

A New View of Formal Equality

Alex Raskolnikov[†]

When it comes to equality under the law, the contemporary focus is decidedly on substance rather than form. This is especially so when economic inequality is concerned. Formal equality of law—understood as the absence of formal legal distinctions based on the material resources of individuals—has few defenders. At least since Rawls, it has been viewed as a cause of material inequality, a foundation of laissez-faire capitalism, a fig leaf of sorts designed to give a veneer of justice to the unjust exploitation of the weak in a market economy. Whatever equality under the law means in contemporary view, formal equality is not it.

This Essay argues that the contemporary view is mistaken. Legal reforms consistent with formal equality of law may, indeed, harm the poor, but they may have the opposite effect as well. In fact, a commitment to formally equal rules offers a counterweight to the key neoliberal maxim that regulation of a market economy should aim only at maximizing economic efficiency—the prescription that is causally related to an increase in inequality in developed capitalist democracies. Moreover, far from being synonymous with laissez-faire capitalism, a commitment to formal equality, when fully understood, suggests that reformers interested in greater material equality should embrace predistribution over redistribution and the property-owning democracy that Rawls extolled over the welfare-state capitalism that he disfavored. Formal equality deserves a renaissance.

[†] Columbia Law School.