

The Irrelevance of Equality before the Law

“He’s fair. He treats us all the same -- like dogs.” Henry Jordan, Green Bay Packers right tackle talking about Vince Lombardi; recalled on Lombardi's death September 3, 1970

Political activists drive around with bumper stickers proclaiming their commitment to equality. Perhaps the bumper sticker loudly asserts “=!” Oppressed people lament their lack of equality. Political philosophers contemplate equality and try to formulate general principles about it. In recent days, some advocates of marriage rights for same-sex couples argued for their view by claiming it’s just a matter of equality. Indeed, one of their advocacy websites uses the name ‘Equality’.¹ They want equal rights. Everyone seems to take it for granted that equality is important. This seems entirely wrong to me. It seems to me that equality is legally (and politically and socially and economically and morally) irrelevant.

There are plenty of general principles involving equality. These differ with respect to what we might call *subject matter*. Thus, for example, some principles involve equality of welfare; others involve equality of opportunity; yet others involve equality of civic obligation. These principles differ with respect to subject matter. Another respect in which equality principles differ might be called *domain*. Thus, for example, some principles are about the *justice* of some arrangement; others are about the *intrinsic value* of some arrangement. And yet others might concern our prima facie obligations.

Consider the principle that says that a distribution of welfare levels cannot be just unless it distributes equal levels of welfare to all recipients. The subject matter here is welfare; the domain is justice. A different principle might say that a distribution of rights cannot be intrinsically good unless it distributes equal amounts of rights to all recipients. In this case the subject matter is rights, and the domain is intrinsic value. Yet another principle might say that it

¹ I allude here to <http://www.equality.org.za/opinion/>. I should also mention that in its decision on same sex marriage, the Massachusetts Supreme Judicial Court argued against the prohibition of same sex marriage by appeal to the claim that this prohibition violated the equal protection clause of the Massachusetts state constitution.

is always morally wrong to treat similar people in unequal ways. In this case the domain is *moral rightness* and the subject matter is *treatment of similar people*.

Some of these equality principles may seem important. My view is that in every case, what's important about the principle can be stated without mentioning equality. The remainder – the part that essentially involves equality – is not worth saying. That's what I mean when I say that equality is morally and politically and legally (etc.) irrelevant. We could get along just as well, and maintain essentially the same values, even if we had no such concept.

I'd like to be able to show that every one of these concepts of equality is in this way irrelevant. However, discussing all of these different concepts might take a long time and it might get repetitious. So I will focus on one of the most widely endorsed and intuitively attractive principles about equality – the principle that says that no system of laws can be just unless it guarantees equality before the law. This invokes the concept of “equality before the law”. I will try to show that this equality concept is irrelevant.

I proceed here as follows: first I say a few introductory words about equality in general. I try to say what it is. Then I turn to the topic I mean to discuss in detail. I discuss the idea that a bare sort of formal *equality before the law* is an essential feature of any just legal system. I try to show that this is a mistake. In order to have an interesting conception of equality before the law, we need to build in some evaluative notions. I explain these. I then argue that if we have these evaluative notions at our disposal we can forget about equality. What bears on the justice of a system of laws is something that can be fully explicated without mentioning equality. This needs to be explained, and so I try to explain it. I try to make it clear that justice (construed as I suggest) can be fully explicated and understood without any appeal to any concept of equality. This may all seem very negative – as if I have nothing nice to say about equality. Am I saying that those who demand equality for oppressed racial, or religious, or gender groups are just confused? Can we make no sense at all of the demand for equal rights for so-and-so's? I try to explain what sense can be given to such claims, and to show that the claims themselves have nothing to do with equality. I conclude by trying to anticipate a possible misunderstanding.

1. What is equality in general?

In the social, political, economic, legal and moral realms, to say that there is equality of something or other is to say that no person is getting more or less of that something than anyone else. Consider anything that can be distributed: money, rights, social status, opportunity, health insurance, tax bills. Call that thing “the distributed item”. Assume that there is a way of measuring the amount of that item that is being distributed to a certain person. Assume that the system of measurement permits meaningful comparisons of the amount distributed to one person and the amount distributed to another. We can say that there is equality of the distributed item within a certain group if the amount distributed to any one member is of the same magnitude as the amount distributed to any other member.

Let me give a simple example. We can imagine a country in which every person is required to give two years’ service to the country, either in the army, or in the conservation corps, or teaching in an understaffed school, or in the peace corps. The government distributes an obligation to each citizen – an obligation to give two years’ service. We measure magnitude of the obligation simply by appeal to the amount of time the person is required to serve. If you are required to serve longer, you have a bigger obligation. But in the case I am imagining, no one is required to serve more than two years and no one is required to serve less. Then (given these assumptions) we can say that there is equality with respect to the obligation for national service in this imaginary country. The amount of national service obligation distributed to any one citizen is exactly equal in magnitude to the amount of national service obligation distributed to each other citizen.

2. What is “Equality before the Law”?

Many of us are naturally attracted to the idea that a system of laws cannot be just unless it guarantees a sort of equality – equality before the law. This constitutes a kind of bare minimum without which a proposed legal system is a non-starter. Even some who are by nature anti-

egalitarian seem to think that this minimal sort of equality is an obvious prerequisite for a legal system.²

If we take this to be a principle about *justice*, then we may be able to formulate it this way:

EBL: A system of laws, L, is just only if L guarantees equality before the law to all within its jurisdiction.

But this equality principle is vacuous unless we can explain what is intended by the phrase ‘equality before the law’. I looked up ‘equality before the law’ in several legal dictionaries and encyclopedias.³ In general, they maintain that equality before the law is pretty much the same as the thing indicated in the first Section of the 14th amendment to the Constitution of the United States. The relevant passage is the one italicized at the end of the quoted section:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

Taken literally, the italicized clause suggests is that there is equality before the law if and only if each person within the jurisdiction of the law receives the same amount of “protection of

² In his essay “Against Equality”, J. R. Lucas anticipates many of the points I make here. In general, he seems to think that equality is vastly overrated. However, he seems to make one exception. He seems to maintain that *equality before the law* is a genuinely valuable sort of equality. He says, ‘Equality before the law is nonetheless valuable for that. It secures to all the protection of the law – no man is to be outside the law, and everyone shall have access to the courts to vindicate his rights against every other man. It secures the uniform administration of the law without fear or favour. It gives the subject protection against arbitrary decisions by those in authority and it gives him freedom to make rational plans. These are reasons enough to value equality before the law. (pp. 107-8 in Pojman and Westmoreland). I certainly agree that all the cited features are virtues of a legal system. However, it seems to me that these are all features of a legal system that guarantees *due process*. None of these virtues essentially involves *equality* at all. (I note that Lucas himself seems vaguely aware of this, though he persists in using the term “equality before the law” to describe the cited feature.

³ I will have to insert the names of the dictionaries here. They are all just a bunch of websites.

the laws” as each other person. So this looks like just another instance of the general concept of equality, but with a novel item of distribution: the distributed item is “protection of the laws”. But what is that?

We might think of the law as a distributor of benefits and burdens. Some of the benefits might be such things as the right to call 911 if you see someone lurking in your back yard; the right to remain silent; the right to possess a shotgun. Other benefits are the services of a free lawyer if you need one but can’t afford to pay. The burdens are obvious: you have to pay taxes; you have to get a driver’s license, keep to the right, stop on red, and get your muffler replaced when it rusts out. A major-league burden would be an all-expense paid six-month trip to Folsom State Penitentiary.

One simple way to formulate an equality principle based on this idea is to say that if the law gives a certain benefit or burden to one citizen, then it must give an exactly equal dose of that benefit or burden to all other citizens. “What’s right for one is right for all” would be the motto of this conception. We can define this conception of equality before the law this way:

EBL1: A system of laws, L, guarantees equality before the law⁴ =df. if L distributes some benefit or burden to some citizen, then L distributes equal-sized doses of that same benefit or burden to all other citizens.

EBL1 might be construed as a clear expression of the purely formal conception of “equal benefits and burdens for all citizens”. This definition implies, for example, that if Smith and Jones are citizens of the same jurisdiction, then the law of that jurisdiction guarantees equality only if it says either they both have the right to own a shotgun, or that neither does. If the law of that jurisdiction distributes that right to Smith, but denies it to Jones, then it fails to guarantee equality before the law in the sense defined by EBL1. If it requires Smith to give two years of service to the country but waives this requirement in the case of Jones, then it again fails to

⁴ I am suppressing the relativization to jurisdictions. EBL1 and succeeding principles should be understood to be accounts of concepts of equality before the law *within some jurisdiction*; all references to “the law” should be understood to be references to the law *of that jurisdiction* and references to “citizens” should be understood to be references to citizens *of that jurisdiction*.

guarantee equality before the law. In either case, the collection of benefits and burdens distributed to Smith is different from the collection distributed to Jones.

3. Why this sort of equality is irrelevant

It should be obvious that no sane person would have any interest in equality before the law if it is understood according to EBL1. Principle EBL becomes preposterous if ‘equality before the law’ is understood as in EBL1. The people whose cars carry bumper stickers saying “=!” surely cannot be thinking of this. If it is not entirely obvious, let me explain why.

According to EBL1, a legal system guarantees equality before the law only if it distributes the same benefits and burdens to all citizens and distributes those benefits and burdens equally. The benefits and burdens distributed by the law are the “good things” and the “bad things” doled out by the law. As examples of “good things” doled out by the law, we can take such items as a free trip to the hospital in an ambulance, an income tax refund check in the amount of \$1,752.37, and the free services of a state appointed lawyer. As examples of “bad things” we can take such items as a six-month stay in Folsom State Penitentiary, an income tax bill in the amount of \$152,642.96, and the services of an FBI agent searching through the files in your computer.

Clearly, no one would want to claim that a system of laws is just only if the law distributes the same collection of burdens and benefits to all citizens. It would be utterly mad to think that if the law doles out a six-month stay in Folsom to one citizen, then in order to be just, it must dole out a six-month stay to every other citizen, too. Can you imagine a lawyer claiming that his client has been deprived of equal protection of the laws because he got six months in Folsom, whereas thousands of others (those who have not been convicted of any crime) received no such burden? Surely not.

This purely formal notion of equality is silly.⁵ We must reformulate it so as to take account of the fact that a system of laws can be perfectly just even though it distributes some burdens to some citizens, but not to others. There are several different ways in which we could reformulate it. Here is one: instead of saying that a system of laws guarantees equality before the law only if it distributes benefits and burdens equally to *all* citizens, we could say that the system of laws guarantees equality only if the law distributes benefits and burdens equally *to citizens who are similar to each other*. So if two citizens have committed similar crimes then the law must provide equal sentences; and if two citizens have equal need for the services of a free attorney then the law must provide equal access to the services of a free attorney.

Let us therefore introduce a new definition of the concept of equality before the law:

*EBL2: A system of laws, L, guarantees equality before the law =df. if L distributes some benefit or burden to some citizen **in virtue of that citizen's having a certain feature**, then L distributes equal-sized doses of that same benefit or burden to all other citizens **who are similar to that one in respect of the feature**.*

In simpler terms, the idea is that a legal system that guarantees equality must distribute benefits and burdens equally to citizens who are similar. An advocate of equality before the law might think that this is the feature he has in mind when he says that in order to be just a legal system must guarantee equality before the law to its citizens.

The introduction of the concept of similarity might seem to be an improvement, but it does not help at all. A completely unjust system of laws could guarantee the sort of equality defined in EBL2. This could happen, for example, if the laws selected groups of people who are similar in ways that are morally arbitrary. For example, a law might select people who are alike

⁵ A reader might suspect that my objection to EBL1 makes essential use of an implausible conception of benefit and burden. I have taken these to be “absolute” benefits and burdens. I have claimed that there is no plausibility to the idea that these should be distributed equally. The reader might think that my objection could be overcome easily if we substituted “conditional” benefits and burdens, such as for example, the obligation to go to Folsom State Penitentiary *if you have been found guilty of murder*. But the move to conditional benefits and burdens would not guarantee any interesting sort of equality. Suppose the law gives everyone this conditional right: the right to ride in the front of the bus *if you are not left-handed*. The granting of this conditional right to all citizens seems to embody precisely the sort of discrimination egalitarians want to avoid.

with respect to left-handedness, and it might bestow a nasty burden on all of them equally. Can you imagine the reaction if the judge were to tell a left-handed person that he has no grounds for complaint since the burdens placed on him in virtue of his left-handedness are exactly the same as the burdens placed on all other left-handed people? “All left-handed people are required to spend six months in Folsom State Prison. We are treating you in just the same way as we are treating all other people who are similar to you. You have equality before the law.” Obviously, that would be an outrage and its victims would not be getting the thing that egalitarians have in mind when they speak of equality before the law.

Clearly, mere similarity is not sufficient. A better idea is that laws should treat people equally when they are similar *in legally relevant ways – in ways that in fact call for, or justify, equal treatment from the law*. Let us assume that there are some objective facts about the kinds of similarity that can be cited as “legally relevant”. Let us agree that race, gender, and left-handedness are not among them.⁶ Let us agree, on the other hand, that *having been found guilty of premeditated murder* is a feature that makes people who have it relevantly similar for purposes of sentencing. Similarly for *having been accused of a felony but being too poor to afford a lawyer*. These are features that have a kind of legal significance. Someone might actually deserve something from the law in virtue of having such a feature. Let us describe such features as “bases of legal desert”. Now we can say:

EBL3: A system of laws, L, guarantees equality before the law =df. if L distributes some benefit or burden to some citizen in virtue of that citizen’s having a certain basis of legal desert, then the law distributes an equal-sized dose of that same benefit or burden to all other citizens who are similar to that one with respect to the selected basis of legal desert.

I want to draw attention to the fact that when we introduce the concept of a basis of legal desert in EBL3, we give up the idea that equality is a purely formal notion. While there is a formal element (people must receive equal amounts of benefit and burden) there is also an

⁶ I am overlooking some important details. In fact, the Supreme Court has determined that some sorts of discrimination can be permitted when there is overwhelming public interest; others can be permitted when there is important public interest; etc. This means, in effect, that different amounts of public interest can make different kinds of similarity relevant.

obviously normative or evaluative element – the requirement of equality applies only within groups whose members share some normative feature. They must share some feature in virtue of which they *deserve* some sort of legal treatment. The identification of such features is a matter that requires something like a moral judgment, not a mere measurement of some objectively detectable fact. So we have gone beyond the idea that equality before the law is just a formal constraint on legal systems.

But even this is not enough to secure the sort of equality before the law that interests the egalitarian. For a legal system could guarantee this sort of equality while being absurdly unjust. To see this, we can imagine that every law is a conditional statement. It says that if a person has some specified feature, then he or she must receive some specified benefit or burden. And the selected feature might be a genuine basis of legal desert. For example, a law might say that if a person has the feature *being accused of a felony but being too poor to afford a lawyer*, then he or she shall receive the benefit of *getting the services of a free lawyer*. Another law might say that if a person has the feature *having earned income after deductions of some amount between \$52,000 and \$57,000 and having two dependents* then the person shall receive the burden of *having to pay \$11,000 in federal income taxes*.

We can imagine that every law in the legal system specifies in its antecedent a feature that is a genuine basis of legal desert. As a result, none of the laws would start out in these ways:

L1: If a person is left handed,....

L2: If a person is male,....

L3: If a person is heterosexual,

The system of laws would contain none that starts out in any these ways, since such laws distribute benefits or burdens on the basis of features that are not bases of legal desert.⁷ Instead, we can imagine, the laws all start off with antecedents like these:

⁷ I make these assumptions for purposes of illustration. I recognize that some readers might think that some of these features in fact are bases of legal desert. Let them substitute features they find acceptable.

L4: If a person has voluntarily and with malice aforethought killed some innocent person...

L5: If a person has earned an after deduction income between \$52,000 and \$57,000 and has two dependents....

Laws starting out like these would be better, since they apply to people who are alike with respect to a feature that actually is a basis of legal desert. The laws would go on to say that such relevantly similar people should receive equal benefits or burdens.

But even we insist that the features mentioned in the antecedents of the laws be in this way bases of legal desert, a legal system as a whole could still be tremendously unjust. It could distribute benefits and burdens equally to all members of a morally defensible similarity class, and it could distribute equal benefits or burdens to them, but it could distribute wholly inappropriate benefits and burdens. For example, it might stipulate that those who have been found guilty of voluntary murder should (all of them, equally) get refund checks for \$100,000 while those who have earned incomes between \$52,000 and \$57,000 should (all of them, equally) get life in prison.

This shows that a system of laws could guarantee equality before the law in the sense indicated by EBL3 while still being grotesquely unjust. Thus, the guarantee of this sort of equality is not a sufficient condition for justice or legitimacy or any other sort of excellence of a system of laws. Perhaps this is the point of the remark about Vince Lombardi mentioned in my epigraph: a system of laws could treat relevantly similar people equally, but if it treated them all like dogs it would not be a very good system of laws.

I think it is especially interesting to note that a system of laws could guarantee equality in the sense indicated by EBL3 while still enforcing precisely the same injustices as a system of law that does not guarantee this sort of equality. To see this, consider some system of law that blatantly discriminates against left-handed people. Suppose it contains laws like these:

L6: If a person is left-handed and wants to ride on the bus, then he or she must sit in the back.

L7: If a person is left-handed and has been found guilty of murder, then he or she shall serve an extra ten years of hard time.

L8: If a person is 16 years old and not left-handed, then he or she has the right to apply for a driver's license.

Such a system of laws seems to discriminate against left-handed people, and so violates the requirement of equality before the law set forth in EBL3.⁸

But it would be easy to change these laws so as to make them consistent with the requirement of equality before the law as stated in EBL3. Consider these laws:

L6*: If a person of any handedness wants to ride on the bus, then he or she must sit in the portion of the bus reserved persons of his or her handedness.

L7*: If a person of any handedness has been found guilty of murder, then he or she shall serve the penalty indicated in the sentencing code for persons of his or her handedness (where the penalty for lefties is in every case 10 years more than for righties).

L8*: If a person is 16 years old and of any handedness, then he or she has the right to apply for a driver's license. (N.B . All applicants must pass the test using the right hand.)

Note that a system of laws containing these laws could guarantee equality before the law in the specified sense. In each case, the antecedent of the law specifies a basis of legal desert and each of them doles out benefits or burdens equally to all people sharing that basis. Yet it should be obvious that these laws are precisely as unjust as their predecessors. They violate the condition right-thinking people have in mind when they insist on "equality before the law". Thus, we still haven't captured the intuition that stands behind the '=!' bumper sticker.

⁸ Assuming that left-handedness is not a legitimate basis for legal desert.

The flaw in laws such as L6*, L7*, and L8* is not that they commit some improper discrimination in their antecedents. It's not that they focus on some inappropriate group and then proceed to dole out equal benefits or burdens to all the people in that gerrymandered group. Each of these laws identifies a group of people who share a feature that is (arguably) a basis for legal desert. Rather, the problem with these laws is that they dole out benefits and burdens that are themselves discriminatory. Right-handed people won't be adversely affected by a law like L7* that makes everyone serve the penalty indicated in the sentencing guidelines, but left-handed people will be adversely affected. Similarly for the other proposed laws. They carry their discrimination buried in their benefits and burdens.⁹

4. A Further Qualification

I think a single amendment will solve both of these problems. The amendment involves a restriction on the kinds of benefits and burdens that may justly be imposed by laws.

Recall that according to EBL3, a system of laws guarantees equality before the law only if it distributes benefits and burdens equally within groups of people who share a basis of legal desert. What we have now seen is that this condition can be satisfied too easily. It is satisfied even if (a) the benefit or burden that is equally distributed is simply inappropriate for people who have the basis of legal desert – it's unfair to give that benefit or burden to anyone in the group. Furthermore, it is satisfied even if (b) the benefit or burden itself contains some covert basis for unjust discrimination.

Consider a benefit or burden that is equally distributed to some group of people in virtue of their sharing some basis of legal desert. Imagine that there is some way to guarantee that the benefit or burden is fully deserved by anyone who has the basis of legal desert. Then since the law would prescribe that benefit or burden to everyone who has the basis of desert, we could be

⁹ Consider a law that applies to everyone (regardless of gender, sexual orientation, handedness, race, etc.) and that says that if a person wants to get married, he or she may marry anyone who is not already married, of suitable age, and *of the opposite gender*. Such a law applies across the board to people who are relevantly alike (they all want to get married) and it gives them all precisely the same benefit (they can marry any person....). But it should be obvious that those who favor same sex marriage would not be satisfied. The discrimination is carried in the benefit itself.

sure (a) that the benefit or burden would be deserved by each of those people, and (b) that those people would receive equal benefits or burdens in a non-discriminatory way.

The idea of a fitting, or appropriate benefit or burden is not so hard to grasp.¹⁰ We can all see that *six months in Folsom* might be fitting for people who are alike in this respect; each of them has been found guilty of assault and battery. *Getting a refund check in the amount of \$11,792* is clearly not fitting for people sharing this basis of legal desert. Let us assume that we understand this concept of *deserved benefit or burden* and, making use of it, introduce a new definition of equality under the law:

EBL4: A system of laws, L, guarantees equality before the law =df. if L distributes some benefit or burden to some citizen in virtue of that citizen's having a certain basis of legal desert, then (a) L distributes equal-sized doses of that benefit or burden to all other citizens who are like that one with respect to the selected basis of desert, and (b) each recipient citizen deserves the benefit or burden in virtue of having the basis of legal desert.

Since EBL4 may seem a little complicated, let me say a few words about what it means. The main point of EBL4 is roughly this: we have equality before the law provided, first, if the laws select all the members of some group to receive equal doses of a benefit or a burden because of their possession of a certain feature, then that feature must be a basis of legal desert. And secondly, if the laws select all the members of a group to receive equal doses of some benefit or burden because of their possession of a certain feature, then each of those people must actually deserve that benefit or burden from the law in virtue of having that feature. We can sum this up by saying that we have equality before the law when the laws select people for equal receipt of some benefit or burden in a morally defensible way, and then go on to dole out equal doses of benefits and burdens that are themselves morally defensible for the people so selected. That may capture a coherent idea that some advocates of equality may have in mind when they

¹⁰ I am not suggesting that it is easy to identify the features that in fact are the correct bases of legal desert, or that it is easy to identify the benefits or burdens that a person legally deserves in virtue of having these bases of desert. I think it is profoundly difficult to identify these features. My point is that we need to make some appeal to these things in order to formulate a plausible criterion of equality before the law.

speak of equality before the law, or of equal protection of the laws. I am attracted by the idea that in order to be just, a system of laws must guarantee equality before the law, so interpreted.

I should mention here that the addition of clause (b) in EBL4 takes us even further from anything that could be called a formal conception of equality. For now we are incorporating another normative judgment. Not only are we making a normative judgment concerning the bases of legal desert when we select groups within which equal benefits and burdens must be distributed, we are also making a normative judgment when we determine that some benefit or burden is legally deserved. The judgment that someone deserves some treatment in virtue of having a certain property is not simply a matter of empirical observation. It is a kind of normative judgment.

We can now make use of the concept of equality before the law as defined in EBL4 together with principle EBL to say something about just systems of law. A system of law is just, according to this view, only if it guarantees equality before the law as defined in EBL4. Perhaps this is the thought that stands behind the demand for equal justice under law.

6. What's really important about just laws

Notice that in my attempt to formulate a clear conception of equality before the law, it became necessary for me to make use of the concept of legal desert. I used this concept twice. First, to identify the classes of people to whom the laws could distribute benefits and burdens. I said that we have equality before the law only when the laws distribute those benefits and burdens equally to people who are alike with respect to *a basis of legal desert*. Second, I used it to identify the sorts of benefits and burdens that the law should distribute. The benefits and burdens that are equally distributed within some group must be fitting or appropriate to the members of that group – they must *deserve* those benefits or burdens in virtue of their possession of the shared legal desert base.

But once we have the concept legal desert, we can formulate a much simpler criterion of justice of a legal system. And this new criterion makes no reference to equality of anything. For we can simply say that a system of laws is just only if it distributes benefits and burdens to

citizens because they have features in virtue of which they legally deserve the benefits and burdens being distributed. In other words:

DBD: A system of laws, L, is just only if if L distributes some benefit or burden to some citizen in virtue of that citizen's having a certain feature, then the citizen legally deserves the benefit or burden from the law in virtue of having the feature.

DBD specifies what it takes for the law of some jurisdiction to provide what we may call a “desert-based distribution”. Such a distribution doles out the benefits and burdens under the law to the citizens of its jurisdiction. The benefit or burden is, in each case, one that the citizen who receives it deserves to get from the law. So we just look at each specific citizen; we consider what burdens and benefits he or she is getting under the law and we look at the feature in virtue of which the law distributes that benefit or burden to the citizen. If the citizen deserves to be getting the benefit or burden from the law in virtue of having the specified feature, then we have a distribution according to desert. If every citizen is like that, then the legal system is providing a desert-based distribution. This, I claim, is as good as a legal system can get. It is a just system.

Notice that DBD never mentions anything about equality. It does not say that citizens receive *equal* or *identical* benefits and burdens. It does not say that similar citizens receive equal treatment under the law. Instead, it says (in effect) that each citizen receives what he or she deserves from the law. But this is all we need. To bring this point into sharp relief, consider a strange constitutional convention. Imagine that the conventioners are mathematically challenged. None of them has the concept of equality. When they see a bumper sticker that says ‘=!', they just scratch their heads. They don't get it. Obviously, if none of them understands what equality is, none of them values equality, either. Imagine that what they value is “receipt according to desert”. In other words, what they value is a feature of individual receipts of burden or benefit. In each case, these conventioners like it best when the law ensures that what each person gets from the law is what he or she deserves from the law. So they try to set up their laws so as to bring about the result that they admire. They construct their legal system in such a way as to ensure that there is (as they see it) distribution according to legal desert. If they succeed in

this, they might construct a perfectly just legal system. *But they are not even thinking about equality.*

I cheerfully grant that if their legal system were instituted and properly administered some pairs of citizens might receive equal benefits or burdens from the law. That would happen, for example, in cases in which the citizens were equally deserving of those benefits or burdens. But in many cases there might be much less equality of receipt. Indeed, it is possible for there to be a perfectly just legal system in which the law doles out benefits and burdens in such a way that there are no pairs of citizens who get equal benefits and burdens from the law. It might turn out that no two citizens receive the same amount of any benefit or burden. I see no problem with this. The law might still be perfectly just. Inequality does not bother me at all – provided that the recipients are unequally deserving.

7. So what are egalitarians demanding?

This may all seem very negative. I have spent a lot of time trying to show that a system of laws can be perfectly just even if it does not guarantee any sort of equality. Equality, I have claimed, is not relevant to the justice of a legal system. Yet it may still seem that there must be something to the claims made by those demanding equal rights. Surely, if left-handed people got together and demanded “equal rights for lefties” their claim would not be utterly pointless. So, if their claim has some point, then it may seem that there is some role for equality – that equality is not totally irrelevant after all.

My view is that when lefties demand equal rights for lefties, they are making a sensible (and in fact legitimate) demand. But this reasonable demand has nothing to do with equality. As I understand them, they are demanding that there be no laws imposing greater burdens (or, presumably, benefits) on lefties simply in virtue of their left-handedness. They are saying that the law should not distribute any benefit or burden to anyone in virtue of their left-handedness. They are saying, in effect, that left-handedness is not a legitimate basis for legal desert of anything, good or bad.

It would be possible to formulate their claim making use of the concept of equality. We could say that the demand for equal rights for lefties amounts to this: the law should not

distribute any benefit or burden to lefties in virtue of their left-handedness unless it distributes an equal-sized benefit or burden to non-lefties in virtue of their non-left-handedness. Thus, it may appear that equality is somehow relevant here.

However, the core of the lefties' demand could even more naturally be stated without mentioning equality: the law should not distribute any benefit or burden to anyone in virtue of their left-handedness or their non-left-handedness. In other words, "left-handedness must not be taken as a legal desert basis".

In general, when people demand equal rights for F's, I think what they mean is that F-ness must not be taken as a legal desert basis. The mere having of F-ness, they are saying, should not ground any beneficial or harmful treatment by the law. This seems to me to be in general what claims to equality for F's amount to. So understood, such claims may often make perfectly good sense. My central point is that *such claims have nothing to do with equality, properly understood.*

8. Forestalling a possible misunderstanding

I want to forestall a certain kind of possible misunderstanding. I have been trying to show that equality before the law is irrelevant. Someone might think that I am saying this because I favor inequality, or that I like it when left-handed people get the short end of the stick, or that I think it's morally better for the citizens of a country to be divided into classes or castes.

I have no such view. I find such views abhorrent. I suspect that the legal arrangements I admire are pretty much the same as the arrangements that right-thinking egalitarians admire. My point concerns the reason why these arrangements are admirable. The egalitarian thinks that they are admirable because they guarantee some sort of equality before the law. I have been trying to show that if these arrangements are admirable, it's not because they embody any sort of equality. Rather, as I see it, these arrangements are admirable (if indeed they are admirable) because they mandate the distribution of burdens and benefits according to justifiable legal desert bases.¹¹

¹¹ This suggests a better way for advocates of same-sex marriage to argue. Instead of saying that same sex marriage should be legalized as a matter of equality before the law, they should argue that same-sex marriage should be

When we have a just system of laws, we very well may find that citizens who are similar in important respects will receive equal-sized benefits and burdens from the law. Such a distribution may be just. But in my view, what makes it just is not the equality (or even the equality within some class of relevantly similar citizens). Rather, what makes it just is that the benefits or burdens received by each citizen are appropriate, or fitting for that particular citizen – they are benefits or burdens based upon the citizen’s possession of a legally relevant desert base, not by the fact that these benefits or burdens are equal in magnitude to the benefits or burdens distributed by the law to other citizens.

Bare formal equality before the law in itself (as captured by EBL1) is easy to understand. We have such equality when the law distributes equal doses of the same benefits and burdens to all. I tried to show that equality before the law so understood is neither necessary nor sufficient for the justice of a legal system. That is, we can have a just system of law within which not all citizens are equal before the law (in that sense). Equally, we can have an unjust system of law within which all citizens are equal before the law (in that sense). Equality before the law in this sense is not even a broad formal constraint on the acceptability of a legal system. What matters with legal systems is not equality. It is that the laws distribute benefits and burdens according to legal desert. A bunch of lawmakers could construct such a just system of laws even though they had no concept of equality and were not trying to achieve it. Equality is irrelevant.

legalized because sexual orientation is not a justifiable basis of legal desert. No one deserves either benefit or burden from the law simply in virtue of his or her sexual orientation. In order for the claim to be truly relevant, I think it would have to be extended to *pairs* of people. The claim should be that the law should not place any distinct burden on any pair of people simply in virtue of the fact that they are both of the same gender.