

# PROPORTIONALITY IN HUMAN RIGHTS: THE AXIOMATIC REASONING OF EQUALITY

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**Abstract** - No human right to subsistence has yet been settled, due to continuing debate over equality and the meanings of proportionality in survival. Across Europe, groceries and energy costs are overtaking consumers' resources to pay for them. Economists say this crisis will increase the number of households subsisting in poverty. In light of this statement of significance, the overall objective of this research is to discover a critical exegesis on the character of equality. After the developments of the axiomatic reasoning of Eudoxus, the issue arises naturally as to how to characterize 'equality'. The argument seeks to sustain the proposition that equality is an axiom in the nature of a *deus ex machina*. Saying that people are alike morally is a circular articulation of a moral rule for the treatment for certain people, demanding reference to how they must be treated alike, effectively a kind of distortion of their proportions. Gillespie's argument, that people who are alike should be treated alike, only applies where the actor had a specific duty to such persons, introduces at once the convenient circularity of an axiom, and at once the convenient circularity of a *deus ex machina*. Browne's explanation of a proportionality genus for rights implies that equality is in the nature of a fictive genus of fictive rights. Equality is an artificial axiomatic construct, cobbled together like a *deus ex machina*, to resolve the meaning of proportionality in assessing people's equal receiving of their due.

**Keywords:** human rights; proportionality; axiomatic reasoning; equality; *deus ex machina*; fictive rights.

## INTRODUCTION

No so-called human right to subsistence has yet been settled, due to continuing debate over equality and the meanings of proportionality in survival.<sup>i</sup> Amid predictions that Europe will experience some ten difficult winters in the immediate future, as it grapples with a strangled energy market, no *deus ex machina*<sup>ii</sup> is yet likely to resolve its cost-of-living crises. Across Europe, groceries and energy costs are overtaking consumers' resources to pay for them. Economists say this crisis will increase the number of households subsisting in poverty.<sup>iii</sup> In the light of this statement of significance, the overall objective of this research is to discover a critical exegesis on the character of equality.

A human right is an ethical construct, requiring deliberations of both morality and justice, which would go against litigation ideas of positive law against required inherent morality. It requires no court declaration of its existence, because it is already owed to the people, although we might not know who owes it. One of the most often-cited definitions is that formulated by Wasserstrom, stating that any genuine human right has at least four essential preconditions.<sup>iv</sup>

First, it must be possessed by all human beings, as well as only by human beings. Second, because it is the same right that all human beings possess it must be possessed equally. Third, because human rights are possessed by all human beings, we can rule out as possible candidates any of those rights which one might have in virtue of occupying any particular status or relationship, such as that of parent, president or promisee. And fourth, if there are any human rights, they have the additional characteristic of being assertable, in a manner of speaking, against the whole world.<sup>v</sup>

The meaning of 'justice', according to Browne, is 'giving every person his due',<sup>vi</sup> suggesting some kind of an equivalence relationship between 'giving persons their due' and 'treating like persons alike', just as Aristotle thought them to be.<sup>vii</sup> The conception of 'every person's due' suffers serious



definitional problems, issues of proportion. This issue of proportion arguably arose from an ancient geometry debate, ultimately resolved by Eudoxus of Cnidus,<sup>viii</sup> with his development of axiomatic reasoning. Therefore, equality was subject to what was called a self-evident reasoning, in which its truth resolve the conflict but failed to create rational conclusions. In the light of these developments of axiomatic reasoning, the issues arises naturally as to how to characterize 'equality'. Argument seeks to sustain the proposition that equality is an axiom in the nature of a *deus ex machina*.

The research paradigm is jurisprudential, in reference to issues of jurisprudential theories and source authors. Therefore, its research methodology is doctrinal, based on the best and most relevant available evidence, in order to construct a legal narrative analysis and its consequent syntheses. The manuscript is structured into the three main body sections of 'Postulates, Axioms, Theorems and Principles'; 'The Idea of Equality in Morals'; and, 'The Connection Between Equality and Rights'. The second main section has a sub-section 'The Connection Between Being Alike and Being Entitled to Be Treated Alike'. The third main section has these sub-sections: 'Equality as Derivative of Rights'; 'Equality and Uniform Administration of Rules'; 'Equality and Comparative Rights'; and, 'The Connection between Equality and Justice'.

The research is likely to conclude as follows. Saying that people are alike morally is therefore a circular articulation of a moral rule for treatment for certain people, demanding reference to how they must be treated alike, effectively a kind of distortion of their proportions. Gillespie's argument, that people who are alike should be treated alike, only applies where the actor had a specific duty to such persons, introduces at once the convenient circularity of an axiom, and at once the convenient circularity of a *deus ex machina*. Browne's explanation of a proportionality genus for rights, implies that equality is in the nature of a fictive genus of fictive rights. Equality is an artificial axiomatic construct, cobbled together like a *deus ex machina*, to resolve the meaning of proportionality in assessing people's equal receiving of their due.

#### POSTULATES, AXIOMS, THEOREMS AND PRINCIPLES

In the classical period of Greek mathematics, there was disagreement over the meaning of 'proportion', or 'area', suggesting a fundamental dialectic over equality. This debate over the meaning of proportion arguably infuses right inside any meaning of the term 'equality'. The crisis, was solved by Eudoxus, around the middle of the 4th century BCE. Eudoxus of Cnidus,<sup>ix</sup> was an ancient Greek scholar, a student of Plato. Seeking to understand incommensurable quantities, Eudoxus organized possibly the first deductive form of mathematics grounded in explicit axioms, by showing with an axiomatic form of reasoning that any irrational number could be approximated by a rational number.<sup>x</sup> In the field of mathematics, two non-zero real numbers  $a$  and  $b$  are said to be *commensurable* if their ratio  $ab$  is a rational number; otherwise  $a$  and  $b$  are called *incommensurable*. Eudoxus' change in conceptions of equality then divided the field of mathematics for some 2000 years. This assertion of Eudoxus led to a widespread introduction of axioms, or postulates,<sup>xi</sup> as 'self-evident truths', necessary for the proof of theorems, which would be equally true but somewhat less self-evident,<sup>xii</sup> with each theorem only applying in respect of its founding axiom. A theory always comprises certain grounding statements called 'axioms', and also some 'rules for deduction', often included within the deducing-rule axioms. Thus, theorems of such a theory are those statements that can be derived from the deducing axioms, by using these deducing rules, and when theorems have a wide general application they are called principles.<sup>xiii</sup>

Among these ancient axioms was the so-called 'Fifth Postulate of Euclid',<sup>xiv</sup> which provided that 'through a given point there is at most one (straight) line parallel to a given line'. However, this postulate looked more like a theorem, apparently true yet not quite self-evident. Its converse, saying that there was at least one of these lines, was a provable theorem. For more than 2000 years, mathematicians tried to prove this postulate, typically by presuming its opposite, that at least two of these described lines existed, and from this attempting to deduce logical contradiction. In 1825, Lobachevski<sup>xv</sup> determined that no such logical contradiction existed,<sup>xvi</sup> by simply assuming, as a new axiom, that two such lines did exist, thereby creating his new system of



non-Euclidean geometry. Lobachevski opened the path for systems of axioms to be chosen at will, without requiring any physical plausibility, truth or self-evidence.<sup>xvii</sup>

A good number of philosophers still maintain that the probability axioms represent norms of rational thinking, therefore generating degrees of belief. This doctrinal view is called 'subjective Bayesianism'. Many claim that human agents cannot follow these norms of degrees of belief, as postulated by subjective Bayesianism, meaning that these norms hold no normative force for human beings. One response to this problem is to extend the superstructure of subjective Bayesianism so that we can identify differences between incoherent levels of credence, thus including non-ideal agents and further identifying their reasoning processes.<sup>xviii</sup> Thus, for all levels of credence, the so-called normalization axiom of probability provides as follows: 'for any statement A, if A is a tautology, the probability of A = 1',<sup>xix</sup> and as an axiom, can be assumed to be self-evidently true.

### THE IDEA OF EQUALITY IN MORALS

Any analysis of equality commences with the views of Plato and Aristotle, who were first to determine that likes must be treated alike, and who gave equality its standing in the field of morals. This view also diffused into the field of law, and as Polyviou observed, '[E]quality invariably begin[s] with the principle of Aristotle that equality consists of treating equals equally and unequals unequally'.<sup>xx</sup> Aristotle had built on the works of Plato,<sup>xxi</sup> saying two things about equality, still dominating Western thought to this day,<sup>xxii</sup> the first apparently an axiom and the second apparently a theorem,

(1) Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness.<sup>xxiii</sup>

(2) Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal.<sup>xxiv</sup>

Thus, argument might now deal with any connection between the fact of two things being alike and the moral inference from this fact that they should be considered as alike. From this, argument should critically examine any justification for equating justice with equality?

The Connection Between Being Alike and Being Entitled to Be Treated Alike

The scholarship is replete with agreement that like cases ought to be treated alike. Consider the following.

To everyone the idea of justice inevitably suggests the notion of a certain equality. From Plato and Aristotle, through St. Thomas Aquinas, down to the jurists, moralists and philosophers of our own day runs a thread of universal agreement on this point .... [T]here is one principle of distributive justice on which there seems to be general agreement, namely, that like cases or individuals are to be dealt with in the same way or treated alike, or that similar cases are to be treated similarly.<sup>xxv</sup>

Thus, Aristotle's axiom's self-evidence is a consequence of his theorem. The proposition 'likes should be treated alike' is also considered as a universal moral truth, that can 'be intuitively known with perfect clearness and certainty .... If, then, the unjust is unequal, the just is equal, as all men suppose it to be, even apart from argument.'<sup>xxvi</sup> Thus, the apparent weakness of the relationship is in its self-evidence by mere intuitive inference, as it purports to transform an 'is' to an 'ought'.

The formula 'people who are alike should be treated alike' comprises two parts: (i) a decision that two people are indeed alike; and, (2) a moral assessment that they ought to have like treatment. The threshold component is the first one. Having determined that two people are indeed alike pursuant to the equality principle, it is then clear exactly how they ought to be treated. Therefore, there is a requirement to understand exactly what it means to say people are alike, for the purposes of this equality principle.<sup>xxvii</sup>

Although 'people who are alike' could mean people alike in all respects, the problem is that no two persons are alike in every respect. The only things that are alike in all respects are non-material forms and symbols, such as for example geometric figures, ideal numbers and similar kinds of fictions, which are not in of themselves subject to morals.<sup>xxviii</sup> Ogden reported Bentham's lament, for example, that the law remained riddled with tautology, technicality, circuitry, irregularity, and inconsistency. Appearing to group these legal iniquities under the heading of 'legal



fiction', Bentham defined a 'fiction of law' as the saying that something existed which did not exist, and then so acting as if it existed, or vice versa.<sup>xxix</sup> Sustaining these views, Tammelo stated that 'equality between two entities can be asserted only in the realm of formal entities'.<sup>xxx</sup> Nevertheless, Plato's *Phaedo* discussion of equality continues the enigma:

Did we not see equalities of material things, such as pieces of wood and stones, and gather from them the idea of an equality which is different from them? For you will acknowledge that there is a difference? Or look at the matter in another way: Do not the same pieces of wood or stones appear at one time equal, and at another time unequal?

That is certain.

But are real equals ever equal? or is the idea of equality the same as of inequality?

Impossible, Socrates.

Then these (so-called) equals are not the same with the idea of equality?<sup>xxxi</sup>

In the second place, 'people who are alike' could mean people, who are not alike in every respect, although they are alike in some respects. While the earlier definition excluded everyone in the world, the latter definition included everyone and every thing, because all people and things have the attribute of being alike in one respect or another. This leaves the morally absurd fictional assertion that 'all people and things should be treated alike'.<sup>xxxii</sup> Thus, Rees had observed that '[T]he attempt to conceive [of] ... a society [in which all persons are equally alike in every respect] faces [the same] number of formidable obstacles, so much so that it must lead one to wonder if it really is a coherent notion'.<sup>xxxiii</sup>

In the third place, 'people who are alike' may mean people morally alike in a specific respect. This interpretation avoids the hurdle of trying to derive an 'ought' from an 'is'.<sup>xxxiv</sup> Thus, Oppenheim stated that '[N]ormative principles cannot be derived from factual generalizations; neither equality nor inequality of characteristics entails the desirability of either egalitarian or inegalitarian treatment'.<sup>xxxv</sup> Lloyd observed that 'The idea of equality or non-discrimination is essentially a value-judgment which cannot be derived from any assertions or speculations regarding the nature of man'.<sup>xxxvi</sup>

Beginning with a threshold normative determination of two people being alike in a morally profound respect and then moving to a normative conclusion that these two people should be dealt with alike, alters the calculus from deriving an 'ought' from an 'is', to deriving an 'ought' from an 'ought'.<sup>xxxvii</sup> Even with this, categories of objects morally alike do not naturally exist, unless moral likeness is constructed when people define the categories.<sup>xxxviii</sup> Merely saying that people are alike morally is therefore a circular articulation of a moral rule for treatment for certain people, demanding reference to how they must be treated alike. The notion of "relevant similarity" [in the proposition that people relevantly similar should be treated similarly] ... concerns features that require or call for treatment of a certain kind'.<sup>xxxix</sup> Gillespie argued that the proposition 'people who are alike should be treated alike' is not a universal quality, as it applies only where the actor had a specific duty to such 'persons'.<sup>xl</sup> He expressed this view, because of how he chose to define the phrasal term 'people who are alike', as people morally alike in some respect but morally entitled to similar treatment. Thus, according to Westen's reasoning, he was obliged to apply the conception of 'duty' of treatment of such people, as a *deus ex machina*<sup>xli</sup> to try and make some sense of the phrase 'likes should be treated alike'.<sup>xlii</sup> This plot-altering device can be altogether avoided if 'people who are alike' is defined as 'people who are entitled to be treated alike in a certain respect'. Although Gillespie appeared to have had in mind something apart from the latter definition of 'people who are alike', it is hard to determine what it would be.<sup>xliii</sup>

In certain ancient Roman and Greek plays, when circumstances were critical and no doubt beyond saving, suggesting a kind of dissolving axiom, its self-evidence disappearing, a genial deity would be rolled in on stage machinery to lend assistance. The resolving advice of this friendly *deus ex machina* was not an elegant way to resolve a difficult problem. However, it ended tragedy quickly, for both the actors and for the audience. Litigators may deploy the operational equivalent of this rhetorical device of classical theatre. They have in their hands the *deus ex machina* of the rules of evidence, namely, judicial notice.<sup>xliv</sup> To escape the necessary negative conclusion of an



argument, proponents must interpret the audience function of confirmation as something sufficiently independent of the prevailing level of belief. One way is to merely stipulate that there is a confirmation function appropriately linked to the agent's function of belief, like as a friendly and persuasive god, such as 'duty'. This strategy of resolving philosophical problems, just by postulating a solution to them is designated the *deus ex machina* method. The *deus ex machina* strategy is considered by philosophers to be an inelegant and unacceptable form of philosophical theorizing, as it represents an attempt to add plausibility artificially to an axiom. Thus, philosophers consider strategies all the worse for their closeness to any of limiting extreme of the *deus ex machina* strategy.<sup>xlv</sup>

With an understanding of what it means to be alike, the reader may now understand what it means to be treated alike. Some suggest that a moral standard implies some consistent treatment for all class members. For example, for the rule that all Rhodes Scholars get fellowships at Magdalen College, Oxford, equal treatment is either by uniformly granting or by uniformly denying the same treatment to all members of the specified class. This implies that it would be 'equality' to take workers with entitlement to be paid by the hour and then pay all of them per capita,<sup>xlvi</sup> and further suggesting it would be equal to take persons entitled in the same way to freedom and then enslave all of them.<sup>xlvii</sup> There are also the same kind of consequential suggestions that it would be equal to boil in oil everyone entitled to a 'certain minimum level of welfare',<sup>xlviii</sup> and also it would be equal to prevent everyone alike entitled to read Doctor Zhivago from reading the book.<sup>xlix</sup> Thus, those who followed this kind of logic would agree that, although none of these examples would be just, they would nevertheless be fictionally equal.

This amplification of the conception of 'like treatment' teaches people to give people, who are 'alike', by the one standard, a treatment that is 'alike', either by that standard or by the converse. However, the concept explained in this way is very clearly absurd, as it is morally contradictory to say that people who are alike entitled to certain treatment should therefore either receive the treatment to which they are entitled or not receive it. Should one say 'likes should be treated alike', then one makes an 'ought' statement into a statement of that which people are morally obliged to do. Yet if the statement orders people to do what they ought not do, then the statement must not be true. From this, if 'likes should be treated alike' is a serious moral proposition, 'like treatment' cannot reasonably have signification of giving people who are 'alike' by one standard the treatment that is alike either by that standard or by its converse. Thus, the relevant standard may well be a *deus ex machina*, of similar effect to calling in a duty.

In the light of this, the scholarship, through its arguers, move on to this:

[I]t is hardly likely that anyone would want to see all men treated alike in every respect. We should not wish rheumatic patients to be treated like diabetics. Equals ... ought to be treated alike in the respect in which they are equal; but there may be other respects in which they differ ... which justify differences in treatment. Men who make identical tax returns ought to be taxed alike, but if they suffer from different ailments they should be treated with different medicines.<sup>l</sup>

A much more natural idea of 'like treatment' is inferred by the way 'people who are alike' has been interpreted.<sup>li</sup> Since no categories of 'like' people exist in the world of nature, thus no treatments can be alike when constrained to reference to a moral rule. Saying that those morally alike in a specific respect 'should be treated alike', must mean that they must be treated pursuant to that moral rule that determined them to be alike. The clear conclusion is that people who should be treated alike by some specific rule, should be treated alike only by that rule, making any exegesis of equality entirely circular.

[A]s soon as any weight is put on this principle it seems to collapse into the shattering triviality that cases are alike, morally or in any other respect, unless they are different."<sup>lii</sup> "[H]uman beings should be treated unequally as to the diversities that in justice should be taken into account. This ... principle ... theoretically is obvious ...<sup>liii</sup>

This circularity in defining 'equality' indicates that there is no substantive unitary moral content in the term,<sup>liv</sup> leaving a principle of equality as meaningless, having nothing to say about how people ought to act. As Williams had observed, 'when the statement of equality ceases to



claim more than is warranted, it rather rapidly reaches the point where it claims less than is interesting'.<sup>lv</sup>

This discovery that equality is a tautological fiction explains why people who are alike should be treated alike, why equality articulates a universal moral truth, and, why equality is considered to be a 'law of thought'. Kelsen stated that 'The second principle, namely, that like cases should be treated in like manner ... is an axiom of all rational ethics ....'<sup>lvi</sup> Feinberg stated it in this alternate fashion: '[T]he principle that relevantly similar cases should be treated in similar ways ... is a principle of reason ...',<sup>lvii</sup> simply indicating it is true because it is widely believed. The reason why Aristotle's moral views remain just as indisputable today, as they were 2,500 years ago, is that equality, as a moral truth, is a simple tautology.<sup>lviii</sup> This should be unsurprising, since as an *a priori* moral truth, equality could not specifically be any other thing.

## THE CONNECTION BETWEEN EQUALITY AND RIGHTS

### Equality as Derivative of Rights

Equality and inequality relationships are derived as secondary relationships. They are, in logic, both posterior, and not anterior, to rights. Many legal theorists have commented on the common law's relative absence of precise definitions and the courts' preferences for mere descriptions.<sup>lix</sup> However, for Bentham, definition *per genus et differentiam*<sup>lx</sup> was the proper and preferred form of definition, and no other would suffice.<sup>lxi</sup>

Considering the legal fictions of right, obligation or power, the logician could find no genus of any of them. This meant definitions of legal fictive terms must be by some alternate process, necessarily not definition *per genus et differentiam*. Bentham suggested that a class of fictitious entities would be identified, and then the lawyer could merely associate the right, or other fiction, to this class.<sup>lxii</sup>

Saying that two people are the same in a specific way is to assume the prior correct applicability of a rule,<sup>lxiii</sup> which acts as a prescribed standard for how to treat them. Prior to such a rule, in time, no standard for comparison had subsisted. However, after that rule has been established, equality between the two is a necessary 'logical consequence' of the rule.<sup>lxiv</sup> 'Equality of treatment is merely a consequence of the fact of keeping to [a] rule',<sup>lxv</sup> even although a rule is fictive. They are thus 'equal' for the rule because that is the meaning of 'equal': "'Equally" means "according to one and the same rule"'.<sup>lxvi</sup> Honore offered an extended discussion:

The notion of conformity to rule can be made to yield the notion that like cases should be treated alike. If we think of those species of rule that prescribe that certain people be treated in a certain way when certain conditions are fulfilled, the demand that such rules should be observed entails the demand that cases falling within the conditions mentioned should be treated in the way prescribed in the rule, that is that people who are alike in the relevant respect should be treated alike. This, then involves the principle 'treat like cases alike'.<sup>lxvii</sup>

Beck summarized, '[E]quality ... simply means the correct application of a general rule .... some commentators would ground equal treatment in the very nature of a rule governed social practice.'<sup>lxviii</sup> However, the scholars fail to see the 'demand' to observe the rule as the hidden *deus ex machina*. Flathman agreed, by virtue of an axiom, that, 'to treat people equally is to treat them in the same way. To treat people in the same way is to treat them according to a rule'.<sup>lxix</sup> They are entitled to equal treatment under a specified rule, because that is the meaning of having a rule: 'To conform to a rule is (tautologically) to apply it to the cases to which it applies'.<sup>lxx</sup> Thus, equality constitutes 'a premise of rational thought'.<sup>lxxi</sup> Further, Browne's equality is 'none other than the weak principle of universalisability, the principle of rationality ....'<sup>lxxii</sup> According to Galston:

All rational moral theories have an element of formal equality because formal equality is inherent in the notion of rationality. If characteristic x is a sufficient reason to treat individual A in a particular manner, then it is a sufficient reason to treat B in the same manner unless some relevant distinction between A and B can be adduced to block this inference.<sup>lxxiii</sup>



Ginsberg reasoned, ‘it does not seem especially helpful to speak of the rule being applied equally when nothing more is meant than that it is being applied’.<sup>lxxiv</sup> Then Westen concluded that equality ‘is an axiom of all rational ethics and is implicit in the notion of a norm or law of action as such’.<sup>lxxv</sup> Saying that two people are ‘equal’, with an entitlement to ‘equal’ treatment, is the same as saying that both satisfy the determining criteria of the relevant governing treatment rule, while saying nothing about either the wisdom or the content of the applicable governing rule, again implying the use of a *deus ex machina*.

It could well be thought that, since relationships of equality follow logically certain substantive definitions of rights, that also, equality may have preceded the definitions of rights. Thus, it could have been thought that a firm right of people to be treated with respect was a consequence of a prior judgment that all persons were equal. ‘If there is anything that should be called a postulate of equality, it is the principle of the intrinsic dignity of the human being, the infinite worth of the human person’.<sup>lxxvi</sup> However, this postulate is not really so. Consider the decision of whether grossly deformed embryos, or victims of stroke, in terminal comas, should be treated with respect as ‘persons’. In attempting this decision, the mere aphorism ‘all persons are equal’ is of little effect, because of the very question of whether these people were indeed ‘persons’ within the real meaning of the rule.

Do human beings have properties which distinguish them in general from (other) animals, and which justify general discrimination in their favor? These are profoundly difficult problems; their solution, however, has nothing to do with equality .... If an ‘elitist’ preference for human beings over animals is justified, then that is ... because of the particular moral significance of the differentiating properties which people have.<sup>lxxvii</sup>

Neither is it effective to maintain that likes must be treated alike, because the question is really whether the three people are alike for human respect, so that first, the trait that entitles a person to treatment with respect must be identified, then assessed in each of the three candidates.<sup>lxxviii</sup> Thus, such axioms must be embedded in qualifying fictions, such as in the case of the fiction of a *deus ex machina*.

Some scholars, thinking that relationships of equality must be based in some empirically verifiable traits, conclude that equality is therefore entirely empirical,<sup>lxxix</sup> implying that equality is a formulation in which an ‘ought’ can be inferred from an ‘is’. Other scholars, who believe that an ‘ought’ may not even be inferred from an ‘is’, conclude that moral conceptions of equality have no empirical grounding.<sup>lxxx</sup> ‘The plain fact is that humans differ, and the differences apply to so many characteristics that the search for a factual basis on which to erect the principle of equality seems hopeless’,<sup>lxxxi</sup> implying a necessary reversion to fiction. ‘[T]he primary function of the equality principle in its moral and political contexts is prescriptive, not descriptive, and ... the quest for some property essential to all men, a property which justifies equality of treatment, is a mistake’.<sup>lxxxii</sup> In truth, both views are correct. Assertions of legal and moral equality do indeed have an empirical grounding, since otherwise there would be no way to distinguish equal from unequal creatures.<sup>lxxxiii</sup> Concurrently, statements of legal or moral equality assume some prior normative element. ‘The considerations which are “relevant” to a claim for inequality are moral considerations, they are special moral claims’.<sup>lxxxiv</sup> In the result, equality statements presuppose subsisting empirical traits that we conclude ought to import specific moral aftermaths:

[The modern classical philosophers] did indeed assert the axiom of equality as a statement of a factual truth about human beings .... More recent philosophers have given these classical writers a hard time; not because the critics are against equality, but on the general ground that those theories attempted to derive moral principles from purely factual arguments, doing a kind of illegitimate logical glide from the ‘is’ to the ‘ought’. But this kind of criticism often does its own kind of logical glide, from the correct statement that moral judgments cannot be deduced from factual ones, to the false conclusion that these two kinds of judgments are logically unrelated to each other. Factual premises alone are not sufficient for moral conclusions, it is true; but they are remarkably necessary.<sup>lxxxv</sup>



If the individuals have the relevant attribute, they satisfy the requirement for being ‘persons’ within the specific meaning of the rule, and from that, are entitled to due respect. If they do not have the relevant trait, they are not equal ‘persons’, and are not to be treated like respected persons pursuant to the rule.<sup>lxxxvi</sup>

#### Equality and Uniform Administration of Rules

Some have argued that, whereas equality may not deliver the content of any rule, it is nevertheless a ‘principle of crucial importance’ in administering the rules.<sup>lxxxvii</sup> When a rule’s formulation has been completed, they argue, equality springs into being as a ‘central’<sup>lxxxviii</sup> and ‘necessary’<sup>lxxxix</sup> facet of justice. This ensures that the rule is applied both consistently and ‘impartial[ly]’<sup>xc</sup> to all instances that are ‘alike’ in accordance with the rule.<sup>xc</sup> Having identified the rules’ substantive subject matter, ‘it is necessary ... to examine them in the light of the formal principle of equality, the aim being to exclude every form of discrimination not justified by relevant differences’.<sup>xcii</sup> Perelman argued that, in producing ‘predictability and security’, equality ‘permits the coherent and stable functioning of a juridical order’.<sup>xciii</sup> Such ideological propositions, based in false and incomplete knowledge,<sup>xciv</sup> therefore falsely imply that equality must impose a certain substantive obligation of consistency appendant to the rule’s substance. It is a mere truism that rules must be applied equally, impartially and consistently, if these terms constitute the tautology that the rule should be practised in all instances in which the conditions of the rule imply that it must be applied. Once a rule is applied in its own terms, equality has nothing more to say about attributes of rule’s scope, for application in artificially-created non-equal classes based in fictive ideology, not already within the substantive and express terms of the rule.<sup>xcv</sup> To say that a rule should be applied ‘equally’ or ‘uniformly’ or ‘consistently’ simply means simply that the rule is applied to those cases in which it applies. Gillespie added:

[T]he resultant ‘consistency’ in my moral behavior is no more than the spelling out of what it means for an act to be prohibited or required; it has nothing to do with consistency per se. There is, instead, only the consistency that results from my taking seriously the idea that an act is morally prohibited or morally required.<sup>xcvi</sup>

Thus, Gillespie had deduced that there was no attribute of reason within moral regulation, leaving it open to external ideological manipulation.

#### Equality and Comparative Rights

Some say that two different kinds of rules are at play in rights and equality cases. They say that equality is different from rights, because equality assumes prior comparison, and rights do not. However, equality, as we have seen above, consists of an axiom, whereas rights are legal fictions based in personal claims. A right is commonly understood as what a man considers to be right, or correct, from his personal point of view.<sup>xcvii</sup> Feinberg, appeared to assume the proposition ‘likes should be treated alike’ as being concerned with only those entitlements that could be determined solely by reference to how others were treated.<sup>xcviii</sup>

So-called substantive rights, such as free speech and the right to a lawyer, may be described without referencing any relationship to any other rights-holder. To determine whether or not speech rights were violated, the legal technique is to juxtapose the state’s general behavioural duty beside the state’s specific instance of treatment of the person to decide whether the state had treated the person pursuant to its prescribed duty. Equality, however, is comparative involving ‘comparative rights’,<sup>xcix</sup> which are rights that may not be assessed without determining the person’s relationships with others.<sup>c</sup> A ‘comparative’ right is a person’s right ‘determinable only by reference to his relations to other persons’, whereas a ‘noncomparative’ right is one that may be ‘determined independently of that of other people’.<sup>ci</sup> More precisely, the issue is between ‘noncomparative rights’, on the one hand, and equality on the other hand. Equality and comparative rights are usually considered to be identical, in their effects.

However, this equating of comparative rights with equality is a fundamental fallacy. First, some rights do involve comparison, without any hint of equality.<sup>cii</sup> Conversely, in as much as rights may be comparative, calls for equality can be noncomparative, all depending on the right’s content substantiating the claim of equality. One example is that of an equality claim in the right of





persons not to be tortured, or, in a right to fundamental economic subsistence.<sup>ciii</sup> In deciding if a person was either tortured or denied subsistence, it is unnecessary to know how others had been treated.

The reason why people think comparative rights have a special relationship to the equality principle may come from confusing comparisons for equality purposes with comparative rights comparisons. Statements of equality, or inequality, involve comparisons by reference to some criterion specifying the relevant respects by which they are or are not the same.<sup>civ</sup> When speaking of 'equals', there is a presupposition of the existence of at least two things or persons, identical in some relevant respect.<sup>cv</sup> 'Equality is a relational attribute which holds between any two individuals in respect to any attribute which they have in common'.<sup>cvi</sup>

Comparisons for comparative rights differ in two ways. Rather than comparing two people to see whether they both satisfy some external criterion, the optimal method compares them to assess how much they might differ from each another. Second, one compares them prior to applying the standard. Thus, the two kinds of comparison differ both in time and type. For the purposes of assessing equality, one must first decide how each person should be treated for the governing legal or moral standard, and afterwards must compare the respective treatments to see if they are the same. For purposes of comparative rights, one compares the two people to see how much they might differ from each other, and then determines how each must be treated under the governing treatment standard. Both equality and comparative rights entail comparisons, while comparisons for purposes of equality have no connection either to comparative rights or to the comparisons for such rights.<sup>cvii</sup>

While, generally, comparative rights might not reflect in equality, some specific kinds of comparative rights necessarily do, such as certain constitutional rights. These are 'conditional' rights entitling a right-holder to the same benefits that other people enjoy.<sup>cviii</sup> In fact, for equality purposes, conditional rights remain substantively indistinguishable from other categories of comparative rights. Browne explained this proposition by positing a proportionality genus for rights, inferring that equality is in the nature of a genus of rights,

[T]he relational attribute of equality is not identical with, but is just one instance of, the relational attribute of proportionality. It is true that the two relations of equality and inequality exhaust the field between them; but unless it is already presupposed that equality has some special significance, the designation of all other proportionalities as 'inequalities' is tendentious and unjustified.<sup>cix</sup>

First, each legal or moral rule generates quantitatively identical treatment for people who are quantitatively identical, in respect of relevant criteria expressed in the rule.<sup>cx</sup> Second, a rule can treat people quantitatively identically, without being comparative. Third, no moral inference can be drawn from a rule proceeding on a per capita basis, since per capita treatment can be unjust or just, depending upon the subject, the class of persons, the reasons for the treatment, and the standards for determining justice in the treatments.<sup>cxii</sup> Thus, 'conditional rights have no greater logical claim to the language of "equality" than any other comparative right, and rights that treat people on a per capita basis have no greater moral claim to equality than rights that treat people on proportional grounds'.<sup>cxii</sup> Any noncomparative right, such as that for basic economic subsistence, or not being tortured, can be articulated either indirectly from equality, or directly from a right.<sup>cxiii</sup>

The Connection between Equality and Justice

The meaning of 'justice', according to Browne, is 'giving every person his due',<sup>cxiv</sup> suggesting some kind of an equivalence relationship between 'giving persons their due' and 'treating like persons alike', just as Aristotle thought them to be.<sup>cxv</sup> Others had thought them to be two separate, but related, principles,<sup>cxvi</sup> consequently invoking inquiries as to whether something could be just, yet unequal, or, whether something could be equal and still unjust.

Addressing these inquiries lies in the structure of the two moral propositions. The conception of justice, just like the conception of equality, is altogether formal,<sup>cxvii</sup> requiring persons to be given their due without defining what could be their 'due'.<sup>cxviii</sup> To discover meaning to the term 'justice', requires looking beyond the bare proposition that 'every person should be



given his due', to the substantive legal or moral criteria that determine the meaning of one's 'due'. Brandt stated as follows:

What, then, roughly does it mean to 'act unjustly'? Roughly, it seems that 'act unjustly' means the same as 'treat persons unequally ....' ... It also implies that injustice is essentially unequal treatment, thereby conforming with a tradition that holds that equity is essentially a matter of equality. Moreover, the phrase 'treat unequally in matters involving allocations of good and bad things' is so general as to permit application in widely different sorts of context; it permits us to accept an ancient adage that 'justice is giving every man his due'.<sup>cxix</sup>

Any claim that treatment may be at the same time just and unequal, or even equal but unjust, must of necessity be derived from self-contradiction.<sup>cxx</sup>

## CONCLUSION

The research question asked, in the light of developments in axiomatic reasoning, how to characterise 'equality'. Argument has sought to sustain the proposition that equality was an axiom in the nature of a *deus ex machina*.

In the classical period of Greek mathematics, there was disagreement over the meaning of proportion, suggesting a fundamental dialectic over equality. The Eudoxus assertion led to a widespread introduction of axioms, or postulates, as 'self-evident truths, necessary for the proof of theorems, which would be equally true but somewhat less self-evident, with each theorem only applying in respect of its founding axiom. A theory always comprises certain grounding statements called axioms, and also some rules for deduction, often included within the deducing-rule axioms. Thus, theorems of such a theory are those statements that can be derived from the deducing axioms, by using these deducing rules, and when theorems have a wide general application they are called principles. Lobachevski advanced this field by determining that no logical contradiction could exist, when simply assuming, as a new axiom, that it did not.

Any analysis of equality commences with the views of Plato and Aristotle, who were first to determine that likes must be treated alike, and who gave equality its standing in the field of morals. Although 'people who are alike' could mean people alike in all respects, the problem is that no two persons are alike in every respect. The only things that are alike in all respects are non-material forms and symbols, such as for example geometric figures, ideal numbers and similar kinds of fictions, which are not in of themselves subject to morals. Tammelo stated that equality between two entities can be asserted only in the realm of formal entities.

Lloyd observed that the idea of equality or non-discrimination is essentially a value-judgment which cannot be derived from any assertions or speculations regarding the nature of man. Merely saying that people are alike morally is therefore a circular articulation of a moral rule for treatment for certain people, demanding reference to how they must be treated alike.

Gillespie argued that the proposition that people who are alike should be treated alike is not a universal quality, as it applies only where the actor had a specific duty to such persons. He expressed this view, because of how he chose to define the phrasal term 'people who are alike', as people morally alike in some respect but morally entitled to similar treatment. Thus, according to Westen's reasoning, there was an obligation to apply the conception of 'duty of treatment' of such people, as a *deus ex machina*, to try and make some sense of the phrase 'likes should be treated alike. Since no categories of 'like people exist in the world of nature, thus no treatments can be alike when constrained to reference to a moral rule. The clear conclusion is that people who should be treated alike by some specific rule, should be treated alike only by that rule, making any exegesis of equality entirely circular. Equality of treatment is merely a consequence of the fact of keeping to a rule, even although that rule is fictive. The scholars fail to see the 'demand' to observe the rule as the hidden *deus ex machina*.

Some say that two different kinds of rules are at play in rights and equality cases. They say that equality is different from rights, because equality assumes prior comparison, and rights do not. However, equality, as we have seen above, consists of an axiom, whereas rights are legal fictions



based in personal claims. A right is commonly understood as what a man considers to be right, or correct, from his personal point of view.

When considering any so-called human right to fundamental economic subsistence, in deciding if a person was denied subsistence, it is unnecessary to know how others had been treated. For equality purposes, these conditional rights remain substantively indistinguishable from other categories of comparative rights. Browne explained this proposition by positing a proportionality genus for rights, inferring that equality is in the nature of a genus of rights. Thus, conditional rights have no greater logical claim to the language of equality than any other comparative right, and rights that treat people on a per capita basis have no greater moral claim to equality than rights that treat people on proportional grounds.

In extended synthesis, no logical contradiction could exist, when simply assuming, as a new axiom, that it did not. The only things that are alike in all respects are non-material forms and symbols. Saying that people are alike morally is therefore a circular articulation of a moral rule for treatment for certain people, demanding reference to how they must be treated alike, effectively a kind of distortion of their proportions. Gillespie's argument, that people who are alike should be treated alike, only applies where the actor had a specific duty to such persons, introduces at once the convenient circularity of an axiom, and at once the convenient circularity of a *deus ex machina*. Browne's explanation of a proportionality genus for rights, implies that equality is in the nature of a fictive genus of fictive rights. Equality is an artificial axiomatic construct, cobbled together like a *deus ex machina*, to resolve the meaning of proportionality in assessing people's equal receiving of their due.

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- [87] JR Lucas, *The Principles of Politics*, Oxford University Press, New York, 1966, p. 246.
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- [101] J Feinberg, 'Noncomparative Justice', *The Philosophical Review*, vol. 83, no. 3, 1974, pp. 297-338, p. 298.
- [102] Consider, for example, the right of secured creditors to absolute preference over unsecured creditors; or the right of veterans of foreign wars or physically handicapped persons or women or members of racial minorities to preferential treatment of certain kinds over other groups; or the right of certain applicants for competitive positions to be selected on the basis of relative exam scores. In each case, to determine whether the claimant's substantive rights are satisfied one must first ascertain his relationship to others. P Westen, 'The Empty Idea of Equality', *Harvard Law Review*, vol. 95, no. 3, 1982, pp. 537-596, p. 552.
- [103] RK Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis*, Rowman and Littlefield, Totowa, 1980, pp. 221-222. (discussing the right to be free from torture as a right of equality).
- [104] A Menne, 'Identity, Equality., Similarity: A Logico-Philosophical Investigation', *Ratio*, vol. 4, no. 1, 1962, pp. 50 et seq., p. 51 ("equal" presupposes two objects"); P Westen, 'The Empty Idea of Equality', *Harvard Law Review*, vol. 95, no. 3, 1982, pp. 537-596, p. 552.
- [105] DE Browne, 'The Presumption of Equality', *Australasian Journal of Philosophy*, vol. 53, no. 1, 1975, pp. 46-53, p. 51.
- [106] *ibid*; To say that an apple is 'like' or 'equal to' an orange means that, despite their many differences, they each possess the feature or features that are relevant to an external criterion, whether those features be weight, surface area, or sugar content; to say that they are 'unequal' means that they do not share the relevant feature, whether it be color, taste, or juice content. This analysis also holds for ethical and legal statements of equality, the only difference being that, instead of testing the persons or things by a descriptive standard for determining which of them are the same, one tests them by a moral or legal standard for deciding which of them should be treated the same. In each case, however, the comparison for purposes of equality simply spells out what it means to have tested both subjects by the controlling standard of relevance. P Westen, 'The Empty Idea of Equality', *Harvard Law Review*, vol. 95, no. 3, 1982, pp. 537-596, p. 553.
- [107] DE Browne, 'The Presumption of Equality', *Australasian Journal of Philosophy*, vol. 53, no. 1, 1975, pp. 46-53, p. 51; CL Carr, 'The Concept of Formal Justice', *Philosophical Studies*, vol. 39, 1981, pp. 211-226, pp. 17-22.
- [108] JH Ely, *Democracy and Distrust, A Theory of Judicial Review*, Harvard University Press, Cambridge, 1980, pp. 23, 90-91, 193. (describing article IV as an "equality" provision).
- [109] D Browne, 'Nonegalitarian Justice', *Australasian Journal of Philosophy*, vol. 56, no. 1, 1978, pp. 48-60, p. 52.
- [110] I Berlin, 'Equality as an Ideal', in F Olafson (ed.), *Justice And Social Policy*, Prentice-Hall, Englewood Cliffs, 1961, p. 132.
- [111] SI Benn & RS Peters, *The Principles of Political Thought*, The Free Press, New York, 1959, p. 124.
- [112] P Westen, 'The Empty Idea of Equality', *Harvard Law Review*, vol. 95, no. 3, 1982, pp. 537-596, p. 555.
- [113] T Nagel, 'The Meaning of Equality', *Washington University Law Quarterly*, 1979, pp. 25-31 (discussing the right to basic economic subsistence in terms of "equality"); G Vlastos, 'Justice and Equality', in R Brandt (ed.), *Social Justice*, Prentice Hall, Englewood Cliffs, 1962, pp. 47-51. (discussing the entitlement to be free from pain in terms of "equality"); JR Lucas, 'Against Equality', *Philosophy*, vol. 40, no. 154, 1965, pp. 296 - 307, p. 298. (discussing same in terms of entitlements).
- [114] D Browne, 'Nonegalitarian Justice', *Australasian Journal of Philosophy*, vol. 56, no. 1, 1978, pp. 48-60, p. 49. (referring to the "fundamental axiom, which is definitive of the concept of justice ... that each person must be rendered his due").
- [115] Aristotle, *Ethica Nichomachea*, trans. W Ross, 1925, V.3, 1131a.
- [116] RN Beck, 'Liberty and Equality', *Idealistic Studies*, vol. 10, no. 1, 1980, pp. 24-39, p. 28 ('equality' a 'component' of 'justice'); HA Bedau, 'Egalitarianism and the Idea of Equality', in *Nomos IX*,



*Equality*, Atherton Press, New York, 1967, p. 18 ('The concept of justice involves that of equality'.); R Brandt, *Social Justice, Social Justice*, Prentice Hall, Englewood Cliffs, 1962, p. v (equality and justice 'have a close relation').

[117] H Kelsen, 'Aristotle's Doctrine of Justice', in H Kelsen, *What is Justice? Justice, Law and Politics in the Mirror of Science*, University of California Press, Berkeley, 2013, pp. 135-136 (the formula "'To every one His due" is an "empty tautology"').

[118] P Westen, 'The Empty Idea of Equality', *Harvard Law Review*, vol. 95, no. 3, 1982, pp. 537-596, p. 556.

[119] R Brandt, *Ethical Theory*, Prentice-Hall, Englewood Cliffs, 1959, p. 410.

[120] J Feinberg, *Social Philosophy*, Prentice-Hall, Englewood Cliffs, 1973, pp. 309-316.