

Equal Treatment & Same Treatment

Brian Barry

One of the great achievements of the French Revolution was the popularization of the idea that within a state there should be a single status of citizen, with all citizens having equal rights before the law. This idea of equal treatment as being treated in the same way, without any special exceptions for the nobility or the clergy, for example, gradually became standard within western liberal democracies. In the United States, with the great exception of slavery, the idea of a common citizenship was present from the outset: it is encapsulated in the notion that everybody is entitled to the equal protection of the laws.

In recent decades, however, this idea that equal treatment means the same treatment has come under fire from a rather heterogeneous collection of political theorists espousing 'the politics of difference' or (as it's more familiarly known) multiculturalism. A common thread is that this conception of equal treatment as the same treatment is actually a formula for unequal treatment, because it fails to take account of the way in which a law that applies to everybody may have a disparate impact on people – especially groups with a minority culture or religion. Charles Taylor has called the traditional conception 'difference-blind' liberalism. Let me remind you, however, that justice is

standardly depicted as blindfold, to indicate that she does not take account of differences between people that are not relevant to a just decision. Whether or not cultural or religious minority status is relevant or not is precisely the question that needs to be asked. We should not assume in advance that law which takes account of more differences is more just than law which takes account of fewer.

I want to argue here that the basic argument relied on by proponents of the politics of difference is flawed. Treating people in the same way is in general treating them equally, on condition that the rule in question has an adequate justification. I am not denying, let me emphasize, that a rule can be unfair or discriminatory and that this is always a valid ground for criticizing it. What I do want to say is that disparate impact on people according to their culture or religion (or anything else) is not in itself a basis for a complaint of unequal treatment.

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Let me begin by acknowledging that there are all sorts of ways in which people could be treated in the same way that would constitute unequal treatment. An army that issued all the soldiers with size 8 boots would be treating them the same but obviously not equally in the relevant respect: Equal treatment requires each soldier to have boots that fit.

What this simple example illustrates is that equal treatment is normally consistent with different people getting or doing different things. People are treated the same in that they have the same rights, but what they do with them may be very different. Consider, for example, an equal right to worship according to your religious beliefs, under some law with uniform application. We can say that everybody has the same right, but observable manifestations of its exercise may have nothing in common – special buildings of all kinds, people's homes, open air; ceremonies of all kinds, no ceremony at all (Society of Friends).

The notion that people are treated equally if they all have the same rights looks attractive, but it is not sufficient in itself. To see this, consider a law that gave everybody the right to be a Roman Catholic or a Protestant but ruled out any other possibilities. To dramatize it, let's say that followers of other forms of Christianity (Greek or Russian Orthodox, Jews, Muslims, Hindus etc) will be executed. Everybody here is subject to the same law, but clearly the impact is different according to religious beliefs: some can worship as they wish, others have a choice of forcible conversion or death. This is clearly not equal treatment.

But does this imply that equal treatment requires equal impact? This hardly seems right, if we think of the impact of a law as something like the extent to which everybody likes the results. Let's go back for a moment to the case of

an equal right to worship. There is no reason for supposing in general that this would satisfy the demands of equal impact: some Protestant sects have never aspired to anything going beyond this right – they are indifferent to what anybody else does. But most religious faiths in the course of history, and some today in a number of places, will argue that they are committed by their beliefs to giving their own a privileged or exclusive position, so as to protect the community of the faithful. They are therefore put at a relative disadvantage by a regime in which all religious groups have freedom to practice and proselytize. Does equal treatment require them to get at least some distance to their goal?

If you are inclined to deny this, as I certainly am, you have to go back and take another look at the notion of equal treatment in relation to religious worship. What you will be driven to say is, I suggest, that the sense in which a uniform set of rules provides equal treatment is that is a fair way of dealing with potentially conflicting demands. It is quite true that the same rights have unequal value to different religions, because they meet the demands of some more fully than they meet those of others. But changing the system of uniform rules to accommodate any one claimant (or more than one) would unfairly diminish the rights of the others.

What this shows is that in talking about equal or unequal treatment we can't eliminate a reference to the fairness of the rule that is applied to everybody. This shouldn't be surprising, because we are surely concerned with unequal

treatment precisely because we think there is something unfair about it. All that I'm adding to this is that we can't escape an independent inquiry into what's fair. Thus, the objection to a law that gives people only the option of Roman Catholicism and Protestantism is that it allocates the right to worship unfairly among believers in different faiths and in none. At the same time, what seems to emerge is that what we predicate fairness on is normally the allocation of rights and opportunities, not the impact that this allocation has on people.

I want to use this discussion as a bridgehead for a wider assault on the thesis that I began by describing: the claim made by partisans of the 'politics of difference' that we have unequal treatment (in a sense in which this is to be taken as objectionable) wherever a uniformly-applied law has a different impact on people according to their culture or religion.

Three examples are:

1) a law mandating that all animals killed for meat have to be stunned first. This is inconsistent with kosher and halal requirements of orthodox Jews and Muslims which demand that the animal be conscious when killed.

2) a law requiring motorcyclists to wear crash helmets is incompatible with turbaned Sikhs riding motorcycles.

3) some Amish in Minnesota (members of one particular branch) claimed that the requirement of putting reflective triangles on the back of their buggies (in line with the law on slow moving vehicles) violated their religious beliefs by being too bright and substituting faith in man for faith in God.

Is uniform law inconsistent with equal treatment in cases such as these? It seems to me important to emphasize that we do not in general regard a law as unfair if it has unequal impacts on different people.

The essence of law is the protection of some interests at the expense of others when they come into conflict. Thus, the interests of women who do not want to be raped are given priority over the interests of potential rapists in the form of the law that prohibits rape. Similarly, the interests of children in not being interfered with sexually are given priority over the interests of potential paedophiles in the form of the law that prohibits their acting on their proclivities. These laws clearly have a much more severe impact on those who are strongly attracted to rape and paedophilia than on those who would not wish to engage on them even if there were no law against them. But it is absurd to suggest that this makes the laws prohibiting them unfair: they make a fair allocation of rights between the would-be rapist or paedophile and the potential victim.

The point is a completely general one. If we consider virtually any law, we shall find that it is much more burdensome to some people than to others.

Speed limits inhibit only those who like to drive fast. Laws prohibiting drunk driving have no impact on teetotalers. Only smokers are stopped by prohibitions on smoking in public places. Only those who want to own a handgun are affected by a ban on them, and so on ad infinitum. This is simply how things are. The notion that inequality of impact is a sign of unfairness is not an insight derived from a more sophisticated conception of justice than that previously found in political philosophy. It is merely a mistake. This is not, of course, to deny that the unequal impact of a law may in some cases be an indication of its unfairness. It is simply to say that the charge will have to be substantiated in each case by showing exactly how the law is unfair. It is never enough to show no more than it has a different impact on different people.

If we rule out the claim that equal treatment entails equal impact, there may still be other arguments for special arrangements to accommodate cultural practices or religious beliefs. But what are they? One natural recourse is to suggest that what I have said so far may be all very well for costs arising from preferences, but that costs arising from beliefs are a different kettle of fish. It is very hard to see why this proposition should be accepted, however confidently it is often advanced. Consider, for example, the way in which people's beliefs may make some job opportunities unattractive to them. Pacifists will presumably regard a career in the military as closed to them. Committed vegetarians are likely to feel the same about jobs in slaughterhouses or butchers' shops. Similarly, if legislation requires that animals should be stunned before being

killed, those who cannot as a result of their religious beliefs eat such meat will have to give up eating meat altogether.

Faced with a meatless future, some Jews and Muslims may well decide that their faith needs to be reinterpreted so as to permit the consumption of humanely slaughtered animals. And indeed this has already happened. According to Peter Singer, 'in Sweden, Norway and Switzerland, for example, the rabbis have accepted legislation requiring the stunning [of animals prior to killing] with no exceptions for ritual slaughter.' The case for saying that humane slaughter regulations are not unfair does not, however, depend upon the claim that beliefs are a matter of choice, so that it is somehow people's own fault if they are incommode by their beliefs. (That is not the point about expensive tastes either.) If we want to say, as Yael Tamir does, that people should be 'free to adhere to cultures and religions of their choice', that should be taken to mean only that they should not be penalized for changing their minds about the value of their current religions or cultural commitments. It should not be interpreted to mean that these commitments are the product of choice. It makes no sense to say that we can decide what to believe. Similarly, we can if we like say that people are responsible for their own beliefs, but that should be understood simply as a way of saying that they own them: their beliefs are not to be conceived of as some sort of alien affliction. (The same may, again, be said in general about preferences.) Talking, as Michael Sandel does, about people being 'encumbered' by their beliefs feeds this sense of alienation.

The position regarding preferences and beliefs is similar. We can try to cultivate certain tastes (by, for example, developing a familiarity or skill), and we can try to strengthen certain beliefs (by, for example, deliberately exposing ourselves to messages tending to confirm them), but in neither case is there any guarantee of success. Moreover, the decision to make the attempt must come from somewhere: we must already have a higher-order preference for developing the taste or a higher-order belief that it would be a good thing to strengthen the belief. Choice cannot, in either case, go all the way down. I suspect that one source of the idea that many preferences are easily changeable is a result of a tendency to muddle together preferences and choices. Suppose, for example, that I have a preference for vanilla over strawberry ice cream, other things being equal. That entails that, if other things are actually equal I will choose vanilla. But this preference may be a weak one, which means that things do not have to be very unequal before my choice switches to strawberry. The weakness of my preference would be revealed by my willingness to pay only a little more for vanilla and my lack of reluctance to let somebody else have the last vanilla ice cream. Even so, the preference itself, even if weak, may be solidly based in physiology and almost impossible to change. The upshot is, then, that beliefs and preferences are in the same boat: we cannot change our beliefs by an act of will but the same can be said equally well of our preferences. It is false that the changeability of preferences is what makes it not unfair for them to give

rise to unequal impact. It is therefore not true that the unchangeability of beliefs makes it unfair for them to give rise to unequal impacts.

Beliefs are not an encumbrance in anything like the way in which a physical disability is an encumbrance. Yet precisely this claim is sometimes made. Thus, Bhikhu Parekh argues that giving people special treatment on the basis of their beliefs 'is like two individuals who both enjoy the right to equal medical attention but who receive different treatments depending on the nature of their illness.' A disability – for example, a lack of physical mobility due to injury or disease – supports a strong prima facie claim to compensation because it limits the opportunity to engage in activities that others are able to engage in. In contrast, the effect of some distinctive belief or preference is to bring about a certain pattern of choices from among the set of opportunities that are available to all who are similarly placed physically or financially. The position of somebody who is unable to drive a car as a result of some physical disability is totally different from that of somebody who is unable to drive a car because doing so would be contrary to the tenets of his religion. To suggest that they are similarly situated is in fact offensive to both parties. Someone who needs a wheelchair to get around will be quite right to resent the suggestion that this need should be assimilated to an expensive taste. And somebody who freely embraces a religious belief that prohibits certain activities will rightly deny the imputation that this is to be seen as analogous to the unwelcome burden of a physical disability.

The critical distinction is between limits on the range of opportunities open to people and limits on the choices that they make from within a certain range of opportunities. Parekh deliberately blurs this distinction by writing that 'opportunity is a subject-dependent concept', so that 'a facility, a resource, or a course of action' does not constitute an opportunity for you, even if it is actually open to you, unless you have 'the cultural disposition . . . to take advantage of it'. This proposal actually destroys the meaning of the word opportunity, which originally relates to Portunus, who was (and for anything I know to the contrary still is) the god who looks after harbours. When the wind and the tide were propitious, sailors had the opportunity to leave or enter the harbour. They did not have to do so if they did not want to, of course, but that did not mean (as Parekh's proposal would imply) that the opportunity somehow disappeared. The existence of the opportunity was an objective state of affairs. That is not to say that opportunity could not be individualized: whether a certain conjunction of wind and tide created an opportunity for a particular ship might depend in its build and its rigging. But it did not depend on the 'cultural disposition' of the crew 'to take advantage of it'. They might, perhaps, have chosen not to sail because setting out on a voyage was counterindicated by a religious omen, but that simply meant that they had passed up the opportunity.

Returning to my original examples, the point is that a complaint of unequal treatment won't stick as long as there is a good case for having the law in the first place. If the law serves a valid public purpose, unequal impact is not in itself a

sign of its being unfair, any more than it is in the other examples I have just given.

In these particular examples, the case for the law is strong.

1) Ritual slaughter: bodies with no religious axe to grind have determined that 'religious methods of slaughter, even when carried out under ideal conditions, must result in a degree of pain, suffering and distress which does not occur in the properly stunned animal' (p. 42). That was the conclusion reached in an extensive investigation carried out by the British government's Farm Animal Welfare Council (1985) and in 1990 the Scientific Veterinary Committee of the EU recommended to the European Parliament that legal exemptions from stunning should be abolished in all member countries on the basis of the same kind of evidence.

2) As far as crash helmets are concerned, the risk of death from accident is reduced by 40%, and a turban provides virtually no protection (contrary to a myth propagated in some parts of the multicultural literature). If it is reasonable to have a crash helmet law to avoid the excess deaths, as most countries have decided, the fact that this will not enable turbanned Sikhs to ride a motorcycle does not make the law unfair.

The underlying problem is that wearing a turban instead of a crash helmet creates a much higher risk of death (and also non-fatal head injuries): that is simply a fact about the effect on a human head of hitting a road at a certain speed. Nothing can be done about this. It can be argued that a crash helmet law is paternalistic (as it is), and that people should be free to risk death if they choose to, in which case there would be no case for a law at all. It can also be argued that the law is worth having for its life-saving potential but that there should be an exemption for Sikhs, thus accepting their higher risk of death so as to let them ride motorcycles while wearing turbans. But it is also valid to say that saving lives is a proper public purpose and that the lives of Sikhs are just as important as those of anybody else. This is the case for saying that Sikhs are not treated unequally by a requirement without exemptions. A parallel analysis can be made of the ritual slaughter case: the underlying problem is that (according to the authorities I have mentioned and many others) killing animals while conscious violates minimal contemporary standards for the humane treatment of animals. Again, it could be argued that the state has no business regulating animal welfare, or that there should be an exemption so that some animals suffer more to satisfy the demands of certain carnivores. But once again my point is that to impose a minimum standard across the board is a legitimate move and cannot be condemned as constituting unequal treatment.

The case of the Amish buggies differs only in that I take it nobody would want to deny that states have a legitimate interest in road safety. When the law

requiring reflective triangles was challenged in Minnesota, the state produced a number of road safety experts who testified that the reflective red and orange triangle is the same throughout the United States and is included in Drivers' Training Manuals, so that it should be instantly recognizable. The proposed alternative of a red lantern and reflective tape would, they said, 'only confuse other drivers' – especially, of course, those from outside the area. It is easy to imagine how easily under poor visibility conditions drivers could fail to decode a lantern and some silver tape in the split second they would have to react and take appropriate action. The State could have given a dispensation to Amish who objected to the reflective triangle, but it was surely reasonable for it to give road safety priority, treating everybody equally.

It may, of course, be said that in all these cases (and others like them) there is an inequality of treatment because the equal right to practise one's religion is infringed. In the first two cases, this has no merit at all because nobody's religion says they have to eat meat or ride a motorcycle. The third does raise the question in as far as a small minority of Amish maintained that reflective triangles were contrary to their conception of the Amish way of life, which they claimed could demand protection as an entirety in the name of freedom of religion. However, it seems to me that the Supreme Court was correct in the well-known Smith case (p. 171) to argue that what has to be ruled out is discrimination, that is to say putting the adherents of a certain religion at a

disadvantage simply in order to damage it, or at any rate putting it at a disadvantage for no adequate reason.

Thus, if there were no good reason for insisting on reflective triangles, a law requiring them could be claimed by the Amish who objected to them as indirectly discriminatory in that it disadvantaged them gratuitously. Similarly, if Amish buggies were singled out, and other slow moving vehicles not required to display reflective triangles, that would clearly be straightforwardly discriminatory. But there is nothing discriminatory in enforcing a uniform standard in pursuit of road safety: on the contrary, making an exception for some would be imposing an unfair burden (an increased risk of accidents) on others. My general argument about equal treatment holds here as well. All laws have different impacts on different people depending on their preferences and beliefs, and this does not constitute unequal treatment provided the law can be justified as advancing some legitimate public objective. People who hold beliefs that mandate practices contrary to some law that serves a significant public objective such as road safety are not treated unequally by having to conform to the law, any more than are those who would like to be allowed to drive with alcohol in their blood or talk on cellphones where these are prohibited.

Let me repeat that legislatures can decide to trade off legitimate public objectives – humane slaughter, reduction of deaths among motorcyclists, reduction in collisions – against the competing value of accommodating cultural

or religious minorities. My argument is simply that they are not required to do so in order to satisfy a requirement of equal treatment. Since this claim plays a large part in the armory of the 'politics of difference' it seems to me worth subjecting to a critical appraisal.

I want now to change tack rather and try to show how the notion of equal treatment as non-discrimination can play an important role in some contexts in invalidating uniform rules because of their unequal impact. The context I shall take up is that of equal opportunity in employment.

The essential idea of equal opportunity in employment is that those who are equally able and willing to do some job should have an equal chance of being employed in it. Equal opportunity is denied when some irrelevant characteristic such as race or gender is used to disqualify or disadvantage equally qualified applicants. This is direct discrimination and it is clear that it is unfair. More interesting is indirect discrimination. The British Race Relations Act defines indirect discrimination as occurring when 'apparently neutral acts done by employers and others' have a disproportionate impact on ethnic minorities in virtue of their religious or cultural characteristics, unless the rules in question can be demonstrated to be 'justifiable' (p. 56) This does not cover indirect religious discrimination as such, but it clearly could be – and I think it should be.

In any case, the most common disputes that arise under the Act involve 'standardized rules about uniforms, dress and appearance' p. 56). The point here is that many requirements – that men should have short hair and be clean-shaven, or that women must wear dresses or have their heads uncovered – cannot be plausibly shown to be essential to the running of the enterprise (office, factory, shop, hospital etc.) and therefore impose unfair barriers to employment. For in such cases somebody is both willing and able to do the job – that is to say to conform to the requirements that the job genuinely has built into it – but is inhibited by gratuitous barriers.

Does this mean after all that opportunity is a desire-dependent concept? I think that what it reinforces is the point that we want lack of equal opportunity to be identified with unfairness. The concept of equal opportunity adapts so that it will have some critical bite in every context. That means that, in relation to employment as elsewhere, disinclination to do a job due to preferences or beliefs will not count as unequal opportunity. There are endless reasons, cultural and personal, for some jobs being attractive to certain people and other jobs repellent, among those jobs they would be capable of doing. If we were to call every case in which the characteristics of a job makes it differentially attractive a case of unequal opportunity, unequal opportunity would be omnipresent but completely unobjectionable: by making it everything we would be making it nothing. We therefore describe these as cases in which people have opportunities but do not pursue them. Inequality of opportunity is useful as a

critical concept in these contexts to deal with cases in which opportunities are not open to those who want a job and are qualified.

It is also not a denial of equal opportunity if you would like a job and are capable of doing it but are not willing to actually do what it requires. For example, if you are qualified to work in the construction trade and would like to do so, it is not a denial of equal opportunity if you are turned down because you are not prepared to wear a hard hat – either from personal preference or because you wear a turban. This is on the assumption that wearing a hard hat is a bona fide requirement related to the nature of the business. There are plenty of reasons for thinking this to be so in addition to paternalistic ones: disruption of work from injuries, risk of injury to others as a result of being struck on the head, higher insurance premiums and so on. We could in fact assimilate such cases to those that I discussed previously: we could say that you have the opportunity to do the job but you choose (maybe for culturally-derived reasons) not to do it, i.e. in this instance not to do what the job actually requires you to do.

Only when we get to indirect discrimination do preferences and beliefs enter into the specification of equality of opportunity. The point about indirect discrimination is that it is unfair because people who are similarly placed – equally willing and able to do a job – are treated differently. In this specific context, the concept of opportunity does take account of preferences and beliefs with the implication that equal opportunity is being denied. But the point here is

that the people who are treated differently by gratuitous demands are similar to other candidates in the respects that are relevant.

It is this peculiarity of the case that prevents it from having wider applications and unravelling the thesis of this lecture. Thus, to return to my earlier example, it is not unfair if somebody who is not prepared to wear a hard hat (for cultural or other reasons) on a construction site is refused a job, because he is not similarly placed to those who are prepared to wear a hard hat. We should mark the distinction by saying that, if he has the necessary skills, he has the opportunity but does not wish to do what is called for to take advantage of the opportunity. The same then goes for somebody who knows how to ride a motorcycle but is (again for whatever reason) not prepared to wear a crash helmet. There is a relevant difference between those who are and those who are not prepared to wear crash helmets: those who are not are much more likely to be killed or injured in an accident. Similarly, there is a relevant difference (defined in terms of animal suffering) between those who will eat only kosher/halal meat and those who do not impose this limitation. The case is analogous to that of somebody who is not prepared to do what the job requires and is not therefore denied equal opportunity if he does not get it. Here there is a lack of willingness to accept the minimum standards of humane slaughter, which makes inability to eat meat not a denial of equal opportunity.

If we were to call all such cases inequalities of opportunity, we would lose the ability to object to real denials of equal opportunity: cases in which, for example, members of some group are simply not permitted to ride motorcycles or eat meat. As in the fable, if we cry wolf all the time, we shall not be in a position to be taken seriously when a real wolf comes along.

In saying this I am, of course simply repeating my earlier argument about equal treatment. If all differences in impact of uniform laws are to count as unequal treatment, unequal treatment is a universal fact of life, and there is nothing intrinsically wrong with it. Again, then, if we want the concept of equal treatment to cut any ice, we should reserve it for rules that treat people differently on the basis of characteristics such as race, gender or sexual orientation where (as will commonly be the case) these characteristics are irrelevant to any legitimate purpose of a rule. Once again, then, unequal treatment should be related to discrimination but the notion of discrimination must retain its critical force so that differential impact is not taken to constitute discrimination in and of itself.