Why Equality of Treatment and Opportunity Might Matter

Is inequality, in itself, something to protest or lament? In answering this question, philosophers gather at two poles. Some say that the mere fact that one person is worse off than another (at least when this is through no fault of their own) is unfair, and so we have reasons to mitigate it when we can, and to regret it even when we cannot (Temkin 1993, Cohen 2008).

But one might have one’s doubts. Of course, if X is worse off than X might be, then that is a reason to make X better off if one can, and to regret it even when we cannot. But is it a further reason for regret that X is worse off than some Y in fact is, a Y who may be, for all that has been said, millennia or galaxies away? And is it a reason for anyone to do anything? Is it a reason, perhaps, for Y to make himself worse off than he is, so that he is no longer better off than X? Granted, it might well be unfair for someone else to leave X worse off than X might be. But is it unfair that X simply is worse off than Y in fact is? No doubt, that state of affairs is not fair. But that doesn’t mean that it is unfair, in a way that might give someone reason to mitigate it. (The state of affairs of the atomic number of carbon’s being six is not fair, but also not unfair.) Such doubts might draw one to the opposite pole: to conclude that inequality doesn’t matter. When there appears to be an objection to X’s being left worse off than Y, this always derives from an objection to X’s being left worse off than X could be (Raz 1986, Ch. 9).

Scanlon (2018) explores what might lie between these two poles. Perhaps there’s no objection to the mere fact of one person’s having more than another, shorn of all history and context. But perhaps given certain histories, in certain contexts, there are objections to inequality, or to ills that travel closely with it. This deceptively short and readable book is so thick with insight that it is hard to decide what to discuss, much less to discuss it. For better or
worse, I will focus on Scanlon’s account of “equal concern,” or as I will call it, “equal treatment,” and then turn to his discussion of equality of opportunity.

1. Comparative equal treatment versus non-comparative fair improvement

Suppose that a state, S, 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. When this occurs, Y is often thought to have what I will call an “equal-treatment complaint,” that the state is favoring X over Y. The complaint is comparative: the state should give B to Y because it in fact gave B to X.

These comparative, equal-treatment complaints need to be distinguished from non-comparative “improvement complaints,” as I will call them. Y’s improvement complaint is simply that others—whether the state, an individual, or some other agency—failed to improve Y’s situation. Others may answer such complaints in two ways. Others may reply that, while they could have done more to improve Y’s situation, this would have asked too much of them; it would have been at most supererogatory.

Others may also reply that they could not have done more, given the constraints they faced. These constraints can be not only physical, but also moral. In particular, improving Y’s situation might mean failing to improve X’s situation, in a way that trades off X’s claims at an unfairly low rate against Y’s. The fact that Y’s improvement complaint can be answered by citing fairness to X may suggest that Y’s complaint is comparative: that it has to do with what others do for X. But Y’s improvement complaint is non-comparative: simply that others could have improved Y’s condition. This says nothing about X. Others’ defense is that they could not
have, given the constraints they faced. In this case, granted, the constraint was fairness to X. But the constraint might as well have been that others were physically unable to do more.

Among many other contributions of Scanlon’s book is to rescue these equal-treatment complaints from philosophical neglect. After all, equal-treatment complaints seem at least as common in actual political discourse as complaints that the state is 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 what another group is, not that it is the “right” amount in some absolute sense.

Some may suspect, however, that Y’s apparent equal-treatment complaint is really an improvement complaint in disguise. The complaint, one might say, is that S could have given B to Y. That S in fact gave B to X is immaterial.

But this doesn’t seem right, for several reasons. First, contrast a baseline in which S provides B to neither X nor Y. If improvement complaints were all that were at issue, then S’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. S, 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 S now does for X, since that has no bearing on what S could have done for Y. Still, Y might seem to have an equal-treatment complaint about the differential treatment. 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, as Scanlon observes (17), there are cases in which neither X nor Y would have an improvement complaint if they did not receive B. Giving B to either is supererogatory. Still, if S gives B to X, Y may have an equal-treatment complaint that the state does not give B to Y too.

Now, 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 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-concern complaint by “leveling up,” by giving B to Y too, would conflict with Z’s improvement complaint not to be burdened unfairly. 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.
Equal-treatment complaints, to be sure, need some escape clause. Y may have no equal-concern complaint if X needs medical care that Y does not, or Y’s parents provide Y with school lunch, whereas X’s do not.

Scanlon suggests that Y has a complaint only if S’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 I worry that this accommodates too much. Suppose that S, 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, S, 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 we should say here is that Y has an equal-treatment complaint just when S gives B to X, but not to Y, unless 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. This is why I have been using the label, “equal treatment,” rather than Scanlon’s “equal concern.”

What is a “justifying difference”? One might think that the general form of a justifying difference is that giving B to X rather than to Y better satisfies improvement claims (including, perhaps, the improvement claims of third parties). Suppose that this is so. One might suspect that it means that equal-treatment complaints collapse, by a different route, into improvement complaints.

But this isn’t so. First, equal-treatment complaints 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 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, 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 S 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 is not obvious that this fact counts as a justifying difference.

2. The restricted scope of equal-treatment complaints

As Scanlon observes, the requirement of equal treatment is restricted. It does not apply to every possible S, B, X, and Y. First, Y has an equal-treatment complaint 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, improvement complaint about S’s 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.

Second, Y does not have an equal-treatment complaint against a private person, P, who gives B to X but not Y, unless (i) it contributes to a pattern of discrimination or (ii) P stands in some special relationship, of the same kind, to X and Y (e.g., that P is the parent of X and Y). 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). “Random acts of kindness” are allowed.

Third, equal-treatment complaints apply to what the state 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 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 seem to be 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.

3. Do obligations require equal treatment?

Why is the state subject to this norm of equal treatment, whereas private persons are not (at least absent a pattern of discrimination or special relationship)? Scanlon suggests that the norm of equal treatment applies to any agent, A, who is obligated to benefit X and Y. It “presupposes an obligation on the part of some agent to provide benefits to everyone in a certain group” (11, also 9, 21).

In the next sentence, Scanlon goes further and says that the requirement applies only “to inequalities that result from the failure of that agent to fulfill [an independent] obligation to all those to whom it is owed” (11). But this can’t be what he means. For in some of Scanlon’s illustrations, while A has non-comparative obligations to give B to X and Y, and while A does not fail to fulfill these obligations, A then violates equal concern by giving X, but not Y, some further increment of benefit, beyond B (e.g., 17). Scanlon’s idea must be instead that the fact that A has an independent obligation to give benefit B to X and to Y explains why the requirement of equal treatment applies when A gives a benefit, B’, to X but not Y, whether or not in giving B’ to X or to Y, A discharges an independent obligation.

But this is unsatisfying, in several respects. First, Scanlon offers no explanation why being obligated to benefit should trigger a further requirement of equal treatment in general.
Scanlon does offer an argument for why the requirement applies in the special case of state and citizens. “[W]hy should some citizens accept that the interests of others count for more than their interests in justifying government policies, which they are being asked to cooperate in supporting through taxes and compliance with other laws?” (22). However, this argument does not appeal, as far as I can see, to the state’s having any obligations to benefit its citizens. It appeals only to the fact that the state burdens people with taxation and compliance and then pursues policies that in one way or another affect their interests. And this argument does not explain in any obvious way a comparative complaint, which rests on actually providing a benefit to X, but not to Y. The argument, as far as I can make out, is that the state fails to compensate or reciprocate Y’s burdens of taxation or compliance if it does not give a benefit to Y, when it does give that benefit to X. But the state also fails to compensate or reciprocate Y’s (or X’s) burdens of taxation or compliance when it doesn’t give that benefit to X either: if, say, it simply wastes the revenue, by paying a neighboring country to erect a pointless wall on its side of the border.

Second, Scanlon’s proposed explanation makes equal treatment apply to too many cases. I am not under a requirement of equal treatment to everyone to whom I ever make a promise to benefit, and so acquire an obligation to benefit. To be sure, Scanlon doesn’t deny this. Indeed, he holds that equal treatment does not apply to individuals’ contributions to aid, even if “they have obligations to aid those less fortunate than themselves” (22). My worry is that this seems an unexplained exception to Scanlon’s proposal that the requirement of equal treatment is triggered by independent obligations to benefit. It’s a case in which equal treatment isn’t triggered although there are independent obligations to benefit. Still more puzzlingly, Scanlon suggests that if some global institution had obligations of humanitarian aid, then equal concern would apply to that institution (24–5). But whatever other differences there may be between the
individual and the global institution, the difference is not, by Scanlon’s lights, that individuals lack, while global institutions have, obligations to give humanitarian aid.

Finally, it makes equal treatment apply to too few cases. It’s a violation, it would seem, for the state to punish or conscript some, while letting others off the hook. Let’s grant that to refrain from punishing or conscripting someone is to benefit them. All the same, neither punishment nor conscription is a matter of obligations to duly convicted criminals or eligible draftees to benefit them in this way; the relevant authorities don’t have obligations to them not to punish or conscript them. Moreover, Scanlon seems to suggest that if an institution has an obligation not to benefit its citizens, but “just to treat them in a certain way—for example, not to violate their Nozickean rights—then even if this obligation is owed to all citizens equally, the idea of equality would have no role in explaining the wrong involved when this obligation is fulfilled for some but not for others” (14). But, while the principal objection would be the non-comparative objection to the violation of rights, involved, say, in unjustified traffic stops or excessive sentences, I’m not sure why there wouldn’t also be a comparative objection here (as Scanlon seems to grant, 16–17): namely, that the night-watchman state subjects only some citizens but not others to these unjustified violations of their Nozickean rights.

4. Equal treatment as part of equal citizenship

So why is the state under a requirement of equal treatment? Perhaps an answer can be found in the main premise of one of Rawls’s arguments for the priority of the equal basic liberties. The argument’s main premise is that it is important to secure for everyone a kind of equal status: that, whatever other hierarchies there may be in society, there be at least one socially recognized relationship in which members of society stand as equals to one another.
The question is then what this socially recognized relationship might be. Rawls’s answer is that it is the socially recognized relationship that is realized by a basic structure that secures the *equal basic liberties* and gives that equality priority over the distribution of other goods. I suggest a more general answer: that the socially recognized relationship of equality is that realized, at least in part, by *equal treatment by the state*: by the state’s providing whatever it directly provides to any citizen to every other citizen, unless there is some justifying difference.

5. **Procedural Fairness as comparative equal treatment and non-comparative fair improvement**

For Scanlon, claims of equality of opportunity are part of a complex, three-part reply to a prior complaint provoked by some particular inequality: such as that X has a better chance of getting a job than Y, if either seeks it.

The first of the three parts is *Institutional Justification*. To answer the complaint, the person or institution responsible for the inequality needs to show that a system that gives a more qualified person a better chance for a job is itself justified: for instance, that the system improves people’s situations in a way that makes trade-offs among them fairly. The second part of the reply is *Procedural Fairness*. It needs to be shown that the fact that X but not Y has the job arose from a process that was *sufficiently sensitive to* the factors that enable the differential distribution to serve the institutional justification: in this case, the factors are the qualifications of X and Y. The final part of the reply is *Substantive Opportunity*. It needs to be shown that Y cannot complain about the opportunity that he was given to *acquire* qualifications.

Now, this all presupposes that Y has some prior complaint that *calls for a reply*. However, Scanlon doesn’t say much about what this prior complaint is.
One possibility is that Y has a non-comparative, improvement complaint: that Y could have been given a better chance for the job without unfairness to anyone else. In general, it is not unfair to X to raise Y’s chances at least as high as X’s, at least if Y would find the job just as rewarding. And if Y is at least as qualified as X, then raising Y’s chances at least as high as X’s is not unfair to those third parties who would be served by the job’s being filled by someone better qualified. Y could have this non-comparative complaint—that his chances for the job could have been improved without unfairness to anyone else—even if Y were the only applicant and the position went unfilled.

A second, not necessarily incompatible possibility is that Y has a comparative complaint (40–1, 49). Intuitively, Y has a comparative complaint when Procedural Fairness is violated. Suppose an employer hires no one, even though hiring someone wouldn’t harm business, and even though X and Y are equally qualified. In this case, perhaps each has an improvement complaint. But now contrast this with a case in which the employer ignores Y’s application and hires X. If improvement complaints were the only thing at issue, then what the employer does in the second case should be less objectionable. But if anything, it seems more objectionable.

Perhaps this is because Y has an equal-treatment complaint. Perhaps (although it would remain to be explained why) the employer, like the state, is required by equal treatment to give Y the same chance of the job as X, unless there is some justifying difference. It might be a justifying difference that X had better qualifications than Y. But we are imagining that X does not have better qualifications. So Y has an unanswered complaint.

6. Substantive Opportunity as non-comparative fair improvement under competition

I turn now to Substantive Opportunity. Consider a stylized case. Suppose that White and Blue have equal potential as children. By saying that “both have equal potential at a time” I mean that
if we counterfactually rolled back the clock to that time and then supposed that they henceforth enjoyed similar conditions, then they would be performing similarly now. White’s parents give White additional education in high school. Blue’s parents do not, either because they could not, or because they chose not to. Crucially, assume that prior to White’s parents giving White additional education, neither Blue nor White had any improvement complaint, against either the school system or their own parents, that their education could have been improved without unfairness to others. Everyone was already doing enough for them; White’s parents just volunteered to do more. Because White was given this additional education and Blue was not, White has more potential at the end of high school for a college education. As a result of that enhanced potential, White receives a college education, whereas Blue does not, and so White becomes more qualified for a desirable job. And as a result of those better qualifications, White gets the job, whereas Blue does not.

Blue seems to have a complaint that, because White got additional education, White, but not Blue, got the college place and later the job. And this complaint seems comparative. It’s only because of what happens with White—only because White’s parents do something for White—that Blue has a complaint. The complaint might seem to be explained by a kind of Cliff’s Notes version of Rawls’s principle of Fair Equality of Opportunity:

*Equal Potential:* Children with equal potential should have equal chances at a given job later in life.

Blue has an objection that the system allowed White’s parents to disrupt this equality.

What, then, might justify Equal Potential? Neither Scanlon’s “just inequality” nor his “self-realization” rationale helps (me, at least) to understand this. To be sure, the fact that there are special “rewards or privileges” attached to the job, or that it would amount to a kind of self-
realization, certainly explains why Blue has reason to care about getting the job. But it doesn’t do much to explain why Blue’s not having the job, under these specific circumstances, is unfair. After all, not getting something that one has reason to care about isn’t always unfair. Granted, attaching special rewards may create a “game” whose rules others have reason to follow only if they are treated fairly. But unless more is said, that’s just another reason to ensure that the rules are fair, not an explanation why rules that led White, but not Blue, to get the job, under these circumstances would not be fair, which, one would have thought, is the question at hand.

Is Equal Potential simply a special case of equal treatment? But equal treatment seems not to apply, since it seems to be White’s parents, rather than anyone in an official role, who provides anything unequally.

Something else is puzzling about Equal Potential, or at least the intuition that Blue has a complaint. It seems oddly fixated on employment. Contrast a case in which the Hausers don’t give Jr. additional education, but save the money and give Jr. the down payment for a house. Later in life, Hauser has no better job than Renter, but Hauser owns, whereas Renter has to rent. Might Renter have a complaint like Blue’s: that the broader social structure permits parents’ desires to do things for their children to translate into significant advantages for them? I imagine that most people who think that Blue has a complaint would deny that Renter does. But why should it be less concerning if Hauser’s parents just give him the financial advantage directly, without laundering it, as the Whites do, through a diploma?

Is it, appealing to the just inequality rationale, that society attaches special rewards and privileges to jobs, but not to home ownership? But home ownership is a legal construct, with special rewards and privileges, if also special responsibilities and liabilities, attached to it. Is it, appealing to the self-realization rationale, that not getting a job has unique importance, say,
because a job is a unique opportunity for self-realization? But Hauser’s house-pride can also be a kind of self-realization.

I suspect that the difference in our reactions to White vs. Blue and Hauser vs. Renter has to do instead with competition: with the fact that one person’s getting the good prevents another from getting it. So understood, “competition” does not require rivalrous exertion. Lotteries, which involve no rivalrous exertion, are still competitive, since one person’s winning the lottery rules out others’ winning it. I suspect, that is, that our moral judgments are more lenient about the Hausers’ gift of the house because we are imagining that it didn’t prevent Renter from getting a house. Renter wouldn’t have gotten a house anyway.

To test this suggestion, suppose that White was not competing with Blue. There are two unfilled spots for anyone who meets the threshold of potential or qualification. White’s additional education pushes him over the threshold, whereas Blue remains below it. This does not come at Blue’s expense, although it does mean that White will enjoy things that Blue does not. It’s not clear to me that this is unjust. Why shouldn’t parents be able to do things for their children, when this doesn’t hurt anyone else?

If the crux is competition, then three things follow. First, jobs are not somehow different in kind from other forms of advantage. If housing were competitive, Renter would have a complaint like Blue’s. Imagine that there’s a land rush, and the Hausers outfit Jr. with a party of advance scouts and the fastest team of horses money can buy. Second, if the crux is competition, then Equal Potential is at very least overbroad, since it applies to non-competitive cases as well as competitive cases. Finally, if the crux is competition, then the self-realization and just inequality rationales at very least need supplement. Neither on its own explains why competitive
and non-competitive cases should be treated differently. The non-competitive case involves self-
realization and socially attached rewards just as much as the competitive case.

But why should competition matter? The competition between Blue and White matters, I
suggest, simply because White’s additional education reduces Blue’s absolute opportunity.
White’s chances of getting the college spot increase from 50%, which, given competition, means
that Blue’s chances decrease from 50%. Blue has a non-comparative, improvement complaint
after all. After all, Blue’s chances could have been improved, by keeping Blue from dropping
below 50%, and this would not have been unfair to White. Why should fairness require reducing
Blue’s chances from 50% to 10% in order to raise White’s chances from 50% to 90%? So Blue
doesn’t have any comparative complaint, grounded in Equal Potential or anything else. Blue just
has a straightforward improvement complaint.

Well, Blue may have an improvement complaint. By hypothesis, people other than White
benefit from White’s additional education. In effect, White’s parents are making voluntary
contributions to augment the stock of human capital. Once we take this into account, whether
Blue still has a complaint that his opportunity could have been improved without unfairness to
others depends on whether it is unfair to trade off the reduction in Blue’s opportunity for these
benefits to others. It may be unfair in some cases, but not in others.

Suppose the case is one in which it is unfair, so Blue does have a complaint. To answer it,
must we prevent White’s parents from giving White the additional education, which is invasive,
or require others to give Blue the additional education, which is expensive? Maybe, but maybe
there’s a third alternative: to make the college admissions process insensitive to White’s greater
potential.
To recap: It seemed at first that Blue’s complaint could not be understood as a non-comparative, improvement complaint, which suggested that we needed to invoke Equal Potential as an independent, comparative constraint. On closer inspection, however, Blue does have an improvement complaint when but only when two conditions are met: (i) Blue and White are in competition, so that Blue’s absolute chances are reduced, and (ii) it is unfair to trade off the reduction in Blue’s chances (brought about by White’s additional education) for the benefits to others (also brought about by White’s additional education).

Does Blue have a complaint when (i) and (ii) do not hold? If so, then we might still need Equal Potential to explain it. But I don’t think the Blue does have a complaint. In the non-competitive case that we described earlier, Blue may have, as it were, a “cosmic” complaint about being unlucky in not having wealthier or more generous parents. But that’s like Renter’s “cosmic” complaint about not having wealthier or more generous parents, or like the “cosmic” complaint of someone who finds themselves in a society where their talents happen to be in either high supply or low demand.


