10.5 Equal Treatment, By the State and By Officials

This section considers one last commonplace claim. Suppose that the state provides a benefit, *B*, for one citizen, *X*, that it does not provide for another citizen, *Y*. The benefit might be some positive good or service: e.g., roads, schools, disaster relief. Or it might be exemption from some rule, duty, or penalty. Suppose, further, that there is no "justifying difference" between *X* and *Y* that might justify this difference in treatment. When the state does this, *Y* is often thought to have a *complaint of unequal treatment by the state*, which is expressed in comparative terms: that the state is *favoring X over Y*, or that *since* the state gave *B* to *X*, it should *also* give *B* to *Y*. Call the principle thereby violated, "Equal Treatment By the State." The issue is one of, as is sometimes said, "comparative injustice."

A similar complaint can be leveled against certain *non-state* officers, such as teachers, administrators, employers, or even custodians of children, provide a benefit, *B*, to one student, administratee, employee, or child in their custody, *X*, but not to another, *Y*, when there is no justifying difference between them. When this occurs, *Y* is often thought to have a *complaint of unequal treatment by an official*, which is expressed in similarly comparative terms, of favoritism. Call the principle thereby violated, "Equal Treatment By Officials."

Although unequal treatment complaints are not much discussed in the philosophical literature (an exception being Scanlon 2018, ch. 2), they seem at least as common in actual political discourse as complaints that states or officials are simply not doing enough for people, in absolute terms. Equal treatment complaints moreover are often especially rhetorically potent. This may be, in part, because they are often easier to establish. One only needs to show that one group isn't getting the same as another group, whatever "the same" happens to be. One doesn't need to show that it is the "right" amount in some absolute sense.

Once again, our question is: Can we explain these apparently comparative, equal treatment complaints be explained as non-comparative, improvement complaints?

One might suggest that we can: that equal treatment complaints are really non-comparative, improvement complaints in disguise. *Y*'s complaint is really just that the state or official could have given *B* to *Y*. That the state in fact gave *B* to *X* is immaterial.

But I doubt this, for several reasons. First, contrast a baseline in which the state or the official provides *B* to neither *X* nor *Y*. If improvement complaints were all that were at issue, then the state's or official's giving *B* to *X*, but not to *Y*, would only subtract a complaint. But, intuitively, it seems to add one.

Second, suppose *B* cannot be given to *Y*. A case of this so common as to be overlooked is the application of the same rule to different people at different times. Here the benefit, *B*, is exemption from the rule. The state or official, applying the rule, required something of *Y* in the past, but now faces the question of whether to require it similarly of *X*. *Y* has no improvement complaint about what the state now does for *X*, since that has no bearing on what the state could have done for *Y*. Still, *Y* might seem to have an equal treatment complaint about exempting *X*. When, in the "office" of teacher or administrator, I'm asked for an extension, waiver, exception, etc. that I've denied before, I hear myself saying "What would I tell the other people I've already said no to?"

Finally, consider cases in which neither *X* nor *Y* would have an improvement complaint if they did not receive *B*. Giving *B* to anyone is either supererogatory[61] or discretionary.[62] Still,

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[61] One might wonder whether anything can be supererogatory *for the state*. The state isn't a person who can say: "I've done enough for others; I have my own life to lead." Of course, the state may rein in current expenditures to save for a rainy day, but this is for the benefit of people when the rain comes, not for *raisons d'état*.

However, first, when the benefit, *B*, is the extra time or effort of an *official* (and possibly a *state* official) beyond what can otherwise be fairly asked of them, we can speak of supererogation. If the official volunteers that extra effort for *X*, then *Y* has a complaint if the official doesn't similarly do so for *Y*.

Second, even if the state is not a person with its own life to lead, still the state's giving *B* to *X* or *Y* may be supererogatory *with respect to what the state must do for X or Y*. In that case, presumably, giving *B* to *X* or *Y* *unfairly burdens some Z*: by, e.g., reducing services, raising taxes, increasing risk. If the state nonetheless gives *B* to *X*, then the state now has a reason to give *B* to *Y* too. This *might* unfairly burden *Z*. In that case, meeting *Y*'s equal treatment complaint by "leveling up," by giving *B* to *Y* too, would conflict with *Z*'s improvement complaint not to be burdened unfairly.

if the state or official gives *B* to *X*, *Y* may have an equal treatment complaint that the state does not give *B* to *Y* too (Scanlon 2018 17).

So far, then, it seems that equal treatment complaints resist reduction into improvement complaints. However, equal treatment complaints need some escape clause. For example, *Y* may have no equal treatment complaint if *X* needs medical care that *Y* does not, or *Y*'s parents already provide *Y* with school lunch. And once we clarify what the escape clause is, one might argue, equal treatment complaints will reduce to improvement complaints.

Scanlon suggests the following escape clause. *Y* has a complaint only if the state's or the official's giving *B* to *X* but not *Y* "would be unjustified if the interests of all those affected were given appropriate weight" (19, or "sufficient" and the "same" weight, 21). But this clause allows too much to escape. Suppose that the state or official, giving *X*'s interests appropriate weight, correctly determines that giving *B* to *X* is optional: giving *B* to *X* is not unjustified, but also not giving *B* to *X* is not unjustified. Knowing that *Y* is in exactly the same situation as *X*, the state or official, in giving *B* to *X*, but not to *Y*, does something that would not be unjustified if the interests of all were equally given their appropriate weight.

What I think Scanlon should say is instead is that *Y* has an equal treatment complaint just when the state or official gives *B* to *X*, but not to *Y*, *unless there is some difference between X and Y justifies not giving B to Y*. In other words, *equal treatment is the default*, pending some showing of a "justifying difference."

However, giving *B* to *Y* too *might not* unfairly burden *Z*. There may be slack or waste in the system, which *already* unfairly burdens *Z*. Using some of that slack to give *B* to *Y* too, assuming that it would not go to *Z* anyway, would not add to *Z*'s burdens.

[62] By "discretionary," I mean that the state's or official's decision whether to provide people with benefit *B* or instead a different benefit *B'* is tied or incommensurable. In that case, no would-be recipient of *B* such as *Y* has an improvement complaint if *B'* is provided instead. But if *B* is provided to *X*, then *Y* does have an equal-treatment complaint if *B* isn't provided to *Y*.

Presumably, it's a justifying difference that *X* needs medical care that *Y* does not, or that *Y*'s parents already provide *Y* with school lunch. More generally, a "justifying difference" for giving *B* to *X* rather than to *Y* will often be that giving *B* to *X* rather than to *Y* will better satisfy improvement claims (including, perhaps, the improvement claims of third parties, such as those who benefit from a job's being given to *X* rather than to *Y*).

But if we say that, in general, a justifying difference for giving *B* to *X* but not to *Y* just is that this will better satisfy improvement claims, doesn't this mean that equal treatment complaints collapse into improvement complaints?

No. First, equal treatment complaints can arise in cases without any such justifying difference in, say, need or ability to pay. *Y* might need the medical care just as much, or leave for school just as bereft of lunch.

Second, the appeal to justifying differences is a *defense* of the *un*equal provision of *B* to *X* but not to *Y*. When there is *equal* provision of *B* to *X* and to *Y*, no defense is called for. So, while there need not be an equal treatment complaint about "means-tested" benefits—since *X*'s having more limited means is a justifying difference—there also need not be an equal treatment complaint about *non*-means-tested benefits that are equally provided—since no justifying difference *needs* to be adduced in the first place.

Finally, when the state or official cannot give *B* to *Y* (say, because it enforced the rule in *Y*'s case) but can give *B* to *X* (say, by exempting *X* from the rule), it would better satisfy improvement claims to give *B* to *X*: it would be a weak Pareto improvement. But it is not obvious that *this* fact counts as a justifying difference.

Equal Treatment suggests another argument for lotteries, besides giving highest fair chances. If an official *actually* gives *X* some chance of *B*, then Equal Treatment requires that the official give *B* the same chance for the good, unless there is some justifying difference between them. Note that such "equal chance lotteries" do not tend to require the official to *maximize* the chances of either *X* or *Y*. It just requires that each have equal chances. So, an equal chance lottery might be to flip a fair coin twice, and award *B* to *X* if the outcome is HH, award *B* to *Y* if the outcome is TT, and to neither if the outcome is neither.

If improvement complaints don't explain equal treatment complaints, then what does? It isn't clear. And making the matter more challenging is that equal treatment complaints pattern in distinctive ways.[63]

First, *Y* has a complaint of unequal treatment by a state, *S*, only if *Y* is a citizen, or at least a resident, of *S*. If *Y* is a non-resident alien, then *Y* may have a humanitarian complaint about foreign aid being too low, but not the sort of comparative complaint that residents have that they don't have access to the same benefits as other residents (Scanlon 2018). Similarly, *Y* has a complaint of unequal treatment by an official only when *X* and *Y* stand in the same relevant relationship to that official.

Second, *Y* does not have a complaint against a private person, *P*, who gives *B* to *X* but not *Y*, unless (i) this differential treatment contributes to a pattern of discrimination or (ii) *P* stands in some special relationship, of the same kind, to *X* and *Y* (such as that *P* is the parent of *X* and *Y*).[64] In general, if you do something supererogatory for one person (e.g., pick up one hitchhiker), you don't have to do it for everyone (even if there is no justifying difference). Equal Treatment allows "random acts of kindness."

Third, equal treatment complaints differ from discrimination complaints. On the one hand, discrimination complaints arise not only against the state or officials, but also against private strangers, as happens in the Half-Warm Society. On the other hand, *Y* can have an equal treatment complaint even if the state's or the official's differential treatment has nothing to do with *X* and *Y* belonging to different protected classes. The state or official might favor *X* for other reasons.

Fourth, equal treatment complaints apply to what the state or the official *directly* provides. If you pave your private driveway up to the public thoroughfare, but I do not pave mine, I do not have any equal treatment complaint about

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[63] For doubts about Scanlon's explanation of this pattern, see Kolodny 2019.

[64] Other such special relationships might be said to be those between trade unions or musketeer trios, organized around a common struggle or danger. Members should refuse to favor themselves, even when this would not come at other members' expense. The phenomenon in these cases, however, seems to me different from equal treatment. It is a matter of "solidarity," as I discuss later.

this, even though the state permitted a "basic structure" that let it come to pass that your private driveway but not mine was paved.

Finally, equal treatment complaints are typically triggered by inequalities in *specific* benefits—per-pupil spending across districts, or exemption from certain rules—without a detailed accounting of overall net receipts. There may be other kinds of "localization" or "compartmentalization," such as differentiation by age cohort. If kids these days get better schooling, their elders may not have a complaint. If a rule is repealed, those who were bound by the rule in the past may not have a complaint.

One might wonder, though, why we are making such hard work of this. Equal treatment is easy to explain. It just follows from the general moral principle of simple fairness, of treating like cases alike, of not making arbitrary distinctions!

This response, however, overlooks two difficulties. First, a general moral principle of simple fairness, or treating like cases alike, or not making arbitrary distinctions, would explain too much. There isn't a requirement to treat like cases alike in general. The requirement applies only to states and officials, only with respect to people who stand in the same relationship to them, only with respect to direct provision, and only with respect to certain goods. In our ordinary dealings with people, we aren't required to treat like cases alike. Again, we don't wrong people by performing random acts of kindness.

And, second, this response doesn't explain why we should *care* about simple fairness, or treating like alike, or not making arbitrary distinctions. What is at stake? Why not regard it as a foolish consistency, Thoreau's "hobgoblin of little minds"? Why isn't it "rule worship" to adhere to the rule applied to *Y*, when violating it in the case of *X* does no harm to the purposes that the rule is supposed to serve?

III. POSITIVE CONJECTURE: AN EXPLANATION IN NON-INFERIORITY

In the previous Part (II), I made the case for my negative observation: that several commonplace claims resist explanation by appeal to interests in improvement or rights against invasion. In this Part (III), I pursue my positive conjecture: that these same claims are explained, instead, by what I call claims against inferiority.

11 CLAIMS AGAINST INFERIORITY

A *claim* against inferiority is, roughly, a claim against a *relation* of inferiority to another person: against being subordinated to another, set beneath them in a social, or interpersonal, hierarchy. Relations of inferiority are the natural-historical legacy of "pecking order" in other social animals, albeit irrevocably transformed by symbol and self-consciousness. This heritage may account for the primitive depth and inarticulateness of our consciousness of relations of inferiority.

My discussion of claims against inferiority takes inspiration from two strains of thought. The first is the revival and development of the "republican" (or "neo-Roman") tradition — by Pettit (1997, 2012a, 2014), Skinner (1998, 2002a, 2008), Lovett (2010), among many others — and of Kant's political philosophy — by Ripstein (2009), Stilz (2009), Pallikkathayil (2010, 2017). These theorists emphasize complaints that look very much like complaints against inferiority: complaints against "domination" and "dependence," against "having a master," or against being vulnerable to an "arbitrary" or "unilateral" or "private" will.

Moreover, these complaints resist explanation as improvement or invasion complaints. For they are not complaints against any *foregone improvement* or *actual invasion*. Indeed, they are complaints not against how one is *actually* treated or provisioned at all, but instead against the mere fact that one is *exposed to the possibility* of certain kinds of treatment at the hands of another will. The philosopher's fictions of the benevolent despot, the kindly slave master, the husband who keeps his wife in a gilded cage, the aristocrat given to noblesse oblige, the colonial administrator who selflessly bears the "white man's burden," and so on, are meant to elicit such complaints.

The second strain of thought from which I take inspiration is what has come to be known as "relational egalitarianism," represented, most notably, by the work of Anderson (1999) and Scheffler (2003). These philosophers have suggested that unless we attend to "relational equality," we risk an incomplete view of what is required for an acceptable distribution of income and wealth. Among other things, they observe that an otherwise fair and efficient distribution of income and wealth—and so one that might not leave, in my terms, improvement complaints—might still be a highly

unequal distribution (compare Cohen 2009 34). And this highly unequal distribution might lead to objectionably inegalitarian relations between people, in which some are dependent on others, or in which there are hierarchies of status. In many societies, for example, inequality arose through debt peonage, which itself was the natural result of fair contracts and the distribution of "option luck." People may have a complaint about finding themselves in, and compelled to support, such a society. This complaint seems more than a mere preference for a certain public culture, such as a preference that the prevailing mores governing interaction among strangers were more open and less reserved. This complaint against "relational inequality" looks like what I describe as a complaint against inferiority. And this complaint is not an improvement or invasion complaint. Again, the distribution is fair and efficient, and it does not violate anyone's natural rights.

If the paths are so worn, why trod them again? What does this book add? One might be put in mind of Reverend Martin Sherlock's review, "In general, throughout the work, what is new is not good, and what is good is not new."

First, I suggest that claims against inferiority animate a broader range of political commitments—our various commonplace claims—than has been appreciated. For the most part, for instance, "relational egalitarianism" has focused only on the implications for the distribution of material goods.

Second, I try to give a clearer and more specific analysis of what relations of inferiority are.

Third, relatedly, I try to distinguish claims against inferiority from other moral ideas, with which they are at times confused.

Finally, also relatedly, I present claims against inferiority as part of a pluralist view. By contrast, writers in both the republican and relational egalitarian camps have at times proposed "non-domination" or "relational equality" as a kind of master value, which could shoulder the whole weight of a political philosophy. But this seems to me a mistake. Interests in improvement, rights against invasion, and claims against inferiority are simply distinct and irreducible concerns. This excessive ambition, I suspect, is partly responsible for the unclarity, vagueness, and

confusion just noted. In *ALTERNATIVES TO* , I draw the contrasts in greater detail.

If, once clarified, claims against inferiority seem, on reflection, worth caring about, then this may provide evidential support for, and an explanation of, the commonplace claims canvased in the previous Part.

With luck, these explanations may also offer us guidance where we are uncertain of what more specifically these commonplace claims require. Does democracy require majority rule? Is gerrymandering undemocratic? Is it corrupt for a legislator to table a bill to attract campaign donations? Is it corrupt for a head-of-state to warm to a foreign power that projects his likeness on a hotel façade?

For all that, it may be that once spelled out, claims against inferiority seem, on reflection, not worth caring about. Perhaps claims against inferiority indeed lie at the root of these commonplace claims, such as democracy and equal treatment. Perhaps, nevertheless, those commonplace claims are without merit. Perhaps, as so often happens with anxieties, once we name their source, once we dredge them up from the murk and into the light of day, we find nothing left to trouble us.

In this case, the upshot would be more confident skepticism of the commonplace claims, greater assurance that we can dismiss them with a clear conscience. At best, concerns about democracy, or corruption, or discrimination, or unequal treatment, and so on, *as such* are overgeneralizations, or vestiges of associative reasoning, borne of the fact that undemocratic government, corruption, discrimination, unequal treatment, and the like tend to travel with a failure to satisfy claims to improvement or with the invasion of rights. This would be a more deflating finding. But it would still be a finding that only an exploration of claims against inferiority, and of the support that they might lend commonplace claims to democracy, non-discrimination, and the like, helped us to see.

11.1 What are Relations of Inferiority? Three Abstract Conditions, Two Paradigms

What, then, are relations of inferiority? To start, we can give at least three necessary conditions. Abstract though they are, they do considerable work, even without further specification.

First, relations of inferiority involve genuine *relations*. These relations need not be face-to-face encounters. But they must involve interactions of some kind, or at least co-membership in common society.

So, on the one hand, there are no relations of inferiority between people who live in altogether different times and places. You, reader, stand in no relation of inferiority to the ancient Egyptian pharaoh, Ramesses the Second.

On the other hand, it is not sufficient for a relation of inferiority simply that some have more, or are better off, in itself. The mere fact that some contemporary, in your society (let alone someone living in an altogether different time and place) discreetly enjoys, in the privacy of their own home, some labor-saving convenience that you don't enjoy does not put you in a relation of inferiority to them (compare Cohen 2013 200 on the cynical scout).

This is not to deny that you can have *improvement* complaints *against* the long-dead Ramesses, or *provoked by* your more convenienced contemporary. Perhaps Ramesses, or whoever better convenienced your contemporary, could have improved your situation, without unfairness to others, but failed to do so.

Second, relations of inferiority involve an *unequal ranking*. There is one party who can be identified as higher in the hierarchy, the other as lower. One is above, the other, below.

Third, relations of inferiority are relations between *individual, natural persons*. They are not relations between an individual, natural person and an artificial person, or collective, or force of nature.

The second point, that relations of inferiority involve unequal rankings, partly explains the third point, that they are not relations between individual natural persons and entities of an entirely different moral category, such as an artificial person, or a collective, or a force of nature. What

would it even mean for you to be the "equal" of a collective, such as Indonesia or the Roman Catholic Church? If I am the "equal" of the City of Albany, the State of California, and the United States, and if equality is transitive, would the city, state, and nation then be equals? And if it doesn't make sense to be equal to a collective, what sense does it make to be unequally ranked—as opposed to neither equally nor unequally ranked—with respect to a collective?

So we have some abstract necessary conditions of relations of inferiority. Here is another point of entry. We can identify relations of inferiority by their two most extreme forms.

On the one hand, there are what we might call cases of "bondage." Here the paradigm would be the relation between slave and master. These are the cases where republican epithets like "domination" and "dependence" seem most at home.

On the other hand, there are cases of "caste." Here the paradigm would be how Brahmins are related to untouchables, or whites to blacks under Jim Crow. These are cases in which there is a stratification of classes across a society.

While bondage and caste often travel together, they can come apart. There might be an *isolated* relation of bondage between two individuals, without the superior in that relation belonging to some class that is recognized as higher in the *broader* society. If a Gallic slave slips the fetters, and speaks Latin without an accent, perhaps he can blend in.

Now—and I can't emphasize this enough—I am not claiming that *all* instances of relations of inferiority are, or are morally equivalent to, bondage or caste. Rather, I am saying that bondage and caste are *extreme* forms: aggravated cases of the pathology, which might instruct us about milder cases. They are cases in which the constituents of relations of inferiority are particularly intense or pronounced, and where the factors that elsewhere "temper" such relations, as I will put it, are sparse or absent.

11.2 What are Relations of Inferiority? Power, Authority, and Consideration

What do relations of inferiority consist in? What are these admittedly extreme examples, bondage and caste, extreme examples of?

In earlier work, I suggested that Y's standing in a relation of inferiority to X consists in one or several of the following three components.

First, Y's standing in a relation of inferiority to *X* can be constituted by an *asymmetry of power*: that *X* has greater power over *Y*. This power need not be to interfere in *Y*'s choice, or to invade *Y*'s person or property. The power might be of another kind, such as to withhold goods or shape someone's environment. Note that what matters is *X*'s power *over Y*, rather than simply *X*'s greater power *than Y*. My neighbor with his larger capacity washing machine has greater power *than* I have, but not, unless he somehow uses the surplus capacity as leverage, greater power *over* me.

Second, Y's standing in a relation of inferiority to *X* can be constituted by an *asymmetry of de facto authority*. *X* can have either greater de facto authority *over Y* or greater de facto authority *than Y with respect to the members of their society* (Lovett ms. 23): greater ability to issue commands, as opposed to advice, that are generally, if not exceptionlessly, complied with. I say that the authority is "de facto" to mark that the commands need not create, or claim to create, or be believed to create reasons, let alone moral reasons, for compliance. However, I will, for convenience, often drop the qualifier, "de facto," taking it to be implied.

Finally, Y's standing in a relation of inferiority to *X* can be constituted by a *disparity of consideration*. X enjoys, whereas *Y* does not, certain kinds of favorable responses from members of their society, such as, among other things, respect, courtesy, a willingness to serve interests. We will say more later about which kinds of responses count as "consideration." Typically, although not always, when there is such a disparity of consideration between X and Y, X will attract such favorable responses because X is believed to have or lack certain "basing traits," such as having no close ancestor with dark skin, or a noble lineage, or wealth, or divine favor, whether or not those traits are thought to justify those responses.

Again, this is how I presented things in earlier work. I now see that one might instead factor relations of inferiority into just the power and consideration components. On the one hand, *X*'s having greater de facto authority *over Y* is just a kind of power over *Y*. On the other hand, X's having greater de facto authority *than* Y is a kind of disparity of consideration between *X* and *Y*, in that having one's directives followed is enjoying a kind of consideration. (Note that while *X* can have greater authority *than Y* only if *X* has greater authority than *Y over some Z*, *Z* might be a third party, rather than *Y*.) So, I will for the most part speak, on the one hand, of *X*'s asymmetric power and authority over *Y*, and, on the other hand, of disparities of consideration between *X* and *Y*, tacitly including disparities in the authority that *X* and *Y* each enjoy.

The specification of these components explains and gives content to the first abstract feature listed in the previous section: namely, that relations of inferiority presuppose "genuine relations" between people. To the extent that *X* and *Y* do not interact, *X* cannot have greater power or authority over *Y*. And where *X* and *Y* do not share a society, there cannot be any asymmetry of authority or disparity of consideration between them. For that requires that both *X* and *Y* come under the same appraising eye, that there is a common judge, who responds more readily to the directives of, or gives greater consideration to, the superior.

This observation points to a structural difference between the first component, *X*'s having greater power over *Y*, on the one hand, and the second component, X's enjoying greater consideration than *Y*, on the other. The second component, but not the first, is constituted by the responses of a third party, an individual or group of individuals, *Z*. For *X* to have greater authority than *Y*, there must be some *Z* who complies more readily with *X*'s directives than with *Y*'s. For X to enjoy greater consideration than *Y*, there must be some *Z* who responds, in the relevant ways, more favorably to *X* than to *Y*. By contrast, *X* can simply have greater power or de facto authority over *Y*. This need not be constituted by the responses of any *Z*.

Does this mean that what I call "relations of inferiority" comprise not a unified category, but instead two distinct categories? Yes and no. On the one hand, there is one person having greater power *over* another. This is what bondage carries to extremity. On the other hand, there is one person enjoying greater consideration *than* another.

This is what caste carries to extremity. Viewed in that way, there are two distinct categories.

Ascending a level of abstraction, however, relations of inferiority comprise a unified category. They share the abstract features that I identified in the previous section: they presuppose genuine relations, they are unequal rankings, and they are between natural individuals. And they are both targets of complaints, on behalf of those set in the inferior position.

11.3 Primary Tempering Factors

We have so far defined relations of inferiority as consisting in asymmetries of power and authority, and disparities in consideration. And we have suggested that those who find themselves in the inferior position, at least, have claims against standing in it.

But surely this is too broad as it stands. Not every asymmetry of power and authority, or every disparity in consideration, gives rise to an objection. Such asymmetries and disparities are everywhere, in schools, houses of worship, and workplaces. For example, the "firm," by definition, involves some asymmetry in authority between managers and workers. We greet these asymmetries and disparities more or less with equanimity.

What's more, we often don't view those asymmetries or disparities in general as bitter compromises, concessions to necessity, or the tragic price paid for efficiency. (Indeed, such asymmetries or disparities, between mentor and mentee, priest and parishioner, and so on, may be constitutive of social forms that we find valuable in themselves.)

I suggest that this is because certain "tempering factors," which we tend to take for granted until we notice their absence, bound, contextualize, or transform asymmetries or disparities in such a way as to make the charge that they amount to objectionable relations of inferiority out of place, or at any rate weaker. The idea is not that these tempering factors somehow *outweigh* or *compensate* for the bad of inferiority. The idea is instead that these tempering factors make it less of a bad to begin with.

A first tempering factor is that the asymmetries or disparities arise only in chance, one-off encounters, instead of being entrenched in an established, ongoing social structure. For example, in an upbeat mood, I might offer supererogatory help to a stranger, or give them a donation, without any plan to do the same for another stranger. There are no established, ongoing relationships among us constituted *by these interactions*. (It is compatible with this, however, that there are *other* established, ongoing relationships among the three of us. It is just that if there are other relationships, they are constituted by *something other* than these fleeting interactions. For instance, there might be, between us, the

relationships of co-citizenship, which is constituted by the interactions of each of us with the same state.)

A second tempering factor is that the asymmetries or disparities are limited in time, place, and context. Managers might only be able to tell workers what to do on the shop floor, when they are on the clock.

A third tempering factor is that the asymmetric power or authority is limited in content: that is, in what can be done or commanded. Managers might be able to tell workers only to perform work-related tasks.

A fourth tempering factor is that the asymmetries or disparities may be escapable, at will, with little cost or difficulty. It matters that a worker can, without too much cost or trouble, leave a given firm and find another job. To take an extreme case, if one can exit a slave "contract" at will, then it is not clear in what sense one really is a slave.

Another way of putting this is to say that what matters for relations of inferiority is not so much inequality in *exercised* power or authority, and *actual* consideration, but instead inequality *of opportunity for* power, authority, and consideration, where equality of opportunity is understood not as equal ex ante chances to end up on the winning end of the asymmetry or disparity, but instead as *ongoing freedom to exit the relations* in which the asymmetry or disparity arises.

The point is not that while being on the losing end of asymmetries or disparities is always a burden, one forfeits one's complaint when the burden is self-imposed—that "one has no one to blame but oneself."[65] It is rather that the freer one is to exit what would otherwise be an objectionable relation of inferiority, the less it seems an objectionable relation of inferiority to begin with.

A fifth tempering factor is that the asymmetries or disparities may not be "final": that is, they may themselves be regulated by a higher court of appeal, or a decision further up the chain of command, which is not itself marked by that asymmetry or disparity. What managers can ask of workers, for example, might itself be regulated by bargains struck at the start of each year.

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[65] So this is not a form of what Lippert-Rasmussen (2018 7) calls "luck relational egalitarianism."

A final tempering factor is that the people in the relationship marked by the asymmetry or disparity might also stand as equals (e.g., enjoy equal consideration) in some other recognized relationship. Once the whistle blows, manager might be just another citizen.

This helps to explain why the extreme cases of caste and bondage are extreme: the primary tempering factors are absent. Bondage, for its part, involves virtually unlimited power and authority over another. Castes, for their part, are woven into the fabric of social relations; not cabined to any one time, place, or context; cannot be exited; and they often preclude any other relationship within which one is the equal of all the others in one's society.

11.4 The Structure of Claims Against Inferiority

We turn now from *relations of* inferiority to *claims against* such relations. Those who find themselves in the *inferior* position in untempered relations of inferiority, I suggest, have complaints against being so positioned.

True, those in the *superior* position may *also* have a complaint about their position. However, I believe that this derives from the complaint of those in the inferior position. The superiors have a complaint about themselves having to stand in relations to which those in the inferior position have a complaint.

Strictly speaking, claims against relations of inferiority are not claims against the *relations* of inferiority themselves, but instead claims addressed to certain agents, to perform or refrain from certain *actions* that involve relations of inferiority. What do claims against inferiority require of those to whom they are addressed? First, Indy has a claim on Benny not to "relate to" Indy as an inferior: not to wield untempered superior *power or authority over* Indy, not to wield untempered superior *authority than* Indy, and not to give Indy untempered *lesser consideration than* Benny gives Altra. Claims of this kind have a "deontological" or "agent-relative" character. Benny is not *himself to relate* to Indy in the objectionable way, whether or not this reduces the overall incidence of cases in which someone relates to someone else in the objectionable way.

Second, even if Benny does not himself relate to Indy as an inferior, so that Indy does not stand in a relation of inferiority to Benny, Indy may still have a claim on Benny, that Benny work, where he can, to temper relations of inferiority that Indy stands in with others, or to bring it about that Indy avoids those relations. Claims of this second kind have a "consequentialist" or "agent-neutral" character. Benny is *to contribute* to reducing the overall incidence of cases in which *someone* relates to someone else in the objectionable way.

Complaints of the agent-relative kind are more likely than complaints of the agent-neutral kind to be held by *someone in particular*. Insofar as I do nothing to combat sexism, perhaps all women equally have that complaint against me. But no woman seems to have that complaint to a greater degree than any other. By contrast, if I myself undervalue the contributions of a certain female colleague, because she is

female, then that is a complaint that she, in particular, has against me. However, even complaints of this second, consequentialist kind can be held by someone in particular. If I don't intervene in, or acquiesce in, another colleague's overlooking the contribution, then the overlooked colleague may have a complaint against me, because I could have intervened in her case, or refrained from acquiescing.[66]

[66] Letting hiring decisions be influenced by discriminatory "reaction qualifications," for example, or using gender to predict traits, such as aptitude for military education, that are correlated with gender only because of prior gender discrimination, may be, if not participating in, then acquiescing in, such a disparity of consideration.

11.5 Justifying the State, Revisited

What, then, do claims against inferiority imply for the state? Part of what they imply is clear enough. People have claims on the state not to cause, and to prevent or undo, asymmetries in power and authority, and disparities in consideration, untempered by the primary factors, constituted by how *individuals subject to the state* relate to one another. The state should support marital and employment protections. The state should combat caste distinctions. And so on.

However, there are not only (to use Pettit's 2012 term) "horizontal" relations of inferiority between one individual and another to consider, but also "vertical" relations of inferiority between individuals and the state itself—or rather between *those individuals who are subject to what the state decides and those individuals whose decisions the state's decisions are*.

And here a problem looms. After all, the state wields vastly greater power over, and vastly greater authority than, the individuals who are subject to it. At the same time, the state just is, like *l'enfer* of Sartre, other people. So, it would seem, those other people wield vastly greater power over, and authority than, the rest of us.

Why, then, isn't subjection to the state's decisions a kind of subordination to those individual, natural persons whose decisions the state's decisions are? Why don't we have claims against relations of inferiority to those individual, natural persons?

This would not be a problem if our relations to the state were tempered by the primary factors. But, on the contrary, those factors seem to be conspicuously absent in our relations to the state.

First, the state is an established social structure and our relations to it are ongoing.

Second, the state has extensive reach. As far as the law is concerned, the shop floor extends all the way to the border, and one is always on the clock.

Third, there are few limits on what the state can do to us, or command us to do.

Fourth, it's costly and difficult to avoid relations to the state within whose jurisdiction one presently resides, or to whose jurisdiction one presently belongs, and all but impossible to escape the jurisdiction of some state.

Fifth, the state's decisions are typically "final": that is, they sit at the apex of the hierarchy, above which there is no further appeal (short of the "appeal to heaven"). The state's decisions are generally treated as overriding or nullifying any other decision. Therefore, there can be no recourse to a decision higher up the chain of command, with a different character.

Finally, one relation within which you might stand as an equal with others, whatever other asymmetries or disparities might mark your relations with them, is equality of citizenship: that you stand as an equal with them insofar as you and they interact with the state. If equality of citizenship with others is not available, because they, but not you, decide what the state does, then it is not clear what *other* relation of equality with them will be available. You may stand to some other individuals as equals in a local club or parish. But it is unlikely that, for every other individual in your society, there is some socially recognized relationship within which you stand as equals. This is especially likely to be the case in a society with cultural, religious, and regional diversity.

What I now suggest is that this is precisely the complaint against the state that we sought in vain all through Chapters 2–4. The state wields vastly greater power over, and vastly greater authority than, those who are subject to it. And, where the state is concerned, the tempering factors are conspicuously absent. Yet, the state just is, when the robes and badges are stripped away, other people. So, the complaint against the state is a complaint against standing in relations of inferiority to those natural persons whose decisions the state's decisions are.

This suggestion would explain why there continues to be a complaint against the state in the Myths of the Omittites and the Trusting Future. Even if there is no force or threat, there are still final and inescapable asymmetries of power and authority.

At the same time, this suggestion—that the complaint against the state is a complaint against the untempered, asymmetric power and authority of those natural persons

whose decisions the state's decisions are—would explain why the complaint against the state is so often expressed in terms of "coercion." What the word "coercion" is gesturing toward, we can now see, is the *final* character of the state's power and authority, that it is the highest link in the chain. And it is natural enough that the word "coercion" should so gesture, since the power to coerce, "strictly speaking"—that is, to "compellingly steer"—is *usually* necessary for holding final power and authority—power and authority that regulates and controls the exercise of other powers and authorities. In the *ordinary* run of human affairs, setting aside the fiction of our Trusting Future, some can enjoy final power or authority over others only if they can, when push comes to shove, compellingly steer them.

This in turn explains why there is so often said to be a complaint against the state's decisions being so much as "backed by coercion," even when the state doesn't *actually* coerce. Earlier, we found that puzzling. If at root the complaint is about *coercion*, why should it apply when the state is *not actually* coercing? We can now solve the puzzle. The complaint that finds expression as a complaint against "backing by coercion" is not, at root, a complaint against coercion, itself. It is instead a complaint about something that usually requires "backing by coercion," or the capacity to compellingly steer: namely, wielding final and inescapable power and authority over others.

11.6 Secondary Tempering Factors

So that's the question: If the state just is *les autres*, if it wields vastly superior power and authority over each of us, and if our relations to the state are not tempered by the primary factors, then how can they not be relations of inferiority?

The answer, I suggest, lies in certain "secondary" tempering factors, which change the character of our relations to the state, so as to make them less like relations of inferiority, of the kind whose extreme expressions are bondage and caste.

These secondary tempering factors, about which more will be said later, are:

- Impersonal Justification: that asymmetries of power and authority are offices justified by impersonal reasons
- Least Discretion: that officials occupying those offices exercise no more discretion than serves impersonal reasons
- Equal Influence: that those subject to the state have equal opportunity to influence its decisions
- Proper Representation: that representatives stand in the appropriate relationship to citizens
- Equal Consideration: that the state shows equal consideration to its citizens
- Equal Citizenship: in virtue of Equal Influence and Equal Consideration, those subject to the state stand in at least one relationship of equality to one another, namely that of equal citizenship, whatever other asymmetries, disparities there may be.

Many of the familiar complaints left unexplained by complaints to improvement and against invasion express, in effect, umet claims to these secondary tempering factors.

A few remarks before elaborating what these secondary factors are. First, claims to secondary tempering factors may be made of arrangements that don't count as "states," according to ordinary usage (or at least not according to the regimented usage of lawyers or social scientists) but that are still, for our purposes, "state-like," in the sense that they, like the state, are not tempered by the primary factors. Thus, claims to the secondary tempering factors may be just as pressing against certain agents in "pre-state" or "failed-state" societies, such as clan elders or warlords. And claims to the secondary tempering factors may be just as pressing against

agents who occupy "privatized" offices within a society governed by a state, such as that of warden in a for-profit prison or that of a private detective in a company town. Even if, by other criteria, these offices do not count as part of the state, nevertheless they are not tempered by the primary factors, which is what matters for our purposes. The for-profit warden might as well be the warden in a state-run prison, and the private detective might as well be a police officer.

Second, claims to at least *some* of the secondary tempering factors may also be made of arrangements where *some* of the primary tempering factors *are* present: arrangements that not only are not counted by ordinary (or specialized) usage as part of the "state," but also are not fully state-like in the sense that matters for our purposes: namely, that *none* of the primary tempering factors are present. In particular, employees have claims to the secondary tempering factors of Impersonal Justification and Least Discretion against their employers, even when the employment arrangement is tempered by, among other things, the primary factor of freedom of exit.

Third, I leave open the possibility that, even in the case of the state (or state-like arrangements in which the primary factors are absent), *not all* of the secondary factors that I go on describe are required. In particular, I leave open the possibility that the secondary factors of Impersonal Justification, Least Discretion, Equal Consideration, and Equal Citizenship, *suffice*: that is, that the distinctively "democratic" secondary tempering factors of Equal Influence and Proper Representation are *not* required. To be sure, I devote a great deal of space to the secondary tempering factors of Equal Influence and Proper Representation in this book. But that should not be read as ignoring the possibility that the other secondary tempering factors might be enough.

Finally, as we will see, these secondary tempering factors differ from many of the legitimating conditions or limits of legitimacy traditionally said to be necessary for the state's justification or legitimacy. In order to satisfy the secondary tempering factors, the state doesn't need to restrict its efforts to protecting people from invasion of their person or property, but could promote other goods as well. Nor need the state have the consent of the governed, or a public justification for what it does.

12 OFFICE

12.1 Impersonal Justification and Least Discretion

The first secondary tempering factor, Impersonal Justification, is that the relevant asymmetry of power of A over B constitutes an impersonally justified office.

To say that the asymmetry constitutes an *office* is, for our purposes, just to say that it consists in A's making certain decisions, by certain processes, which have certain implications for B. And to say that an office is *impersonally justified* is to say that its existence and operation serves impersonal reasons, against the relevant background, at least as well as any alternative, and better than any alternative not marked by a similar asymmetry.

By "impersonal reasons," I mean simply reasons that are not personal. What is being ruled out is that it could justify my asymmetric power or authority over you that the asymmetry would serve *my* interests, projects, or relationships, as opposed merely to *someone's* interests, projects, or relationships. To be sure, personal reasons are genuine reasons. More than that, they are reasons that can justify acting in ways to which someone would otherwise have a complaint. For example, you might have no complaint about my passing up some opportunity to help your child, because my child needs my attention instead. What Impersonal Justification claims is that personal reasons of this kind have no bearing on whether asymmetric power over someone is justified. I can't wield (untempered) asymmetric power over you in order to ensure that *my* child gets attention, as opposed merely to *some* child's getting attention. If it is justified, the case must be made in terms of impersonal reasons.

This ban on personal reasons is not a ban on all *agent-relative* reasons. First, there may be agent-relative restrictions, such as the Force Constraint, which make reference not to the agent's interests, projects, or relationships, but instead merely to the structure of the choice that the agent faces, such as that the agent may not use force (at least absent adequate opportunity to avoid) even to bring about a greater good. Note that such agent-relative restrictions apply not only to natural individuals, but also to artificial or corporate agents, which don't have personal reasons, because they don't have interests, projects, or relationships.

Second, there may be personal reasons that are nonetheless shared by everyone who is party to the asymmetry. Perhaps you and I each have personal reasons to aid *our compatriots*, as opposed merely to aiding *people*. In that case, while the reasons that justify the asymmetry between us may be no more mine than yours, still they may be *ours* in a way in which they aren't the reasons of others outside of the asymmetry. Reasons of this kind are, at least with respect to the asymmetry between *us*, impersonal.

The principal impersonal reasons, I assume, are reasons to promote the public interest: to improve the situation of everyone, as far as is possible compatibly with fairness to others.[67] However, there might be other impersonal reasons, such as to protect the environment or to promote the arts.

This first tempering factor of Impersonal Justification, that asymmetries be impersonally justified offices, explains the Duty to Execute. The official's personal reasons cannot justify her using an office in a way that otherwise comes at the expense of the public interest. An office that operated in this way would not serve impersonal reasons as well as an alternative office in which the official's use of the office was not sensitive to personal reasons.

The second, and closely related, secondary tempering factor, Least Discretion, is that the official should exercise only so much discretion in decisions about how to use the office as serves the impersonal reasons that justify it. If the official could serve the impersonal reasons no less well without such and such discretion, then the official should not exercise it.

Note that Least Discretion presupposes that there *are* impersonal reasons that justify the office (or at least that *would* justify it if the official were to use it appropriately), in the service of which whatever discretion is permitted is permitted.

So far our discussion has been stipulative. What might explain the stipulation? Why do Impersonal Justification and Least Discretion temper asymmetries of power? The

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[67] I find myself tempted to add, "giving *equal* weight to everyone's interests." But this addition seems empty. So long as one gives *proper* weight to everyone's interests, and does *not* give weight to personal reasons, then one will give, as a kind of by-product, *equal* weight to everyone's interests.

basic idea is that jointly they effect a separation of the *office* from the *natural individual* who occupies it. This distinction between office and occupant, as has long been noted, is particularly pronounced in the modern Western conception of the state (Weber 1956, Klaveren 1957, Huntington 2002). As Ripstein 2009 puts it:

> An official is permitted only to act for the purposes defined by [a] mandate. The concept of an official role thus introduces a distinction between the mandate created by the office and the private purposes of the officeholder (192).[68]

To the extent possible, the superior power of the office is not that of the natural person who occupies it. Thus, you are not, or less, subject to him, the person occupying the office, and rather, or more, subject to the office alone. To be sure, you are subjected to the asymmetric power and authority of the office itself. However, whatever the office is, it is not another natural person. It is not the sort of entity to which relations of inferiority (or superiority or equality) are possible.

Why is this? Insofar as Impersonal Justification is satisfied, the office, in the first place, serves *reasons*, as opposed to the arbitrary whims of the occupant or particularized considerations such as that she is Dolly Parton, as opposed to someone or a national treasure. Moreover, the office serves only *impersonal* reasons, as opposed to the personal reasons of the occupant (or anyone else). And insofar as Least Discretion is satisfied, the official's decision-making is limited to the service of those impersonal reasons. The office, as Ripstein puts it, "exhausts" the occupant.

At one point, some might push a different idea [This is the sort of idea that I took Jorge to be asking about]: "What is needed is not that the asymmetry serves *impersonal* reasons

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[68] Ripstein seems to suggest that the difference between acting for public purposes and acting, corruptly, for private purposes can be shown to depend only on external conduct, not on attitudes (193–4). For reasons given in ***Error! Reference source not found.***, I doubt this can be done. I agree, though, that "alienated" officials, who "do not care about the law or justice, but only about doing their jobs and collecting their pay," need not violate the Duty to Execute. See XXXX. For some other differences, see Defining "Domination"

alone. What is needed is instead that the asymmetry serves *your* reasons alone. If, but only if, the asymmetry serves your reasons alone, you are subjected only to yourself. *That* is the only thing that can make the asymmetry acceptable. In short, what is needed is *positive self*-rule, not simply *negatively* not being ruled *by another*." [69]

If this sort of self-rule is required, then it would rule out, in general, asymmetries that serve the public interest. Those asymmetries don't "serve your reasons," where that would mean, perhaps, helping you to achieve whatever it is that you have reason to achieve. At best, the asymmetries, by serving the public interest, help you to achieve whatever it is that you have reason to achieve, *compatibly with fairly doing the same for everyone else*. This will mean often forgoing opportunities to help you to achieve what you have reason to achieve, in order to help others.[70]

So, if tempering asymmetries requires this sort of positive self-rule, then there is a complaint against even the ideal state. Insofar as the ideal state does not serve your reasons alone, it fails to satisfy the one condition that might temper the asymmetries that it involves. But it is not clear why positive self-rule is required, if the objection to those asymmetries is a negative claim not to be subject to inferiority to another natural individual with whom one has

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[69] This offers another possible hook on which to hang a "right against what one cannot accept," of the sort discussed in Public Justification. We understand "your reasons" as reasons that *you can reasonably accept* and say that you serve your reasons, and so enjoy positive self-rule, insofar as you serve only reasons that you can reasonably accept. If one is attracted to the idea of a right against what one cannot accept, this seems the way to ground it: to present reasonable acceptability as a response not to force or coercion, but instead as a secondary factor tempering asymmetries of power and authority.

[70] To this it might be replied: "But you have the Duty to Improve: a duty to promote the public interest. You have reason to fulfill that duty. So, insofar as the asymmetry helps you to fulfill that duty, the asymmetry serves your reasons." For one thing, your reasons to fulfill your Duty to Improve are only *some* of your reasons. For another thing, by and large, asymmetries that serve the public interest will just serve the public interest directly, rather than helping you to fulfill your duty to act in ways that serve the public interest.

a meaningful claim to equality, rather than a positive claim to be, in some other sense, autonomous or self-governing.

This is a theme to which we will return in the conclusion, with reference to Rousseau. It is easy to conflate the aspiration to *positive* rule over *oneself* with the *negative* claim not to be ruled over *by another*. Whereas the former, I think, is incompatible, even in principle, with organized social life, the latter is, at least in principle if not in practice, compatible with organized social life. And while realizing the aspiration to positive rule over oneself would also suffice to meet the negative claim not to be ruled over by another, it is not required to meet that negative claim.

Least Discretion, again, is satisfied insofar as the official exercises only so much discretion in decisions about how to use the office the official occupies as serves the impersonal reasons that justify it.[71] If the official could serve the impersonal reasons that justify the office just as well without this discretion, then the official should not exercise this discretion.

Least Discretion thus explains the Duty to Exclude: the duty to exclude improper reasons. Let an "improper reason" be a reason such that the official could execute the office *just as well* without being sensitive to it, even if sensitivity to improper reasons, in any given case, might not mean that the official executed the office any *worse*. Insofar as the official does *not* exclude improper reasons, insofar as the official *is* sensitive to them, the official violates Least Discretion. The official exercises "excess" discretion, discretion beyond what the official needs in order to serve the impersonal reasons that justify the office.

This explains what the distinctive wrong of official corruption, or at least the closest thing to a distinctive wrong of official corruption, is. After all, the paradigm cases of corruption, such as bribery or nepotism, consist in failing to exclude reasons of personal gain, or of the gain of one's nephews. These reasons are improper. One doesn't need to be sensitive to them to serve the impersonal reasons that justify the office.

Corruption thus "subverts the public to the private" by turning exposure to the asymmetric power of an impersonally justified office into subjection to the private person who occupies it. All those who are subject to the decisions of the office, therefore, have an objection.

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[71] "To use an office" need not be to *exercise* the office. For example, Bent might, for personal gain, *accept* a gift that he is offered *only because* he holds an office, even if that has no influence on how he *exercises* the office.

The Duty to Exclude also applies only to offices that Bent currently holds. So it does not violate the Duty to Exclude to run for office from personal ambition, even if one knows that there are already equally qualified candidates in the race

Why say, restrictively, that a reason is improper if the official could execute the office *just as well* without being sensitive to it? Why not say, more permissively, that a reason is improper only if the official could execute the office *better* if they were not sensitive to it? For one thing, the more restrictive prohibition is more in keeping with the spirit of *Least* Discretion. And it implies, as we sought, that Bent's taking bribes to resolve underdetermination still counts as a violation of the Duty to Exclude. That is sensitivity to a reason—the bribe—that adds nothing to the service of the impersonal reasons that justify the office.

The Duty to Exclude offers a third kind of justification of lotteries: not to give highest fair chances, or to ensure equal treatment, but instead to provide an official a way of making an underdetermined decision without sensitivity to an improper reason.[72]

[72] This last sort of reason is a special case of what Stone 2011 calls the "sanitizing" function of lotteries.

12.3 Which Reasons are Excluded?

To specify which reasons are improper to a given office, we need to know which decision-making processes enable the office, given the relevant background, to serve the impersonal reasons that justify it.

To begin with, processes will better serve the impersonal reasons insofar as they are "accurate": they identify the particular decision that, in the circumstances, would best serve the impersonal reasons. If officials were omniscient, then a perfectly accurate decision-making process could be described in this way: "Identify the decision that, in the circumstances, best serves the impersonal reasons." But given human limitations, a more accurate process might involve deciding only on more concrete, proximate considerations: e.g., to decide that this shipment should pass customs on the basis of a judgment that duties on its full value have been paid.

Moreover, accuracy isn't the only virtue. There is also the cost, speed, transparency, and predictability of the process; the incentives created when others expect the process in the future; or the relationships the process would foster or rupture. These factors may also argue for deciding on more concrete, proximate considerations.

It may also be important, for democratic values or for pragmatic responses to disagreement, that the office can be occupied by people with a range of opinions on matters of policy, legal interpretation, and so forth. This argues against, for example, processes that are defined exclusively in the terms of a specific, contentious economic policy or jurisprudence.

This implies that it may actually violate the Duty to Exclude, to decide, in certain offices, on the grounds that the decision best serves the public interest. For some offices, that itself might be an improper reason. A process in which the official stepped back and tried to take in the whole would do worse.

A fortiori, the improper reasons need not consist in some benefit to oneself or those close to one. So, there can be violations of the Duty to Exclude that do not meet our initial definition of "official corruption," which specified acting for the benefit of oneself or those close to one. Nor need improper reasons be base. They might be otherwise be morally praiseworthy: again, avuncular affection, or a sense

of gratitude (Teachout 2014, Lessig 2015 91–99), or devotion to a charitable cause, or loyalty to a foreign prince. Nor need there be a *quid pro quo*: an explicit, pre-arranged agreement that a specific official act will be performed in return for a specific personal favor.[73]

A further difficulty lies in specifying the "relevant background." What sort of concessions, if any, do we make to the "crooked timber" of humanity: to received habits or expectations, to temptation or ignorance, etc.? That is, to what extent do we "take men as they are"? And what sort of concessions, if any, do we make to imperfections elsewhere in the institutional structure?

I note these difficulties without proposing to resolve them (Estlund 2019). I do observe, though, that our ambivalence about which reasons are improper may stem from our ambivalence about how concessive to imperfection we should be in specifying the relevant background. Consider (without necessarily accepting as accurate) Fukuyama's (2011 x–xiii) description of present-day Papua New Guinea. Each local "wantok" expects that its "Big Man," once elected to the national parliament, will simply try to siphon off as much public spending for it as he can. Pork-barrel politics is all there is. If we feel ambivalent about criticizing Big Men as corrupt, perhaps this is because, barring a profound change in the relevant culture, excluding such reasons would serve the justifying values worse. It would extinguish the traditional relationship of Big Man to his wantok, with no other source of social trust to replace it. Even in societies of the sort more familiar to us, similar concessions may argue against otherwise desirable processes. Refusing to give or receive small favors might cause offense or weaken esprit de corps.

No doubt, all of this makes it murky and controversial where to draw the line between proper and improper reasons in any particular case. Nevertheless, we can explain the relative clarity and consensus in condemning

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[73] The applicable federal laws governing bribery reflect at least two different dimensions of "quid-pro-quo-ness": how specific the official act and how definite the agreement to perform it. A conviction is less likely if the official only vaguely agrees to help the briber when she can, or agrees only to give some, perhaps not dispositive, weight to the favor in deciding whether to perform the act (Lowenstein 2004).

paradigmatic cases of corruption, such as bribery and nepotism. The explanation is that even if we don't confidently agree on which reasons are proper, we may still confidently agree that the benefit of oneself or one's relatives are not among them. Whether decisions to lease public land should be sensitive to environmental or business concerns, for example, all can confidently agree that they need not be sensitive to whether the lessee is the official's nephew. Whether legislators should be trustees or delegates, all can confidently agree that floor votes should not be sold for cash payments. And so on.[74]

Setting aside where to draw the line between proper and improper reasons, there is another problem. The Duty to Exclude might seem to police officials' motivations. This is not only rigoristic, but also paradoxical. If the Duty to Exclude says that officials can't be motivated by self-interest, why doesn't an official violate the Duty to Exclude by refusing a bribe from self-interested fear of a penalty? Again, why aren't anti-corruption laws entrapment?

We need to distinguish. On the one hand, there is *excluding* certain considerations as reasons in one's decision-making. The Duty to Exclude does police this. On the other hand, there are *the reasons why* one excludes those considerations: one's *motivations* for excluding them. The Duty to Exclude does not police this. It calls for exclusion, not exclusion *from certain motives*. Different officials might exclude the same considerations, giving them no weight in decision-making, from a variety of different motives: such as fear of penalty, disaffected routine, or a desire to impress. If an official refuses the bribe, then their decision-making isn't sensitive to the bribe, even if the reason why they made their decision-making insensitive to the bribe is entirely self-interested, such as to avoid the penalty.[75]

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[74] Compare Raz 1977 220: "Since it is universally believed that it is wrong to use public powers for private ends any such use is in itself an instance of arbitrary use of power."

[75] Perhaps it is even possible for officials to positively treat certain considerations as reasons, to give them a certain positive weight or relevance toward the decision, from a variety of different motives. The disaffected official might be like the psychopath who doesn't sincerely feel the force of moral reasons, but knows how to mimic the decision, in any given case, that would be reached by someone who did feel their force, and who does so from prudence or training.

12.4 Exploitative Offers, Revisited

With the Duty to Exclude in hand, we can finally explain Employee's complaint about Boss's exploitative offer in Car Wash: to keep Employee on if Employee washes Boss's car. That was the fly in the ointment in our effort to explain, in general, when and why Hablo's Conditioning and Announcing of a response to Audito's choice wrongs Audito. In most cases, we observed, the explanation was given by Choice: namely, that Hablo left Audito's choice situation worse than Audito was entitled to from Hablo. But Car Wash was a stubborn exception. For Boss's offer leaves Employee with, if anything, a better choice situation than Employee is entitled to from Boss: namely, Boss's firing Employee flat out.

With the Duty to Exclude, we have a fresh lead. Observe that Boss occupies a position of superior power and authority over Employee. Granted, some primary tempering factors may be present. Employee may be able find work elsewhere, for example, or there may be democratically enacted labor laws. Still, the firm involves particularly pronounced asymmetries of power and authority. In particular, it is one of the few settings in modern society, outside of the formal state itself, in which some adults give other adults, for most of their waking hours, orders that they are expected to obey. So it should not be surprising that some of the secondary tempering factors are called for in relations between employers and employees.

Observe, next, that firing Employee is an exercise of office, and that Conditioning or Announcing firing Employee, whether or not it is an exercise of office, is certainly a use of office.

Finally, observe that whether or not Employee washes Boss's car is not, in the main run of cases, a reason that serves the impersonal values that justify the asymmetry. The hierarchical structure of the firm, to be sure, serves some impersonal values. That social structure allows for efficient production, for example, where transaction costs among autonomous producers would be prohibitive (Coase XXXX). But doing personal services for Boss plays no role in that justification.

Thus, firing Employee for not washing Boss's car violates the Duty to Exclude, and so Least Discretion. So too does

Conditioning or Announcing it. This is so even if there is only Conditioning without Announcing, as in Silent Car Wash, or if there is only Announcing without Conditioning, as in Akratic Car Wash. As we noted earlier, in connection with Silent Car Wash, the objection to such threats or offers does not depend on anything being communicated to Employee. The fact that Boss aims to get Employee to do his bidding, or intervenes in his deliberation, is a red herring.

Does this cover all wrongfully exploitative offers? In *Melodrama*, Mater cannot pay for treatment that will save her child's life, and Mustache offers to pay for the treatment in return for sexual favors (Feinberg 1986)—or, dialing back the villainy, a kiss or some obsequious display. If Mustache has a duty of rescue to pay for the treatment, then Choice might explain straightaway why the offer is wrong. She is entitled to a choice situation in which Mustache will pay for the treatment whatever she decides to do, and Mustache would wrong her by not paying for it. But, if the treatment is costly enough, then Mustache's paying for the treatment seems supererogatory. In that case, the offer would seem to improve her choice situation beyond what she is entitled to from Mustache. So Choice seems not to explain the case.

Melodrama differs from Car Wash in at least two ways. First, the asymmetry of power and authority is not established and ongoing. Still, while there is no established, ongoing hierarchical relationship, Mater is nonetheless in desperate need of what Mustache is able to provide, so desperate that, if not for the excessive cost to Mustache, he would have a duty of rescue to provide it. One might have thought that the argument for a social safety net is in part that it would prevent this sort of asymmetry from arising. The argument is not only that people should get aid when they need it, but also that they shouldn't be made dependent in this way on others (Satz 2010; Khokhar ms.).

But this brings us to a second and more decisive difference between the cases. While the asymmetry between Boss and Employee, we are supposing, serves impersonal values, the asymmetry between Mater and Mustache does not. Mater should not be dependent on Mustache in this way to begin with. So Least Discretion has nothing to apply to. What would it be for Mustache to use the asymmetry *for* reasons that serve the impersonal reasons that justify that asymmetry? What would those impersonal reasons be?

Perhaps, then, our distaste for what Mustache does has to do with what it expresses. As Mustache should acknowledge, Mater should not be dependent on Mustache in this way. Now it's one thing if Mustache acts as he would if he were duty-bound to provide the aid, accepting no more than compensation, a fair return, or a free gift after the fact. And it's one thing if he just opts not to help, as he would if he decided that he has his own life to live. But it's quite another if he conveys that he embraces Mater's dependence on him, by demanding favors, or by making a production of the fact that whether the child lives is up to him to decide, say, by ostentatiously flipping a coin. Mustache should want not to be in the position, rather than to see it as a welcome opportunity.

12.5 Corruption without Inequality?

A principal complaint against official corruption, I have suggested, is that it violates Least Discretion. Least Discretion, in turn, is called for because it tempers the otherwise objectionable asymmetry of power and authority between the official and anyone subject to the official. To violate Least Discretion is to remove the tempering factor: to allow the asymmetry to revert to its objectionable form. So, this complaint against official corruption, I am claiming, is, at root, claim against inferiority.

But can the complaint against official corruption a complaint against inferiority? To begin with, complaints against official corruption are (or have been) voiced by people otherwise at peace with hierarchy (Teachout 2014 282). Surely theirs was a coherent position.

Perhaps these people thought that, while hierarchy does need to be tempered in some way, Impersonal Justification and Least Discretion are *sufficient* to temper it. *Further* tempering factors, such as Equal Influence, are not necessary. They weren't at peace with hierarchy *tout court*; they were at peace only with *non-corrupt* hierarchy. If that was their position, then nothing that I have said so far implies that it was incoherent. Indeed, in some moods of democratic pessimism, I wonder whether their position might not be correct. In any case, the disagreement, if there is any, would not be about whether hierarchy poses a problem. Nor would it be about whether Impersonal Justification and Least Discretion are *part* of the solution to the problem. The disagreement would only be about whether they are the *whole* of the solution.

There is another worry about the idea that the complaint against official corruption a complaint against inferiority. Can't A be wronged by B's official corruption—understood broadly as B's use of an institutional role for personal gain—even though B's office does not involve an asymmetry of power or authority over A?

However, this too is not, in itself, a challenge to anything that I have said. It would be a challenge only if there was a good argument that the wrong in the cases that I discussed earlier, which did involve asymmetry, had to be the same kind of wrong as in these cases, which don't involve asymmetry.

Consider a proposed counterexample, from Sophia Moreau, of official corruption without asymmetry. A lawyer in a civil case, Saul, who fails to disclose documents to the opposing lawyer, Dooright, for personal gain. Whether Saul wrongs anyone else, surely Saul wrongs Dooright, who has a professional interest in winning cases. Yet Saul does not wield asymmetric power and authority over Dooright.

However, I think that we can explain, in other terms, how Saul wrongs Dooright. In a word, Saul cheats. The value of competitions (or their outcomes) typically depends on competitors, referees, judges, etc. observing certain constraints on the means taken to bring it about that a given competitor wins (or achieves what would otherwise have counted as winning). Breaching such constraints—that is, cheating—wrongs those who have an interest in the relevant value. Note that breaching such constraints, unlike violating the Duty to Exclude, does not depend on Saul's reasons. Saul wrongs Dooright in the same way if he fails to disclose documents from carelessness or misunderstanding of the law.

12.6 Equal Treatment by Officials, Revisited

Now, let us ask: Why are officials under the requirement of Equal Treatment? Why is it the case that when an official, *O*, provides a benefit, *B*, for one person subject to the office, *X*, that *O* does not provide for another person subject to the office, *Y*, when there is no "justifying difference" between them, *Y* (at least) has a complaint?

Later, we will explain why the *state*, in particular, is under a particularly stringent requirement of equal treatment, stemming from the secondary tempering factors of Equal Consideration and Equal Citizenship. But those explanations appeal to special characteristics of the state. It is less clear that they can explain why a requirement of equal treatment should apply to many *non-state offices*, such as teachers, administrators, employers, even custodians of children. So what accounts for *Equal Treatment By Officials*?

Of course, *O* might decide to benefit *X*, or not to benefit *Y*, for a reason that does not serve the relevant impersonal reasons. Perhaps *X* is *O*'s nephew, or perhaps *Y* refused to pay *O* a bribe. In that case, *O* would simply violate the Duty to Exclude.

But it is possible that *O*, by following a decision-making process that conforms to the Duty to Exclude, might decide, say, to grant *X* an exemption, but also that *O*, by following a different (or perhaps even the same) decision-making process that conforms to the Duty to Exclude, might decide to deny *X* an exemption, even holding fixed the relevant features of *X*'s case. In other words, *X*'s case might be underdetermined, such that *O* could reach either decision without violating the Duty to Exclude.

Imagine that *X*'s case is like this. Why then should *O* violate the Duty to Exclude by reaching one decision for *X*, granting *X* the exemption, while reaching a different decision for *Y*, denying *Y* an exemption, even though the relevant features of *X*'s case and *Y*'s case are exactly alike?

Even if *O* does not thereby violate the Duty to Exclude, I suggest, *O* would still violate the broader principle of Least Discretion. *O*, exercising discretion, has granted (or will grant) an exemption to *X*. Holding that fixed, why shouldn't *O* simply apply to *Y* whatever judgment was reached in *X*'s case? Why should *O* have the *further* discretion to deny *Y* an exemption, assuming that there is no justifying difference

between *X* and *Y*? This seems like unjustified, "excess" discretion, which does not serve the justifying values. So it violates Least Discretion.

To be sure, we're not denying that a decision-making process that leaves *O* with discretion may serve the justifying values. The point of offices is largely to reap the benefits of *O*'s exercise of judgment about particular cases. But once it is settled that, exercising that judgment, *O* has reached a certain decision in *X*'s case, nothing is lost if *O* henceforth applies the same judgment to all cases that in all relevant respects, as *O* acknowledges, are the same as *X*'s. (Moreover, it seems that some things are gained. *O* doesn't have to rethink the case. And *Y* now knows what the decision in his case will be.)

In sum, Equal Treatment by Officials is a special case of Least Discretion. Equal treatment curbs what would otherwise be the excess discretion of officials.

Consider now three objections. First, Least Discretion implies something broader than Equal Treatment by Officials. By the same logic, Least Discretion should rule out inconsistent treatment of a *single* person, over time, by an official. Is this not an overgeneralization? No, on reflection, it seems to me the right result. There is a recognizable complaint against an official who grants you an exception one day, but not the next, while acknowledging that there is no relevant difference between the cases, other than, apparently, how they feel from one moment to the next. This means that insofar as Equal Treatment by Officials stems from Least Discretion, it is not really concerned with maintaining equality among the various people subject to the office. It is concerned, instead, with a kind of limitation of official discretion, which is itself, in turn, called for in order to preserve equality between the occupant of the office and anyone subject to it. By contrast, Equal Treatment By the State, which, as we will see, is based on Equal Consideration, is concerned with equality among people subject to the state.

Second objection: What if *O* simply made a mistake in, say, denying *Y* an exemption in the past? In that case, in granting *X* the exemption, *O* is simply saving *X* from *O*'s past mistake. This sort of discretion is not unjustified. It corrects an error. So *Y* has no complaint, at least on the grounds of Least Discretion, in this case. But, intuitively, it may be thought, *Y* does have a complaint. Perhaps,

however, the complaint is simply the non-comparative complaint that *O* made the mistake in *Y*'s case—a complaint that *Y* would have even if *X* hadn't appeared on the scene.

Final objection: Suppose *O* denies *Y* the exemption, but grants it to *X*, even though there is no justifying difference. Our proposal suggests not only that *Y*, but also, oddly, that *X*, has a complaint against *O*: namely, that *O* violated Least Discretion, by not applying the same judgment to them both. I suspect, however, that the oddness is just the general oddness of having a complaint about an action that has in fact benefitted one. But it is clear, or so it seems to me, that we can complain of actions that benefit us.[76]

[76] In many cases, the oddity has to do with the "affirmation dynamic" illuminated by Wallace 2013.