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EQUALITY AND IDENTITY

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I.

"Like cases should be treated alike," it is said, but what is it to say that? Initially, to prescribe equivalent treatment for equivalent cases is to make a claim that can be treated either temporally or spatially. When a claim is temporal, it is a claim that like cases should be treated the same over time, a claim that we should treat today's cases in the same way we treated yesterday's, and that we should treat tomorrow's cases in the same way that we treat today's. When put this way, we think of the question of *precedent*, or stare decisis, and we recognize the similarity between the questions that arise about decision according to precedent[1] and those that arise about decision according to principle,[2] for they are but the forward- and backward-looking manifesta-

* Professor of Law, University of Michigan. This is the text, with only minor modifications, of a talk given at a Symposium on Equality and the Constitution at New York Law School on April 22, 1988.

1. Although studies of precedent in law are almost as old as law itself, the issue has recently received a flurry of renewed attention. *See, e.g.*, PRECEDENT IN LAW (L. Goldstein ed. 1987); Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771; Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

2. *See* especially Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978). The classic remains Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1 (1959), which suffers from its excess reliance on the idea of "neutrality." For further discussion in this regard, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971). The idea of neutrality clouds the issue by confusing the source of a principle with its decisional effect in the future. Principles reflect values and decisions, and none of them, the claims of their proponents notwithstanding, are neutral. Nevertheless, a non-neutral principle may, having been introduced, exercise decisional weight in future cases independent of the substantive validity of the principle. This decisional weight, a product of normative commitments to, among other things, consistency for consistency's sake, is strikingly similar to the normative commitment to the idea of precedent, and neither have anything to do

tions of the same normative aspiration for inter-temporal consistency.

When we think spatially rather than temporally, we are likely to use the language of *equality* rather than that of precedent. Still, the core idea remains the same. In talking about equality, we are concerned with consistency of treatment across instances, or across individuals,[3] but the idea of consistency that concerns us when we think about precedent or principle concerns us in only a slightly different way when we think about equality. There is an essential unity between the concepts of precedent, principle, and equality, a unity which comes from the manner in which all three concepts are about consistency of treatment of multiple particulars.

Yet, what is it to be consistent, or to treat different instances similarly in a world in which no two instances are alike? What is it to treat like cases the same when no two people, objects, or events are exactly the same? For example, I am 43 years old, male, a law professor, a Yankee fan, an object weighing 148 pounds and located (now) 230 miles East Northeast of Chicago, a citizen of the United States, a builder of model ships, a skier, a skin diver, a part-time resident of South Pomfret, Vermont, a lover of cassoulet, a hater of sushi, and so on, and on, and on, and on. All of these properties, and more, comprise my complete profile, and constitute my unique identity. I am the sum of my parts, and no one else has *all* of my parts.[4]

Although I am particularized by my complete profile, most descriptions of me abbreviate that complete profile, and in so doing deprive me of my unique identity. If, for example, I am described only as a five foot, eight inch, 43 year old Jewish white male constitutional law professor born in Newark, New Jersey, I have lost my unique identity, because another participant in this Symposium, Mark Tushnet, is as accurately described by this combination of properties (predicates) as am I.

A statement of fewer than all of my properties thus strips me of my uniqueness and puts me in a group with others. Yet, the group in which I am placed by any truncated description will vary depending on the description. The group of which I am a member by virtue of my maleness is not the same group of which I am a member by virtue of being a skin diver, and the class of skin divers is hardly congruent with the class of 148 pound objects located 230 miles East Northeast of Chicago. Depending on the collection of properties by which I am de-

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with neutrality.

3. *See generally* Coons, *Consistency*, 75 CAL. L. REV. 59 (1987).

4. Moreover, the properties I possess today are not the properties I possessed yesterday nor those I will possess tomorrow. Thus, to equate the person with my name who owns my clothes tomorrow with the person with my name who owns my clothes today is itself not without problems. *See* D. PARFIT, REASONS AND PERSONS (1984).

scribed, I therefore move among numerous groups, and my uniqueness consists of the way in which I exist at the intersection of these various groups.

Once we recognize that a complete description of any individual instance makes that instance unique, the stricture to treat like cases alike becomes substantially more problematic. Similarly, when we recognize that no person is exactly like any other person, the stricture to treat people equally becomes commensurately troublesome. No act, event, or person is *just* like anything else. To describe any person by less than the sum of *all* of her parts is therefore to place that person in one of any number of potential groups. The uniqueness-depriving truncated description is a product of focusing on some properties and excluding others. This selective focus has a double aspect, for in selectively focusing on but some of the properties of any individual we also selectively suppress other properties.

As a result, it is simply mistaken to assume that the command to treat like cases alike or to treat similar people similarly involves nothing other than the identification of a natural and logically inexorable similarity as the starting point for the process. The notion of "the same" is deeply problematic, and thus the goal of treating the same cases or the same people in the same way is also deeply problematic. Since equality is centrally about sameness, the problems we encounter when we try to clarify the concept of the sameness are similarly present when we try to clarify the concept of equality.

II.

All of the foregoing, of course, is a statement about life and not about law. The process of selectively focusing on some of the properties of any particular, and consequently selectively suppressing other properties of that particular, is inherent in the process of generalization and thus in the nature of human discourse. We carve up the world into categories,[5] and those categories are reflected in our language and in every other aspect of our cultural apparatus.

Thus, much of our everyday life bears a close affinity to the metaphysical position commonly known as "nominalism." In contrast to metaphysical realism, which draws our attention to the natural kinds of the world and to those "real" divisions of the world that precede human intervention, nominalism stresses the contingency of categorization. It focuses on the way in which we employ a language that both

5. As will become apparent, I do not use the word "category" as strictly as does the metaphysician, who describes all agglomerations of particulars as "classes" and reserves "category" for those classes that are in some sense ultimate. I will continue to take "class" and "category" as essentially synonymous because little about law turns on whether its classes are or are not ultimate in a metaphysical sense.

reflects and reinforces the organization. The fact that we group two-tined forks with knives and spoons as "utensils," rather than with antelopes and electric plugs as "biprongs," is not a function of natural division but of contingent human categorization. Even if, as I believe, there *are* natural kinds and natural divisions, most of our existence looks more nominalist than realist. On numerous occasions we create categories, such as universities, states, nations, occupations, and art. Moreover, even when categories precede the process of human conceptualization, on numerous occasions we divide up the world according to one rather than another of these natural divisions. For example, even if there *is* something natural about the fact that some people have darker skin than others, there is nothing natural about the choice to refer to people according to the lines drawn by that division, as opposed to lines drawn on the basis of eye color, height, weight, thigh circumference, or current distance from magnetic north. Every one of these forms of division is as "natural" as skin color, making apparent the essential unnaturalness of relying on one natural division rather than another.

Thus, we live in a world that consists largely, if not exclusively, of constructed similarity and constructed difference.[6] Our task, however, is not merely to make metaphysical or conceptual observations; instead, it is to relate those observations to a norm of equality and specifically to the fact that the norm of equality is embedded at numerous places in American law. Once we see that there is no identity, we see as well that all is different and that everything is, in some important sense, unequal. Discovery may lead to the conclusion that, as a legal norm, the very idea of equality is empty,[7] with the normative work left to be done by specific substantive rights. Yet that conclusion is in its own peculiar way a product of a (legal) realist view of that world. To assume that a legal idea of equality is empty is necessarily to assume that legal categories have no pre-legal existence or at least to assume that the pre-legal existence of the categories used by law is subject to infinite manipulation in the hands of legal actors.[8]

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6. I make no claim of originality for these observations. For a deeper—and also more original—analysis, see Minow, *The Supreme Court, 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

7. *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). For a sampling of the debate that Westen has generated, see Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983); Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982).

8. This is the perspective implicitly undergirding E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948). Thus Westen's view of equality can be usefully seen as the spatial

Such a view of the status of legal categories rings most true for those categories that have no extra-legal existence. There is no pre-legal conception of the categories of acts or events organized under the headings *habeas corpus*, *assumpsit*, *interpleader*, or *corporation*, and thus the legal system, taken in the large, is in total control of filling the vessels that it itself has constructed. When the categorial vessels used by the law are not the law's creation, however, the picture becomes more complex. I do not mean to suggest that the categories of life are totally distinct from those of the law,[9] but it is still the case that even our constructed legal world draws on an extra-legal and a pre-legal conceptual apparatus. The similarity between turkeys and robins precedes the life of the law, as does the difference between banshees and bandsaws. Thus, a pre-legal world organizes its universe of particulars into categories and consequently creates a world of similarity and difference that the law must then confront. Once we see that there is such a pre-legal world, with its own constructed disparities, we can then see that the idea of equality need not be so empty. Instead, it involves a central case of the way in which legal norms deal with a non-legal world that is not of the law's making and is not totally within the law's power to remake.

III.

We now have a picture of an array of equalities and inequalities that precede the law. A society will have constructed some number of similarities and also some number of differences. When we think about equality as a legal norm, therefore, we can think about the intersection of that norm with the equalities and inequalities, the similarities and the differences, that exist logically and temporally prior to legal intervention.

To superimpose a norm of equality upon an existing array of similarities and differences can now be seen hardly to be empty. Instead, the imposition of a legal stricture of equality could be to use the law, or to use any other kind of normative pressure, as a vehicle for the enforcement of values that precede the law. For law to be used in such a behavior-reinforcing way is hardly uncommon. Indecent exposure is wrong, to most people, not *because* there is a law against it, but rather there is a law against it *because* it is wrong. Laws against driving while intoxicated, prohibiting the sale of heroin, and prohibiting murder all seem to be of the same variety. In each of these cases, and of course in

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analogue of Levi's—and others'—view of precedent. *See supra* note 7.

9. The dependence of an increasing number of extra-legal concepts on legal ideas is stressed in Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984), and in Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1985).

countless others, the law is seen not as a way of shifting behavior for the population of its addressees, but instead as a way of reinforcing a preexisting pattern of behavior, as a way of entrenching existing behavior patterns against the danger of individual divergence or widespread shift.

Suppose that a legal norm of equality existed under this behavior-reinforcement model of the role of law. Law would then be seen as a way of enforcing and therefore of entrenching not so much existing behavior patterns as existing—pre-legal—conceptualizations, or existing—pre-legal—ideas of similarity and difference. From this perspective, the law might therefore permit, or might at one time have permitted, distinctions to be drawn by the state on the basis of race, gender, age, sexual preference, religion, ethnicity, or place of birth, but would not permit the state to treat dissimilarly those who shared the same race, gender, age, sexual preference, religion, ethnicity, or place of birth.

This picture, obviously, just does not seem to get it, although in the abstract the idea does not seem as odd or as morally repulsive as it does when examples like these are given. In other words, the idea of the law enforcing pre-existing conditions of similarity and difference is not self-evidently preposterous. Law might be seen, as it is so often seen, as an instrument of consistency, of stability for stability's sake, or of community.[10] In that case, the norm of equality would serve those goals, prescribing adherence to existing social constructs of similarity and difference and proscribing departures from those constructs.

The virtues of any preservational legal attitude are a function of a combination of two determinations. First is the value of preservation for its own sake, where preservation, conservatism—in the non-political sense—and stability are seen as goods in themselves. Second, of course, is the substantive value of that which is preserved, conserved, or entrenched. Insofar as any division of the world or any division of its members will, as we saw above, focus on certain properties and suppress others, one function of a moral theory of equality is the identification of those properties of people that are morally relevant and those that are morally irrelevant. Insofar as some existing pre-legal division satisfies the standard of moral value, then a legal norm of equality will serve to entrench that which has been determined to be of independent

10. My reference to community is designed to incorporate the views of Ronald Dworkin in LAW'S EMPIRE (1986). Although Dworkin's vision in its full richness would seem to reject the role of law as enforcing morally repugnant distinctions, I am concerned here only with his justification of law *qua* law, premised as it is on the idea of an intra-community integrity—which is close to internal consistency, and close to internal coherence—a value that is at least partially independent of the content of the norms that a community would share. That is, law recognizes the value of the sharing independent of the substance of what is shared.

moral worth.

This, of course, leads us to consider the other side of the coin. Insofar as the pre-legal divisions of the world are, from a moral perspective, undesirable, a behavior-enforcing conception of a norm of equality is undesirable as well, for that conception will not so much attack the morally undesirable divisions as entrench them. Once we recognize that there is neither identity nor any logically inexorable conception of similarity and difference, then a norm of equality becomes indiscriminate, entrenching the bad as well as the good. For it to be otherwise, a norm of equality must reject a behavior-reinforcing view and think instead about behavior-shifting. But for a norm of equality, or any other norm for that matter, to be behavior-shifting it must look outward, incorporating a moral theory of similarity and difference that cannot be derived from existing divisions of the world.

Thus, for a norm of equality to serve to *modify* rather than merely to entrench existing pre-legal demarcations of the world, it cannot be viewed as in any way logical, or neutral, or self-contained. To view the mandate of equality in that way would deny the difference between *Plessy v. Ferguson*[11] and *Brown v. Board of Education*,[12] because the difference between the two lies in an explanation of the difference between race and other factors that is not generated by any abstract or logical notion of consistency. Rather, it is generated only by a substantive moral theory of equality, a theory that is ascriptive rather than descriptive. A moral theory of equality is ascriptive when it determines what differences should be ignored. In that sense it ascribes similarity of treatment for those particulars that are, as are all particulars, in fact different.

We are now in a position to restate the role of a normative theory of equality. A normative theory of equality can be descriptive, identifying—describing—existing similarities and differences and serving to stabilize the similarities and differences so identified. Such a descriptive conception of equality, however, seems at odds with our normal understanding, which can now be understood as ascriptive rather than descriptive. An ascriptive perspective on equality is not concerned with identifying existing equalities. Instead, it imposes an equality on existing inequalities. That act of imposition, that ascription, must be generated from somewhere. It is not my goal at this point to develop the moral or political theory upon which a strategy of ascriptive equality can be developed. My mission today has been only prologue. When we recognize the necessity of developing a theory of ascriptive equality, we will have the impetus to develop it. In my view, the theory will be a substantive theory of domination, demonstrating, on the basis of his-

11. 163 U.S. 537 (1896).
12. 347 U.S. 483 (1954).

tory, why some inequalities are to be treated as pernicious while others are benign. The development of that theory, however, must wait for another occasion.