Consistency in Administrative Law

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In 1978, 13-year-old Carl Bridgewater was murdered during a burglary at Yew Tree Farm in the West Midlands. Jim Robinson and Vincent Hickey were charged with the murder. Although they insisted they were innocent, both men were convicted and sentenced to life in prison. The two men were still in prison, 18 years later, when it was revealed that the police had fabricated the evidence against them. Robinson and Hickey were released, and the Secretary of State accepted that there had been a miscarriage of justice.

There is a right to compensation for miscarriages of justice under s 133 of the Criminal Justice Act 1988. The amount of compensation is fixed by an independent assessor, who must consider 'any other conviction of the person and any punishment resulting from them' when fixing compensation for non-pecuniary losses, such as loss of reputation. The assessor assigned to Robinson's case, Sir David Calcutt QC, deducted 10% from the compensation otherwise due to him because of his long criminal record. The assessor assigned to Hickey's case, Lord Brennan QC, deducted 25% from the compensation otherwise due to Hickey considering his long criminal record. Hickey's criminal record was, however, no longer, or worse, than Robinson's.[1]

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Hickey appealed. Like cases had been treated unalike, he said. He and Robinson had like criminal records, yet Robinson had been treated better than him. At trial, the judge in *O'Brien v Independent Assessor* [2] thought that two things were 'incontrovertible':

> First, if the same assessor had determined ... [both] cases, he would not have made such different deductions .... Secondly, when considered individually ... [the Hickey deduction] cannot be said to be irrational or otherwise open to challenge. [3]

The assessments were collectively inconsistent, but individually reasonable. This second point was decisive:

> [The assessor for Hickey] simply disagreed with the 10% deduction which ... had been made in *Robinson*. Was he to make what he believed (and, in my judgment, permissibly believed) to be the correct decision or was he bound to allow himself to be influenced by an award with which he disagreed? In my judgment it was neither irrational nor otherwise unlawful for [the assessor] to apply deductions ... which were in all other respects unobjectionable. He was not bound by any principle of consistency because there was good reason in

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including some citations. The final version will be published in T Endicott, H Kristjansson, and S Lewis (eds), *Philosophical Foundations of Precedent*.

[1] Indeed, Hickey's record was not as bad as Robinson's. See *O'Brien v Independent Assessor* [2007] UKHL 10, [24].

[2] [2003] EWHC 855 (Admin). Robinson's and Hickey's claims were heard along with others challenging decisions in respect of compensation for miscarriages of justice. One of these other claims was brought by Michael O'Brien.

[3] [2003] EWHC 855 (Admin), [44].

> his permissible judgment to depart from Sir David's approach.[4]

An assessment that would be lawful, taken on its own, does not become unlawful because it is inconsistent with another lawful assessment.

Hickey's appeals to the Court of Appeal and House of Lords also failed. Lord Bingham, in the House of Lords, explained:

> [T]he assessor's task in this case was to assess fair compensation for each of the appellants. He was not entitled to award more or less than, in his considered judgment, they deserved. He was not bound, and in my opinion was not entitled, to follow a previous decision which he considered erroneous and which would yield what he judges to be an excessive award.[5]

Even though Sir David and Lord Brennan disagreed as to the appropriate deduction, each acted reasonably and hence lawfully.

Many claimants have tried, as Hickey did, to convince a court that an administrative decision in their case was unlawful simply because it was less favourable than a decision in a previous and like case.[6] Had these claimants succeeded, there would be something akin to a system of administrative precedent. The decision by an executive official in one case would bind an official

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[4] [2003] EWHC 855 (Admin), [47].

[5] [2007] UKHL 10, [30]

[6] See, e.g., *R (Gallaher Group Ltd) v The Competition and Markets Authority* [2018] UKSC 25, [24] ('the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law'), per Lord Carnwath. There are helpful overviews in K Steyn, 'Consistency – A Principle of Public Law?' (1997) 2 Judicial Review 22; J Randhawa and M Smyth, 'Equal Treatment and Consistency Before and After *Gallaher*' (2018) 23 Judicial Review 159.

in a later and like case, even if the official in that later case believed that the earlier decision was erroneous. The 10% deduction in Robinson's case would dictate the permissible deduction in Hickey's case, for example, even though the assessor in Hickey's case was convinced 10% was too low.

In general, English courts have rebuffed these attempts, as the courts rebuffed Hickey's attempt.[7] I want to know whether they are right to do so. I won't defend the claim that an official should decide a case as an official decided a previous and like case. I'm sure that claim is false, for reasons I explain in §3. But I shall defend a similar claim:

Consistency Where A and B are officials, A should decide a case as B decided a like case, unless A is more likely to decide the case correctly than B.

This claim holds true, I'll say, even when the official in the later case believes that the earlier case was decided incorrectly. This claim is relatively modest, but it is practically important. It suggests, for instance, that Lord Brennan was wrong to deduct 25% from Hickey's award and that he should have deducted 10% instead, as Sir David did. I shall also defend:

Enforcement It should be unlawful for A not to decide a case as B decided a like case, unless A is more likely to decide the case correctly than B.

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[7] English courts have been more amenable to the argument that the treatment of a case is unreasonable due to the different treatment of a previous and like case. But on this approach, 'differential treatment of like cases per se is insufficient to invalidate a decision': J Randhawa and M Smyth, 'Equal Treatment and Consistency Before and After *Gallaher*' (2018) 23 Judicial Review 159, 162.

Essentially, it should be unlawful to breach Consistency. Based on this claim, I shall suggest, tentatively, that the courts should have held that Lord Brennan's decision to deduct 25% from Hickey's award was unlawful.

2

I want to start by clarifying the relevant notion of consistency.

One type of consistency is consistency between a decision in a case and a prior commitment. A "commitment" includes a policy and a promise as to how a case, or cases of a class, will be decided. If an official adheres to a commitment when deciding a case addressed by that commitment, then the official's decision is consistent with that commitment. Consistency with prior commitments is required, under some conditions, by the doctrine of legitimate expectations.[8] If, for example, Lord Brennan had promised Hickey that he would deduct only 10% from his compensation, then Hickey could rely on the doctrine of legitimate expectations to challenge Lord Brennan's 25% deduction.

It is an interesting question whether the law should require consistency with prior commitments, and if so why. I suspect that the answer will appeal to practical rationality. Commitments such as policies and promises can be understood as, or involving, plans or intentions. One is rationally required to follow through

[8] See, e.g., *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA). For a discussion of the doctrine, see F Ahmed and A Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 Cambridge Law Journal 61.

on one's plans or intentions unless one reconsiders them.[9] Reconsideration is rational only under special circumstances, such as when one is presented with new evidence.[10] By insisting that officials follow through on their commitments, absent special circumstances, the law upholds the rational requirements applicable to officials. Much more would have to be said to substantiate this suggestion, of course, but I shall not try to do that here. My interest is not consistency with commitments.

A second type of consistency is between the decisions in, or treatment of, two cases.[11] Let us say that the decisions in two cases are consistent if and only if the cases are alike and the decisions are alike. The decisions are inconsistent if and only if the cases are alike and the decisions are different. When are two cases 'alike'? Not when they are identical. No two cases are identical. Even though Robinson and Hickey were convicted of the same murder and spent the same number of years in prison, for example, their cases were different in many respects. The parties were different, the cases were heard at different times, etc. Let us say, instead, that two cases are alike if and only if their fact patterns are the same.[12] Robinson's and Hickey's cases share a fact pattern, despite differing in many particulars.

Within the category of consistency between cases, we can draw a further distinction. Like cases could be decided at the same time

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[9] T Scanlon, 'Reasons: A Puzzling Duality?' in RJ Wallace, P Pettit, and S Scheffler (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (OUP 2004), 244.

[10] M Bratman, 'Planning and the Stability of Intention' (1992) 2 Minds and Machines 1, 4-8.

[11] H Wilberg, 'A Duty of Consistency? The Missing Distinction Between Its Two Forms' UK Const. L. Blog (27 February 2020) available at <https://ukconstitutionallaw.org/2020/02/27/hanna-wilberg-a-duty-of-consistency-the-missing-distinction-between-its-two-forms/>.

[12] J Brand-Ballard, *The Limits of Legality* (OUP 2010), 256.

or at different times. There is synchronic inconsistency if like cases are decided differently at the same time.[13] If a single official makes synchronically inconsistent decisions, then that official will normally hold inconsistent beliefs. The official believes that a case with a certain fact pattern merits one type of treatment and, at the very same time, believes that it does not merit that type of treatment but some other type of treatment instead.[14] Many philosophers think that it is irrational to hold contradictory beliefs at the same time.[15] If the law should uphold the rational requirements applicable to officials, then there may be a simple argument for the unlawfulness of certain types of synchronic inconsistency between cases. My concern is not synchronic consistency between cases, so I shall not pursue this possibility further.

Diachronic inconsistency – inconsistency between cases decided at different times – is trickier. Even when two cases were decided by one official, and even when that official holds inconsistent beliefs, we still cannot infer any irrationality if the cases were decided at different times. Yesterday I believed that Johannesburg is the capital of South Africa. Today, having thought better, I instead believe that Johannesburg is not the capital of South Africa. These beliefs are inconsistent, but I am not irrational for holding both if I hold them at different times. It is not irrational for me to change my mind. The same is true of officials. So, the irrationality of inconsistent beliefs does not

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[13] See, e.g., *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin) (holding that the differential treatment of mushroom pickers and other agricultural workers in the same legislation was unreasonable).

[14] This assumes that the official believes that the fact pattern *uniquely* merits one type of treatment and a different type of treatment.

[15] See, e.g., J Broome, *Rationality Through Reasoning* (John Wiley & Sons 2013) 155.

explain what, if anything, is wrong with diachronic inconsistency between cases.

My interest, going ahead, is diachronic inconsistency between cases. This is the more common type of inconsistency between cases; most cases are not decided at the same time. It is also the only type of inconsistency at issue in Robinson's and Hickey's cases. There was no policy or promise in these cases, and they were decided at different times. I want to know what, if anything, is wrong with this type of inconsistency and what, if anything, judges should do about it.

When two cases are alike, I shall sometimes refer to the decision in the earlier case as a "precedent". If the official in the later case makes a like decision, he or she "adheres to" precedent; otherwise, he or she "departs from" precedent. This is just a convenient shorthand. By using these terms, I do not mean to propose that administrative law should incorporate the equivalent of the common law doctrine of precedent, with all its elaborate distinctions and rules.

3

My argument starts with the principle that like cases should be treated alike, which I term the "Fairness Principle".[16] I then show how to move from the Fairness Principle to Consistency. Much

[16] Others also characterise the principle as part of fairness, including R Dworkin, *Taking Rights Seriously* (OUP 1978), 113. But the principle is also claimed on behalf of other normative domains. See, e.g., *Matadeen v Pointu* [1999] 1 AC 98, 109 ('treating like cases alike and unlike cases differently is a general maxim of rational behaviour'), per Lord Hoffmann; *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634, [34] (the principle is 'perhaps the most fundamental principle of justice').

of this section summarises and refines an argument that I have developed elsewhere for precedent-following in the judicial context.[17]

3.1

Formulating a plausible version of the fairness principle is not easy. Here is a first attempt:

Strong Fairness Principle	For any two like cases c_1 and c_2, where c_1 is earlier than c_2, if you treat c_1 in some way, then fairness provides a decisive reason to treat c_2 alike and reason not to treat c_2 unalike.

To say that there is a decisive reason for you to do something is another way of saying that you should or ought all-things-considered do it. To decide a case differently than a like case would be to act contrary to a decisive reason, were the strong principle sound. Lord Brennan decided Hickey's case differently than Sir David decided a like case. So, Lord Brennan would have acted wrongly, were the strong principle sound.

The strong principle is not sound, however. Deciding a case incorrectly does not make it right to decide a like case incorrectly. Imagine that Sir David erred by deducting a mere 10% from Robinson's compensation. Lord Brennan should not repeat that mistake. Any principle that tells us otherwise is a bad principle.[18]

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[17] 'Precedent and Fairness' (unpublished ms, available on request).

[18] Phillip Montague, *Comparative and Non-Comparative Justice*, 30 Philosophical Quarterly 131, 133 (1980); Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1, 10 (1989); Lamond, *supra* note ___.

We can avoid this objection by weakening the fairness principle. Here is one way to weaken it:

Moderate Fairness Principle	For any two like cases c_1 and c_2, where c_1 is earlier than c_2, if you treat c_1 in some way, then fairness provides a pro tanto reason to treat c_2 alike and reason not to treat c_2 unalike.

According to the strong principle, fairness provides a *decisive* reason to treat like cases alike. The moderate principle is weaker because it says that fairness provides merely a *pro tanto* reason to treat like cases alike. Pro tanto reasons can be outweighed. Perhaps the reason provided by the moderate principle *is* outweighed when it favours an otherwise incorrect decision. Lord Brennan would have a reason of fairness to make the same decision as Sir David, even if Sir David erred. If he erred, though, then Lord Brennan would have an even stronger reason to make the correct decision instead.

Much of the difficulty remains, however. It is simply not true that a wrong decision in one case is *any* reason, of any weight, to treat a like case wrongly as well. Robinson was imprisoned even though he was innocent. That fact does not provide even the slightest support for imprisoning the equally innocent Hickey, for example.[19]

So, the strong and moderate principles are not appealing. Before we abandon the idea that it is fair to treat like cases alike, it is

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[19] Larry Alexander, *Constrained by Precedent* (1989) 63 Southern California Law Review 1, 10; Larry Alexander, 'Precedent' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (John Wiley & Sons 2010), 495. I offer additional objections to the Moderate Fairness principle in my 'Precedent and Fairness' (unpublished ms).

worth reflecting a little more on our intuitions. Imagine that an immigration officer reviews our visa applications. Our applications are alike. Both should be rejected. And, indeed, mine is rejected. Yours, however, is granted. I cannot object that I have been treated incorrectly; after all, the correct decision *was* to reject my application. But there is still something objectionable here. What is objectionable – what is unfair – is that you have been treated better than me even though we are no different.[20] A good principle would accommodate this intuition without committing the same mistakes as the strong and moderate principles.

Here is a principle that can do so:

Weak Fairness Principle	For any two like cases c_1 and c_2, where c_1 is earlier than c_2, if you treat c_1 correctly, then fairness provides a pro tanto reason for you to treat c_2 alike and not to treat c_2 differently.[21]

The condition does not apply if an earlier case was decided incorrectly. As a result, the weak principle does not demand that we repeat our errors, unlike the strong and moderate principles. The condition *is* satisfied when the earlier decision was decided correctly, so it explains why it was unfair to correctly refuse my visa application and grant yours. The Weak Fairness Principle gives us everything we need in a principle of fairness. I shall treat it as true in what follows.

3.2

[20] D Lyons, 'Formal Justice' (1972) 58 Cornell Law Review 833, 843.

[21] This formulation appears, with slight changes, in my 'Precedent and Fairness' (unpublished ms).

There is, of course, a big difference between the Weak Fairness Principle and our target claim, Consistency. Now I want to bridge that gap.

If the Weak Fairness Principle is sound, and officials in like cases at different times disagree as to the correct decision, then there is an asymmetry between:

- the two officials deciding differently when the official in the later case is correct, and
- the two officials deciding the same way when the official in the earlier case is correct.

In the first scenario, if the later official decides differently than the earlier official, then the later official decides correctly. But he or she does not decide fairly. He or she does not decide unfairly either. Fairness is simply not at issue.[22] In the second scenario, if the later official decides in the same way as the earlier official, then the later official decides correctly *and* fairly.

Suppose that the two officials are equally likely to reach a correct decision. Following and departing from precedent have the same probability of yielding a correct decision. But following precedent has a greater probability of yielding a decision that is also fair. So, following precedent is the weakly dominant alternative: it is better in one respect (the value realised) and worse in no other (including the probability of realising a value). To illustrate, suppose that Sir David and Lord Brennan are equally likely to arrive at a correct assessment. Since Lord Brennan is more likely to decide fairly by following Sir David's decision than by departing from it, he should follow Sir David's decision. Lord Brennan should therefore deduct a mere 10% from Hickey's award. In essence, Lord Brennan is faced with a tie between his

[22] At least, by virtue of any principle of fairness about the like treatment of like cases.

view and Sir David's, which fairness breaks in favour of following Sir David's.[23]

Here is an analogy. You can play on either of two pinball machines. You have the same odds of winning on either machine. If you win on either, then you will receive a free turn. But if you win on the left-hand machine, it will give you a second free turn. On which machine should you play, all else being equal? The answer is, of course, the left-hand machine. The probability of a payoff is the same, but the payoff is larger. Similarly, if Lord Brennan is equally likely to decide correctly whether he makes a like or unalike decision, but he obtains the "fairness bonus" only if he makes a correct and like decision, then he should make a like decision.

It is easy to see that the same reasoning applies with even greater force when the earlier official is *more* likely decide correctly than the later official. In that case following precedent is strictly dominant: it is better than departing from precedent in every respect. There is a higher probability of realising some value *and* the value realised is greater.

If the earlier official is not more likely to decide correctly than the earlier official, nor are they equally likely to decide correctly, then only one possibility remains: the later official is more likely to decide correctly. So, another way to state the conclusion is that a later official should follow precedent unless he or she is more likely to decide correctly than the earlier official. And this, of course, is just Consistency.

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[23] I thank Andrew Currie for help with this argument.

With my argument for Consistency in hand, I turn to Enforcement. Enforcement, to recall, is the claim that it should be unlawful for officials to decide cases as earlier officials decided like cases, unless the later officials are more likely to decide correctly. In other words, there should be a legal requirement to adhere to Consistency. By a "legal requirement" I mean a judicially enforceable requirement.

My argument for Enforcement is simple:

P1	There is a reason to legally require officials to do what a moral requirement directs them to do if they would be more likely to satisfy that requirement as a result.
P2	Officials would be more likely to satisfy Consistency were they legally required to do so.
C	So, there is a reason to legally require officials to satisfy Consistency.

I shall treat P1 as given. It follows from a general understanding of judicial review as a set of requirements aimed at bringing officials into greater conformity with the moral and rational requirements already applicable to them.[24] The conclusion states only that there is a reason for it to be unlawful to violate Consistency. It does not state that this is what should be done overall or all-things-considered; that is a stronger claim, which may be correct but which I shall not argue for here. I shall focus instead on P2.

[24] For some initial efforts in this direction see my 'Plan B: A Theory of Judicial Review' (unpublished ms, available on request).

4.1

To establish P2 it is necessary to show three things:

- that officials would sometimes violate Consistency left to their own devices,
- that judges can force officials to change their decisions, and
- that judges can identify would-be violations of Consistency.

The first condition is obviously true. Officials are neither saints nor paragons of rationality. There is probably no moral or rational requirement that they fully adhere to, and Consistency is no exception. Hickey's case, and others like it, confirm the point.[25] Nor does much need to be said on the second point: judges have a suite of orders and remedies designed to bring recalcitrant officials into line with the law. The third condition, however, requires explanation.

To reliably identify would-be violations of Consistency, judges must be able to do two things. One is to identify when like cases are alike. The other is to work out whether a later official is more likely to decide a case correctly than an earlier official. I do not minimise the challenges involved here; at the same time, these are challenges which judges are well-equipped to meet.

Start with identifying whether two cases are alike. This is what judges do every time they decide whether a judicial precedent is distinguishable. Indeed, a common law judge's greatest claim to expertise is working out whether cases are alike. Of course, there

[25] For many examples along the same lines, see the discussions in K Steyn, 'Consistency – A Principle of Public Law?' (1997) 2 Judicial Review 22, and J Randhawa and M Smyth, 'Equal Treatment and Consistency Before and After *Gallaher*' (2018) 23 Judicial Review 159.

are differences between the judicial and administrative contexts. It can be difficult to identify what exactly are the reasons in administrative matters. And there may be no detailed explanation of those reasons. On the other hand, judges already review administrative decisions to determine whether they are based on all relevant 'considerations' (meaning, reasons). Indeed, this ground is the 'bread and butter' of judicial review.[26] The implication is that judges are competent to identify reasons in administrative contexts.

Turn now to identifying whether a later official is more likely to make a correct decision. In general, agents are equally likely to decide a matter correctly if they have:

- the same ability to evaluate evidence on a matter, and
- the same evidence on the matter.

Conversely, an agent is more likely to be correct than another agent on a matter only if he or she has greater ability to evaluate evidence, greater evidence, or both.[27] By the 'same ability to evaluate evidence' I mean to describe an equivalent overall ability, which can be the result of different inputs. Two officials can be equally able, for example, even though one is more intelligent, and the other is more experienced. And by the 'same evidence' I do not mean evidence of the same particular facts. The evidence before Sir David was about Robinson whereas the evidence before Lord Brennan was about Hickey. In some sense, they did not have the same evidence. What matters for our purposes is whether there is evidence of the same types.

As with determining likeness across cases, comparing evaluative abilities and access to evidence is familiar work for judges.

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[26] M Elliott and J Varuhas, *Administrative Law* (OUP 2017) 237.

[27] SE Bokros, 'A Deference Model of Epistemic Authority' (2021) 198 Synthese 12041, 12049.

Sometimes judges compare their own abilities and access to those of other bodies. This is what judges do every time they decide whether to defer to the opinion of an executive official or legislature on epistemic grounds, for example.[28] Sometimes, judges must compare two other bodies' abilities and access. If there are competing expert witnesses at trial, for instance, the judge must decide who is more likely to come to a correct opinion of a factual issue, based on the witnesses' qualifications, track records, access to the scene, familiarity with the lay witnesses, etc.

In summary, if the argument for Enforcement is controversial, it is because P2 is controversial. And if P2 is controversial, it is because that premise requires judges to identify would-be violations of Consistency. However, identifying would-be violations of Consistency merely requires judges to perform tasks that are analogous to tasks they already perform, and which it is generally accepted that they are competent to perform. That is enough to show that P2, and hence the argument for Enforcement, is plausible.

To be clear, I mean only that judges are competent to work out whether cases and officials are alike. I do not mean that they are necessarily more competent than anyone else. If a later official thinks that he or she is better able to assess evidence or has better access to evidence than an earlier official, then it may be appropriate for a judge to take that view into account.

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[28] See, e.g., *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [16] (the court should give 'appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice'); *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [34]; *International Transport Roth GmbH v SSHD* [2002] EWCA Civ 158, [87].

4.2

If my argument for Enforcement is right, then judges should review official decisions for consistency. Generally, the burden is prove that an administrator has acted unlawfully lies with the claimant. Suppose that a claimant can show that his or her case is like an earlier case, which was decided more favourably. Should the claimant also need to show that the later official is not the superior of the earlier official?

No. When there is no evidence as to which of two events occurred, a rough and ready rule is to assign the same probability to each event.[29] If I flip a coin, and you have no reason to think it landed one way over the other, you should assign a 0.5 probability to the event of it landing heads and a 0.5 probability to the event of it landing tails. By the same reasoning, if a court has no evidence as to which official decided correctly, then it should proceed on the basis that it is equally likely that each official decided correctly. So, in the absence of any reason to think that one of these officials is more accurate than the other, the court should treat the officials as equally likely to have decided correctly.

The implication is that, if a claimant can prove that two cases are alike, then the claimant should prevail, in the absence of evidence that the earlier official was more likely to have decided correctly. The claimant need not demonstrate anything else for a court to be able to conclude that Consistency has been violated. The burden does indeed lie with the claimant to show that like cases were treated differently. Once that burden is satisfied, though, the burden shifts to the official to bring forward evidence

[29] This is the principle of indifference. As formulated, the principle is too simple. Exactly how to correct for its flaws is a matter of intense philosophical debate. For an overview and a possible solution, see M Huemer, *Paradox Lost* (Palgrave Macmillan 2018) c 8.

that he or she is more likely to have decided correctly than the earlier official.

When the burden of proof shifts in this way, it is appropriate to distinguish a rule from its exception.[30] Enforcement therefore favours this doctrinal structure:

Rule	It is unlawful for an official to decide a case differently than an earlier official decided a like case.
Exception	There is an exception to this rule if the later official is more likely to decide the case correctly than the earlier official.

It would be for the claimant to show that the rule applies. It would then be for the official to bring him or herself within the scope of the exception.

4.3

Let me explain how these points could apply in practice. In Hickey's case, the burden would lie on him to show that his case is like Robinson's and that he was treated worse than Robinson. This would have been an easy burden for him to meet. It was obvious to the courts that Robinson's and Hickey's cases were alike.

The burden would then shift to Lord Brennan (more precisely, to the Office of Independent Assessor) to show that the exception applies. That would mean showing that Lord Brennan is more likely to decide Hickey's case correctly than Sir David was to

[30] For a sophisticated account of exceptions consistent with this proposal, see LD d'Almeida, 'A Proof-Based Account of Legal Exceptions' (2013) 33 Oxford Journal of Legal Studies 133.

decide Robinson's case correctly. This would have been a difficult burden to meet. Before serving as independent assessors for miscarriages of justice, both Sir David and Lord Brennan long and distinguished careers as barristers.[31] Both served as Chairman of the Bar of England and Wales. Both argued many high-profile cases, built diverse legal practices, served on varied committees and boards, etc. Their biographies are hardly identical. No doubt the two were able in different ways. But there is no evidence, as far as I can see, that one assessor is better than the other at evaluating evidence relevant to compensation for miscarriages of justice. Moreover, both assessors had access to the same information about the same murder as well as the criminal records of the claimants. It is plausible, as a result, that Sir David and Lord Brennan were equally likely to reach a correct decision. Certainly, there appears to be no reason to believe that Lord Brennan would have been more likely to decide correctly.

If Lord Brennan failed to discharge his burden, either because there was no evidence of his superiority or that evidence was insufficient, then Hickey should prevail. As a result, it is plausible that the ground of review that I have outlined would have led to a different result in *O'Brien*.

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[31] 'Lord Daniel Brennan QC' (*The Legal 500*) <https://www.legal500.com/firms/9227-matrix-chambers/9227-london-england/lawyers/628816-daniel-brennan-qc/> accessed 27 January 2022; James Morton, 'Sir David Calcutt' (*The Guardian* 17 August 2004) <https://www.theguardian.com/media/2004/aug/17/guardianobituaries.pressandpublishing> accessed 27 January 2022.