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"PRESCRIPTIVE EQUALITY": TWO STEPS FORWARD

*Kent Greenawalt**

In this Response to Professor Peters, Professor Greenawalt argues that prescriptive equality does have meaningful normative force. Prescriptive equality plays a reinforcing role when it agrees with nonegalitarian justice and is not incoherent when it pulls against nonegalitarian justice. Specifically, when one individual has been treated better than is required by nonegalitarian justice, a similarly situated and significantly related individual who is aware of that treatment may merit equivalent treatment because of widespread and deep-seated feelings about equality.

I. INTRODUCTION: FEELINGS ABOUT EQUAL TREATMENT

When my late wife, Sanja, and I learned that our oldest son Robert's school was offering Suzuki group violin lessons, we perceived the chance for him to develop some musical talent, despite the liability of having unmusical parents. As the academic year wore on, we realized that the instructional periods were very brief, and Robert's progress modest. In April, his Suzuki teacher told us that Robert would have to master a few of Mozart's Twinkle variations if he was to play with the group in the spring concert. With some pressure and effort all around (including my learning to play the variations myself), Robert achieved sufficient mastery, and we were able to beam proudly during his concert performance. Robert, however, was uninterested in a second year of Suzuki lessons. On reflection, we concluded that his time and our money had been largely misspent.

The next September, our second child, Sasha, then in senior kindergarten, wanted to join the Suzuki program. We strongly suspected that his main reason was that Robert had done so, and we urged him not to insist, explaining that we doubted the program's value. Sasha insisted. Although we anticipated that Sasha's time and our money would likely be misspent, and assumed that we would have said "no" if we had held our present opinion and Sasha had been the first child involved, we nevertheless gave in. Sasha also mastered the Twinkle variations and dropped the program after a year.

This tale may have something to do with seeds that bear unexpected fruit in a long-distant future, since Robert was fleetingly a Croatian rap star¹ and Sasha played bass for a number of rock bands. However, the story also reflects feelings that underlie ideas of equality. As Sasha saw it, he did not want to be denied a benefit given to Rob-

* University Professor, Columbia University School of Law. I am very grateful to Kenneth Simons for his helpful comments.

¹ See *Students' Rap Song Tops Charts in Zagreb*, N.Y. TIMES, Dec. 8, 1991, § 1, at 67.

ert, and we, his parents, thought that his desire for equal treatment had some kind of force.

In this Response, I explore just what kind of force these feelings may have, and offer a few observations on their relation to equality in legal treatment. My primary focus is on two recent articles by Christopher Peters. In the first article, Professor Peters claims that no deontological principle of equality justifies the doctrine of precedent.² In the second article, which appears in this issue, he mounts a more exhaustive attack on the principle of prescriptive equality.³ Reviewing various circumstances in which this principle might be asserted, he concludes that the principle proves to be unpersuasive, and indeed is incoherent and self-contradictory in many or all settings. After a brief account of how Professor Peters's claims fit within discussions of equality, I contend, using examples and abstract arguments, that his broad negative conclusions are unwarranted. I also offer some suggestions about when claims of prescriptive equality have force and what kind of force they have. In particular, I believe that the principle has force at least when two equals stand in some significant relationship to each other, and when the one who might receive worse treatment is aware that the other is an equal in relevant respects and has received better treatment. The principle derives its power from deep-seated feelings that unequal treatment is unfair, feelings that generate resentment and envy. Nevertheless, my Response is more critical than constructive: I present no fully developed scheme of my own, and on some difficult questions I lack confident answers. One ambition of the discussion is to shift attention to inquiries about equality that promise to be fruitful.

II. THE FORMAL PRINCIPLE OF EQUALITY AND THE PRINCIPLE OF PRESCRIPTIVE EQUALITY

In 1982, Peter Westen published an article entitled *The Empty Idea of Equality*.⁴ In this article, Professor Westen argued that, to identify who counts as equal and to decide what constitutes equal treatment, one has to elaborate standards for how people should be treated. Thus, the formal principle of equality — “equals should be treated equally” (or some variant, such as “likes should be treated alike”) — adds nothing to what the standards for treatment already indicate. According to Professor Westen, the principle of equality is tautological and empty. To illustrate, if a teacher decides that all students who get

² See Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996).

³ See Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997).

⁴ See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Professor Westen subsequently wrote a more comprehensive book on the subject. See PETER WESTEN, *SPEAKING OF EQUALITY* (1990).

91% of the answers correct on an exam should be awarded an A-, the comment that two students who get 91% should be treated equally tells us nothing new. Each student should get a grade commensurate with her performance on the exam. If that happens, equals will be treated equally, but equal treatment will be a simple product of correct treatment according to relevant substantive criteria.

Professor Westen's article drew a number of responses, including one by me suggesting in part that, notwithstanding Westen's argument, the formal principle of equality might yet have normative force.⁵ I granted Westen's point that one could not typically tell which people and what treatment are equal without substantive standards, but I argued that the formal principle could stand as a reason not to give unequal treatment to equals. I pointed out that sometimes we are confident that two people count as relatively equal — for example, that they should be punished equally — before we have decided what treatment they should receive.⁶ I noted that the principle of equality could sometimes stand as a reason against experimenting with two people — that is, giving two equals different treatment to learn something about the effects of each treatment.⁷ Most important for purposes of the law, I urged that, if someone has already been given better than appropriate treatment, the principle of equality could constitute one reason to give his equal better treatment than would otherwise be appropriate.

Imagine, for example, two co-participants in a crime who are similar in every relevant respect. Judge *A* has given the first participant a suspended sentence. Judge *B*, who is to sentence the second, believes that six months in jail is appropriate, but hesitates to impose a more severe sentence on the second offender than the one his partner has received. The equality principle suggests a more lenient sentence than do other considerations. The principle also works in this manner when parents have given a (perceived) benefit that they now regret to one sibling, as in my Suzuki story, and another sibling wants the same benefit. Arguably, the principle might also support following precedents in law that current judges regard as mistaken. The idea is that it would be unfair if the similarly placed litigant in the second case receives worse treatment than the winning litigant in the first case.

Professor Peters's articles lie in the skeptical tradition of Professor Westen's, but they self-consciously adopt a position that is crucially different. Professor Peters identifies what he calls a "principle of prescriptive equality," according to which "the bare fact that a person has

⁵ See Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1169-73 (1983).

⁶ See *id.* at 1171-72.

⁷ See ROBERT ROSENTHAL & RALPH L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH: METHODS AND DATA ANALYSIS* 235-36 (2d ed. 1991).

been treated in a certain way is a reason in itself for treating another, identically situated person in the same way."⁸ He acknowledges that this claimed principle of morality is not tautological in Westen's sense, but asserts that on examination it proves to be misguided and even incoherent. Professor Peters supports his position by categorization of various kinds of situations, examination of examples within the categories he has developed, and abstract argumentation demonstrating that the principle of equality cannot be valid.

The two steps in my Response's title refer to two aspects of Professor Peters's analysis. First, using a grading example from my earlier essay, Professor Peters patiently shows that the principle of prescriptive equality, as he formulates it, is not tautological.⁹ If this point was not clear to American readers after, among others, the initial responses to Westen and Joseph Raz's *The Morality of Freedom*,¹⁰ one hopes that the conclusion will be obvious to anyone who reads Professor Peters's Article, and that the muddled claim of emptiness, in the sense of tautology, will not rear its head again.

My title's second step refers to Professor Peters's serious effort to unpack the possible normative force of a principle of prescriptive equality. Once we perceive just where his argument is and is not persuasive, we can begin to take the needed next step — a fuller, subtler account of what the force of the principle may be. My Response not only answers arguments that Professor Peters makes, but also begins to develop a more comprehensive and satisfactory account.

Before I engage the "principle of prescriptive equality" directly, I should note that I differ with Professor Peters about how this principle relates to the formal principle of equality that "equals should be treated equally." Does the formal principle definitely include prescriptive equality, definitely not include it, or is it ambiguous? Professor Peters supposes that prescriptive equality "means something *other* than what [the formal principle's] traditional expression allows."¹¹ I have always thought that the formulation "equals should be treated equally" (and variations thereon) incorporates the idea that giving a form of treatment to one equal is a reason to give the same treatment to another equal. The fact that the formal principle might otherwise be "empty" has struck me as a solid reason to ascribe this content to it. Professor Peters's conclusion that the "traditional expression" does not *allow* such an inclusion is puzzling, although he might plausibly claim that the traditional formulation is ambiguous or indecisive about

⁸ Peters, *supra* note 3, at 1223 (emphasis omitted). *Foolish Consistency* has a formulation that is identical except for the absence of the comma. See Peters, *supra* note 2, at 2062 (emphasis omitted).

⁹ See Peters, *supra* note 3, at 1222-27.

¹⁰ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 217-44 (1986).

¹¹ Peters, *supra* note 3, at 1223.

prescriptive equality. I do not pursue our disagreement about the content of the formal principle further, however, because the crucial concern is the force of a norm of prescriptive equality.

III. UNDERSTANDING THE PRINCIPLE OF PRESCRIPTIVE EQUALITY

A. "Reinforcement" and "Pulling Against" the Balance of Other Reasons

As I have noted, Professor Peters puts the claim of prescriptive equality as follows: "the bare fact that a person has been treated in a certain way is a reason in itself for treating another, identically situated person the same way."¹² Joseph Raz offers a similar (although not identical) formulation: "All Fs who do not have G have a right to G if some Fs have G."¹³ If such a principle were valid, it could *reinforce* other reasons to give someone a particular benefit or burden. It could also *pull against* the balance of other, nonegalitarian reasons, by pointing toward a treatment different from what these other reasons would indicate. If the principle of prescriptive equality possesses this second kind of force, then it will sometimes be decisive, leading to treatment different from that indicated by the balance of other reasons.¹⁴

My talk of "reinforcement" and "pulling against" is not meant to introduce any profound or controversial moral claim, but rather to refer to a common moral understanding more straightforward than these abstract terms. Let me illustrate. People often suppose that there exists a deontological moral norm against telling serious lies. In most situations, one has other good reasons to communicate what one believes is true, and no good reasons to lie. In those situations, the norm against lying will add some extra force to, will "reinforce," the independent reasons to tell the truth. Sometimes, independent reasons not to tell the truth (say, because it will be very hurtful) are stronger than any independent reasons to tell the truth. The norm against lying counters, "pulls against," the balance of other reasons. In a situation in which there are some independent reasons to tell the truth, but stronger independent reasons not to do so, the anti-lying norm will both "reinforce" reasons to be truthful and "pull against" the balance of the reasons that do not include the norm. If we understand that reasons for action can relate to each other in this way, we can also understand that sometimes the norm against lying will be strong enough to determine that one should be truthful, even though the bal-

¹² *Id.* at 1223 (emphasis omitted).

¹³ RAZ, *supra* note 10, at 225.

¹⁴ Professor Peters agrees that, if the principle were valid, it would sometimes lead to treating people differently from what would otherwise be appropriate, and therefore wrongly. See Peters, *supra* note 3, at 1225-27. As he notes, someone who believes that the principle is valid would not be likely to describe the treatment as wrong. See *id.* at 1227 n.34.

ance of other reasons tips in the opposite direction.¹⁵ If the principle of prescriptive equality has normative force, it "reinforces" and "pulls against" independent reasons in the same manner as the norm against lying.

The "reinforcement" effect proves easier to conceptualize than to argue for or against in particular instances. Assume *S* and *T* have been identified as equals and criteria have been established for their treatment. Each, for example, has gotten 91% correct on an exam, a score that warrants an A-.¹⁶ *S* has been awarded an A-. Should *T* also be given an A-? Of course, and not only because he deserves it. For if the principle of prescriptive equality has force, the fact that *S* has gotten her A- is an added reason to give equally qualified *T* an A-. Turning the point around, suppose *T* were given a grade lower than A-. That would be wrong: *T* would be treated incorrectly under the relevant standards. According to the principle of prescriptive equality, *T* would suffer an added wrong because *S* has received an A-. In a sense, *T*'s treatment would be worse than it would have been had he been the only person taking the exam and been given the "incorrect" lower grade. Someone who asserts that the principle of prescriptive equality is misguided claims that, putting aside any consequentialist considerations,¹⁷ the wrong done to *T* is the same in both instances. Reinforcement turns out to be hard to evaluate in many individual circumstances. Once we are sure that someone should be treated in a certain way, discerning the presence of any extra reasons is elusive.¹⁸ Further, if we sense that an extra reason may be present, distinguishing between an added deontological norm and expected negative consequences is often also difficult.

¹⁵ For example, if the balance of independent reasons in favor of lying is slight, the norm against lying needs to have only moderate force to make telling the truth the preferable course of action.

¹⁶ One reader has suggested that the grading example "stacks the deck" because grades are primarily (perhaps entirely) comparative. I am assuming in the example that the professor believes that, at his institution, a particular grade represents a certain level of performance, and that he attempts to grade by the same standards every year. That assumption is sufficient to sustain the force of the example, but for readers who find the example inapt, the sentencing one that follows illustrates the same problem without this arguably diluting feature. A recent "live" grading illustration of substantially more complexity occurred when the College Board raised the scores of 45,000 students, because it had not previously recognized the correct answer to a math question. See Mary B.W. Tabor, *Student Proves That S.A.T. Can Be: (D) Wrong*, N.Y. TIMES, Feb. 7, 1997, at A1.

¹⁷ As I explain in Part V below, two related problems complicate the question of exactly which considerations are put aside. One problem is the uncertain borderline of deontological and consequentialist considerations. Another problem is the status of a rule-consequentialist approach. If a person adopts a principle because of its desirable consequences in general, but does not assess consequences in individual instances, would that count as "consequentialist considerations"? My formulation at this stage is intentionally vague.

¹⁸ See RAZ, *supra* note 10, at 239-40.

Instances of prescriptive equality possibly pulling against the balance of other reasons are etched more clearly. Suppose *S*'s actual score on the exam is 89, which the professor previously determined is the top of the B+ range. The professor has computed her grade inaccurately and awarded *S* an A-. He then realizes his mistake but, having informed *S* she will get an A-, feels he cannot change the grade. *T* also gets an 89. Because no student has scored between 87 and 89 (the B+ range), giving *T* the higher grade will not create any obvious inequity between him and students who have scored less well. Is *S*'s grade, in itself, a reason to give *T* an A-? According to the principle of prescriptive equality, the answer is yes. According to opponents of the principle, the answer is no.

An example I have already mentioned raises the same dilemma more seriously. Judge *A* gives a convicted offender a suspended sentence, and Judge *B*, who must sentence the equally guilty co-participant, believes that that sentence is too lenient. Is the sentence Judge *A* has given to the first co-participant a reason for Judge *B* nevertheless to award a suspended sentence? The answer to this question depends on whether the principle of prescriptive equality validly applies in this context. For such examples, tests by reflective intuition¹⁹ seem more promising than such tests concerning possible reinforcement.

B. How the Principle Can Operate Before Initial Treatment Is Determined

The formulations of Professor Peters and Professor Raz that I have quoted contain a potentially misleading temporal dimension.²⁰ The implication of their terms is that the principle springs into play only *after* someone has already received correct or incorrect treatment. (This assumption, indeed, becomes the source of one mistaken argument Professor Peters offers against the principle.) Typical applications of the principle *do* involve the temporal sequence Professor Peters assumes, but that sequence is not inevitable. If a decisionmaker is determining treatment for two equal people at one moment in time, he may be moved by the equality principle not to differentiate between them, although doing so might otherwise be desirable — say, in

¹⁹ By "reflective intuition," I mean an intuition that survives some examination and testing, but does not necessarily involve the comparison to a comprehensive theory sometimes implied by the term "reflective equilibrium." See JOHN RAWLS, *A THEORY OF JUSTICE* 48–51 (1971).

²⁰ Professor Peters also provides formulations that do not include the temporal sequence. One is: "Identically situated people are entitled to be treated identically . . ." Peters, *supra* note 3, at 1225 (internal quotation marks omitted); see also *id.* at 1226 n.33 (suggesting that favorable incorrect treatment might give rise to a claim by someone previously treated correctly, but not explicitly recognizing that a *prediction* of incorrect treatment could give rise to the principle).

order to experiment. If valid, the principle applies to simultaneous treatments and decisions about treatment.²¹

More significantly, perhaps, the principle could also influence a first decisionmaker who is confident a second decisionmaker will make a mistake. (Barring psychological aberration, this will not occur when the same person makes both decisions, because he will not predict a future mistake by himself.) Suppose Judge *B* sentences first and knows that Judge *A*, who opposes imprisonment unless an offense is very serious, is virtually certain to suspend the sentence of one co-participant, whatever Judge *B* does. If the principle of prescriptive equality has force, it could affect Judge *B*'s initial choice of sentence.

C. Other Conditions for Application

More complex questions about the principle as formulated by Professor Peters concern what he means by "the bare fact" and "a reason in itself," in his statement that "the bare fact that a person has been treated in a certain way is a reason in itself for treating another, identically situated person the same way."²² One question this formulation raises is whether other conditions might be necessary to bring the principle into play. Suppose that the principle applies only when the two equals receiving treatment have some significant relationship and at least one is aware of the treatment the other receives. If these conditions are necessary for the principle's application, one might defend Professor Peters's rejection of the principle on the ground that "the bare fact" of a first person's treatment is not alone enough to call for equal treatment of an equal. Professor Peters's skepticism, however, goes much further. He argues that under no set of conditions does the treatment of one person in a particular way generate a deontological norm to treat someone else the same way.

D. Consequentialist Considerations

The more important question about "the bare fact" and "a reason in itself" is what consequentialist considerations Professor Peters excludes. He is clear that he does not contest doctrines of precedent that rest on reliance, fair notice, and efficiency, among other considerations.²³ For Professor Peters, ordinary consequentialist reasons to afford equal treatment in certain contexts do not support the (deontological) principle of prescriptive equality.²⁴ Thus, Professor Peters can accept various consequentialist reasons for equal treatment

²¹ Indeed, the medical and lifeboat examples Professor Peters uses are of this sort. *See id.* at 1232-43.

²² *Id.* at 1223 (emphasis omitted).

²³ *See* Peters, *supra* note 2, at 2037-38.

²⁴ *See* Peters, *supra* note 3, at 1238 n.46, 1257 n.67.

and still reject the principle as a principle. His fundamental claim is that any deontological norm of prescriptive equality is indefensible.

Professor Peters never discusses a certain kind of consequentialist consideration I emphasize: the desirability of satisfying feelings of affected persons that unequal treatment is intrinsically unfair. One might say: "Such feelings are common, but they are normatively unwarranted. We who are wiser may need to accede to such feelings on occasion, but only to avoid adverse consequences." I suggest near the end of this Response that deep feelings of intrinsic unfairness raise difficult issues about the border between deontological norms and consequentialist considerations. Here, I restrict myself to noting that Professor Peters does not discuss such feelings.²⁵ For now, I assume that the principle of prescriptive equality has force if it appropriately guides action because of such deep-seated feelings.

E. What Normative Force?

We can identify at least five ways of viewing the normative force of the principle of equality. First, the principle may be tautological and empty. Second, it may not be empty in this way, but it may prove on examination to be mistaken or even incoherent. Third, the principle may carry direct deontological force, indicating moral considerations that do not depend on the consequences of an action. Fourth, the principle may reflect generally applicable consequentialist considerations. Fifth, the principle may express deep-rooted feelings, not easily dispelled, to which decisionmakers appropriately are responsive. As I shall later explain, I do not here treat the fifth possibility as a subcategory of the third or fourth category, because of perplexities about where to draw a line between deontological norms and consequentialist considerations.

We should not suppose that the principle of equality will necessarily have the same force in all contexts. My own tentative conclusion is that it carries force when at least one of the two "equals" identifies significantly with the other, when that person is aware of what is happening to both, and when he may be given less favorable treatment than the other. In such instances, deep-rooted feelings call for equal treatment. Believing that these feelings usually cannot be dispelled by "explanation," I think they are one appropriate guide to action.

²⁵ One reader has suggested that because Professor Peters, in leaving the content of nonegalitarian justice open, *see id.* at 1228–30, does not discuss any consequentialist considerations in depth, we should not expect him to discuss these feelings. However, because Professor Peters is rejecting the principle as a deontological norm, one would expect him to discuss feelings that it is such a norm, if he thought them very significant. Further, his suggestion that feelings that coincide with the outcome of the principle can be otherwise explained, *see, e.g., id.* at 1257, also indicates that Professor Peters does not think the feelings attached to equality are significant.

F. Prescriptive Equality and Other Issues About Equality

Neither Professor Peters's articles nor this Response focuses on what we have come to consider as the major issues about equality in Western societies. These issues concern the criteria that may be used to determine how people should be treated. Laws against discrimination according to race, religion, and gender are grounded in the view that, in many circumstances, it is immoral to employ certain criteria to determine how people are treated. This view raises delicate questions concerning the steps government and private enterprise should take to see that opportunities in life do not depend on these characteristics. Is affirmative action appropriate? Should pornography and hate speech be suppressed because they help perpetuate discrimination against women and minorities? Against these critical social issues, the subject of Professor Peters's inquiry is narrow and comparatively insignificant. But it is definitely worth our attention. Understanding what reasons we may have, if any, for treating equals equally, when one is not receiving what would otherwise be the best form of treatment, is important. That understanding may illuminate other aspects of the concept of equality.²⁶

IV. THE CHALLENGE TO PRESCRIPTIVE EQUALITY

Professor Peters attacks normative claims on behalf of the principle of prescriptive equality in two stages. Usefully breaking down categories of situations in which the principle might apply, he first concludes that, in "conditions of *competition*,"²⁷ the principle turns out either to yield absurd results or, when the right course of action would correspond with the principle, not to explain our intuitions. Professor Peters then considers "conditions of *infinite supply*."²⁸ He contends that the principle reveals itself to be incoherent and self-contradictory when it seems to suggest treatment different from what would otherwise be appropriate. The reasons Professor Peters offers that the principle is incoherent and self-contradictory for conditions of infinite supply also apply to conditions of competition.²⁹ Thus, anyone wishing to defend

²⁶ I see "substantive" questions about equality as more closely linked to what Professor Peters calls the principle of prescriptive equality than he does. See Greenawalt, *supra* note 5, at 1168; Peters, *supra* note 3, at 1213-14. I have discussed substantive questions elsewhere. See generally KENT GREENAWALT, DISCRIMINATION AND REVERSE DISCRIMINATION *passim* (1983) (discussing issues of discrimination and affirmative action); KENT GREENAWALT, FIGHTING WORDS *passim* (1995) (discussing a number of free speech issues in which equality figures prominently).

²⁷ Peters, *supra* note 3, at 1232 (emphasis added).

²⁸ *Id.* at 1245 (emphasis added).

²⁹ In *Foolish Consistency*, Professor Peters explicitly puts forward the claim about incoherence as applicable to all assertions of the principle. See Peters, *supra* note 2, at 2067-72. But see Peters, *supra* note 3, at 1245-54 (referring only to conditions of infinite supply).

the principle in its application to conditions of competition must meet the incoherence claim as well as other challenges.

Professor Peters's discussion of competition does establish that acting on the principle of equality is *often* inapt, but it does not show that this is always true, or even that the principle lacks all force in situations in which acting upon it is unwise. Professor Peters's analysis of infinite supply and the supposed incoherence of the principle highlights features of prescriptive equality, but it fails to recognize the limited class of relevant persons in many situations. Further, it gives a misleading account of the relation between the principle and other standards of decision. By assessing the strengths and shortcomings of Professor Peters's demonstrations, we will be in a much better position to evaluate the forcefulness of claims of equality.

A. Conditions of Competition

Professor Peters devotes fourteen pages of his Article to conditions of competition,³⁰ in which the amount of treatment given to one person "necessarily affects the amount of that treatment available to other identically situated people."³¹ Most of the analysis is about conditions of scarcity, for which Professor Peters employs a medical example and a lifeboat example.

The medical example illustrates "divisible treatments."³² Smith and Jones, equals in need and entitlement, could each use 100 units of medicine, but there are only 150 units for them both. The egalitarian would rightly say each should receive 75 units. Professor Peters responds, however, that we would reach the same answer according to nonegalitarian justice:

Any result that apportions more medicine to one than to the other . . . necessarily violates nonegalitarian justice, because it necessarily treats Smith or Jones according to some criterion that is not relevant If Smith is being treated differently from Jones, it must be because an irrelevant criterion for treatment, or an incorrect weighing of criteria for treatment, is being applied.³³

Professor Peters uses the lifeboat example for "indivisible treatments."³⁴ The lifeboat will stay afloat only if it carries ten or fewer people. Eleven equal people are available for the ten places; anyone denied a place will drown. Professor Peters supposes that the treatment cannot be divided up.³⁵ Because justice is constrained by the

³⁰ See Peters, *supra* note 3, at 1232-45. On conditions of competition, see Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 12 (1989).

³¹ Peters, *supra* note 3, at 1231. The phrase "necessarily affects" may be too strong for the last two categories Professor Peters discusses.

³² *Id.* at 1232 (emphasis omitted).

³³ *Id.* at 1235.

³⁴ *Id.* at 1232 (emphasis omitted).

³⁵ That is, the eleven cannot take turns swimming or clinging to the boat from the water.

possible, and it would be absurd for all eleven to drown, "[p]rescriptive equality . . . appears enfeebled to the point of irrelevance in conditions of scarcity of indivisible treatments."³⁶ Each of the eleven could be given an equal chance at a place in the lifeboat, for instance by lottery, but nonegalitarian justice would call for the same treatment in any event.

Professor Peters's primary examples and discussion contain a double fallacy. The first fallacy is his assumption that, whenever following the principle of equality is absurd (as in the lifeboat example) or is dictated by nonegalitarian justice, the principle lacks normative force. The second fallacy is the supposition that the examples capture all the relevant situations within his categories, and that one would therefore never act on the principle of equality unless the same action were dictated by other considerations. I shall attend mainly to the second fallacy, offering a brief comment about the first.

Consider a variation on the medical example that may straddle the categories of divisible and indivisible benefits. In this example, the benefits *are* divisible, but likely usefulness is disproportional to the amount of benefit. By some measure of medical effectiveness, 75 units of the medicine is one and a half times as good as 50 units, but 100 units is more than twice as good as 50. We could imagine that, for people bitten by a poisonous snake, 100 units is 100% likely to save their lives, 75 units is 60% likely, and 50 units is 40% likely.³⁷ The total lifesaving potential will be maximized by a 100-50 split of the units of medicine among our snake-bitten equals, Smith and Jones. If the medicine is split unequally in this way, the chance that one life will be saved is 100%, and the chance that both lives will be saved is 40%. If the medicine is split equally, the chance of saving both lives is 36% (0.6×0.6); the chance of saving at least one is 84% ($1 - (0.4 \times 0.4)$). In contrast to the case of the indivisible scarce benefit of the lifeboat, equal treatment here is a practical possibility, and, in contrast to Professor Peters's own medical example, doctors have good reason to give unequal treatment, because it would maximize the potential saving of life. I believe that, in some settings, such as when Smith and Jones are close friends, members of the same family, companions on a trip, or perhaps even patients of the same doctor without other connection, one might well opt for equal dosage despite its lower medical effectiveness. Professor Peters seems to deny this conclusion, although the hypotheticals on which he concentrates do not cover such circum-

³⁶ Peters, *supra* note 3, at 1238.

³⁷ For purposes of the illustration, I assume that nothing less than 100 units will be 100% likely to save a life. I also omit consideration of intermediate alternatives, such as a 90-60 split. Professor Peters considers a similar illustration briefly, commenting that more total nonegalitarian justice would be achieved by an unequal distribution of medicine. *See id.* at 1233 n.43.

stances.³⁸ Of course, one might allow Smith and Jones to choose (if they are not unconscious or small children) or perform a lottery on their behalf.³⁹ But the sense of some normative pull toward 75 units for each is neither confused nor obviously misguided.

One can imagine altered factual assumptions that would make the lifeboat choice more troublesome than the one Professor Peters presents. To simplify, suppose that everyone will definitely survive if only ten are in the boat, and that if eleven are in the boat, there is an 80% chance all will survive and a 20% chance all will perish. The expected value in lifesaving of taking all eleven is 8.8 (11×0.8), as compared with 10 if only ten are taken. Given these odds, one might conceivably choose equal treatment over optimizing the projected saving of life.

Similarly, one might choose equality in preference to a relatively trivial indivisible scarce benefit.⁴⁰ If two siblings would like a certain toy as a gift and only one is available, a parent might buy somewhat less favored toys for both, leaving the most favored toy in the shop.⁴¹

What do my examples show? They certainly do not demonstrate that the "right action" is the one to which the principle of equality points. But they do illustrate how that principle might pull some people to treat equals equally, although other considerations would suggest a different outcome.

If this much is granted, could we view the principle as relevant in Professor Peters's lifeboat and medical examples? We might see the principle as exerting some slight normative force for equal treatment in the lifeboat example, although that force is easily overcome by the desirability of saving lives. In respect to Professor Peters's medical example, we might conceive the principle of equality as reinforcing in-

³⁸ Professor Peters often talks about what nonegalitarian justice calls for, and someone might wonder if the example is irrelevant to his claims because the reason for unequal treatment concerns welfare, not justice. However, Professor Peters explicitly says that his construct of nonegalitarian justice includes "*the net effect of all the relevant (nonegalitarian) criteria.*" *Id.* at 1228. In any event, if one conceded that a principle of equality could count against independent welfare considerations, one would probably concede that it could count against "nonegalitarian justice," more narrowly conceived than by Professor Peters.

³⁹ If Smith and Jones were risk-averse in a certain peculiar way, they might each prefer receiving 75 units to having a 50% chance of receiving 100 units and a 50% chance of receiving 50 units. However, the lottery, viewed before the drawing, actually maximizes each's chance of survival in comparison with equal dosage.

⁴⁰ Professor Peters discusses a similar example. See Peters, *supra* note 3, at 1240 n.49. His conclusion that one should not withhold the more favored treatment (for example, tickets to the World Series) because justice is constrained by the possible is not convincing. If the principle of equality is valid, it may well be more just overall to withhold the favored treatment. See LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 163 (1987).

⁴¹ In my earlier piece, I raised a more troubling adoption example in which twins are to be placed separately and one available home is better than all others. See Greenawalt, *supra* note 5, at 1172-73. As Raz points out, "[e]galitarian principles often lead to waste," because they suggest wasting a benefit that cannot go around. RAZ, *supra* note 10, at 227.

dependent reasons to give each patient the same amount of the drug. The principle of equality could exert *some* normative force even when the action for which it calls is either clearly required for other reasons, or obviously absurd because countervailing reasons are so strong.

After discussing conditions of scarcity, Professor Peters moves to conditions of exact sufficiency (200 units of medicine, Smith and Jones each needing 100 units) and of finite surplus (250 units of medicine). In both circumstances, equals can get all they deserve. In both, it would be wrong if one person is given so much (Smith gets 175 units) that another receives less than he deserves, but Professor Peters assures us that we do not need the principle of equality to explain why. Professor Peters is right that the injustice of the distinction can be explained without reference to any principle of equality. Again, however, it does not follow that the principle has no force.

B. *Conditions of Infinite Supply*

In what Professor Peters calls conditions of infinite supply, no shortage of a given treatment will occur.⁴² Because a judge does not have a limited number of suspended sentences, the judge's choice as to whether to give the co-participant a suspended sentence is made under conditions of infinite supply. And, because my wife and I could have afforded group violin lessons for all our children, the same was true of our choice whether to give our second child, Sasha, the lessons.⁴³

As an example of this category, Professor Peters imagines a lottery in which the bearer of one \$500,000 ticket, Ms. Lucky, is mistakenly given \$600,000. Should another holder of a \$500,000 ticket, Mr. Unlucky, also be given \$600,000? Professor Peters initially puts aside

⁴² Professor Peters also discusses conditions of distinction, which he regards as special cases of his other examples. See Peters, *supra* note 3, at 1231. He refers to situations in which deserved treatment is denied on grounds such as race. Here, he says the substantive wrong is basing a decision on an irrelevant criterion, not a violation of prescriptive equality. See *id.* at 1254-56.

My own view is a bit different: the claim that race is irrelevant is a claim that people equal except for race should be regarded as equal. This issue is an important concern for theorists of equality writ large, but it does not concern the force of a narrower principle of prescriptive equality. See Greenawalt, *supra* note 5, at 1178-83. Once the determination is made that members of different races are equal, then the principle of prescriptive equality kicks in. (If this conclusion is correct, it may be a worse wrong if a white is given a benefit and a black is denied the benefit because of race, than if the black is the only person concerned and he is denied the benefit because of race.) Interestingly, because racial classifications cause humiliation in some instances by implying that some people are not fit to associate with others, the principle of equal treatment can apply to matters that would otherwise be unproblematic, such as positions in a class photograph. I shall not treat further the issue of classification by improper criteria, because it presents serious issues that do not turn on the possible validity of a narrow principle of prescriptive equality.

⁴³ It might be said that any benefit that costs money cannot be provided infinitely. Professor Peters's own lottery example shows that he does not mean the category to be understood so literally.

"consequences that disserve nonegalitarian justice"⁴⁴ before proceeding to the claim that the principle of prescriptive equality proves to be self-contradictory, incoherent, and invalid.⁴⁵ He makes three arguments.

1. *Self-Contradiction?* — Professor Peters's first argument endeavors to establish that prescriptive equality "necessarily contradicts itself."⁴⁶ If Mr. Unlucky is given \$600,000, he will be "treated *unequally* with respect to a whole different set of people: everyone who has ever received *just* treatment according to nonegalitarian justice."⁴⁷

We might take what Professor Peters says here as implicitly concentrating on other lottery winners of \$500,000 or like sums. If Mr. Unlucky receives the windfall Ms. Lucky has received, those who do not receive extra money are being treated *unequally* to him. Here, Professor Peters is on solid ground. But often the pool of relevant potential beneficiaries is closed: all within the pool might be given the favorable treatment. In the sentencing example, two people committed a particular crime together. The most relevant comparison is between each of these two people, not between these two people and others who may have committed somewhat similar crimes, but who cannot easily be identified as exactly equal to our two offenders in terms of what they deserve.

Similar analysis applies to my grading and family examples. In family situations generally, parents are mainly responsible for their own children, not all children. Because most parents can give many particular benefits to all of their similarly situated children, there is an infinite supply of those benefits in Professor Peters's terms, although the number of aspirants for the benefits is far from infinite. My wife and I were able to give Suzuki lessons to Sasha without doing an evident injustice to our children, or anyone else's children.

Professor Peters's language suggests a broader point: that those who receive more favorable treatment than they deserve are being treated *unequally* with those who receive *any* form of treatment they deserve. As Professor Peters puts it, "[e]very person in the world is situated identically with respect to his or her entitlement to be treated justly."⁴⁸ Mr. Unlucky, if he gets an extra \$100,000, and indeed our son Sasha, is being treated *unequally* with respect to every criminal who ever receives the appropriate sentence. Professor Peters claims that the principle of prescriptive equality is self-contradictory when-

⁴⁴ Peters, *supra* note 3, at 1248.

⁴⁵ See *id.* at 1249-54; see also Peters, *supra* note 2, at 2067-73 (offering further arguments to support this claim).

⁴⁶ Peters, *supra* note 3, at 1249.

⁴⁷ *Id.*; see also Peters, *supra* note 2, at 2068 (using similar language).

⁴⁸ Peters, *supra* note 2, at 2068; see also Peters, *supra* note 3, at 1249 (using similarly expansive language).

ever it might recommend giving people what they do not otherwise deserve, because equality for them relative to others who have benefited undeservedly comes at the cost of inequality with those who have been treated appropriately.

This way of speaking is odd: we do not think of people as being equal simply because they may get some benefit or burden they deserve. We do not suppose that Mr. Unlucky, who may get an extra \$100,000, is the "equal" of a murderer who deserves life imprisonment but may receive a sentence of thirty years. Still, Professor Peters apparently contends that these people are equal in deserving to be treated according to the standards that apply. Let us grant the point that, in some sense, those who receive more than they deserve are being treated unequally with those who receive what they deserve with respect to totally different subjects. What follows?

Some comparisons and relationships are far more salient and important than others. In the lottery example, the salient comparison is with other lottery winners. In the sentencing example, it is with the other co-participant. The principle of prescriptive equality may have normative force only when the person who may be less well treated perceives himself as significantly related to his well treated equal. If we suppose instead that giving one person better treatment than he otherwise deserves does involve some slight sacrifice of prescriptive equality in comparison with all others who are treated justly in various domains, satisfying the principle in relation to those with whom the connection is closest may rank as vastly more important. (For example, parents and children care much more about fairness within their own families than about how their treatment compares with treatment other parents give their children.) If this is so, then application of the principle would be much more complex than one might first suppose, implicitly evoking an infinite number of comparisons with every treatment ever given anyone; nonetheless, the dimension of magnitude of importance would keep the principle from falling into self-contradiction or incoherence. It does not follow that appropriate application of the principle will usually be simple. Not infrequently, one pool of persons may be highly relevant; however, another, larger pool may be relevant enough to matter substantially. To develop all the pertinent comparisons may be complex and require much fuller elaboration of what relationships are significant than I provide in this Response.

A related point about salience concerns the particular responsibilities of particular agents and is aptly illustrated by the family. Parents have responsibilities primarily for their own children. Perhaps, when parents make decisions about their children, the primary questions about justice, to them, concern the children for whom they have re-

sponsibility. A worldwide tabulation of instances of deserved and undeserved treatment is not of much relevance for them.

These points about magnitude and agent responsibility matter even when comparisons are less than global. Within a fairly narrow compass, some relationships are more important than others, and how anyone should act will depend on the range of her responsibilities. Thus, the principle of prescriptive equality can have force even when a repetition of *A*'s undeserved favorable treatment for *B* may generate *some* unfairness vis-à-vis more remotely related *C*, *D*, and *E*, who are treated as they deserve.

2. *Contradiction With Nonegalitarian Justice?* — Professor Peters's second argument is that prescriptive equality "necessarily contradicts nonegalitarian justice," because it calls for treatment "according to the same irrelevant criterion" used "in the unjust treatment of an identically situated person."⁴⁹ This observation has a core of truth, but the notion of "contradiction" contained in it is troublingly misleading.

If the principle of equality does have normative power, the proper analysis is as follows. Nonegalitarian relevant criteria may call for one form of treatment, the principle of equality another (just as independent reasons might call for telling a lie, and the norm against lying for telling the truth). Prescriptive equality thus would pull in a different direction from the balance of other criteria. In an overall account of what is just, one would need to qualify the force of the otherwise relevant criteria in light of deontological or consequentialist considerations of equality. We qualify the application of some standards for decisions in light of the relevance of others all the time; it does not follow that the second standards contradict the first, much less that they are thereby rendered incoherent. Just as consequentialist considerations might pull against deontological considerations without contradicting them or becoming incoherent, so might prescriptive equality also pull against nonegalitarian considerations without contradicting them or becoming incoherent.

Professor Peters's own analysis suggests the flaw in his claim that prescriptive equality necessarily contradicts nonegalitarian justice. Professor Peters is quite open to the idea that consequentialist considerations may pull toward following precedents. When the precedent case is believed to be "wrongly decided," the consequentialist reasons for following it pull against what would be a just and desirable decision according to other standards. Professor Peters sees no contradiction between the reasons for following the precedent and the reasons for reaching the otherwise just result. What is just or desirable overall takes into account all relevant reasons. The relationship between a

⁴⁹ Peters, *supra* note 3, at 1250. Whether a decision to accord equal treatment demands consideration of irrelevant criteria, *see id.* at 1253 n.62, depends on whether prescriptive equality adds a significant factor that was not present for the initial (mistaken) choice.

deontological principle of prescriptive equality and the just result according to other relevant criteria is analogous.⁵⁰

3. *Injustice Based on Random Sequence?* — Professor Peters's third argument is that prescriptive equality is incoherent because it violates substantive principles of justice by making a correct decision depend on a random sequence.⁵¹ What would be appropriate treatment if Judge *B* initially sentenced her offender — six months in jail — becomes inappropriate because Judge *A* has given the co-participant a suspended sentence first. I have already indicated why this argument rests on a misperception.

The principle of prescriptive equality is not limited to second decisions: it applies to first decisions in which the content of the second decision is highly predictable (for example, when Judge *B* is virtually certain Judge *A* will give a suspended sentence). One might correctly respond that the principle seems to have its claimed force mainly when second decisions are involved. One reason is that a single decisionmaker will not commonly predict a future mistake by himself, though he may recognize a past mistake. A second reason is that a different decisionmaker is less likely to predict a future mistake by someone else than to identify a past mistake by someone else. But these reasons are ones of evaluation and confident prediction; they do not suggest that the heart of the principle of equality is tied to sequence.

A different reason emerges that explains why the principle may seem more forceful when a past mistake is involved. Perhaps, when an equal receives what the decisionmaker regards as deserved treatment, and he knows his equal has already received better treatment, he will feel more unfairly treated than when the equal's better treatment follows his own treatment. Whether this differential feeling exists may depend on circumstances. If it does exist, it would show that the force of the principle ties to people's strong feelings of unfair treatment, not that the principle results in arbitrary applications.

⁵⁰ Professor Peters may perceive a difference in that the principle of prescriptive equality pulls against nonegalitarian justice in every instance in which the initial decision is judged to be mistaken. See Peters, *supra* note 3, at 1250 ("[I]t necessarily contradicts nonegalitarian justice." (emphasis added)); see also Peters, *supra* note 2, at 2072 ("Adjudicative consistency, that is, can be justified by conceptions of nonegalitarian justice that are not inherently and universally self-contradictory."). The answer to this possible argument is that, if no contradiction is involved in a single instance of tension between prescriptive equality and nonegalitarian criteria, it is irrelevant whether the tension is always, or only sometimes, present. In any event, it is also true that consequentialist considerations for following precedents will always be in tension with the best decision according to other criteria if the first decision is mistaken, and Professor Peters does not suppose that that conflict generates any contradiction.

⁵¹ See Peters, *supra* note 3, at 1252–53. Professor Peters's contention about random sequencing is in some tension with his acknowledgment that a mistaken second decision might generate a claim to alter an otherwise correct first decision. Compare *id.* at 1253 n.63 (random sequencing), with *id.* at 1226 n.33 (mistaken second decision).

What have I demonstrated, and what is its significance? I have shown that, in many applications, prescriptive equality is not incoherent and self-contradictory. Further, I have shown that, for examples other than the exact ones Professor Peters has chosen, the principle has intuitive plausibility. What I have not yet done, however, is show that it is ever really valid. I now leave the comfortable moorings of contentious response to examine the troubling issue of validity.

V. CONSIDERING THE FORCE OF PRESCRIPTIVE EQUALITY

A developed account of the scope and force of the principle of prescriptive equality would require much that this Response does not contain. It would need a systematic treatment of various circumstances in which the principle is invoked, and it would need a full moral theory to which to tie conclusions about equality. Nevertheless, short of such comprehensiveness, we can make substantial progress in our understanding of prescriptive equality.

It helps to start by recognizing that the situations for which the principle has intuitive force are those in which the people are in some relationship with each other. People feel they have been treated unfairly, they are resentful and envious, if they discover that those whom they believe to be their equals have been treated better than they have. This is certainly one powerful lesson of life in a family with children who are close in age to one another. But are these feelings any basis for decisions, and, if so, do they support the principle of equality?

When I told my Suzuki story to a colleague, he responded that parents should explain to the second child why they thought they had made a mistake in giving the lessons to the first child. Of course, my wife and I had tried that unsuccessfully, but perhaps my colleague is more adept at giving such explanations to five-year-olds than we were. Even if he is not, his main point could be defended in the following way: whatever the appropriate response to the powerful feelings of small children may be, one who deals with adults should expect explanations of previous mistakes to suffice. A reasonable "second person" should realize he has no right to treatment previously given to an equal if the present decisionmaker has good reasons for believing a less favorable treatment is warranted. No doubt, some adult "second persons" may fail to grasp the point, but neither our decisions nor our moral understandings should be bent to accommodate the unreasonable, resentful second adult.

Once one understands feelings about equal treatment in this way, one should recognize a distinction between the range of legitimate influences on decisionmaking and statements of moral principle. I start from the admittedly debatable premise that, at least in our culture, and probably in Western culture in general, the feeling that one should

not receive worse treatment than a perceived equal is fairly deep and strong and is not dispelled either with maturity or with explanations of why the judgments of decisionmakers have altered. If this assumption is correct, then one can reasonably expect good decisionmakers to accede to these feelings to some degree.⁵² Thus, although it is possible that countervailing feelings would sometimes support giving people "the right treatment," judged apart from how others have been treated, these feelings about equality would be recognized as a legitimate influence upon decisions.

Professor Peters may not disagree with this conclusion, but he would respond, I am fairly sure, that even if decisionmakers rightly accede to feelings about equality to some degree, they do so for consequentialist reasons, not because the principle of prescriptive equality is valid. According to Professor Raz, "strictly egalitarian principles can often be instrumentally justified"⁵³ because "[t]hey may diminish the occurrence of envy and hostility,"⁵⁴ though "[t]he prospect of such benefits can easily be exaggerated."⁵⁵ On this view, what decisionmakers do when they accede to such feelings is to render decisions that are less just in order to reap consequentialist benefits.

I have two answers to the parry that, after all, only consequences are at issue. The simple answer is that, if analysts wish to call accession to egalitarian feelings consequential, they should acknowledge that the feelings themselves are not based on consequentialist considerations, as normally understood. The equal who ends up being treated worse than another often feels wronged, quite apart from whether the disparate but otherwise deserved treatment places him at any intrinsic disadvantage in comparison with what his condition would have been if he had been the only individual involved and received the same (deserved) treatment. The co-participant sentenced to six months in jail after his partner in crime receives a suspended sentence will feel that he has been wronged, though he suffers no competitive disadvantage.⁵⁶ Even if the decisionmaker makes a concession to egalitarian feelings on a purely consequential basis, the motivation to make this concession still stems from the deontological sense of injustice, however "misplaced," of affected equals.

⁵² In general, this accession will occur when the decisionmaker allocating treatment for the second person believes a mistake has been made regarding treatment for the first person. However, as I have noted, it could also occur when the decisionmaker dealing with the first person (for example, the judge first imposing a sentence) confidently predicts that the second decisionmaker (for example, another judge soon to sentence the co-participant) will make a mistake.

⁵³ RAZ, *supra* note 10, at 233.

⁵⁴ *Id.*

⁵⁵ *Id.* at 234.

⁵⁶ If it is said that his co-participant has an advantage, the answer is that usually two partners in crime will not be competing against each other for future benefits in their lives.

I believe that this explanation is one plausible way of making sense of the claimed force of the principle of prescriptive equality. On this understanding, it might be said that the principle itself has no real force, but rather that the feelings it reflects affect consequentialist considerations. In this way, "prescriptive equality" might properly play a much greater practical role than Professor Peters's articles would suggest, but what is arguably Professor Peters's major theoretical assertion — the denial of a deontological principle — could remain untouched.

My second answer to the idea that the feelings of equality give rise only to consequentialist considerations is more complex. This answer begins with the alternative perspective that the deep feelings that underlie the principle may support a deontological norm. One might attempt to situate the principle within an overall account of deontological duties and rights. Or, one might claim that deep intuitive moral feelings that are not dispelled by reflection and analysis are our best guide to valid deontological norms. If Professor Peters's arguments against the principle are unpersuasive and we see no cause for the feelings that would cast their moral soundness into doubt,⁵⁷ then perhaps we can tentatively conclude that the feelings are reflective of aspects of deontological justice.⁵⁸

Once we begin to ask if the principle is deontological or points to desirable consequences, the question arises as to what exactly makes a standard deontological, rather than a guide to consequentialist calculation. This question has an important practical dimension — how should agents respond in particular situations? — as well as a theoretical aspect — how may one best conceptualize conclusions about how and why agents should act as they should?

It may be tempting to say that all concessions to imperfections are consequentialist — not true deontological standards. In deontological terms, one would have a moral right or claim in justice to *X* only if one should receive *X*, even if one were fully reasonable and appropriately generous. However, many of the moral standards accepted in our culture would be hard to defend on these terms. If people were always reasonable, their moral right to speak freely might be conceived as more circumscribed than it now is, because part of this right includes expressing irrational, hostile feelings that may be hurtful to others. If people were not generally so self-centered, the rich might be held to have a greater duty to give to the very poor and have less

⁵⁷ I mean a cause like the kind a historical explanation might provide for people's having feelings of racial superiority that are not morally defensible.

⁵⁸ I do not intend to suggest that prescriptive equality would necessarily provoke this kind of moral reflection in every culture. Rather, equality fits within the basic moral understanding of Western liberal democratic cultures and serves to stimulate the moral responses of members of these cultures in the ways I am suggesting here.

moral right to keep their wealth. We cannot relegate the principle of prescriptive equality to the dustbin of consequentialist considerations simply because people who were completely reasonable and ideally altruistic might accept treatment determined without reference to it.

A better approach to drawing the line between deontological standards and consequentialist considerations asks whether individuals making decisions should calculate in terms of consequences. Take the situation where Person 1 has received a particular treatment, and a decisionmaker must determine treatment for Person 2, a closely related equal. The decisionmaker believes that the appropriate treatment is less favorable than what Person 1 has received. If we imagine that only little children and a small percentage of those who are older will perceive an unfairness if they are Person 2 and receive worse treatment than Person 1, then we will conclude that prescriptive equality is not a principle to be followed generally. At most, decisionmakers should be alert to perceive feelings that might incline them in individual circumstances toward equality. If instead we suppose that the vast majority of people are moved by the feelings that prescriptive equality recognizes, we may think that the principle states a standard that should generally constitute a reason for action when closely related equals are to be given benefits or harms. Thus, we may conclude that the practical force of the principle should not depend on calculations in individual cases, which decisionmakers might assess inaccurately, but that the principle should appropriately be given weight in all relevant instances.⁵⁹

We can imagine three distinguishable attitudes a decisionmaker, *D*, might take when she is presented with a situation in which the principle of prescriptive equality corresponds with feelings that an equal affected by a decision would commonly have. *D* might consider carefully the various likely feelings of the individuals concerned if she decided in favor of equal treatment or, instead, treated someone as would otherwise be warranted. In this event, the "principle" would be no more than a signal to pay attention to possible feelings of unfairness and resentment in the particular situation. A second attitude would be that *D* should make a more general consequentialist inquiry. *D* would ask what general rule or principle, if followed by decisionmakers in a relevant class of situations, would have the most desirable consequences. The third attitude *D* might take would be that the principle has force, independent of assessments of consequences in the particular situation or in a general class of situations. According to this account, the first attitude is act-consequentialist, the second attitude rule-consequentialist, and the third attitude deontological.

⁵⁹ Note that it would be consistent with this approach to allow extra consequentialist weight if the decisionmaker is sure that feelings of unfairness and resentment will be acute.

We can ask different questions about these three approaches. One is descriptive: what attitude do most *D*'s have in our society? Another is prescriptive: what attitude should *D*'s have? A variation on the second question is, what attitude fits best with the fundamental moral ideas we now accept? It is entirely consonant with much of what Professor Peters says that people, confused about what deontological justice requires, now give the principle of prescriptive equality an unwarranted role in their decisions. What Professor Peters mainly urges is that any considerations that the principle may obliquely reflect are matters of consequence to be assessed by the *D*'s of this world. Whatever else they may do, *D*'s should not give the principle deontological force.⁶⁰

Could Professor Peters endorse a *D*'s adoption of the principle on a rule-consequentialist basis? Although he does not absolutely rule out this possibility in his articles, such an approach would almost certainly give prescriptive equality much more force than he regards as justified.

I believe that, because this principle reflects deep feelings of most people that cannot be dispelled by explanation, *D*'s properly accept it as a norm of behavior, not merely as a guide to contextual calculations of consequences. But the question remains whether the principle is a true deontological or a rule-consequentialist standard.

If decisionmakers ought to consider these matters of equality self-consciously in terms of which general rules, if followed, will yield the best consequences, then the principle may be adopted on a rule-consequentialist basis. If solid, convincing arguments that do not relate to consequences can be made for the principle, then it should be accepted as a deontological norm. Although I have countered arguments against the principle and have defended its intuitive plausibility, I have not presented arguments in its favor that are entirely separate from the consequences of its application. Perhaps such arguments can be offered, or perhaps intuitions themselves are sufficient to support the principle. I, however, am inclined toward another possibility: perhaps it is best if people, when they are acting, regard the principle as deontological, even though the ultimate reasons that that attitude is justified concern the desirable consequences for human life of people conceiving the principle in this way.

⁶⁰ Professor Peters says his "project is primarily descriptive, not normative," Peters, *supra* note 3, at 1212, and he indicates that most feelings pointing toward equality can be otherwise explained, *see, e.g., id.*, but he also seems to believe that people may be confused at times and that part of the point of his article is that "prescriptive equality, if acted upon, can have harmful consequences," *id.* at 1263. Perhaps one can best characterize most of his discussion as a conceptual and logical analysis of how prescriptive equality fits, or does not fit, with shared fundamental moral assumptions. Thus, he can conclude that the principle "has no substantive moral force of its own." *Id.* at 1213.

This special combination of desirable attitude and ultimate justification may strike some readers as paradoxical, but it is not hard to explain. Justifications for criminal punishment provide a fruitful context in which to explore this point.⁶¹ A common debate is whether punishment is warranted on retributive — that is, deontological — or utilitarian grounds.⁶² It certainly is possible that punishment will actually work best — that is, have the most desirable consequences — if those who receive it and those who impose it alike think and feel that its justification does not depend on favorable consequences. The main idea is that punishment will be most effective if its subjects believe that it is intrinsically deserved, instead of feeling that they are being “used” to accomplish social objectives.

Suppose someone philosophizing about the subject has this understanding, while concluding that the standard arguments in support of the retributive view are not persuasive. Would that person regard punishment for crimes as a deontological or consequentialist norm? My own view about this conceptual borderline is that a position should count as rule-consequentialist only if its proponent thinks that the people making moral decisions and acting reflectively should be self-consciously guided by rule-consequentialist analysis. Thus, I count as deontological an approach to punishment in which a theorist believes that retributive (deontological) attitudes are to be preferred to consequentialist ones, even if the theorist also believes that the final justification for these deontological attitudes lies in their positive social effects.

In short, I believe that, in many aspects, people should approach moral choices in a nonconsequentialist way, but the fundamental reason that these moral practices are warranted is that they will have beneficial consequences for human life. My present sense is that prescriptive equality fits into this category.⁶³ As we have seen, it should not always determine outcomes, but decisionmakers rightly give it some force apart from their conscious considerations of consequences.

⁶¹ See Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 359 (1983), reprinted in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336, 1344-45 (Sanford H. Kadish ed., 1983).

⁶² The utilitarian position is typically qualified by certain deontological constraints: most importantly, not punishing the innocent.

⁶³ However, someone might argue that, even if my general observations are sound, they do not apply to prescriptive equality, which comes into play only if one of the affected persons is aware of the treatment the other receives. It might be said that awareness signals concern about consequences. This issue is a difficult, complicated one. My brief response is that decisionmakers should give some force to the principle without first ascertaining likely awareness in the circumstances, and also that an attitude may be deontological even if the principle is triggered by awareness.

This last Part has covered vast ranges of moral philosophy in a few quick bounds.⁶⁴ But it is within these ranges that the genuinely troubling questions about prescriptive equality lie. The principle of prescriptive equality cannot simply be dismissed as empty, self-contradictory, or untrue to our reflective intuitions.

VI. CONCLUSION

This Response has not attempted systematically to work out precisely when the principle of prescriptive equality has force. As I have indicated, my reflective intuitions give strength to the principle only when the people to be treated are significantly related in some sense, and when the one who may receive worse treatment will be aware of the better treatment received by his equal.

These conditions are not met when courts decide to follow precedents they have rendered years before. Furthermore, a countervailing factor exists for civil cases that was not present in any of the examples I have considered. If one litigant in Case 2 is to receive better than otherwise deserved treatment because of a precedent — that is, he will win a case he would have lost if the court setting the precedent had not made a mistake — then the competing litigant in Case 2 will get worse treatment than he otherwise deserves. I have not argued that the principle of equality should authorize giving people worse treatment than they otherwise deserve.⁶⁵ In fact, I agree with Professor Peters that the principle of prescriptive equality is not a solid foundation for the doctrine of precedent.

If one were to address the principle in a serious way, and to refine its force and implications, one would need to examine what counts as "related" and why relationship matters as it does. Two final examples indicate some important implications. First, Professor Raz talks of egalitarian principles as having "symbolic or expressive functions in small or intimate groups."⁶⁶ Professor Raz mentions a voluntary surrender of possible benefits, but his observation could apply to choices by parents for children as well. One might believe intimate relationships matter for equal treatment largely because of the significance of symbolic and expressive functions.

A second example is Professor Peters's consideration of retroactive application of newly announced standards as raising issues essentially similar to those regarding precedent.⁶⁷ Professor Peters strongly criti-

⁶⁴ I discuss these matters in a somewhat fuller way elsewhere. See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 40–41, 159–86 (1987). In my view, many claims of a natural duty to obey the law rest ultimately upon desirable effects for human life, although the idea of "natural duty" is a deontological one.

⁶⁵ I am not sure whether the principle has no force in that direction, or only weaker force.

⁶⁶ RAZ, *supra* note 10, at 234.

⁶⁷ See Peters, *supra* note 2, at 2044–50.

cizes the Supreme Court's emphasis on deontological equality in a recent retroactivity case.⁶⁸ On reflection, one might think that those individuals who are identically situated except for whose case arrives first at the appellate court are closely enough related to trigger the principle of prescriptive equality. The principle might then carry the day for litigants not initially before the court, provided the opposing parties had no strong competing reliance interest based on the old standard.⁶⁹

The hard work, and one hopes the next steps, regarding prescriptive equality lie mainly in close analysis of such complex considerations.

⁶⁸ See *id.* at 2047-50. The case is *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Professor Peters compares its deontological approach unfavorably with the consequentialist analysis of precedent in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See Peters, *supra* note 2, at 2044-47.

⁶⁹ It could matter whether the case was against the government or a private party, whether it was civil or criminal, and whether its newly announced standard was justified on consequentialist (for example, deterrence) or deontological grounds.