

# Comments

## Comment On “Empty Ideas”: Logical Positivist Analyses of Equality and Rules

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In a recent article in the *Harvard Law Review*,<sup>1</sup> Professor Peter Westen directs his considerable capacity for logical analysis at the idea of equality. Professor Westen asserts and defends “two propositions: (1) that statements of equality logically entail (and necessarily collapse into) simpler statements of rights; and (2) that the additional step of transforming simple statements of rights into statements of equality not only involves unnecessary work but also engenders profound conceptual confusion.”<sup>2</sup> Therefore, he says, equality is an “empty idea” that “should be banished from moral and legal discourse as an explanatory norm.”<sup>3</sup>

Many, no doubt, will wish to defend equality as a concept with independent content, at least in some situations. This Comment takes a different tack. “Statements of rights” (rules) are the heroes of Professor Westen’s story, though they are spared the scrutiny lavished on equality. He seems to regard rules as suitable norms for explanatory moral and legal discourse—norms that in themselves are independent of equality, imbued with content, and comparatively simple to apply without confusion.<sup>4</sup> Us-

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1. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) [hereinafter cited as Westen].

2. *Id.* at 542.

3. *Id.*

4. See *infra* pp. 1138, 1140-41. Professor Westen might regard substantive rights as empty ideas analytically, but useful ones nonetheless. Cf. Westen at 579 n.147 (“Some formal concepts [such as rights] are quite handy, even indispensable [sic].”) He argues that equality as a form of analysis is not useful, *id.* at 577-92, largely because “people do not realize that [equality] is derivative [from substantive rights], and not realizing it, they allow equality to distort the substance of their decisionmaking.” *Id.* at 592. It would seem to be at least equally so that “people” often do not realize that statements of substantive rights themselves are empty of content in the same sense, and allow the so-called plain meanings of such statements to distort their decisionmaking. Westen offers no empirical grounds for concluding that equality causes more confusion than rules. Cf. *infra* note 14 (such grounds might support Westen’s position if rights did not collapse into equality); note 50 (like equality, rules hide their incompleteness).

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ing methods of logical analysis similar to those Westen used to criticize equality, this Comment will demonstrate that rules collapse into equality and also are empty, in the sense that Westen regards equality as empty. By the logical positivist method of analysis, both equality and rules must be banished from explanatory legal and moral discourse, a move that would render such discourse impossible. The alternative is to reject that method of analysis because it proves too much, and to retain both equality and rules as instruments of thought and argument.

### I. Analysis of Equality

In the abstract, the premises of Professor Westen’s argument should be familiar to any well-educated common-law lawyer. Westen treats equality as meaning that “likes should be treated alike” (and the sometimes less noticed corollary that “unlikes should be treated unlike”). This is, he says, a tautology. Because no two people are alike in every respect, equality could not mean that only people who are alike in every respect should be treated alike. Because any two people are alike in some respect, equality could not mean that people who are alike in some respect should be treated alike. In one case, the equality norm applies to no one, and in the other it requires equal treatment of everyone. Either interpretation is absurd.<sup>5</sup>

“People who are alike” must mean “people who are morally alike in a certain respect.”<sup>6</sup> Moral likeness, however, is not a datum of nature but a normative conclusion. Equality has no meaning until the premise from which that conclusion follows has been adopted. “To say that people are morally alike is therefore to articulate a moral standard of treatment—a standard or rule specifying certain treatment for certain people—by reference to which they are, and thus are to be treated, alike.”<sup>7</sup>

Professor Westen’s main thesis is that, once one has adopted such a moral rule or standard, the idea of equality is rendered analytically superfluous and should be discarded in favor of the rule or standard.

Thus, to say that people who are morally alike in a certain respect “should be treated alike” means that they should be treated in accord with the moral rule by which they are determined to be alike. Hence “likes should be treated alike” means that people for whom a certain treatment is prescribed by a standard should all be given the treatment prescribed by the standard. Or, more simply, people who by a rule should be treated alike should by the rule be treated alike.

5. *Id.* at 543-44.

6. *Id.* at 544-45.

7. *Id.* at 545 (citations omitted).

So there it is: equality is entirely "[c]ircular."<sup>8</sup>

In other words, if a rule requires a certain treatment of each of two people, they should be treated alike by virtue of the rule, not by virtue of the equality norm. Westen thus regards equal treatment as a necessary consequence of applying rules to "all cases to which the terms of the rule dictate that it be applied."<sup>9</sup> The intellectual task of establishing a rule and applying it to each of two cases is logically anterior to determinations of equality.<sup>10</sup> Once that task has been performed, nothing remains to be done because like cases will have been treated alike and unlike cases will have been treated unlike.

Now the assumption seems to be that "the terms of the rule *dictate* that it be applied,"<sup>11</sup> and that they do so by an intellectual process that does not depend of necessity on considerations of equality,<sup>12</sup> or on other norms that are vulnerable to the criticisms made of equality.<sup>13</sup> Though Professor Westen did not undertake to analyze the logic of rules in his paper, such an analysis is necessary to the soundness of his thesis, which appeals to the meaningfulness and analytical simplicity of rules as contrasted with equality. We would have two choices if the idea of substantive rights, determined by the language of rules, were as empty as, and collapsed into, the idea of equality.<sup>14</sup> We could conclude that rules also should be "banished from moral and legal discourse as an explanatory norm,"<sup>15</sup> or that neither concept should be banished because the method of analysis yielding such an absurd result is inappropriate.

## II. Analysis of Rules

Professor Westen's separation of rules from equality is complete, as can be seen from his discussion of comparative rights:

8. *Id.* at 547 (citation omitted).

9. *Id.* at 551.

10. *Id.* at 548.

11. *Id.* at 551 (emphasis added).

12. *See id.* at 550-51 (equality superfluous in administration of rules).

13. To summarize, the principal criticisms were (1) that statements of equality have no substantive content of *their own*, but depend on norms outside equality *itself*, *id.* at 553, 566, 571-72, 574, 577-78, 580-81; (2) that equality is a wholly normative concept, lacking the identification of empirical traits, the presence of which would entitle a person to the treatment claimed, *id.* at 544-47, 549; and (3) that application of the equality norm requires logically illicit moves between "is" and "ought," *id.* at 544-45. To justify banishing equality while retaining rules requires at least that rules be different from and better than equality by the same criteria.

14. If rights were analytically empty but did not collapse into equality, *cf. supra* note 4 (Westen might regard rights as empty but useful), Professor Westen might maintain his position by showing on empirical grounds that equality as a form of argument engenders more confusion than rights as a form of argument. He did not try to make that case.

15. Westen at 542.

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Equality differs from rights, it is said, because equality presupposes comparison, while rights do not. Substantive rights, such as the right of free speech and the right to counsel, can be described without reference to a person’s relationship to other rightsholders. To decide whether a person’s speech rights are violated, one juxtaposes the state’s general duty of behavior against the state’s particular treatment of the person to determine whether the state treats the person in accord with its prescribed duty. Equality, in contrast, is comparative in nature . . . .<sup>16</sup>

Westen’s argument in the succeeding text is that some equality claims do not involve factual comparison and that some substantive rights claims do involve factual comparison.<sup>17</sup> In any case, however, it is the controlling moral or legal standard—not the comparison—that determines how each case will be treated.<sup>18</sup> Therefore, substantive rights are determined by rules operating independently of the equality norm.<sup>19</sup>

It is simply wrong, however, to suggest that substantive rights can be determined in any case without reference to a person’s normative relationship to other rightsholders,<sup>20</sup> at least if the statement is meant to convey what is involved in legal reasoning. Let us consider the right of free speech. The general terms of the First Amendment appear on their face to be simple to apply: “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>21</sup> We will apply this general proscription to two particular cases, which will serve as illustrations throughout the remainder of this Part.

Imagine that a state<sup>22</sup> has made it a crime to hang the Governor in effigy, and that a state has made it a crime to hang any person, including the Governor. It will be seen that the Supreme Court could not reach conclusions as to the validity of these laws without considering the norma-

16. *Id.* at 551 (citation omitted).

17. *Id.* at 551-56.

18. *Id.* at 553.

19. “[I]t is wrong to think that, once a rule is applied in accord with its own terms, equality has something additional to say about the scope of the rule.” *Id.* at 551. “The distinction . . . is between rights that cannot be determined independently of a person’s [factual] relationship to others and rights that can.” *Id.* at 556. “Like rights of speech and religion, rights of race and sex [must] be stated without reference to ‘likes’ or ‘equals.’” *Id.* at 565.

20. For example, Westen asserts that “[t]o decide whether a person has been tortured or denied basic subsistence, one need not know how anyone else has been treated.” *Id.* at 552. The Supreme Court has not so approached the Eighth Amendment. See *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (“punishments of torture” include those used in England during the 17th century “and all others in the same line of unnecessary cruelty”); cf. *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958) (drawing analogy between physical mistreatment or primitive torture and expatriation).

21. U.S. CONST. amend. I.

22. The text will pass over the analytical problems involved in the incorporation of the First Amendment within the due process clause of the Fourteenth Amendment so as to make it applicable to the states, even though it applies by its terms to Congress.

tive relationship of (1) hanging the Governor or (2) hanging the Governor in effigy to other activities that enjoy (or do not enjoy) First Amendment protection. The Court must determine whether hanging the Governor in effigy or in the flesh is in some important aspect "like" such other activities—for example, (3) making a public speech criticizing the Governor or (4) hanging one's spouse. Because "the terms of the rule" do not "dictate" which aspect of each activity is *important*, arguments based on the rule collapse into arguments by analogy, which themselves are claims to equal treatment under the law.

### A. *Legal Reasoning as Deduction*

To separate rules from equality completely, one who would adopt Professor Westen's position seems forced to regard legal reasoning as fundamentally deductive, rather than purposive, inductive, or analogical in character. Only a logical positivist model of legal reasoning can purport to explain rules and rights independently of equality or other similarly vulnerable norms.<sup>23</sup> Thus, in the hypothetical free speech cases, a statement of the state's general duty of behavior (the rule) would stand as the major premise of a syllogism. A statement of the state's treatment of the person (the facts) would stand as the minor premise. Whether the state acted in accord with its duty would depend on whether the rule logically entailed the facts.<sup>24</sup>

That this is Professor Westen's view of all defensible legal reasoning seems a fair interpretation of his expressions in this work, despite the facial implausibility of such a mechanical model.<sup>25</sup> To repeat, he says that "[t]o decide whether a person's speech rights are violated, one *juxtaposes* the state's general duty of behavior against the state's particular treatment of the person to determine whether the state treats the person *in accord with* its prescribed duty."<sup>26</sup> He emphasizes that equality between two per-

23. See *supra* note 13.

24. Technically, the general rule would logically entail particular statements that correspond to discrete facts in the world. See *infra* p. 1149.

25. If this is not an accurate interpretation of Professor Westen's position in this article, he should demonstrate how rules produce rights in particular cases without using the equality norm or other norms that are vulnerable to the criticisms he makes of equality. See *supra* note 13; *infra* note 63.

One footnote could be interpreted as treating rules purposively or instrumentally. See Westen at 554 n.55 (equality between in-state and out-of-state citizens under privileges and immunities clause "does not derive from some direct comparison of the two, but is rather a logical consequence of their relationship in light of an external rule serving particular substantive ends"). On the instrumentalist view, however, rules depend on norms outside the terms of the rules themselves and lack a predetermined empirical foundation. Westen would banish the equality principle because it has those characteristics. *Id.* at 544-45, 549-50; see also *infra* pp. 1141, 1146.

26. Westen at 551 (emphasis added). The statement is strongly reminiscent of Justice Roberts' much-maligned characterization of the judicial function in constitutional adjudication:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the

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sons "is a 'logical consequence' of the established rule."<sup>27</sup> Thus, "[r]elationships of equality are derivative, secondary relationships; they are logically posterior, not anterior, to rights."<sup>28</sup>

Moreover, we should avoid reading Professor Westen to favor purposive or inductive (including analogical) reasoning to determine whether the facts come within the rule. Purposive treatments of legal rules are too value-laden and context-dependent for "the terms of the rule [to] dictate that it be applied."<sup>29</sup> Induction cannot at all explain the application of a rule to facts.<sup>30</sup> Additionally, analogical reasoning essentially involves comparisons to determine similarity and difference according to an unspecified rule, and would be analytically superfluous if the rule were known in advance.<sup>31</sup> In the analysis of reasoning, analogies necessarily appeal to the principle that "like cases should be treated alike"—the equality principle—and are vulnerable to the criticisms Westen makes of equality, to the same extent.

It is true that legal reasoning often employs the deductive form in practice. As Holmes said, however, "you can give any conclusion a logical form."<sup>32</sup> Deduction cannot serve to explain legal reasoning because it leaves unanswered five critical questions.

First, major premises (rules) often are chosen, not given. From a logical point of view, an issue in the Governor-hanging cases would be whether the deductive implications of the speech clause must prevail over the deductive implications of the state statute. The terms of no rule in the constitutional text dictate the choice of major premise.

article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

United States v. Butler, 297 U.S. 1, 62 (1936).

27. Westen at 548 (citation omitted); see also *id.* at 564 (relationship of equality between shares and shareholders "logically necessary" consequence of right to vote in proportion to ownership).

28. *Id.* at 548. Professor Westen's expressions also are strongly reminiscent of an earlier writer, who more explicitly presented judicial reasoning as a syllogism:

Now it must be perfectly apparent to any one who is willing to admit the rules governing rational mental action that unless the rule of the major premise exists as antecedent to the ascertainment of the fact or facts put into the minor premise, there is no judicial act in stating the judgment.

Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287, 338 (1918).

29. Westen at 551; see *supra* note 25.

30. G. GOTTLIEB, *THE LOGIC OF CHOICE* 18-20 (1968); see Salmon, *Should We Attempt to Justify Induction?* in *NEW READINGS IN PHILOSOPHICAL ANALYSIS* 500, 503 (H. Feigl, W. Sellars, & K. Lehrer eds. 1972) (we do not have rule of inference to justify inductive conclusions); Strawson, *The Justification of Induction*, in *id.* at 491 (induction would collapse into deduction if we had rule of inference).

31. For a classic argument concluding that a logically sound argument by analogy would be analytically superfluous, which is the same as Professor Westen's argument for so treating equality, see Malcolm, *Knowledge of Other Minds*, in *THE PHILOSOPHY OF MIND* 151 (V. Chappell ed. 1981).

32. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). For an elaborate example that, philosophically speaking, treats all that matters as given, see-N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 19-52 (1978).

Second, the major premise must be construed. Hanging the Governor in effigy is not obviously entailed by the general concept "freedom of speech." "Speech," however, may be taken to mean "talking," "political expression," or "expression." Thus, hanging the Governor in effigy may be "speech" for this purpose (and so may hanging the Governor). But that, too, is required (deductively) by the terms of no rule in the constitutional text. Justice Black, for example, seemed to insist that "speech" means "using words."<sup>33</sup>

Third, the facts must be characterized—framed in language as a minor premise. Did the state convict a citizen who protested the Governor's policies or a person who killed another person? Again, no positive rule of law dictates the critical choice.

Fourth, the language thus adopted as a minor premise must be interpreted—given meaning.<sup>34</sup> Hanging the Governor in effigy and in the flesh are each in some respect political expressions and at the same time harms to the Governor's interests. In the latter case, for example, did the state convict a citizen who forcefully expressed political views, or a person who committed a homicide with malice aforethought?

Fifth, the major and minor premises must be "squared" (or not squared). This is the only point deductive models address.<sup>35</sup> Of course, it depends on all of the choices that have gone before, which often remain hidden from view. Moreover, it is naive to think that any person—even a "disinterested" legal scholar—decides each of these five questions independently of the others. Indeed, from a logical point of view, it would be superfluous to do so if the syllogism operated in legal reasoning as it does in symbolic logic. Once one adopts a major premise—all men are mortal—one has concluded that Socrates is mortal. Conversely, once one has concluded that Socrates is mortal, one can construct the premises necessary to support the point. As has been said, the function of syllogistic argument is "not to prove the conclusion desired, but to make explicit what is already implicit in one's position on a question."<sup>36</sup> Thus, the syllogism begs the question.

## B. *Legal Reasoning as Analogy*

The question-begging character of the syllogism as an explanation of

33. *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Black, J., dissenting).

34. The third and fourth steps sometimes overlap.

35. The text passes over a further jurisprudential problem discussed in Northrup, *Law, Language, and Morals*, 71 *YALE L.J.* 1017, 1031-32 (1962) (legal syllogism requires justification of third premise—that norms of positive law ought to be obeyed).

36. Oliphant & Hewitt, *Introduction*, in J. RUEFF, *FROM THE PHYSICAL TO THE SOCIAL SCIENCES* ix (1929).

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legal reasoning is not a characteristic only of the example chosen. It is inherent in the nature of language, without which one could not express either rules or facts, nor function as a lawyer at all. As Locke observed, all language, save perhaps proper names, is and must be general to function as language.<sup>37</sup> Both the ideas in our minds and the realities of the world are more complex than language can be and still be language. Consequently, every statement in language, if taken to have referents in the world, will by its plain meanings refer to both more and less than anyone wanted or wants.<sup>38</sup> To associate a piece of language with a discrete fact in the world cannot be done deductively or by simple correspondence.<sup>39</sup> Certainly, good lawyers never have approached language—statements of rules and statements of fact—as the mathematician or logician approaches the symbols of closed analytical systems.

Rather, as Edward H. Levi put it, legal reasoning is "reasoning by example."<sup>40</sup> It is analogical reasoning.

Thus it cannot be said that the legal process is the application of known rules to diverse facts. Yet it is a system of rules; the rules are discovered in the process of determining similarity or difference. But if attention is directed toward the finding of similarity or difference, other peculiarities appear. The problem for the law is: When will it be just to treat different cases as though they were the same? A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings into play the general rule. If this is really reasoning, then by common standards, thought of in terms of closed systems, it is imperfect unless some overall rule has announced that this common and ascertainable similarity is to be decisive. But no such fixed prior rule exists.<sup>41</sup>

Let us be clear about what is at stake in Professor Westen's proposal to banish the idea of equality from legal and moral discourse. If legal reasoning is indelibly analogical, as Levi asserts, Westen is challenging far more than contemporary legal and political claims to equal treatment. His analysis challenges the integrity of legal reasoning itself.

37. 2 J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 14-16 (A. Fraser ed. 1959).

38. "[F]act is richer than diction." Austin, *A Plea for Excuses*, in ORDINARY LANGUAGE 41, 56 (V. Chappell ed. 1964).

39. It seems doubtful that there even are such things as "discrete facts" in the world, waiting to be matched to a word or statement by a correspondence principle. See, e.g., A. WHITEHEAD, MODES OF THOUGHT 1-10 (1938); Quine, *Ontological Relativity*, in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 26 (W. Quine ed. 1969).

40. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1948); see also G. GOTTLIEB, *supra* note 30; N. MACCORMICK, *supra* note 32.

41. E. LEVI, *supra* note 40, at 3.



It should require little explanation to establish that the common-law process works primarily by analogical reasoning. *Stare decisis* itself is another manifestation of the principle that "like cases should be decided alike." Equality, analogical reasoning, and *stare decisis* stand or fall together when confronted by Professor Westen's analysis. At common law, however, a judge has no authority to enact a general rule. One may be announced in a case, but it stands in substantial, though indeterminate, part as *dictum*.<sup>42</sup> It is an opinion as to the significant point in the case, open to reinterpretation or the engrafting of exceptions by successors, not to mention the possibility of overruling. Thus, "the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them."<sup>43</sup> Judges may present the rule in a case as if it has always been what it has come to be, but that is patently an empty fiction.

Enacted rules, whether statutory or constitutional, once were thought to be different from the common law, perhaps to operate more as the syllogism does in symbolic logic.<sup>44</sup> The enactment of a rule does seem to establish an authoritative major premise as a "given" for the purpose of a particular case. But this is a superficial and incomplete observation because of the problems identified above.<sup>45</sup>

I suggest that the two Governor-hanging cases are clear because we engage in analogical reasoning. We posit a clear case of protected speech (a lecture criticizing the Governor's policies) and a clear case of murder (killing one's spouse). In the light of the values underlying the First Amendment, we regard hanging the Governor in effigy as more like the first case, and hanging the Governor as more like the second. And we regard all four cases as easy ones. Of course, no two of the four cases are alike in all respects, and all four cases are alike in some respects. We make a normative judgment as to what respects are the important ones.

That judgment, however, is not a logical consequence of the terms of the First Amendment,<sup>46</sup> which cannot be applied in a particular case without recourse to such analogies.<sup>47</sup> For example, all four cases are "ex-

42. *E.g., id.* at 2; F. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEAS* 33-36 (1959); A. HARARI, *THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS* 5-18 (1962); K. LLEWELLYN, *THE BRAMBLE BUSH* 66-69 (1950).

43. E. LEVI, *supra* note 40, at 4.

44. *See* H. HART, *THE CONCEPT OF LAW* 121-23 (1961).

45. *See supra* pp. 1141-42.

46. For a sample of efforts to articulate the principles or methods used in making such judgments, see T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 80 (1970); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 584-91 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *HARV. L. REV.* 1482 (1978).

47. *See generally* Moore, *The Semantics of Judging*, 54 *S. CAL. L. REV.* 151 (1981); Stone, *From*

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pression” in some respect, while none of the four cases is “expression” in all respects; and all are “anti-social behaviors” in some but not all respects. To apply the rule, we must make judgments about which respects are important in each case. The judgment of importance in applying a rule, like the judgment of similarity in using an analogy, depends on unspecified values outside the rule itself, and involves us in analytical problems of moving from “ought” to “is” when we apply the rule.<sup>48</sup> Professor Westen therefore errs in stating that the conclusions are the “logical consequences” of the rule<sup>49</sup>—not normative judgments but logically deduced from a “given.” Where are the “given” rules that distinguish the Governor-hanging cases?

To test the point further, let us posit some rules (really meta-rules) that stand on a different logical plane and tell us how to apply the enacted rules: (1) the First Amendment shall not invalidate state statutes if the statutes are necessary to protect a compelling state interest; and (2) a constitutional provision shall be construed according to the intention of the framers or according to its purpose. It should be observed that both of these meta-rules are judge-made and consequently partake of the problems of common-law rules, making the process of applying enacted rules wholly dependent on analogical reasoning in the same manner.<sup>50</sup> But let us pass over that problem and inquire whether *these* rules can be applied without engaging in reasoning by analogy—without using the equality principle to determine substantive rights.

The logic of the so-called “compelling state interest” test is fairly transparent. To say that the First Amendment invalidates a state statute unless the statute is necessary to protect a compelling state interest is logically reducible to saying something like: freedom of expression is more important than a state statute unless the state statute is more important than freedom of expression. Again, what do we mean by “important”? Surely nothing follows as a “logical consequence” in any real-world case from “important” as the key term in the major premise of a syllogism. Neither “compelling state interest” nor “importance” are things that exist in nature (observables), nor can they be reduced analytically to necessary and sufficient conditions that are observable without deriving an “is” from an “ought.”<sup>51</sup> They are normative concepts. As such, they beg the question

*a Language Perspective*, 90 YALE L.J. 1149 (1981).

48. See *supra* note 13.

49. Westen at 548; *supra* pp. 1140-41.

50. Moreover, if the rule itself were empty of content and dependent on a meta-rule, Professor Westen’s preference for the more simple and direct approach suggests that we discard the rules and work directly with the meta-rules. Like equality, rules hide their incompleteness and therefore cause confusion.

51. See, e.g., G. MOORE, *PRINCIPIA ETHICA* 9-21 (1903); *supra* note 13; *infra* pp. 1147-50.

whether application of a state murder statute to one who hung the Governor, or a state statute against hanging the Governor in effigy, should be invalidated by the First Amendment: it should if it should. One might offer another rule to tell us, as a "logical consequence," what a compelling state interest is—a meta-meta-rule—but it should be apparent that this tack leads to an infinite regress of no small significance.<sup>52</sup>

The logic of construing a constitutional provision according to the intention of the framers or according to its purpose could lead us into a similar regress.<sup>53</sup> Neither "intention" nor "purpose" are observables, if we state them in the abstract. We can say that the framers intended the First Amendment to protect "expression" or "political expression," though they said "speech," or that this was the purpose of the text. The problems of knowing such things, with the assurance necessary to exclude *de novo* normative judgments, are well-known.<sup>54</sup> And even if we knew that the framers had such an intention or purpose, we still do not know that hanging the Governor in effigy and in the flesh are not both "expression," or neither "expression," or one "expression" and the other not, or the other "expression" and the one not, so far as the logical consequences of the meta-rule take us. Again, we need a meta-meta-rule and are off into the darkness of a regress.

Alternatively, the purpose or intention (of "freedom of speech" or of "compelling state interest") can be stated in the particular. To do so, however, is to state a case, be it hypothetical or historical. To say merely that the evil before the minds of the framers was, for example, suppression of the political opposition is again abstract, a negative version of the statement analyzed in the preceding paragraph. We must have a case, such as what happened to Zenger, or what Zenger did. As "general propositions do not decide concrete cases,"<sup>55</sup> however, "[c]oncrete decisions do not make law."<sup>56</sup> What Zenger did can be described in narrow terms and limited to the press, or in broad terms and expanded to cover all thought and action. Another meta-meta-rule seems necessary to tell us what the rule of the Zenger case is, unless we break the regress by shifting from deduction to analogy. Then, we might say, hanging the Governor in effigy is like what Zenger did but hanging the Governor is not, and all might agree.

52. The problem seems to exist in closed analytical systems as well. See D. HOFSTADTER, GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (1979).

53. See also *supra* note 25.

54. See generally Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1 (1965); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

55. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

56. A. HARARI, *supra* note 42, at 9.

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Of course, shifting from deduction to analogy (equality) does not solve our problems as analysts of legal reasoning. The problem identified by Professor Westen and others—identifying normative grounds for purposes of determining whether cases are alike or unlike—is no small problem. It is not solved, however, by shifting from equality to rules, which also depend on unspecified values outside the rules themselves. Thus, if rules are given the same kind of intensive logical analysis that Westen gives to equality, they too stand empty and collapse into equality. This logical analysis of rules and equality drives us back and forth between the two in a regress, as when we stand between the barber’s mirrors.

### III. Reflections

If the foregoing analysis is sound, it seems that one of two conclusions may be drawn: either that rules and equality both should be “banished from moral and legal discourse as explanatory norms”<sup>57</sup> or that something is seriously wrong with the kind of analysis that yields this result. I, for one, prefer the latter.

#### A. *Law and Logical Positivism*

It is hazardous for a legal scholar to venture forth in the world of modern philosophy. It seems to me, however, that Professor Westen’s criticisms of equality are strikingly similar to certain early twentieth century writings by positivist logicians, which philosophers generally regard as valiant efforts that failed.<sup>58</sup>

Let us state Professor Westen’s thesis in a different form. His argument that equality is an empty idea rests on the assertion that equality is a wholly normative concept that lacks a “reality referent,”<sup>59</sup> a designated “trait”<sup>60</sup> that entitles a person to the treatment claimed, a trait that can be ascertained empirically and compared to traits of others.<sup>61</sup> He says, however, that “statements of equality presuppose the presence of empirical traits that we decide ought to carry certain moral consequences.”<sup>62</sup> The decision to single out an empirical trait (observable characteristic) for a

57. Westen at 542.

58. See Feigl, *New Reflections on Empiricism*, in *NEW READINGS IN PHILOSOPHICAL ANALYSIS* 1, 12 (H. Feigl, W. Sellars, & K. Lehrer eds. 1972) (logical positivists failed to achieve sound epistemology); see generally C. GLYMOUR, *THEORY AND EVIDENCE* (1980); T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); W. QUINE, *FROM A LOGICAL POINT OF VIEW* (2d ed. 1961); R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1980); L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans. 1958).

59. The phrase is Professor Leff’s. See Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 558 (1967).

60. The word is Professor Westen’s. See Westen at 549.

61. *Id.* at 549 n.40.

62. *Id.*

prescribed treatment is embodied in a rule. The presence of the trait entitles or subjects a person to the treatment prescribed by virtue of the rule. Therefore, the claim of equal treatment is superfluous.

Accordingly, one who would adopt Professor Westen's position must believe that moral and legal rules have "reality referents" and thus do not exist, like equality, only on the normative plane. To restate my criticism, if the terms of rules do not themselves specify empirically ascertainable traits, they too would be empty by this analysis. And legal rules generally do lack such specifications, at least in the sense that Westen seems to intend. I hesitate to go quite so far as to say that all words in all legal rules symbolize normative concepts. They almost all are set in abstract language, however, and that, it will be seen, carries the same implications for the purposes of this kind of analysis.<sup>63</sup>

Many legal and moral rules are stated in normative terms. From the examples offered in Part II, it should be clear that concepts like "freedom of speech" and "compelling state interest" themselves are normative.<sup>64</sup> The workaday vocabulary of the lawyer similarly is full of normative or normatively ambiguous concepts: proximate cause, duty, malice, promise, substantial performance, title, material issue of fact, reasonableness, good faith. No rule using such words specifies an empirically ascertainable trait in the sense that Professor Westen's criticism of equality seems to require: such things cannot be seen, touched, tasted, smelled, or heard.

Other legal rules that appear to be stated in factual terms also turn out to be normative on analysis. "Cause-in-fact" in tort law is an example.<sup>65</sup> Moreover, even purely formal rules often turn out to be normative in their application to the world. For example, a rule says that a will is valid if witnessed "by two persons" whose signatures appear. But a will witnessed and signed by three persons probably is valid under that rule—because the witnesses serve to assure due deliberation and the exercise of free will by the testator, and three is *better* than two for that purpose. The rule

63. See generally G. GOTTLIEB, *supra* note 30, at 42-47; R. UNGER, *KNOWLEDGE AND POLITICS* (1975); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 802 (1941).

Even if some legal rules could sometimes be applied by deduction, it would not follow that those rules as such operate by deduction. One can always describe observable aspects of a paradigm case in the form of necessary and sufficient conditions for the application of a rule—a bootstrap strategy because the conditions were not ascertained prior to the decision in the case. See *supra* p. 1141. For example, a flat EEG together with a flat EKG for a time surely may establish that most certain and final fact—death. For purposes of a legal rule using the word "death," however, those two elements do not necessarily constitute the necessary and sufficient conditions for "death" as the meaning of the rule itself. A flat EEG alone may be sufficient, or the person's disappearance for a long period of time. One could elaborate a complex definition, but it would be derived analogically from the cases rather than from any ontological properties entailed by the rule *ex ante*. See also *Riggs v. Palmer*, 115 N.Y. 506, 510-11, 22 N.E. 188, 189-90 (1889).

64. See *supra* pp. 1144-47.

65. Malone, *Ruminations on Cause in Fact*, 8 STAN. L. REV. 60 (1956); see also Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978).

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means “at least two persons” because it ought to mean that, though it did not say that.

At least some wholly factual words or concepts might appear in some rules, though in the abstract. Treating an observable trait as significant because the trait is entailed by such a rule might require more than one logical step. Thus, the word or concept might be shown, by logical analysis, to entail a number of discrete elements (necessary and sufficient conditions). By reducing the word to its elements, and each element to its sub-elements, and each sub-element to its sub-sub-elements, it might be thought that one could reach a level of particularity at which statements of empirically ascertainable traits appear, statements that are logically entailed by the rule. Such statements then could be juxtaposed to reality, and it could be determined whether the latter corresponded to the former.<sup>66</sup>

Such reductionism was a goal of the logical positivists,<sup>67</sup> but they never achieved it in any particular case.<sup>68</sup> They found themselves in an infinite regress, and in endless debates on the existence of and distinctions between “atomic facts,” “sense data,” and “physical objects.”<sup>69</sup> Several abandoned ship when they saw the futility of it all.<sup>70</sup> Others, like Carnap, in later life modified their views dramatically.<sup>71</sup> Consider a rule that requires the “signature” of a party to be charged under a contract for the sale of goods worth more than \$500. Will initials do? A first initial with a last name? A corporate seal? A computer printout of a secret number? Can the answer be determined from the logical entailments of the word “signature” or of the terms of the statute of frauds?

The quest for empirically ascertainable traits is a hallmark of another revealing aspect of logical positivism—the elimination of metaphysics. None of the logical positivist philosophers ever tried to reduce a normative concept to empirically ascertainable traits. Doing so obviously requires some magical move from “ought” to “is.”<sup>72</sup> Consequently, they proclaimed that all metaphysical statements—normative and esthetic statements, for

66. Of course, the judge or jury in law cases has, not “reality,” but often fragmentary data and second-hand reports of past events, before it.

67. See generally Ayer, *Editor's Introduction*, in LOGICAL POSITIVISM 3 (A. Ayer ed. 1959); Feigl, *Logical Empiricism*, in READINGS IN PHILOSOPHICAL ANALYSIS 3 (H. Feigl & W. Sellars eds. 1949).

68. Even if it were possible to achieve the reductionist ideal, the occasions would be too few to characterize our legal system.

69. See J. AUSTEN, *SENSE AND SENSIBILIA* (G. Warnock ed. 1962); C. GLYMOUR, *supra* note 58, at 10-63; Quine, *Epistemology Naturalized*, in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 69 (W. Quine ed. 1969); *supra* note 39.

70. Compare L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (D. Pears & B. McGuinness trans. 1961) (picture theory of meaning) with L. WITTGENSTEIN, *supra* note 58 (meaning as use); Feigl, *supra* note 67 (advocating logical positivist epistemology) with Feigl, *supra* note 58 (positivist epistemology failed).

71. See, e.g., C. GLYMOUR, *supra* note 58, at 17-19, 29-48, 147.

72. See G. MOORE, *supra* note 51, at 9-21.

example—are meaningless.<sup>73</sup>

The governing slogan was that the truth-value of a proposition lay in its method of verification. Meaningful propositions, they insisted, were of two kinds, each of which could be verified in a different way. Analytical propositions could be true or false by virtue of the meanings of the symbols of the proposition, according to the laws of logic operating in a closed formal system like mathematics. Synthetic propositions could be true or false by virtue of sensory experience, however elusive such verification might be. Because metaphysical propositions, including normative propositions, cannot be verified in either way, they were held to be meaningless. As Carnap put it, “[i]t is altogether impossible to make a statement that expresses a value judgment.”<sup>74</sup>

It should now be apparent what Professor Westen is doing in effect when he proclaims equality an empty idea that should be banished from legal and moral discourse. His argument amounts to a rerun of those put forward decades ago by Carnap, Ayer, and others. His ground for claiming that equality is empty is Carnap’s ground for claiming that all metaphysical statements are meaningless. If equality is offered as an analytical concept, Westen claims that it is tautological. If equality is offered as a synthetic concept, Westen claims that it lacks verifiability by empirically ascertainable traits, logically entailed in the concept itself. Therefore, he concludes, equality is empty.

But it is also the case that Professor Westen claims less than Carnap claimed, for he spares legal and moral rules from the same intense scrutiny, and therefore from the same fate. By the very terms of his hypothesis, there are no grounds for doing so. Legal rules as we know them are normative or abstract, and as lacking in empirically ascertainable traits as is the idea of equality. In either case, by the logical positivist analysis, both rules and equality must be banished from legal and moral discourse as explanatory norms. Professor Westen’s banishment of equality alone is selective and unjustified.

## B. *Law and Life*

Eliminating both rules and equality would, of course, leave us little to do as lawyers. We would feel, perhaps, as Wittgenstein felt after writing his *Tractatus Logico-Philosophicus*.<sup>75</sup> He concluded:

73. E.g., Ayer, *On the Analysis of Moral Judgments*, in A MODERN INTRODUCTION TO ETHICS 537 (M. Munitz ed. 1958); Carnap, *The Elimination of Metaphysics Through the Logical Analysis of Language*, in LOGICAL POSITIVISM 60 (A. Ayer ed. 1959).

74. Carnap, *supra* note 73, at 77.

75. L. WITTGENSTEIN, TRACTATUS, *supra* note 70.

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We feel that even when all possible scientific questions have been answered, the problems of life remain completely untouched. Of course there are no questions left, and this itself is the answer.

The solution of the problem of life is seen in the vanishing of the problem. . . .

The correct method in philosophy would really be the following: to say nothing except what can be said, *i.e.*, propositions of natural science—*i.e.*, something that has nothing to do with philosophy—and then, whenever someone else wanted to say something metaphysical, to demonstrate to him that he had failed to give a meaning to certain signs in his propositions. Although it would not be satisfying to the other person—he would not have the feeling that we were teaching him philosophy—this method would be the only strictly correct one.<sup>76</sup>

My propositions serve as elucidations in the following ways: anyone who understands me eventually recognizes them as nonsensical, when he has used them—as steps—to climb up beyond them. (He must, so to speak, throw away the ladder after he has climbed up it.)

He must transcend these propositions, and then he will see the world aright.

What we cannot speak about we must pass over in silence.<sup>77</sup>

A philosopher has the luxury to say such things, stop writing, and contemplate life in silence. Wittgenstein did that, for a time.<sup>78</sup> Lawyers cannot. The untouched problems of *life* remain. Disputes must be settled, lest we return to the blood feud. Justice must be sought, be it normative in the deepest sense.

Declining the invitation to eliminate rules and equality from our discourse nonetheless leaves us in a quandary. The lesson of logical positivist analysis—the elusiveness of Cartesian certitude in legal reasoning—cannot be ignored. This kind of logical analysis must be qualified or replaced—in either case with a method that does not condemn as meaningless, because it may be doubted, that which may be doubted. Thus, one might not quarrel with an analysis of equality along the lines of that employed by Professor Westen if it were used to show the incompleteness of the equality principle itself, and the consequent ways in which arguments from equality often are question-begging or misleading. What seems indefensible is the conclusion that the idea of equality should be banished from legal and moral discourse because it fails to satisfy a conceptual standard that virtually no legal or moral principle can satisfy.

76. But see T. KUHN, *supra* note 58 (scientific truths dependent on agreed paradigms).

77. L. WITGENSTEIN, *TRACTATUS*, *supra* note 70, at 187-89.

78. Wright, *Biographical Sketch*, in N. MALCOLM, *LUDWIG WITGENSTEIN: A MEMOIR* 1-22 (1958).



Accordingly, both equality and rules must be treated as meaningful instruments of legal reasoning, even if they are normative and fail on analysis to achieve Cartesian certitude.<sup>79</sup> Philosophically speaking, we may not *know* that either equality or rights in fact have played any role in the history of our civilization. Yet, we might quite properly believe that both ideas have been central, even essential, to much that we consider progress over the centuries. We may on that ground alone treat both ideas as pragmatically valuable instruments of thought and argument. At least for non-philosophers, this is a fact of life.<sup>80</sup> The enduring challenge is to explain it.

### Conclusion

The logical positivist method of analysis is capable of rendering virtually all, if not all, propositions of law and morals meaningless. We should be wary of scholarly claims that one or another legal or moral proposition is an empty idea. If based on the kind of logical analysis employed by Professor Westen to criticize equality, the argument will prove too much.

79. Thus, one would tolerate the uncertainty associated with legal reasoning that appeals to theories of social justification. There is no viable alternative.

80. See Waismann, *How I See Philosophy*, in LOGICAL POSITIVISM 345 (A. Ayer ed. 1959).