

## Concept, Principle, and Norm – Equality before the Law Reconsidered\*

Equality before the law leads a strange double-life. In public discourse it is an undisputed political ideal, by turns celebrated and taken so much for granted that it hardly merits mentioning. In a recent example, then US President Barack Obama responded to civil unrest and riots in the small town of Ferguson by asserting that all Americans are “united in common values” that include “equality under the law”.<sup>1</sup>

In academic debate, the principle of equality before the law faces almost the diametrically opposite situation. Generations of legal scholars and philosophers have dismissed the idea as trivial, misguided, or senseless. In Hans Kelsen’s classical formulation:

“[The particular principle of so-called equality before the law] means nothing else than that the judicial institutions shall make no distinction, which the applicable law does not itself make. [...] This principle has hardly anything to do with equality. It states only that the law shall be applied as it is meant to be applied. It is the principle of legitimacy or legality, which is immanent in the essence of any legal order, regardless of whether this order is just or unjust.”<sup>2</sup>

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<sup>1</sup> “But let’s remember that we’re all part of one American family. We are united in common values, and that includes belief in equality under the law; a basic respect for public order and the right to peaceful public protest; a reverence for the dignity of every single man, woman and child among us; and the need for accountability when it comes to our government.” Statement by the President, Edgartown, US, August 14, 2014. Barack Obama, *Statement by the President, Office of the Press Secretary*(2014), at <https://www.whitehouse.gov/the-press-office/2014/08/14/statement-president>.

<sup>2</sup> The original German reads: “Und nun gar das besondere Prinzip der sogenannten Gleichheit vor dem Gesetz! Es bedeutet nichts anderes, als daß die rechtsanwendenden Organe keine Unterschiede machen sollen, die das anzuwendende Recht nicht selbst macht. [...] Mit Gleichheit hat dieses Prinzip kaum noch etwas zu tun. Es besagt nur, daß das Recht so angewendet werden soll, wie es seinem Sinne nach anzuwenden ist. Es ist das Prinzip der Recht- oder Gesetzmäßigkeit, das jeder Rechtsordnung ihrem Wesen nach immanent ist, gleichgültig, ob diese Ordnung gerecht oder ungerecht ist.” Hans Kelsen, *Was ist Gerechtigkeit?*: 35-36 (Reclam. 2010); for related criticisms cf. Alf Ross, *Om ret og retfærdighed*: 371-372 (Nyt Nordisk Forlag. 1953); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 *California Law Review* (1974); Herbert Lionel Adolphus Hart, *The Concept of Law*: 160-161 (Clarendon Press. 1997); Peter Westen, *The Empty Idea of Equality*, 95 *Harvard Law Review* (1982); Peter Ingram, *Procedural Equality*, 21 *Archiv für Rechts- und*

Considering the attention equality before the law has received, both laudatory and critical, it is peculiar how fundamental disagreements about the content of the principle persist. The first ambition of this paper is to explore the various ways in which a principle of equality before the law can be understood and argue in favour of a specific, concise definition. With a clearer understanding of the principle in hand we are better equipped to assess the critique of the principle. Doing so is the second ambition of the paper. I will argue that much traditional criticism is unpersuasive, and develop a different, underappreciated argument against equality before the law. Finally, the discrepancy between public and academic assessments of the principle poses a puzzle. Is there really nothing important about the principle, to explain why so many feel so strongly attracted to it? The third ambition of the paper is to sketch an argument that there is a sense, overlooked by most critics, in which the principle does capture something important.

I shall attempt to realise these ambitions in that order, and so, we will begin by taking a closer look at what equality before the law means.

### **What do we talk about, when we talk about equality before the law?**

In this and the three subsequent sections of this article I will pursue the task of constructing a precise definition of the principle of equality before the law. I will first suggest that the principle is procedural and requires relatively sophisticated conceptions of likeness between cases and treatments, and next note the way normative properties are required to give content to the principle, before finally exploring when first cases and then treatments are alike.

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Sozialphilosophie (1985); Wojciech Sadurski, *Equality Before the Law: A Conceptual Analysis*, 60 *The Australian Law Journal* (1986); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity and Justice in Stare Decisis*, 105 *Yale Law Journal* (1996); Christopher J. Peters, *Equality Revisited*, 110 *Harvard Law Review* (1997); Fred Feldman, *The Irrelevance of Equality before the Law*, unpublished manuscript, <http://people.umass.edu/~ffeldman/EBLforLund2.pdf> (2004).

To begin we must recognize, I believe, that equality before the law has at least two fundamentally different meanings. On the one hand, it pertains to the rights and duties contained in positive law, i.e. the *content* of the law, and mandates something like the absence of certain distinctions in the distribution of these. On the other hand, it pertains to the practices of the courts, police officers, ministries, etc., i.e. the *process* of the law, and mandates something like the absence of certain distinctions in its application.<sup>3</sup> A state which, like Apartheid-era South Africa, enshrines racial differences in law will have violated the first sense, while a judge who allows racial prejudice to wittingly or unwittingly cloud her judgment in the application of racially neutral law will have violated the second. To distinguish the two we can usefully label the former as equality *in* the law; it is not my topic here, and I shall touch upon it only tangentially.<sup>4</sup>

The concept of equality before the law at stake, then, is procedural. It pertains to how legal institutions treat persons, specifically to whether such institutions treat persons equally or differently. Indeed, the concept of equality before the law is often summed up in what is sometimes referred to as an Aristotelian principle of justice that the court must “treat like cases alike”.<sup>5</sup>

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<sup>3</sup> Cf. Hart, fn. 2 *supra*: 159-167; Sadurski, fn. 2 *supra*: 131; Kasper Lippert-Rasmussen, 'Punishment and Discrimination', in *Punishment and Ethics*: 171-172, (Jesper Ryberg & J. Angelo Corlett eds., 2010).

<sup>4</sup> This is not because equality in the law does not pose interesting problems of its own. see e.g. John Gardner, *Liberals and Unlawful Discrimination*, 9 Oxford Journal of Legal Studies (1989); Tom D. Campbell, 'Unlawful Discrimination', in *Ethical Dimensions of Legal Theory* (Wojciech Sadurski ed. 1991); John Gardner, *Discrimination as Injustice*, 16:3 Oxford Journal of Legal Studies (1996); Oran Doyle, *Direct Discrimination, Indirect Discrimination and Autonomy*, 27 Oxford Journal of Legal Studies (2007); Andrew Sepielli, *The Law's 'Majestic Equality'*, 32 Law and Philosophy (2013).

<sup>5</sup> Cf. Ian Carter, *Respect and the Basis of Equality*, 121 Ethics: 541 (2011); Bert Heinrichs, *What is Discrimination and When is it Morally Wrong?*, 12 Jahrbuch für Wissenschaft und Ethik: 102 (2007); Westen, fn. 2 *supra*: 543; Joel Feinberg, *Noncomparative Justice*, 383 The Philosophical Review: 310 (1974); Peter Singer, *Is Racial Discrimination Arbitrary*, 8 Philosophia: 186 (1978). Like Christopher Peters, however, I am sceptical that the view can actually be attributed to Aristotle. Cf. Peters, fn. 2 *supra*: 2058. The passage most commonly cited to support the attribution seems to me to argue for adjusting the allocation of goods according to desert and, perhaps, subsuming the distribution of goods under the issue of justice in the first place. Cf. *Nicomachean Ethics*: 86-87, 1131b-1132a (Roger Crisp trans., Cambridge University Press. 2000). Feinberg, it is worth noting, is at places more careful in his reading; cf. Feinberg, *op cit.*: 303; 319.

We need, however, to clarify the notion of ‘treating like alike’. An initial definition might hold that an agent, i.e. the court,<sup>6</sup> treats the cases A and B equally, in the sense required for equality before the law, *iff*:

- 1) the agent performs action(s) F ( $\phi$ 's) with respect to both case A and case B,
- 2) cases A and B are relevantly similar (alike persons), and
- 3)  $\phi$ 'ing in the cases of A and B are relevantly similar actions (treating alike).<sup>7</sup>

However, the “relevantly similar”-conditions of this definition stands in need of clarification. Why are they necessary and how should they be understood?

To see first why the conditions are necessary consider the following two scenarios:

**25% Added Value:** All else equal, the court sentences any person with property P (P-persons) to periods of incarceration 25% longer than  $\neg$ P-persons, whenever it rules on a person found guilty of a crime that warrants prison.

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<sup>6</sup> I shall speak throughout of “the court” as an agent that “treats equally”, “punishes”, etc.. This is not because I assume that institutions can properly speaking be conceived as agents – perhaps they can, but I do not wish to rely on the assumption – but merely a form of shorthand for whoever we ought ultimately to consider the relevant agents, e.g. the judge, the jury, the lawyers, etc.

<sup>7</sup> Some may prefer a subjective version of the principle, where all that is required is that the agent *believes* the cases and/or treatment to be alike. I believe the objective version is the more plausible and intuitive of the two, and so I focus on that here, but since nothing of substance in the following will turn on the distinction, I invite readers who disagree to assume that we are discussing the subjective version instead.

*One Size Fits All*: All else equal, the court sentences P-persons to  $n$  months of prison, and  $\neg$ P-persons to  $n$  months of prison, whenever it rules on a person found guilty of a crime that warrants prison.<sup>8</sup>

Are these scenarios instances of equality before the law or not? It may be tempting to say that the first scenario exemplifies differential treatment while the second exemplifies equal treatment, and that as such the latter is an instance of equality before the law (at least supposing other conditions are met) while the former is not. In fact we ought to say that neither scenario contains sufficient information to conclude either way.

Our evaluation of *25% Added Value* will turn on whether we assume that P-persons and  $\neg$ P-persons are relevantly similar or not. If we imagine that P is a property the possession of which merits more severe punishment – suppose e.g. that P is ‘premeditation for the crime in question’ and that this in fact merits increasing punishment by 25% – then *25% Added Value* seems not to be an instance of differential treatment in the sense necessary to violate equality before the law.

Likewise, in *One Size Fits All*, if we suppose that P is itself pertinent to how the persons involved ought to be treated (e.g. premeditation again), then labelling it an instance of equality before the law looks like a mistake. P-persons and  $\neg$ P-persons are treated equally in one sense, but intuitively they have not met equality before the law.

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<sup>8</sup> Does the fact that these treatments distribute burdens and therefore also affect telic considerations, say of desert, beneficence and outcome-equality, make them unsuitable? I do not believe so – it is difficult to find good examples of deontic equality that do not – but if it aids the reader, I invite her to imagine that we are discussing instead how the court decides the admissibility of a piece of material evidence, estimates the reliability of witness-testimony, or some other such action.

As the above analysis shows, whether or not a scenario qualifies as equality before the law hinges on whether or not the cases are similar or dissimilar in specific ways. This leaves the qualification of relevantly similar actions to be motivated (and both to be clarified, but first things first).

Let us return to the scenarios. Suppose now instead that P is a property which plays no proper part in determining how the court ought to treat a person, say parentage (i.e. who are the offender's parents). This seems to make *25% Added Value* a paradigm instance of inequality before the law (and *One Size Fits All* the opposite), but explaining why is more difficult than one might think. After all, in one obvious sense, the actions of the agent are exactly the same in this variation as in the original scenarios, so that the treatment, it would seem, cannot be unequal now if it was equal before, and vice versa. On this reading, the premeditation version of *25% Added Value* involves treating like persons alike because the action at stake is something along the lines of "subjecting convicted offenders to a procedure of sentencing that differentiates on the basis of P", but on that interpretation of the action we could say the same of the parentage version of *25% Added Value*.

What if we say instead that *25% Added Value* is a case of treating unalikes unlike, since the persons are unlike with respect to possessing P and are treated differently in the sense of being punished differently, and allow that this too can suffice for equality before the law? Again it seems that we would be forced to say that the parentage version can also qualify, since this involves treating unalikes unlike in exactly the same sense.

What we need is a way of distinguishing treatment that we wish to classify as equal from treatment that we do not, specifically a way that will allow us to say that while the premeditation version of *25% Added Value* is an instance of equal treatment the parentage version is not. In Hart's apt formulation: "There is therefore a certain complexity in the structure of the idea of justice. We may say that it consists of two parts: a uniform or constant feature, summarised in the precept 'Treat like

cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different."<sup>9</sup>

### **How alike must a likeness be to be a likeness alike?**

The above conclusion will come as no surprise to egalitarians. After all, any egalitarian theory must define both the scope of the theory (i.e. the situations to which the principle applies) and the equalisandum (i.e. the currency of what is to be equalised). To spell out the scope and equalisandum in the present context is to ascertain what likenesses are and are not relevant to the principle of equality before the law.

Note first that we are concerned only with likeness in certain respects, since otherwise the demand would be impossible to meet. No two cases or treatments can ever be exactly the same. This cannot be taken to violate equality before the law as long as the differences are trivial. To be relevant to the principle such differences must be normatively relevant, that is, they must make a difference to which reasons the court has for acting. Treatments that do not differ in terms of the reasons the court has for or against that treatment, and cases that do not differ in terms of the reasons for action they give rise to, cannot differ in the light of the principle. This observation allows us to narrow our focus.

Note second that equality before the law is a comparative principle of justice. Non-comparative principles are capable of specifying what the right (or wrong) action or outcome is without reference to other outcomes or actions. Comparative principles on the other hand specify the proper outcome or action with reference to other outcomes or actions.<sup>10</sup>

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<sup>9</sup> Hart, fn. 2 *supra*: 160.

<sup>10</sup> Feinberg, fn. 5 *supra*.

Third, I shall need to adopt the following assumption. Let us suppose that for any case before the court there is some way that the court ought non-comparatively speaking to treat the case, and that the way it ought non-comparatively speaking to treat the case is determined by the (non-comparative) reasons that speak in favour of treating it in various ways. This is, I think, a minimal assumption, because while extant jurisprudential theories disagree about which reasons apply, what weight to attribute them, and how they interact, they typically agree by virtue of being jurisprudential theories that there are reasons that apply, the weight and interaction of which determine the way the court ought to treat a case, and this point is all that the current analysis requires. However, to include the possibility that these reasons do not single out a unique way of treating the case, let us say that they pick out the set of permissible actions, where it is possible that the set contains a unique action but not that it is empty.<sup>11</sup>

The above observations and assumption in combination gives us an answer to one part of the riddle: two cases ought, non-comparatively speaking, to be treated alike just when the set of permissible actions for case A is identical to the set of permissible actions for case B. This is, of course, a central point of Peter Westen's celebrated critique of egalitarianism, and so it remains to be seen whether we can define the principle in a way that avoids his conclusion that it is therefore "empty".<sup>12</sup>

## Alike cases

The next step is to determine when cases are alike in the sense relevant to equality before the law. Broadly speaking, cases can be alike in three different respects: they can share (non-normative, but

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<sup>11</sup> Note that the assumption is therefore deliberately neutral on the controversial issue of whether there are hard cases, i.e. cases where there is no unique action that the court ought to take. I leave open the possibility that sets of permissible actions contain more than one member partly so as to avoid having to take sides with Dworkin against this possibility. Ronald Dworkin, *Law's Empire* (Hart Publishing, 2006).

<sup>12</sup> Westen, fn. 2 *supra*: 1220.



normatively relevant) properties, there can be similar reasons for action in the cases, or the same action(s) can be permissible:<sup>13</sup>

*Equal cases 1:* Cases A and B are alike *iff* they share the set of properties that give rise to reasons for action.<sup>14</sup>

*Equal cases 2:* Cases A and B are alike *iff* they share the set of reasons for action.

*Equal cases 3:* Cases A and B are alike *iff* they share the set of permissible actions.

Among these options, we should prefer the third, I believe, for the simple reason that we can otherwise be forced to say that cases are unlike in a way that seems inconsistent with the principle of equality before the law. Suppose we have two cases with different properties that nonetheless give rise to the same set of reasons. If we adopt the first option we must classify them as unlike, and since they are unlike we must require that they be treated differently for equality before the law to obtain. This cannot be right. The same problem pertains to the second option, where cases that share permissible actions, but not reasons, must then be treated unlike. The second option must therefore also be rejected.<sup>15</sup>

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<sup>13</sup> Note that we constrain the properties here, because e.g. “being a case in which the court ought to  $\phi$ ” is a (moral) property, but including it and other moral properties will prevent us from cleanly separating the three possible ways of comparing cases. I assume that a property is normatively relevant *iff* it will give rise to reasons for treating the case one way or another

<sup>14</sup> Two such cases will, of course, thereby also share the sets of reasons and permissible actions, just as two cases that share the set of reasons, but not properties, will thereby also share the set of permissible actions.

<sup>15</sup> Some might now raise the objection that I have not defended the idea that different sets of properties can give rise to the same reasons, and different sets of reasons to the same permissible action(s). If either or both of these claims are false, the objector might say, then we have no reason to prefer the third option. My response would be that, although I have not defended the claims, my argument here does not rely on them. All we require is that it is conceptually possible for the claims to be true, which I take it few will deny, since this allows us to imagine a situation in which differences in properties or reasons force us to classify cases as unlike, as per above. This possibility is what shows that the likeness of cases pertains to permissible actions, not properties or reasons.

Two cases are thus alike in the sense required for equality before the law *iff* they share the set of permissible actions, that is, if the court ought non-comparatively to treat them the same. The property of likeness between cases supervenes on the distinction between the action(s) that the court ought and ought not to perform, or in Joel Feinberg's words: "...a non-comparative principle of justice determines the criterion of relevance for the application of the otherwise formal principle of comparative justice for certain contexts."<sup>16</sup>

On this analysis the cases in the premeditation version of *25% Added Value* are unlike, even if we can truthfully describe the court's action as permissibly applying a procedure that distinguishes between P-persons and  $\neg$ P-persons, since the set of permissible actions for the case(s) of P-persons includes the action of punishing more severely, while the set of permissible actions for the case(s) of  $\neg$ P-persons does not. In the same vein, the parentage version involves alike cases, no matter how we describe the action that the court performs.<sup>17</sup>

## Alike treatment

This clarifies only the first and least complex half of the principle however. We still need to specify when two treatments are alike. A first and tempting suggestion is to say simply:

*Equal treatment 1:* A court treats two cases alike *iff* the court  $\phi$ 's in case

A and  $\phi$ 's in case B.

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<sup>16</sup> Feinberg, fn. 5 *supra*: 313. Peters makes the same point: "Identity of situation is defined by reference to criteria for the treatment in question. If persons are identically entitled to the relevant treatment, they are "identically situated" under our expression of equality." Peters, 1996, fn. 2 *supra*: 2059. Cf. also Phillip Montague, Comparative and Non-comparative Justice, 30 *The Philosophical Quarterly*: 135 (1980); Joshua Hoffman, A New Theory of Comparative and Non-comparative Justice, 70 *Philosophical Studies*: 167 (1993).

<sup>17</sup> The same observations hold true, *mutatis mutandis*, for *One Size Fits All*. Note also that a benefit of the definition is that it can account for our intuitions in cases where relevant circumstances of the cases change, e.g. because the legislature votes into effect an amendment to a body of law. Intuitively, if courts follow the rules and treat otherwise similar cases differently before and after the amendment, this ought not to constitute procedural inequality, and on the suggested definition it does not.

Recall, however, that we could accurately describe both the premeditation and parentage versions of *25% Added Value* as “subjecting convicted offenders to a procedure of sentencing that differentiates on the basis of P”, and on the above definition it appears we must say that the cases were treated alike in both scenarios. An obvious remedy is the following:

*Equal treatment 2:* A court treats two cases alike *iff* 1) the court  $\phi$ 's in case A and  $\phi$ 's in case B, and 2) the court acts as it non-comparatively ought to in each case (i.e. performs one of the actions from the set of permissible actions).

This appears to be a natural extension of the point made above about when cases ought non-comparatively to be treated alike. A court *ought* to treat two cases alike *iff* the cases are alike, so surely the court *will* treat cases alike when the court performs the same action and this action is what it ought to do in each case.

It has the further virtue of potentially explaining why the parentage version of *25% Added Value* does not qualify as equal treatment, even when described as applying a similar procedure to the two cases. Arguably, doing so is permissible in the case(s) of  $\neg$ P-persons, but it is clearly impermissible in the case(s) of P-persons, who will be subjected to an unjustly increased punishment as a result.

However, I believe this suggestion overlooks an important feature of equality before the law, which is that the principle can be observed even when the court fails to treat cases as they ought non-comparatively to be treated.

It seems reasonable to suppose that courts can and do fail to treat cases with non-comparative justice. As an obvious example, most theories of criminal justice hold that there is some particular level of just punishment for any given crime, which at most falls within a narrow range. Given that liberal

states employ widely different levels of punishment for comparable crimes, at least some of them thus over- or underpunish, and thereby fail to satisfy non-comparative principles of justice. But we might want to maintain that such systems satisfy equality before the law nonetheless, supposing that they apply the non-comparatively unjust punishments in a way that respects comparative procedural justice.

We can revise the definition as follows to accommodate this point:

*Equal Treatment 3*: A court treats two cases alike iff 1) the court  $\phi$ 's in case A and  $\phi$ 's in case B, and 2) the court does not have more reason to  $\phi$  in case A than it does to  $\phi$  in case B, or less reason to  $\phi$  in case A than it does to  $\phi$  in case B.<sup>18</sup>

Clearly these conditions are met when the court performs an action that it ought to perform, but the revised definition makes room for the possibility that, even when the court fails to perform one of these actions it still treats the cases equally when its action in one case is neither (non-comparatively) better nor worse than its action in the other.<sup>19</sup>

There remain two problems. First, the definition above does not preclude describing the actions of the court in the premeditation version of *25% Added Value* as applying the same procedure in both cases, an action that we can reasonably suppose it has equal reasons to perform. This gives us the

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<sup>18</sup> Note that an action's "having reason to  $\phi$  in case A and  $\phi$  in case B" here denotes the result of weighing and comparing the applicable reasons, so that a court may be said to have a certain level of reasons to  $\phi$  even when these reasons are weaker than the reasons supporting another action, or when the reasons makes the action all-things considered impermissible. As an example, a person can, on this terminology, be said to have more reason to cause unjustified harm of a certain severity than to cause even more severe unjustified harm, because there are stronger reasons *against* performing the latter.

<sup>19</sup> Is there space for supererogatory actions in the context of the court's treatment of cases? Those who want to answer in the affirmative, and who may for that reason have bristled at the way in which I have hitherto identified actions that the court ought to perform with actions that are permissible, will presumably find that this definition has the added advantage of accommodating their view. On the present definition a court that has a range of permissible actions, some of which it has stronger reason to perform than others, will fail to treat two cases equally if it performs two actions that differ in this respect.

intuitively unsatisfying result that the premeditation version is treating unalikes alike, and the parentage version is treating alikes unlike, which suggests that the two are equally a violation of equality before the law. This cannot be right, and so the definition still requires amendment.

Furthermore, consider the original version of *One Size Fits All*, where the court imposes similar sentences on cases that ought to be treated differently. Clearly, the cases are unlike, since the actions the court ought to perform are different, but the above definition entails that the cases are treated unlike, since although the court  $\phi$ 's in both cases, it must either have more or less reason to  $\phi$  in one of them. This does not sound right – surely treating two cases exactly the same should qualify as treating alike.

It might appear that we are at an impasse – a simple requirement for identical actions does not rule out describing the action of differentiating as treating alike, a condition that the actions be permissible rules out non-comparatively unjust comparative justice, and a condition of equal reason for the actions rules out equally treating unlike cases.

However, the actions that have hitherto caused so much trouble involve distinguishing on the basis of a property, one which is relevant when premeditation, which is to say that it has an effect on how the court ought to treat the case, and normatively irrelevant when parentage. Given that we are attempting to define treating alike, it should come as no surprise that the definition will flounder if we allow the actions at stake to include actions that differentiate between the cases. This suggests that we should say instead:

*Equal treatment 4:* A court treats two cases alike iff 1) the court  $\phi$ 's in case A and  $\phi$ 's in case B, and 2)  $\phi$ 'ing does not require the court to distinguish on the basis of a property that case A and case B do not share.

Call actions that meet condition 2 of this definition “non-discriminatory actions”.

Applying this analysis to the two scenarios yields intuitively satisfactory answers. The premeditation version of *25% Added Value* involves treating unlike cases unlike, since the two cases do not share sets of permissible actions (the court ought to punish premeditated crime more severely), and the court’s treatment must either be described as different actions (punishing less in one case and punishing more in the other), or as one action which requires the court to distinguish on the basis of P. The parentage version, meanwhile, involves treating like cases unlike, since the court’s treatment mirrors the treatment in the premeditation version, while the two cases now share sets of permissible actions.

Conversely, the premeditation version of *One Size Fits All* involves treating unlike cases alike, since the cases do not share sets of permissible actions but the court performs the same action, one which does not require the court to distinguish between cases on the basis of P. Finally, the parentage version of *One Size Fits All* involves treating like cases alike, since the two cases share sets of permissible actions and are treated the same.

Have we lost anything along the way? I believe there is one intuitively appealing sense, in which the original version of *25% Added Value* instantiates equality before the law because it involves treating like cases alike. It is this sense that is captured by *Equal treatment 3*’s condition that the court does not have more reason to  $\phi$  in case A than it does to  $\phi$  in case B, or less reason to  $\phi$  in case A than it does to  $\phi$  in case B, that is, the court treats cases equally when it does no more and no less wrong in one than in the other. As we have seen in our analysis of *One Size Fits All* this condition provides strongly counterintuitive answers in some cases of what we would like to call treating unlike cases alike. But if possible we should be able to account for the intuitive appeal of the way *Equal treatment*

3 allows us to analyse *25% Added Value*. I believe there is a way of doing so, but I will postpone presenting it to the end of the next section.

This concludes the analysis of when cases and treatments are alike. The answer is a surprising inversion of what one might expect, in that equality of treatment, which involves actions, is defined without direct reference to normative factors, while equality of cases, initially identified by their descriptive properties, is defined with respect to permissible actions. The normativity involved, however, is strictly non-comparative, and as such we have yet to touch upon the normative content of the principle of equality before the law itself. It is to this topic that I shall now turn.

### **What *exactly* does a principle of equality before the law claim?**

Having settled the necessary conceptual issues, let us see if we can give clearer shape to the normative content of the principle of equality before the law. At its most basic, a principle of procedural legal equality will hold that a court ought to treat a case in a certain way if similar cases have been treated that way before. It need not, however, claim that the principle overrides all other concerns, so the “ought” is best understood as a claim that there is a *pro tanto* reason of comparative justice to perform the action.<sup>20</sup>

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<sup>20</sup> Cf. Peters 1997, fn. 2 *supra*: 1227: “[T]he alleged prescriptive strength of equality need not be absolute. [...] The egalitarian may believe that although the incorrect treatment of X is a reason favoring incorrect treatment of Y, other reasons exist that disfavor such treatment - reasons that outweigh the reason provided by equality.” Kent Greenawalt, “*Prescriptive Equality*”: *Two Steps Forward*, 110 *Harvard Law Review* (1997): 1270: “If the principle of prescriptive equality has normative force, it “reinforces” and “pulls against” independent reasons...” Schauer makes the related point for a doctrine of precedent: “To say that precedent provides a reason for deciding in a particular way is not to say that following precedent is what we should always do, all things considered.” Frederick Schauer, *Precedent*, 39 *Stanford Law Review* (1987): 592. Note also that this appears to be the stumbling block upon which Peter Westen’s analysis ultimately trips. In his reply to Greenawalt, he comes eerily close to formulating the principle as I here set it out only to reject it as “untrue” because he believes it “tells us we should do something we know we should not do, that is, to take people who are entitled to certain treatment and either give them that treatment or not give them that treatment.” Peter Westen, *To Lure the Tarantula from Its Hole: A Response*, 83 *Columbia Law Review* (1983): 1193. Although he is right that this implication would make the principle implausible, it follows only if the principle provides the court with a decisive reason that renders all other reasons irrelevant. In places Peters appears to make a similar mistake, when claiming that egalitarian justice must be “incoherent”; cf. Peters 1997 fn. 2 *supra*: 1249-1250, also fn. 45 below.

Further, the principle must hold, I think, that there is stronger reason to treat a case in a particular way the greater a proportion of similar cases have been treated that way. One argument for this understanding of the principle is that it seems intuitively right, that the amount of like treatments ought to affect the strength of the reason. Another is that this proportionality equips the principle to deal with a potential problem identified by Christopher Peters, which arises in situations where the court has treated equal cases in at least two different ways, since then “[e]quality contradicts itself because it is not possible to treat certain people equally in one way without treating other people unequally in another way.”<sup>21</sup> In short, if the principle holds that there is an equal strength reason to treat a case in any way that similar cases have been treated, then any exception from a practice of φ’ing with respect to a type of case would leave the court with equally great reasons of procedural legal equality to follow either the mainstream or the exception.<sup>22</sup> To avoid this, a principle of procedural equality must hold that the proportion of equal treatment matters to the strength of the reason.<sup>23</sup>

Finally, in order to distinguish the reason at stake from those relevant to non-comparative justice, the principle must hold that the reason at stake is the result of the treatment of other cases. That is, the reason is a reason for treating the case at stake in a particular way *just because* alike cases have been treated that way.<sup>24</sup>

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<sup>21</sup> Peters 1996, fn. 2 *supra*: 2068.

<sup>22</sup> What about the notion familiar from doctrines of precedent that the most recent way of treating alike cases should carry added or even exclusive weight on how the present case ought to be treated? Whatever its merits it seems to me to involve a very different principle to the one at stake, one which must be both defined and defended independently and I shall not discuss it here. It is worth mentioning, however, that I do think some of the challenges to the principle of equality before the law discussed below would apply to it too.

<sup>23</sup> Note that we need not hold that the reason to treat a like case like a minority of like cases have been treated disappears. We can say rather that it is outweighed by the reason to treat it like the majority of like cases have been treated, but that the ratio between majority and minorities influences the strength of the reason to prefer treating the present case like the majority. This allows that only in situations where no majority exists would the reasons cancel out, which seems intuitively right.

<sup>24</sup> Cf. Peters 1996, fn. 2 *supra*: 2062: “[T]he “true” norm of equality [...] holds that *the bare fact that a person has been treated a certain way is a reason in itself for treating another identically situated person the same way*” (emphasis in original). Also Schauer, 1987, fn. 20 *supra*: 571: “The previous treatment of occurrence X in manner Y constitutes, *solely*



Putting the elements of the prior analysis together, we might sum up the principle of **procedural legal egalitarianism** as follows:

There is at least a *pro tanto* reason for a court to prefer performing the non-discriminatory action  $\phi$  which has been more frequently applied to cases that share the set of permissible actions, to treating it by performing any action  $\neg\phi$  which has been less frequently applied to such cases, all else being equal, just because  $\phi$  has been more frequently applied to cases that share the set of permissible actions, the strength of this reason being directly proportional to the proportion of such cases that have been treated by  $\phi$ 'ing.

Conversely, one might hold **procedural legal non-egalitarianism**:

There cannot be a reason for a court to  $\phi$  in a case C just because fewer or more cases that share the set of permissible actions have been treated by  $\phi$ 'ing, all else being equal.<sup>25</sup>

While I believe this captures the essential features of the principle, a few clarifications and caveats are in order.

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*because of its historical pedigree*, a reason for treating X in manner Y if and when X again occurs” (emphasis in original). Deborah Hellman also cites Gerald Postema in support of this point. Cf. Deborah Hellman, 'An Epistemic Defense of Precedent', in: Christopher J. Peters (ed.) *Precedent in the United States Supreme Court* (Springer Netherlands. 2013): 64. <sup>25</sup> These principles borrow heavily, as I am sure is obvious, from the discussion of what Larry Temkin has dubbed “The Slogan”. Cf. Larry S. Temkin, *Inequality*: 248 (Oxford University Press. 1993); Larry S. Temkin, 'Equality, Priority, and the Levelling Down Objection', in *The Ideal of Equality* (Matthew Clayton & Andrew Williams eds., 2002); Derek Parfit, 'Equality or Priority', in *The Ideal of Equality* (Matthew Clayton & Andrew Williams eds., 2002): 98-99, 110-115. Recall however, that unlike in the debate between egalitarians and prioritarians we are dealing with procedural equality, a subspecies of deontic egalitarianism, rather than the telic concern over equality in the distribution of goods between persons. cf. Parfit, *op cit.*: 88-90.

First, the stated principle remains jurisprudentially neutral, broadly speaking, but it does assume that the principle of equality before the law is at least potentially a kind of principle which could give the court (comparative) reason for action. If one holds e.g. both that 1) the principle of equality before the law is a moral, not a legal principle, and that 2) moral principles do not give rise to reasons for a court to act in a certain way, then the principle of equality before the law can be dismissed out of hand.<sup>26</sup> I see no reason to think that this is the case, nor how one could plausibly argue that it was, but since I will not argue against it here, I shall simply adopt the assumption.

Second, as stated the principle is strictly backward-looking. This seems to me to be how the principle is typically conceived, but as Kent Greenawalt has argued, there may be reason to question whether this is its most plausible form.<sup>27</sup> Consider:

*Future likeness:* the court has historically treated alike cases  $C_1, C_2 \dots C_n$  by either  $\varphi_1$ -ing or  $\varphi_2$ -ing, with slightly more cases subjected to  $\varphi_1$ .  $\varphi_1$  and  $\varphi_2$  are non-comparatively speaking equally just treatments of C-cases. The court also knows that independent of its present treatment a much larger number of future C-cases will be treated by  $\varphi_2$ -ing than by  $\varphi_1$ -ing.

The strictly backward-looking principle will hold that equality before the law gives the court reason to  $\varphi_1$  in the present situation. This sounds odd, because the future treatment of other cases ensures that  $\varphi_2$ -ing will be the most common treatment, and that the number of cases treated alike will therefore overall be greater if the court presently  $\varphi_2$ 's rather than  $\varphi_1$ 's. If we want to avoid this, the

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<sup>26</sup> Note that I do not assume, nor need to assume, that equality before the law is a legal principle. Only that it is a type of principle that, whether legal or moral, is at least potentially capable of giving reasons for the court to act. I say "potentially" to include the possibility that the principle does not in fact give such reasons, e.g. because it happens to be false.

<sup>27</sup> Greenawalt, 1997, fn. 20 *supra*: 1271-1272.

principle will have to be both forward- and backward-looking, or time-indifferent. A similar point can be made with respect to counterfactual cases, and we may therefore want to extend the principle to cover alike cases that the court *would* treat by  $\phi$ 'ing, were it to treat these cases, even though it neither has nor will.

Next, we might want to be able to say that equality before the law obtains with respect to certain elements or features of a case even if not with every element or feature of the case, and presumably we would then want to say that the principle is fulfilled in this particular respect. Hence, we should distinguish between total and dimension-specific equality before the law. The principle can be suitably modified by saying that there is a reason to treat a case C with respect to D by  $\phi$ -ing, if similar cases have been treated by  $\phi$ -ing with respect to D, where D covers one or more dimensions of the case.

Further, I have formulated the principle as claiming no more than a *pro tanto* reason, but it is of course possible to imagine both stronger and weaker versions. At one end of the spectrum, the former might resemble a strict doctrine of precedent, where the principle claimed a *decisive* reason for whatever treatment has been applied to the greatest proportion of past cases. At the other end of the spectrum, the latter could resemble what Derek Parfit calls moderate egalitarianism, where the principle would claim a reason so weak that it will always be outweighed by competing reasons, so that it will never make a difference to what the court ought to do *all things considered* whether more or fewer cases have been treated with the same procedure.<sup>28</sup> Since the criticism I will turn to presently applies irrespective of the strength of the principle it makes no difference which version we adopt, but

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<sup>28</sup> Cf. Parfit, fn. 21 *supra*: 111-114.

because it seems to me the most plausible I shall continue to focus on the *pro tanto*-version stated above.<sup>29</sup>

Finally, although treating like cases alike seems to me the paradigmatic requirement of the principle, and treating like cases unlike the paradigmatic violation, some might want to demand more of the principle of equality before the law than the above. Thus, Hart argues that for what we mean by procedural equality to be adequately captured by the maxim “treat like cases alike”: “...we need to add to the latter ‘and treat different cases differently’.”<sup>30</sup> We could accommodate this simply by adding a further condition to require that the treatment of unlike cases be unlike, but we presumably need to be more specific than this.

In fact, what we need, I think, is something like the second condition of *Equal treatment 3*, which held that cases are treated alike only if the court does not have more reason to  $\phi$  in case A than it does to  $\phi$  in case B, or less reason to  $\phi$  in case A than it does to  $\phi$  in case B. In this case, a suitably modified version of the condition would hold that for equality before the law to obtain unlike cases should be treated unlike in such a way that court does not have more reason to  $\phi_1$  in case A than it does to  $\phi_2$  in case B, or less reason to  $\phi_1$  in case A than it does to  $\phi_2$  in case B.<sup>31</sup>

Call the original principle of equality before the law defined at the beginning of this section a *narrow* principle of procedural legal egalitarianism, and let us say that a ***wide principle of procedural legal egalitarianism*** adds the following:

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<sup>29</sup> That is, I assume that there cannot be a decisive reason to  $\phi$  if there is not a *pro tanto* reason to  $\phi$ , and thus, that if the stated version fails, e.g. because it turns out to be implausible, then this means that the strict version fails too.

<sup>30</sup> Hart, fn. 2 *supra*: 159; cf. also Feinberg, fn. 5 *supra*: 310; Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 *Columbia Law Review* (1983): 1173-1175.

<sup>31</sup> Why not simply require that the court treats each case as it ought? Because, again, we presumably want to maintain that equality before the law could obtain even under conditions of non-comparative injustice, so long as the cases are treated with comparative justice.

There is at least one *pro tanto* reason to prefer treating a case by performing a non-discriminatory action  $\phi$  for which the court has no more and no less non-comparative reason than it did for performing actions  $\neg\phi$  in unlike cases, all else being equal, the strength of this reason being directly proportional to the proportion of unlike cases that have been treated with such actions  $\neg\phi$ .<sup>32</sup>

Two potential problems are raised by moving from the narrow to the wide principle. First, the wide principle of equality before the law involves two separate reasons. Some may consider this unsatisfactory, particularly since it appears to suggest that there could be situations in which the reasons conflict, and the principle would then pull in two different directions at once. Second, the way the principle relies on weighing reasons for the purposes of comparing unlike cases raises the question of whether (other) comparative reasons should themselves count in this weighing. That is, when deciding how strong the reasons for and against an unlike case is, should whether and to what extent this case has received treatment similar to the treatment of alike cases, make a difference?

Intriguing as these problems are, however, I set them aside for the present. Partly this is because exploring them would take me beyond the scope of the present article, and partly it is because I believe doing so is unnecessary. As Frederick Schauer notes, there is no logical connection between the narrow and the wide principle; the two appear to be related but independent.<sup>33</sup> However, the problems that the narrow principle encounters in the next section would affect the wide version as well. Thus,

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<sup>32</sup> Note that the target of comparison has thereby shifted. The narrow principle compares with and prefers actions that have most frequently been performed. The wide principle compares with and prefers strengths of reasons for action that have most frequently obtained. However, strengths of reasons cannot differ for the same action when comparing alike cases, so it is possible that the focus on comparing actions in the narrow principle works because frequency of actions piggybacks on frequency of strengths of reasons there, and that the two versions of the principle are thus ultimately concerned with the same type of comparison.

<sup>33</sup> Frederick Schauer, *Profiles, Probabilities and Stereotypes* (Belknap Press. 2003): 201-203.

while I take no stand for or against the wide conception of the principle, I shall restrict my attention to the narrow conception of the principle.

## Procedural legal egalitarianism and its discontents

Having finally given clear shape to the principle, it is time to confront its critics. So far, I have argued that cases are alike when the court ought to perform (one of) the same action(s) in each case, that treatment is alike when it consists of identical actions that do not require the court to distinguish on the basis of a property cases do not share, and that the (narrow) principle of equality before the law claims that there is a *pro tanto* reason to perform an action if it will constitute alike treatment of alike cases. This clarifies the principle, but we have yet to assess whether it is attractive or even plausible.

In this section I will argue that traditional criticisms of the principle fail, but that a different line of critique shows the principle to be false. I am not the first to pursue this line of argument – it has been developed at length by Christopher Peters.<sup>34</sup> It seems to me worth revisiting however, both because misconceptions about the principle persist, and because we can provide further clarification to certain details of the principle and the debate surrounding it.

Recall that, as I noted at the beginning of this article, the principle has had numerous critics. Even the moderately sympathetic Hart holds against equality before the law that: “To say that the law against murder is justly applied is to say that it is impartially applied to all those and only those who are alike in having done what the law forbids; no prejudice or interest has deflected the administrator from treating them ‘equally’. [...] The connection between this aspect of justice and the very notion of

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<sup>34</sup> Peters 1996, fn. 2 *supra*, and, Peters 1997, fn. 2 *supra*. Peters himself modestly claims that his work “...is an effort to carve a new path through very well-trodden territory - always a difficult task, and one that should inspire a healthy dose of humility in those who attempt it. I thus have no illusions that the analysis this Article offers is comprehensive, unassailable, or entirely original. I hope only that it contributes in some positive way to the current thinking about its subject.” Peters, 1997, *op.cit.*: 1214. These admirably honest observations undoubtedly apply double to the present article.

proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice.”<sup>35</sup>

The general problem adduced by critics is the following: since the equal treatment required by the principle of equality before the law applies only to cases that are alike, that is to cases that ought to be treated equally on non-comparative grounds, how can the principle requiring equal treatment add anything to the situation? But beyond this intuitive concern, critical approaches divide on a number of issues.

First, critics differ on what alternative principle they rely on to undermine equality before the law; second, on whether they argue that equality before the law means or is entailed by the alternative principle; and third on whether this leads equality before the law to be trivial, senseless, or false. It will be useful to discuss these elements of the critiques in reverse order, since this will allow us to better understand the way critics proceed and to dispense with one more easily dismissed type of challenge before discussing a more complex one.

Let us first consider briefly the conclusions that critics argue for. We find at least three different claims in the literature: that equality before the law is trivial, that it is senseless, and that it is false. The first of these would be the case, I take it, if it turned out that the principle was true, but its truth was guaranteed by a wider and more fundamental principle so that equality before the law added nothing to the normative landscape. The second would be the case if the principle turned out to be incapable of being true, that is, if it became apparent that despite its taking the shape of a truth-apt proposition, it did not actually express an idea that could be true. Finally, the third would be the case if the principle was both substantial and truth-apt but simply expressed a proposition which was not

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<sup>35</sup> Hart, fn. 2 *supra*: 160-161.

true. These differences between the conclusions are important because the arguments necessary to derive them are distinct, and we shall bear them in mind below.

Next, consider what alternative principles are at stake in the criticisms I have cited so far. As we have seen these are often phrased in terms of the “generality of rules” and the “principle of legality”, but I believe we can boil them down to three requirements that allow for the broader range of reasons I have included. One claims that the court must act in accordance with the non-comparative reasons it has for action. Call this the positive requirement of reason. A second claims that the court must not act in accordance with non-existent or inapplicable reasons for action. Call this the negative requirement of reason. A third claims that the court must recognize that one or more specific properties give non-comparative reasons for action and that one or more specific properties do not; the most obvious example of the former is a legal rule, while examples of the latter include simple numerical identity, personal animosity, and race. Call this the identification requirement of reasons. Obviously, one can hold that two or all three of these requirements apply.

### **Two anti-egalitarian strategies that fail**

Now let us consider the two strategies. The first of these claims that, properly interpreted, equality before the law just means one of these requirements. Call this the semantic-identity strategy of criticising equality before the law. It is sometimes difficult to be certain which strategy a critic has in mind, but the following passage from Wojciech Sadurski seems to me exemplify this approach: “Equality in the application of legal rules *means* nothing more than that only differences which are relevant (from the point of view of the legal rule) should be taken into account when this rule is applied or enforced. It is the legal rule (and not, say, a judge’s whim) that determines which differences are relevant. Equality before the law *means*, therefore, correct application of the law –



and nothing more.”<sup>36</sup> The argument as I understand it is that equality before the law is semantically identical to what I called the negative requirement of reason above, and the conclusion that equality before the law is therefore trivial or senseless (I am not quite certain which of these Sadurski intends).

What are we to make of the semantic-identity strategy? It seems to me that while it may be true that we sometimes employ ‘equality before the law’ as a convoluted way of expressing one or more of the three requirements I sketched above, it is certainly also conceived along the lines I have developed in the first half of this article.<sup>37</sup> What this suggests is that the semantic-identity strategy can at most constitute an argument for the superiority of this conception over the others.

However, the conception of the principle of procedural legal egalitarianism I have defined is also independently preferable to a conception that equates equality before the law with one of the three requirements offered by critics. If we take seriously the notion that equality before the law is an *egalitarian* principle, and recognize that such principles are comparative by nature, then the conception I have defined is superior simply because it is comparative while the three requirements are not.<sup>38</sup>

The second strategy argues, roughly, that equality before the law is guaranteed by one or more of the three requirements, and that it can therefore be rejected (as trivial, senseless, or false). Call this the guaranteed-satisfaction strategy of criticising equality before the law. Consider again a formulation by Sadurski: “The principle of equal treatment of equal persons is a necessary consequence of the

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<sup>36</sup> Sadurski, fn. 2 *supra*: 132, my emphasis. Cf. also Kelsen *op.cit* p.1, Ross, fn. 2 *supra*.

<sup>37</sup> Cf. Greenawalt, 1997, fn. 20 *supra*: 1268-1269, on whether (what I label) the principle of legal procedural egalitarianism is best conceived as part of or separate from other conceptions of “formal” equality.

<sup>38</sup> Cf. Carl Knight, *Describing Equality*, 28 *Law and Philosophy*: 335-338 (2009); Peters, fn. 2 *supra*: 1223-24 (1997). In fairness to Sadurski, Ross, Kelsen, and their compatriots, the argument can be read as a more restrictive conditional claim, that *if* one accepts their broader analysis of law, *then* the only conception of equality before the law that has not already been ruled out is the one that is then subjected to critique. Since this reading presupposes that there is a convincing argument against the conception I have developed, we will not be in a position to evaluate whether it would leave their overall argument better off until we have explored the second strategy.

*general* nature of any rule which calls for certain treatment of certain situations. The generality of a rule consists in its application to all future cases governed by that rule. The very essence of a rule is that it brings specific situations under a general scheme; hence all equal persons (equal, that is, from the point of view of that rule's criteria of classification) must be treated in the same way. Equal treatment of equal persons is therefore nothing else but the *correct* application of a general rule.”<sup>39</sup>

The structure of the argument is as follows:

- 1) the principle of equality before the law is satisfied *iff* like cases are treated alike, i.e. the court performs the same action in cases with identical sets of non-comparatively permissible actions,
- 2) a court that acts in cases on the non-comparative reasons it has to act in these cases (positive), and/or does not act in cases on reasons it does not have to act in these cases (negative), and/or recognizes which properties {P<sub>1</sub>, P<sub>2</sub>...P<sub>n</sub>} do and do not give reason to act in cases (identification), will perform a non-comparatively permissible action in each case,<sup>40</sup>
- 3) a court that satisfies the positive, negative and/or identification requirements will satisfy the principle of equality before the law (from 1 and 2),

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<sup>39</sup> Sadurski, fn. 2 *supra*: 132 (emphasis in original); cf. also Hart, quoted above; Westen, fn. 2 *supra*: 550-551; Winston, fn. 2 *supra*: 10.

<sup>40</sup> The strongest version of the premise holds that all three requirements apply. Indeed, the identification requirement is by itself clearly incapable of making the premise plausible. I include it regardless because it does the argument no harm and some critics seem to appeal to it or something like it.

4) if the principle of equality before the law is necessarily satisfied when the court does what it ought to for other reasons, then the principle is trivial/senseless/false.

C The principle of equality before the law is trivial/senseless/false (from 3 and 4).

What are we to think about this strategy? The inference from 3) and 4) to the conclusion is valid, the strong version of 2), where we apply all three requirements, seems to me indisputable, and I have myself argued in this article that 1) is true. That leaves only premise 4) and the inference from 1) and 2) to 3).

Let us consider 4) first: which of the claims – triviality, senselessness and falseness – might be true? Certainly not senselessness. For this to be the case it would need to be impossible for equality before the law to obtain, and in fact the first part of the premise assumes just the opposite. Falseness and particularly triviality do better. Admittedly, there is something intuitive about the idea, which comes down, I think, to the principles giving competing interpretations of the reasons at stake, a competition which when resolved in favour of one robs the other of credibility.

Consider for illustration the relation between the harm and offense principles of criminalisation.<sup>41</sup> If it turned out that the offense principle could best be understood as concerned with preventing a particular form of psychological harm, and the harm principle is based on a plausible explanation of why we have reasons to prevent harm generally, including this form of psychological harm, then this would seem to undermine the plausibility of the offense principle.<sup>42</sup>

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<sup>41</sup> Joel Feinberg, *Harm to Others* (Oxford University Press, USA. 1984); Joel Feinberg, *Offense to Others* (Oxford University Press. 1985).

<sup>42</sup> Cf. Thomas Søbirk Petersen, *No Offense! On the Offense Principle and Some New Challenges*, Criminal Law and Philosophy (2014).

The argument can be further bolstered by arguing, as some critics do, that it counts against the principle of equality before the law that it is conceptually dependent on non-comparative principles, while the reverse is not true. That is, they add:

- 5) Equality before the law is conceptually dependent on what the court ought non-comparatively to do,

And revise the fourth premise as:

- 4\*) if the principle of equality before the law is necessarily satisfied when the court does what it ought to for other reasons, *and* conceptually dependent on what the court ought non-comparatively to do, then the principle is trivial/senseless/false.

Which supports the conclusion from 3), 4\*) and 5). This strengthens the claim because the conceptual dependence suggests that the non-comparative requirements are fundamental and equality before the law derivative.

Crucially, however, the plausibility of 4)/4\*) relies on the comparative and non-comparative requirements not being able to come apart and unfortunately for the premise they can do just that. As Christopher Peters has shown, there can be cases where procedural equality obtains although the non-comparative requirements are not met, e.g. because the court ought non-comparatively to  $\phi$  but instead  $\phi_1$ 's, and  $\phi_1$  is the action most frequently applied to alike cases.<sup>43</sup> Even if satisfaction of the non-comparative requirements was sufficient for satisfying equality before the law, it is not necessary, which undermines the premise. But even worse we can also have cases where the court does what it non-comparatively speaking ought but procedural equality is not satisfied, e.g. because the court

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<sup>43</sup> Peters 1996, fn. 2 *supra*: 2063-2064; cf. also Alfonso Ruiz Miguel, *Equality before the Law and Precedent*, 10 *Ratio Juris*: 378 (1997).

ought non-comparatively to  $\phi$  and  $\phi$ 's, but  $\phi_1$  is the action most frequently applied to alike cases.<sup>44</sup> This shows that the inference from 1) and 2) to 3) is invalid. It may appear valid because it holds when the court does what it non-comparatively ought in *every* case, but for the argument to work it would have to also apply to more realistic situations in which the court occasionally fails to do what it ought.<sup>45</sup>

Both strategies of critique against equality before the law fail in the end, the first because it overlooks the most interesting sense of that principle, and the second because it does not follow from the possible satisfaction through more fundamental principles that it is trivial or false.

## The real challenge

Unfortunately for the principle, it is possible to present a much stronger challenge. Consider two closely related objections offered by Christopher Peters. First, that in those situations where the principle can conceivably make a difference: “[i]t necessitates the treatment of a person according to the same irrelevant criterion (or according to the same incorrect balancing of relevant criteria) that has been applied in the unjust treatment of an identically situated person.”<sup>46</sup> Second, that “...equality contradicts justice in every case in which equality can be claimed to have any operation at all—in other words, in cases where an identically situated person already has been treated unjustly. As such, a

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<sup>44</sup> Would the arguments do better if we required strong procedural legal equality? Only marginally, if at all; there could still be cases where procedural equality is satisfied but non-comparative requirements are not so long as all cases are treated with equal degrees of non-comparative injustice, and the status of situations where a court begins to treat cases as it ought against a background of wrongful treatment is entirely unaffected by the switch from weak to strong equality.

<sup>45</sup> Cf. Peters 1997, fn. 2 *supra*: 1226: “The alleged prescriptive scope of nontautological equality extends primarily to cases in which one person, X, already has been treated wrongly according to some nonegalitarian treatment rule, and the question of how to treat another, identically situated person, Y, arises. In such a case, prescriptive equality claims to provide a reason to treat Y similarly wrongly, a reason the nonegalitarian treatment rule does not give us. As we have just seen, that reason is the fact that X already has been treated wrongly. Prescriptive equality, however, does not claim to carry much force in a case in which X already has been treated correctly according to the nonegalitarian treatment rule.”

<sup>46</sup> Peters 1996, fn. 2 *supra*: 2070.

commitment to equality as a substantive norm, if coupled with a commitment to any nonegalitarian notion of justice, is equivalent to a concession that one's moral system can never be fully coherent.”<sup>47</sup>

Peters claims that the problem is that the decision is caused by one or more unjust decisions in similar cases, and that the conflict between comparative and non-comparative reasons render the moral system as a whole incoherent. These objections strike me as unpersuasive. The fact of causation cannot be held against decisions grounded in the principle, since such decisions are caused by the application of an independent and purportedly just principle, not by the mere repetition of the non-comparatively unjust decision(s). Similarly, the existence of conflicting reasons does not in and of itself render a moral system incoherent. Any system will face such conflicts regularly, if only because reasons of beneficence often involve trade-offs between the wellbeing of different persons, and so long as it is theoretically possible to achieve a balance of reasons, the system can be coherent nonetheless.<sup>48</sup>

However, the two objections point in the direction of a closely related objection, the content of which seems to me to underlie at least some of Peters' concern: a suitably modified levelling-down objection. This type of objection shows that on careful reflection of cases where the principle would require compromising non-comparative justice it is simply implausible that there could be a reason – any reason – to treat like cases alike.

The original levelling-down objection is designed to show that telic egalitarianism is implausible, since there are situations in which an improvement in equality which is better for no one is intuitively no better at all.<sup>49</sup> The suitably adjusted levelling-down objection must show that there cannot be a reason for or against  $\phi$ 'ing in a case simply because fewer or more alike cases have been treated by

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<sup>47</sup> Peters, 1996, fn. 2 *supra*: 2071; cf. also Peters 1997, fn. 2 *supra*: 1249-1251

<sup>48</sup> Cf. Greenawalt, 1997, fn. 20 *supra*: 1281-1283, for a related critique.

<sup>49</sup> Parfit, fn. 21 *supra*: 98-99; 110-115.

φ'ing, all else being equal. Conversely, a proponent can make plausible the principle by producing a levelling-down scenario in which intuition supports the existence of a reason to level down. Alfonso Ruiz Miguel attempts to do so with the following:

“Suppose that in the office where I apply for a certificate I am told, instead, that even if the legal rule requires certificates to be delivered a day later, they are usually produced within five minutes; while I am filling in my application I can see another man presenting his application and arguing fiercely with the official, who finally tells the man to come back next day to get his certificate. Is that not unjust and arbitrary official conduct because of its contempt towards the principle of equality before the law? Can it not be said that such unjust inequality is a worse result than continuing not to apply the rule and, in that particular case, the principle of legality?”<sup>50</sup>

I share the basic intuition that there is indeed something ethically problematic about the decision to require the second person to return for his papers the next day, when it is both possible and common practice to deliver them after a five minute wait. The question is what drives the intuition, and here it seems less than clear to me that it is equality before the law that does the work. At least three other factors might be thought to affect our intuition. First, the intentions of the official are clearly malicious, even if the malice imposed is only minor inconvenience, and no matter what theoretical views one holds about the moral relevance of intentions it is unlikely that our intuition can avoid being affected by them in cases such as this. Second, the public expression and awareness of differential treatment is likely to create shame and frustration, beyond that engendered by the delay

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<sup>50</sup> Miguel, fn. 36 *supra*: 382.

itself. While these are effects of inequality before the law, they do not show that equality before the law is in and of itself important, and so properly speaking they should be discounted, a task which our intuition is likely to find difficult when processing the scenario. Third, and most importantly, it is not clear that this is a proper levelling down scenario. The intended reading is for the practice of handling applications swiftly to be unjust, but even if we accept that (and it is not entirely clear that we should) so that the official's insistence on delaying the processing is in that respect non-comparatively better, it is clear that the man is treated worse than others, i.e. "pushed below" not "levelled down to", in a different sense. That too, it seems to me, is very likely to affect our intuition.

Consider instead the following scenario, which avoids these intuitive distortions:

**Injustice for all-but-one:** This appalling court consistently treats all cases unjustly, violating the most fundamental tenets of non-comparative justice. However, it does so systematically, treating like cases alike, and no unlike cases better or worse than others, satisfying wide procedural legal equality. One day, however, due to a series of judicial mistakes and coincidences it manages unintentionally and unbeknownst to all concerned to treat case C as it non-comparatively ought. This is the only difference between this situation and what would have happened had the court treated C as it treats other cases.<sup>51</sup>

Note the importance of the qualifier that the difference in treatment is the only difference between the actual case of C and what would have happened had the court treated C as it does other cases.

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<sup>51</sup> Note that to constitute a more traditional example of levelling-down we should instead imagine that the court considers how to treat the case, and is for some reason aware both that all previous treatments have been unjust and of what would constitute non-comparatively just treatment of the case at hand. I avoid this version to set aside potential complications to do with the mental states of the agents involved, such as the intention to discriminate between cases, which some might hold to be morally objectionable in themselves.



That is, we should imagine that nobody is thereby made better or worse off than they would otherwise have been. This is important because otherwise we risk polluting our assessment of the purely procedural principle with telic factors such as the intuitive pull of our concern for equality of outcomes or just deserts.<sup>52</sup> We must imagine that this lack of impact extends to nobody being aware that there has been a difference of treatment. The principle does not depend on persons recognizing that unequal treatment has occurred, and if we suppose that they do, we risk polluting our intuition with such extraneous factors as the resulting grievances, envy, and loss of social cohesion.<sup>53</sup>

By stipulation the court has acted better than it otherwise would have in non-comparative terms. However, in so doing it has also failed to satisfy equality before the law. But is there any sense in which the court's treatment of C can be said to be normatively bad? Was there any reason for the court to treat C as it does alike cases, rather than with the non-comparatively just treatment it applied?

Intuitions can be fickle, and some may feel the pull less than I, but it seems clear to me that the answer must be in the negative. There is not even a single ground for the court to regret having treated C as it did, and there was not even a single reason for the court to treat C as it treats other cases.<sup>54</sup> If true,

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<sup>52</sup> That is, many will feel at least some pull towards it being better to create situations in which persons are made more equal off, or in which morally better persons are better off than morally worse persons, but to properly assess the procedural principle we must set such concerns aside. We can suppose for example that the court substitutes a procedure that unjustly assigns random outcomes in some dimension with a procedure that justly weighs the relevant factors, but that the outcome of that weighing is the same as the random outcome the court would have delivered. Both Greenawalt and Peters note this as a general problem for arguments in favour of the principle, but it seems to me that it is possible to construct examples in which such factors ought to play no part, and in which it would therefore be possible for the proponent of the principle to demonstrate its validity. Cf. Greenawalt, 1997, fn. 20 *supra*: 1270-1271; Peters 1996, fn. 2 *supra*: 2066-2067. The problem is that, as the above example is intended to show, such examples do not in fact support the principle.

<sup>53</sup> Kent Greenawalt makes what I believe to be the mistake of supposing the opposite; cf. Greenawalt, 1983, fn. 30 *supra*: 1173: "...when treatment is being decided *for equal humans sensitive to possible inequalities*, the moral power of the formal principle exerts a significant pull against unequal benefits or burdens." (my emphasis) Note that the problem with that notion is not, I believe, the objection to which Greenawalt responds, that the reasons might be telic rather than deontic (Greenawalt writes "consequentialist" and "deontological"); cf. Greenawalt, 1997, fn. 20 *supra*: 1285-1289. The problem is rather that irrespective of whether the negative consequences of perceived inequality ground telic or deontic reasons to avoid inequality, they are not *egalitarian* reasons.

<sup>54</sup> Feinberg uses the specific example of a justice system which metes out non-comparatively unjust punishments in a comparatively just fashion in his discussion. Cf. Feinberg, fn. 5 *supra*: 312-316. For a critique of Feinberg's notion of comparative justice which to some extent mirrors my arguments in the present see Montague fn. 15 *supra*: 133; Hoffman, fn. 15 *supra*. Montague, however, also joins the critics discussed above: "But one who acts in accord with principles of

this is bad news for the principle of procedural legal egalitarianism, since it turns out we should be error-theorists about it: while the principle is neither trivial nor senseless, it is false.

Some readers, however, may not share the intuition at all, or indeed may have the opposite intuition.<sup>55</sup>

What are we to do then? A first response would be to ensure that the intuition is firm and reliable, that it is not based on a misunderstanding of the principle or case at stake, and does not involve any irrelevant factors, but if some readers still have contrary intuitions we are unlikely to be capable of making further progress. Intuition of the type at stake here are normative bedrock. It is worth bearing in mind, however, that this does not support the principle. Rather, as Henry Sidgwick famously argued, when reasonable persons have suitable but contrary intuitions, each person ought (at least temporarily) to suspend belief in the evidentiary value of their intuition.<sup>56</sup> While this applies to critics of the principle too, offhand it still leaves the principle in dire straits. It seems unreasonable for proponents to grant the principle weight barring any support at all, and such support will have to rely on other means than the suspended intuitions. It is difficult to imagine what these might be.

Perhaps we should not ultimately be surprised that the principle runs into such trouble; if the challenge seems familiar it is likely because the objection is neatly captured in the adage that “two wrongs don’t make a right”.

### **A permissibility-restricted variation**

Consider one last rescue-attempt, based on a narrower version of the principle. Caleb Nelson argues that the doctrine of *stare decisis* ought to distinguish between demonstrably erroneous past decisions,

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non-comparative justice will deny no one his due, and will automatically meet the requirements of comparative justice. Thus there can be no conflicts between comparative and non-comparative principles relative to actions required by the latter.” Montague, *op cit.*: 136.

<sup>55</sup> An anonymous reviewer emphasized that this was their response.

<sup>56</sup> Henry Sidgwick, *The Methods of Ethics* (Hackett. 1907 (1981)): 341-342.

and those that fall under judicial discretion, but which are nonetheless different than the court would currently reach.<sup>57</sup> Only previous decisions that are recognisably permissible responses to cases of the kind in question, Nelson argues, should give rise to *stare decisis* considerations.

Set aside for now the merits of Nelson's jurisprudential argument, and let us consider a different question: can the point be transferred to the principle of equality before the law? That is, should we prefer a version of the principle where it concerns only cases that have been treated permissibly? Call this **permissibility-restricted (narrow) procedural legal egalitarianism**:

There is at least one *pro tanto* reason to prefer treating a case by performing the *permissible* non-discriminatory action  $\phi$  which has been more frequently applied to alike cases, to treating it by performing any action  $\neg\phi$  which has been less frequently applied to alike cases, all else being equal, the strength of this reason being directly proportional to the proportion of like cases that have been treated by  $\phi$ 'ing.

This version has two immediate benefits. First, it is intuitively appealing to focus the requirement of like treatment on the instances of treatment that are non-comparatively just. Second, it avoids the levelling-down challenge presented above. The unjust treatment of other cases gives no reason, on the restricted principle, for treating a case unjustly.

However, the move to a permissibility-restricted version faces at least three problems. First, despite its intuitive appeal, the restriction seems problematically ad hoc. It requires drawing a distinction between two sets of alike cases that fall under the scope of the original principle, and holding that one should be excluded. This in turn requires a justification, which cannot be simply that doing so avoids

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<sup>57</sup> Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Virginia Law Review (2001).

the embarrassment of the levelling-down objection. Perhaps one is forthcoming, but until we see it we should not assume that it exists.

Second, the fundamental justification of the original principle of equality before the law is the intuitive appeal of its requirement that agents do not differentiate between similar cases. This justification is no longer available, since the revised principle does not hold this, and it is not clear what is meant to replace it as fundamental justification for the permissibility-restricted principle.

Third, the principle runs into difficulties with the timing of cases on either of the interpretations (past-oriented or time-indifferent) of which cases to compare with. As Peters argues, a past-oriented principle implausibly fetishizes the order in which cases happen to have been decided by the court.<sup>58</sup> Suppose that a subject of the court prefers that the court  $\phi_1$ 's rather than  $\phi_2$ 's, even after recognizing that both actions are (non-comparatively) permissible. Suppose also that in the one alike prior case the court  $\phi_2$ 'ed. Suppose finally that the court is non-comparatively inclined to  $\phi_1$ , but that this inclination is weak enough that the reason generated by comparative concerns defeats it, leading it to  $\phi_2$ . It seems no answer to the subject's complaint that the court  $\phi_2$ 'ed in her case to say that since it has previously  $\phi_2$ 'ed the court ought now to  $\phi_1$ . She will reasonably respond that the court would have  $\phi_1$ 'ed if the order of the cases had been reversed and that the mere accident of the order of temporal occurrence is no grounds for frustrating her preference.<sup>59</sup>

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<sup>58</sup> Peters 1996, fn. 2 *supra*: 2068-2069, and Peters 1997, fn. 2 *supra*: 1252-1253. Note that Peters introduces this as a general objection to the principle. I have reserved it as an objection for here both because I believe the non-permissibility restricted version is defeated by the leveling down objection, and because the objection strikes me as stronger in cases where the court merely chooses between permissible alternatives, and the order is therefore more obviously the result of mere chance.

<sup>59</sup> Consider that there may well be other reasons that would constitute an answer. It seems perfectly legitimate to answer her complaint by saying either that her preference did not give the court reason to act, or that there was at least one other reason counting in favour of  $\phi_2$  which did not count in favour of  $\phi_1$ . The point is not that the court cannot give an answer to the complaint; it is merely that the answer cannot plausibly be based on procedural egalitarianism.

Similar considerations apply to the time-indifferent version of the principle, although the claim will here be that the mere accident of the frequency of the occurrence of actions among the permissible set cannot give grounds for frustrating her preference. Note that these frequencies are themselves accidental, in the sense that, since there is no reason for a court to prefer one of them to another – all permissible actions in alike cases have equally strong non-comparative reasons in favour of them by definition – which of them it chooses is based on chance.

I conclude that this revision of the principle is no more, and probably less, plausible than the original version.

### **The non-egalitarian grounds of the norm of procedural legal egalitarianism**

At this point it may be tempting to echo Bernard Williams' scepticism about the moral importance of equality in general and say of procedural legal equality simply that: "...when the statement of equality ceases to claim more than is warranted, it rather rapidly reaches the point where it claims less than is interesting."<sup>60</sup> Having reviewed and rejected as unconvincing the normative significance of procedural equality above, we are left with a choice: do we discard the principle as mere misunderstanding, or is there something yet to be said in its favour? I will argue the latter, but at the cost of shifting from intrinsic to instrumental normative significance.<sup>61</sup> Specifically, I will argue, we may have telic reasons to support a norm of procedural equality.<sup>62</sup>

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<sup>60</sup> Bernard Williams, 'The Idea of Equality', in *Problems of the Self*: 231, (2006).

<sup>61</sup> I am not the first to think of this way of defending equality. Kenneth Winston argues in a somewhat parallel way that treating like cases alike may be beneficial in particular contexts; cf. Winston, fn. 2 *supra*: 36-39. Similarly, at least part of Kent Greenawalt's defence of equality is an argument along roughly these lines, and Peters affirms repeatedly that there are "consequentialist reasons" for adhering to the principle of procedural legal egalitarianism; cf. Greenawalt, 1997, fn. 20 *supra*: 1285-1289; Peters, 1996, fn. 2 *supra*.

<sup>62</sup> It is worth emphasising that, although the argument is concerned with the consequences of having and reinforcing a certain norm, it is not therefore consequentialist. Since it rests on telic reasons it relies on the positive consequentialist claim that consequences matter to the moral status of an action, but not the negative consequentialist claim that nothing but consequences matter to the moral status of an action.

I take a norm to be, roughly, a socially reproduced principle of practical reasoning, i.e. a rule constitutive of the decision-making procedures of an agent.<sup>63</sup> Thus, while norms are action-guiding they are not reasons-generating. Rather, norms can help us act in accord with or respond to reasons, and we can therefore have instrumental reasons to adopt and internalize certain norms. Note further that I take for granted that given our psychological constitution norms are relatively robust. While at least some norms will be subject to revision through introspection, reflection and conscious effort, as well as through external pressures, it is in practice impossible for an agent to review and revise her set of norms prior to any individual decision. When we assess the moral importance of norms we are by necessity assessing their quality as relatively enduring principles of decision-making.

Furthermore, bear in mind that the present discussion differs by virtue of concerning a norm from the more common jurisprudential issue of the benefits of a doctrine of *stare decisis*. Although presumably a legal doctrine and a norm will often go hand in hand, e.g. because establishing a doctrine of *stare decisis* is one way of introducing and reproducing a norm of procedural legal egalitarianism, they are logically separate, and my argument here concerns the latter. Having said that, the two issues are similar enough that points can often be transferred from one context to the other, and I shall do so where it seems to me legitimate.

Now let us consider what might be instrumental reasons for adopting a norm of procedural legal egalitarianism. I believe there are arguments to be made for benefits of efficiency, accuracy and

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<sup>63</sup> The literature on the nature and function of norms is both complex and contentious. However, the central disagreements concern the mechanisms and origin of norms, that is, how they affect behaviour and how they emerge and develop as social phenomena. C. Bicchieri, *The Grammar of Society: The Nature and Dynamics of Social Norms* (Cambridge University Press. 2005); M. Hechter & K.D. Opp, *Social Norms* (Russell Sage Foundation. 2001); E.A. Posner, *Law and Social Norms* (Harvard University Press. 2009). Christina Bicchieri & Ryan Muldoon, 'Social Norms' in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2011) provides a good overview. On these issues I take no stand.

motivation. These will be sketchy – their fuller development would require a paper of its own – but will at least suggest the strategy for justifying a norm of procedural legal egalitarianism.<sup>64</sup>

First, as a conservative norm, which essentially advocates following established traditions, the norm of procedural legal egalitarianism may promote shorter deliberation of how to treat a case. This can sound like a flaw rather than a benefit, but bear in mind that any process of deliberation imposes accumulating costs that eventually outweigh the benefits of further deliberation; no case can or should be deliberated forever.<sup>65</sup> Note also that these costs accrue to all parties to the proceedings, the state, the accused and the defendant (or the litigants in civil trials) as well as those close to them, and often the general public. Giving weight to precedent effectively allows multiple cases to share deliberation costs.<sup>66</sup> This benefit comes at a price, since comparing with other cases itself requires deliberation about which cases are comparable. However, bear in mind that the comparison can be dimensional, that is focus on a particular element of the cases, and employ proxies, e.g. compare on the basis of shared relevant properties. Thus, if it employs a criterion of comparison that is at least moderately easy to apply, and if non-comparative deliberation is halted in favour of comparison only once the marginal benefits of non-comparative deliberation are exceeded by the benefits of comparative deliberation, the norm will promote overall efficiency.<sup>67</sup>

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<sup>64</sup> The legal literature contains a number of additional arguments sometimes cited in defense of equal treatment in the context of the doctrine of *stare decisis*, including benefits of stability and predictability; cf. Peters 1996, *supra* fn. 2: 2039. Although considerations of space preclude my developing that argument, I believe the three benefits I discuss here to be the most plausible, but if stability, predictability or other benefits also apply this simply means that the case for the norm is even stronger than I here suggest.

<sup>65</sup> Cf. Stephen Maitzen, *The Ethics of Statistical Discrimination*, 17 *Social Theory and Practice*: 25-31 (1991).

<sup>66</sup> Schauer, 1987, fn. 20 *supra*: 599, and Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 77 *Chicago-Kent Law Review* (1989) both make the similar point concerning the benefits of *stare decisis*.

<sup>67</sup> Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 *The Journal of Legal Studies* (1986) develops and formalises this point elegantly. Note too that, as Lewis Kornhauser observes in a slightly broader context, there are obvious parallels between this argument and Joseph Raz's argument for authority; cf. Lewis A Kornhauser, 'The Economic Analysis of Law' in *The Stanford Encyclopedia of Philosophy* (Edward Zalta ed., 2011); Joseph Raz, 'Authority, Law, and Morality', in *Ethics in the Public domain* (1994). Finally, note that the argument is importantly different from Richard Posner's familiar argument for an efficiency norm in common law, in fact it might be said to be its inverse, in that Posner seeks to justify a norm of efficiency, while I take promotion of efficiency to justify the establishment and reproduction of a norm. Nor is my argument here required to endorse the more controversial

Second, following past procedure can be conducive to applying the right procedure in an imperfect justice system, for reasons illustrated in the multiple-choice version of the Condorcet Jury-theorem.<sup>68</sup> Any individual agent has limited time, resources and cognitive power, and on the previously adopted assumption that cases have a right answer, in the minimal sense that there will be a limited set of permissible actions and therefore by extension a set of impermissible actions, it is both possible and realistically speaking likely that courts will occasionally make mistakes.<sup>69</sup> By relying on the accumulated considerations of past deliberators the agent increases her chances of choosing the correct answer about how to act herself so long as her fellow agents are minimally competent, i.e. statistically more likely to derive the right answer to the same question than to pick any mistaken answer.<sup>70</sup> The norm of procedural legal egalitarianism functions, on this interpretation, as a form of precautionary principle limiting individual blunders by deference to the superior capacities of the collective of past thinkers.

It is worth bearing in mind two features of this argument. The first such feature is that it is a different argument than the argument in favour of relying on the presumed epistemic authority of an individual precedent.<sup>71</sup> As Schauer puts it, a judge may well reason: “If Cardozo decided this way, who am I to disagree?”<sup>72</sup> However, whatever the merits of this type of argument, it would not support the proportionality of the principle of procedural legal egalitarianism as I have set it out, and cannot

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premises of Posner’s argument, such as his claim for the ethical superiority of a principle of wealth-maximisation; cf. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 *The Journal of Legal Studies* (1979); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *Hofstra Law Review* (1980).

<sup>68</sup> Christian List & Robert E. Goodin, *Epistemic democracy: generalizing the Condorcet jury theorem*, 9 *Journal of Political Philosophy* (2001).

<sup>69</sup> Cf. Kornhauser, fn. 48 *supra*: 68-73.

<sup>70</sup> Jonathan R. Macey, *Internal and External Costs and Benefits of Stare Decisis*, 106 *Chicago-Kent Law Review* (1989), Kornhauser, fn. 48 *supra*: 76, and Hellman, fn. 24 *supra*: 74-75 all make similar points regarding the benefits of *stare decisis*. For criticism of that view cf. Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court’s Doctrine of Precedent*, 78 *North Carolina Law Review*: 652-653 (1999). Nelson, fn. 41 *supra*: 55-61 provides further arguments that pertain specifically to a weak doctrine of *stare decisis*, elements of which would also apply to a sufficiently weak norm of procedural legal egalitarianism.

<sup>71</sup> Cf. Hellman, fn. 24 *supra*: 65-66.

<sup>72</sup> Schauer, 1987, fn. 20 *supra*: 575.



therefore constitute an argument in its favour. Another feature is that the strength of the resulting reason may vary in two different contexts. As Hellman emphasizes (*mutatis mutandis*) in the parallel discussion of epistemic reasons for a doctrine of *stare decisis*, there can be reason to support a norm of procedural legal egalitarianism, if the norm overall leads to better legal decisions, even if there are individual cases where the norm pulls the court's decision in the wrong direction.<sup>73</sup> This systemic or institutional consideration is different, however, than the issue of what the court ought to do in individual cases. Will the court have reason to follow the norm in those individual cases, where doing so would lead to a worse decision?<sup>74</sup> It might, as Hellman suggests, if doing so will support the norm while deviating will weaken it, or if the court has sufficient reason to doubt its assessment that the relevant former cases have been decided wrongly. However, it might not, if such reasons do not apply. Importantly, it can (theoretically, at least) be simultaneously true that there is reason to support the norm and false that the court has reason to follow the norm in an individual case. The reasons at stake are different, and their strength need not correlate.

Third, and perhaps most importantly, the norm of procedural equality may aid the agent in tackling the challenge of bias. For present purposes it will suffice to say that a bias consists in an agent systematically (as opposed to accidentally) but unintentionally giving a type of reason undue weight in her deliberations, including giving such reason any weight when it should carry none or no weight when it should carry some.<sup>75</sup> It is one thing e.g. to consciously affirm the racial superiority of persons with a particular skin-colour, and another to affirm their equality while unwittingly attributing weight

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<sup>73</sup> Hellman, fn. 24 *supra*: 64-69.

<sup>74</sup> Hellman's primary concern is arguing this latter point, (applying her terminology) that epistemic reasons can lead to decisions that are "precedential" because such reasons satisfy the "independence thesis": the reasons to treat a case C2 similar to a past case C1 persist regardless of whether C1 was decided correctly or wrongly.

<sup>75</sup> This is a somewhat broader and less psychological definition than is common in the literature. I intend for it to be complimentary rather than opposed to such definitions, but since the point I develop here does not rely on a particular account of the psychological mechanisms that produces the agent's disposition, e.g. whether it is attitudinal or doxastic, I shall rely on the broader definition. Michael Brownstein, 'Implicit Bias' in *The Stanford Encyclopedia of Philosophy* (Edward Zalta ed., 2015) provides a good overview of current debate.

to the colour of a person's skin in one's decision-making. On this definition, only the latter involves bias.<sup>76</sup> Thus a court is biased if the set of reasons it takes to determine what it ought to do contains at least one member which is unintentionally granted more or less weight than it should, and this reflects a tendency of the court to misestimate the weight of that type of reason. Unfortunately, there is little reason to doubt that courts do suffer from bias in this manner.<sup>77</sup>

Assuming an agent who is both motivated to act as she ought and aware of the reasons that pertain to the case, a norm of procedural legal egalitarianism is suited for a safety mechanism. Consider that psychological appeals and repeated information cannot be expected to make a difference to the agent's actions. What she lacks is neither motivation nor information, but the ability to see how bias distorts her deliberations. Comparisons with alike cases provide an independent yard-stick against which to measure her own conclusions. Whether this will be enough to alter her behaviour can clearly be questioned, and even optimistically it will likely vary from case to case, but the norm at least presents her with an opportunity to critically examine her reasoning without relying on the same procedure of deliberation that led her astray in the first place.<sup>78</sup>

## Concluding remarks

In the course of the preceding, I have spelled out the notion of equality before the law in a principle of procedural legal egalitarianism, argued that traditional critiques misrepresent or fail to undermine it, only to show that while conceptually distinct it is not a plausible normative principle. However, I

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<sup>76</sup> Although it is of course consistent with the definition e.g. that one could openly affirm a prejudice and simultaneously suffer from a bias pertaining to the same group.

<sup>77</sup> Jeffrey J. Rachlinski, et al., *Does Unconscious Racial Bias Affect Trial Judges?*, Paper 786 Cornell Law Faculty Publications (2009); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 06 UCLA Law Review (2010); Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA Law Review (2012).

<sup>78</sup> Hellman makes the related point in favour of according precedent some weight in judicial deliberations, that doing so "forces decisionmakers to engage with a contrary point of view and tak[ing] that view seriously improves decisions." Hellman, fn. 24, *supra*: 74. More pessimistically, we might suspect that bias will affect the court's perception of the reasons at stake enough to distort its perception of which cases are alike, and hence ought to serve as suitable comparisons. If so, the norm may do little good, because the court will distinguish cases rather than challenge its initial assessment.

have suggested that there may be a way of salvaging procedural legal egalitarianism if we understand it as a norm justified by its instrumental benefits, rather than as a principle that carries independent normative weight.

The conclusion that procedural equality is normatively insignificant will perhaps not come as a surprise to some. It fits with contentious but well-supported conclusions against egalitarianism in the broader field of ethics, but the argument I have presented here may have implications for this wider debate too. At least in the context of the legal system, I think it is possible that the intuitive support some people feel for egalitarian principles is properly attributable to the benefits of the norm. By offering an alternative explanation of the intuitions allegedly supporting one particular egalitarian principle, the argument further weakens the case for deontic egalitarian principles.

We should keep in mind in the end, however, that a shift from intrinsic normative value to instrumentally valuable norm need not diminish the principle's practical importance. Although a court of angels wielding perfect justice would scoff at anything less than the ideal procedure, in the real world equality before the law may be not merely all we can hope to get, but an aspiration for which we ought to strive.

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