On "Confusing Ideas": Reply

Peter Westen†

> *"Equality" is one of the great undefined terms underlying much current controversy and antagonism. This one confused word might even become the rock on which our civilization is wrecked. It should be worth defining.*
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> *Equality is such an easily understood concept in mathematics that we may not realize it is a bottomless pit of complexities anywhere else.*[1]

The argument I advance about equality[2] can be stated as a syllogism:

(1) *Major premise:* Any concept in law or morals that is both empty and confusing should be banished as an explanatory norm;

(2) *Minor premise:* The concept of "equality"is both empty and confusing;

(3) *Conclusion:* Therefore, the concept of equality should be banished as an explanatory norm.

The argument can be challenged in the usual ways. One can challenge the major premise by denying that all empty and confusing concepts should be banished from normative discourse. One can challenge the minor premise by denying that equality is an empty and confusing concept. Or one can challenge both premises together.

Professor Steven Burton does none of these things, at least not directly. Instead, he challenges the argument by replacing the major premise with one he assumes I would *want* to accept, replacing the minor premise with one he believes I would *have* to accept, and then suggesting that the premises combine to produce results I would *never* accept. The argument, as he reformulates it, can also be stated as a syllogism:

(1') *Major premise:* Any concept in law or morals that is empty should be banished as an explanatory norm;

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1. Sowell, *We're Not Really "Equal,"* NEWSWEEK, Sept. 7, 1981, at 13.
2. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

(2') *Minor premise*: The concept of "rights" is empty;

(3') *Conclusion*: Therefore, the concept of rights should be banished as an explanatory norm.

Professor Burton presents the reformulated syllogism as a *reductio ad absurdum*. He assumes that his major premise (1') is equivalent to (1). He asserts that his minor premise (2') is as true as (2). He thus puts the reader to the choice between either accepting both conclusions (3) and (3') or rejecting both (3) and (3'). He obliges the reader to choose between either agreeing that "rights" should be banished or denying that "equality" should be banished. As he puts it:

> We would have two choices if the idea of substantive rights . . . were as empty as, and collapsed into, the concept of equality. We could conclude that rules also should be "banished from legal and moral discourse as an explanatory norm," or that neither concept should be banished. . . .[3]

I disagree with Professor Burton's line of argument, but not for the reasons he supposes. He assumes I accept his major premise but reject his minor premise. In fact, my position is quite the opposite: I accept his minor premise but not his major premise. I agree that the concept of "rights" is an empty concept. Indeed, I thought I made it clear that "rights" (like equality) is a "formal" or "rhetorical" device[4] through which one expresses anterior notions of right and wrong. The real difference between rights and equality is not that rights are substantive and equality is formal, but that rights are a "useful" form of moral and legal discourse, while equality is a confusing form of discourse. By the same token, the real difference between Professor Burton and myself is not that he thinks rights are empty and I think them substantive, but that we start from different major premises and hence come to different conclusions. He starts from the premise (or at least attributes to me the premise) that all empty concepts should be avoided; and, hence, he concludes that rights and equality must both be eschewed (or, alternatively, both be embraced). I start from the narrower premise that all empty *and* confusing concepts should be avoided; hence, I conclude that equality alone should be eschewed.

Why would a reader as careful and perceptive as Professor Burton misconstrue my argument about equality? What causes him to collapse "confusion" into "emptiness"? Why does he assume that I would banish all

3. Burton, *On "Empty Ideas,"* 91 YALE L.J. 1136, 1138 (1982) (footnotes omitted).
4. Westen, *supra* note 2, at 579 n.147.

empty ideas from moral and legal discourse? The answer, I suspect, is that I failed to explain as well as I should what I mean by an "empty" idea. I shall try again, therefore, to distinguish empty (or formal) ideas from substantive ideas, and then to apply the distinction to the two concepts of rights and equality.

I. What Are Empty Ideas?

I argue that equality is an empty concept. Professor Burton suggests that rights are also empty. What do we mean by "empty"?

Equality is empty in the same way that a variable in a mathematical formula is empty. Both are derivative in nature. Both can be made to stand for any of a range of specified values, but neither has determinate content of its own. The variable, x, in mathematics is used as a stand-in for something else, whether it be a known value (*e.g.*, the speed of light) or an unknown value (*e.g.*, the time it takes a train traveling at 100 miles per hour to overtake a train that left two hours earlier traveling at 95 miles per hour). X itself, however, has no content apart from the specified value for which it stands. X itself is "empty."

This "empty" formalism is a characteristic of many concepts in law and morals. Consider the concept of freedom. Every statement of freedom has both form and substance. The substance of the statement is the specification of who in particular is unconstrained by what in particular to do or be what in particular.[5] The form of the statement is the triadic relationship of some agent, x, from some constraint, y, to do some activity or nonactivity, z. It is a descriptive formula. It describes things as they are, and is not a moral norm for prescribing what should be. It is a formula for stating who is unrestrained by what to do what, not a prescription of who ought to be (or ought not to be) free from what to do what.[6] The form of every statement of freedom is the same. The three variable terms of the formula can encompass an almost infinite range of agents, an almost infinite range of constraints, and an almost infinite range of activities.

5. This discussion of the concept of freedom relies heavily on Gerald MacCallum's seminal essay, *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967). As he explains:

> Whenever the freedom of some agent or agents is in question, it is always freedom from some constraint or restriction on . . . doing, not doing, becoming, or not becoming something. Such freedom is thus always *of* something (an agent or agents), *from* something, *to* do, not do, become, or not do, become, or not become something; it is a triadic relation. Taking the format 'x is (is not) free from y to do (not do, become, not become) z, 'x ranges over agents, y ranges over such "preventing conditions" as constraints, restrictions, interferences, and barriers, and z ranges over actions or conditions of character or circumstance.

Id. at 314 (footnotes omitted).

6. *See* Cook, *Coercion and Social Change*, in NOMOS XIV: COERCION 107, 122-23, 126-30 (J. Chapman & J. Pennock eds. 1972) (descriptively, freedom neither good nor bad).

Specific freedoms thus share a common logic or structure. Some freedoms are good and lawful (*e.g.*, the freedom of members of Congress from the constraint of libel laws to speak and debate legislative matters); some freedoms are bad and unlawful (*e.g.*, the freedom of husbands from the constraint of criminal penalties to beat their wives). To prescribe (or proscribe) freedom requires something that the descriptive formula of freedom cannot supply: moral or legal standards by which to distinguish good freedoms from bad freedoms, lawful freedoms from unlawful freedoms. Once one possesses such moral or legal standards, one can insert them into the formula, thereby transforming statements of freedom from descriptions into prescriptions.

It follows, therefore, that the concept of freedom is an empty concept in two significant respects. Descriptively, it is largely empty, because it is a set of variable terms that must be further specified before one can know who in particular is unconstrained by what in particular to do or to be what in particular. Prescriptively, it is entirely emply, because it has nothing at all to say about who ought (or ought not) to be free from what to do or to be what. It can do nothing but incorporate by reference whatever external normative standards may otherwise exist for distinguishing good/lawful freedoms from bad/unlawful freedoms.[7]

A. *Are Rights Empty?*

The concept of rights differs from the concept of freedom in at least one

7. Concepts come in varying degrees of open-texturedness. The less the variable terms of a concept are specified in advance, the more the concept can encompass by reference—and, hence, the more the concept is open-textured or "empty." Conversely, the more the variable terms of a concept are specified in advance, the less the concept can encompass by reference—and, hence, the less the concept is empty. It follows, therefore, that as the contents of a concept are increasingly specified, the compass of the concept is increasingly diminished, until the point is reached at which it can stand for only one thing in the world. As that point approaches, the concept ceases to contain variable terms—and thus ceases to be empty—and thus becomes indistinguishable from the one thing for which it stands. Consider descriptive concepts in law and morals, such as freedom. Freedom is a triadic relationship of an agent, *X*, from a constraint, *Y*, to engage in an activity, *Z*. The descriptive concept of freedom is neither entirely empty nor entirely specified. It is not completely empty because its variable terms do not stand for just anything; they stand for particular things—agents, constraints, and activities, respectively. At the same time, freedom is not entirely specified either, because *X*, *Y*, and *Z* are variables: they can be made to stand for any agent, any constraint, and any activity, respectively. In short, descriptive freedom is more or less empty. Freedom would be emptier than it now is, if one or more of its variable terms were changed to encompass more than they now do (*e.g.*, by changing *X* to stand for any agent or thing). Conversely, freedom would be less empty than it now is, if one or more of its terms were changed to encompass less than they now do (*e.g.*, by changing *Y* to stand for any man-made constraint).

The significant thing about equality and inequality is that prescriptively they are entirely empty. (Prescriptively, the same is also true of freedom.) To say two or more things are equal or unequal means that they are identical or nonidentical by reference to a given standard of meaurement, *X*. *X* is completely open-textured. It can stand for any standard of measurement, whether descriptive or prescriptive; and among the latter, it can stand for any prescriptive standard. That is what it means to say that equality and inequality are wholly "empty." *See infra* note 22.

significant respect. The concept of freedom is a set of variable terms that can encompass either descriptive or prescriptive relationships. One can say "people are free to commit suicide whenever they wish," or "people should be (or should not be) free to commit suicide whenever they wish." The first statement expresses an "is"; the latter expresses an "ought." The concept of rights, in contrast, is exclusively prescriptive. It is always a form of normative discourse, always a way of making "ought" statements.

It does not follow, however, that because rights express norms they are also a source of norms. Some normative concepts are entirely derivative. An example is the concept of justice, which is defined as *suum cuique*—"to each his due."[8] So defined, justice is a wholly open-textured norm: it prescribes that everyone be given his or her due, but does not itself specify anyone's due. It does nothing but incorporate by reference whatever moral or legal standards may otherwise exist for determining dues. It is a prescriptive formula consisting of a key variable term, "due," into which external standards of right and wrong must be inserted to give the term content. "Justice" has no meaning apart from those standards of right and wrong; it is simply a summary abstraction of whatever such moral or legal standards happen to be.

The same is also true of rights. Alf Ross, in a famous and brilliant essay,[9] demonstrates that "rights" is an "empty"[10] word, a word "without meaning" and "without any semantic reference."[11] Rights are a rhetorical "tool" or "technique"[12] for expressing moral and legal rules. The rules take the following form: *if* an agent has or does or is *y* (the conditioning fact), he shall *then* be entitled to *z* (the conditioned normative conclusion). To talk about "rights" is to talk about the connection between particular conditioning facts and particular conditioned normative conclusions. One can express the connection directly by simply saying: "if a person has or does or is *y*, he or she shall then be entitled to *z*." Or one can insert the concept of rights as an interface between the two terms of the rule:

(1) If a person has or does or is *y*, he or she shall have a right;

(2) If a person has a right, he or she shall be entitled to *z*.[13]

8. *See* Kelsen, *Aristotle's Doctrine of Justice*, in WHAT IS JUSTICE? 110, 128 (1957) (Aristotle's definition of distributive justice "but a mathematical formulation of well-known principle *suum cuique*, to each his own, or to each his due"); *see also id.* at 136 (formula "[t]o every one his due" an "empty tautology").

9. Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957).

10. *Id.* at 818.

11. *Id.* at 821.

12. *Id.* at 825.

13. *Id.* at 817-18.

The meaning of the term "rights" shifts between (1) and (2). It is used in (1) as a stand-in for the other half of the rule—the conditioned normative conclusion contained in (2); it is used in (2) as a substitute for the first half of the rule—the conditioning fact contained in (1). Together the two terms do nothing but "connect" the conditioning fact to the conditioned normative conclusion.[14]

It follows, therefore, that the term "rights" has no prescriptive content of its own. It is a rhetorical "technique of presentation,"[15] a way of referring to the connection between certain conditioning facts and certain conditioned normative consequences. The term "rights" has nothing at all to say about what facts should (or should not) lead to what normative conclusions. It can do nothing but incorporate by reference whatever normative rules already obtain.

Rights are therefore empty in the same way as justice. Nevertheless, it does not follow that rights and justice should be banished from normative discourse, because it does not follow that either of them is useless. There is no necessary connection between the emptiness of a concept and its usefulness. Some concepts, like variable terms in mathematical formulas, are useful precisely because they are empty. Ross makes precisely that argument in favor of rights. Although rights is "an empty word,"[16] he says it is useful "technique of presentation"[17] that enables us "to achieve clarity and order in a complicated series of legal rules."[18]

B. *Is Equality Empty?*

Equality is empty in the same ways in which freedom is empty. Like freedom, equality is a formula that can encompass descriptive relationships as well as prescriptive relationships. Descriptively, equality and freedom are empty because they contain variable terms that must be filled in to give them descriptive content. Prescriptively, equality and freedom

14. *Id.* at 817-19.

15. *Id.* at 822.

This is not to deny that the term "rights" can also be used more narrowly as a term of art for prescriptive claims of a certain sort, such as claims of particular importance or force. *See, e.g.*, Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, 76 MICH. L. REV. 1213, 1214-34 (1978) (discussing Ronald Dworkin's usage of "rights" to refer to prescriptive claims that have sufficient force to "trump" other prescriptive claims). I use "rights" the way it appears in the Equal Rights Amendment—to refer generically to prescriptive legal claims of all sorts, whether they have their source in organic law, statute, judicial opinion, or custom. *See* Westen, *supra* note 2, at 540-41 nn.11-12.

16. Ross, *supra* note 9, at 818.

17. *Id.* at 825.

18. *Id.* at 821; *see also id.* at 819. *But cf.* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 632 (1981) (noting that the conclusory rhetoric of "rights" may skew constitutional discourse by suggesting that constitutional values are present on only one side or the other of constitutional questions); Churchill & Siman, *Abortion and the Rhetoric of Individual Rights*, HASTINGS CENTER REP., Feb. 1982, at 9 (suggesting that rhetoric of "rights" skews moral and legal discourse by begging very questions at issue).

are empty because they have nothing at all to say about which relationships are good and which are bad, which are lawful and which are unlawful. They are formulas through which one can express prescriptive standards of right and wrong, but they do not themselves specify such standards.

The essential task is to define the term equality. We can begin with descriptive equality. To say that two persons or things are descriptively equal cannot mean that they are descriptively identical in every respect, for no two persons or things can ever be identical in every respect.[19] Nor does equal mean that two persons or things are descriptively identical in some particular respect, for all persons and things are identical in some respects. Thus, to say two persons or things are descriptively equal means that they are identical in relevant respects—"relevant" being defined by reference to a given descriptive standard.[20] To say two persons or things are descriptively unequal means that they are nonidentical in the relevant descriptive respect.

It follows, therefore, that statements of equality and inequality presuppose standards of measurement.[21] The ideas of equality and inequality relate the consequences of applying one standard as opposed to another, but the ideas do not themselves specify particular standards of measurement. They are empty variables into which one may insert whatever descriptive standards one wishes to apply.

The same analysis also governs prescriptive equality. The idea, or definition, of equality is the same in both cases: equality is the relationship of relevant identity that obtains between two or more persons or things by reference to a given standard of measurement. Prescriptive equality differs from descriptive equality only with respect to the content of the given standard. Descriptive equality is the relationship of relevant identity that obtains between two or more persons or things by reference to a descriptive standard—a standard for measuring things as they *are*. Prescriptive

19. Leibnitz, in his famous principle of the identity of indiscernibles, demonstated that there can be no two things in the universe that are exactly alike. *See* W. RABINOWITZ, UNIVERSALIZABILITY 24, 113-14 (1979).

20. "Whether or not persons or things are equal depends in part on the scales used to compare them. Two distances may be the same when measured in miles, but different when measured with a micrometer." Evans, *Equality, Ambiguity and Public Choice*, 14 CREIGHTON L. REV. 1385, 1393 (1981). *See also* Bedau, *Egalitarianism and the Idea of Equality*, in NOMOS IX: EQUALITY 3, 7-8 (J. Chapman & J. Pennock eds. 1967).

Elizabeth Wolgast takes the position, which I find entirely persuasive, that statements of equality and inequality logically presuppose an additional element, namely that the two or more persons or things being declared "equal" or "unequal" both be *capable of measurement* by the given descriptive standard. *See* E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 37-39 (1980).

21. "We can only call two things similar in virtue of some rule or criterion of similarity. Thus, whether two objects are the same color depends on what we count as 'the same color.' " J. WILSON, EQUALITY 41 (1966).

equality is the relationship of relevant identity that obtains between two or more persons by reference to a prescriptive standard—a standard for measuring persons as they *ought* to be.

This can be illustrated by reference to the moral and legal issue of achieving "equality" in the payment of wages and salaries. Assume the following case:

> A company employs three persons, *A*, *B*, and *C*. The three employees all work identical hours and perform identical tasks. Yet they do so in varying circumstances. *A* and *B* both have the same amount of seniority in the company, but they have less seniority than *C*. *B* and *C* both possess the same degree of skill, but they possess less skill than *A*. *C* and *A* are both the same age, but they are younger than *B*. The company is uncertain as to how it should pay the three employees for their work. Accordingly it puts the following question to its general counsel: "Are *A*, *B*, and *C* morally or legally equal for salary purposes?"

The answer obviously depends on the content of the moral or legal standard that governs the payment of salaries. If the legal or moral rules of the society prescribe that salaries be based on the number of hours worked or on the nature of the tasks performed, then it follows that *A*, *B*, and *C* are prescriptively equal. If, on the other hand, the society adheres to another moral or legal rule—seniority, skill, or age for example—for calculating salaries, the three employees are not prescriptively equal. The equality and inequality of *A*, *B*, and *C* are the consequential relationships of identity and nonidentity that obtain among them as a result of applying one prescriptive rule for salaries as opposed to another.

Like freedom, therefore, equality and inequality are prescriptively empty. They relate the consequences of applying normative rules to two or more persons, but they do not themselves supply or specify particular norms. They are formal relationships among persons that depend on a variable prescriptive standard that must be filled in to give them actual content. That is what philosophers mean in saying that, prescriptively, the idea of equality is "formal,"[22] "derivative,"[23] "consequential"[24] and "vacuous"[25]—in short, empty.[26]

22. J. FEINBERG, SOCIAL PHILOSOPHY 100 (1973); C. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 11-29 (1963); Locke, *The Trivializability of Universalizability*, 77 PHIL. 25 (1968).

23. Flathman, *Equality and Generalization, A Formal Analysis*, in NOMOS IX: EQUALITY 38, 51 (J. Chapman & J. Pennock eds. 1967).

24. Brown, *Nonegalitarian Justice*, 56 AUSTRALIAN J. PHIL. 48, 52 (1978).

25. J. REES, EQUALITY 95-96 (1971); Wollheim, *Equality and Equal Rights*, in JUSTICE AND SOCIAL POLICY 111, 116 (F. Olafson ed. 1961).

26. J. HARRISON, HUME'S THEORY OF JUSTICE 197 (1981); P. POLYVIOU, THE EQUAL PROTEC-

II. Is Professor Burton Correct that Rights Derive from Equality?

I argue that statements of prescriptive equality logically collapse into simpler and anterior statements of rights. The reason for this should be apparent. To say that two persons are prescriptively equal is to presuppose a prescriptive standard or rule of treatment by reference to which they are identical. Their moral or legal equality is the logical consequence of the fact that the prescriptive rule deems them to be indistinguishable for its purposes. Take the statement that "men and women are legally equal with respect to voting." The statement presupposes a legal rule or right by which they are indistinguishable—that is, a legal rule to the effect that "no person shall be restrained from voting on grounds of sex." Without such a legal rule, no relationship of legal equality among men and women can be ascertained. With such a legal rule, their legal equality ensues automatically.

Professor Burton takes the opposite position. Equality is not based on rights. Rights, he says, are based on equality. This is so for two reasons. First, equality cannot be based on rights or rules because, at common law, judges have "no authority to enact . . . general rule[s]."[27] A court may announce a rule to explain its decision, but the announcement is nothing

TION OF THE LAWS 7 (1980); Carr, *The Concept of Formal Justice*, 39 PHIL. STUD. 211, 212 (1981); Honore, *Social Justice*, 8 MCGILL L.J. 77, 83 (1962).

It should be apparent by now that Professor Burton and I are using "empty" to mean very different things. By empty, I mean "derivative": equality is morally and legally empty, I say, because rather than being an independent prescriptive norm, equality can do nothing but incorporate by reference prescriptive norms that obtain independently of it. In contrast, Professor Burton uses empty to mean "empirically unverifiable": rights are empty, he would say, because like all moral concepts, rights cannot be derived from—or reduced to—empirically verifiable facts.

This difference in usage produces confusion of two distinct kinds. First, the different ways Professor Burton and I use "empty" may create the impression that we agree where, in reality, we may not agree at all. Thus, by declaring rights to be empty, Professor Burton appears to agree with me when *I* say rights are empty; yet he uses empty so differently that he may not in fact agree with what I *mean* in saying rights are empty, *viz.*, that "rights" are a formula for expressing anterior normative judgments that are and must be capable of being expressed otherwise.

Second, and quite the opposite, the different ways we use empty may create the impression that we disagree where, in reality, we may not disagree at all. Thus, Professor Burton assumes that we disagree about the *significance* of emptiness. He assumes that I would banish empty concepts from moral and legal discourse, while he would retain them. I have already suggested that he is incorrect in his assumption—that I do not regard emptiness as a sufficient reason for banishing concepts from normative discourse. But even if he were correct, the disagreement could easily be explained by the fact that emptiness (and, hence, the significance of emptiness) mean very different things to him than they do to me. He wishes to retain empty concepts, because emptiness (as he uses it) is a feature that pertains to all moral and legal norms—*i.e.*, that prescriptive norms are empirically unverifiable. If I wished to banish empty concepts, it would be because emptiness (as I use it) is a feature that pertains to only some prescriptive norms—*i.e.*, norms that are derivative expressions of anterior prescriptive judgments that are more clearly and accurately expressed directly. In short, if Professor Burton used emptiness the way I do—or if I used emptiness the way he does—we might discover (for all we know) that we are in substantial agreement regarding both the content of rights and equality and their rhetorical significance.

27. Burton, *supra* note 3, at 1143.

more than an "opinion" or "dictum"[28] as to what the rule really is. The opinion is always a dictum, because it is always "open to reinterpretation" and to "overruling"[29] by judges in subsequent cases. A judge may announce the rule "as if it has always been what it has come to be," but that is a "fiction."[30] The announced "rule" is not a principle on which equality can be based, because the rule cannot be said really to exist until the original judge announces it, and it cannot be said to survive after subsequent judges have revised or overruled it.

Professor Burton, it seems to me, confuses the existence of judge-made rules with their longevity. Obviously, judge-made rules do not begin to exist until they are announced, and they do not continue to exist after they have been revised or overruled. The same is also true of legislation: legislative rules do not begin to exist until some legislature announces them, and they do not continue to exist after subsequent legislatures have revised them or repealed them. That legislative and judge-made rules are revisable—and hence, potentially ephemeral—does not mean, however, that they do not exist. Judge-made rules exist as legal norms until the time comes (if ever) that a subsequent court is willing and able either to overrule them or to replace them with alternative rules that are fully consistent with previous decisions. Some judge-made rules, such as the constitutional rule of judicial review in *Marbury v. Madison*,[31] continue to govern unrevised for long periods of time. As long as they continue unrevised, they provide prescriptive standards by which persons are rendered prescriptively equal and unequal.

Professor Burton's second argument is more subtle. Equality cannot be based on rights or rules, he says, because rights and rules are themselves the product of reasoning based on the principle of equality. Judge-made rules do not exist *ex ante* as " 'fixed prior rule[s].' "[32] They " 'arise out of a process' "[33] of legal reasoning. Legal reasoning, in turn, is reasoning by "analogy"[34] and by " 'example' "[35]—that is, by searching for prior decided cases or hypothetical cases that are legally "like"[36] the case at hand. Having found prior or hypothetical cases that are similar in all significant

28. *Id.*
29. *Id.*
30. *Id.*
31. 5 U.S. (1 Cranch) 137 (1803). Professor Van Alstyne has identified a number of features of *Marbury* that would have permitted subsequent courts to construe it more narrowly than Chief Justice Marshall originally framed it. *See* Van Alstyne, *A Critical Guide to Marbury v. Madison,* 1969 DUKE L.J. 1, 34-38.
32. Burton, *supra* note 3, at 1143 (quoting E. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1948)).
33. *Id.* at 1144 (quoting E. LEVI, *supra* note 32, at 4).
34. *Id.* at 1143.
35. *Id.* at 1143 (quoting from E. LEVI, *supra* note 32, at 1).
36. Burton, *supra* note 3, at 1144.

respects, the court first decides to resolve the instant case similarly, then formulates a rule of decision that is consistent with its prior decisions. The announced rule of decision thus comes *after* the process of "analogical reasoning"[37] by which the court decides the case. Since analogical reasoning "necessarily appeal[s] to . . . the equality principle,"[38] it follows—Professor Burton would say—that rules of decision are the product of anterior concepts of equality.

Unfortunately, Professor Burton makes the same mistake that his mentor, Edward H. Levi, made in his influential *Introduction to Legal Reasoning*.[39] Burton and Levi assume that in reasoning by analogy a person *first* identifies legally relevant similarities and *then* formulates a legal rule to explain the similarities. In reality the process of reasoning is precisely the opposite. One can never declare *A* to be legally similar to *B* without first formulating the legal rule of treatment by which they are rendered relevantly identical. Why? Because that is what the terms legally similar, equal, the same, and alike mean. They mean that *A* and *B* are prescriptively identical by reference to a given prescriptive rule of treatment.

For example, is the act of hanging the Governor in effigy legally like or unlike hanging one's spouse? Obviously, the two acts are alike by some descriptive standards and unalike by other descriptive standards. By the same token, the two acts of hanging are prescriptively alike by reference to some prescriptive standards (*e.g.*, by reference to a rule that "any adult who hangs a living person by the neck shall be guilty of a felony"), and unalike by reference to other prescriptive standards (*e.g.*, by reference to the rule that "any adult who hangs either a living person or the representation of a living person by the neck until dead shall be guilty of a felony"). To decide whether the two acts are really similar or dissimilar in law, one must make a legal judgment as to which of the two hypothetical prescriptive rules *should* prevail. Before one has identified the prevailing legal rule, one has no way of knowing whether the acts are legally similar or dissimilar. After one has identified the prevailing rule, the similarities or dissimilarities of the two acts follow as a logical consequence: their similarity or dissimilarity—their equality or inequality—is simply another way of saying that they either do or do not both fully satisfy the terms of the prevailing rule.[40]

37. *Id.* at 1143.
38. *Id.* at 1141.
39. *See* E. LEVI, *supra* note 32, at 1-4.
40.
> So the relevance of [an] analogy is dependent upon perceiving a rational principle within which the two items compared can both be contained. . . .
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> . . . .
>
> This explanation further indicates why no clear line of distinction can be drawn between

It goes without saying that the formulation of legal rules to govern certain persons in certain ways is a normative process. Logic alone cannot derive a moral or legal rule from an amoral premise: one cannot infer an "ought" from an "is." The choice of one prescriptive rule over another—and, hence, one prescriptive equality over another—is a moral, not a logical, decision. Logic comes into play only after one formulates a rule prescribing that certain persons be treated in certain ways; it then logically follows that the persons are either identical or nonidentical to one another for purposes of the prescribed treatment. Their prescriptive equality or inequality follows logically from their relative treatment under the rule, because that is what prescriptive equality and inequality mean.[41]

Conclusion

Equality is a normatively formal concept through which one asserts normative standards that originate elsewhere. The same is also true of other formal concepts, such as freedom, justice, and rights. Some formal concepts facilitate moral and legal discourse by virtue of their capacity to

argument from legal principle and argument from analogy. *Analogies only make sense if there are reasons of principle underlying them.*

N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 163, 186 (1978) (emphasis added).

41. I am afraid that much of Professor Burton's discussion in Part I, B.1. and Part II. A. of his essay is based on a misperception of my views regarding the nature of prescriptive rules. He evidently understands me to be arguing that prescriptive rules can (somehow) be logically derived from—or reduced to—purely nonmoral descriptive premises. I am sorry that he has come away with that impression, because I thought I made it clear that I believe precisely the opposite. *See* Westen, *supra* note 2, at 544 n.23. I believe, like Benn and Peters, that "doing justice calls for decision-making, not calculation: we have to *decide* what is relevant, and what consequences ought to follow—and though we decide according to rule, we are still doing something different from arithmetic." S. BENN & R. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 124 (1959); *see* Westen, *supra* note 2, at 549 n.40 ("statements of equality presuppose the presence of empirical traits that we *decide ought* to carry certain moral consequences") (emphasis added); *see also* Allen, *A Critique of Gewirth's Is-Ought Derivation*, 92 ETHICS 211 (1982); Holmes, *Frankena on "Ought" and "Is,"* 64 MONIST 394 (1981). This means that Professor Burton and I are not as far apart in his views as he assumes. Though I am not sure I fully understand everything Professor Burton says in Part II. A. of his essay, I am sure that I fully agree that "legal rules" are "moral concepts," not purely descriptive statements.

What, then, is the source of Professor Burton's misperception? Why does he take me to be arguing that prescriptive rules are exclusively the products of logic and description. The answer, I think, is that he confuses the *origin* of prescriptive rules with their *consequences.* The origin of prescriptive rules is necessarily normative in nature: one cannot decide whether *A*, *B*, and *C* should be treated in certain ways without adjudging how the world ought to be (as opposed to how the world is). At the same time, however, the formal relationships of equality or inequality that obtain among *A*, *B*, and *C* as a consequence of deciding that they be treated in certain ways are necessarily logical or analytical in nature: logically speaking *A*, *B*, and *C* are either identical to one another for purposes of the rule of treatment (and hence, "equal") or nonidentical for purposes of the rule (and, hence, "unequal"). The relationships of equality or inequality that obtain among them are an analytical consequence of the prior normative judgment as to how they should be treated. Professor Burton thus confuses what I say about the consequences of moral rules with what I do not say (or, at least, do not intend to say) about the origin of moral rules. He assumes that, because I declare the formal consequences of moral rules to be analytic, I must also declare the origin of moral rules to be purely analytic. But, of course, that conclusion does not follow from that premise, and I do not mean to say it does.

incorporate diverse normative standards by reference without distorting their content. The trouble with equality is that it tends to mask the substantive normative standards it incorporates by reference and, hence, to confuse moral and legal discourse.

That is why Thomas Sowell can say that equality is such "an easily understood concept in mathematics" and yet so complex anywhere else.[42] Equality itself is always the same—it is the relationship of relevant identity between two or more persons or things by reference to a standard of measurement. The difference between equality in mathematics and equality in morals is the degree to which people agree on the relevant standard of measurement. Equality is clear and simple in mathematics because, in agreeing to play the game of mathematics, we implicitly commit ourselves to the rule that identities and nonidentities should always be governed by reference to number—that is, that the left side of a mathematical equation shall equal the right side whenever they are identical in their numerical sum. In contrast, equality is elusive in law and morals because we do not (and, perhaps, cannot) agree on the normative rules by which people should be governed. We use the word "equality" in law and morals as if it stood for a common norm (as it does in mathematics), without realizing that we are surreptitiously asserting diverse and sometimes conflicting moral and legal norms. Equality conceals the diverse nature of the normative standards it incorporates by reference and, by masking them, becomes "a bottomless pit of complexities."[43]

42. *See* Sowell, *supra* note 1, at 13.
43. *Id.*

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