so strange and different from "us" that something would be lost if they were allowed to appear in ceremonial parades. And of course, like the indirectly discriminatory fitness or managerial tests that we just considered, the reasoning of the RCMP seems to involve stereotypes in a morally troubling way. For the traditional image of the Mountie wearing his Stetson hat –the image that the RCMP thought it so important to preserve-- is not just the image of a man who is strong and brave like a cowboy. It is the image of a man who is strong and brave and *white.*

I have argued in this section of the paper that indirect discrimination is not, as we might think, less morally problematic than direct discrimination. I have suggested that it often involves a failure to see other groups as equals, and I have also suggested that the same failure is found in cases of direct discrimination. But one might object that my analysis omits an important principled difference between direct and indirect discrimination, something that might explain why, even if many cases of indirect discrimination involve a failure to treat others as an equal, and even if the same is true of direct discrimination, nevertheless direct discrimination also involves something *further*, something that makes it *even more serious* from a moral standpoint. So I shall turn in the next section to some attempts to appeal to a single principle that might explain the moral difference between these two forms of discrimination. I shall argue that none of these explanations succeeds.

*3. Why might direct discrimination be more serious from a moral standpoint?*

There are a number of plausible moral principles to which one might appeal in trying to explain why direct discrimination is generally more serious than indirect discrimination and its agents, more culpable. In this section of the paper, I want to look in some detail at four of these principles. I shall argue that although these principles might have an initial intuitive appeal, each of them invokes a distinction that either does not accurately map onto the distinction between direct and indirect discrimination or does not have the explanatory power that it seems to have. Some of the principles fail for both of these reasons.

Consider first:

*(i) It is morally worse to act in ways that bring about harm than to omit to perform an action that might have averted harm*

One might suggest, using principle (i), that in cases of indirect discrimination, the agent merely omits to perform an action that might have averted harm: he "allows" harm. But in cases of direct discrimination, he takes positive steps to do something harmful. There is a wide philosophical literature on the moral significance of the distinction between acting and omitting, or doing harm and allowing harm, and some of this literature supports (i). But, even if we help ourselves to the large claim that (i) is sound, there are two problems with its application to direct and indirect discrimination.

First, at least within the law --and in particular the law of interpersonal wrongs, or tort law-- we don't commonly assume that omissions as a class are less culpable than harmful actions. What is relevant from a legal standpoint is not whether an agent acted or failed to act, but whether he had a duty to act in a certain way and violated that duty. Omissions that constitute violations of duties are, under the law, treated as wrongful and as culpable as actions that constitute violations of duties. So, for instance, if a doctor fails to diagnose and treat a pregnant woman's illness and her foetus is consequently born with medical problems, he is liable for that failure, because he failed to do something that he had a duty to do. I suspect that if we think the action/omission distinction is helpful in explaining cases of direct and indirect discrimination, this is because we are tacitly assuming *that there is no moral duty* owed in cases of indirect discrimination by the alleged discriminator to the group that his policies happen to disadvantage. In other words, we are assuming that all cases of indirect discrimination are cases of omission where there is no violation of a duty to act. But if this is right, then principle (i) does not explain why direct discrimination is more serious than indirect; rather, it smuggles this conclusion in through the back door by requiring that we assume from the start that the agent of indirect discrimination is not violating any moral duty.

And there is a second, independent problem with the application of (i) to cases of direct and indirect discrimination. This is that the distinction between doing harm and allowing harm simply does not map neatly onto the distinction between direct discrimination and indirect discrimination. Indirect discrimination might look like it involves merely allowing harm, if we think of examples such as failing to change a training program or failing to adopt an alternative test. But most cases of indirect discrimination also involve the discriminator taking certain positive steps. The same members of the Canadian Armed Forces who failed to change their training program also consistently *ran* the existing program, and they *enforced* a policy of silence by *punishing* those who complained of abuse. It was this combination of actions and omissions that condoned and so encouraged acts of abuse. The fire-fighting departments that failed to change their tests also *applied* the current tests based on men's aerobic capacities and used these tests to *deny* some women jobs. Again, it was a combination of actions and omissions that led to the increased disadvantage to women. These cases are not analogous to the cases of allowing harm in the philosophical literature, in which an agent simply stands by and watches while some other agent or some natural force causes harm to another person. Both direct and indirect discrimination each involve a combination of actions and omissions. So whatever the moral use of the distinction between doing harm and allowing harm, it is not, I think, helpful in this context.

A more promising explanation of the moral difference between direct and indirect discrimination might be that it lies in whether the agent intends harm as an end or a means to his end, or whether he merely foresees it as a side-effect of his act. Recall that, when we considered the culture of sexual harassment in the military, we noted that many of the officers who engage in direct discrimination, assaulting or insulting women and LSBTQ members, are harming them as a means to increasing or publicly demonstrating their own power over them. By contrast, the officers who enforce or fail to change the otherwise neutral policies are not aiming to harm anyone –they are simply foreseeing further assaults and insults as a side-effect of their action and inaction, given the existing culture in the military.

So perhaps underlying our moral reactions to direct and indirect discrimination is the following principle:

> *(ii) It is morally worse to intend harm as an end or a means to your end than merely to foresee harm as an unfortunate side-effect of your act.*

One problem with applying (ii) in this context, however, is that relatively few cases of direct discrimination involve an agent who maliciously *aims at harm*, either as an end or as a means to some further end. I think that, in our casual thoughts about discrimination, we think far too much about agents who maliciously desire to harm others. We assume that the typical agent of direct discrimination is deeply prejudiced and aims to harm the group in question, either as an end or as a means. Of course it is true that historically, the most heinous cases of discrimination have involved agents setting out to harm others, sometimes out of a cold hatred that makes harm its end,

and sometimes as a means to some other end, such as consolidating one's power or ingratiating oneself in the eyes of others who hate these groups. But I think it is crucially important to note here that it is no part of the definition of direct discrimination that an agent must act out of a desire to harm others, either as an end or as a means. And out of all of the cases of direct discrimination that have been recognized in our legal systems, most have actually not involved agents who aim at the harm of the disadvantaged group. Think, for instance, of the many forms of direct gender discrimination in the workplace. Consider the old American laws restricting women's working hours but not men's: although they were paternalistic, they were intended to protect women, not to harm them. Consider the many employers who hired young men over young women, worrying that the women would likely become pregnant and leave their employment. They were not trying to harm the women whom they did not hire: all that they were aiming to do was hire someone who had a greater chance of staying in their employment, because this was more cost-effective. Consider the businesses that impose a dress code requiring only female staff, but not male staff, to wear make-up and short skirts. They too are not aiming at harm: they simply believe this kind of dress code will make their female staff more attractive to clients and hence garner more clients overall. And we can see the same kind of motivation even in instances of racial discrimination. When youth clubs or sports clubs try posting different opening times for minority communities (eg. one time for members of the black community, one time for members of the Latino community), we standardly treat this as legally prohibited direct discrimination, since it is a form of explicit racial segregation. But the clubs' aim is to help, not to harm. If we regard such segregationist policies as morally problematic, the problem must lie in some other fact about them –perhaps that they show a presumptious paternalism, an insensitivity to the perspective of blacks and Latinos, and an ignorance of the history of racial segregation and the sorts of messages that segregationist policies now send, given this history.

All of these cases of direct discrimination that I have just mentioned –and there are many similar examples that could be cited—are poorly explained by the suggestion that the agents were intending harm as an end or as a means to their ends. It is true that in both the United States and the U.K., direct discrimination is proven as a matter of law by showing that an agent *intended* to draw a distinction based on a protected characteristic. But intending *to draw a distinction* is clearly different from intending *to harm* the group that is disadvantaged by that distinction.

A second problem with principle (ii) is that it invokes one part of the Doctrine of Double Effect, while omitting to mention another part of the doctrine that is crucial to the DDE's explanatory power. The DDE is supposed to explain why certain acts that cause harm might, under special circumstances, be permissible. It does this not just by appealing to the agent's intent, but also by imposing a requirement of proportionality. In order for it to be morally more acceptable for an agent to bring about certain harms when he simply foresees them as side-effects of his action than when he intends them as an end or as a means to his end, the beneficial effects of the action that the agent aims at must outweigh the action's harmful side-effects. The agent who discriminates

indirectly seems –at least in cases where the indirect discrimination is prohibited by law and potentially morally troubling— to *violate* this proportionality condition of the DDE. She has failed to adopt an alternative policy in cases where there is an available alternative that would serve her goal and cause *less* disadvantage to the protected group. So she is not acting with a view to bringing about some good that could outweigh the harmful side-effects of her action upon these other groups.

This means that, once we invoke the complete DDE, we are left without a good explanation of why the agent of indirect discrimination is less culpable than the agent of direct discrimination. In fact, far from exonerating the agent of indirect discrimination, the proportionality condition of the DDE may help to explain how she fails.[15] The members of the Armed Forces who continue to enforce a policy of silence within a culture of sexual harassment, and the RCMP officers who insist on preserving a traditional hat and turn a blind eye to the needs of Sikhs, and the companies that choose not to look for alternative tests in the sorts of circumstances we have discussed –all of them have, we might say, made a culpable mistake in their judgments about how much moral weight to give to the interests of others. They have accorded far too little weight to the harms that will be suffered by members of a particular disadvantaged group as a result of their policies, in a situation where these harms are not outweighed by the particular good that the agent is trying to bring about. These agents may indeed be trying to bring about some good –such as preserving tradition, or finding good fire-fighters or promoting the sorts of people who will make efficient managers—and for this reason they may seem innocent. But they do not give enough weight in their deliberations to the harmful effects of their policies on others, in circumstances where they ought to have known better. Is this really so much better from a moral standpoint than aiming at these people's harms? Or are these just different ways of failing to value other people appropriately? I am not sure that we can say that one is morally worse than the other. So *even if* direct discrimination were defined in such a way that all of its agents aimed at harm –which, as I have explained, it is not—it is unclear that principle (ii) would successfully explain why it is worse than the kinds of indirect discrimination that we prohibit by law and that we think are potentially wrongful.

A final difficulty with principle (ii) is that it seems to confuse a lack of absoluteness with a lack of moral seriousness. At least if we agree with Anscombe's interpretation of the DDE,[16] the difference between aiming at or intending a harm and acting in a way

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[15] Seana Shiffrin has a very illuminating discussion of how the *negligen*t actor fails to meet the proportionality condition of the DDE in her paper, 'The Moral Neglect of Negligence' in David Sobel, Peter Vallentyne, and Steven Wall (eds), *Oxford Studies in Political Philosophy,* Volume 3 (Oxford University Press, 2016). I think that the agent of indirect discrimination is one sort of negligent actor, and my discussion of how he fails to meet this proportionality condition is indebted to Shiffrin's discussion of negligence. (For a brief defence of my view that indirect discrimination is a form of negligence, see Section 4 of the paper; for a longer defence, see my paper, 'Discrimination as Negligence' (2012) in Colin MacLeod (ed), Supplementary Volume 36: Justice and Equality *Canadian Journal of Philosophy* 123.

[16] See G.E.M. Anscombe, 'War and Murder', in her *Ethics, Religion and Politics: Collected Philosophical Papers*, Volume 3 (Oxford, Basil Blackwell, 1981).

that one foresees will cause harm lies in the *absoluteness* of the prohibition: there is an absolute prohibition on making harm the object or purpose of your action, whereas there is only a relative prohibition on acting in ways that one foresees will bring about harm (because whether an act that foreseeably causes harm actually amounts to a moral wrong in a particular case is contingent on the circumstances --and in particular, as I noted above, on whether the beneficial consequences of the act outweigh its harmful ones). But absoluteness and moral seriousness are not the same thing. Even if we accept that there is only a relative prohibition on acting in ways that foreseeably cause harm, this does not commit us to any view at all about *how bad* or *how culpable* it is to act in ways that foreseeably cause harm *in those cases where such acts are wrong*. So although the DDE gives us a way to distinguish absolute from relative prohibitions, it is not clear that it can do the kind of work that principle (ii) needs to do, which is to explain a difference in moral seriousness.

Perhaps, though, the real moral difference between direct and indirect discrimination lies in the extent to which the harm is closely or directly connected to the agent. Although it is not true that all agents of direct discrimination aim at harm, it is true that because they draw explicit distinctions on the basis of a protected characteristic (or on the basis of a characteristic that is very tightly connected to a protected characteristic), the harm to the disadvantaged group usually results more directly or immediately from the agent's action. By contrast, cases of indirect discrimination usually involve neutral-looking policies that have disadvantageous effects on a particular protected group only because of a host of mediating factors, such as the education levels of a group, its poverty, past injustices towards that group, and so on. So it can look as though the relevant moral difference between direct and indirect discrimination lies in the closeness of the agent to the disadvantage, along the causal chain –or, to borrow a term from tort law, the "remoteness" of the damage from the agent.

So we might try:

> *(iii) It is morally worse to bring about harm directly than it is to bring it about indirectly through a causal chain in which the harm is more remotely connected to the agent.*

I have included this alternative in part because the concepts of "direct" and "indirect" discrimination seem to invite such an explanation, focussing as they do on the closeness or directness of the agent to the disadvantageous result. But I confess that I find it hard to see how this could be thought of as a defensible moral principle. Why should we think that it is morally worse to bring about harm directly rather than indirectly? Certainly we do not generally suppose that people are *less responsible* for outcomes just because they occur further down the causal chain. If it is my job to take a group of teenagers who have been in trouble with the law onto an island and guard them for a night, and I fall asleep and leave them to their own devices, with the result that they escape, board a boat, drive it recklessly into another boat, and damage that boat, the damage can be laid at my door because, even though there are numerous acts

of other agents intervening between my falling asleep and the boat being damaged, this is precisely the sort of eventuality that was reasonably foreseeable and that I had a duty to guard against.[17] Similarly, if I negligently drop a broken bottle in the sand and it is tossed about, carried here and there, and finally washes up on another beach many years later and injures a child, I am morally culpable for this injury in spite of the many factors and the many years intervening between my act and the actual injury –because this is precisely the kind of injury that makes it risky to drop broken bottles on a beach, and so I had a duty not to drop it. It is true that if the causal chain is very long and mediated by many other people's acts, then we do not generally think a particular agent is responsible for the outcome *unless he failed to do something that he had a duty to do.* But this suggests that what is really doing the moral work for us in (iii) is not actually an appeal to the directness or indirectness of the harm or disadvantage, but once again the tacit assumption that we have no duty to prevent disadvantage accruing to the groups marked out by protected characteristics, in cases of indirect discrimination. And this is a problem, for principle (iii) is supposed to explain *why* there might be a moral difference between these two forms of discrimination, and it is supposed to be the *remoteness* of the consequences that does the explanatory work here. It seems that it does not do this work; instead, what does the explanatory work is the claim that agents in cases of indirect discrimination do not have any moral duties to the groups they are disadvantaging.[18]

There is also another difficulty with (iii). The distinction between bringing about harm directly and bringing it about indirectly does not map neatly onto the distinction between direct and indirect discrimination. There are many core cases of direct discrimination where the disadvantage accrues to a particular group only because of many other factors that having nothing to do with the agent. Consider my earlier example of the local club that assigns different access hours to blacks and Latinos in order to reduce racial tensions. This is direct discrimination, and in fact a classic example of it, since it involves racial segregation. But it only disadvantages these groups because of a very complicated history of racial segregation and unequal treatment, and the disadvantage results not directly from different opening hours but very indirectly, through people's assumptions about what this segregation stands for, through the symbolic force of segregation, and through all of the many things that different members of these communities and of other communities will do in the face of this new policy of racial segregation in the club. Without all of these mediating acts, the policy of allocating different access hours to different racial groups would impose as little disadvantage on anyone as imposing different access hours for different age groups: babies and pre-schoolers from 9-11am, school-age children from 4-6pm. So even if (iii) were a sound moral principle, it is not clear that it could explain the difference between direct and indirect discrimination.

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[17] See *Dorset Yacht Co Ltd v Home Office* [1970] UKHL 2, [1970] AC 1004

[18] What about this claim, however? Perhaps *this* is the real reason why indirect discrimination seems less serious to us from a moral standpoint: we are tacitly assuming that agents of indirect discrimination do not stand under any special duties towards members of minority groups. I shall discuss this objection in Section 4.

*4. Direct and indirect discrimination as forms of negligence*

I have now tried to show that the most seemingly plausible moral principles that we might invoke to explain why there is a moral difference between direct and indirect discrimination actually fail to explain this. In each case, we saw that either the principle was unsound or it invoked a distinction that did not accurately map onto the distinction between direct and indirect discrimination. This should give us some reason for doubting that the distinction between direct and indirect discrimination has the moral significance that it initially seems to have.

But if we accept that the two forms of discrimination are not so different from a moral standpoint, can we give a unified account of what is morally troubling about them? I think we can, and it is an account that is consistent with a number of different theories that scholars have recently proposed to explain why direct discrimination is unfair. When we looked at examples of indirect and direct discrimination in Section 2, we found that common to all of them was a certain kind of failure to give other people and their interests the kind of moral significance that they should be given in the agent's deliberations. In that sense, it was a failure to think of others as one's equal, and a concomitant failure to treat others as equals through one's actions. I think we can see this as a form of negligence. This sort of negligence mirrors the kind of negligence we recognize as culpable in tort law: though the negligence that discrimination involves is not negligence in the sense of an unreasonable creation of a risk, but negligence in the sense of unreasonably failing to take someone and her interests as seriously as one ought to take them, and then unreasonably failing to act in the way that a person who had taken their interests seriously would have acted.[19]

I should emphasize here that in suggesting that both direct and indirect discrimination involve a kind of negligence, I am not offering the concept of negligence as a kind of recipe or instruction manual for determining how far an employer or other agent's obligations extend to those who are adversely affected by discrimination. The abstract idea of negligence cannot do that: for that, we need a theory of *when* and *why* it is reasonable for us to take these groups' interests seriously, and of what constitutes taking them seriously in particular circumstances.[20] I think it is helpful for us to think about discrimination as a form of negligence, not because this one idea can specify the full extent of an agent's obligations, but rather because it draws us away from an exclusive and narrow focus on the agent's intentions and aims, and instead broadens our gaze, out towards the many things that the agent has failed to notice and failed to do, and out towards the many effects of his policy on the victims of discrimination, which make the policy into something that the agent ought to have scrutinized further and altered.

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[19] For a much more detailed account of why we can see both kinds of discrimination as a form of negligence, see my article 'Discrimination as Negligence' (n 15).

[20] See below for further discussion of this, in relation to different theories of discrimination.

There are at least two objections one might make to my suggestion that both direct and indirect discrimination involve negligence. First, one might argue that prohibitions on indirect discrimination are best thought of, not as akin to negligence law, but as a form of strict liability. After all, it is no defence to a claim of indirect discrimination that one took all of the precautions that one reasonably could have taken to avoid disproportionately harming a particular protected group or that one did one's best to look into alternative policies. And presumably, even though in many cases we do think that a reasonable person in the agent's position would have been aware of the disproportionate effects of their policy on a particular group and would have located a viable alternative, nevertheless there will be some cases in which agents, though no fault of their own, fail to notice either the availability of alternative policies or the negative effects of their existing policy. Would we really want to say that these agents are negligent? Wouldn't we want to say, instead, that although they are not negligent and are not in any way at fault, there are nevertheless sound policy reasons for holding that they too should bear the costs of fixing their policies, to eliminate these harmful effects on protected groups?

It is true, of course, that absence of fault is no defence in law to a claim of indirect discrimination, either in the U.K. or in the United States. But this does not seem to me to show that it is unhelpful to think about the kind of failing that is involved in cases of discrimination as a form of negligence. I think we can view the absence of such a defence as reflecting the diverse nature of the aims of anti-discrimination law. One of the aims of anti-discrimination law is clearly to encourage governments, corporations, employers, providers of goods and services –any agent who is in control of significant resources or is in the position of offering significant opportunities to members of the public—to consider the impact of his actions on groups that have historically been treated as second-class citizens and significantly disadvantaged. But another aim of anti-discrimination law, and particularly of prohibitions on indirect discrimination, is to try to rectify or reduce some of these disadvantages. In other words, anti-discrimination law focuses not just on the agents of discrimination but on the effects of their policies on protected groups. Presumably, if lack of fault were a defence, this would impeded the goal of improving the prospects of these groups. It might also function as a disincentive to employers or other agents of indirect discrimination, who might, under an explicit fault standard, be less likely to stretch themselves, less likely to take that extra step to try to figure out alternatives that would cause less harm to members of protected groups. So we can explain the absence of this defence in a way that is entirely consistent with my theory.

Having said this, I do not think it is true that many *actual* cases of wrongful indirect discrimination have involved agents who made perfectly reasonable assumptions and investigations but were simply unable, through no fault of their own, to grasp that their policies had disproportionate effects on protected groups or to locate better alternatives. We need to remember here who the bearers of a legal duty not to discriminate are. Under the law, these are not ordinary private citizens going about their affairs, but organizations that hold themselves out to the public as providers of

goods and services, or bearers of employment opportunities –organizations that in some way act within the public sphere and that are in charge of significant resources and opportunities. As John Gardner has said, describing the role of employers, "The employer finds himself in a special privileged position in the distributive mechanics of society . . . [he will], like a government, determine some of the society's most important distributions."[21] It seems to me that it is reasonable to expect people in these positions to be aware of the history of social exclusion of minority groups in our society and to be particularly vigilant about the effects of their own policies on these groups. And it seems to me, similarly, that these duty-bearers are likely already to have access to much of the relevant information they need, in order to assess the impact of their policies on these groups. They are a part of many social networks of similar employers or providers of similar goods; and they live in a society in which the media regularly bombard them with information (not all of it accurate, admittedly) about allegations of discrimination made by minority groups in a variety of contexts. The idea that there could, under these circumstances, be many sincere employers who are simply unable to figure out that their tests have unfair adverse effects on ethnic minorities or that their policies unfairly disadvantage women –this seems to me a convenient fiction, one that some agents of indirect discrimination might like us to believe, but not one that has much basis in actual fact. So I think we need to be honest that such cases, if they ever do arise, will arise rarely. When they do, we can say, as I did above, that there are nevertheless sound reasons of distributive justice for holding these agents liable as a matter of law, even if from a moral standpoint we think they are not culpable.

There is also a second objection one might make to my suggestion that both direct and indirect discrimination involve negligence. One might object that it is only negligent to fail to give other people's interests a certain weight in one's own deliberations, and to fail to act accordingly, if we are actually *obliged* to give others' interests that weight. And one might claim that the existence of such obligations is precisely what is contested by at least some of those people who think that indirect discrimination is less morally problematic than direct discrimination. When I have discussed indirect discrimination of the kind that is prohibited by law, I have suggested that the agents ought to make efforts to determine whether there are alternatives to their policies that would disadvantage minority groups to a lesser extent while still serving their overall purpose, and that they are obliged to implement such alternatives if they exist. And I have suggested that those who fail to do this are failing to take other people, and their interests and ambitions, seriously. But some philosophers who theorize about discrimination, such as John Gardner and Richard Arneson, would deny that we stand under *any* such duties towards members of protected groups --at least, not duties that we owe them by virtue of their membership in such groups. These philosophers would argue that the agent who discriminates indirectly does not inappropriately elevate her own interests above theirs because she stands, in the first place, under no obligation to give their interests any particular weight in her own

[21] John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 *Oxford Journal of Legal Studies* 1, 11.

deliberations.[22] Of course, both Gardner and Arneson allow that there could be beneficial effects to prohibiting indirect discrimination that might justify such prohibitions in a legal system: for instance, such prohibitions likely result in a redistribution of opportunities from the privileged to the underprivileged, and this will increase the well-being of underprivileged groups. But these are just beneficial consequences of a certain policy choice; and they do not, for Gardner and Arneson, track any kind of prior moral duty that agents might have to each other. And so agents who fail to give such weight to the interests of disadvantaged groups are not, on their views, negligent.

Neither Gardner nor Arneson gives lengthy arguments for the view that we have no such duties to minority groups. Arneson starts from a principle rather like my principle (ii) in Section 2, suggesting that direct discrimination is wrongful because the agent in some way aims at harm or is driven by an unwarranted hatred or prejudice, and then suggests that because this motivation is absent in cases of indirect discrimination, we should try instead to explain our legal prohibitions on such cases as driven by policies of bettering the situation of minority groups. I have already argued, in Section 2 that most agents of direct discrimination do not aim at harm and are not motivated by unwarranted hatred; and I cannot, in the short space that is left here, offer a full defence of the claim that we do stand under such moral duties. But I do want to note two things. First, it does seem more plausible than not to suppose that we owe some kind of duty to these minority groups, when we consider what all of the groups identified by "protected characteristics" have in common. I have been silent on this so far in the paper, and in fact legal discussions of discrimination are often silent on this because we simply take the list of protected characteristics as a given. But of course the kinds of groups that possess these protected traits –racial minorities, women, LGBTQ members, members of religions that have historically faced persecution or that are now regarded as "barbaric"—all of these groups have suffered social subordination, unjust exclusion, and persistent and severe economic disadvantage. So to suppose that I have a duty, in my deliberations, to give some weight to the disproportionate disadvantage suffered by these groups as a result of my policy is not like supposing that I have a *general* duty to give as much weight to other people's interests in my deliberations as I do to my own. It seems quite plausible that there is some special fact or set of facts concerning the history or situation of these groups and my relationship to them that could ground a duty owed by me to members of these groups, but not to others.

There are many quite different accounts we could give of what these facts are –and this brings me to my second point. The idea that we stand under some such duty is consistent with a number of the theories that are currently being put forward by philosophers who write on discrimination.[23] We could suggest, as Tarun Khaitan has

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[22] See Richard Arneson, 'What is Wrongful Discrimination? (2006) 43 *San Diego Law Review* 775, and Gardner, 'Liberals and Unlawful Discrimination' (n 21).

[23] My aim here is simply to suggest that the view that discrimination involves negligence (and thereby involves the violation of a duty to the groups who are directly or indirectly disadvantaged)

done, that the disadvantages faced by these groups prevent them from accessing some of the basic goods necessary to live a good life, and that this is ultimately what grounds our legal and moral duties towards them.[24] We could adopt a desert-prioritarian account such as Kasper Lippert-Rasmussen's.[25] We could appeal to the importance of preventing the creation and perpetuation of subordinate classes of people, as Owen Fiss did.[26] Or we could instead appeal to Hellman's account of discrimination as problematic insofar as it demeans the groups that are disadvantaged.[27] And I have tried, in other articles, to defend a view of discrimination that grounds our duty not to discriminate upon a right to "deliberative freedom,"[28] and more recently, a pluralistic view that appeals to a number of these different harmful effects.[29] All of these views offer us potential ways of explaining why, in both cases of direct and cases of indirect discrimination, we can see agents as negligent, as unreasonably failing to give other people and their interests the kind of weight that they should have given to them in their own deliberations.

In this paper, I began by analyzing a number of cases of indirect discrimination that are commonly prohibited by law. I tried to show that they all involve a certain kind of moral failing: a failure to treat others as equals and to give them and their interests due weight in one's deliberations. I then looked at principles that might explain why direct discrimination involves some even greater failing –but I was unable to find any general principle that might satisfactorily explain the difference between cases of direct discrimination and cases of indirect discrimination. Finally, I suggested that rather than assuming that there is a deep moral difference between these forms of discrimination, we might think of both of them as instances of negligence. I have emphasized throughout the paper that, in focussing on the agents of discrimination and their deliberations, I do not mean to discount the importance of the harms that

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is consistent with a number of different theories of what makes discrimination unfair. I am not claiming that all of the proponents of these theories would actually endorse my view, but rather that a coherent version of their theory could be constructed that accords with my view. (Also, it is important to note that some of these theorists, such as Hellman, would hold that the relevant duty is a moral duty and a legal duty; others might hold that it is a legal duty but not a moral duty).

[24] Tarun Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015).

[25] Kasper Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (Oxford University Press, 2014).

[26] Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5 *Philosophy and Public Affairs* 107.

[27] Deborah Hellman, *When is Discrimination Wrong?* (Harvard University Press, 2008). Although Hellman, like Fiss, offers her account as an account of direct discrimination only, it is not clear to me that it is only direct discrimination that demeans people, and not also certain cases of indirect discrimination. I have tried throughout the paper to show that a number of core cases of indirect discrimination can also be understood as demeaning and subordinating. See, for instance, my discussion at the end of Section 2 of the RCMP's Stetson hat policy.

[28] See Sophia Moreau, 'In Defense of a Liberty-Based Account of Discrimination' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013); and Moreau 'What is Discrimination?' (n 8).

[29] Sophia Moreau, 'Equality and Discrimination,' forthcoming in John Tasioulas (ed), *The Cambridge Companion to Philosophy of Law* (Cambridge University Press, 2018).

accrue to victims of discrimination. On the contrary, the negligence of these agents can only be fully explained by appealing to these harmful effects.

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