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Marking the Internal and External Limits of Discrimination Law in *Lee v Ashers Baking Company*

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Abstract

One of the most frequently occurring clashes between different groups in society is where religious beliefs concerning homosexuality are manifested in the public square through positive acts such as preaching against homosexual practices and omissions such as a refusal to provide goods and service to homosexual individuals. In cases such as these, discrimination law is expected to intervene to uphold the value of equality. *Lee v Ashers Baking Company* was no different, involving bakers who refused to fulfil a customer's order of a cake iced with the message 'Support Gay Marriage'. The Supreme Court decided in favour of the bakers, and in so doing, analysed and marked the limits of discrimination law — specifically, the prohibition of direct discrimination. This article seeks to mark these limits, examining their desirability against the background of domestic and international jurisprudence and political theory concerning freedoms of religion and expression. It first examines the *internal limits* of discrimination law, namely the different fact patterns in which the conventional 'shape' of direct discrimination cases has been permitted to be modified. It then examines the *external limits* of discrimination

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law, namely the pressure exerted on the reach of discrimination law by alleged discriminators' freedoms of religion and expression.

Keywords: discrimination law, direct discrimination, LGBTQ discrimination, freedom of religion, freedom of expression

I. Introduction

As the equality project advances, diversity in the United Kingdom increases, and political polarisation becomes starker, clashes become increasingly frequent between groups of different race, belief, gender, and sexual orientation. In these instances, equality law is expected to intervene. One of the most paradigmatic clashes is where religious beliefs concerning homosexuality are manifested in the public square through positive acts such as preaching against homosexual practices,[1] and omissions such as a refusal to provide goods and services to homosexual individuals.[2] *Lee v Ashers Baking Company*[3] embodies the latter clash. Ashers Bakery, a business run according to its owners' — the McArthurs'— Christian beliefs, cancelled an order placed by Mr Lee for a cake iced with the message "Support Gay Marriage". It did so because, in the owners' view, fulfilling the order would be promoting a message that was contrary to their beliefs, violating their conscience.

The type of clash embodied in *Lee* is particularly challenging because it presses at the limits of discrimination law, from both the inside and the outside. The internal limits are faced because *Lee* presents a unique pattern of alleged discrimination: the differential treatment was dealt out irrespective of the specific customer's identity, thereby bending the conventional form of direct discrimination as differential treatment of *persons*. To have found discrimination in *Lee* would therefore have expanded the range of conduct prohibited. The external limits are faced because Ashers' unilateral objection to the order was rooted in their religious belief that marriage is reserved for heterosexual couples, engaging their freedoms of religion and expression. The aim of this article is to utilise this special *Lee* fact pattern to trace the limits of discrimination prohibitions. These should then be heeded to maintain the conceptual integrity of discrimination law, and vindicate the values of a liberal plural society in future discrimination cases.

This article focuses on the impact of the decision in *Lee* on the application of the Equality Act 2010 in England and Wales, whose provisions are substantially

1 *Hammond v DPP* [2004] EWHC 69 (Admin), [2004] 1 WLUK 95.
2 *Bull v Hall* [2013] UKSC 73, [2013] 1 WLR 3741.
3 *Lee v Ashers Baking Company* [2018] UKSC 49, [2018] 3 WLR 1294.

analogous to the Northern Ireland provisions applied in *Lee*.[4] In the first Part, I draw the internal limits of discrimination law by analysing and evaluating the Supreme Court's application of the tools of comparator, indissociability to protected characteristics, associative discrimination, and indirect discrimination. There, I conclude that the limits of the discrimination concept observed by the Court can be explained as a sustained focus on the personal characteristics of individuals, rather than the substance of messages involved, even when the substance relates to protected personal characteristics. In the second Part, building on the Court's brief analysis of relevant rights in the European Convention on Human Rights, I study the tension between discrimination law and freedoms of religion and of expression, concluding that the Court rightly observed these external limits. I supplement the Court's brief reasoning with an analysis of case law in other jurisdictions and propose a preferable future trajectory for the interaction between these values for future discrimination cases.[5]

II. Internal Limits

A. Link between protected characteristiscs and less favourable treatment

The Supreme Court's analysis of direct discrimination firmly refocuses discrimination prohibitions as protections against differential treatment of *persons*, and clarifies what that means. This was captured by Lady Hale's terse statement in her judgment that "[by] definition, direct discrimination is treating people differently".[6] This seems a rather obvious point until one confronts the dispute at the heart of *Lee*, which raises questions about what it means to discriminate against a person. Lee claimed he had been treated less favourably on grounds of his sexual orientation or political beliefs by being refused his order, whilst Ashers claimed they had not treated Lee less favourably on those grounds but rather objected to the message requested regardless of Lee's personal characteristics, and would have so objected whatever the customer's characteristics. The Supreme Court decided in favour of Ashers on both the grounds of sexual orientation and political belief,

[4] Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI 21)); Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SI 2006/439).

[5] At the time of writing, it has been reported that the European Court of Human Rights will soon hear a claim by Mr Lee on the implications of the UK Supreme Court ruling on his rights under the European Convention on Human Rights. The court will pronounce on whether the UK has fulfilled its obligations to protect Mr Lee's Convention rights. I explore these issues in Section III.

[6] *Lee* (n 3) [23].

drawing a distinction between discriminating against a person and discriminating against a message:

> "[i]n a nutshell, the objection was to the message and not to any particular person or persons [...].[7] There was no less favourable treatment on [the ground of political beliefs] because anyone else would have been treated in the same way. The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake. The less favourable treatment was afforded to the message not to the man".[8]

It is a reasonable first impression of the decision that the distinction is artificial and formalistic. Is it not the point of discrimination law to foster an environment in which diversity is tolerated and even celebrated, so that any individual can obtain goods and services and take part in society without hindrances like the one faced by Lee in this case? It is argued, however, that the distinction can be supported.

The deconstructed issue faced by the Court was: what is the requisite link between the protected characteristic in question and the less favourable treatment afforded? This is an essential aspect of any direct discrimination claim because not all "less favourable treatment" is simply characterised as unlawfully discriminatory: the treatment must be specifically related to a prohibited ground (i.e., protected characteristic).[9] Campbell and Smith have called this the "grounding requirement"[10] for direct discrimination. The question of what this requisite link is can only be answered satisfactorily with reference to the aims of discrimination and equality law, which is the focus of this section. More analytically, the Court's granular application of the relevant tools of discrimination law — discussed in later sections — are best understood in light of its circumscription of this requisite link, thereby internally limiting discrimination law.

The standard link between protected characteristic and treatment afforded in core direct discrimination cases is that of less favourable treatment dealt out simply because the specific recipient of the treatment is of a particular race, sex, age, or other protected characteristic. Take the example of a plumber who only fixes

7 ibid [34].

8 ibid [47].

9 The protected characteristics in the Equality Act 2010 (at section 4) are the characteristics possession of which have been determined as illegitimate grounds for treating individuals differently.

10 Colin Campbell and Dale Smith, 'The Grounding Requirement for Direct Discrimination' (2020) 136 LQR 258.

the plumbing in white households, and refuses to carry out a service requested by an Indian household. The Indian household has received less favourable treatment simply because they are not white: they have been differentiated expressly on grounds of their race (a protected characteristic) and dealt with accordingly. This standard link is not the only possible permutation that gives rise to a claim in direct discrimination. An example of an expansion of the range of possible links is associative discrimination, where the protected characteristic that has factored into the less favourable treatment belongs to a person other than the recipient of the treatment, but who is associated with that recipient. Another example is perception-based discrimination, which finds unlawful discrimination where the recipient of the treatment does not actually possess a protected characteristic, but where the alleged discriminator thought they did possess it, and discriminated on that ground. These expansions show how the requirement of a characteristic-treatment link has not been rigidly interpreted.

Some links are impermissible, however, not simply because they are tenuous but because they distort the very concept of discrimination. For example, counsel for Lee at the County Court submitted that "under [the Fair Employment and Treatment Order], discrimination can take place on the grounds of the discriminator's religious belief and political opinion".[11] Thus, counsel claimed that the protected characteristic could belong to the alleged discriminator who dealt out the less favourable treatment. In rejecting this proposal, Lady Hale laid out the basic requirements for the characteristic-treatment link:

> "[t]he purpose of discrimination law is to protect a person (or a person or persons with whom he is associated) who has a protected characteristic from being treated less favourably because of that characteristic. The purpose is not to protect people without such a characteristic from being treated les [*sic.*] favourably because of the protected characteristic of the alleged discriminator […].[12]
>
> [Such] a reading would be inconsistent with article 3(2)(a) [the provision which prohibits direct discrimination] which requires a comparison between the person receiving the less favourable treatment and 'other persons': this would not be possible if the treatment were on the grounds of the discriminator's beliefs

[11] *Lee* (n 3) [42]; Lee *v Ashers Baking Co Ltd* [2015] NICty 2, [2015] 5 WLUK 483 [47(7)].
[12] *Lee* (n 3) [43].

because everyone would be treated alike".[13]

Lady Hale's rejection of this proposal is based on an understanding of the meaning of discrimination as contravention of the rule that 'everyone [should] be treated alike'. This is a notably *personal* understanding of discrimination: it is not established where there has been less favourable treatment which was related — in the alleged discriminator's mind — to an unfavourable perception of a race, sex, sexual orientation, or other characteristic, conceived in the abstract. It is only established where a protected characteristic is possessed (or perceived to be possessed) by a specific individual who is either themselves less favourably treated, or is associated with someone who is.

The reason for requiring a characteristic-treatment link lies in the rationale underpinning discrimination law. The idea of direct discrimination as a wrong is based on the principle of formal equality that 'like cases be treated alike'. This Aristotelian principle of consistent treatment has underpinned the notion of equality from its inception.[14] There have been various moral justifications proposed for this principle, one of the most significant of which is that of universal human dignity, deriving from Aquinian philosophy. This theory, based on dignity, holds that inconsistent treatment fails to respect the universal human dignity of individuals by refusing to confer advantages on them on the basis of characteristics that are irrelevant, especially where the characteristic has been the subject of historical prejudice.[15]

Dignity continues to be regarded as the basis of discrimination law. The Universal Declaration of Human Rights ties equality — a foundational ideal of the Declaration — to dignity: "All human beings are born free and equal in dignity and rights".[16] The EU Charter of Fundamental Rights also emphatically declares the value of dignity: "Human dignity is inviolable. It must be respected and protected".[17] Although the specific content of the concept of 'dignity' is not clear, it is agreed that the basic idea is "recognition of the worth of the human person as a fundamental principle".[18] This "worth of the human person" is upheld

[13] ibid [44].

[14] Jarlath Clifford, 'Equality' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 420, 422.

[15] Patrick Shin, 'Is There a Unitary Concept of Discrimination?' in Deborah Hellman and Sophie Moreau, *Philosophical Foundations of Discrimination Law* (OUP 2013) 163.

[16] Universal Declaration of Human Rights, Article 1.

[17] EU Charter of Fundamental Rights, Article 1.

[18] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' [2008] European Journal of International Law 655, 710, quoting Paolo Carozza, 'My Friend is a Stranger: The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 Texas Law Review 1031, 1081.

by discrimination law, which prohibits the singling out of individuals from others solely because they have a particular characteristic.

This universal dignity is not harmed where everyone is treated alike. The contrast between *Lee v Ashers* and *Bull v Hall* is illustrative here. In *Bull v Hall*, Christian B&B hoteliers operated a policy of only allowing married couples to book a double room, on the basis of their religious belief that sexual relations should only take place within marriage. Therefore, they refused to allow the complainants, a gay couple, to book a double room. At the time, there was no legislative provision for same-sex marriage. This differed from *Lee* in a crucial respect. In *Lee*, any customer ordering that cake would have been refused, and so everyone would have been treated alike. The personal worth of the customer as a human being sharing universal dignity equally with any other human being, would have been respected. The bakery would have made no distinction between customers who made that order, their decision to refuse being based solely on the content of the message. Indeed, if the order had come in through a nameless online form, it would still have been refused. On the contrary, in *Bull*, a heterosexual couple would have been able to book the double room, whereas the homosexual couple (complainants) were not allowed to. This is clearly differential treatment of individuals personally, because the hoteliers' conduct differed according to the personal characteristics of the customer in question. Such differential, non-universal treatment does not respect the universal dignity of the heterosexual and homosexual customers alike, because the former have been regarded as being entitled to the benefits of a double room, but not the latter. The attitude of the hoteliers — whether malicious or wholly well-meaning — is immaterial.[19] It may be argued that *Bull* is not all that different from *Lee* because both instances of conduct sprang from a religious belief applied as a blanket policy for all their business operations. However, the very reason that *Lee* is a unique matrix is not that Ashers held a protected belief, but that it was absolutely immaterial what the sexual orientation or political belief of the customer before them was: the order was refused not because Lee was gay or because he supported same-sex marriage, but because that message had been ordered. In contrast, in *Bull* the sexual orientation of the customers was absolutely material: it determined whether the benefits of the double room would be conferred or not.

The Canadian judicial explication of basic dignity helpfully sets out its connection to the principle of consistent treatment. Courts have regarded a violation of dignity to have taken place where people have been treated differently — on a personal and specific level — on the grounds of a protected characteristic,

[19] *R(E) v JFS Governing Body* [2009] UKSC 15, [2010] 2 AC 728.

thereby relegating them to a demeaned position in the community of individuals they live in:

> "[e]quality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity".[20]

In *Bull*, the homosexual couple were effectively relegated as 'second class citizens' relative to the hypothetical heterosexual couple that would occupy the 'first class' in this metaphor, because on grounds of their sexual orientation they could not obtain the benefit they sought. In contrast, in *Lee*, no customer was first or second class: they were all treated alike. The capacity of the equal marriage message itself to perpetuate first-class and second-class citizenship is beyond the scope of this inquiry. Firstly, that operates on a secondary plane of analysis (since it does not concern consistent treatment of customers) and is therefore irrelevant. Secondly, it is also an inappropriate factor for judicial analysis since the inquiry into the dignity aspect of equal marriage rights entails a more politically debatable question of dignity compared to whether treatment of individuals has been consistent. This is especially so considering that same-sex marriage had not yet been legalised in Northern Ireland at the time. The level of basic dignity being protected by the legal discrimination concept is that of being viewed on the same level as other individuals despite possession of a protected characteristic.

A historical appraisal of discrimination law supports this view of prohibited discrimination. Fredman has observed that the concept of equality in the UK gained traction "with the advent of mercantile capitalism and the loosening bonds of feudalism", and the significance of the equality principle in that period was its economic outworking in "the principle of freedom of contract" or the "notion of equal parties".[21] This exposes the most basic understanding of the dignity of human beings, which requires that they not be viewed as occupying different levels of society simply by virtue of arbitrary differences, but rather as equal, and treated accordingly in transactions and social interactions. In Shin's words, this basic equality principle prohibits adverse treatment on the basis of "an antagonistic attitude toward individuals because of a [protected characteristic]".[22]

In short, principle and history inform us that discrimination prohibitions have the narrow aim of addressing violations of the basic universal dignity of human beings that requires consistent treatment. This should not be carelessly

[20] *Law v Canada* [1999] 1 SCR 497, [51].
[21] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 5.
[22] Shin (n 15) 173.

disregarded in favour of expansive interpretations of discrimination law, as this risks impinging on the autonomy of individuals — specifically their freedoms of expression and religion. The nobility of the ideal of equality, and the openness and indeterminacy of the general social concept of discrimination that is used to describe a range of undesirable behaviours in society, can lead an enthusiastic judge to engage in a teleologically expansive interpretation of discrimination law, widening the scope of situations that could be found to constitute unlawful discrimination. It is commendable that the judges did not so expand the law in *Lee*.

This principled narrow domain of discrimination law requires a continued tethering of the relevant protected characteristic to the recipient of the less favourable treatment (or their associate). The granular tools of discrimination law with which counsel for Lee attempted to draw a qualifying characteristic-treatment link, and the Supreme Court's application of them, merit detailed discussion as they collectively operate as the internal limits of discrimination law.

B. Choice of comparator

The choice of comparator — an essential step in claims of direct discrimination — is often not obvious, as demonstrated in the different choices made initially by Brownlie J in the County Court[23] and then by the Northern Ireland Court of Appeal,[24] affirmed by the Supreme Court.[25] The latter, in rejecting the former's formulation of the comparative exercise, clarified that the relevant protected characteristic had to be possessed by a specific individual: either the one who was meted out the less favourable treatment or an associated individual. No other circumstance in the comparator counterfactual can change, for otherwise direct discrimination may be established on facts that actually lack a qualifying link between the adverse treatment and the protected characteristic.

The competing comparator options in *Lee* yielded dramatically different outcomes. In the sexual orientation claim, Brownlie J compared Lee to a "heterosexual person placing an order for a cake with the graphics either 'Support Marriage' or 'Support Heterosexual Marriage'".[26] This was rejected by Morgan LCJ in the Court of Appeal because it "changed both the sexual orientation of the person and the message".[27] Instead, "[the] true comparator was a heterosexual person seeking the same cake". The Supreme Court upheld this.[28] This appellate

[23] *Lee v Ashers Baking Co Ltd* [2015] NICty 2, [2015] 5 WLUK 483 [42].
[24] L*ee v Ashers Baking Co Ltd* [2016] NICA 39, 2016 WL 06268003 [24].
[25] *Lee* (n 3) [24], [34]–[35].
[26] *Lee* (n 23) [42].
[27] *Lee* (n 24) [24].
[28] *Lee* (n 3) [24], [47].

conclusion circumscribed the appropriate comparator to account only for the personal characteristics of individuals, without changing any other circumstance. In the Equality Act 2010, this circumscription is expressly mandated by section 23(1): "[o]n a comparison of cases for the purposes of section 13 […] there must be no material difference between the circumstances relating to each case". Even without express provision, this approach accords with the principle underpinning direct discrimination law. The mischief to be remedied, after all, is denial of equal dignity to an individual because of their protected characteristic.

This was carefully and commendably applied in *Ladele v Islington LBC*.[29] Ms Ladele, a registrar for the council, refused to register civil partnerships on the grounds of her religious belief. Whilst the employment tribunal had adopted the comparator of a gay registrar (who would have registered the partnerships) and thereby found direct discrimination, the Employment Appeal Tribunal (EAT) and the Court of Appeal held that the tribunal had adopted the wrong comparator. Instead, the appropriate comparator is "another registrar who refused to conduct civil partnership work because of antipathy to the concept of same sex relationships but which antipathy was not connected [to] or based upon […] her religious belief".[30] If Ladele was treated differently from this comparator, then it would be clear that she had been treated differently, contrary to discrimination law, because of her religious belief. If the tribunal's comparator had been adopted, differential treatment would as plausibly be attributed to her religious belief as to her bare non-compliance with her employer's instruction (which is a legitimate basis for discipline).

The District Judge's comparator in *Lee* suffered from a similar fault as the tribunal's improper comparator in *Ladele*. If Ashers' policy was to refuse a gay customer's "Support Gay Marriage" order and to fulfil a heterosexual customer's 'Support Heterosexual Marriage' order, there are two possible reasons for such differential treatment, one directly discriminatory and the other not: Ashers could be said to have treated Lee as it did either because Lee was personally gay, or because they did not want to print the message. The latter has nothing to do with Lee's sexual orientation or his identity generally — "anyone else would have been treated in the same way"[31] — albeit it triggers the discussion (in the second Part below) of Ashers' freedoms to do so. To become certain that it was discriminatory conduct, the comparator would need to hold the message constant and vary only Lee's sexual orientation, hence the Supreme Court's choice of comparator. Setting up the comparative apparatus as the Supreme Court did would secure the required

[29] *Ladele v The London Borough of Islington* [2009] EWCA Civ 1357, [2010] 1 WLR 955.
[30] ibid [39].
[31] *Lee* (n 3) [47].

link between the treatment and the protected characteristic. It would ensure that direct discrimination is not established simply because a less favourably treated complainant happens to possess a certain protected characteristic. As Lord Nicholls warned in *Nagarajan v London Regional Transport*,[32] the "crucial question" is "why the complainant received less favourable treatment": it could have been on grounds of race, or because he was not as qualified for the job; it could have been on grounds of religious belief, or because she did not comply with general instructions; it could have been on grounds of sexual orientation, or because the message ordered was unfavourable to the bakers.

C. Indissociability

One avenue of relaxing the requirement of a characteristic-treatment link is the recognition that the alleged discriminator need not have overtly expressed their criterion for treatment to have been the protected characteristic. If their overt criterion was indissociably linked to a protected characteristic, such that the criterion was simply a proxy for differential treatment based on that characteristic, they have directly discriminated. This get-around has been helpfully explained by Benn as an "anti-formalistic device",[33] to ensure that treatment which is genuinely discriminatory in substance will not be found to be non-discriminatory simply because the discriminator has framed their criterion in terms that do not — on their face — refer to a group with a protected characteristic.

In *Lee*, Lady Hale held that the criterion determining Ashers' treatment of Lee — i.e., that he had ordered a cake with the message "Support Gay Marriage" — was not indissociable from being gay (sexual orientation), but that it might have been indissociable from his support of equal marriage rights (political belief). Nevertheless, a reading of the statute that is compatible with Convention rights had to be adopted, and so it was regarded as not being so. Therefore, Lee could not rely on the doctrine of indissociability to construct the requisite link between his protected characteristic and the adverse treatment he had received. It is argued that this was a correct decision. A significant critique that has been levelled against it has been its apparent inconsistency with the application of indissociability in *Bull v Hall*, the most recent significant case on the doctrine at the time, where the gay couple's marital status was held to be indissociable from their sexual orientation given that same-sex marriage was not, at the time, legal.[34] However, a closer analysis

[32] *Nagarajan v London Regional Transport* [2000] 1 AC 501, 511.

[33] Alex Benn, 'The UK Supreme Court and the Gay Marriage Cake: Is "Indissociability" Half-baked?' (*OxHRH Blog*, January 2019), <https://ohrh.law.ox.ac.uk/the-uk-supreme-court-and-the-gay-marriage-cake-is-indissociability-half-baked/> accessed 22 February 2021.

[34] ibid.

in this section of the facts in each case will reveal that Lady Hale's reasoning was consistent. If Lady Hale had found indissociability in *Lee* (as in *Bull*), that would have constituted an unprincipled extension of *Bull*. It would have deformed the concept of direct discrimination by overly liberalising the characteristic-treatment link, and in so doing, enmeshed it with indirect discrimination.

A central case of indissociability is presented in *James v Eastleigh Borough Council*.[35] The council applied a policy of allowing free entry into the public swimming pool for those over the statutory retirement age, which was, at the time, 60 for women and 65 for men. This meant that men between 60 and 64 years of age could not gain free entry into the pool whereas women in that age range could. Although, as Lady Hale stated, "the criterion used for allowing free entry […] was not sex but statutory retirement age", the criterion had the effect in substance of affording different treatment to men and women. The subset of individuals between 60 and 64 who are beyond their retirement age exactly corresponds with the subset representing women, and conversely, the subset of individuals who have not yet met their retirement age exactly corresponds with the subset representing men. This means that users of the swimming pool were treated differently by virtue of their protected characteristic of sex. It did not matter that the council had no discriminatory intent.[36] The effect of the policy was the same as if they had overtly stated that, for those between 60 and 64 years of age, women could enter for free whereas men had to pay a fee (which would more obviously constitute direct discrimination).

The doctrine of indissociability is susceptible to incremental extensions when applied to criteria that are increasingly dissociable from a protected characteristic. Unchecked, these extensions may carry into unprincipled findings of direct discrimination. In *Eastleigh BC*, the criterion was logically indissociable from — or a direct proxy for — the characteristic of sex. It was impossible, as a simple matter of categories, for a 60 to 64-year-old man to have passed his statutory retirement age. In contrast, in *Bull*, the overt criterion was not as logically dissociable from the protected characteristic in question. The overt criterion applied by Mr and Mrs Bull, Christian B&B hoteliers, was that only married couples could book double accommodation as a matter of their preference.[37] At the time, homosexual couples could not be married. Lady Hale held that the criterion of having to be married was indissociable from being of heterosexual orientation, and adversely treated homosexual individuals on the basis of sexual orientation. She acknowledged "that some people of homosexual orientation can and do get married, while […] some

[35] *James v Eastleigh Borough Council* [1990] 2 AC 751.
[36] See now *JFS* (n 19).
[37] *Bull* (n 2) [9].

people of heterosexual orientation can and do enter civil partnerships",[38] but held that this fact could be "[left] aside" because marriage and civil partnership[39] may be regarded as analogous legal institutions for the flourishing of heterosexual and homosexual relationships respectively, and therefore "the criterion of marriage or civil partnership [may be regarded] as indissociable from the sexual orientation of those who qualify to enter it". The criterion and characteristic in *Bull* are at least a shade less indissociable than those in *Eastleigh BC*, and required the — not necessarily tenable — assumption that those in heterosexual marriages are of a heterosexual orientation, in addition to the family policy considerations.[40]

Failing to limit extensions such as those in *Bull* risks internally distorting the concept of direct discrimination. When applied traditionally as in *Eastleigh BC*, the doctrine of indissociability maintains an acceptable link between the adverse treatment and protected characteristic. It prohibits policies that effectively stratify society, adversely treating whole swaths of individuals personally possessing a protected characteristic, even when the overt policy does not stratify as such. (Although the link may not have been subjectively drawn in the alleged discriminator's mind, it is firmly established that good intentions and motives do not vindicate direct discriminators.[41]) The doctrine therefore remedies the mischief addressed by the direct discrimination prohibition, i.e., differential treatment that falls precisely on lines of certain characteristics. This meets the overarching aim of upholding equal dignity and status, as maintained in the previous section. Particularly where equality has been compromised by historical circumstances and prejudices, to effectively purge these "antecedent inequalities"[42] it is necessary to counter differential treatment on these lines even if the alleged discriminator's motives were absolutely benign.

Where the criterion and characteristic are more dissociable, however, to establish direct discrimination on grounds of indissociability would be expansive. Such an application of the doctrine may blur the distinction between direct and indirect discrimination. Granted, the distinction is already partially eroded by the very existence of this doctrine of indissociability; however, it cannot be allowed to do so any more than is necessary to vindicate the rationale explained above. In a discrimination case in the European Court of Justice (ECJ), *Schnorbus v Land*

[38] ibid [29].

[39] At the time, marriage was lawful only for heterosexual couples and civil partnership was lawful only for homosexual couples.

[40] *Bull* (n 2) [26]–[29].

[41] *JFS* (n 19).

[42] Fredman (n 21) 13.

Hessen,[43] Advocate General Jacobs distinguished between direct discrimination established by means of the indissociability doctrine and indirect discrimination:

> "[t]he discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected".[44]

The blurring of the boundary in *Bull* is clear when Advocate General Jacobs' distinction is applied to its facts. Lady Hale's recognition that individuals of homosexual orientation do enter heterosexual marriages seems to fit better with a finding of indirect discrimination: a "substantially higher proportion" of heterosexually married individuals are of heterosexual orientation, and a "substantially higher proportion" of homosexual couples were not married since this was not legally possible. It is not as tenable to regard sexual orientation as "necessarily linked" to whether or not one is in a legal marriage.

Perhaps this explains the apparent reluctance of the ECJ in its jurisprudence to find direct discrimination by means of the doctrine, preferring instead to find indirect discrimination. In *Schnorbus*, applicants for practical training to be employed in the civil service in Hesse, Germany were given priority if they had completed compulsory military or civilian service. However, German law only required men to complete compulsory military service. Advocate General Jacobs advised that the criterion of completing military service was not indissociable from being female because the relationship between the criterion and the characteristic was attributed to a legislated policy and not to an unchanging fact of nature such as the relationship between pregnancy and being female.[45] This point was memorably expressed in these terms: "No amount of legislation can render men capable of bearing children, whereas legislation might readily remove any distinction between men and women in relation to compulsory national service".[46] Therefore the preference in favour of national service was not "as such" a preference in favour of men over women. The Court followed Advocate General Jacobs' analysis and found indirect discrimination instead. Ten years later in *Bressol v Gouvernement de la Communauté Française*,[47] Advocate General Sharpston advised that the criterion of having a right of residence in Belgium was indissociable from being of Belgian

[43] Case C-79/99 *Schnorbus v Land Hessen* [2000] ECR I-10997.
[44] ibid [33].
[45] ibid [40].
[46] ibid [40].
[47] Case C-73/08 *Bressol v Gouvernement de la Communauté Française* [2010] 3 CMLR 559.

nationality since Belgian nationals acquired that right automatically whilst non-nationals had to meet additional requirements to do so. Therefore, she advised, the policy directly discriminated on grounds of nationality.[48] The Court declined to follow this, and found instead that the policy was indirectly discriminatory.

The significance of the direct/indirect distinction is that direct discrimination cannot—whereas indirect discrimination can — be objectively justified by showing that the provision, criterion, or practice is "a proportionate means of achieving a legitimate aim".[49] Addressing both direct and indirect discrimination furthers the aim of equality. Direct discrimination focuses more narrowly on formal equality, or equality of treatment.[50] Indirect discrimination focuses on a more substantive notion of equality, aiming at equality of opportunities or of outcomes for different groups in society. As Fredman writes: whereas direct discrimination focuses on equal treatment, indirect discrimination "recognises that equal treatment may itself have a disparate impact"; therefore "it is the disparate impact of an apparently neutral requirement that establishes a prima facie case of indirect discrimination".[51] Given these differences, it is clear that direct discrimination is the "more overt form of discrimination".[52] It is adverse treatment of a group of individuals filtered by their protected characteristic, such that one may draw a Venn diagram representing groups with different characteristics and find that the differential treatment follows those groups exactly. This is more harmful than indirect discrimination, where, owing to factors which may or may not be ascertainable,[53] a policy has particularly disadvantaged a group defined by a protected characteristic, but the outcome for individuals in that group was not *as such* linked to their protected characteristic.[54]

It is fair that central cases of indissociability such as *Eastleigh BC* should be construed as direct discrimination. As explained above, the policy manifested the evil of stratified treatment of individuals. Furthermore, if the policy had been held to be indirectly discriminatory, the council might have objectively justified the

[48] *Schnorbus* (n 44) [67]–[68].

[49] Equality Act 2010, section 19(2)(d).

[50] Bob Hepple, *Equality: The New Legal Framework* (Hart Publishing 2011) 54.

[51] Sandra Fredman, 'The Reason Why: Unravelling Indirect Discrimination' (2016) 45 ILJ 231.

[52] Jane Mair, 'Direct Discrimination: Limited by Definition?' (2009) 10 International Journal of Discrimination Law 3, 13.

[53] *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343.

[54] The structural distinction of indirect discrimination from direct discrimination—the treatment not needing to be linked as such to protected characteristics—can be seen especially in the Supreme Court's landmark decision in *Essop* (n 53) that a claimant does not need to be able to explain how a provision, criterion, or policy led to disparity. Therefore, on the facts, a career promotion assessment that was failed by a significant proportion of non-white candidates could be found to be indirectly discriminatory without the claimant having to show which particular aspects of the assessment disadvantaged non-white candidates.

policy according to the aim of helping pensioners and the differential treatment would not have been remedied, simply because the direct discrimination did not appear on the face of the policy. It is in cases such as this that direct discrimination — the more overt, unjustifiable species of discrimination — should be established: where whole swaths of individuals set apart by a protected characteristic are filtered out by the discriminator's criterion and treated differently. It is only in such cases that indissociability can be permissibly applied. It is argued that *Bull* represents the weakest acceptable indissociable link between the discriminator's criterion and the protected characteristic, and therefore the outer boundary of the doctrine of indissociability. It is the exceptionally weighty policy reasons that justifies the outcome in *Bull*. That a legal union is a personal act fairly taken as a manifestation of one's sexual orientation is an assumption that undergirds marriage policy; further, civil partnership at the time was regarded as the institution analogous to marriage for homosexual couples.

On the contrary, the criterion applied in *Lee* was not sufficiently indissociable: the criterion of ordering the message "Support Gay Marriage" is not proxy-linked to the person's sexual orientation or political belief. There is no similar policy reason why someone who orders a cake with a custom message should be regarded as necessarily advocating the message personally (i.e., possessing that protected political belief), let alone as belonging to the group for which the message expresses favour (i.e., possessing a homosexual orientation). Regarding political beliefs, perhaps Lee's personal assistant, who does not hold that belief, was sent to order the cake on his behalf;[55] or perhaps Lee is ordering the cake as a gift for his neighbour's QueerSpace party, but does not support gay marriage himself. These are conceivable situations that make it clear that Ashers' criterion did not as such exclude a whole swath of individuals with a certain political belief for different treatment. The criterion more readily approximates indirect discrimination, which is discussed below.

Even more conceivable are situations where the person who orders the cake is not homosexual themselves. Lady Hale herself highlighted: "People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation".[56] The recent legalisation of same-sex marriage in Northern Ireland, Hambler has observed, is vivid evidence that "support [for gay marriage] went rather wider than simply the

[55] It is acknowledged, however, that this might raise an issue of agency.

[56] *Lee* (n 3) [25].

gay community alone".[57] Whilst the Court of Appeal did remark that "[there] was an exact correspondence between those of the particular sexual orientation and those in respect of whom the message supported the right to marry",[58] it is unclear how this link is significant for the purposes of establishing a direct discrimination claim. On the contrary, for what it is worth, to limit the legitimate supporters of equal marriage rights to those who are themselves gay would do no favours to the LGBTQ movement. In sum, given the dissociability of sexual orientation and of political belief from ordering the message, the Supreme Court correctly held that direct discrimination could not be made out.

In light of the danger of deforming direct discrimination by expansively applying the doctrine, it is argued that the Court should not even have entertained the possibility of indissociability of the message from political belief.[59] As has been shown, there are strong reasons internal to discrimination law why the criterion was not indissociable from the protected characteristic, and so the Court need not have made its call based only on their section 3 Human Rights Act 1998 duty to uphold Convention-compliant interpretations of the law. To have established indissociability — which presumably it would have done if Convention rights happened not to have been engaged — would have foregone the requirement of an acceptably close characteristic-treatment link, finding discrimination beyond the principled internal limits of direct discrimination.

D. Associative discrimination

Associative discrimination is another tool for establishing a characteristic-treatment link, where adverse treatment is dealt out because of a protected characteristic belonging not to the individual who has received the treatment but to individual(s) associated with them. The Supreme Court's application of this doctrine in *Lee* was another valuable internal delimitation of the concept of direct discrimination.

The Court of Appeal had held that even if Ashers did not perceive that Lee was gay, they had discriminated because he was perceived as associating with "the gay and bisexual community". As the less favourable treatment was dealt out because of the sexual orientation of that community, it was held that this was associative direct discrimination.[60] The Supreme Court disagreed. Firstly,

[57] Andrew Hambler, 'Cake, Compelled Speech, and a Modest Step Forward for Religious Liberty: the Supreme Court Decision in Lee v Ashers' (2018) 181 Law & Justice – Christian Law Review 156 (in relation to a statistic on the nearby Irish referendum).

[58] *Lee* (n 24) [58].

[59] *Lee* (n 3) [48].

[60] *Lee* (n 24) [58].

there been "no evidence that the bakery had discriminated on that or any other prohibited ground in the past". On the contrary, there was evidence that Ashers "employed and served gay people and treated them in a non-discriminatory way" in the course of their business. Therefore, there was insufficient factual basis for inferring that Ashers had discriminated on this ground against Lee's associates. What was far clearer was that "[the] reason [for their conduct] was their religious objection to gay marriage".[61] Secondly, there needed to be a "closer connection" than simply that "the reason for the less favourable treatment has something to do with the sexual orientation of some people".[62] Lady Hale expressly refrained from defining the closeness of the association required to find associative discrimination. It is argued that, in future cases, this connection should be narrowly construed.

The classic example of associative discrimination is presented by *Coleman v Attridge Law*[63] where the claimant, who formerly worked as a secretary for a law firm, alleged that she had been "subject to unfair constructive dismissal and had been treated less favourably than other employees because she was the primary carer of a disabled child".[64] The ECJ held that the principle of equal treatment in Directive 2000/78 applied not only to individuals who themselves have a disability. Direct discrimination had taken place because the claimant was treated less favourably "based on the disability of [her] child, whose care is provided primarily by [her]".[65] She had received adverse treatment because of a protected characteristic belonging to an individual associated with her.

The ambiguity that remained after *Coleman* and other associative discrimination cases (and left unresolved after *Lee*) is: what connection or association must there be between the person possessing the protected characteristic and the treatment afforded? Or — deconstructed — what constitutes a sufficient characteristic-treatment link?

A wide view of associative discrimination regards the requisite connection as between the treatment afforded and *a protected characteristic in the abstract*. The important connection to establish is between the reason for the treatment and any protected characteristic, where it is immaterial who possesses the protected characteristic and how they are linked to the treatment. The emphasis is not on the association between the person with the characteristic and the recipient of the treatment, but simply on the existence of a hypothetical group of people possessing a protected characteristic, who are discriminated against by the alleged

61 *Lee* (n 3) [28].
62 ibid [33].
63 C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-05603; [2007] IRLR 88.
64 ibid [22].
65 ibid [56].

discriminator's conduct. On one reading of the case, the ECJ in *Coleman* upheld this wide view:

> "[The] purpose of [Directive 2000/78], as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies *not to a particular category of person* but *by reference to the grounds* mentioned in Article 1 (emphasis added)".[66]

More starkly, Advocate General Maduro opined:

> "[The] Directive performs an exclusionary function: it excludes religious belief, age, disability and sexual orientation from the range of permissible reasons an employer may legitimately rely upon in order to treat one employee less favourably than another. In other words […] it is no longer permissible for these considerations to figure in the employer's reasoning when she decides to treat an employee less favourably".[67]

These statements locate the centre of gravity of associative discrimination in the characteristic in the abstract, rather than the individual possessing that characteristic.

The ECJ further widened this view in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*,[68] showing how far the flexibility of the wide view can expand the scope of discrimination law. CHEZ, an electricity supplier in Bulgaria, generally installed electricity meters 2-metres high except in one Roma-majority district, where the meters were 6- to 7-metres high. The reason for the distinction was to prevent electricity theft by tampering with the meters which, CHEZ argued, occurred more frequently in that district. The complainant, a non-Roma woman living in the district, succeeded in arguing that the principle of equal treatment applied to her. The ECJ left the actual finding of direct discrimination to the referring court, but indicated that CHEZ had indeed directly discriminated even against the complainant. As Atrey comments, this was not an instance of traditional associative discrimination, for the Court did not mind itself to draw an associative link between the complainant and Roma people.[69] Rather, the measure constituted

[66] ibid [38], emphasis added.

[67] *Coleman* (n 63), Opinion of Mr Advocate General Maduro delivered on 31 January 2008 [18].

[68] C-83/14, "*CHEZ Razpredelenie Bulgaria" AD v Komisia za zashtita ot diskriminatsia* [2015] electronic Reports of Cases.

[69] Shreya Atrey, 'Redefining Frontiers of EU Discrimination Law' (2017) PL 185, 188.

direct discrimination so long as it had been "introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned".[70] On one reading put forward by Atrey, this seems to further divorce the relationship between the characteristic and person, recognising instead a sort of "collateral discrimination"[71] claim on the complainant's part by virtue of the fact that she suffered the adverse effects of a policy that was constructed on racial stereotypes. However, a more conservative reading of the judgment is possible, limiting the width of associative discrimination. Perhaps an associative relationship existed between the complainant and Roma people because she lived in a Roma-majority district, and so she had been discriminated against for living in a district with Roma people, the subject of CHEZ's prejudice.

In domestic law, the EAT in some cases has also developed a wide view of associative discrimination. In *Showboat Entertainment Centre v Owens*,[72] the EAT held that the statutory wording "on racial grounds" in section 1 of the Race Relations Act 1976 included a case where a manager had been dismissed for refusing to obey an instruction not to allow Black people into an amusement centre. It stated that "[the] only question in each case is whether the unfavourable treatment afforded to the claimant was caused by racial considerations".[73] On this wide view, there would have been little trouble establishing associative discrimination in *Lee* because the reason why Ashers treated Lee as it did was because the requested message expressed support for *gay* marriage, factoring in sexual orientation even if only in the abstract. This was the conclusion reached by the Court of Appeal,[74] which was rejected by the Supreme Court.

The narrow view imposes a requisite connection between the recipient of the treatment and the individual(s) possessing the protected characteristic. This is the conservative reading — and Butlin argues, the "proper reading"[75] — of *Coleman*. The Court did not adopt the same exclusionary analysis as Advocate General Maduro, framing its decision more tightly around the fact that the disabled party was the dismissed woman's son. Domestically, associative discrimination began in narrow form. In *Race Relations Board v Applin*,[76] a married couple who cared for "coloured" foster children from the local authority were pressured by their neighbours to take White children only. In the Court of Appeal, Stephenson LJ concluded that "A can discriminate against B on the ground of C's colour,

[70] *CHEZ* (n 68) [3].
[71] Atrey (n 69) 188.
[72] *Showboat Entertainment Centre v Owens* [1984] 1 WLR 384.
[73] ibid 390.
[74] *Lee* (n 24) [58].
[75] Sarah Fraser Butlin, 'Cakes in the Supreme Court' (2019) 78 CLJ 280, 282.
[76] *Race Relations Board v Applin* [1973] QB 815.

race or ethnic origin".[77] In the House of Lords, Lord Simon concurred on this point, providing the example of "discriminating against a White woman on the ground that she had married a coloured man".[78] In *Applin* it seems to have been envisaged that associative discrimination would apply where there is a relationship between a third-party possessing the protected characteristic and the recipient of the treatment.

Preference for the narrow view in domestic law is still evident more recently in *Redfearn v Serco Ltd*[79] where the Court of Appeal curtailed the broad trajectory set in *Showboat*. Mr Redfearn was employed by Serco to provide transport services to customers most of whom were of Asian origin. After he was elected councillor for the British National Party, which is known for its aim of establishing a predominantly White Britain, he was dismissed by Serco on the ground that he presented a risk to the health and safety of Serco's customers and employees. The Court held that the mere fact that racial considerations had been taken into account by the alleged discriminator "[did] not mean that it is right to characterise Serco's dismissal of Mr Redfearn as being on 'racial grounds'".[80] As Forshaw and Pilgerstorfer have argued, this seems to have been more of an 'instinctive' knee-jerk reaction to Redfearn's membership of BNP, rather than a judicially reasoned decision, given the sparse legal analysis.[81] Side-by-side with *Showboat* where the claimant had refused to shut the centre to Black people, it appears the Court was teleologically interpreting discrimination law. In *Redfearn*, Mummery LJ remarked that to allow Redfearn to establish direct discrimination would be "incompatible with the purpose of the [Race Relations Act 1976] to promote equal treatment of persons irrespective of race by making it unlawful to discriminate against a person on the grounds of race".[82] In *Showboat*, Browne-Wilkinson J also sought to vindicate underlying policy, finding it "impossible to believe that Parliament intended that a person dismissed for refusing to obey an unlawful discriminatory instruction should be without a remedy".[83] Evidently, domestic courts have sensed the potential of an unreservedly wide view to distort or overstep the intended scope of direct discrimination law.

In future cases, the ambiguity in *Lee* should be resolved in favour of the narrow view. The individuals possessing the protected characteristic need not

[77] ibid 831.

[78] *Race Relations Board v Applin* [1975] AC 259, 289.

[79] *Redfearn v Serco Ltd* [2006] EWCA Civ 659, [2006] ICR 1367.

[80] ibid [46].

[81] Simon Forshaw and Marcus Pilgerstorfer, 'Taking Discrimination Personally? An Analysis of the Doctrine of Transferred Discrimination' (2008) 19 King's Law Journal 265.

[82] *Redfearn* (n 79) [46].

[83] *Showboat* (n 72) 389.

be named people known to the recipient of the treatment. So long as they are individuals belonging to a definable set, who are linked to the recipient more than simply in the alleged discriminator's abstract thought, associative discrimination should be made out. Discriminatory instruction cases such as *Showboat* would fall within direct discrimination because the employee associated with Black people by refusing to exclude them. *Redfearn* would fall outside direct discrimination because there was no set of individuals defined by race that Redfearn could be identified with for the sake of differential treatment by Serco. Conversely, Redfearn was associated with BNP, a Whites-only political group not distinguished by the White race but rather by their common political ideology that happened to be racist. There was no group of individuals defined by their race being accorded second-class citizenship or unequal dignity by the employer's acts in respect of Redfearn.

In *Lee*, there was no factual evidence that Ashers had determined its refusal on the basis of Lee's associates' characteristics. Indeed, Ashers employed gay and bisexual employees and had not discriminated against them in the past, rendering an assumption of associative discrimination rather implausible. The only way to establish associative discrimination, therefore, would be to hold that the message "Support Gay Marriage" itself yields a sufficiently close associative connection between Lee and homosexual individuals (who do not need to be determined as specific individuals, but at least as a definable set of individuals). This could not be the case because even if the message could be related to all proponents of same-sex marriage, that did not set apart a set of individuals defined by sexual orientation.[84] It is similar to *Redfearn* in that there is no set of individuals representing a characteristic that could be associated with the recipient of the treatment, except in abstract subject-matter terms. The wide view of associative discrimination would have allowed direct discrimination to be made out here simply because the abstract matter of sexual orientation was a consideration in Ashers' decision: specifically, since their belief that marriage is only between a man and a woman delineated on grounds of sexual orientation, and since it determined their treatment of Lee, direct discrimination would be established. This, however, should be rejected.

One obvious argument weighing in favour of the narrow view is legislative intention. Before the Equality Act 2010 was passed, the EAT had upheld a creative interpretation of the statute that allowed for wide associative discrimination, stating in *Zarczynska v Levy*,[85] a discriminatory instruction case, that "the strict interpretation of the relevant sections […] may well create an absurd or unjust situation which Parliament would not have intended if they had contemplated its possibility". Now, the Explanatory Notes to the Equality Act 2010 make express

[84] *Lee* (n 3) [25], [33].

[85] *Zarczynska v Levy* [1979] 1 WLR 125, 129; see Showboat (n 72) 389.

reference to associative discrimination, circumscribing it to the narrow view. It states that direct discrimination in section 13 is "broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic".[86] The emphasis is therefore on the association between the recipient and the individual possessing the characteristic, rather than the characteristic in the abstract.

Another argument in favour of the narrow approach is normative. By unhinging protected characteristics from particular individuals, a wide view of associative discrimination would effectively prohibit certain opinions and points of view from being acted upon, which would exceed the role of the legal prohibition of direct discrimination and undermine democracy. As explained above, on a wide view, Ashers would have been regarded as unlawfully discriminating on grounds of sexual orientation by acting upon a personal belief about sexual orientation. There would have been no need to show that they perceived that Lee was a LGBTQ person, or associated with LGBTQ people. Prohibiting acts which do not fit the structure of unequal treatment of individuals because of a protected characteristic personally possessed by a relevant individual, simply because they were motivated by a belief *about* a protected characteristic, would severely affect the freedom of individuals to hold and to express beliefs about any of the protected characteristics — sex, race, gender, sexual orientation, nationality, age, and so on. In short, divorcing protected characteristics from individuals would allow discrimination law to creep outside the unequal treatment situation, into the extensive possible situations in which beliefs that have something to do with protected characteristics are acted upon in the abstract. This exceeds the mandate of the direct discrimination prohibition, which is to protect the kernel of human dignity that demands that like people be treated alike. The issue of whether the beliefs of the alleged discriminator facilitates equal human dignity or not, is a step removed from the issue of whether they treat like persons alike in their formal actions, and it is an issue meant to be determined through the political, democratic process and not the prohibition of direct discrimination.

Finally, it is worth remembering that there are other elements of the comprehensive equality legal framework operating to address these more abstract instances of discrimination. Bodies such as the Equality and Human Rights Commission are tasked to encourage the development of an equal society.[87] Analysing the *Showboat* decision, Forshaw and Pilgerstorfer point out that specific statutory protection existed against discriminatory instructions issued by employers. The statute at the time, however, only allowed such a claim to be

[86] Explanatory Notes to the Equality Act 2010, paragraph 59.

[87] Equality Act 2006, sections 1–3; Northern Ireland Act 1998, section 73.

initiated by the Commission for Racial Equality. Now, section 111(5) Equality Act 2010 would allow the manager to bring a claim with regard to the employer's instruction without having to shoehorn his case into a direct discrimination mould. Therefore, choosing the narrow view in the future would not leave a lacuna in equality protection.

E. Indirect discrimination

It has been questioned by Connolly why Lady Hale gave such short shrift to the possibility that Ashers had indirectly discriminated against Lee.[88] Observing that Brownlie J — having already found direct discrimination — did not find indirect discrimination, Lady Hale remarked that "it is not easy to see how she could have done so".[89] It is argued that indeed, *Lee* does not fit the paradigm of indirect discrimination because the particular disadvantage suffered needs to be tangible and objectively ascertainable, rather than a mere amorphous subjective impact such as offense.

To establish indirect discrimination, it must be ascertained what "particular disadvantage" has been suffered by homosexual people or supporters of gay marriage as a group.[90] In most cases, the disadvantage is tangible and objectively ascertainable. In *Bull*, for example, homosexual couples lacked the access to double rooms that heterosexual couples enjoyed. Since Ashers' policy was to refuse to ice a cake with the message "Support Gay Marriage" whatever the sexual orientation or political belief of the customer, the particular disadvantage suffered by gay people or supporters of gay marriage cannot have been their inability to obtain the cake: anyone of any characteristic would have been likewise unable to obtain it. Instead, the disadvantage can only have been a subjective impact on individuals owing to their own sexual orientation or protected belief. The most plausible expression of this subjective disadvantage for gay people is that Ashers' policy stalls the campaign for rights of equal marriage which they would personally reap. It is argued that this is too remote a link because Ashers' supply or failure to supply the cake does not directly affect whether or not gay people enjoy marriage rights. In any event, that would have appeared inconsistent with Lady Hale's later suggestion that the

[88] Michael Connolly, 'Lee v Ashers Baking and its Ramifications for Employment Law' (2019) 48 Industrial Law Journal 240, 246.

[89] *Lee* (n 3) [21].

[90] Equality Act 2010, section 19(1).

benefits of gay marriage accrue to individuals of all sexual orientations in the "wider community".[91]

It might instead be argued that gay people suffer particular offense, insult, or affront to dignity as a result of Ashers' policy, in a manner uniquely felt by them and not by heterosexual individuals. Firstly, however, this would undermine Lady Hale's central conclusion that since any customer would have been treated equally, Lee had not been treated in a degrading manner, and that therefore Ashers had not directly discriminated.[92] Secondly, this is too subjective an impact to be considered "particular" to homosexual individuals as a category. Major homosexual gay rights activists such as Tatchell have campaigned for less interference by public order legislation with "insulting" expression;[93] indeed, Tatchell supports the decision in *Lee*.[94] Further, as the Court of Appeal pointed out, "some gay people oppose gay marriage",[95] for reasons such as its perceived patriarchal legacy.[96] Founding indirect discrimination on the claim that gay people suffer special insult when service providers disagree with their right to marry would be an unwarranted assumption and would pre-empt the answer to what is actually a complex socio-political question. It would also make a significant inroad into free speech by conceding that a right not to be insulted by another person's idea horizontally competes with their freedom to express it. For these reasons, *Lee* also falls outside the limits of indirect discrimination law.

III. External Limits

In cases such as *Lee*, there arises a normative dilemma between equality law on one hand, and freedoms of religion and of expression on the other. The latter freedoms place external pressure on discrimination law, keeping it within its bounds in a liberal plural society. In this section, I examine the uniquely composite

91 *Lee* (n 3) [33].

92 ibid [35].

93 Michael White, 'Peter Tatchell's right, we don't need a law against hurt feelings' (*The Guardian*, 16 May 2012) <www.theguardian.com/politics/blog/2012/may/16/law-hurt-feelings-peter-tatchell> accessed 22 February 2021.

94 Peter Tatchell, 'I've changed my mind on the gay cake row. Here's why' (*The Guardian*, 1 February 2016) <www.theguardian.com/commentisfree/2016/feb/01/gay-cake-row-i-changed-my-mind-ashers-bakery-freedom-of-conscience-religion> accessed 22 February 2021.

95 *Lee* (n 24) [24].

96 Tom Geoghegan, 'The gay people against gay marriage' (*BBC News Washington*, 11 June 2013) <www.bbc.com/news/magazine-22758434> accessed 22 February 2021.

engagement of freedoms of religion and expression in *Lee* that compelled a different outcome from *Bull*, in which only freedom of religion had been engaged.

A preliminary structural clarification to make is that, in the Court's analysis, the Convention rights were used not as a justification *per se* of direct discrimination, as Collins has argued.[97] Instead, pursuant to the Court's duty to construe the law compatibly with Convention rights,[98] the rights "[impacted] […] the meaning and effect"[99] of the statute by determining which of the alternative interpretations of indissociability should prevail in Lee's political beliefs claim. The Court chose to follow the Convention-compatible conclusion that the criterion and characteristic were dissociable.

A. Composite engagement

Ashers' objection to the express message requested by Lee sets *Lee* apart from cases such as *Bull* and *Ladele*,[100] where there was no express message being objected to, but only an act in respect of a person with a protected characteristic that the alleged discriminator refused to carry out on grounds of conscience. *Bull*, *Ladele*, and *Lee* all involved a "balancing exercise between protection from discrimination and the rights of religious people not to be compelled to act against their conscience".[101] However, what tipped the balance in favour of Ashers in *Lee* was the crucial composite engagement of the owners' freedoms of religion and of expression.

B. Political messages concerning gay rights

Ashers' refusal to promote the message merits protection as political speech. First it must be noted that there is a distinction between protected political speech and hate speech, of which the latter falls outside the ambit of freedom of expression.

The Canadian case law in this regard, helpfully catalogued by Moon, provides examples of anti-LGBTQ religious expression where courts have sought

[97] Hugh Collins, 'A missing layer of the cake with the controversial icing' (*United Kingdom Labour Law Blog*, 4 March 2019) <https://uklabourlawblog.com/2019/03/04/a-missing-layer-of-the-cake-with-the-controversial-icing-hugh-collins/> accessed 22 February 2021.

[98] Human Rights Act 1998, section 3.

[99] *Lee* (n 3) [48].

[100] Both were decided against the religious alleged discriminators.

[101] Butlin (n 75) 283.

to draw this distinction.[102] In *Owens v Sask. (HRC)*,[103] *Lund v Boissoin*,[104] and *Whatcott v Sask. HRC*,[105] the Canadian courts protected — in the interest of free speech — newspaper ads, editorial letters, and flyers expressing the authors' opinion that homosexuality is immoral. A recurring reason for these decisions was that the expression took place amidst an "ongoing debate"[106] about the place of sexuality in Canadian policy. The expression was therefore a political contribution. Nevertheless, it must be scrutinised whether it constitutes hate speech: as Rothstein J remarked, "[speech] that has the effect of shutting down public debate cannot dodge prohibition on the basis that it promotes debate".[107] The Canadian courts have identified unlawful political *hate* speech where the speech contains "representations of detestation and vilification delegitimizing those of same-sex orientation".[108] Where political messages degrade, detest, or vilify groups in a manner that undermines their dignity, they do not merit protection.

Similarly, in the Convention context, there is a strong foundational protection of freedom of expression: Article 10 protects "not only […] 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also […] those that offend, shock or disturb the State or any sector of the population".[109] Applied to anti-LGBTQ religious expression, the Supreme Court of Sweden acquitted a pastor who had delivered a sermon that expressed critical opinions on homosexuality, on the ground that, since his speech was delivered as a church sermon, it was "not something that can be deemed to encourage or justify hatred of homosexuals".[110] The backstop for free speech was manifest hatred of homosexuals in a manner that scorned their dignity. Therefore, in *Vejdeland v Sweden*[111] the European Court of Human Rights (ECtHR) found that the conviction of a group that had distributed anti-gay leaflets in a school did not breach their Article 10 right because, the materials having manifested hatred, the interference had been "necessary in a democratic society for the protection and

[102] Richard Moon, 'Putting Faith in Hate' (CUP 2018), 121.
[103] *Owens v Saskatchewan (Human Rights Commission)* [2006] SJ N 221 (CA).
[104] *Lund v Boissoin* [2012] ABCA 300.
[105] *Whatcott v Saskatchewan Human Rights Commission* 2013 SCC 11.
[106] *Owens* (n 103) 66; *Boissoin* (n 104) 71; *Whatcott* (n 105) [200].
[107] *Whatcott* (n 105) [117].
[108] ibid [200]; see *Owens* (n 103) 62.
[109] *Handyside v United Kingdom* (1979) 1 EHRR 737, [49].
[110] *Prosecutor General v Åke Green*, Case No.B 1050-05 (29 November 2005).
[111] *Vejdeland v Sweden* App.No.1813/07 (ECtHR, 9 Feb 2012).

rights of others".[112] This was captured well by the Supreme Court in *Vejdeland*, cited by the ECtHR:

> "[The leaflets] were formulated in a way that was offensive and disparaging for homosexuals as a group and in violation of the duty under Article 10 to avoid as far as possible statements that are unwarrantably offensive to others thus constituting an assault on their rights, and without contributing to any form of public debate which could help to further mutual understanding".[113]

The objection to the message "Support Gay Marriage" in *Lee* was much milder than in these cases as it involved an omission rather than positive speech, and concerned the ancillary issue of the right to marry, not the central issue of equal dignity. It more closely approximates — and even so does not come close to the intrusiveness of — a case such as *Gündüz v Turkey*[114] where the applicant's defence of sharia law on a television debate was protected political speech despite being a religiously divisive proposal, the content of sharia even being viewed by some as socially discriminatory. To characterise Ashers' refusal as hatred would not only be inaccurate but would chill political speech concerning gay rights so severely that it would amount to censorship of dissenters.

Indeed, a look back at history will reveal the constitutional irony that would be committed if anti-LGBTQ political speech is not properly protected. Leigh argues that it would manifest the rejected Devlinist posture to moral values — but this time in favour of gay rights.[115] Lord Devlin, opposing the de-criminalization of homosexual conduct, argued that "society was entitled to enforce its shared morality over sexual conduct". Now we witness the converse development — what Leigh calls "the Devlinization of gay rights" — in instances such as the removal of a Christian student from his social work degree course because he had posted comments on social media expressing views on homosexuality and marriage.[116] If we value consistency in the enjoyment of fundamental constitutional rights regardless of a person's race, belief, sex, *et cetera*, anti-LGBTQ political statements should be protected even as they decline in popularity. This right to free speech was expressed memorably by Sedley LJ in *Redmond-Bate v DPP*: "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the

[112] ibid [59].
[113] ibid [15].
[114] *Gündüz v Turkey* (2005) 41 EHRR 59.
[115] Ian Leigh, 'Homophobic Speech, Equality Denial, and Religious Expression' in *Extreme Speech and Democracy* (OUP 2009) 375.
[116] *R(Ngole) v University of Sheffield* [2019] EWCA Civ 1127.

heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having".[117]

Rigorously protecting the freedom to express anti-LGBTQ views in legitimate political speech would also be favourable for the very concept of equality. Rivers has observed conceptual slippage underway in equality case law, where the notion of unequal treatment is conflated with disagreement with political ideas.[118] This would undermine the very core of the concept of equality as it was supposed to operate in a plural society, protecting the dignity of individuals amidst diversity. Instead it would be transformed into a comprehensive notion of equality that can only operate in a monolithic ideological landscape. This, Leigh has observed,[119] would run counter to our liberal visions such as Rawls' "'overlapping consensus' among people of different 'comprehensive views'" and Sachs J's statement in the South African Constitutional Court that,

> "[t]he objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all".[120]

If equality slips into a concept that runs counter to these visions, it will decline in utility unless we sacrifice other essential liberal values.

C. Tacit political messages and compelled speech

Applying this protection of expression in future, courts will face the question of what activity counts as political expression so that refusal to engage in it can be regarded as objection to a certain "message" rather than to the customer's characteristic. The most obvious case is where — as in *Lee* — an express political statement such as "Support Gay Marriage" is involved. This might be complicated by the argument that a message requested by a customer cannot reasonably be attributed to the service-provider in their personal capacity.[121] It is argued, however, that it can.

Firstly, the conscience dimension of Ashers' refusal weighs heavily in favour of protecting their conduct, on the basis of their freedoms of religion

[117] *Redmond-Bate v DPP* [2000] HRLR 249, [20].
[118] Julian Rivers, 'Is Religious Freedom under Threat from British Equality Laws?' (2019) Studies in Christian Ethics 1, 11.
[119] Leigh (n 115) 396.
[120] *Minister of Home Affairs v Fourie*, Case CCT 60/04, 1 December 2005, [94].
[121] *Lee* (n 27) [67].

and expression, which are closely linked here. It has been established that certain compelled conduct such as a "caps off" instruction during Christian prayers amounts to compelled active participation in religious activity, contravening freedom of conscience.[122] Whilst courts should not be absolutely deferential in conscience claims, courts should readily respect claims such as Ashers' that participation in an expression violates their conscience, because "in its religious dimension", the conscience is "one of the most vital elements that go to make up the identity of believers and their conception of life",[123] beyond mere political convictions. Furthermore, inquiring into the plausibility of being conscience-stricken comes dangerously close to questioning the substantive reasonableness of an individual's beliefs.[124] It would perpetuate the English courts' "fairly narrow view of the salience of religion or belief in the lives of individuals" observed by Rivers, a trajectory that that may "radically […] disempower, and we might even say *outlaw* religious groups".[125]

Secondly, freedom of expression encompasses freedom not to express. Barendt has pointedly remarked that to afford individuals the freedom to speak their opinions while compelling them to speak opinions they do not hold, would be "nonsense".[126] Given the equality interest at stake for Lee, however, a preferable approach to compelled speech cases would be to weigh the effect of the compelled speech against the speaker's ability to exercise their freedom to disclaim that view in favour of their actual personal view. For, after all, the speaker retains the ability to communicate their contrary personal views in a personal capacity. Canadian and US jurisprudence have taken this approach to cases involving the payment of dues for compulsory unions and associations which then finance political activities that the union members do not personally support. In those cases, the courts have held that since the compelled payment did not prevent the complainants from personally speaking against those political activities, it did not implicate their freedom of expression.[127] Applying this approach to cases of service-providers' objections to messages, their freedom not to express should indeed be upheld. Unlike in the union cases, which only involved private payment of a fee, Ashers was asked to produce a message on a cake, which they would be known to have produced because of their branding on it. They might be regarded by some of the public as complicit in the expression of the message, and would not have many

[122] *Commodore Royal Bahamas Defence Force v Laramore* [2017] UKPC 13, [2017] 1 WLR 2752.
[123] *Kokkinakis v Greece* (1993) 17 EHRR 397 [31].
[124] *Eweida v UK* (2013) 57 EHRR 213 [81].
[125] Rivers (n 119) 5–6.
[126] Eric Barendt, *Freedom of Speech* (OUP 2007) 94.
[127] *Glickman v Wileman Bros* 521 US 457 (1997); *Lavigne v Ontario Public Service Employee Union* [1991] 2 SCR 211.

options in their personal capacity to "neutralise" or disclaim it except by positively stating their disapproval in a way that would be disproportionate and unhelpful.

Protection does not extend, however, to tacit statements represented by mere actions. In *Bull*, for example, freedom of expression was not engaged by the hoteliers' decision not to let a double room to gay couples. But the line distinguishing protected speech and mere actions must be drawn carefully. The question arose in the US Supreme Court in relation to a refusal to supply a wedding cake to a same-sex couple, in *Masterpiece Cakeshop v Colorado Civil Rights Commission*.[128] Three justices found that making a wedding cake was indeed expressive as it "celebrates a wedding, and [if it] is made for a same-sex couple it celebrates a same-sex wedding".[129] Two justices regarded a wedding cake as simply a good which is not *per se* expressive of a political idea and therefore did not merit protection.[130] This point was not pertinent in the final decision. However, it is argued here that the latter view should prevail. Especially in a politically charged climate saturated with debates ranging from investment portfolios to personal diet, nearly all conduct can be interpreted as a political message of some sort owing to their political undertones and implications. Protection of all obscurely 'political' conduct would begin to unfasten freedom of expression from its core rationales such as aiding the discovery of truth, guarding a unique channel of self-fulfilment, receiving and imparting information, and facilitating democratic discussion.[131] Nevertheless, even if the conduct complained of in *Masterpiece* did not interfere with the baker's freedom of expression, it was a claim in freedom of religion insofar as it was motivated by conscientious convictions. The claim takes on, therefore, the conscience dimension highlighted above, which has been increasingly neglected or softened in recent jurisprudence. In that regard, the Court's final decision that the Civil Rights Commission did not exhibit religious neutrality was a welcome reclaiming of conscience protection, even if the case did not finally concern freedom of expression. A balancing exercise of the actor's freedom of religion against the customer's right to non-discrimination was merited.

There remains a narrow category of 'symbolic speech' — or 'expressive conduct'— that constitutes protected expression even though it does not involve an express message. Examples include saluting a national flag,[132] taking one's cap off,[133] or conducting a silent sit-in.[134] These are forms of conduct, supported by deep cultural

[128] *Masterpiece Cakeshop v Colorado Civil Rights Commission* 138 SCt1719 (2018).
[129] ibid 1738.
[130] ibid 1751.
[131] Barendt (n 127) 2.
[132] *West Virginia State Board of Education v Barnette* 319 US 624 (1943).
[133] *Commodore Royal Bahamas Defence Force* (n 122).
[134] *Brown v Louisiana* 86 S.Ct.719 (1966).

history, that can plausibly be understood as "communicative"[135] of a message: a silent gesture delivering assent or dissent in the same way a spoken message would. In contrast, the provision of a cake, without the element of a message, or hotel room, is primarily the provision of a service to other persons.

It is worth noting, to close, that the judgment in *Lee* was handed down in a plural and diverse society, balancing the values that compete uniquely in our current social context. The most democratic way to foster equality and mutual respect in our diversity is not by prohibiting expression of views that are thought to be illiberal, but rather, as Geddis argues, by a more "transformative" strategy whereby "the public [learns] to tolerate […] offence in the name of a vibrant, robust and open realm of public discourse".[136] The outcome in *Lee* might have been different in a less diverse society where, as Knights hypothesises, the allegedly discriminatory "service providers […] effectively have monopolies" or "minority views […] are widely opposed".[137] As it happens, Lee managed to obtain the cake elsewhere. But if, in that hypothetical society, every bakery had refused Lee's order, then Lee would have not been able to obtain his desired cake at all. If such a homogeneous society was the backdrop of Ashers' conduct, then the service-providers' freedoms of religion and expression should have been more readily limited in favour of equality and freedom of expression for Lee. This different balance would have been achieved with flexible proportionality analysis.[138]

IV. Conclusion

In this article I have sought to mark the internal and external limits of discrimination law confronted by the Supreme Court in *Lee*. I have expanded on the brief treatment given in the judgment to the tools of discrimination law and Convention rights, which are far more complex than meets the eye. The internal tools must be carefully applied to preserve the core aim of discrimination prohibitions, that is, the prohibition of differential treatment of individuals with protected characteristics. Viewed on an analytical level, courts must carefully guard the requisite link between treatment afforded and the protected characteristics. The guaranteed freedoms of alleged discriminators place external pressure on discrimination law, which generally interferes with individual autonomy and

[135] *Clark v Community for Creative Non-Violence* 104 SCt3065 (1984).

[136] Andrew Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace?—"Insulting" Expression and Section 5 of the Public Order Act 1986' (2004) PL 853.

[137] Samantha Knights, 'Case Comment: Lee v Ashers Baking Company Ltd & Ors.' (*United Kingdom Supreme Court Blog*, 12 November 2018), <http://ukscblog.com/case-comment-lee-v-ashers-baking-company-ltd-ors-2018-uksc-49-2/> accessed 22 February 2021.

[138] See *Bull* (n 2) [45].

specifically interferes with freedoms of religion and expression. To guard the diversity and pluralism that we value as a society, these freedoms must be protected even in respect of views with which we disagree, provided they are not violent or hateful. Whilst tracing these limits and identifying the values vindicated by them, I have also proposed trajectories for their future application. In sum, it is argued that the decision was a welcome bridling of discrimination law, an area in which expansions can be tempting owing to the nobility of the aim of equality, but which must be limited for the sake of other liberal values.