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Equality Before the Law

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SERIOUS STUDENTS of society are familiar with the head-on conflict between substantive equality and equality before the law.[1] Since men are inevitably unequal in nature and nurture, substantive equality can only be produced by unequal treatment designed to reduce all to the same level. Conversely, since men are inevitably unequal in their condition equal treatment must perpetuate substantive inequality; and this applies especially to equal treatment before the law. It is of course substantive inequality in general, not in particular, which equal treatment before the law perpetuates. For such equality of treatment is the protector of liberty, since it is the citizen's shield against arbitrary government, and the effect of liberty is to give opportunity to particular substantive inequalities to wax or wane, to appear or disappear, or to move from one form to another.

It follows that substantive equality, or more precisely the attempt to produce it since its actual achievement is impossible, meets liberty four square as an enemy. A programme of egalitarianism cannot allow men to use their talents as they wish, or indeed to seek their own ends in any shape or form. Though totalitarianism may not be egalitarian, egalitarianism must be totalitarian.

All this has always been clear to champions of liberty. But to demonstrate the conflict between substantive and legal equality, and to expose the repulsive evil of substantive equality, is not enough. Though the concept of equality before the law presents itself immediately to the intelligence as an essential principle of a free and humane society, there are difficulties about it which, if not grasped and resolved, may catch the libertarian on the hip.

First, and most obvious, if the slave owner were excepted from its ambit, equality before the law might be compatible with equality of slavery for all but him, contrary to the basic purpose and effect attributed to it above. In such a case it might go hand in hand with substantive equality. In practice this is extremely unlikely, since the slave owner is almost certain to have his favorites and his overseers who will be

above the law applicable to the rest of the slaves. Furthermore it is arguable that "laws" which can be the mere expression of the whim or caprice of the slave owner do not merit the appellation of law; against which, however, it may be contended that it is not impossible in principle for the slave owner to promulgate rules which have the generality, predictability, and impartiality of true law. Whatever be the truth of these contentions, the term "equality before the law" must be qualified or amplified if it is to fit the concept which is set up as the opposite of substantive equality.

We may begin by stating simply that the principle of equality before the law must apply to rulers as well as to the ruled. But this brings us immediately to the second difficulty. Since rulers have a function special to themselves, what is the meaning of equality before the law when different persons are in situations which differ from each other in some relevant respect? Must they be treated exactly alike, or must the laws applicable to them be tailored to their differing situations?

It is first necessary to determine what differences are relevant in this context. There are laws governing the behavior of drivers of automobiles which do not apply to pedestrians and laws concerning the conduct of business by limited liability companies which do not apply to sole traders. In these cases the law is in principle impartial between persons. It differentiates itself according to differing objective situations, in which all citizens have an equal right to place themselves. The purpose of the discrimination is not to favor one person against another, but to take account of the effects upon other persons of engagement in these activities by the persons who choose them. Hence in principle this type of discrimination leaves the citizens in a state of equality before the law.

In practice it is difficult to keep this type of discrimination within its proper bounds. Consider the case of laws of hygiene. It is not correct to say that consumers must be protected by law against the sale of diseased meat. For it is possible in principle, however fanciful it is in practice, for purchasers to employ analysts to test meat before purchase, or at least before consumption; and if they do not, the risk may be said to be theirs. Alternatively, and this is in no way fanciful, the seller may employ his own analyst before sale, and warrant his meat to be disease-free. If then the purchaser takes meat from a seller who gives no such warranty, he is clearly acting at his own risk. The true justification of the prohibition of the sale of diseased meat lies in the fact that its infection may be passed on to third parties who did not purchase it (it is incorrect, incidentally, to say that the justification is the same as that of the prohibition against misrepresentation, for the seller may openly say that he does not know whether his meat is infected or not and that he sells at the purchaser's risk). But the fact that the prohibition against the sale of diseased meat is justified spreads the belief that it is right for the state to protect purchasers as well as third parties, and this tends to establish a principle which undermines equality before the law. Thus it is now fashionable to pass laws requiring shopkeepers to give information about their goods whether it is asked for or not (*e.g.* the marking of groceries not only with their prices but also with their prices per unit of weight); or prohibiting the sale of goods (*e.g.* here again groceries) except in certain units of quantity. The purpose of these laws is to protect the purchaser against the assumed bargaining advantage of the seller. This is *prima facie* inconsistent with equality before the law, for it is not a part of the latter's functions to even out disparities in bargaining power any more than disparities in the citizens' nature or nurture (in

addition, of course, popular assumptions about sellers' bargaining superiority are usually factually wrong). *Caveat emptor* is *prima facie* an essential principle of freedom, and of the equality before the law which protects it.

Though the discrimination which we have examined is thus often wrongly extended so as to change its character, it remains in its proper form within the ambit of equality before the law. Now consider discrimination of a different kind. There are laws protecting children and women against those who are thought to be able to exploit them in contract. There are laws protecting racial minorities against those who are thought to be able to exploit them by refusing to contract with them. There are laws protecting the public against those who are thought to be able to exploit them by the exercise of monopoly power. In these cases discrimination is intended not to fit differences of objective situations which all may freely choose, as between driving and walking or selling meat and selling glue, but to redress the balance of personal situations which are not matters of choice.[2]

The case of children may be recognized as a necessary exception to the general rule. The protection of children is a proper object of law, and hence complete equality before the law between adults and children is not acceptable. It may be contended that this is not a true case of an exception to the general rule, on the ground that when correctly stated the rule of equality before the law is limited by implication to persons who can be held fully responsible before the law for their actions and can hence be regarded as fully free persons. It matters little whether the case of children is held to be an exception to the general rule or outside its ambit. In either case there will be some situations in which children will be treated as equal with adults before the law, and others in which they will not.

But the protection of children may be well or ill conceived. It may serve their interests, or it may run counter to them. The traditional way of protecting children in free societies has been to modify the laws of contract and tort in their favor. Thus in the Anglo-American system a minor has full freedom of contract with adults with full power of enforcement, but an adult has the power of enforcement only where the contract is for the minor's maintenance, education or other similar necessity. And in tort the liability of a child to other persons is less than that of an adult, while the liability of an adult to a child is greater than his liablity to other adults. Thus what would be held to be negligence in an adult may be not so held in a child; and what would not be held negligence if done to an adult may be held to be negligence if done to a child. However we regard them in the context of equality before the law, such modifications of the laws of contract and tort are wholly consistent with the pattern of the kind of society which erects equality before the law as its guiding principle. They enhance the freedom of children in measure with the proper diminution of their responsibility.

In our times, however, the impetus of state interventionism has given the protection of children additional and very different forms. Under child labor laws children may not contract freely for employment; and under education laws children must submit to compulsory schooling. In either case the freedom of children, or of their parents to nurture them as they think fit, is diminished. The justification of child labor laws is of course spurious. Such laws in the early days of the industrial revolution would have deepened the poverty and shortened the lives of the children concerned, and would have delayed the economic development which enabled parents and guardians to take their children out of

employment, laws or no laws. The ill-treatment of children by parents does, it is true, properly fall within the ambit of legal prohibition. But it is a wild correlation to put labor down as the equivalent of ill-treatment.

The case of education is perhaps different. It may of course be cogently argued that compulsion is unnecessary because all parents would freely provide education for their children, as they do food, clothing and shelter. But if this be correct, compulsion diminishes no one's freedom and discriminates between no one because it is nugatory. However, in practice compulsion must diminish freedom and produce discrimination because it is not education which the laws demand, but schooling and usually schooling at particular times and particular types of establishments. But suppose that we equate schooling with education; and suppose that there are some parents who would not have their children put to school without compulsion. Is compulsion then consistent with equality before the law? The answer is surely No, unless education is put in the same category as food, clothing and shelter. Pace the now popular view, it is difficult to show that it is in a relevant sense in this category. All children, from those of Bushmen and Hottentots to those of university dons require food, and in most climates, also clothing and shelter. Education is obviously a necessity by convention only; and the convention is that of a society which is ready to put some forms of state intervention above the principle of equality before the law. Hence the convention cannot be appealed to as authority for the reconciliation of the principle with educational compulsion.

The cases of women and racial minorities present none of the analytical difficulties of that of children. Yet our society rushes into measures of intervention which are thought to be both favorable to the interests of women and racial minorities and consistent with equality before the law, but which are neither. The intellectual confusion of our times is indeed so remarkable that these measures are thought to be not merely consistent with equality before the law but necessary to make it a reality.

Intervention ostensibly on behalf of women takes the two principal forms of restrictions upon the range of their employment, and the requirements of nondiscrimination between men and women in the employments open to them. The two are logically inconsistent with each other, but few of the ardent champions of nondiscrimination have yet been heard to demand a right for women to mine coal, or tend sewers, or demolish high buildings. The restriction of the range of women's employment obviously deprives them of economic opportunities and makes them unequal with, and inferior to, men before the law. The idea that it protects them against exploitation is obviously intellectually empty. Quite apart from its results, even the aim of protecting them by these means is often spurious as well as misconceived, for one of the motives behind it is not infrequently the desire of men to thwart their competition.

But it is nondiscrimination which especially claims to be necessary to put men and women on an equal footing before the law. The form which is principally demanded is "equal pay for equal work." It need hardly be said that this is in reality a demand for equal pay for unequal work. Where work is in all respects equal, pay is also equal (*e.g.* piece work rates where exactly the same work is done by men and women). Where pay is not equal, there is always some difference in the work, whether it be a difference of an obvious kind or something of which account is not taken by the observer or agitator, such as the chance of pregnancy or the likelihood of early retirement. What is called discrimination is

of course the natural result of equality before the law, (except to the extent that it is caused by legal restriction of the range of employment), and to end it is to produce inequality before the law.

This is not controverted by the contention that, quite apart from legal restrictions on their employment, women are in large measure a noncompeting group in relation to men. The concept of noncompeting groups is a source of great confusion amongst those who do not grasp its precise import. If one person is paid more than another because they are in noncompeting groups, it does not follow that the market fails to measure their true relative values and that they are receiving unequal pay for equal work. There are no true values other than those measured by the market under whatever conditions of competing or noncompeting supply there are. Hence all we can say is that if the two persons were not in noncompeting groups, their pay would probably be relatively different and might be equal. If they are in noncompeting groups by choice (*e.g.* the case of women preferring not to be coal miners or men preferring not to be typists), their difference in pay is clearly the result of freedom and equality before the law. In such a case there is no sense in saying that a more competitive supply situation would give a better or truer result, for this would be to turn competition into an instrument for forcing people to do what they do not freely wish to do. But suppose that they are in noncompeting groups because of prejudice among employers. Does that make the case different? Would the prohibition of the prejudice serve or run counter to equality before the law?

It might be enough to say that prohibition would merely substitute the prejudice of lawmakers for that which is condemned. This would clearly not be consistent with equality before the law as construed here. But suppose that there were some objective standard by which one could properly condemn a view as a prejudice without the substitution of a counter-prejudice. Would prohibition then be within the rubric of equality before the law? The answer is surely No. Prejudice in this context means irrationality in the hiring of employees, so that men are for no objectively good reason preferred to women. Clearly this is not within the purview of law in a society which seeks to be governed according to law. Any attempt to prohibit irrationality in the choice of human association is par excellence a mark of totalitarianism. The demand for equal pay for "equal" work, when based upon the contention that men and women are kept by prejudice in noncompeting groups, is just as much a demand for substantive equality masquerading as equality before the law as it is when based on other grounds.

Our last observations lead naturally to the case of racial or cultural minorities. Discrimination in personal or business relations for racial or cultural reasons may be contemptible and cruel, or it may not. In either case it is a fundamental right in a society living under the rule of law. To force a man to sell land or goods or services to someone with whom he does not wish to have dealings not merely infringes this fundamental right. It also imposes discrimination between persons under the guise of promoting nondiscrimination. Its purpose is substantive equality, not equality before the law; and the arguments which are commonly propounded, not least in the United States Supreme Court, to show that its purpose is equality before the law are amongst the most transparent and contemptible of legal sophistries.

The case of laws of competition presents problems of greater complexity than do laws relating to children, women and racial minorities. Traditionally a great many of

the champions of freedom of enterprise, who by definition also have been or ought to have been champions of equality before the law, have favored the policing of competition by laws against monopoly. Competition has been seen not merely as the engine of economic progress but also as the counterpart in the economic field of the dispersion of power in the political field which is the mark of a free society. Hence it has appeared to be necessary in the interests of freedom, and therefore ultimately of the principle of equality before the law, to pass laws against what is called monopoly (which is normally either oligopoly or cartellization).

Whatever form they may take—the regulation of so-called natural monopolies, the prohibition against the pursuit of a dominant position or against its abuse once acquired, or the outlawry of agreements to limit competition—laws against monopoly are aimed against the acquisition or exercise of the bargaining advantage which monopoly is thought to have. But, as we have already suggested, the redressment of bargaining advantage is *prima facie* a means to substantive equality, not equality before the law, just as is the redressment of advantages of nature or nurture.

Why, then, have laws against monopoly been so widely (though by no means universally) approved by champions of the free society? Because the bargaining advantage of monopoly is regarded as so lethal to the free economy, and hence to the free society, as to require special measures to repress it. However, there are two basic weaknesses in this position. First, it is strongly arguable that the bargaining advantage of what is called monopoly is not only not lethal to the free economy but is also a good deal less harmful than it is alleged to be. Secondly, it is even more strongly arguable that laws against monopoly are a misconceived remedy for its evil. The first point requires lengthier exposition than is possible here, but the second point is simpler. It is that the problem of monopoly is a creation of the state, and that in seeking to remedy it by repression the state is chasing its own tail. Protection against imports, subsidization of particular industries, licensing of particular activities, special legal privileges for labor unions, these are the main sources of such monopolistic action as is undesirable.[8] In addition, in the case of labor unions, the evils of which largely spring from the use or the threat of violence, the failure of the state to discharge its duty to protect the lawful rights of employers, workers, and the citizens generally from this violence lies at the root of the problem. Let the state act positively and negatively according to the precepts of equality before the law, and monopoly will exist but the monopoly problem will not. For monopolistic situations (*i.e.* oligopoly and cartel agreements) which appear, disappear, and appear and disappear again are not so serious a threat to the free economy as to justify repression which is inconsistent with the principle of equality before the law.

There is clearly much cogency in the above argument, and since the burden of proof must surely lie with the proponents of antimonopoly legislation, it is a fair conclusion that such legislation is contrary to the principle of equality before the law. We may perhaps be fortified in this conclusion by the obvious diseconomy or counterproductivity of a great deal of antimonopoly legislation; witness, for example, the highly dubious results of attempts by the American courts to apply the provisions of Sherman, Clayton, and Robinson-Patman.

Let us now return to the problem of ruler and ruled which led us to examine various forms of legal discrimination. We have seen that some forms are intended to take account of differences in objective situations

and thus maintain equality before the law, while others are intended, whatever color may be given them, to redress advantages or disadvantages so as to promote substantive equality. In which category should laws governing the behavior of rulers be placed? Since rulers have a special function which objectively distinguishes them from the ruled (except in tiny communities where the ruled may also at the same time be the rulers), it appears *prima facie* that special laws relating to them fall properly within the ambit of the principle of equality before the law. This is the gravamen of the indictment against Dicey's famous statement of the British constitutional principle that the rulers were subject like other citizens to the ordinary law of the land. Under this principle there was no need or justification for the *droit administratif* developed on the Continent and especially in France.

The modern tendency is to find the indictment against Dicey proven.[4] He failed, it is alleged, to take account of the special function of the rulers or to grasp its character. Hence he failed to see that the French *droit administratif*, which he thought put the rulers above the law, in fact subjected them to the law and to a law which was all the better for being tailored to suit the needs of their relationship to the ruled. Furthermore, though this is a minor count in the indictment, he was not entirely right in saying that in Britain the rulers were subject to the ordinary law of the land. For one thing the ordinary rule of *respondeat superior* did not apply to them. Thus if a civil servant injured a citizen in contract or in tort, he was personally liable under the ordinary law but the Crown, whose servant or agent he was, could not be sued. This defect in the principle enunciated by Dicey was not put right until 1945, long after his death. Or consider the powers of arrest of policemen and ordinary citizens. In theory a policeman was, and still is, an ordinary citizen who is in uniform, and both policemen and other citizens had the right to arrest malefactors. But an ordinary citizen was safe against a suit for wrongful arrest only if an offense had in fact been committed, while a policeman was safe as long as he had reason to believe that an offense had been committed. This was no doubt an excellent distinction, but it remained a differentiation between the position under law of policemen and that of other citizens.

It is hard to acquit Dicey completely on this indictment and the arguments in favor of the development of a *droit administratif* within the British (or Anglo-American) system have much cogency. Yet the indictment is not as securely founded as it appears to be. Consider the marvellous sense of individual liberty and independence which pervaded Britain before 1914 (and the United States before the New Deal). It is lost to our generation and its full flavor comes down to us only when we steep ourselves in the atmosphere of those fortunate times. The Anglo-Americans were not at fault in comparing their lot with satisfaction with that of the Continentals. Of course the French were on the whole a free people, but the special bouquet of freedom and independence of the English-speakers was not theirs. This was no accident. It did have a root in the constitutional principle enunciated by Dicey, incomplete and defective though it was. And it was no accident that it was in France, the most centralized state in Europe, that the *droit administratif* was developed. The truth is that a *droit administratif* is a valuable, perhaps essential, protector of the rights of the ruled in a system where the power of the rulers are heavy, wide and penetrating. In such a situation a *droit administratif* is to be commended in general, and in particular as being within the ambit of equality before the law. But the situation itself is objectionable. Equal-

ity before the law is safest in a system where the powers of the rulers are emphatically not heavy, wide or penetrating. In such a system the citizens may rightly dispense with the *droit administratif*.

In examining the position of the rulers we must consider the relation between equality before the law and the extent of the franchise. Does the principle require equality of the right to the franchise, that is, what is called the universal franchise? In complete strictness it obviously does not, since minors and aliens are excluded from the franchise although they are substantially given the benefits of equality before the law. However, these are exceptions which hardly go to the root of the question. The objection to the view that equality before the law ineluctably requires the universal franchise has stronger roots. Suppose that the franchise is limited to a small oligarchy. Is it in principle impossible for the oligarchs to hold themselves as trustees for the whole society and to apply equality before the law as fully as is possible? Surely it is not impossible. Indeed the principle of equality before the law has been followed most closely in practice in societies such as those of Britain and the United States before the days of the universal franchise. The extension of the franchise has gone hand in hand with the pursuit of substantive equality, the enemy of equality before the law.

It will be contended that the enfranchised will always give more weight to their own interests than to those of the nonenfranchised. Politics and government are affairs of interest as well as, and perhaps much more than, of ideas. To think that oligarchs will ever in practice act as trustees for the whole society in matters touching their own fundamental interests is to live in a dream world. Clearly there is much substance in this view. But there is even more substance in the view that under universal franchise the majority will inevitably despoil the minority, which indeed is exactly what has happened in all known cases of universal franchise. Our conclusion must therefore be that equality before the law neither prescribes nor proscribes equality in the right to the franchise. Where the universal franchise is already established, it may be expedient to seek equality before the law within its framework. Where it is not, as for example in most of the successor states to the modern empires of Britain, France, Belgium and the Netherlands, it is almost certainly inexpedient. In either case it is a question of expediency, not of principle.

It remains to consider a matter which appears, at least at first sight, to raise perplexing difficulties. If equality before the law allows substantive inequality to find, in freedom under law, its own level, what happens at the seat of justice itself? Must the rich be allowed to have an advantage over the poor as defendants in a criminal court, or as plaintiffs or defendants in a civil court, in point of access to legal talent? If so, how can there be equality before the law among litigants? Does not equality before the law require equality of access to the talents of advisers and advocates? If so, does not equality before the law require in this context substantive equality? Ought not the state to provide legal aid for the poor in order to put them on an equal footing at the seat of justice with the rich? If so, is this not a fundamental contradiction in the concept of equality before the law as the enemy of substantive equality?

It may be contended that the private charity of the legal profession or of the public will take care of the problem in a free society; or that where, as in the United States, contingency suits are permitted, the problem at least of the poor civil plaintiff is taken care of. Thus the dock brief has from time immemorial been available for

a nominal sum to the defendant in English criminal courts, and legal aid societies used to provide advice to civil litigants, though the services of advocates only in the lowest courts, before the days of state—provided legal aid. Also it is certainly true that the contingency suit enables the poor plaintiff to escape complete helplessness in the United States.

However, if equality of access to the talents of advisers and advocates is thought to be a condition of equality before the law, these contentions do not meet the case. Dock briefs, private legal aid, and contingency suits (which in any case do not help the poor civil defendant), all still leave the poor at a disadvantage with respect to the rich. The best legal talent is by definition rare, and therefore expensive. If the rich are allowed to use their wealth for this purpose, they, not the poor, will get the talent.

It may be further contended that disparities among legal talent are of illusory value, at least as far as advocacy is concerned. Thus it is well known that, at least where judges are highly competent and juries are honest, as they generally are in Britain, the great majority of cases decide themselves. The efforts of the advocates may appear to the layman to be decisive, but the experienced observer of the courts knows that they are not. Thus, on this view, the rich waste their money in buying the services of famous counsel, and the poor are as well off as the rich without knowing it.

Certainly there is some truth in this contention. A high proportion of cases do decide themselves. Nevertheless it would be nonsensical to say that the famous advocate is not worth his hire. No one knows, or knows for certain, which cases will decide themselves. Some cases will not; and in such cases the exceptional advocate tips the balance. Hence it remains true that the rich have a genuine advantage over the poor in access to justice.

But now we have to face a fundamental difficulty. If equality before the law requires equality in advocate's services, then equality before the law is impossible. For nothing on earth can equalize the talents or experience of available advocates. If equality before the law requires only equality of access to advocate's services, the equality of access still cannot be more than equality of chances in a lottery. That is to say, it could only be produced by prohibiting the free purchase of advocate's services and by allocating advocates to litigants by lot or by some other impartial process. This would not only not give equality of justice. It would also debase the quality of justice for all litigants, for nothing would be better calculated to reduce the profession of advocacy to a low standard of competence than a system which deprived it of the spur and discipline of competitive success and failure. And the nourishment of the law depends in large measure upon the existence of a virile, competent and thrusting legal profession.

In practice modern states attempt to secure neither equality in advocate's services nor equality of access to them. What they provide, at substantial cost to the taxpayer, is what is thought to be a reasonable minimum standard of advocate's service for the poor litigant. If the other party, whether he be a public prosecutor or a private litigant, commands better legal services, the chips are allowed to fall where they may. Thus modern states believe, or act as if they believe, either that equality in or of access to advocate's services is unnecessary for equality before the law or that it is impracticable to procure it.

Before attempting to reach a conclusion on this question, we should note that the provision of legal aid, like almost everything else done by the modern state, is in practice beset by abuse. In both criminal and civil cases many "poor" persons obtain

legal aid who could afford to buy the necessary services themselves. Since it costs them nothing, criminals tend to waste the court's time and the public's money in hopeless pleas of not guilty; and civil litigation is unnecessarily stimulated. In the British system there is also gross inequity in that while the state finances the "poor" plaintiff and the "poor" defendant, it refuses to allow against itself the costs of the successful not-poor defendant who has been sued by a state-aided "poor" plaintiff. Clearly the state here is not concerned with equality before the law but with some kind of crudely conceived substantive equality.

We must also take note of another facet of this question before seeking a conclusion. The need for legal aid arises in part from the extreme complexity of many parts of modern law. But this arises in the main from the activities of the state which seeks substantive equality or which seeks to "correct" the substantive inequalities of the free society.[5] In a state which was faithful to the principle of equality before the law, the need for legal aid would be much less even on the footing that equal access to legal services is necessary for equality before the law.

We are now in a position to move to a conclusion. Why should it be thought that equality before the law requires equality in advocacy or equality of access to advocacy? Because equality before the law appears to imply evenhandedness in the administration of justice. But this is a misunderstanding. Equality before the law does not imply evenhanded justice *tout simple.* It implies only evenhanded justice subject to the constraints of nature and the limitations which arise in a regime of freedom. Suppose that there were no advocates for hire and that all litigants had to appear in person. Some would naturally be more intelligent than others. The courts would properly try to see to it that the case of a less intelligent litigant received due attention; and of course, as we have noted, many cases would decide themselves. Yet there would be cases where intelligence would tip the scales, and justice would not be evenhanded. Ought the rules of procedure, or the law itself, to be crimped so as to handicap the more intelligent litigant and bring him down to equality with the less intelligent? Of course not. The proposition needs only to be stated to be rejected. Now move from inequality of intelligence to inequality of incomes. Inequality of incomes is just as natural as inequity of intelligence. The attempt to produce equality of incomes is just as impossible and just as odious as would be the attempt to produce equality of intelligence. The only difference is that egalitarians have persuaded themselves and millions of others that equality of incomes is possible and praiseworthy. But if inequality of incomes is natural and proper, such a shortfall from evenhandedness of justice as may arise from the ability to buy scarce legal talent is also natural and proper and consistent with the principle of equality before the law. The attempt to produce equality in advocacy turns out to be a quest for substantive equality, not equality before the law.

Why should this surprise us? For some generations the state in Western Europe and North America hewed to the principle of equality before the law and did *not* provide legal aid. It is in our time, when the state rushes into substantive equality, that the cry is heard for state-provided legal aid as a condition of equality before the law. We should not be surprised to find that the cry arises from a spurious claim.

What about the reasonable minimum of legal aid which the state in fact provides, as distinct from equality of advocacy? Since it does not actually produce substantive equality, is it justified? Here we are

on the same ground as a reasonable minimum of state-provided education or health care. The pressure for it derives from a claim for equality, which on examination proves to be spurious. Remove that claim and what the state provides proves to be on balance—bearing in mind the effects of the forcible seizure of the taxpayer's money—inferior to the combined results of private charity (including professional discrimination in favor of the poor) and the proper vigilance of the courts to see that the less well-presented case receives the fullest possible attention. Our fathers knew more than we do about what the state should or should not provide.*

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[1]See especially: Hayek, *The Constitution of Liberty*, cap. 6.

[2]Even the monopoly situation is usually not a matter of choice in the sense of this argument. Most "monopolies" are oligopolies which arise in the natural course of business. So too do most monopolies (if they exist outside the field of patent and copyright).

[3]Reference is not intended here to patents and copyrights, which raise special issues of their own. Though they produce monopoly, they do not necessarily produce a monopoly problem.

[4]See Hayek, *ibid*, cap. 13.

[5]Not wholly, because the automobile alone, not to mention other features of an industrial society, would engender some complex law even in a state which wholly abjured substantive equality.