

Equal Treatment, By the State and By Officials

Commonplace claim to equal treatment (or “comparative injustice”): State/ official provides a benefit, *B*, for one citizen, *X*, that it does not provide for another citizen, *Y*, when there is no “justifying difference” between *X* and *Y*.

- Common and especially rhetorically potent.

Are equal treatment complaints really improvement complaints?

- 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*. “What would I tell the other people I’ve already said no to?”
- Finally, consider cases in which giving *B* to anyone is either supererogatory or discretionary. Still, 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.

“Justifying difference”

- *Equal treatment is the default*, pending some showing of a “justifying difference.”
- Doesn’t make equal treatment complaints collapse into improvement complaints.
- Equal treatment complaints can arise in cases without any such justifying difference in, say, need or ability to pay.
- Justifying difference only a *defense* of the *unequal* 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 equal *non-means-tested* benefits OK.

Equal treatment complaints pattern in distinctive ways:

- 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*. 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 contributes to a pattern of discrimination). Allows “random acts of kindness.”
- Third, equal treatment complaints differ from discrimination complaints.
 - Discrimination complaints against private strangers.
 - Equal treatment complaints without protected classes.
- Fourth, applies to what the state or the official *directly* provides.

- Finally, triggered by inequalities in *specific* benefits.

“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!”

- Doesn’t explain distinctive pattern.
- Why do we *care* about simple fairness, treating like alike, not making arbitrary distinctions? What is at stake? Why not “foolish consistency” or “rule worship”?

On to the “positive conjecture”!

Positive conjecture = the commonplace claims, which we could not explain by appeal to interests in improvement or rights against invasion, are explained instead by claims against inferiority.

A *claim* against inferiority = (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.

What are *relations* of inferiority?

Three vague, abstract necessary conditions:

1. Genuine *relations*.
 - a. No relation of inferiority to e.g., Ramesses the Second.
 - b. No relation of inferiority to a neighbor who, e.g., discreetly enjoys some convenience.
2. *Unequal* ranking: One is above, the other, below.
3. Between *individual, natural persons*. Contrast: artificial person, collective, force of nature.

2 partly explains 3. Equality isn’t an issue with, e.g., collectives. E.g., 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 inferior or superior—as opposed to “n/a” or “none of the above”?

Two paradigms:

- Bondage, the relation between slave and master.
- Caste, the relation between Brahmins and untouchables.

These are *extreme* forms: aggravated cases of the pathology, which might instruct us about milder cases. The constituents of relations of inferiority particularly intense or pronounced; factors that elsewhere “temper” such relations are sparse or absent.

Constituents:

1. *Asymmetry of power*: that X has greater power over Y.
2. *Asymmetry of de facto authority*: greater ability to issue commands that are generally complied with:
 - a. X has greater de facto authority *over* Y
 - b. X has greater de facto authority *than* Y
3. *Disparity of consideration*: X enjoys, whereas Y does not, certain kinds of favorable responses, such as, among other things, respect, courtesy, a willingness to serve interests. Typically, because X believed to have certain “basing traits,” such as having no close ancestor with dark skin, or a noble lineage, or divine favor.

Viewed another way, only two categories here:

- 2a included in 1: authority over a kind of power over
- 2b included in 3: complying with commands a kind of consideration

Explains the vague necessary condition of “genuine relations”:

- where X and Y do not interact, X cannot have greater power over Y
- where X and Y do not share a society, and so are not appraised by some common Z, no disparity of consideration.

Primary tempering factors:

Objection: Not every asymmetry of power and authority, or every disparity in consideration, gives rise to an objection. Consider schools, houses of worship, firm.

Reply: This is because certain “tempering factors,” which we tend to take for granted until we notice their absence, limit, 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. Not that these factors *outweigh* or *compensate* for the bad of inferiority. Rather, not (or less) bads to begin with.

Primary tempering factors:

1. Asymmetries, disparities arise only in chance, one-off encounters, instead of being entrenched in an established, ongoing social structure.
2. Asymmetries, disparities limited in time, place, and context.
3. Asymmetric power or authority is limited in content: what can be done or commanded.
4. Asymmetries, disparities escapable, at will, with little cost or difficulty.
 - a. Put another way, what matters is not so much inequality in *exercised* power or authority, and *actual* consideration, but instead inequality of *opportunity* for power, authority, and consideration, understood as *ongoing freedom to exit the relations* in which the asymmetry or disparity arises.
 - b. 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.”
5. Asymmetries, disparities not “final”: that is, they may themselves be regulated by a higher court of appeal not itself marked by that asymmetry or disparity.
6. People in the relationship marked by the asymmetry or disparity also stand as equals in some other recognized relationship.

Part of why caste and bondage are extreme cases: primary tempering factors are absent.

Claims against inferiority:

Individuals who find themselves in the *inferior* position in untempered relations of inferiority have complaints against being so positioned.

Strictly speaking, claims not 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.

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.

Second, Indy has 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. A “consequentialist” or “agent-neutral” character.

Justifying the State, Revisited

What, then, do claims against inferiority imply for the state? 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 don't we stand in relations of inferiority to those individual, natural persons?

Primary tempering factors no help:

1. State is an established social structure and our relations to it are ongoing.
2. State has extensive reach
3. Few limits on what the state can do to us, or command us to do.
4. Costly and difficult to avoid relations to the state.
5. State's decisions are typically “final”: that is, no further appeal.
6. If equality of citizenship with others is not available, not clear what *other* relation of equality with them will be available.

So, perhaps *this* is the complaint against the state: 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.

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.

... why complaint so often expressed in terms of “coercion” or “backing by coercion.” Gestures toward the final character of the state’s power and authority. The capacity to “compellingly steer” is *usually* necessary for holding final power and authority.

Secondary Tempering Factors:

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?

Secondary tempering factors, to be discussed later:

- Impersonal Justification: asymmetries are offices justified by impersonal reasons
- Least Discretion: officials exercise no more discretion than serves impersonal reasons
- Equal Influence: those subject to the state have equal opportunity to influence its decisions
- Proper Representation: representatives stand in the right relationship to citizens
- Equal Consideration: 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.

—Might apply to non-state arrangements where, like the state, primary tempering factors are absent (e.g., warlords, Pinkerton in a company town).

—Might apply to non-state arrangements where some of the primary tempering factors *are* present. In particular, employees have claims to 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.

—Perhaps not all of the secondary tempering factors are required. Perhaps Impersonal Justification, Least Discretion, Equal Consideration, and Equal Citizenship, *suffice*, so that the distinctively “democratic” secondary tempering factors of Equal Influence and Proper Representation are *not required*.

—Note that 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.

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.

- asymmetry constitutes an *office*: it consists in A's making certain decisions, by certain processes, which have certain implications for B.
- an office is *impersonally justified* when 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.
- *impersonal reasons* = 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. Does not deny that personal reasons are genuine reasons, which can justify acting in ways to which someone would otherwise have a complaint.
- Not a ban on all *agent-relative* reasons: in particular, agent-relative restrictions, e.g. Force Constraint, which make reference not to the agent's interests, projects, or relationships, but only to the structure of the choice.
- The principal impersonal reasons are reasons to promote the public interest.

Impersonal Justification explains the *Duty to Execute*. Personal reasons cannot justify using an office 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 next 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.

Why do Impersonal Justification and Least Discretion temper asymmetries of power? They effect a separation of the *office* from the *natural individual* who occupies it. 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.

How do IJ and LD effect that separation?

- Insofar as Impersonal Justification is satisfied, the office serves *reasons*, as opposed to the whims of the occupant or particularized considerations. And the office serves only *impersonal* reasons, not the personal reasons of the occupant.
- Insofar as Least Discretion is satisfied, the official's use of the office is limited to the service of those impersonal reasons.

An alternative? “What is needed is not that the asymmetry serves *impersonal* reasons alone. What is needed is instead that the asymmetry serves *your* reasons alone.”

- Insists on *positive* rule over *oneself*, not merely *negatively* not being ruled over by *another*.
- These two ideas are often conflated.
- Such positive self-rule would rule out asymmetries that serve the public interest—perhaps even any organized social life.

Corruption, Revisited

Least Discretion explains the *Duty to Exclude*: the duty to exclude improper reasons.

- *improper reason* = 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.
- Explains the distinctive wrong of official corruption. The paradigms, e.g., bribery, 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.

Why more restrictive “could execute the office *just as well without* sensitivity to improper reasons”? Why not more permissive “would execute the office *worse with* sensitivity to improper reasons”?

- More restrictive prohibition is more in keeping with the spirit of *Least Discretion*
- And would explain why being bribed to resolve underdetermined decision violates Duty to Exclude: sensitivity to the bribe adds nothing to the service of the impersonal reasons that justify the office (even if it doesn’t detract).

Which Reasons are Excluded?

How to specify *which* reasons are improper to a given office? Need to know which decision-making processes enable the office, given the relevant background, to serve the impersonal reasons that justify it.

- Not only accuracy, but also
- the cost, speed, transparency, and predictability of the process;
- the incentives created when others expect the process in the future;
- the relationships the process would foster or rupture;
- democratic values or for pragmatic responses to disagreement.

A fortiori, the improper reasons need not be benefit to oneself or relatives, base, *quid pro quo*.

A further difficulty lies in specifying the “relevant background.” What sort of concessions, if any, do we make to imperfections of people and existing institutions?

- I don’t have an answer—a general problem in political philosophy.
- Murky and controversial where to draw the line between proper and improper reasons in any particular case.
- But we can explain the relative clarity and consensus in condemning paradigmatic cases of corruption, such as bribery and nepotism. 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.

The Duty to Exclude might seem to police officials’ motivations.

- Rigoristic
- Paradoxical: Why aren’t anti-corruption laws entrapment?

We need to distinguish:

- *Excluding* certain considerations as reasons in decisions about how to use the office. The Duty to Exclude does police this.
- *The reasons why* one excludes those considerations. The Duty to Exclude does *not* police this. It calls for exclusion, not exclusion *from certain motives*.

Exploitative Offers, Revisited

Duty to Exclude explains exploitative offers. Recall Car Wash: “I could rightly fire you, but you can keep your job, if you wash my car.” Not explained by Choice, since leaves Employee with a *better* choice situation.

- Granted, some *primary* tempering factors may be present in the firm. Rights of exit, labor protections.
- Still, the firm involves particularly *pronounced* asymmetries of power and authority. 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 *some* of the secondary tempering factors are called for in relations between employers and employees.
- Firing Employee is an exercise of office.
- Conditioning or Announcing firing Employee is at least a *use* of office.
- Whether 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 reasons: in particular, efficient production where transaction costs among autonomous producers would be prohibitive.
- But doing personal services for Boss is not one of those reasons.
- Thus, firing Employee for not washing Boss’s car violates the Duty to Exclude, and so Least Discretion.
- So too does Conditioning and Announcing it.

- So too does just Conditioning without Announcing, as in Silent Car Wash. Actually irrelevant that Boss *aims* to get Employee *to do his bidding*, or interferes with his *deliberation*.

Corruption without Inequality?

Objection: Can the complaint against official corruption a complaint against inferiority? Complaints against official corruption have been voiced by people otherwise at peace with hierarchy. Surely 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 agreed that hierarchy is a problem; they just accepted non-corruption as a sufficient solution.

Equal Treatment by Officials, Revisited

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* has a complaint?

Of course, might violate Duty to Exclude: e.g., if *X* is *O*’s nephew, or perhaps *Y* refused to pay *O* a bribe.

But there can be unequal treatment without violating Duty to Exclude. Suppose whether or not to give *B* to *X* is underdetermined. It can be resolved either way without resorting to improper reasons. Then *O* might give *B* to *X*, but not to *Y*, even though the relevant features are exactly alike, without violating the Duty to Exclude.

But still violates the broader principle of Least Discretion.

- *O*, exercising discretion, has given *B* 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 is unjustified, “excess” discretion, which does not serve impersonal reasons.
- Not denying that a decision-making process that leaves *O* with discretion may serve impersonal reasons. 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.

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.

Objection: 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. 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*.

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 that the oddness is just the general oddness of having a complaint about an action that has in fact benefitted one. But we can complain, or so it seems to me, of actions that benefit us.