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THE SUBSTANTIVE PRINCIPLE OF EQUAL TREATMENT

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This paper attempts to identify a principle of equal treatment that gives specific structure to our widely shared judgments about the circumstances in which we have moral reason to object to the differential adverse treatment of others. I formulate what I call a "substantive" principle of equal treatment (to be distinguished from principles of formal equality) that describes a moral constraint on the reasons we can have for picking out individuals for differentially adverse action. I argue that this constraint is violated when an action, in view of its rationale, expresses lesser respect for the moral status of an individual under some differentiating description compared to the respect reserved to another class of individuals who are not picked out by that description. I show that this substantive demand of equal treatment is not morally otiose and I reveal the fallacy underlying accounts that have concluded otherwise.

I. INTRODUCTION

Suppose two qualified applicants seek a desirable position in some organization. An official who has broad hiring discretion reviews each candidate's application. Although there are at least two positions open, she offers only one of the applicants a position and notifies the other that he has not been selected. The unsuccessful applicant subsequently challenges the official's decision. He concedes that if he had been the only applicant, it would have been permissible for the official to refuse to offer him the position. He claims, however, that he has been wronged by the official's decision because the official failed to treat the two applicants equally.

The disappointed applicant's charge of unequal treatment, if supportable, seems to state a morally serious objection. On reflection, however,
the content of this objection seems difficult to articulate. What does it imply? That is, what conditions must obtain in order for a moral objection of unequal treatment to be sustained? We cannot say that the rejection of the applicant’s candidacy must have been impermissible per se; indeed, the rejected applicant concedes that this is not true. Thus the claim of unequal treatment does not reduce to a claim of independent, unconditional entitlement to the position.

Perhaps we might say that the claim of unequal treatment implies nothing more than that the official acted on certain irrelevant considerations, such as the applicant’s race or sex. This seems plausible. On this understanding, however, it would seem that the objection is just a less-than-perspicuous way of asserting that the applicant’s rejection was unjustified in virtue of being based on insufficient reasons. But if his complaint is truly one of unequal treatment, it seems to voice some sort of concern about how he was treated relative to the applicant who was given the position. That seems to be more than just a claim that his rejection lacked sufficient justification. Thus we potentially underdescribe the unequal-treatment objection by reducing it to such a claim. Then again, how could this concern about the applicant’s treatment relative to the other one have any genuine moral significance? Unless the applicant can assert that he was entitled to the position he sought based on the merits of his own candidacy, why should it matter to the evaluation of the decision to reject him that another applicant may have been treated differently?

On the one hand, the demand of equal treatment seems morally serious, perhaps even fundamental. Yet, on the other hand, it seems difficult to isolate the moral constraints that belong distinctively to the idea of equal treatment. Furthermore, even if we could identify such constraints, it seems a puzzling idea that any requirement as to equality of treatment could add anything to, let alone take precedence over, the simple requirement of acting on sufficient reasons, inasmuch as the latter is surely a requirement that the treatment of any individual must independently satisfy regardless of the treatment of others.

My aim in this article is to provide a solution to this puzzle. To do so, I identify a moral principle that both explains and justifies our ordinary judgments about the kinds of actions that seem open to objection as violations of the demand of equal treatment. I propose a “substantive” principle of equal treatment and test it against various objections that raise doubts about what I call the “moral distinctiveness” of that principle, by which I mean its status as a moral concept with independent significance and explanatory value. In Section II, I outline my objectives in this paper. In Section III, I introduce the “otiosity objection,” the skeptical argument against the moral distinctiveness of the demand of equality. In Section IV, I articulate the substantive principle of equal treatment and show how it meets the otiosity objection.
II. GENERAL DESIDERATA FOR AN ACCOUNT OF EQUAL TREATMENT

A. The Need for a “Substantive” Principle

What kind of constraint does the demand of equal treatment place on action? One common notion is that equal treatment requires simply that individuals who are alike be treated alike. This basic prescription is sometimes called the principle of formal equality or formal justice, because the constraint on action that it embodies appears, on its face, to be independent both of the substance of the treatment in question and of the criteria of likeness that are taken to be applicable. The principle of formal equality, as standardly stated, just says that given some rule that determines likeness, like individuals must be treated alike under that rule. This principle has frequently been characterized as tautologous, empty, or devoid of moral content. Whether or not those characterizations are warranted, it does seem true that the moral idea of equal treatment must also have a more “substantive” dimension. The most obvious reason for thinking so is that an action’s satisfying the formal principle of equality does not seem to imply its immunity from moral objections of unequal treatment. Since the principle of formal equality demands only that like cases be treated alike under some consistently applied criterion of likeness, it cannot speak to whether the criterion applied is itself objectionable as a matter of equal treatment. (This is precisely the sense in which the principle is formal.) If there are

1. I am referring here to actions by individual agents or institutional actors, not the “actions” of a society in arranging for the distribution of goods and resources. Thus the question of equality I am raising here is very different from the central concern of political philosophy, which usually focuses on what it means for a society to be characterized by equality or justice. See Elizabeth Anderson, What Is the Point of Equality?, 109 ETHICS 287 (1999); see also Will Kymlicka, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 3–4 (2d ed. 2002); John Rawls, A THEORY OF JUSTICE 47 (rev. ed. 1999) (explaining that his theory of justice governs the basic institutional structure of society, not the decision-making of agents within that structure).


4. In fact, I do not think the formal principle is tautologous or empty. I believe that a complete conception of equal treatment should provide an account of the formal principle as well as the substantive principle. The latter is my focus in this paper. I argue elsewhere that previous accounts of the formal principle have not fully captured the structure of arguments from formal inequality of treatment nor adequately explained how such arguments can often seem to have the moral force and significance that they do. My own account of the formal principle attempts to provide such explanation, but further elaboration is beyond my scope here.

5. I argue elsewhere for an interpretation of the formal principle that is somewhat more complicated than I suggest here, but the point I am presently making applies just the same to either formulation.
criteria of likeness that are themselves objectionable in that way, it follows
that the requirement of equal treatment cannot be exhausted by the formal
principle.

It is not difficult to imagine cases that illustrate this possibility. Indeed,
any case in which a discriminatory rule is applied consistently would seem
to suffice. Suppose, for example, that a professor adopts the rule that a
student who scores a 60 shall receive a passing grade if and only if the
student is male. Formal equality demands that like individuals be treated
alike. The professor might claim that male and female students are not alike
and that her grading rule therefore does not violate the maxim of treating
like cases alike. Obviously, this would be absurd. The professor’s rule surely
constitutes unequal treatment in an obvious and important sense. What we
may want to say is that the professor’s rule does violate the demand to treat
like cases alike under morally acceptable norms of likeness. But the formal
principle of equality cannot by itself fully capture that judgment,6 because
the formal principle does not determine the validity of any particular criteria
of likeness. What we need, therefore, is an account of equal treatment—
what I am characterizing as a substantive interpretation—that captures the
judgment that the professor’s treatment of the students is wrong because it
involves an objectionable comparison between male and female students.

B. The Problem of Moral Distinctiveness

What might a substantive requirement of equal treatment encompass that
the formal principle does not?7 One possibility (which I reject) is to see the
requirement as a moral constraint on the criteria of likeness or similarity that
determine the satisfaction conditions of the formal principle in a given case.
We might say, for example, that the professor’s application of her sex-based
grading rule violates the requirement of equal treatment simply because sex
fails to pick out a morally relevant consideration that justifies the differential

6. This aspect of the formal principle is sometimes taken to show its inadequacy as a
principle of justice or its weakness as a moral principle. But what I take the inadequacy to show
is that the formal principle by itself does not provide a fully adequate account of the concept
of equal treatment. This does not imply that the formal principle is not an important part of
the concept.

7. One answer that does not seem plausible to me is that the equal treatment of a group
of individuals always requires the promotion of equality of outcomes within that group. If an
employer pays a bonus to one of her employees, the mere fact that this differential reward
would make her employees unequal in wealth does not imply, without more, that the employer
has violated any requirement of equal treatment. Conversely, the employer violates a norm of
equal treatment if she docks the pay of an employee because of the employee’s race, even if
that action has an equalizing effect on the overall wealth of her employees. The idea of equal
treatment, interpreted as a constraint on individual action, does not reduce to a standing
normative presumption in favor of actions that benefit the less well-off or promote outcomes
tending toward distributive equality. I think this is true whether or not we favor an egalitarian
theory of justice. Cf. Rawls, Theory of Justice, supra note 1, at 47 (distinguishing the principles
of justice from principles that govern individual action); see also John Rawls, Justice as Fairness:
treatment at issue. Thus, even if the professor could say that all students who are alike under her rule are treated formally alike, she cannot claim that they are treated equally, because her rule involves differential treatment of individuals who are not different in any morally relevant way. According to this theory, equal treatment in its substantive aspect can be analyzed as a requirement that differential treatment be justified by morally relevant differences. Which differences are morally relevant would then depend on the context of the differential treatment at issue.\textsuperscript{8} Let us call this the relevant-difference view of the substantive requirement of equal treatment. It represents an attempt to analyze the demand of equal treatment primarily as a substantive requirement that actions be justified by morally relevant considerations.

The difficulties with the relevant-difference view as an understanding of the substantive requirement of equal treatment are that it is too broad and that it is explanatorily misdirected. It is too broad because not every case of treating an individual differently for an irrelevant reason seems to be objectionable in virtue of constituting unequal treatment. Suppose, for example, that an employer decides to hire Benson but not Johnson for a position as a tollbooth operator because Benson graduated first in his class from Harvard, whereas Johnson graduated second.\textsuperscript{9} This difference between Benson and Johnson does not seem to provide a morally relevant reason that could justify the hiring of one rather than the other for the tollbooth position. We could therefore say that Johnson has been treated differently from Benson on the basis of an irrelevant consideration, one that fails to justify their differential treatment. But it would be implausible for Johnson to claim that the employer’s hiring decision is morally objectionable on grounds of unequal treatment.\textsuperscript{10}

The relevant-difference interpretation of equal treatment is also explanatorily misdirected or incomplete. By this I mean that it seems to focus on the wrong aspect of the treatment in question. Suppose the employer hires Benson instead of Johnson based on the fact that Benson is white and Johnson is not. What does it mean to say that hiring Benson over Johnson on the basis of skin color is wrong because it constitutes unequal treatment? The relevant-difference view says that this objection reduces to the claim that the color of Benson’s skin is not a difference between the two applicants that justifies the hiring of Benson rather than Johnson. The view focuses on the failure of justification for the treatment in question rather than on the

\textsuperscript{8} A difference may be relevant in some contexts but not others. For example, sex may not be relevant to decisions about which doctors should be awarded a surgical residency but it might be relevant to decisions about which doctors should be assigned to examine female victims of sexual abuse.

\textsuperscript{9} Let us assume that the demand of formal equality of treatment is satisfied here in virtue of the employer’s consistent application of a hiring rule that calls for ranking of candidates based on college performance.

\textsuperscript{10} It seems to me that Johnson’s real complaint (if he has one) is simply that the hiring decision was arbitrary or baseless.
way in which the treatment offends against the presumed equality of the two individuals. This focus is misdirected. It is surely true that the color of Benson’s skin justifies neither his hiring nor Johnson’s rejection. The objection of unequal treatment, however, implies not (just) that the treatment in question rests on an insufficient justification but that the treatment in question depends on an objectionable judgment about how the differently treated individuals are related to each other.

In claiming that the employer’s reliance on skin color in hiring Benson is criticizable on grounds of unequal treatment, we are making a claim not just about the sorts of considerations that can justify a hiring decision, but that the employer’s actions imply some morally objectionable judgment about the difference between Benson and Johnson. The relevant-difference view interprets the objection of unequal treatment as a claim about the justificatory insufficiency of irrelevant considerations while leaving unexplained the complaint that the objection implicitly voices about the relational judgment of moral inferiority that acting on such considerations involves. The relevant-difference view falls short as an interpretation of unequal treatment because it does not provide an account of the nature of that morally objectionable relational judgment.

Both of these difficulties with analyzing the substantive requirement of equal treatment in terms of the relevant-difference approach are aspects of the same theoretical problem, which I am calling the problem of distinctiveness. This problem consists in the challenge of articulating a principle of equal treatment that is not readily reducible to a general requirement of acting on the basis of morally relevant reasons. The worry is that if the wrongness of every action that seems objectionable because it violates the substantive requirement of equal treatment can be fully explained in terms of acting in the absence of sufficient reason, it follows that the requirement is morally otiose. An adequate conception of the substantive requirement of equal treatment should provide a response to this “otiosity objection.”

I argue that a successful response can be developed by focusing on the objectionable relational judgment that characterizes those actions that we regard as morally wrong on grounds of unequal treatment. I turn now to that argument. In Section III, I introduce some basic ideas about the meaning of equal treatment and explain how the otiosity objection casts doubt on the significance of those ideas. In Section IV, I set forth my arguments for rejecting that objection.

11. Addressing the problem of distinctiveness may not necessarily require proof that the substantive objection of unequal treatment uniquely picks out a class of actions to which we would otherwise have no moral objection or that there exists a special class of reasons for action consisting in irreducible considerations of equality. For purposes of establishing distinctiveness, it may be enough to show that the substantive objection of unequal treatment picks out features of an action or of the structure of its motivation that are not captured by other moral objections that may also apply. The latter is the conclusion for which I argue.
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III. THE OTIOSITY OBJECTION

A. Equal Respect and Concern

The central idea that animates the substantive interpretation of equal treatment is that individuals ought to be treated in a way that is consistent with the fundamental notion that all persons have equal moral status and are entitled to equal moral respect and concern. Rawls discusses this idea in his description in *A Theory of Justice* of the moral basis of the demand of equality. There he speaks of a “fundamental” idea of equality that is “owed to human beings as moral persons” and is defined in part by a moral duty of “mutual respect.” The obligation of mutual respect is, according to Rawls, “the duty to show a person the respect which is due to him as a moral being” and calls forth various attitudes, including “our willingness to see the situation of others from their point of view, from the perspective of their conception of their good; and in our being prepared to give reasons for our actions whenever the interests of others are materially affected.”

The idea of equal treatment is that everyone is equally entitled to be treated with this sort of respect. As Rawls writes, the idea of the moral equality of persons—which is one of the concepts modeled by the Original Position—is “expressed by the supposition that [all persons have] . . . a right to equal respect and consideration in determining the principles by which the basic arrangements of their society are to be regulated.”

Ronald Dworkin has also invoked in his writings the notion of a right to “equal respect and concern.” He describes this right of equal treatment as the right “to be treated with the same respect and concern as everyone else” and the right that one’s “interests be treated as fully and sympathetically as the interests of others.” But Dworkin wants this right to be understood as more than a purely formal protection that could just as well be satisfied by

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12. The presumption of equal moral status is a moral claim, not an empirical one. As Kenneth Simons puts a related point, “normative equality need not supervene upon descriptive equality.” Simons, supra note 2, at 726. Or perhaps it might be better to say that it is a moral question whether any particular descriptive equality should be thought to be sufficient for equality of moral status.

13. See, e.g., Brian Barry, *Equality, in 1 ENCYCLOPEDIA OF ETHICS* 322–323 (Lawrence C. Becker ed., 1992). Barry identifies in various discussions of equality a common idea of “fundamental equality,” which he describes as encompassing the notion that all human beings have equal moral worth and are entitled to equal moral respect and concern.

14. RAWLS, THEORY OF JUSTICE, supra note 1, at 447.

15. Id. at 297. As I argue below in my discussion of Ronald Dworkin’s view, this notion of mutuality of respect does not by itself provide an adequate understanding of the substantive requirement of equal treatment.


19. Id. at 227. Dworkin actually draws a distinction between “equal treatment,” which he associates with the right to equal distributive shares, and “treatment as an equal,” which he
an equal *failure* of respect with regard to all individuals. He explains that treating others equally in the sense of equal respect and concern involves a certain kind of respect for the autonomy of others. This means, in his words, “attempting, so far as it is possible, to see the situation of each person defined through the ambitions and values of that person.”

Taken together, these remarks suggest that equality of treatment in the sense of equal respect and concern means that no individual’s reasonable objection to a particular principle of action should be considered less important than another’s, that no one should be regarded as less entitled to demand reasonable justification of actions that affect him adversely, as less worthy of being treated in accordance with moral reason, or as less secure in his basic rights and liberties.

B. The Skeptic’s Challenge

At this point, the skeptic about the distinctiveness of equal treatment enters the scene, ready to assert the otiosity objection. What work is *equality* doing in the notion of equal respect and concern? Assuming that one acts in a manner that is consistent with the autonomy and the moral status of others, what could be added by the requirement that one’s actions evince this attitude *equally* with respect to all persons? Joseph Raz, raising this objection against Dworkin’s view, puts the point in this way:

> The truth is that Dworkin’s invocation of the right to be treated as an equal is no more than a rhetorical device to enlist the sympathies of those who are moved by appeals to equality. . . . [W]hen Dworkin talks of a right to equal concern and respect he really has in mind a right to concern and respect. He adds “equal” to indicate that none has a greater right than another . . . ; but this . . . follows not from any conception of equality but from the fact that he is here referring to a group with equal claim to have the right.  

Raz’s claim is that the notion of equality in Dworkin’s talk of a right to equal concern and respect adds nothing to the idea of a right to concern and respect simpliciter. It is true, Raz argues, that everyone has an equal entitlement to concern and respect, but this is just to say that the content of that entitlement is the same for everyone. The right itself has nothing to do with equality.

connects with the right to equal respect and concern. I do not adhere to this useage, which seems to me largely stipulative, in my own discussion.

20. Id. at 357.
21. The objection could also be put to Rawls, insofar as his remarks can be taken to suggest that moral equality of treatment reduces to treating everyone equally in accordance with the duty of mutual respect.
In order to respond to Raz’s challenge, let us distinguish between comparative and noncomparative requirements or rights concerning the treatment of others. A comparative requirement or right represents a constraint on how an individual may be treated the content of which is predicated upon how individuals in some comparison class are treated. An example of a comparative right might be a right to equal pay for equal work. Whether this right is satisfied with respect to Smith depends upon how others in the relevant comparison class (employees performing equal work) are being paid. If Jones is in that class, then Smith can assert ipso facto a right to be paid the same as Jones. A noncomparative requirement or right is a constraint on how an individual may be treated that is not predicated on how any other individual is treated. An example of a noncomparative right might be a right to receive a statutory minimum wage. If the legislated minimum wage is $6 per hour, then whether this right is satisfied with respect to Smith does not depend on how others in any comparison class are treated. If Smith is covered by the wage law, then he is entitled to be paid $6 per hour, regardless what Jones or anyone else is being paid.

We can think of the basic duty to treat others with moral respect and concern as consisting at least in the duty to treat others in accordance with their noncomparative rights. The requirement of equal treatment, then, interpreted as the comparative requirement to treat all individuals with equal respect and concern, amounts to a duty to treat others equally in accordance with their noncomparative rights.

The otiosity objection asserts that treating individuals equally with respect to their noncomparative rights amounts to just the same thing as treating them in accordance with their noncomparative rights. When an individual’s right to be treated equally with respect to a given noncomparative right is violated, the wrong consists in the violation of the noncomparative right, and nothing of moral significance is added by characterizing it as unequal

24. Dworkin’s own reply to Raz on this point strikes a rather concessionary note. Dworkin allows that it would “perhaps” be better to speak just of “respect and concern” rather than of “equal respect and concern” and then adds that “the idea of equality” means something like “attempting, so far as it is possible, to see the situation of each person defined through the ambitions and values of that person.” Dworkin, supra note 18, at 356–367. This interpretation of equal respect and concern, however, sounds very much like a demand for reciprocity rather than for equality as such. A wide variety of actions that violate that sort of demand (e.g., promise-breaking, lying, killing) are not typically going to be objectionable on the specific grounds of unequal treatment. Thus the reciprocity interpretation fails to capture what is morally distinctive about the demand for equal treatment. The response to Raz that I develop below attempts to do just that.

25. This distinction is related to the one that Joel Feinberg draws between the notion of comparative and noncomparative justice, but I do not follow Feinberg’s usage precisely. See Joel Feinberg, Noncomparative Justice, 83 Phil. Rev. 297 (1974). My understanding of this idea has been aided greatly by Peter Westen’s discussion, although I disagree with many of his conclusions. See Westen, supra note 3, at 72–74, 134–139. See also Simons, supra note 2, at 693–771; Joshua Hoffman, A New Theory of Comparative and Noncomparative Justice, 70 Phil. Stud. 165 (1993).
treatment.\textsuperscript{26} In other words, according to the otiosity objection, in cases where it might be claimed that an action violates an individual's right to be treated equally with respect to his noncomparative rights, the complaint against the action is already exhausted by the objection that it simply violates the individual's noncomparative rights.

\section*{IV. THE SUBSTANTIVE PRINCIPLE}

A. Response to the Skeptic: An Initial Formulation

There is, to be sure, a deep connection between the noncomparative requirement of moral respect and the comparative requirement of \textit{equal} respect or equal treatment. We might say that the comparative demand of equal treatment falls out of the fact that the \textit{basis} of moral respect is a status that is shared by everyone to whom it is owed. We might disagree about exactly what the basis of the entitlement to moral respect is. But it seems internal to the concept that it is owed to individuals in virtue of some fundamental status—for example, status as a moral person, a human being, rational agent, or member of a moral community—that transcends human heterogeneity and socially manifested variability.\textsuperscript{27} If the noncomparative requirement of moral respect stems from the implications of this status for the justification of action with regard to those who have it, we can think of the requirement of equal treatment as falling out of and reflecting back upon the fact that this status is shared by everyone. The basis of moral respect is in an important way \textit{coterminous} with the basis of the substantive requirement of equal treatment.

That still leaves unanswered, though, how the requirement of equal treatment might be thought to add anything to the noncomparative requirement of moral respect. My view is that they represent different aspects of the recognition of an individual's moral status. If we can think of the noncomparative requirement of respect as a constraint that speaks to the adequacy of particular considerations as justifications for action, then we can think of the requirement of equal treatment as a constraint that speaks to whether the

\textsuperscript{26} As an example, Raz asserts that a "person who keeps his promises to one person and breaks his promises to another is . . . treating them unequally," but "the wrong is the same as where . . . a person always breaks his promises to all. . . . To accuse him of unequal treatment . . . is not to identify the nature of the wrong." Raz, \textit{Morality, supra} note 23, at 228–229.

\textsuperscript{27} Rawls, for example, describes an idea of moral or "fundamental" equality that applies to the respect that is "owed to human beings as moral persons." Rawls, \textit{Theory of Justice, supra} note 1, at 447. Richard Arneson, in a prelude to an avowedly inconclusive investigation into the basis of moral equality, says this: "Neither supposed racial differences, nor skin color, sex, sexual orientation, ethnicity, intelligence, or any other differences among humans negate their fundamental equal worth and dignity. These platitudes are virtually universally affirmed." Richard J. Arneson, \textit{What, if Anything, Renders All Humans Morally Equal?}, in \textit{Singer and His Critics} 103 (Dale Jamieson ed., 1999).
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reasons for an action are consistent with the fact of the moral equality of persons.

So, for example, breaking a promise to someone just because you did not feel like keeping it is a violation of moral respect insofar as it involves a failure to take seriously the promisee’s entitlement to have her expectations met except on the basis of adequate reasons. But breaking a promise to someone because you have a practice of keeping only those promises you make to Caucasians is, in addition to being a violation of moral respect, also a violation of the requirement of equal treatment insofar as it is predicated on a rejection of the presumed moral equality of Caucasians and non-Caucasians. These two cases of promise-breaking thus seem to give rise to two distinct objections—one based on the noncomparative requirement of moral respect, and the other based on a comparative ideal of moral equality or equal treatment.

The fallacy in the otiosity objection is that it relies on a question-begging assumption that whenever an action involves an impermissible violation of a noncomparative entitlement, the fact of that impermissibility provides a complete explanation of the wrongness of that action. In order fully to understand this fallacy, I need to set forth what exactly the substantive demand of equal treatment—the comparative demand of equal respect—entails. Some remarks by Bernard Williams in his paper “The Idea of Equality” are helpfully suggestive. Williams proposes that the distinctive demand of equal treatment be understood as a general constraint against allowing our “fundamental attitudes” toward others to be governed by socially salient differentiating characteristics such as their social and professional status. Williams thus construes equal treatment as an unconditional demand on our attitudes toward others but also as a demand whose force is felt as a counterweight against various comparative judgments we might be inclined to make about individuals on the basis of socially salient differentiating characteristics. On this interpretation, we can think of the idea of equal treatment as substantive in the sense that its prescriptive force is categorical or unconditional, whereas in virtue of its incompatibility with certain comparative judgments it can be understood as a genuine norm of equality.

Equal treatment surely does not require, however, that in deciding how any individual ought to be treated, we abstract away from all socially salient characteristics that might differentiate him from others. No one thinks, for example, that equal treatment requires that jobs requiring technical proficiency be awarded without regard to characteristics that may largely or wholly be the product of social circumstance, such as the fact that one individual has more work experience than another. This is presumably because taking account of that consideration does not deprecate the moral status of the individual with less experience in any way.

28. Williams, supra note 3.
What is needed, then, is a specification of the demand of equal treatment that constrains moral deliberation to respect the moral equality of individuals while not precluding the possibility that differential treatment of them might be justified. These considerations, though very general, already suggest a way of stating a substantive principle of equal treatment. As a first pass at formulating it, consider the following proposition:

(S0) The treatment of an individual violates the requirement of equal treatment in the substantive sense when that treatment, in view of its rationale, expresses unequal respect for the moral status of that individual.

Under this principle, the requirement of equal treatment is categorical or unconditional in that its violation cannot be avoided by the selection of a comparison class determined by some more or less arbitrary rule of treatment. This makes it sufficiently substantive to be able to capture as unequal treatment those differential actions in which an individual is actually treated the same as all individuals in a selected comparison class (e.g., “Minorities must sit at the back of the bus”), yet all such individuals are treated in an objectionably discriminatory way because the rule that defines that class is itself discriminatory. Such an action constitutes unequal treatment as defined by (S0) insofar as it expresses unequal moral respect for the individuals who are adversely affected by it, relative to those who are not.

Yet, though the requirement of equal treatment is unconditional in this sense, there is still a comparative element embedded in principle (S0) that applies to what the action, considered in light of its rationale, may “express.” I postpone briefly a fuller discussion of what it means for an action to “express” unequal respect for an individual’s moral status, but for now I suggest that an action expresses unequal respect for an individual at least when its rationale is given by considerations that depend for their force as reasons upon an assumption that the individual has a lesser moral status than do the individuals to whom the standing to object to the action is presumably reserved. An action’s “rationale,” as I intend the term, broadly encompasses the actor’s putative reasons or the apparent motive for the action.

The principle’s focus on an action’s rationale is inspired by Williams’s suggestion that equality of respect is centrally concerned with the attitude that we adopt in our treatment of others and in particular with the considerations that we take to justify treating one individual differently from another. The principle (S0) is comparative insofar as it defines unequal treatment in terms of whether the level of respect that an action expresses with regard to an individual is equal to that reserved to others.29 Unequal treatment according to (S0) is a matter of giving more weight or

29. As discussed below, this aspect of the formulation will require some revision in order to capture adequately our common understanding of equal treatment.
significance to the reasons or reasonable objections of some individuals than to those of others.\textsuperscript{30} We might say, therefore, that whether an action violates the substantive requirement of equal treatment as formulated in (SO) is a matter of the comparative content of the action’s motive or rationale.

There is, however, an obvious and serious problem with (SO) as a principle of equal treatment. It may well pick out as unequal treatment the actions we would want to be picked out as such, but it also seems to pick out some actions that while morally objectionable, do not seem to involve unequal treatment in any ordinary sense. A sociopathic individual who engages in indiscriminate killing, for example, by firing an assault rifle into a crowd of people, may act on a rationale that evinces unequal respect for the moral status of his victims compared, say, to himself. But I do not think that we would normally object to the killer’s conduct on the grounds that it constitutes unequal treatment.\textsuperscript{31} A similar difficulty arises in the case of the sadistic dictator who orders that everyone be tortured.\textsuperscript{32} The dictator’s action may demonstrate unequal respect for the moral status of his victims compared to the status he presumably reserves for himself and perhaps his kin, but its indiscriminate character makes it difficult to locate its wrongness even partly in its constituting unequal treatment in any ordinary sense.\textsuperscript{33}

\textsuperscript{30} I use the term “individuals” advisedly so as not to limit the principle’s application to, say, persons or human beings. My discussion to this point (and hereinafter) assumes, however, that the requirement of equal treatment applies to individuals who share the same moral status—for example, all human beings who are persons. I do not take this assumption to be controversial, particularly because my aim here is to analyze the moral objection contained in a commonly held notion of equal treatment rather than to resolve debates about whether that notion extends to entities such as fetuses or nonhuman animals. If this assumption were rejected, then the differential treatment of two individuals with different moral status—e.g., a nonperson and a person—would give rise to an objection of unequal treatment under (SO) if that treatment expressed unequal treatment for the moral status of the nonperson. The difficulty would be that this sort of “unequal treatment” should arguably be regarded as morally justified. This is not fatal to (SO) nor to the more adequate principle (S) I ultimately endorse below, but my account would then have to be slightly adjusted to allow more explicitly for a distinction between justified and unjustified unequal treatment. For my present purposes, however, I assume that the moral demand of equal treatment with respect to a given set of individuals generally presupposes that the individuals entitled to the equal treatment share the same moral status.

\textsuperscript{31} Perhaps there is some sense in which the indiscriminate killer engages in unequal treatment, but then all cases in which an agent excepts himself from a moral rule would also constitute unequal treatment in that same sense. Thus this sense of unequal treatment could not provide an answer to the otiosity objection.

\textsuperscript{32} The example is a variant of one offered by William Frankena. See Frankena, supra note 3, at 17.

\textsuperscript{33} One may be reminded here of one of Sidney Morgenbesser’s memorable quips. When asked by a reporter whether Morgenbesser believed he had been treated unjustly or unfairly when he was hit on the head by the police during a student protest, Morgenbesser reportedly responded that he had been treated unjustly but not unfairly: unjustly because the police ought not to have hit him on the head, but not unfairly, “since they hit everyone else over the head, too.” Obituary, Sidney Morgenbesser, THE TIMES (London), Sept. 8, 2004; see also Sidney Morgenbesser, 82, Kibitzing Philosopher, Dies, N.Y. TIMES, Aug. 4, 2004. (Both obituaries actually seem to misquote Morgenbesser, transposing the words “unjust” and “unfair.” See the online posting by Gilbert Harman at http://crookedtimber.org/2004/08/03/sidney-morgenbesser,
The problem, I believe, is that many or even most cases of morally unjustified action will involve, in some sense, unequal respect for the moral status of others. In any case in which an agent wrongfully harms another or simply excepts himself from any moral rule, the agent implicitly fails to respect the moral status of others as much as his own. Under the formulation of principle (SO), every such case would fall under the definition of unequal treatment. Thus that principle fails to provide an understanding of what, if anything, is morally distinctive about the requirement of equal treatment: it falls prey to the otiosity objection.

B. The Principle

What we need, therefore, is a modification of (SO) under which an agent’s failure to give some other individual the same moral respect that he presumes for himself is not by itself sufficient to make it count as unequal treatment. I propose that this modification be effected as follows:

(S) The treatment of an individual violates the requirement of equal treatment in the substantive sense when that treatment, in view of its rationale, expresses unequal respect for the moral status of that individual under some differentiating description, compared to the respect reserved to some class of individuals who are not picked out by that description.

By “differentiating description,” I mean some specification of the individual that picks out a class whose members possess or exhibit that specification. Most ordinary descriptions that refer to some feature, trait, or characteristic of an individual will count as differentiating in my intended sense. Descriptions constituted by proper names or indexical references (e.g., “the person standing to my left”) are among those that do not generally count as differentiating in the relevant way. This restriction reflects our ordinary judgments about the sorts of action that seem objectionable as unequal treatment. More theoretically speaking, in cases where the differentiating description is something like a proper name or indexical reference, it will
not usually make sense to think of the agent’s action as evincing a judgment that the victimized individual is entitled to lesser moral respect in virtue of falling under that description, even though the description is what does the work for the agent in picking out his victim.

Looking at some examples may help clarify my view. Consider again the indiscriminate killer. According to (S), the indiscriminate killer does not violate the substantive requirement of equal treatment because the rationale of his action does not express unequal respect for the moral status of his victims under a differentiating description of the relevant sort. The killer fires upon whomever he happens upon, or whoever is in closest proximity, or perhaps whoever is at a particular place at a particular time. It is true that this latter kind of description—“whoever is at a particular place at a particular time”—may very well pick out a unique set of individuals (at a given place and time). Presumably, however, the killer’s motive does not rest on the idea that the individuals thus picked out have a lesser moral status than any other group of individuals that might have been picked out by some different description (or the same description, modulo a different place and time). The killer’s choice of whom to fire upon might as well be regarded as presupposing equal disregard for everyone’s moral status. This is precisely the sense in which his killing is indiscriminate.

Much the same can be said for the case of the brutal dictator who orders his subjects to be tortured. Even though the dictator’s action clearly fails to give equal respect to the moral status of his subjects compared to the respect he presumably reserves for himself, it seems inapt to object to the action as unequal treatment. On my view, this is because the dictator’s action does not express unequal respect for the moral status of his victims under any particular differentiating description or in virtue of their membership in some differentiable class.

Suppose we were to change the case slightly so that the dictator now orders the torture of only some of his subjects. Would his action then constitute unequal treatment according to (S)? The answer depends on the significance of the description that differentiates those to be victimized from those to be spared. Suppose that the dictator orders that only those subjects who have an even number of letters in their last names shall be tortured. Again, as in the case of the indiscriminate killer, this description certainly does single out a specific set of individuals who will receive different treatment. But I would claim that the dictator’s action does not express a judgment that these individuals with an even number of letters in their last names are less entitled, in virtue of falling under that description, to moral respect than any group of subjects who could be picked out by some other description.

35 An exception might be a case in which some agent, say Hatfield, picks out some individual for worse treatment because that individual is a McCoy, and the action expresses a judgment that McCoys in general have a lesser moral standing than people who are not McCoys, such as Hatfields.
It seems more plausible to say that the dictator’s action expresses equal disregard for the moral status of *all* subjects and that his bizarre method of selecting his victims simply reflects that he does not really care who gets selected. One imagines that he might just as soon have selected some other class of individuals to victimize. In any event, on my account, the dictator even in this second case does not violate the substantive requirement of equal treatment.

I noted that a description constituted by a proper name does not count as “differentiating” in the sense I have in mind. Thus, if the dictator takes a disliking to a particular named individual and orders him to be tortured just because he is that very individual, this will not count as unequal treatment under (S). I do not deny that the dictator, by singling out this particular individual, expresses unequal respect for his moral status in a very real sense. But, to repeat, manifestation of unequal respect in that sense characterizes almost every case of a willful violation of an individual’s rights. What we want is an account that *distinguishes* the concept of unequal treatment from the broader notion of morally objectionable action.

Contrast the foregoing cases with one that clearly does seem to involve a violation of the requirement of equal treatment. We might imagine that the dictator orders the torture of all subjects with a particular racial ancestry. In such a case, it seems quite plausible to say that the dictator’s action expresses unequal respect for the moral status of individuals of that race, under that description, compared to individuals of other races. We presume that the dictator’s rationale (such as it is) involves the idea that the differentiating description he invokes—being of a particular ancestry—picks out individuals who are, in virtue of meeting that description, less worthy of moral respect and therefore have a lesser objection to being victimized. This is different from the previous case, in which the most we might have said is that the differentiating description there—having an even number of letters in one’s last name—picked out individuals who were, as a result of meeting that description, subjected to different treatment. The crucial distinction between the two cases is the presumed role of the differentiating description in the dictator’s rationale: in the race case, but not the other, it picks out a class of individuals who are presumed to be less entitled than others to moral respect and who therefore have less standing to object to the wrongful treatment at issue.

36. I do not deny, however, that given more detail about the case, we might plausibly reach a different conclusion. If there were reason to believe that the dictator’s action really was predicated on some notion of the inferiority of the particular class of victims selected, then the action could count as unequal treatment under (S).

37. As noted above (see supra note 35), an exception to this general rule might be required where a proper name was used to pick out a group of individuals, such as a family, tribe, or other group.

38. This same distinction allows us to understand why the punishment of criminals and the paternalistic treatment of children are not automatically objectionable as unequal treatment. Depriving criminals of certain rights and privileges does not imply a rejection of or disregard
When it comes to deciding whether a particular action constitutes unequal respect for some class of individuals, there are, of course, going to be some hard cases. This is not necessarily a defect of the principle I am proposing. After all, from the standpoint of our ordinary judgments, situations do sometimes arise in which it seems unclear whether an objection of equality of treatment should be raised. The account I am proposing helps us understand the source of the difficulty in some of these cases. At least in some hard cases, the source of the uncertainty is the inherent vagueness of the idea of an action's "expressing" unequal moral respect.

Sometimes the uncertainty is primarily an epistemic matter—we just might not know or we might be unable to infer what the putative rationale of the action in question is. Importantly, however, there are other cases in which the uncertainty is not simply epistemic. If we know that the agent's operative rationale—the set of considerations that constitute the agent's putative reasons for acting—involves the idea that some individual under some differentiating description is less entitled than others to moral respect, then the objection of substantive unequal treatment will generally be well taken. However, in the opposite case, where we know that the agent's operative rationale does not involve any such specific idea, an objection of unequal treatment might nevertheless be sustainable.

This possibility is reflected in (S) by the fact that an action, in view of its rationale, might express unequal respect for the status of some class of individuals even if the agent responsible for the action has no conscious belief as to the moral inferiority of such individuals. This might be the case, for example, where a government prosecutor consistently exercises her broad prosecutorial discretion to seek the death penalty in every possible case in which the defendant is a minority but never in cases where the defendant is not a minority, even though she has ample opportunity and resources to do so. The prosecutor might not be aware that she is doing this and perhaps might insist that she seeks the death penalty only in the most grievous cases. But if this rationale fails to explain her conduct adequately, we might very for their moral status. Imprisoning someone who has committed a crime, for example, is not predicated on any judgment that the individual is somehow less entitled than noncriminals to demand justification for that treatment. On the contrary, legitimate state-sanctioned punishment depends upon justification under general principles that no one could reasonably reject. (Absent such justification, an objection of equal treatment might very well arise.) To put it another way, the differential treatment of criminals is consistent with the demand of equal treatment not because we are justified in disregarding the moral status of criminals but because—and only to the extent that—our treatment of them is based on justificatory principles that express respect for their moral status. The case of children is perhaps more controversial. Some might argue that children have the same moral status as adults (i.e., are entitled to the same moral consideration) but that it is justifiable to treat them differently in light of their inchoate rationality. If that is true, then their different treatment does not express unequal respect. Others might argue that children do not have the same moral status as adults, in which case the requirement of equal treatment simply does not apply to them in the same way, as discussed supra, note 30.
well be inclined to object to her actions as constituting unequal treatment in the substantive sense, her own professed neutrality notwithstanding.

My account allows for (although it does not compel) such an objection insofar as we can say that the prosecutor’s different treatment of minority defendants, in view of the weak rationale she gives for it, expresses unequal respect for that class of individuals: it fails to take seriously their reasonable objection against being disproportionately subjected to capital punishment while apparently reserving to nonminorities a claim to be immune from it.

These observations suggest the following general account of what it is for an action to “express” a principle in the sense relevant to (S). On my view, an agent’s action expresses a principle when it would be objectively reasonable for observers to attribute to the agent an attitude of endorsement regarding that principle. Whether such an attribution is reasonable will typically depend upon an assessment of the ostensible rationale for the action. This explains why (S) calls for attention to an action “in view of its rationale.” In any event, an action expresses unequal moral respect for an individual under a differentiating description when it would be reasonable to attribute to the agent an attitude endorsing such inequality of respect.39

The claim that the treatment of an individual expresses unequal respect is not necessarily a claim about the actual psychology of the agent responsible for it.40 It is more in the nature of a moral claim about how that treatment can be interpreted for purposes of determining whether it is objectionable. Of course, since what an action expresses may often depend on what we think its rationale might have been, investigation into what the agent was actually thinking may be relevant to this determination.41 But as the example of the biased prosecutor was meant to show, we may be justified in regarding an action as expressive of an attitude of unequal moral respect even if the agent responsible for it does not actually act on any such attitude.42

39. It may be worth adding explicitly that whether an action expresses an attitude of inequality of respect does not necessarily imply that anyone suffers a harm, dignitary or otherwise. Conversely, the fact that someone suffers a dignitary harm because of an action will not be sufficient to qualify it as unequal treatment.

40. For a helpful discussion of what it means in general for an action to express an attitude, see Elizabeth Anderson & Richard Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1512–1513 (2000). Anderson and Pildes observe that “people’s conscious purposes and intentions, while relevant to, are not the sole determinants of, what attitudes their actions express.” Id. at 1513.

41. As Tim Scanlon puts it, an agent’s reasons for acting can affect the “meaning” of the action for the agent and others. T.M. Scanlon, Moral Dimensions: Permissibility, Meaning, Blame (2008).

42. What about the following case, based on a hypothetical suggested by an anonymous reviewer for Legal Theory? Suppose that a prosecutor is racist and tries to obtain harsher punishments for black defendants than white defendants but, due to his incompetence, actually ends up accomplishing the reverse. Is there an objection of unequal treatment under (S)? I think so: in light of the prosecutor’s goal, the differential treatment of the black and white defendants surely can be regarded as an expression of unequal respect for those individuals under those race-based descriptions, even though the results ultimately produced by the prosecutor are not what he intended. And I think that (S) delivers the right answer here.
I am not trying to provide a general account of the conditions under which we would be so justified, but I hope it suffices to observe that a number of different aspects of the context of the treatment in question will come into play. In particular, our judgments about what attitudes can reasonably be attributed may be heavily driven by the history of the treatment of a particular group of people.

For example, in a case where a bank loan officer consistently rejected the loan applications of minorities at a higher rate than applications by similarly qualified Caucasians, we might judge the loan officer's differential decisions as expressing an attitude of unequal respect, even if the loan officer believed herself to be acting on individualized determinations of creditworthiness. Any judgment to that effect would in large part be driven, I believe, by cognizance of the history of discriminatory lending practices, combined with a feeling that the loan officer should be faulted for being oblivious to the consonance of her differential action with those patterns of historical injustice. The point is that our judgment about what that action expresses—and consequently how we can object to it—may be affected by a variety of considerations that may be external to the agent's subjective psychological states, including symbolic connections between the action and historical examples of injustice.

It may be useful at this point to summarize my main conclusions so far. I am trying to establish the following points: (1) that the idea of equal treatment includes what might be called a substantive as well as a formal element; (2) that this substantive requirement of equal treatment consists in an unconditional demand that our attitudes reflect the moral equality of persons; and (3) that this requirement is violated when an action expresses an inequality of respect for the moral status of some class of individuals compared to another. As we see above, the question of whether an action expresses the attitude of inequality that characterizes unequal treatment is often a difficult one and may not always admit of a determinate answer. But it is my contention that the distinctive thrust of a complaint of unequal treatment in the substantive sense is to register an objection to the principle

To be sure, neither the white nor the black defendants are in the best position to assert the unequal treatment objection, insofar as the former are only unintended victims and the latter are actual beneficiaries of the prosecutors' actions; but it does not follow that there was no unequal treatment. If we accept (S), then claiming that the prosecutor's bungled plan to achieve disparate results constitutes unequal treatment is just to claim that his actions are morally objectionable because they give voice (albeit inarticulately) to a judgment that black and white defendants have different moral standing.

43. Anderson and Pildes suggest several ways in which actions may express attitudes that are at odds with agents' actual intentions in acting. “First, they might act negligently or thoughtlessly, by failing to notice or take certain considerations as reasons for action,” and in so acting, their behavior might express a certain attitude of “inconsiderateness.” Anderson & Pildes, supra note 40, at 1512–1513. “Second, people may act in ignorance of social conventions or norms that set public standards for expressing certain attitudes. . . . Third, people may act on attitudes or assumptions of which they are unaware.” Id. at 1513.

44. For a similar discussion of the wrongness of discrimination, see Scanlon, supra note 41, at 72–74.
of unequal moral status that it expresses. This is ultimately what qualifies
the substantive requirement of equal treatment as a meaningful norm of
equality.

C. The Otiosity Objection Reconsidered and Rejected

The foregoing elaboration of the substantive requirement of equal treat-
ment has shown how the requirement of equal treatment, interpreted as
deriving from the idea of equal respect and concern, could be a genuine
norm of equality while at the same time being more than just a formal
norm of consistency. The skeptic about the distinctiveness of equal treat-
ment, however, will perhaps still feel unsatisfied. Even granting that the
account of equal treatment stated in proposition (S) is plausible, it still
remains unclear, the skeptic might argue, just why the idea of equal treat-
ment is necessary to adequate moral judgment. After all, what the principle
of equal treatment proscribes is the expressed endorsement of unequal
respect for the moral status of some class of individuals.

But will it not be the case that every action that expresses unequal moral
respect for some individual in this way will also involve a noncomparative
violation of that respect? And if every expression of unequal respect does in
fact involve a simple, noncomparative violation of respect, what moral work
could be done by judgments concerning the former? Exactly what actions
does the requirement of equal treatment rule out that purely noncompara-
tive moral requirements do not? In this section, I address these lingering
skeptical questions. I show how my account of equal treatment both answers
those questions and at the same time facilitates a diagnostic explanation of
why the skeptic's objections have the surface plausibility that they do.

To answer the skeptic's objections, I will introduce another bit of termin-
ological shorthand to track the difference between the idea of respect for
moral status and that of equal respect for moral status. Let us distinguish
between the following:

- **Equal treatment**—treatment that expresses equal respect for the moral status
  of all individuals relative to others.

- **Right treatment**—treatment consistent with the requirements of moral respect
  and concern, that is, treatment in accordance with an individual's noncom-
  parative rights.

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45. This does not imply that rights to equal treatment must be understood as rights protect-
ing solely against expressive harms. First, expressive harm is neither necessary nor sufficient to
a violation of (S). Second, when an objection of unequal treatment lies, there is necessarily
an objection to the treatment's expressive content, but the objection is to the treatment as a
whole (in view of its rationale). However, as I elaborate further in the next section, it is indeed
my position that the objection to the treatment's expressive content is what accounts for the
moral distinctiveness of the complaint of unequal treatment. I am grateful to an anonymous
reviewer for prompting me to make this clarification.
Doing what right treatment requires is just a matter of taking an individual's noncomparative rights seriously without regard to what equal treatment may require. What equal treatment requires is the topic under discussion, but I am suggesting that it means, roughly, not treating an individual as though that individual belonged to some class of individuals that was less entitled to right treatment than anyone else.

The worry we are presently considering can be restated, then, in the following way. It might seem problematic for a theory of equal treatment if it turned out that every action that was ruled out as a purported violation of some individual’s entitlement to equal treatment could just as adequately be ruled out as a violation of right treatment. If this were the case, then the requirement of equal treatment might appear to add nothing to that of right treatment. For example, if an individual complains that he was treated unequally in virtue of being singled out to suffer a violation of his right to $x$, one might think that the simpler objection to the treatment he suffered is just that his right to $x$ was violated. And since the fact that the treatment violates the individual’s right to $x$ is sufficient to make it inconsistent with right treatment, it would seem that no recourse to any idea of equal treatment is necessary to rule out the treatment in question.

So wherefore any further talk of unequal treatment?

The problem with this line of objection is that it is question-begging as to the moral primacy of judgments about the permissibility of action. An alternative and, to my mind, a more adequate way of understanding what is going on in the kind of case just mentioned is to think of the offense to equal treatment as being merely obscured or overshadowed by the fact that the violation of the individual’s right to $x$ is by itself sufficient to make the objectionable treatment morally impermissible. That is, the fact that the action in question would entail violating the individual’s rights is by itself a conclusive moral reason against doing it. This might make it appear that any further objection of unequal treatment would simply be otiose. But I believe that this conclusion is incorrect.

Even granted that an objection of unequal treatment might in a sense overetermine the wrongness of a given action, it does not follow that the

46. I do not mean by my definition of “right treatment” to suggest that equal treatment is not itself a right. My terminology here is meant to mirror the sentiment behind the otiosity objection, which basically claims that any right to equal treatment is redundant of our noncomparative rights. That is of course the claim that I wish to reject.

47. This distinction is not necessarily meant to be substantively different from the original distinction between noncomparative and comparative requirements. It is largely heuristic and is meant to provide a slightly different way of articulating the skeptical challenge to the moral distinctiveness of equal treatment.

48. J.R. Lucas makes just this kind of point in arguing that the idea of equal respect for humanity has nothing to do with equality as such. See J.R. Lucas, Against Equality, in Justice and Equality 140–141 (Hugo Bedau ed., 1971). And as discussed above, Joseph Raz makes a similar argument in arguing against Dworkin’s notion of equal respect and concern. See Raz, Morality, supra note 23, at 228–229; see also Christopher J. Peters, Equality Revisited, 110 Harv. L. Rev. 1210, 1213 (1997).
objection is superfluous, unimportant, or illusory. In my proposed account, to characterize an action as unequal treatment is to register a certain objection as to what, in view of its rationale, the action expresses. This objection will either be well taken or not, but its force does not depend upon its being necessary to a determination of the action’s permissibility. For example, the *impermissibility* of falsely arresting an individual on account of his race follows simply from the individual’s right not to be arrested except on the basis of certain well-defined types of reasons.

But it is nevertheless true that the principle of such an action, insofar as it presumes that an individual’s being of the disfavored race is a reason to arrest him, violates our commitment to equal respect for the moral status of individuals of this race; it embodies a presumption that this class of individuals is morally inferior, incapable of making a demand on us that our actions toward them be justified in ways that everyone could reasonably be expected to accept. Our objection to the action on the grounds that it expresses this attitude does not depend on or imply that the action must be *impermissible* on these same grounds. In other words, assuming that the race-based false arrest constitutes a violation of both right treatment and equal treatment, our recognizing that the former is enough by itself to establish the action’s impermissibility does not necessarily imply that the latter adds nothing to our understanding of why it is objectionable. Indeed, even granted that the idea of equal treatment is unnecessary here for a determination of permissibility, we might still think that it is necessary for a complete understanding of the action’s wrongness and in particular of how its wrongness is affected by the action’s being predicated on the victim’s race.

I believe that the idea of unequal treatment is essential to understanding the moral difference between a “straightforward” case of false arrest and the race-based case we are imagining. The moral concern of equal treatment is distinct from that of right treatment.

Just as an objection of unequal treatment may be necessary to fill out our understanding of the wrongness of some actions that are already impermissible on other grounds, an objection of unequal treatment may also be necessary to account for our moral criticisms of some actions that we might judge to be independently permissible. These are cases in which the action in question is not a violation of right treatment but that nevertheless seem to raise questions of equal treatment. Let us return to the example I describe at the outset. Two qualified applicants apply for a desirable position. The hiring official has discretion to select one, both, or neither of the applicants. Suppose we now learn that one applicant is white, the other black. It turns out that the official is a racist, and so she hires the white applicant and rejects the other. It seems plausible to argue that insofar as neither applicant has any independent claim to be hired, what we might say about the official’s action is that the hiring of the white
applicant and the rejection of the other are not morally impermissible per se. If we thought that this judgment of permissibility exhausted our moral assessment of the action, we might then conclude that any notion of unequal treatment could not do any work here. Surely, though, we would not be right to think this. Even if we agreed that it was permissible for the official to hire the white applicant and reject the other, the treatment of the applicants would still remain objectionable in view of the decision-maker’s rationale for it, and it would be objectionable specifically on the grounds of unequal treatment. A moral assessment of the official’s action that ignored that aspect of its wrongness should be regarded as seriously incomplete.

V. CONCLUSION

The skeptic’s objections, then, do not carry the day. The puzzle presented at the outset of the paper was to explain how the demand of equal treatment could be thought to add anything morally distinctive to the general requirement of not treating others adversely without sufficient reason. The foregoing discussion shows that the substantive requirement of equal treatment has a structure that does add something distinctive to our moral evaluation of action and that the requirement goes beyond (without necessarily being exclusive of) the demand of sufficient reason.

In addition, I think that we can now see why the skeptic’s objection can seem at first to be so plausible. The skeptic’s mistake is in assuming that a moral judgment about an action is otiose unless it is necessary to a determination of the action’s moral permissibility. My account makes it clear that the substantive requirement of equal treatment, as specified by (S), primarily provides a basis for criticizing an action when its apparent motive or rationale expresses an attitude of unequal respect for some differentiated

49. I am bracketing here any questions about whether the rejected applicant would have a legal claim of discrimination. We might very well have good reason, from an institutional standpoint, to regard the decision-maker’s actions as legally impermissible whether or not we could say that the employer’s action was morally impermissible.

50. The skeptic about equal treatment might argue that even though neither applicant has a claim to the position, they both do have a claim that the decision-maker use some impartial procedure for determining which of them is selected. The skeptic might then say that it is in virtue of this latter claim being violated, not in virtue of any distinct proscription against unequal treatment, that the official’s action is objectionable even if the rejection of the disfavored applicant itself is permissible. But this leaves the skeptic with no way to distinguish the wrongness of what the decision-maker does in this case from the wrongness of a case in which the actor refuses to use an impartial procedure for nonracist reasons, for example, simply because she is lazy. In both cases, the decision-maker violates any claim the applicants might have to an impartial procedure. I think there is a further character to the wrongness of the racist decision-maker’s action. My claim is that this additional aspect of the action’s wrongness is given by its violation of the substantive requirement of equal treatment.
class of individuals. But as others have persuasively argued, judgments about the *permissibility* of an action are largely independent of judgments about an agent's actual or imputed motives. Thus if we assume that the moral evaluation of an action is exhausted by judgments about the action's permissibility, then it will be no wonder that it seems the skeptic is on to something in casting doubt on the need for any talk of equal treatment. More specifically, in cases where considerations of *right* treatment seem to answer the question of an action's permissibility, it may appear that no objection relating to *unequal* treatment could do any meaningful work.

What I claim is that this conclusion should be resisted and that we should reject the skeptic's assumption that judgments about an action's permissibility always exhaust our moral assessment of an action. Considerations relating to the idea of equal treatment are sometimes indispensable to an adequate evaluation.

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