

## F W Guest Memorial Lecture 1998

### 'Freedom and Status' Revisited: Where Equality Fits In

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#### My father

I remember my father with very great affection although it is now thirty years since he died very suddenly and unexpectedly. I was somewhat luckier than my brothers, I think, in getting to know him from — as it were — his own point of view, as an academic, since he was my lecturer in Legal System.

I had one year in the Faculty — my first year as a law student and his seventh year as professor of law and Dean of the Faculty — before he died. That day was, incidentally, on the evening of the assessor's meeting for the Legal System examination — the day before the examination results were announced.

He was a lucid and friendly lecturer for whom there was great respect. He spent the hour walking backwards and forwards the entire width of the front of the room with, I think, a cigarette in his hand. He was like a pendulum. Coming up to his turn he would slow down, imperceptibly stop on the turn, deliver his point, and then gradually increase speed to the other side of the room. All done very gracefully — and something he had got to a fine art. But I'm sure that, had I told him what he did, he would have been absolutely disbelieving.

His greatest gift was a brilliant lucidity in putting a point. It was done in the fewest words, properly chosen. It was in that year, that I took to heart — because of its direct intuitive appeal — his own definition of the *ratio decidendi* of a case, which was: 'the narrowest set of reasons that justify a particular decision'. Later, I understood the subtlety in this deceptively simple approach. It tells you directly that the judicial role requires judges to look only to disposing the case before them. He thus refined the word 'material' in Professor Goodhart's famous definition of a *ratio* — that only 'material' facts should be taken into account<sup>1</sup> — and made the crucial point that *ratios* concern justification. Dad's definition also disposed of Professor Montrose's famous definition, according to which *ratios* can only be about the reasons judges actually give.<sup>2</sup> For Dad had made it clear that the *ratio* of a case was something independent of any reasons actually given by anyone.

This last point is important. We would not make much sense of law if the only legal reasons that existed were those that had already actually been enunciated. In particular, it would rule out anything imaginative, innovative and creative.

In February 1967 there was, for then, a very big class of Legal System, with 120 students. This was the time of the expansion of the universities. The

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<sup>1</sup> *Essays in Jurisprudence and the Common Law* Cambridge U.P. 1931

<sup>2</sup> 'The *Ratio Decidendi* of a Case' (1957) 20 *Modern L.R.* 587

atmosphere was great. There was more money around, so it was much easier then for students to educate themselves without the dark cloud of vocational criteria hanging over them. There was also an almighty failure rate in Legal System, and in fact, only one-third of the class traditionally passed the final examination. At the first lecture, Dad announced to the class of 118 men and 2 women, 'look at the two people sitting next to you. They will both fail'. I discovered in my second year that what he said was true.

Later on in the year, when he got to know the class, he would say 'good afternoon, gentlemen, and Miss Mayhew and Miss Lovell-Smith'. You will know Judith Mayhew, who now chairs the Planning and Resources committee of the City of London Corporation. And you will also know Jane Lovell-Smith but, of course, as Judge Lovell-Smith of Auckland.

There were two things about my father which, in the context of law, really stood out, I think. First was his view of legal education as a genuinely academic discipline, as of the same mould as philosophy, literature, music and the sciences. He thought law was more than an arithmetic of rules learned by heart. In those days, for many, legal education was thought to be only a matter of acquiring 'the rules', say, of Evidence, or of the Criminal law. And so he encouraged law students to take subjects in other disciplines, and to take additional degrees. He had a genuine, strongly felt and early understanding of the idea that you do not just parrot rules to win an argument or to convince a judge. You had, instead, to make interpretative judgements, in trying to make sense of what the courts and the legislature had done. In this, you employed those qualities, concentrated in a good lawyer, of objectivity, impartiality, and fairness and, above all, of appreciating the point of view of the other side.

Secondly, Dad's interests in law were primarily moral. He had no doubts — it was his way of life — that to be a good lawyer you have to form and hold moral convictions about what you are doing. You could not otherwise internally generate good arguments that would fill — for the judge's, or your client's, or your own satisfaction — those gaps between the rules which, in fact, create the need for courts in the first place, particularly the appellate courts.

There is a very effective route to this point. None of us could be a lawyer in Hitler's Germany. We could have learned the rules. The German *Law for the Protection of German Blood and Honour of 1935*, for example, made sexual intercourse a criminal offence between Jew and German.<sup>3</sup> But our convictions could not lead us in any genuine, engaged sense, to argue, as Nazi lawyers successfully did, that the law therefore also prohibited kissing, as equally disrespectful to the German race.

A contemporary trend in thinking about morality says that there are no moral truths and that the Nazi morality was as much morality as that of our different forms of liberalism. But it is seriously confused to think this way. Nazi morality was not morality. We can each try to adopt the point of view of the Nazi judge, but we would remain detached, because we could not accept the Nazi convictions, nor the surrounding nonsense of inconsistency, half-truth and, basically, psychological hang-up. The truth is that Nazism was bigoted and

<sup>3</sup> *Reichsgesetzblatt* (1935), I, 1146. This was enunciated at the 'Reich Party Conference of Freedom' in Nuremberg on 15 September, 1935

callous. It graded people as lower than sub-human, grading some even as 'lice'. Dad was right in thinking that true conceptions of morality infused our legal system, and legal argument. He was, therefore, right to be reverent about what Herbert Hart called the most 'peculiarly legal' of the moral virtues, that of justice, and that idea's special connection with the freedom and dignity of the individual.

### ***Freedom and Status revisited***

That all brings me to the main subject of this lecture, which is to examine what Dad said in his inaugural lecture delivered here in 1959. It was entitled 'Freedom and Status' and it was about justice. I read it when I was young, not long after that time, I think. It struck me as very austere. The reason was that I had not really come to grips with how peculiarly austere the idea of justice is. That idea requires you to distance yourself from yourself, and to suspend many of the judgements you make about people. How ugly, tasteless, nasty or plain scummy they are — like the people who travel on the London Underground. Or how rich, piggish or conceited they are, or what colour they are, or how old or young they are, or what sex they are, or whether they are Jewish or Muslim, or whatever. Justice cuts through all that.

To be a just person means being both distant and close. You recognise the other person as like you, but distance yourself from personal judgements you make on another plane. Lawyers understand the idea. The good ones excel at thinking this way. And law, properly understood and practised, develops our innate sense of justice through its use of principles and rules of universal application. That is what sticks out as what's wrong with thinking of Nazi law as just law, indeed, as law at all.

In what I have said, I have laid the foundations for the thesis I want to present this evening. It is that if we take seriously the idea that people should be free, we must also take seriously the idea that all people, not just some, are in an important respect equal to us.

For 1959, Dad's inaugural lecture — 'Freedom and Status' — was far-sighted. The contemporary interest in political philosophy, and its merger with legal philosophy, was still to begin. In fact, the development of political philosophy really only began a decade later. It was towards the end of the 1960s when copies of the typescript of John Rawls's highly influential *A Theory of Justice* began to circulate, and it was not until 1971, when it was published, that rapid growth in political philosophy took place. Before that time, political philosophy in the twentieth century was much more an affair of intellectual history, so that articles or books in the subject, while worthy, were on the dull side.

Dad's thesis was a fairly simple one and very abstract. It was that freedom, to mean anything, must be constrained. Dad argued in the following way. He took a well-known statement by the nineteenth century historian and jurist Sir Henry Maine, from his book *Ancient Law*, published in 1866. It was that, to quote him: 'The movement of progressive societies has hitherto been a movement from status to contract.'

Maine was an exemplar of what is often called the 'historical school of jurisprudence'. In the first part of this compelling book, Maine traced the

historical development from ancient times through to feudal times, when relationships between people were governed by the statuses that they were accorded. And so being a slave, being a serf, being a landowner, being a tenant, being a woman, being plebeian, and so on, determined the degree of respect, enshrined in the law, to which each was accorded. In the Roman law, for example, of fundamental importance in determining the legal remedy, was the legal status to be accorded both the person who made the complaint as well as the person against whom the complaint was made.

Maine then argued that the move since the feudal times, however, was away from relationships defined by status, towards relationships defined by contracts created freely by the contracting parties.

I think it needs to be pointed out that Maine's approach in jurisprudence was, in method, like the rest of the historical school, a blend of determinism and moralising. 'Progressive' meant to him — as it did, incidentally, to the Marxists — moral betterment. So the historical movement towards contract and away from status was, in his view, for the good. It meant that, no longer did the slave and the serf live lives governed by a pre-ordained status, from which their personal rights in relation to others flowed. Instead, their personal lives were governed by the relations which they were free to determine.

Sir Henry Maine's idea is a heady one. We all place fundamental importance on the idea of freedom and, except in precisely determined ways, shy away from the idea of status. One way of expressing this idea is by a contrast. We regard freedom in some way as naturally good for people, while status is something artificial. Maine's conception of status envisages a hierarchy of people, according to which some are regarded as inherently better than others, superior to them, and deserving more. You can see how the idea is particularly related to the feudally stratified society.

This conception of status, however, is one which, on analysis, is not particularly appealing, and I think Maine was right to consign it to the ancient and medieval societies. The problem with status — what makes us think it is artificial — is that all too often people wrongly equate the status with the person. Looking at it that way encourages them not to appraise the person behind the status or, in perhaps more modern terms, the person who occupies the office which defines his status. The downside of the idea becomes apparent when you make the accusation that people have let their office 'go to their head'. Wonderful examples of this are to be found in England, although fewer, I think, than 25 years ago when I first arrived there. The hereditary lords are a good example of the equation of person and status. This is because their status is defined only by the fact of their pedigree or, in short, of their existence.

The idea is fundamentally opposed to democracy because it gives disproportionate political impact to just one person. For these people, it is only their person — no qualifications of appointment, such as popularity or public service, moral perception, experience, or even sanity — which allows them to vote in the House of Lords.

To see last month's vote in the House of Lords on equalising the age of consent to male homosexual acts with the age of consent to heterosexual acts was to witness it in full. The 'Scottish castles', as they are known, turned up in droves

— some of them in early 1950s Morris Minors. They had their titles, some 900 years old. Many of them had not set foot in the Lords for years — yet they came to make their spectacularly undemocratic presence successfully felt.

One of the attractive features of New Zealand, and something I appreciate in my up-bringing, is the general ability in people to be able to distinguish rank, title, status, class, office and so on, from the person who possesses that particular rank, title and so on. We — you New Zealanders at any rate — have a term for the failure to do so, not widely understood in England, which is ‘getting up yourself’.

Maine’s answer to all this was the idea of the *laissez-faire* contract. He surmised that the development of human relations had progressed from defining people by status, to defining them in terms of their contractual relations. To be able to make a contract with another person meant that you were free. And so it followed that a society that valued contracts was committed to recognising that each person was a free agent.

Although many think that a society that values the *laissez-faire* contract is one in which great wrongs can be, were and are done, it is important to appreciate Maine’s insight. It is a step forward in recognising something crucial about the moral good of people. This is that — in some essential, fundamental sense — people must be free to live according to their own lights, and not somebody else’s. Accordingly, the move from seeing people in terms of their status to seeing them as contracting beings, was a progressive move, a move for the better.

In his lecture, Dad comments on Maine’s idea of status, which, he thought, was too restricted. Not all status is bad. In fact, if we move from thinking of statuses as exclusively concerned with the relegation of men to lower or higher statuses than is right, and if we preserve the idea that we can look to the person behind the status, the idea of status assumes great importance. Take, for example, the status of ‘employee’ and the status of ‘consumer’. To be regarded as either one of these means that your rights to contract freely — the principle of *caveat emptor* — are constrained and controlled.

If you are an employee, even after the Employment Contracts Act 1991, which largely removed the protections of collective bargaining, the terms of the contract are determined by a set of stringent requirements. These range from the way wages are paid, through to safety requirements, hours of work, compensation arrangements and so on.

If you are a consumer, especially as the result of the widespread standardisation of contracts and the recognition that the parties are not always on equal bargaining terms, the state has also intervened to impose terms. Through the common law and legislative enactment — such as the Fair Trading Act 1986 and the Consumer Guarantees Act 1993 — standards of fair and reasonable behaviour are imposed.

These rules do not, of course, say that every consumer will have an excellent outcome from buying. But they do say that goods and services of differing kinds should meet reasonable standards. To a controlled extent, the principle of *caveat emptor* applies, but fraud, misrepresentation, false advertising and other forms of like behaviour are ruled out. The law sometimes even requires contracts to be made, for example, the compulsory insurance provisions under transport

legislation. And, of course, there are requirements relating to the control of monopolies and restrictive practices and there is the full gamut of laws relating to trade licensing.

Dad's point was that status had not died at all but had, instead, grown. Again, take being employed and being a consumer. All of us are either one or the other and most of us are both. Being an employee and being a consumer are clearly ways of gaining freedom. And yet these two ways in which we find ourselves in one sense free, in another sense, the sense Sir Henry Maine had in mind, they restrict our freedoms. Much of Dad's lecture was given to describing the extent to which, in 20th century England and New Zealand, as he put it, in 1959, there was a 'modern tendency to expand public law at the expense of private law.'

All this was, in Dad's view, a move away from freedom of contract back to relationships determined by status, albeit 'status' in an extended sense from Maine's. Was this something to be worried about? Dad thought not. He thought that the idea of our having 'absolute freedom' to do things was an absurd one. He condemned Sir Herbert Spencer's notorious statement of the last century that, to quote, 'It is better that the poor of the cities should die in epidemics than that State Boards of Health should curtail individual freedom or interfere with individual initiative...'

Dad was certainly right. No one should have the freedom to drive North along George Street on the right hand side of the road. Nor do you or I have the freedom to kill, or assault, or harass. Furthermore, the great appeals to freedom since the Enlightenment never relied on freedoms of this sort. He put his finger right on what has now become the nerve of the debate in contemporary Anglo-American political philosophy, which is the identification of the principles that constrain the principle of freedom.

He makes some remarks towards the end of the lecture where he hints where these principles might lie. Two things stand out. First, he appeared to have the very strong view that the state should be concerned with the moral conduct of its citizens. This view — which in some circles would be regarded as most conservative — is tempered by a second view. This was that, in the end, the overriding principle, the one that permits the move from freedom back to status was, to quote him, the 'recognition of the dignity of human personality'. And so his conclusion was that 'freedom and status are not and cannot be irreconcilable.'

### **Where equality fits in**

*Freedom versus equality.* I should now examine more closely this question of what constraints should be placed on freedom. My conclusion will be that the fundamental idea at work here is that of equality. Indeed, I shall go so far as to say that freedom and equality are really the two sides of the one coin, that of the absolutely fundamental moral principle, that people have a right to respect and to their dignity.

The problem is that there are stereotypical usages of these two ideas. One stereotype is accepted by those who think we should have more freedom and less equality. These people are against state regulation for all sorts of reason, although there are mainly two. First, that it is 'uneconomic', and second, that

equality stifles human endeavour, enterprise and creativity. Those who think like that generally have a picture in their minds of a monster. It is something like the former East European states. In such states, people were equal, true, but only in living colourlessly, at subsistence level. Economic activity was stagnant, and state intervention led to a vast and corrupt bureaucracy. Here the perceived monster is the 'levelling down' that equality appears to bring, stifling freedom in the process.

The second stereotype is accepted by those who think we should have more equality and less freedom, who are for more state support and intervention, particularly in the real marketplace. The monster for these people is the society in which those who are capable of exercising freedom come out on top. Not everyone can exercise freedom to the same extent. But healthy people, who have some nous, who have — in general — an entrepreneurial spirit, can take freedom away from others by manipulation and exploitation. These societies are thought to be inconsistent with socialism and, because entrepreneurs can often compound their freedom, they are called 'capitalist' societies.

Both stereotypes are false. None of us wants the 'levelled down' society. Nor, I believe, do any of us really want a society in which a particular psychological type — the entrepreneur — is favoured over the rest. The problem with these stereotypes is that the force of each — why they have become stereotypes — is that people think equality and freedom oppose each other. But equality does not oppose freedom. In fact, in my view, a principle of equality — that people are equal in some serious and significant way — is the bedrock of our moral dealing with others. And, since being a person means having certain sorts of freedoms, the twin ideas of equality and freedom are related. It is in this relation that the meaning of the 'dignity of the individual' lies. It is that right to respect that we command merely by being people with the degree of freedom that 'being a person' requires.

We all — not just some of us — have a right from others, from the government, the legislature, and the judiciary — in short, the state — to equality of respect. Take the tenor of Dad's lecture. It shows that his invocation was not to the dignity of particular people, such as to the 'dignity of Joe Tui,' or to a particular class of people, such as to the 'dignity of people who live in Hampstead'. It was, instead, to the dignity of the person. He clearly thought that the move from freedom back to status was a move of moral progress. This followed, he thought, because the freedoms essential to the dignity of the individual could only be protected by the creation of statuses.

And so the employee, by having special legal rights, would be placed in a position where he or she becomes recognised as equally able to enjoy freedoms as the employer. The employee's special rights merely make for a more level — a fairer — playing field. The consumer, too, is brought, through the creation of legal status, closer to the level of the other contracting party, who would otherwise be in an unfair bargaining position.

I should, of course, add here the legal status of Maori. That status, in the admirably intended legislative and judicial activity of the past twenty or so years, recognises equality. It is special because it aims at righting the inequality of

freedom essential to the dignity to which Maori are now and always were equally entitled.

*Equality of outcomes.* Nevertheless, the idea of equality is a complex and elusive one. It needs looking at. It is enormously difficult to understand how commitment to it works in practice. More important, it requires a defence against the many who deny its worth as a moral ideal at all.

We might note first the comparative nature of equality. Someone is equal *to* someone else; someone is unequal *to* someone else. It requires a judgement about the extent to which one state of affairs matches up to, or compares with, another. Obviously, the idea of comparing human beings with one another is, in many respects, absurd and that is partly the reason why so many have rejected the idea altogether.

The variations in people are just staggering. There are smooth ones and there are hairy ones. There are tiny little ones, like Princess Pauline in the Guinness Book of Records, who was only 24 inches tall, and enormous ones like John Minnoch of Washington State, similarly recorded, who weighed 442 kilograms. There are Catholics, atheists, talented and immoral people, and moral and untalented people, beautiful and ugly people and a mass of people who have absolutely no distinguishing feature at all.

Because of these differences between people, Jeremy Bentham — who was the founder of the utilitarian doctrines so widely used by governments throughout the world today — firmly rejected the idea of equal rights. In his work *Anarchical Fallacies*, in 1796, he exclaimed that, if we really were to regard people as equal, it would follow that we would have to equate the sane with the insane. He said, in that case:

The madman has as good a right to confine anybody else, as anybody else has to confine him. The idiot has as much right to govern everybody, as anybody has to govern him.<sup>4</sup>

One common way to answer Bentham's famous objection is to say that what is common to all people is their humanity — everyone is a human being — and it is that in respect of which each person is equal. But, as many thinkers have pointed out, to say that all people should be treated in respect of their humanity is something that can be said perfectly well without reference to equality at all. The moral injunction, in other words, only tells you to treat people with respect, or dignity. 'Equal' adds nothing more than a reminder that it is all people, not just some, who are entitled to respect.

In the face of this criticism, one way of giving flesh to the idea of equality, has been to look at the quality of a person's life and, using the comparative idea implicit in equality, compare it with another's. We might try to compare the happiness that people have in their lives, or — a different thing — the satisfaction that they feel they have with their lives or, simply, the amount of wealth that they possess. We might then be able to make some comparisons between a couple of proposed government policies. We might want to say: 'this is the better policy

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<sup>4</sup> *Anarchical Fallacies*, in Waldron 'Nonsense Upon Stilts' p.51.



from the point of view of equality because the evidence is that it will bring about more equality than the other policy'. If we could do this — and it is very common in left-wing manifestos — we would be able to give an equality content to the idea that 'human beings should be treated with equal humanity'.

But attempts to isolate a distinct moral principle of equality in people's overall feelings of welfare, or their overall well-being, or their wealth, are unsuccessful. If you compare two outcomes, say of well-being of differing amounts between two individuals, or two societies, the problem is that it seems that levelling people down is as consistent with levelling people up. Say A has more than B. We can make A and B equal by giving B as much more as necessary to bring B up to A's amount. But we can also make them equal by taking away the extra amount from A so that A has just as much as B. And we could take so much away from A and give it to B so that both have equal amounts. The point is that equality appears to be quite neutral on the question of whether any of these three outcomes is better than any other. It advocates any and all, equally.

One way philosophers have tried to provide an answer to this difficult problem is to say that levelling down is wrong because you have to look at the overall position from the point of view of the worst off. She looks upward and wants to be up there, so levelling up is good and, since it makes her no better off to have the other person worse off than she already is, then levelling down is no good.

I think this common answer, is confused. What makes the woman in B feel better when she is brought up to A's position? It can only be that she has personally been made better off. If we have to say that she feels better because in addition she is now equal to A, then we have made equality a principle which is independent of the outcome. It follows, then, as far as equality is concerned, she should be just as happy if A is lowered to her standard.

It all boils down to the following. We must dispense with the idea of equality if we say it is just a matter of bettering the worst off wherever we can. Treating people with common humanity therefore just means that we — the community — should morally be concerned with improving the lot of the worst off members of our society. And, given certain constraints concerning freedom and impartiality, that is why John Rawls in his *A Theory of Justice*, manages to talk so very little about equality.

So it all follows, in my view, that if we are to hold dear to a principle of equality, it cannot be to a conception of equality which is defined by outcomes for people's lives.

*Act equality.* I suggest, instead, that we need to know more about, not the outcome for a person's life, but how that person has been treated. Only here does a principle of equality start to have moral bite. For people can still justifiably complain that they have not been treated as equals even when their states of well-being, or their salaries, are the same. Take the woman whose personal circumstances are fine. She has money, because she was fortunate enough to marry someone rich. She is a person of a naturally happy disposition. She is intelligent enough to do whatever she wants within the parameters of the society in which she lives. Her personal well-being, her enjoyment, her wealth, put her in the top half of the population in her community and she has no complaints about other people being better off.

Nevertheless, this society is chauvinistic and the woman is denied an education, and much of her public behaviour, such as what she wears, is dictated by her community. Although she exists in a state of well-being above others, she is denied equality of respect.

The converse holds. Some people are treated with the utmost respect but remain misery guts, like Scrooge, who had both status and money.

My point, generalised, is that our personal circumstances are only accidentally connected to the question whether we have been treated properly. While some of us are just 'misery guts', others of us go too far the other way, being tediously 'happy, happy Pollyannas all day long'. Sometimes these accidental features are just inbuilt psychological mechanisms, other times they are facts about the circumstances that the world presents to us from birth. It is a fact of life that there are people who have special gifts, such as the ability to get on with others, and the enjoyment that follows, or the ability to enjoy music, or be good at sport. Most of us are reasonably sane and reasonably fit, but not all. Some have children who die tragic deaths where no one is at fault. Some suffer from painful and debilitating diseases which nothing — no extent of good will — can alleviate. In our dealings in our personal affairs and personal projects, it really is most uncontroversial to say that it is both possible and natural to end up with states of welfare — or well-being — much lower in comparison with others.

Such situations are ones for regret — real regret — we might say, but not for reasonable regret. I suggest that if we have been treated with respect — if we have been treated fairly — then we cannot have reasonable cause for complaining that others have been unjust to us, given the accidental circumstances in which we find ourselves in this world.

If what I say is right, this means, I think, that we do not say that a state of affairs is morally unequal merely because it consists of unequal outcomes for people. If we are to persist with the idea of equality, therefore, we must say that it is to be defined not in terms of outcome, but in terms of our conduct towards them. When I turn the focus this way, we see that equality is implied in the common sort of complaint that goes 'I'm a person, too', or 'Try to see it from my point of view', or 'Be fair to me.'

Seen this way, I think, treating a person as an equal means 'acting in a way in which at the forefront of your mind is the fact that the other is, in some important aspect, equal to yourself'. By this, I believe I have preserved the idea that equality is comparative, but now the comparison is between ourselves and someone else — and not between two people external to us. I could usefully call this idea 'first person equality', to distinguish it from the equality of outcomes in comparing second and third persons. But as it expresses what I think is the nerve of morality, I like to call it 'direct' equality.

*Grading.* Direct equality is like the idea of equality when it is reduced to treating people with common humanity, the idea I mentioned before. But it is clear that direct equality can supply us with something beyond the injunction merely to 'treat others as human beings, sharing a common humanity'.

The directness of the appeal that others are 'the same as me' has a powerful intuitive hold on us. That intuition is powerfully expressed in terms of equality. Take the slogan of the eighteenth century French revolutionaries, that of 'Liberty,

Fraternity, and Equality'. Do we really take it that what was being demanded was only freedom and brotherhood for all, and that the call for Equality was redundant? No. The third ingredient was that the society that France had become at this stage treated people in the wrong way by grading them. The aristocracy consisted of a different grade of people, not just people, the same as all of us, who possessed different powers, rights, and so on, but different in a more fundamental way.

French society institutionalised different grades, or statuses, of person. 'Equality,' for the French revolutionaries, did not just mean equal incomes, or equal say in how government was to be run. Those — yes — but more fundamentally, the revolutionaries wanted a sea-change in the way people were to be regarded — a way in which people should not be seen as degraded, or low, or inferior.

This idea can be brought out by showing you how strongly we reject the grading of people into classes, or statuses. We only have to imagine a graph of graded people. What? Slim, white, beautiful, rich, confident, pleasant males (or Aryans, or philosopher kings) at the top? Clean working class types in the middle? Scummy people at the bottom, along with every other commonly degraded type (the Jews, blacks, women, ugly fat people)? It is a strong intuition we have that grading in this way is fundamentally opposed to morality.

*Empathy.* Our rejection of grading people shows, I think, that being callous strongly emerges as the other extreme to treating people as equals. If we recoil at grading people, and the callousness implied by that idea, we must know why. What qualities of being human tend us to rank them? Virtue? Is a person worthy of better treatment merely because they are more virtuous? There are some accounts of morality, Aristotle's, for example, which rank people exactly like that, on the basis that the more virtuous you are the more you deserve. Equality opposes that on the ground that people who lack virtue are, nevertheless, entitled to respect.

Essentially, equality as I have characterised it is a principle of sympathy, or better, empathy, with another. You recognise good and bad qualities in others and, in a crucial respect, you do not mind, because you can see yourself as them. Perhaps the brute sentiment of what I have expressed more formally is contained in the idea of 'he who is without sin, should cast the first stone.' As I have said, the test of treating another as an equal is to put yourself in his or her position. You then understand that others are not 'higher' or 'lower' grade people, merely because they have or lack certain qualities, or their circumstances of unreasonable regret differ. You have contempt, at best, for dispositions, tastes, actions, omissions, styles, lack of style, but not contempt for the person in whom these dispositions, tastes, and so on reside.

At this stage, although it is really consequential to the lecture, I do need to make a short remark about what I think are the characteristics of the object of our empathy. I will suggest that it means recognising the other as a self-initiator of action and as possessing individual sovereignty over its own will. Further, it means recognising another as a being that can suffer in a number of ways through physical pain, and through pain's psychic cognates, such as hunger, and the frustration of desire. Central amongst these is the idea of self-initiation in

accordance with a — perhaps very limited — plan and consciousness of the future.

The idea of self-initiation is important, I think, since it captures what it means to have an identity — a sense of who and what we are. I think the idea also implies some sense the other has of property, in the sense of what is necessary for that other minimally to act.

In this collection of ideas, I suggest, the recognition of the thing that is your equal lies. You recognise a being with its own self-initiating identity, who is capable of doing something and— there is no better word — you empathise with the fact that it is like you in this important respect. You understand what it is to be frustrated, to feel pain, as well as not being able to establish yourself in some way that marks you out as your own.

Direct equality, as distinct from outcome equality, is fundamentally opposed to grading and identifying people according to their status. Treating others as equals depends fundamentally on seeing the other — on top of, or underneath, his or her status. The argument, then — that nothing is added by the word 'equality' — is wrong. 'Equality' has substantive force here in directing our moral judgement.

If I am right, I have rescued equality from the destructive 'levelling down' argument. And I can claim that I have secured that rescue without having had to rely on the vaguer idea of 'treating people with respect to their common humanity'.

### **Government and economics**

*The public and the private.* What applications can we make of this principle of direct equality? One is that it enlightens our understanding about the distinction between our public and private duties. The principle that we should treat others as our equals makes very good sense of the public structure of justice and just institutions. We cannot personally martyr ourselves to the cause of every single other person by treating them as equals. In fact, treating people with respect requires our giving special attention to those people immediately proximate to us. Obviously, we have special duties towards our family, our friends, our associates, or, in short, our neighbours, although those duties themselves are ones of equality of respect.

At the point at which neighbourly proximity is exceeded, the duty to treat others becomes a communal and public duty. We have a duty towards those people who are not our neighbours because we delegate that task to the community. It is obvious. In modern and complex societies, even saints cannot take on that task. It follows, I think, that, if we take seriously the idea that we should treat others as our equals, we must say that the community has a duty delegated from each and every one of us, to treat all of its members as equals.

It goes further. If the community is, in this sense, our delegate for treating people as equals, it must follow that each of us has, as part of our own duty of equality, a duty to ensure that the structure of delegation, the process of decision-making, as well as the decisions themselves, are consistent with that duty. And I should say that I think that the closest we have got to a structure which expresses

this principle of delegation, is that of democracy and the closely related structural principle of the rule of law, which abstractly crystallises the right people have to be treated as equals.

I have drawn the well-known distinction between the public and the private in terms of direct equality. I believe this way of drawing the distinction brings out the special qualities of the neighbour principle in tort first formulated by Lord Atkin in 1932 in *Donoghue v. Stevenson*. We have duties to others in the sense that we must not omit to treat them as our equal. That there are such circumstances is clearly explained by the intuitive trust we have in the parable of the Good Samaritan in, which passers-by omitted wrongly to assist the sick person in the ditch. The neighbour principle makes use of this distinction because it rests fundamentally on the idea that the test of who is your neighbour is not the person whom you actually thought would be affected by your act. It is, instead, the person whom you ought reasonably to have contemplated. So, when the duty is breached, liability is imposed for your omission to act properly.

Just out of reasonable contemplation's reach, personal liability ceases. This point is not defined, I believe, by a crude yardstick of what would prevent the courts from clogging up with too many litigants. Nor do I think it is defined by the even cruder one of what judicial decision would contribute most to the gross domestic product. Instead, I think, it is defined by respect for a person's capabilities, by duties that are reasonable to impose upon him — in short, by considerations that take into account his own point of view.

*The economic market.* A second application direct equality has to the real world is to a non-hysterical understanding of the economic market. The connection I have made between equality and freedom is, in my view, the best way to make sense of it.

First, we need to remind ourselves that the free market is only an ideal, because otherwise we would not talk — as even the most ardent free marketeer will talk — about the market 'imperfections' that exist in the real world. And so, it does not inexorably follow — as it does for some — that any interference with actually operating real world market transactions is contrary to the free market.

What is attractive about the ideal market? Much of it derives from the attraction of that most basic tool of economists — the Pareto criterion of economic success. The Pareto criterion says that when we bargain with another, so that at least one of us is better off and neither is worse off, that must produce a better state of affairs. One attraction of the criterion is that it easily takes account of the points of view of both parties, for it stipulates that neither of them is to be worse off.

It is therefore different from the criterion of cost-benefit. That criterion measures only in wealth — something quite different from well-being, or happiness, as my example of Scrooge proves — and it allows one, or even both, parties to emerge much worse off. Cost-benefit analysis has its place as a useful tool for both individuals and companies in the rational allocation of scarce resources. But it is altogether a different matter to apply the analysis wholesale to a community, for people are then treated, not as having their own individual points of view, but on the basis of the 'average' behaviour they exhibit in groups.

The real appeal of the Pareto criterion lies in the freedom that both parties have to determine their own affairs. What relationships they enter into, and

with whom, is their choice alone. And this was the appeal to Sir Henry Maine in his approving the step from status to contract.

In the real world, we see the practical ramifications of protecting this ideal. The rights of the party to bargain are protected — often by statuses, as Dad said. Equality denies anyone the right to defraud, or get away with misrepresentation. It denies anyone the right to make a bargain through duress. That implies a right to respect for each bargainer's physical integrity. There is also a cognate right not to suffer economic duress. That must surely imply respect for a person's fair control over his own property.

And these rights imply others. Disproportionate bargaining power arising from an initial distribution of wealth that departs too far from rough equality of outcome, is contrary to the Pareto criterion. If you are not respected as an equal to others in the market place from the outset — that is to say, you either are in a weak position to bargain, or cannot even enter the market place because you have no money — it cannot be a genuinely free market.

You should note here that this does not imply a return to an equality of outcomes, but implies the opposite, which is that, where equality of outcomes is required it is required by the *deeper* principle that people should be treated with respect.

So, built into the idea of a free market — very much contrary to what Margaret Thatcher supposed — is the idea of equality itself. For we have here the requirement that people are at least respected to the extent that the wealth distributed to them is sufficiently fair to allow them to bargain.

## Conclusion

I have argued for the idea, which I have claimed to be the nerve of morality, of seeing matters from another person's point of view. I have argued that this idea — of seeing others as others see it — is the proper route to understanding equality. That idea, I think, is more fundamental than comparing outcomes of welfare, or money, or well-being, or whatever, in other people's lives.

It is here that I return to Dad's lecture. In the idea of what I have called direct equality, I suggest, lies the idea of respect for individual dignity and the freedom to do what you want within the constraints that equality requires. The statuses Dad talked about are quite different in quality from the statuses implied by grading and so he was right to say that freedom was enhanced by a network of private and public rights and duties. Really, what he was saying — as interpreted by his son — is that freedom means nothing unless it recognises that each individual is entitled to the status of being a person. This requires, as I have argued, that our actions, as well as our institutions, be thoroughgoing in respecting others as our equals.

After emphasising how important planning for the future was — for freedom, and for order— Dad concluded his lecture by saying:

In the framework of law, freedom and status are not and cannot be irreconcilable. If we look after justice, freedom and order and freedom and planning will look after themselves.

If I might just add to that, I would rewrite the sentence thus: 'If we ensure that our institutions never fail to treat people with equality of respect, our institutions will be just, and freedom and order and freedom and planning will look after themselves.'