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THE UNIVERSITY OF CHICAGO**

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Must Like Cases Be Treated Alike?

David A. Strauss*

The question is an old one, but the answer, I believe, is unobvious, and complex. There is a tradition, often traced to Book 5 of the Nicomachean Ethics, that holds that the principle “treat like cases alike” is central to the notion of justice, with justice seen as a distinct ethical virtue.¹ Others associate that principle with the rule of law, which is in turn seen as a central feature of a liberal state.² The general idea of treating like cases alike (characterized variously as coherence, or integrity, or fairness) plays a central role in some general philosophical accounts of law.³ And the idea seems to enter into popular rhetoric, as well: when people say things like “It’s not that I object to his views; it’s that he’s so unprincipled,” they seem to be appealing to an intuition that, whatever criterion is used, it is important to apply it uniformly.

The question whether like cases must be treated alike is also important for practical reasons. In fact, it may be more important as a concrete practical question than as a theoretical problem. It is especially important in a society characterized by complex

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¹ See, e.g., H.L.A. Hart, *The Concept of Law*, ch. VIII; Ch. Perelman, *Justice* (1967); De la *Justice* (1945)).

² See, e.g., Lon Fuller, *The Morality of Law*; John Rawls, *A Theory of Justice*, §38; cf. Judith Shklar, *Legalism*.

³ See, e.g., Ronald Dworkin, *Law’s Empire*; Neil MacCormick, *Legal Reasoning and Legal Theory*; cf. Raz, *The Relevance of Coherence*.

bureaucratic organizations, where many different actors make a large number of decisions in roughly similar cases. In such organizations, specific things can be done to try to ensure that like cases are treated alike. Or one might consciously make the opposite decision: not to incur any costs to ensure that like cases are treated alike.

In this paper I want to consider what arguments can be made for this principle. Obviously there are some conceptual issues that have to be resolved. How do we decide what cases are alike, in the relevant sense? Similarly, how do we decide what constitutes treating cases alike? Isn't the important question what criteria we use for determining likeness and difference, so that the principle "treat like cases alike" is actually empty and unhelpful? I do not think the principle is empty, but I will postpone that discussion until I have tried to make the question more concrete.

My ultimate (although tentative) conclusion is, to answer the question in the title, that cases need not be treated alike. The principle "treat like cases alike" has no independent moral force. The intuitive attractiveness of that principle is a result of two other considerations. First, sometimes, as a contingent matter, like cases should be treated alike for instrumental reasons. Treating like cases alike promotes some other good, or averts some problem. Second, the notion that like cases must be treated alike reflects the intuition that differences in treatment must be *justified*: if people are treated differently, there has to be a (legitimate) reason for the difference in treatment. But this is, as I will try to explain, not the same thing as saying that like cases must be treated alike.

In Part I, I will describe the kinds of cases that give rise to the question whether like cases must be treated alike—kinds of cases that arise often in a complex

administrative state. I will also, as an aside, explain why the question whether like cases must be treated alike is different from the familiar issue of whether rules are preferable to discretionary standards. In Part II, I will address the question of what it means to treat like cases alike, and why that formulation is not empty.

In Part III, I canvass instrumental reasons for treating like cases alike—reasons that it might be a good idea, in certain circumstances, to treat like case alike (for example, that it reduces the likelihood of discrimination). These reasons, although often important, are contingent; they may or may not apply, depending on the particular circumstances, and so they do not provide a general justification for requiring like cases to be treated alike.

Finally, in Part IV, I will address the persistent intuition that, quite apart from anything else, it is unfair not to treat like cases alike. This intuition does reflect an important principle: the principle that there must be a reason for treating people differently. But that principle does not require that like cases be treated alike. Specifically, when the difference in treatment of like cases is the outcome of a process that can be independently justified, then the difference in treatment is unproblematic. The maxim “treat like cases alike” overlooks the possibility that we might want to use processes that treat like cases differently, for many reasons: to take advantage of a wide range of judgments, to engage in experimentation, to protect values of local autonomy, and so on. If we can give a good reason for using such a process, then so far as fairness is concerned we should not be troubled the fact that like cases are sometimes treated differently.

I. When Does The Question Arise?

There are at least two kinds of common, important situations in which the question—must we treat like cases alike—arises. The first is when decentralized decisions are made under what might be called conditions of moral uncertainty; familiar examples include criminal sentencing and jury determinations of liability or damages. The second situation involves institutional roles that require decisionmakers to implement certain rules but give them some leeway in how they apply the rule in a particular case. Familiar examples are a judge operating in a precedent-based system, or an administrative official who has a range of discretion.

Decentralized decisionmaking in conditions of moral uncertainty. A large number of controversies, presenting generally similar facts, arise across society. They are resolved by different people or groups, although under the auspices of a bureaucratic or other organization. The specific issues presented by these controversies—this is crucial—are difficult and complex, so that in each instance we are unsure, within a wide range of possible decisions, what decision is correct. But while we are unsure how to decide correctly, it is clear that we can do various things to make the decisions more consistent with each other.

The sentencing of convicted criminals is a prominent example. The once-dominant approach in the United States was to allow the judge who imposed the sentence to exercise discretion, within a wide range specified by statute. There were shared understandings, sometimes enacted into law, that certain factors should be taken into account (for example, whether the offender had a criminal record, and how violent the

crime was) and that certain factors could not lawfully affect the decision (for example, the offender's, or the victim's, race). But there was no general agreement about whether some factors should be taken into account, such as whether the offender came from disadvantaged social or economic circumstances. And there was nothing approaching general agreement about what weight was to be given to the various factors that were relevant to a sentencing decision.

The alternative regime, instituted in recent decades by the federal government and many states, is to limit judges' discretion by specifying, with precision, the sentences for various crimes, the factors that may be taken into account in departing from that specified sentence, and the amount of the departure that would be allowed. If a judge misapplies these guidelines, an appellate court is obligated to overturn her decision. There is much less room for discretion than before.

One of the most important arguments made for the sentencing guidelines is that they promote uniformity. Before the sentencing guidelines were instituted, it was quite clear that offenders were receiving different sentences even though they and their crimes were similar in any respect that anyone might consider morally or legally relevant. The differences resulted from different judges' views about criminal sentencing. The guidelines greatly reduced these disparities. In fact, the principal aspiration of the guidelines was simply to reduce disparities. The guidelines were derived from existing sentencing practices; the idea was simply to make those practices uniform. The question is whether that reduction in disparities, taken in isolation, is a good thing.

That question will often be crucial in cases of this kind. The reason is that uniformity may provide the guidelines (or other similar reforms) with their only clear claim to superiority over the discretionary system. This will be true for two reasons. First, it will be effectively impossible to arrive at a clear evaluation of what was going on in the discretionary system, apart from saying that it was clearly not uniform. Undoubtedly one will be able to identify discretionary decisions that are clearly wrong, at both ends of the distribution—too harsh, and too lenient. But the decisions present so many different facts that—except for these outliers—it will probably be impossible to identify, with confidence, a large number of incorrect decisions. If one cannot do that, then one cannot claim, with confidence, that the new system will produce, on the whole, better decisions.

Second, apart from the difficulty of evaluating the discretionary system, it will be difficult to claim, with any confidence, that the sentences specified by the guidelines are optimal. Determining the right sentence for a particular offender is just too complex and difficult a task to allow one to have much confidence in the answer. The task of determining an appropriate sentence is plagued by something comparable to Rawls's "burdens of judgment": conscientious people with well-developed moral sensibilities, in possession of all relevant information, will reach different conclusions.

Thus the argument that the sentencing guidelines are good because they reduce disuniformity is simply an argument that uniformity, in itself, is a good thing—that, other things equal, we should adopt laws that increase the chance that like cases will be treated alike. The point is not just that the guidelines, because of their inflexibility, will fail to take all relevant factors into account and therefore will produce morally incorrect sentences in some number of cases, too severe in some cases and too lenient in others.

That much is obvious. But the discretionary system also produced such errors. The argument for uniformity goes further. It acknowledges that, assuming there is some way to sum moral errors committed in the respective systems, the guidelines might even have increased that sum. We don't know enough to be confident that the guidelines decreased the sum. The argument I am considering is: we should have guidelines anyway, even if there is an increase in the sum of moral error, because the guidelines provide more uniformity.

A similar question arises in other important areas. Social welfare programs make benefits available to people who cannot work in their accustomed jobs because they are disabled. Government employees must decide whether particular claimants, who number in the millions nationwide, are disabled. The decision can be left to the examiners' discretion, informed by relevant medical information and information about available jobs, and guided by some general norms. Or the government might promulgate a precise schedule, showing exactly what kinds of conditions constitute a disability for what kinds of employment.

Which system is better? Again it will be difficult to know which set of decisions deviates further from the moral optimum. The relevant factors are too numerous, and the judgments involved are too complex. It may be that the uniformity produced by the schedule is "bad" uniformity, in the sense that the discretionary decisions, taken as a whole, were more nearly correct. But we can't be sure about that, either way. What we can be sure of is that the schedule produces more uniformity. Is that, by itself, an argument in favor of the schedule?

A final important example is the question whether a class of decisions should be made by juries or by government bureaucracies. Juries, it seems clear, produce more disuniformity. Bureaucrats are likely to be more homogeneous in background and orientation; they are much more easily disciplined; their decisions can be coordinated more easily by hierarchical organization; and the tradition (reflected in the law in some instances) is deliberately to allow juries wide discretion. There is a body of research that suggests, for example, wide variation among juries' decisions on the amount of damages to be awarded for certain kinds of civil wrongs (such as injuries inflicted by defective products)—variation that cannot be explained by any factors that seem morally or legally relevant.⁴ But again it is very difficult to determine what the right damages awards should be.

This raises the same question: should these decisions be made by bureaucrats, instead of by juries, on the ground that the officials' decisions will be more uniform? If we knew that the officials' decisions, taken as a whole, were more likely to be right, the question would be an easy one. But if we do not know that (and we generally don't), does the increase in uniformity provide an argument for a different institutional arrangement?

An aside on rules and standards. These examples (particularly the sentencing guidelines example) might seem to suggest that questions about “treat like cases alike” are just variations on the dilemma of rules and standards: whether decisions should be governed by relatively determinate rules, or by standards that allow more discretion. But the question whether like cases must be treated alike involves more than just that familiar

⁴ E.g., Sunstein et al.

dilemma. Rules can be one way of increasing the chance that like cases will be treated alike. But rules also, notoriously, force unlike cases to be treated alike; and for similar reasons, although less obviously, rules can cause like cases to be treated differently. A well-informed 17-year old may be similar, in all relevant respects, to people who are allowed to vote, but the voting-age rule will cause her to be treated differently.

In other words, sometimes rules are the best way to ensure that like cases are treated alike; but sometimes standards will be a better way of doing that, if the relevant factors are too complex to capture in rules. We might sometimes prefer a rule-governed system even though it causes like cases to be treated differently—if, for example, predictability is very important, or there is an especially great danger of illegitimate discrimination, or the administrative costs of case-by-case decisions are too high. Certainly rules will sometimes, perhaps most of the time, increase the chance that like cases will be treated alike. Most observers believed that was true of the sentencing guidelines. But the connection is contingent. “Treat like cases alike” does not dictate an unequivocal preference for rules over standards.

Institutional roles. A second kind of case that presents the question whether like cases should be treated alike is also characteristic of a modern bureaucratic state. But this time moral uncertainty is not part of the picture. Rather, this is a situation in which a person is responsible for carrying out a law that she believes (correctly, we can assume) to be morally wrong. Must she, speaking roughly, administer the law in a way that’s consistent with its underlying logic, even though she thinks the law is misguided, because otherwise like cases will be treated differently? Or can she deliberately subvert the law in order to move it, so to speak, in a better direction?

Three (realistic) conditions make the case interesting for purposes of testing the principle that like cases must be treated alike. First, the law, while wrong, is not an abomination. An official who has an opportunity to make an exception to a morally reprehensible regime should do so and should not be concerned about treating like cases differently; that seems indisputable. The question about treating like cases alike only becomes serious when the law is wrong but not terrible. Perhaps it is an aspect of the tax laws that has perverse economic consequences and no clear moral or public policy benefits. Or, say, a rent control law, if we believe that such laws do more harm than good. Or it may be a principle of sovereign immunity, barring suits against the government under laws that apply to everyone else; it is not clear that that principle can be justified on moral or policy grounds.

The second realistic condition is that the official charged with administering the law has some, but not unlimited, ability to decide how to administer it. The official cannot repeal the rent control law; the judge cannot overrule all the precedents that establish the doctrine of sovereign immunity. She would, in both cases, if she could; but she cannot, consistent with her institutional role. She does have the discretion to decide in a particular case whether to allow a tax deduction, or whether a particular cost incurred by the landlord is included in calculating the rent ceiling, or whether a particular government agency is shielded by sovereign immunity.

The third condition is that most officials who administer the law, and who have a comparable range of discretion, believe in it and carry out its purposes. As a result, a decision that contravenes its purposes, and subverts the law to a limited degree, will have

the effect of treating a like case differently. The most relevantly similar cases—being decided by people who agree with the law—will come out the other way.

In these circumstances, is it a good argument to say that the official should (other things equal) act in a way that is consistent with the overall purposes of the law, in order to be sure that like cases will be treated alike? Again this is a common practical problem. In any complex society there will be laws and institutions that many individuals will consider to be wrong, but not so badly wrong that they cannot occupy institutional positions that call for them to administer the laws. There is probably not a single government official who agrees with all the rules she is asked to apply. At the same time, it is characteristic of complex societies that people occupy institutional roles that give them some, but limited, freedom to decide how to administer the governing norms. To a limited degree, they can subvert the governing norms without breaching the rules that govern their institutional role.

This is not just an issue for government officials, of course. The question can arise in any bureaucratic system: a corporate or academic administrator might be in the same position. Her institutional role gives her a degree of discretion in administering a system-wide rule. A person who believed that that rule was a good rule would make one choice. But this administrator believes that the rule is a bad rule, and it is not an abuse of her institutional obligations to make a decision that (as she would put it) mitigates the bad effects of the rule. Is it a good argument, against that decision, that it would result in like cases being treated differently?

II. What Does It Mean To Treat Like Cases Alike?

The first task in answering that question is to address the conceptual issues, and to decide what it means, exactly, to treat like cases alike. The problem, of course, is that any two cases will be alike in some respects and different in some respects. So what counts as “like cases” (and, similarly, “alike” treatment) seems to depend entirely on the criteria used for determining similarity and difference. Unless we have such criteria, it serves no purpose to talk about treating like cases alike.

Obviously certain criteria seem more plausible than others. No one would seriously say that cases are alike just because they both arose on even-numbered days of the month, or something of that kind. But this suggests that we should use criteria that identify morally relevant characteristics: cases that are alike in morally relevant respects should be treated in the same way. But if that is all we have to say, then the principle of treating like cases alike again becomes uninteresting. Of course if cases have the same morally relevant characteristics, then they should be treated in the same way, at least so far as morality is concerned. That is probably a tautology. In any event it seems to make the question about treating like cases alike not worth contemplating. The serious question is how to identify the morally relevant considerations.

The examples I described suggest how, notwithstanding this argument, the “like cases” question can remain interesting. As a first approximation, at least: like cases are treated alike when they are all decided according to a plausible moral view that some individual might hold. “Plausible” and “some individual” have a psychological content. That is, if the cases are all decided according to principles that, as a matter of human

psychology, some individual might plausibly affirm, then the cases are being treated alike. The proviso about psychological realism is needed because, of course, some set of principles can always be devised that is logically consistent with every decision. The point is that this set of principles must be something that someone might actually adopt. That is the test of treating alike, or, as shorthand, of coherence.⁵

So in the criminal sentencing example, the preguidelines system was one in which no single real-life, psychologically plausible individual would ever have made all of the decisions that were actually made. The same would be true in the rent control and sovereign immunity examples, if the official subverted the rule. Most of the decisions made throughout the system would be affirmed by someone who believed in sovereign immunity. The particular official in question was making a decision that would be affirmed by someone who did not believe in that principle. But no recognizable (that is, psychologically realistic) person would affirm all the decisions.

The question, then, is this: assuming that the moral optimum is out of reach, is there an obligation (other things equal) to try to bring about a state of affairs that is coherent in this sense? Or is it immaterial that one's act is producing a set of decisions that no individual would ever avow in its totality?

Two points about this account should be noted at the outset. First, the question about treating like cases alike becomes interesting only when the moral optimum is unreachable, as it is in the examples I gave. In the first kind of example it is unreachable

⁵ This account is explicit in Dworkin, *Law's Empire*, and fairly implicit elsewhere; see e.g. Raz, *The Relevance of Coherence*.

because we cannot, realistically, know what it is. In the second kind of example it is unreachable because one's institutional obligations preclude one from bringing it about. If the moral optimum were reachable—if one could bring about a state of affairs in which all cases were decided in the morally correct way—then there would be no reason to care independently about treating like cases alike. That state of affairs would of course satisfy the principle about treating like cases alike: all the morally similar cases would be decided in the same way. It is only when we cannot reach that state of affairs that the principle becomes independently interesting, because then we cannot take the reductionist step of defining “like” and “unlike” according to moral criteria.

Second, if there is an obligation to treat like cases alike, it seems clear that that obligation is not very strong. No one would say that an official in a genocidal regime should carry out its genocidal purposes because otherwise like cases would not be treated alike. No one would say that a sentencing guideline was a good thing, because it produced uniformity, if the guideline were horribly draconian (assuming that the previous state of affairs was not so bad). Intuitively it seems as if there might be something to be said for treating like cases alike, in the way I have specified, in the kinds of cases I have discussed. But that is only because the coherence that would be brought about is not coherence with evil.

III. Instrumental Arguments

What is there to be said for treating like cases alike? Some of the arguments for the principle identify categories of cases in which following the principle promotes some other good objective. These are often good arguments, but they are contingent on specific

empirical circumstances. They suggest occasions on which it is a good idea to treat like cases alike, but they do not justify a general requirement.

1. *Predictability and workability.* One argument is that when like cases are treated alike—when decisions are coherent in the relevant sense—they are more likely to provide clear guidance and less likely to produce various dislocations that can come from disuniformity. Sentencing disparities or jury variation might produce suboptimal deterrence or otherwise distort markets. People with disability claims might migrate to certain parts of the country, or might try in other ways to have their claims decided by more sympathetic examiners. Even if it is a bad idea to have a tax deduction for home mortgage interest, it may be better to have that deduction treated in a coherent way; a haphazard application of the rule, varying with whether a particular administrator thinks the rule is a good one, might produce economic waste that is more harmful than the consistent application of an admittedly bad rule.

There is obviously something to these arguments. The last example suggests a parallel with the economic theory of the second best. When markets are operating in a way that is not optimal, it is not always an improvement to make one aspect optimal if the other aspects remain nonoptimal; similarly, if we are stuck with a bad rule in a range of cases, it is not necessarily better to depart from that rule in a few instances. Everything will depend, though, on the particular circumstances. Sometimes there will be no dislocations from injecting incoherence into a regime. Sometimes incoherence will cause dislocations, but that cost will be outweighed by the benefit of not applying a bad rule. So considerations of this kind seem to alert us to possible reasons for treating like cases alike in particular settings, rather than justifying the principle in general.

2. *Visibility and accountability.* These again are concerns in a bureaucratic setting. The idea is that overall processes of accountability will work better if an administrator maintains the coherence of the regime she is administering. If there is a rule that has been adopted, say, by a legislature or the head of an agency, it is better for the rule to be enforced in a fully coherent way, so that people will know what the rule is, and will know whom to hold responsible for it. Once we allow exceptions that blunt the force of rules that might be bad, we make it less likely that political debate will focus on those rules. This argument is easiest to see in the case of rules (as opposed to standards), but it is not limited to rules; it can apply to a statutory or common law regime characterized by a good deal of discretion, so long as the discretion is exercised coherently (in the sense defined above—according to principles that could all be avowed by a real person). If there is going to be rent control, or sovereign immunity, then there should be a uniform regime, and we will see whether people really want that regime or not.

Similarly, it will promote deliberation on criminal sentencing, for example, if people have a clear idea of what sentences are imposed. A regime characterized by disuniformity can, in a sense, prevent a debate from developing. So one argument for treating like cases alike, even when we aren't sure that the rule we're using is a good one, is that if we act that way, we are likely to get a fuller, better-focused debate about whether the rule is a good one. The uniform application will facilitate the operation of democratic processes, or other processes that might correct the error.⁶

⁶ This is one variant of the argument advanced in Justice Jackson's concurrence in the *Railway Express* case.

These arguments are surely sound in many settings. They may not have a great deal of weight, in the sense that they would not justify treating like cases alike when doing so meant perpetuating a significant injustice. But that is what we would expect—the principle of treating like cases alike has, as I said, no intuitive appeal when invoked in those circumstances. But these arguments based on visibility and accountability cannot be the whole story. That is because the principle that like cases should be treated alike seems plausible even in settings where fostering political debate, or visible decisions, is not an issue.

The question might arise, for example, not about the act of an administrator, but about a possible amendment to a statute. Should the tax laws be amended so that like cases are treated alike—so that transactions that are indistinguishable on any plausible moral or economic ground are treated the same way? Or should we resist such an amendment if we think the underlying principles, whose coherence the amendment would promote, are misguided? This seems to be a serious question, but the concerns about accountability and visibility are not implicated, at least not directly. Or the question might arise in a context in which it is just implausible to suppose that public debate is going to focus on an issue. For example, the issue may not be important enough to attract attention except among, say, administrators and interested groups who are deeply familiar with the area. They will be fully aware of what is going on and will focus on the issue even if there is incoherent implementation.

3. *Preventing arbitrariness and discrimination.* This concern seems to be more central to the principle. One reason we might insist that people treat like cases alike is that if they do not, there is a chance that they are acting in an arbitrary or a discriminatory

way—that is, that they are acting out of whim, or on the basis of illegitimate considerations. A judge who follows the sentencing guidelines may be imposing sentences that are not morally justified, but at least she is not discriminating against racial minorities. And, by the same token, perhaps the real concern about the disuniformity of the pre-guidelines discretionary sentencing regime was that it was produced not by varying conscientious judgments but by impermissible motives.

This justification explains why “treat like cases alike” is considered an aspect of the rule of law. One of the ideas behind the rule of law is that officials’ personal biases and preferences should not affect how the law is administered. When officials are under an injunction to treat like cases alike, we have a greater assurance that those biases and preferences are not operating. The inverse is not true. People who do not treat like cases alike may be acting entirely properly; they may be improving the world. But if we are very concerned about the possibility of arbitrary or discriminatory action, we are more likely to insist that like cases be treated alike.

So understood, the principle “treat like cases alike” is not really a moral principle. It might be called a prophylactic institutional norm. It is a principle that we might insist on in circumstances where we thought the danger of a certain kind of harm was very great. We might insist on the principle even though we know that it will produce bad consequences in certain cases. That is, deviations from the principle might make the world better; but the chances of that happening, and the possible gains, are small enough, and the risk of improper action great enough, to justify our insisting that the principle be followed across the board.

In this way, the principle “treat like cases alike” might be compared to “no person may be a judge in his own cause”—another famous principle that is identified with natural justice and the rule of law. Someone who is a judge in his own cause might not be biased; he might even bend over backward. And there might be something to be gained, in convenience or in familiarity with the situation, by allowing a person to be a judge in her own cause. But the possibility of bias is too great. The costs of “treat like cases alike” seem clearer, but the argument for the principle may be the same: it sweeps broadly to prevent biased decisionmaking.

IV. Fairness, Equality, and Reason-Giving

1. *What about fairness?* There are also arguments for treating like cases alike that are not contingent and instrumental. Perhaps the most straightforward intuition is that like cases should be treated alike because it is unfair to act otherwise. A person who has been treated wrongly may be willing to accept that outcome as just a misfortune. But if someone else, indistinguishable in relevant respects, is then treated differently, the wrong treatment becomes unacceptable. The complaint is usually put in terms of fairness.

It is easy to dismiss this objection. (Raz says about a similar argument: “The weakness of the argument is evident.”) Having treated one person wrongly, why isn’t it better, as it were, to cut one’s losses? How can it possibly be fairer to inflict a second injustice? Of course if the action in the first case was right, then other similar cases should be treated the same way, but just because it is, by hypothesis, right to do the same thing in those cases. The principle that like cases must be treated alike matters only when it is used as a reason to do something that might not be right. How can fairness require that?

Still, the intuition about fairness is strongly held. I think the basis for the intuition, though, is not a principle that like cases must be treated alike in the sense of coherence. That would encounter the objection that it is senseless to replicate a wrong decision. Rather, the “fairness” intuition can be seen as a demand that differences in treatment be justified by reasons. It is unfair to treat me differently from someone else unless there is a reason (a good reason, of course) for doing so. If there is a reason, then it is not unfair.

This principle—that differences in treatment must be justified by reasons—might be seen as a requirement of equality. No plausible conception of equality requires that everyone be treated the same; what equality requires is that differences in treatment be justified by reasons. What counts as a good reason is determined by the particular conception of equality—it might be something that would be acceptable in the original position, or something that could not be rejected by a reasonable person, or it might be a reason provided by a consequentialist view. But in any event, the idea that differences in treatment must be justified by reasons is an important one, and certainly intuitively plausible, at the least. I will assume it is correct for present purposes.

2. *Two kinds of reasons.* At first glance this requirement—that any differences in treatment be justified by giving reasons—might seem to be just another way of saying that like cases should be treated alike. It is not, though. That is because there are different kinds of reasons: reasons that identify ways in which the cases differ, and reasons that justify a process that might end up treating cases differently even though their characteristics are the same.

Suppose people who are indistinguishable in all relevant respects are treated differently by different juries or sentencing judges. Their treatment is a paradigm violation of the principle that like cases should be treated alike. But they can be given a reason: the reason is that decentralized decisionmaking of this kind has some advantages, and if we capture those advantages we will, unavoidably, end up treating like cases differently. This is, one might say, a procedural reason, not a substantive one. Instead of point to a morally relevant difference in the characteristics of the cases, it defends the different outcomes by showing that they are the product of a justifiable system. Of course, the system might not be justifiable. The advantages of decentralized decisionmaking might be outweighed by the disadvantages—dislocations, the risk of discrimination, and so on. But the question is just whether the advantages outweigh the disadvantages, and the mere fact that the decentralized system causes like cases to be treated differently—that it is incoherent in that sense, or “unprincipled” as some would say—does not count as a disadvantage.

Similarly, in the sovereign immunity or rent control examples, the official who introduces incoherence into the system—by departing from a regime that she believes is flawed—will cause like cases to be treated differently. But she too can give a reason, consisting of an explanation of her institutional role (which prevents her from making the system coherent and, by her lights, sound) and her reasons for the departure (which will be derived from her explanation of why the system is flawed). These too are procedural rather than substantive reasons in the sense I used before, because they do not rest on morally relevant differences between the cases. But again, if the reasons are good ones,

then the fact that the official is causing similar cases to be treated differently is not, by itself, a bad thing.

The crucial point is the difference between two kinds of reasons. The principle that like cases must be treated alike, in the version I am considering, demands a reason based on differences in the facts of the cases. If there are no such differences, then one individual could not have decided the cases differently. A system that decides the cases differently violates the principle that like cases be treated alike. But there is another category of reasons, of a kind that can be given even when there are no morally relevant differences in the characteristics of the cases. Those reasons have to do with, loosely speaking, the kind of system that is used. If the system is justifiable, then the fact that it causes like cases to be treated differently is acceptable. Moreover, there does not seem to be any reason to consider the fact that it treats like cases differently—that fact in itself, apart from consequences such as dislocations or discrimination—to be a count against it.

3. *Different jurisdictions.* Perhaps the point can be made clearer by considering people who are identical in all relevant respects except that they live in different jurisdictions—different nations, or even different localities within the same nation. It is common for people in that situation to be treated differently from each other in many respects. We do not automatically say that the difference in treatment is unacceptable because it is a violation of the principle that like cases be treated alike. We do not even automatically say that the difference is problematic.

It depends on whether the jurisdictional divisions are justifiable. Disparities between citizens of rich and poor nations might be morally wrong, if there is no adequate

reason for them. But in other circumstances differences between citizens of different nations, or between citizens of different subnational units, might be untroubling. The jury and criminal sentencing examples are analogous (in fact, they might be exactly the same thing: differences based on jurisdictional boundaries). They are not automatically troubling; it all depends on whether the jurisdictional boundaries are justified. If there are good reasons to have a class of decisions made by juries, then the mere fact of disparities—if unaccompanied by dislocations or other such consequences—should not matter.

An even clearer instance of differences that are the product of “jurisdictional” distinctions is the treatment of children who are born into different families. Two children who are identical in every other relevant respect might have entirely different fortunes because their parents have different values or make different judgments. As long as the parents’ actions are within the range of acceptability, we do not automatically consider this a troubling situation. Indeed, doing things otherwise—trying to make sure that similar children in different families are treated similarly, whatever their respective parents think—seems more problematic than accepting the different outcomes.

The reason for this difference in treatment is that important values are served by maintaining family autonomy. Those values have to do with the usefulness of decentralized decisionmaking (although that seems to be too clinical a way to put it, for families) and the importance and value of maintaining certain relationships. In a different and less obvious way, those same values might be implicated in other institutional arrangements that cause like cases to be treated differently, such as local governments and juries.

4. *Integrity and precedent.* Ronald Dworkin's well-known arguments for "integrity" would provide a separate reason for the principle that like cases must be treated alike. But at least insofar as those arguments might be used to support that principle, they seem, in the end, unconvincing, although in a way that sheds light on the issue.⁷

Dworkin begins by appealing to settled intuitions that it is unacceptable for political institutions, when faced with disagreement among citizens, to compromise by adopting "checkerboard" solutions that are not coherent—that is, compromises that split the difference arbitrarily, in a way that no plausible set of principles could defend. His principal example is a law that permits only women born on even-numbered days to have abortions. No one would seriously propose that solution to the abortion controversy, which, Dworkin says, demonstrates an intuition that laws should be coherent—in his terms, that "integrity" is a value.

This example is, however, not well chosen. Among other things, there are other compromises that would probably be preferred unanimously, by people on both sides of the issue, to the random allocation of abortion rights—such as allowing abortions in cases of rape or incest or allowing abortions in states where people wish to permit them. Those compromises are coherent; they could be accepted by a single recognizable individual. If Dworkin's example seems weirdly unacceptable—something, as Dworkin says, that no

⁷ Dworkin says that "integrity" is not the same as treating like cases alike, and integrity serves many other purposes in his account. His discussion is relevant here only to the extent that his arguments for integrity would also be arguments for treating like cases alike in the way in which I understand that notion. (Raz disputes that Dworkin's account has to do with coherence at all, but he is using a different definition of coherence. Raz does not think Dworkin's account succeeds, in any event.)

one would entertain—that is probably because it fails the noncontroversial Pareto criterion for social welfare functions: there are other options that are unanimously preferred. The example does not demonstrate that there is an intuitive belief in “integrity.”

A better example might be, say, a selective subsidy; the price of sugar is supported, but not the price of peanuts. No one can think of any basis for distinguishing between the two crops. If subsidies are a bad idea across the board, do peanut farmers have a legitimate complaint? Here, I think, intuitions are just not clear. There is some plausibility to the idea that the peanut farmers have a point. But there is not the overpowering intuitive case for “integrity,” or treating like cases alike, that Dworkin asserts.

Dworkin’s second argument is that “integrity” in the law is an aspect of a well-functioning political community, one that can support an obligation to obey the law, because if the laws are coherent, members of the community can “accept that they are governed by common principles, not just by rules hammered out in political compromise.”⁸ (Or, as he says at another point: “Political obligation is . . . a matter of . . . fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community’s scheme.”⁹) The problem here is not with the premise—which seems plausible—that political community, and political obligation, should rest on a coherent justificatory account. Rather the problem is the opposition between “common

⁸ Law’s Empire 211.

⁹ Id. at 190.

principles” and “rules hammered out in political compromise.” There is no reason that the “common principles” have to refer to outcomes alone. One of the common principles might be that political compromise, when reached through reasonably just institutions, is acceptable.

Political compromise is, by definition, not optimal: it would be better if the sugar growers did not get a subsidy either. But there is no reason that a commitment to a principled understanding of the political order requires us to extend the injustice from sugar consumers to peanut consumers. A compromised, partially mistaken decision can be acceptable if the procedures or institutions that produced it are acceptable. The principles that define the community can be principles about procedures, not just about substance. If that is right, then “integrity” does not require that like cases be treated alike. Citizens can give each other reasons for the laws.¹⁰

Dworkin’s third justification—not explicitly offered as such, but really at the heart of his project—is that “integrity” explains the kind of reasoning that is used in a common law system. Everyone agrees that sometimes judges should follow precedents, even if they think the precedents are wrong; why is that? Dworkin’s answer is that they have an obligation, other things equal at least, to maintain the “integrity” of the law. (He also has an account of when and how judges should depart from precedent, but that is not immediately relevant here.) But a notion of “integrity” is not needed to explain stare decisis. There are other, well-established explanations, rooted in the bounded rationality of judges and the impracticality of constantly reexamining issues. In fact, Dworkin’s

¹⁰ Raz’s criticism of Dworkin is, I believe, at bottom the same as this.

version of “integrity”—which he views as a distinctive virtue of political organizations—seems particularly inapt as a justification for following precedent, because nongovernmental organizations—including, for example, business firms, which are concerned only with maximizing profit and not with maintaining the kinds of communal bonds that Dworkin associates with “integrity”—also often follow precedent in their decisions.

V. Conclusion

It is easy to see why the principle that like cases must be treated alike is intuitively appealing. Often treating like cases alike will avoid other bad consequences. And like cases should not be treated differently without a reason: when cases are treated differently, the difference has to be justified. To the extent the principle “treat like cases alike” can be seen as raising a warning flag about possible problems when they are treated differently, or as demanding an explanation for differences in treatment, the principle is sound, and important.

But there is more than that to the principle, at least in certain conceptions. The principle “treat like cases alike” is usually thought to apply generally, not contingently. And the principle is often thought to demand a certain kind of reason, one that identifies a difference in the characteristics of the cases. When the principle is understood in that way, there does not seem to be a good justification for it. Instead, treating like cases alike can become a way of extending injustice unnecessarily. Odd as it might seem, it is, in that sense, a bad idea to treat like cases alike.

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