

Discrimination as Injustice

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I

Reasons of justice are reasons for or against altering someone's relative position. The word 'relative' is of the essence here. One may have reasons to alter someone's position which do not make any essential reference to anyone else's position. For example, the fact that a prisoner is being tortured is reason enough by itself to write letters of protest, with the aim of improving the prisoner's treatment. Torture is inhumane. But isn't torture also unjust? Doesn't one also have a reason of justice to protest? Perhaps. As part of one's protest, one might relate the position of the torture victim to the position of other people (other prisoners, people of different political views, the torturers themselves, the torture victim's victims, the government, etc.). In that case one may be trying to give a reason of justice for the torture to desist. It may buttress the reason of humanity. But of course it may also fail to do so. The authorities inflicting the torture may accurately reply, in some cases, that they are inflicting it with impeccable justice. Yet still, on grounds of its inhumanity, the torture should cease, and the protests should go on if it does not.

This kind of example should give considerable pause for thought to those who suppose, with John Rawls, that 'justice is the first virtue of social institutions.'¹ The justice of their social institutions may provide little consolation to those who live under brutal,

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¹ Rawls, *A Theory of Justice* (Cambridge, Mass. 1971), 3. C.f. Tom Campbell, 'Humanity before Justice', *British Journal of Political Science* 4 (1974), 1.

cowardly, dishonest, intolerant, or ungenerous regimes. And yet we might be tempted to accept, for all that, that justice could be the first virtue of *some* social institutions. In particular, there are grounds for supposing that justice has a special link with adjudication, such that, while legislators, bureaucrats and government officials ought to be just *inter alia*, courts ought to be just above all. The idea is captured in the familiar proposal that the role of the courts lies in ‘the administration of justice’. At its most basic, this special association between courts and justice comes of the fact that, in court, there can normally be no winners without losers. Whatever the court decides, what is at stake is the relative position of the parties. Thus the reasons which the court has for its decision, whatever else they may include, must include reasons for or against granting a judgment to one person *at another’s expense*, i.e. reasons for or against altering the parties’ *relative* positions. This way of putting it may especially bring to mind the activities of courts dealing with private law disputes. But the same point applies, when you think about it, in criminal law and public law adjudication, where what is at stake is the state’s right to punish someone or deprive them of some benefit, in which the victory of the state is also, of necessity, that person’s loss. In fact, with the possible exception of purely declaratory proceedings, there can be no escaping the issue of justice in the courtroom. This may lead one towards the conclusion that courts have reason to be astute, above all and not merely *inter alia*, to the justice or injustice of their own decisions.

It may even be proper to regard this as a logical truth about courts, i.e. to see it as part of the very concept of a court that justice is a court’s first virtue. What one should not do, however, is project this claim onto the law as a whole. As John Finnis says, one should beware of mistaking adjudication for the whole of legal practice.² The question of whether justice is the first virtue of the courts in administering the law is one question, and the question of whether justice is the first virtue of the law as a whole is quite another. Some parts of the law may well have no particular connection with justice apart from the

² ‘Reason and Authority in *Law’s Empire*’, *Law and Philosophy* 6 (1987), 357 at 363.

secondary or derivative connection which comes of the fact that they too should be justly administered in the courts. Is the law of negligence concerned to eradicate injustice? Not especially. It is the avoidance of carelessness, rashness, and inconsiderateness which structures the primary duties in this corner of the law. How about the law of contract? Here they are not duties of justice so much as duties of honesty, reliability, and trustworthiness which we find at centre stage. By and large, contract and tort duties are not duties to treat people in certain ways relative to other people, but duties to treat people in certain ways full stop. In both cases questions of justice come to the fore only when the legal duties have (arguably) been violated, and the matter comes to court.³ The key issue at that stage is: how can justice be done, given that it is too late to prevent the accident or maintain the accord? But the doing of justice was only a secondary aim of the law, relating mainly to its administration. It would have been better in the law's eyes had there been no (arguable) violation of the original duties in the first place, no accident or breakdown of accord, no question of carelessness or untrustworthiness on either side. Then a demand for justice would not have been ignited, and a case would never have been brought to trial.

It should immediately be conceded, however, that *some* areas of the law do pay primary attention to matters of justice. Anti-discrimination law is one clear case in point. The primary duties of the law relating to sex and race discrimination are duties to treat people in certain ways defined by reference to the way that others are treated. As the very name 'discrimination' implies, they are duties essentially concerned with people's relative

³ Finnis appears to take the opposite view in *Natural Law and Natural Rights* (Oxford 1980). Although he notes that reasons of justice are reasons for or against altering people's relative positions (162–3), he follows Aquinas in regarding as a matter of justice 'determination of what is to count as a crime, a tort, a binding agreement, etc.' as well as determination of disputes arising when crimes and torts are (arguably) committed or contracts are (arguably) broken (178–9). To my mind this strikingly distorts the emphasis of these areas of law, which are largely non-relative in their logic and justification. It is no answer that my fidelity to the narrower view of justice 'leaves untouched a wide range of problems' (178). So indeed it should. Justice is, as Finnis himself accepts, but one virtue among many (165).

positions. That is true of direct and indirect discrimination alike. Direct discrimination occurs when someone treats another less favourably than he treats or would treat a person of another sex or race. Indirect discrimination occurs when someone applies unjustifiable standards⁴ which people of one sex or race find it harder to comply with than people of another, to the detriment of someone who is a member of the former sex or race. Either way, comparisons between people are of the essence in defining anti-discrimination law's primary duties, before we even get to the secondary problem of the administration of the law by the courts. It follows that questions of justice arise in two distinct phases in anti-discrimination law. They arise primarily in the structure of the original duties imposed upon employers, landlords, shopkeepers etc.. Then they arise secondarily when (arguable) breaches of those duties come before the tribunals and courts. The primary question of justice is always (in one form or another): how are some people treated in comparison with others? But only if there is an (arguable) disparity here does the secondary question of justice arise at the point of adjudication, which is: how can judges and adjudicators do justice now in view of the (arguable) injustice that has been done by this defendant?

II

Now justice famously comes in two forms: corrective and distributive. Reasons of corrective justice are undoubtedly different from reasons of distributive justice. But what is

⁴ The British legislation speaks of 'requirements' and 'conditions' here: Sex Discrimination Act 1975, s1(1)(b); Race Relations Act 1976 s1(1)(b). According to the Court of Appeal in *Perera v Civil Service Commission (No. 2)* [1983] IRLR 166, the effect is to prevent the screening for disproportionate group impact of mere factors which weigh in the balance but which are not in themselves decisive. Both European Community law and United States law are more flexible on this point, allowing factors to be screened for disproportionate group impact even if failure to meet them is not an absolute bar to appointment.

the difference? In his recent paper on the place of injustice in anti-discrimination law,⁵ Andrew Morris draws the distinction in at least four ways:

a. Reasons of corrective justice are reasons for or against changing the relative positions of particular individuals, while reasons of distributive justice are reasons for or against changing the relative positions of whole groups of people. Corrective justice is ‘individual justice’ whereas distributive justice is ‘group justice’.⁶

b. Reasons of corrective justice are reasons for or against restoring the relative positions of two or more people (or groups of people) to those which obtained before, or which would have obtained apart from, some action or series of actions taken by one or other of those people (or groups of people). Reasons of distributive justice, on the other hand, are reasons for or against changing the relative positions of people (or groups of people) other than by restoring them to such a *status quo ante* or *status quo alter*.⁷

c. Reasons of corrective justice are agent-relative reasons, whereas reasons of distributive justice are agent-neutral reasons. That is, reasons of distributive justice are by their nature reasons for everyone to act in certain ways or secure certain results, whereas reasons of corrective justice apply only to people in certain special positions.⁸

d. Reasons of distributive justice are universal or global, applying to all possible beneficiaries, while reasons of corrective justice are local to particular beneficiaries. If one has a reason of distributive justice, in other words, it must apply in one’s dealing with

⁵ Morris, ‘On the Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice’, *Oxford Journal of Legal Studies* 15 (1995), 199.

⁶ Ibid, e.g. 204 and 220.

⁷ Ibid, 205.

⁸ Ibid, e.g. 205 and 214.

everyone, whereas a reason of corrective justice need only apply in one's dealings with some people (or some groups of people).⁹

By all of these criteria, corrective justice can be regarded as in some respect narrower or more circumscribed than distributive justice. It seems that this fact leads Morris to regard the criteria as interchangeable. But interchangeable they certainly are not. Nor does one have to look any further than anti-discrimination law to see that they are not.

Consider two mid-1980s decisions of the U.S. Supreme Court concerning the permissibility of voluntary 'affirmative action' plans. In *Wygant v Jackson Board of Education* it was held that a government agency could voluntarily implement a racially discriminatory affirmative action plan consistently with the 14th Amendment of the U.S. Constitution only where there had been past discrimination by the particular government agency implementing the plan, only at point of recruitment, and then only to benefit members of the particular racial groups which had been the victims of that same past discrimination.¹⁰ In *Johnson v Santa Clara Transportation Agency*, on the other hand, it was held that proof of past sex discrimination by a particular employer was quite irrelevant to the legality of that employer's voluntary affirmative action plan under Title VII of the Civil Rights Act 1964, dealing with the internal promotion system, so long as there was now a conspicuous segregation in the workforce, with women preponderating in the lower grades and men in the higher.¹¹ What kind of justice is involved in these competing approaches? It is not clear what answer Morris would give. According to Morris's criterion (a), the *Wygant* and *Johnson* approaches to voluntary affirmative action plans both appear to be distributive justice approaches, since both are matters of 'group justice'. Both cases allow people to benefit under affirmative action plans irrespective of their individual histories and predicaments, so long as they are members of *groups* with relevant histories and predicaments. It is true that

⁹ Ibid, 205.

¹⁰ 476 US 267 (1986).

¹¹ 480 US 616 (1987).

Wygant requires the group in question to have a certain history (a history of discrimination) while *Johnson* requires it to be in a certain predicament (a predicament of disadvantage). But that does not detract from the essential point that, under both the *Wygant* and *Johnson* approaches, it is the relative position of a group, not an individual, which is decisive. That is enough to make both into distributive justice approaches according to Morris's criterion (a). According to Morris's criterion (b), on the other hand, the *Wygant* approach is corrective while the *Johnson* approach is distributive. Whereas the former approach looks to the impact of the government agency's own past actions, the latter approach ignores the past actions of the employer altogether, attempting to remedy relative disadvantages *per se* rather than attempting to cancel out the employer's, or indeed anyone else's, past contribution to them. *Wygant* therefore envisages the resoration of a *status quo ante* or *status quo alter* which is irrelevant to *Johnson*, and that is enough to make the former corrective and the latter distributive under Morris's criterion (b). Meanwhile Morris's criterion (c) makes both approaches corrective. Neither *Wygant* nor *Johnson* gives everyone a reason to act in certain ways. Both give special responsibilities to certain agents. *Wygant* gives special responsibilities to state agencies which are bound by the Fourteenth Amendment of the Constitution. *Johnson* gives special responsibilities to employers and other bodies covered by the Civil Rights Act 1964. Neither is, in the relevant sense, an agent-neutral approach, and so both are, according to Morris's criterion (c), corrective justice approaches. As for criterion (d), that would make the *Wygant* approach a distributive justice approach, concerned as it is with affirmative actions plans at point of recruitment (where anyone can in principle be considered), while the *Johnson* approach would seem to be a corrective approach, concerned as it is with a promotions system (where the standards in the plan can be applied, obviously, only to those already employed). *Wygant* has potentially global beneficiaries, whereas the beneficiaries of *Johnson* are necessarily local to the particular workforce, and that is what matters for the purposes of Morris's criterion (d). Since criterion (a) makes both approaches distributive, criterion (c) makes them both corrective, criterion (b) makes the *Wygant* approach corrective and the *Johnson* approach distributive,

and criterion (d) points to precisely the opposite result, it follows that the four criteria cannot possibly come down to the same thing in the end.

Which of Morris's criteria draws the correct distinction between distributive and corrective justice? The answer is undoubtedly criterion (b). Reasons of corrective justice are reasons for or against restoring people's relative positions to what they were before, or would have been apart from, some action or series of actions performed by one or other of them.¹² Reasons of distributive justice are reasons for or against changing people's relative

¹² Those familiar with the contemporary literature on corrective justice in tort law may like to note three features of this characterisation. (1) It is sometimes suggested that the action or series of actions which triggers a reason of corrective justice must be *wrongful*. There must be 'a nexus of wrongdoing'. This strikes me as too restrictive. It includes within the ambit of corrective justice the paradigm private law situation, in which damages must be paid because a wrong was done and the wrong was still done even though damages were paid. But it excludes from the ambit of corrective justice cases like that of compulsory purchase, in which no wrong is committed so long as compensation is (promptly) handed over. What these two scenarios have in common, and what unites them under the heading of corrective justice, is that the action of one party, *wrongful or not*, is the ground of the restorative transaction. (2) A further constraint which is often introduced in the definition of corrective justice, but which is not included in mine, is that reasons of corrective justice are reasons why we should see to it that the wrongdoer *and nobody else* does the restoring of relative positions. Again I find this too restrictive. If the court orders a tortfeasor to pay and he refuses then the court should ultimately take his money and hand it over to the plaintiff. It is not an ideal solution. It would have been better if the money had been paid by the tortfeasor himself upon the court's order, and better still if it had been paid spontaneously in the first place without the need for a court order. But still it is a case of corrective justice. In corrective justice the 'nexus' between the parties lies in the fact that their relative position should be restored to that which obtained before or apart from some action performed by one or other of them. Who actually does the restoring is not logically (although it may be morally) pivotal. (3) The idea of 'restoring relative positions' may be thought to neglect the fact that the gain one person makes out of her actions need not in principle mirror the loss she inflicts on others. When this is so, no restoration of relative positions is possible. Does this not make my definition too restrictive? Should it not be expanded to include various other reparative options which do not succeed in restoring relative positions? The answer is that such options are already comprehended within my definition. My definition is a definition of *reasons* of corrective justice. One acts on reasons of corrective justice when one acts in order to restore the parties' relative positions. Perhaps one is bound to fail in the attempt because one cannot fully

positions other than by way of such restoration. That this marks the true point of distinction between corrective and distributive justice is not something that I am just stipulating *ex cathedra*. Nor is it something which we should accept simply because it is the way that certain philosophers traditionally drew the distinction: philosophers, unlike judges, are authority for nothing. We should draw the distinction in this way because in this way, and in this way alone, we divide reasons of justice into categories *qua reasons of justice*. Reasons of justice are distinctive, as I said at the outset, in respect of the relativity between persons that by definition they introduce. Now distinction (b) separates out, as distinctions (a), (c) and (d) do not, two logically distinct kinds of relativity between persons. The relativity of corrective justice is, as Aristotle put it, ‘arithmetic’ relativity, whereas the relativity of distributive justice is ‘geometric’.¹³ That is to say, corrective justice regards the relative positions of people in terms of addition and subtraction (‘what was added must be subtracted’, or ‘what was subtracted must now be added’). Distributive justice, on the other hand, regards the relative positions of people in terms of division (‘what there is must be divided up in such-and-such a way’), without responding to past additions and subtractions by the people *inter se*, and, if cancelling out such additions and subtractions, then doing so only accidentally.¹⁴ That is the key to understanding what differentiates corrective from

eradicate the loss by confiscating the gain, or vice versa. That then poses moral problems: one must decide whether to concentrate on the loss (as in the law of tort) or on the gain (as in the law of restitution). But it poses no *conceptual* problem. Either way, by my definition, the response can count as a corrective justice response, since the reasons for it are corrective justice reasons. All three of these issues have been interestingly discussed by Jules Coleman in his book *Risks and Wrongs* (Cambridge 1994). On each of the three issues he seems to favour the very position which I reject. However, none of this disagreement with Coleman bears directly on the respects in which corrective justice differs from distributive justice. Thus none of it is strictly material to my criticisms of Morris. Accordingly, I cannot pursue it in detail here.

¹³ *Nicomachean Ethics* 1131^b14, 1132^a2.

¹⁴ C.f. Finnis, *Natural Law and Natural Rights*, above note 3, 163, who seems to conceive the arithmetic/geometric distinction as a distinction between two different ways of dividing, one more sensitive to differences between the beneficiaries than the other.

distributive justice, and it remains the key to understanding the difference whether we are dealing in justice among groups or justice among individuals, whether the reasons of justice in question apply agent-neutrally or agent-relatively, and whether they apply to all candidates for just treatment or only across some special constituency.

III

The main aim of Morris's paper is to demonstrate that, contrary to a view represented in my own work and the work of several other writers, the law of indirect discrimination is primarily concerned with corrective rather than distributive justice.¹⁵ If I am right to insist that the distinction between corrective and distributive justice is in fact distinction (b) above, then Morris's argument stands or falls according as to whether the law of indirect discrimination focuses on restoring people to the relative positions they were in before, or would have been apart from, some action or series of actions taken by one or more of them. But of course, whether one accepts that this is the focus of the law of indirect discrimination depends on what one means by 'the law of indirect discrimination'. For as I explained a moment ago, 'the law of indirect discrimination' comes in two phases. First, and primarily, it imposes duties on employers, landlords, shopkeepers etc. not to discriminate indirectly. Secondly, and secondarily, it creates a framework for the administration of the primary duties whenever, to the law's disappointment, an (arguable) breach of those duties occurs. There is certainly no denying that this secondary dimension of indirect discrimination law is a matter of corrective justice. If one hesitates about this, it is only because remedies for indirect discrimination are so parsimoniously granted by anti-discrimination legislation in both Britain and the United States.¹⁶ But to the extent that they

¹⁵ 'On the Normative Foundations of Indirect Discrimination Law', above note 5, 208.

¹⁶ In Britain, the compensation remedy is unavailable where the discriminator proves that the discrimination was unintentional: Race Relations Act 1976 ss 56(1)(b) and 57(3); Sex Discrimination

are granted at all they take the form of (re)instatement or compensation ordered or recommended by a court or tribunal and aimed at restoring the relative position of the discriminator and the person or people discriminated against to what it would have been had there been no act of indirect discrimination.¹⁷ The court or tribunal dealing with the case is being asked to change the parties' relative positions arithmetically rather than geometrically, and hence being asked to mete out corrective rather than distributive justice between the parties. But Morris exploits the palpable truth of this to give the impression that the original duty not to discriminate indirectly is also a duty of corrective justice between the parties. Thus, as Morris presents it, the court in an indirect discrimination case is not only meting out corrective justice but in doing so is also responding to some corrective injustice perpetrated by the discriminator against his victim. That is palpably false. In committing an act of unlawful indirect discrimination I commit no corrective injustice against anyone. There is no previous act of mine, or anyone else's, which by discriminating indirectly I am failing or refusing to make up for. What I do is merely to apply an unjustifiable standard which people of one sex or race find it harder to comply with than people of another, to the detriment of someone who is a member of the former sex or race. My failure is fundamentally a geometric failure, a failure to divide up in legally acceptable proportions the opportunities over which I exercise control. It is not an arithmetic failure, a failure to replace some opportunity which I, or indeed some other protagonist, earlier subtracted. Of course it *happens* that in our society someone *did* earlier subtract opportunities from black people and from women. That is why black people and women are now so seriously disadvantaged, particularly in the labour market. It is also why race and gender have developed their special symbolic importance in our public culture, so that discrimination on these grounds now has the powerful social meaning that it does,

Act 1975 ss 65(1)(b) and 66(3). In the United States, the 'intention' issue is also foregrounded in the key remedial provisions, Civil Rights Act 1964 §706(g) and Civil Rights Act 1991 §101.

¹⁷ See *Calder v James Finlay Corporation Ltd* [1989] ICR 157. Also *Albemarle Paper Co. v Moody* 422 US 405 (1975), at 419.

making the case for thorough legal regulation so unanswerable, even if it has significant economic or social costs.¹⁸ But the key thing is that the primary legal duty not to discriminate indirectly focuses centrally on the relative disadvantage of some applicants *as such*, rather than on the past actions which established and maintained that relative disadvantage. For that reason it is essentially a duty of distributive, not corrective, justice.

To the extent that Morris's counterargument does attend to the primary legal duty not to discriminate indirectly, it foregrounds one particular element of that duty, viz. the element of unjustifiability. To be guilty of unlawful indirect discrimination, you will recall, one must not merely apply a standard which has disproportionate impact on people of one race or sex to the detriment of someone of that race or sex; the standard one applies must also be unjustifiable. Morris makes much of the claim that the legal test of justifiability, at least in the employment context, is not distributionally sensitive. At some points he talks as if the test of justifiability would only count as distributionally sensitive if it dispensed tougher results for wealthier employers than for poorer employers, which, as he rightly

¹⁸ This powerful social meaning incidentally explains the 'symmetry' of the prohibition on direct discrimination, which many progressively-minded people find so baffling. Why, they ask, when black people and women are so seriously disadvantaged, does the direct discrimination prohibition stand in the way of strong measures to advantage them? Answer: because the shape of the right not to be discriminated against on grounds of race and gender is determined both by what discrimination on these grounds *brings about* (compound disadvantage) and by what discrimination on these grounds *expresses* (profound disrespect). The two sides do not form a perfect match. In the indirect discrimination model, the disadvantage takes justificatory priority over the disrespect; in the direct discrimination model, however, the priority is reversed. Those who would abandon the direct discrimination model are perhaps prone to forget that the social meaning which lends it its inconvenient symmetry is the same social meaning which makes the basic case for having sex and race discrimination laws in the first place. Without it, these particular sources of disadvantage would be nothing special, and the case for special legislative frameworks would be lost. (I am not denying, of course, that the two sides of the right not to suffer discrimination may come into conflict; nor am I prejudging which should win when they do: see my note on *Australian Iron and Steel Pty Ltd v Banovic*, *Law Quarterly Review* 106 (1990), 361.)

observes, it does not.¹⁹ But that, of course, is only one possible axis of distributional sensitivity. The test of justifiability might be distributionally sensitive, not as between employers *inter se*, but as between employers and those supposed to benefit from the legislation. The test of justifiability is distributionally sensitive in *that* dimension so long as it is sensitive to the burdens which the duty not to discriminate indirectly is capable of imposing upon employers. Here Morris's remarks are more equivocal. On the one hand, he holds that the justifiability test looks to the relationship between the standard applied by the employer and 'job performance'. If the standard cannot be justified in terms of its bearing on the applicant's ability to perform the job, it is not, Morris tells us more than once, a justifiable standard in law.²⁰ On the other hand, he emphasises that the justifiability of the standard turns on its pertinence to the employer's economic objectives, fundamentally a matter of market competitiveness.²¹ Morris would like to think that these two ways of structuring a justifiability test come down to the same thing in the end, attached as he is to the folk myth that 'merit' and 'achievement' are well served by 'ordering through markets'.²² In fact any correlation here is at best accidental and at worst non-existent, as courts in both the United States and Britain have long since discovered.²³ Pious early attempts to limit justifiability to considerations of ability to perform the job quickly gave way in both jurisdictions to the realisation that indirect discrimination law could

¹⁹ 'On the Normative Foundations of Indirect Discrimination Law', above note 5, e.g. 218, 219.

²⁰ Ibid, 217: justifiability requires 'a snug fit between the challenged requirement and job performance'. And again at 218: justifiability puts an 'emphasis on the applicant's ability to perform the job' and requires 'the selection of employees substantially based on their ability to perform.'

²¹ Ibid, 217: the justifiability factors 'are factors relating to the contribution of the challenged condition to the employer's economic ends or competitiveness'. And at 218: the test of justifiability 'refers to the respondent's economic needs as determined by market forces.'

²² Ibid, 202.

²³ See the frequently-quoted remarks of Judge Kennedy in *American Federation of State, County and Municipal Employees v Washington* 770 F 2d 1401 (9th circuit, 1985), at 1407.

impose great costs on employers, dramatically affecting their competitiveness or efficiency, quite apart from the inevitable (but at least universally borne) transaction costs involved in tailoring ‘person specifications’ more closely to job descriptions.²⁴ Provision of fringe benefits, additional safety requirements, flexible working patterns: all could sometimes be mandated by the duty not to discriminate indirectly, but all could impose potentially crippling costs on employers without it being possible to connect them reliably with anyone’s job performance. The fact that these costs would not be uniformly borne by employers led to a watering down of the job performance aspect of the justifiability test, and an increasing emphasis on the scale of employer burdens. The ‘business necessity’ standard in the United States, and the ‘real need’ standard in Britain thus came to be considered mainly as matters of economic and operational need rather than job-performance need.²⁵ We may, of course, deplore the further tendency in many cases to regard economic or operational need as automatically established whenever the employer can point to any loss of competitiveness.²⁶ Such a low standard of need, as I have pointed out before, can make a mockery of the entire edifice of indirect discrimination law.²⁷ But,

²⁴ On costs arguments for and against anti-discrimination law, see Christopher McCrudden and Julia Black, ‘Achieving Equality between Men and Women in Social Security: some issues of costs and problems of implementation’ in McCrudden (ed), *Equality between Women and Men in Social Security* (London 1994).

²⁵ Compare the emphasis on job performance in *Griggs v Duke Power* 401 US 424 (1971) with the business costs emphasis in *Watson v Fort Worth Bank and Trust* 487 US 977 (1988). In Britain the same development can most easily be seen in cases under The Equal Pay Act 1970, s 1(3): consider the shift in emphasis from the ‘personal equation’ in *Clay Cross Ltd. v Fletcher* [1979] ICR 1 to the labour market argument in *Rainey v Greater Glasgow Health Board* [1987] IRLR 26.

²⁶ See the notorious *Wards Cove Packing Co. v Antonio* 490 US 642 (1989). In Britain we may detect a similar (although more surreptitious) dilution in e.g. *Chymo v London Borough of Wandsworth* [1989] IRLR 241.

²⁷ See my essay ‘Private Activities and Personal Autonomy: At the Margins of Anti-discrimination Law’ in Bob Hepple and Erika Szyszczak (eds), *Discrimination: The Limits of Law* (London 1992), 148 at 164–5.

whether the standard of need is low or high, it is now too late for the argument that the test of justifiability is insensitive to employer burdens. It is thus too late to deny the distributional sensitivity, in this dimension, of the justifiability test in indirect discrimination law. Indeed the classic formulation of the test, found in the leading British case of *Ojutiku v Manpower Services Commission*, carries its distributive credentials on its face. It is for ‘the party applying the discriminatory condition to prove it to be justifiable in all the circumstances on balancing its discriminatory effect against the discriminator’s need for it.’²⁸ Whether an employer or anyone else should bear a given burden, irrespective of their past wrongdoing, in order to permit others to have enhanced access to opportunities is, on any view, a question of distributive justice.

But even if the test of justifiability in indirect discrimination law were not centrally a matter of distributive justice, would it be centrally a matter of corrective justice instead? In his text Morris repeatedly asserts that it would.²⁹ But in a bizarre footnote, he turns against his own view.³⁰ It seems that he allows the urge to criticise my views to overcome the ambition to defend his own position. In my 1989 essay ‘Liberals and Unlawful Discrimination’, which is the main target of Morris’s critique, I observed that the test of justifiability in British law had become slightly sensitive to corrective as well as distributive concerns.³¹ Looking at *Ojutiku*, I suggested that the Court of Appeal was inclined to draw a distinction between a case in which someone could not comply with an employer’s discriminatory recruitment standards because of the employer’s own past discriminatory actions (e.g in denying an earlier training opportunity), and a case in which inability to

²⁸ [1982] ICR 661 at 674 per Stephenson LJ. The test was adopted by the Court of Appeal in *Hampson v Department of Education and Science* [1989] ICR 179 and approved by the House of Lords in *Webb v Emo Air Cargo* [1993] ICR 175.

²⁹ ‘On the Normative Foundations of Indirect Discrimination Law’, above note 5, e.g. at 215, 216, 219, 220.

³⁰ *Ibid*, 217 (note 57).

³¹ ‘Liberals and Unlawful Discrimination’, *Oxford Journal of Legal Studies* 9 (1989) 1, at 13.

comply was ‘in no way the responsibility’ of the employer setting the standards.³² In the former case, as I interpreted the arguments of the Court of Appeal, the claim that the impugned standard was economically justifiable would not have cut much ice. I still believe that this is an important theme of the decision. Morris, however, takes the somewhat perverse step of disputing it. He complains that the arguments in *Ojutiku* ‘refer to no difference in required level of “justification” based on prior acts of the employer.’³³ In making this claim Morris attacks his own professed position. Remember that he promised to draw out of the cases on justifiability the moral that indirect discrimination law is more a matter of corrective justice than a matter of distributive justice. But he ends up playing down the importance, for the justifiability test, of distributive justice and corrective justice alike. Evidently he would have us believe that justifiability is sensitive neither to disproportionate employer burdens nor to past employer actions. It seems, therefore, that the view of the justifiability test that Morris ought properly to be espousing is that it is not fundamentally a matter of justice at all, whether distributive or corrective.

IV

Are there other axes of distributive justice in indirect discrimination law, apart from that embodied in the test of justifiability? Of course there are. Apart from the distributive justice to which the employer is a *subscriber*, as I put it in ‘Liberals and Unlawful Discrimination’, there is also the distributive justice of which the employer is an *agent*.³⁴ This is distributive justice, not between an employer and those who are intended to benefit

³² The quoted words are from [1982] ICR 661 at 668, per Eveleigh LJ.

³³ ‘On the Normative Foundations of Indirect Discrimination Law’, above note 5, at 217 (note 57).

³⁴ ‘Liberals and Unlawful Discrimination’, above note 31, at 11. The paragraph which follows simply reiterates the essential points of section III.2 of this earlier essay.

from indirect discrimination law, but distributive justice between members of groups which find it relatively difficult to meet the employer's recruitment standards and members of groups which find it relatively easy to do so. Morris compounds his failure to identify the former axis correctly (remember that he mistakes it for justice among employers *inter se*) by mixing it up with the latter axis. He confuses the role of employer as subscriber to distributive justice, in other words, with the role of employer as agent of distributive justice. This comes out most clearly when he raises the question of whether 'employers exist who are not sufficiently wealthy to bear a special obligation to do distributive justice.'³⁵ For this question entirely misses the point. Employers do not become agents of distributive justice between the opportunity-advantaged and the opportunity-disadvantaged on the ground that they are *rich* enough to become such agents. They become agents of distributive justice between the opportunity-advantaged and the opportunity-disadvantaged because, having control over access to some of the most important opportunities that modern life presents, they are particularly *well-placed* to become such agents. There is no point in appointing people to redistribute the opportunities they offer if they offer no opportunities. Employers do, however, offer opportunities. That is so by definition: employment itself is an opportunity, and in our society an opportunity which opens the door to many others. This, and not wealth, is what makes employers fit to be agents of distributive justice. The burden upon their wealth becomes an issue, if at all, only when we come to ask whether, as agents of distributive justice, they are also *subscribing* too much to distributive justice, i.e. whether, in doing distributive justice between others, they suffer a distributive injustice upon themselves. And that, as I already explained, is the distinct distributive axis which is at stake when justifiability is pleaded.

One of Morris's overarching problems, which underlies his failure to keep the role of employer-as-agent distinct from the role of employer-as-subscriber, is that he profoundly misinterprets the relationship between the element of disproportionate group impact and

³⁵ 'On the Normative Foundations of Indirect Discrimination Law', above note 5, at 211.

the element of unjustifiability which (when combined with a particular applicant's inability to comply) add up to the wrong of indirect discrimination. According to Morris, 'disparate impact is not a wrong in itself but provides a prima-facie screening device that signals when the law should look more closely for a wrong. If and only if disparate impact is present, the justification enquiry then tests for actual wrongfulness'.³⁶ Here Morris proceeds from the perfectly sound observation that disproportionate group impact is only prima facie indirect discrimination. But he misunderstands what 'prima facie' means in this setting. He takes it to be an evidential classification. Thus, as Morris presents it, disproportionate group impact is merely prima facie *evidence* of indirect discrimination, which may be rebutted by an employer's countervailing evidence at the stage of the 'justifiability' inquiry. But disproportionate group impact is not mere evidence, prima facie or otherwise, of indirect discrimination. It is no mere 'screening device', prompting the law to 'look more closely' for wrongdoing. It is a *constituent part* of the wrongdoing that is indirect discrimination. Thus disproportionate group impact counts as 'prima facie' indirect discrimination in the simple sense that it is not by itself the whole of indirect discrimination. That has nothing to do with how indirect discrimination falls to be proved.³⁷ Morris's confusion on this score is familiar from the American cases. The question of how indirect discrimination is to be defined is pervasively confused, in the Supreme Court as well as the lower courts, with the question of how it is to be proved. Thus the doctrine in *McDonnell Douglas Corporation v Green*,³⁸ by which an employer may rebut prima facie evidence of *direct* discrimination by adducing evidence of a non-discriminatory explanation for his decision, is pervasively confused with the *indirect* discrimination doctrine derived from *Griggs v Duke Power*,³⁹ by

³⁶ Ibid, at 210.

³⁷ I discuss the ambiguity of 'prima facie' more fully in my paper 'Justifications and Reasons' in A.T.H. Smith and Andrew Simester (eds), *Harm and Culpability* (Oxford, forthcoming).

³⁸ 411 US 792 (1973).

³⁹ 401 US 424 (1971).

which the (proved) disproportionate group impact of an employment practice may be defended by (proved) business necessity.⁴⁰ An effect of this confusion (to which *Griggs* itself gave succour) is that the *intrinsic* importance of the disproportionate group impact in the structure of indirect discrimination is suppressed. It is pushed into the realm of the purely instrumental, the purely probative. For Morris's purposes, this means that the key role of the employer as distributive agent in the law of indirect discrimination is quite readily absorbed into, or at any rate made subordinate to, the employer's distinct role as subscriber. For the part of indirect discrimination law in which the employer is a distributive agent, viz. in the redistribution of opportunities from members of one group to members of another, is reduced to a mere forensic sideshow, incidental to the main substantive business which is supposedly transacted at the 'justifiability' stage, when the scale of the employer's own contribution as against the benefit conferred by the redistribution of opportunities becomes the key issue. Yet this is a travesty of the truth: of these two elements of indirect discrimination, the disproportionate group impact element and the justifiability element, neither is any kind of sideshow. Both are at the heart of the substantive business of indirect discrimination. And thus both the employer's role as agent of distributive justice and the employer's role as subscriber to distributive justice should be kept equally in focus, and regarded as equally central to the idea of indirect discrimination, which emerges in the process as a *doubly* distributive idea – albeit, admittedly, with an occasional corrective twist à la *Ojutiku*.

⁴⁰ For instances of such confusion, see *Hayes v Shelby Memorial Hospital* 726 F 2d 1543 (11th circuit, 1984) at 1553; *Wards Cove Packing v Antonio* 490 US 642 (1989) at 659.

In ‘Liberals and Unlawful Discrimination’, I portrayed the occasional corrective twist in the doubly distributive idea of indirect discrimination as problematic.⁴¹ This twist introduced, as I then thought, an incoherence which had to be confronted and defused. This is no longer my line of thinking. What is more, I now trace my earlier anxiety back to a serious muddle in my whole approach to the subject of anti-discrimination law. When I wrote ‘Liberals and Unlawful Discrimination’ I was interested, on the one hand, in explaining why discrimination on grounds of race and gender is *wrongful*. But at the same time I was interested in justifying *the use of the law* to prevent such wrongful discrimination. The second issue, that of the law’s legitimacy, confronted me with a stark choice. It was a choice between two quite different ways of fixing the law’s limits in a free society. On one view, originating famously with John Stuart Mill, use of the law in a free society is limited to the task of harm-prevention. On another view, which we owe principally to the work of John Rawls, the law in a free society is properly preoccupied with the task of ensuring that justice is done. These are cross-cutting doctrines: given any plausible account of harm and any plausible account of injustice, there can be harmless injustices, as well as harms that are not unjust. That being so, some have thought that the Millian and Rawlsian theses should be combined, permitting the law to be used either to prevent harm or to do justice.⁴² But my own view was, and remains, that the two approaches to the limits of legal legitimacy in a free society are genuinely competing views. Both Mill and Rawls, to my mind, were addressing the same fundamental problems about the relations between morality and authority in a liberal regime. Both saw their principles as dealing adequately with the same

⁴¹ ‘Liberals and Unlawful Discrimination’, above note 31, at 12–13.

⁴² See, e.g., Jeremy Waldron, ‘Autonomy and Perfectionism in Raz’s *Morality of Freedom*’, *Southern California Law Review* 62 (1989), 1097 at 1142. In discussing the proper application of the harm principle in matters of taxation and subsidy, Waldron elects to ‘bracket off issues of justice and redistribution.’

basic objection to the moralistic state, namely that such a state leaves people too little space to lead their lives by their own lights, making their own mistakes in the process.⁴³ The point is simply that the two arguments arrive at different and sometimes conflicting principles, and we are left to ask ourselves which solution is the one that really pulls its weight. Anti-discrimination law in particular forces us to face up to this choice, as I argued in ‘Liberals and Unlawful Discrimination’, because it confronts us with a situation in which the two accounts of legal legitimacy in a free society both patently have something directly to say, but say slightly different, and at times awkwardly juxtaposed, things. The harm principle begs us limit anti-discrimination law in one way, and the principles of justice would have it limited in another. We just cannot have it both ways.

My egregious mistake, however, was to conflate this distinction between the Millian and Rawlsian accounts of *legal legitimacy* with a quite different distinction between two different types of *wrongdoing*. This is the distinction, of which I have been making a great deal, between corrective injustices and distributive injustices. I talked in ‘Liberals and Unlawful Discrimination’ as if the competition between Millian and Rawlsian accounts of what made legal regulation of race and sex discrimination legitimate corresponded to a competition between two different accounts of what made such discrimination wrong in the first place, namely a corrective account and a distributive account. And just as the Millian and Rawlsian approaches to legitimacy were held to be in direct competition, so too was there held to be a direct competition between the corrective and distributive accounts of discrimination’s wrongfulness. Thus the corrective twist in an otherwise distributive law of indirect discrimination was seen as a sign of confusion; likewise the equivocation in the

⁴³ Thus Rawls’ claim in *Political Liberalism* (New York 1993) at 187: ‘when basic institutions satisfy a political conception of justice ... *this fact* confirms that those institutions allow sufficient space for ways of life worthy of citizens’ devoted support’ (emphasis added). We may compare Mill’s view that the harm principle is ‘entitled to govern absolutely the dealings of society with the individual in the way of compulsion’ so that we may all pursue ‘our own good in our own way’: ‘On Liberty’ in J.S. Mill, *Three Essays* (ed. Wollheim, Oxford 1975), 5 at 14 and 18.

United States Supreme Court between corrective and distributive elements in the regulation of voluntary affirmative action plans. These were, I suggested in 1989, attempts to have it both ways.⁴⁴ What I now accept, however, is that several different kinds of reasons can conspire to make a certain action wrong, and thus the profile of its wrongness can be formed out of an interaction of reasons of distributive justice and reasons of corrective justice, as well as reasons which are not reasons of justice at all.⁴⁵ It means that there is no need in principle to insist on a unified or reductive view of what makes discrimination wrong: one should not expect the conflicts and discontinuities to be ironed out in the structure of the legal (or for that matter moral) duty. One should only expect that, whatever the structure of the moral duty, it should pass into law only so long as it *also* passes the test provided by whichever account of the limits of legal legitimacy in a free society turns out, on closer examination, to be the superior account.

My failure to distinguish these two issues inflicted profound damage upon the main argument of ‘Liberals and Unlawful Discrimination’. But it seems that Morris, for all he rejects my views, has been content to follow in my footsteps on this crucial point. He has been content to correlate the distinction between corrective and distributive justice with the distinction between the Millian and Rawlsian accounts of the law’s legitimacy. For he ventures that ‘the conclusion that indirect discrimination law reflects corrective justice also

⁴⁴ ‘Liberals and Unlawful Discrimination’, above note 31, at 12–15.

⁴⁵ Compare Ernest Weinrib in ‘Legal Formalism: On the Immanent Rationality of Law’, *Yale Law Journal* 97 (1989) 949 at 984: ‘because the forms of justice represent mutually irreducible conceptions of coherence for juridical relationships, no single juridical relationship can coherently combine the two forms. If a corrective element is mixed with a distributive one, each necessarily undermines the justificatory force of the other’. This now strikes me as nonsense. Weinrib himself undermines it by observing that one could shift the corrective paradigm of tort law to a distributive paradigm by replacing tort law with compulsory first-party insurance. He forgets that this shift still leaves a role for corrective relations in the event that the insurance company refuses to pay up, and that the distributive nature of the insurance plan would then be thoroughly interwoven with a corrective claim in breach of contract. Does he honestly believe it would strip either the distributive or the corrective reasons of their justificatory force?

makes out a prima facie case that indirect discrimination law rests more appropriately under the head of Mill's harm principle'.⁴⁶ And this, it seems to me, brings out the real point of Morris's venture. He is leading us towards the conclusion that the legitimacy of anti-discrimination law derives from its role in preventing harms to those who are on the receiving end of discrimination, direct or indirect, rather than its role in promoting justice between different social groups. But that, funnily enough, was exactly the claim with which I ended 'Liberals and Unlawful Discrimination'. I argued that indirect discrimination, like direct discrimination, is harmful to its victims, and falls to be regulated on that very ground.⁴⁷ The argument rested on the acceptance of a counterfactual element in harming, according to which one harms people not only by reducing their options, but also by failing to enhance or maintain their options when one has a duty to do so.⁴⁸ But what has to be recognised is that this duty may be, and in the case of the duty not to discriminate certainly is, a duty of distributive justice. The misleading impression I gave in 'Liberals and Unlawful Discrimination' is that, in order to accept the view that discrimination law exists to prevent harm to those discriminated against, one must ultimately abandon the view that discrimination is fundamentally a distributive injustice.⁴⁹ Looking for an alternative, Morris suggested that discrimination is fundamentally a corrective injustice instead. But in this, as we can now see, he compounded, rather than correcting, my original error.

⁴⁶ 'On the Normative Foundations of Indirect Discrimination Law', above note 5, 201.

⁴⁷ 'Liberals and Unlawful Discrimination', above note 31, at 18.

⁴⁸ I took my cue from Joseph Raz's remarks in *The Morality of Freedom* (Oxford 1986), 415–8.

⁴⁹ Thus I seemed to some to be resisting, when I should have embraced, the main thrust of Christopher McCrudden's argument in 'Changing Notions of Discrimination', in Stephen Guest and Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice* (Stuttgart 1985).