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## Does "Equal Moral Status" Add Anything to Right Reason?

Jeremy Waldron

### 1. A Single Status Community

It is not easy to explicate the principle of basic equality – i.e., the principle that all humans are one another's equals – in a way that makes clear (on the one hand) its fundamental importance and (on the other hand) the way it differs from particular egalitarian principles like the principle of equal opportunity or the principles of equality of welfare, equality of resources, and equality of political power.<sup>1</sup> Some philosophers explicate basic equality in terms of certain abstract rights, as with Ronald Dworkin's formula: the right to equal concern and respect.<sup>2</sup> Utilitarians express the idea of basic equality in the Benthamite

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<sup>1</sup> I am assuming that there is a difference between (a) equality (in various respects) as a political aim, and (b) the basic equality of all humans as an assumption of moral and political thought. (In the literature, (b) is sometimes referred to as 'deep' equality (e.g. Ronald Dworkin, A Matter of Principle (Cambridge: Harvard University Press, 1985), pp. 271-3), and sometimes as 'abstract' equality (e.g. Ronald Dworkin, 'In Defense of Equality,' Social Philosophy and Policy, 1 (1983), at p. 24).) A tremendous amount of attention has been devoted to (a) in recent political philosophy: people ask whether equality of wealth, income, or happiness is something we should aim for; whether it is an acceptable aim in itself or code for something else, like the mitigation of poverty; etc. See e.g. Amartya Sen, 'Equality of What?' in his collection Choice, Welfare and Measurement (Cambridge: MIT Press, 1982), 353; Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality (Cambridge: Harvard University Press, 2000); David Miller, 'Arguments for Equality,' in Peter French et al. (eds.) Midwest Studies in Philosophy: VII. Social and Political Philosophy (Minneapolis: University of Minnesota Press, 1982), 73; Larry S. Temkin, 'Inequality,' Philosophy and Public Affairs, 15 (1986), 99; Amartya Sen, Inequality Reexamined (Cambridge: Harvard University Press, 1992); Derek Parfit, Equality or Priority? (University of Kansas, 1995); Harry Frankfurt, 'Equality and Respect,' Social Research 64 (1997), 3.

Those are not my concerns in this paper: I am interested in (b) not (a). The difference between them is not the difference between prescriptive and descriptive views - equality as aim vs. equality as (alleged) fact. It is between equality as a policy aim, and equality as an underlying normative commitment of many different policy stances. (Whether equality in sense (b) requires support from some thesis of the descriptive equality of all humans is a further question.) Highlights of the literature on (b) include the following: Gregory Vlastos, 'Justice and Equality' (originally 1962), in Jeremy Waldron (ed.) Theories of Rights (Oxford University Press, 1984), 41, esp pp. 49 ff.; Bernard Williams, 'The Idea of Equality' (originally 1962), in his collection Problems of the Self (Cambridge: Cambridge University Press, 1973), 230, esp. pp. 230-9; John H. Schaar, 'Some Ways of Thinking about Equality,' Journal of Politics, 26 (1964), 867; Richard Wasserstrom, 'Rights, Human Rights, and Racial Discrimination,' Journal of Philosophy, 61 (1964), 628; Stanley I. Benn, 'Egalitarianism and the Equal Consideration of Interests,' in J. Roland Pennock and John W. Chapman (eds.) Nomos IX: Equality (New York: New York University Press, 1967), 61; John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971), pp. 504-12; D.A. Lloyd Thomas, 'Equality Within The Limits of Reason Alone,' Mind, 88 (1979), 538; Amy Gutmann, Liberal Equality (Cambridge: Cambridge University Press, 1980), Ch. 1; Louis Pojman, 'Are Human Rights based on Equal Human Worth?' Philosophy and Phenomenological Research, 52 (1992); and John E. Coons and Patrick M. Brennan, By Nature Equal: The Anatomy of a Western Insight (Princeton: Princeton University Press, 1999.)

<sup>2</sup> Ronald Dworkin, Taking Rights Seriously, Revised Edition (Cambridge: Harvard University Press, 1977), pp. 180 and 272.

formulation: "Each person to count for one, nobody for more than one."<sup>3</sup> Kantians express it in terms of the universalization implicit in the Categorical Imperative and the idea of "the kingdom of ends."<sup>4</sup> Others do it in terms of religious ideas: we are all children of God, made in His image.<sup>5</sup>

One formulation I have found useful is that the principle of basic equality commits us to the ideal of a single-status moral community. [ref: Vlastos] We all have the same moral status. We have the same standing or significance for moral purposes. We are all on the same footing morally, irrespective of race, sex, birth, wealth, or national or communal membership. We are all on the same moral footing even so far as merit and deserving are concerned, though of course we do not all have the same merits or deserts.<sup>6</sup> The idea of single moral status conveys that we all have the same basic moral rights and we labor under the same array of basic moral duties. As for our non-basic rights and duties, they vary by circumstance and by the undertakings and other relations we have entered into. But circumstances and undertakings work the same way for all of us: we have the same moral capacities (to create rights and duties) and the same moral liabilities (to find ourselves under special duties in special circumstances). In the moral world, there is no equivalent of caste or ranks of nobility: or perhaps we should say, with Gregory Vlastos, that our moral community is like a caste society but with just one caste, or like an aristocratic society but with just one rank (and a pretty high rank at that) for all of us.<sup>7</sup>

Obviously the idea of status that is used here is a legal concept, and its use in the moral context is based on analogies with its use in the legal context. One of the things I would like to do in this paper is talk a little bit about some of the issues and perplexities

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<sup>3</sup> It is surprisingly difficult to find a source for Bentham's principle. David G. Ritchie observes, in Natural Rights: A Criticism of Some Political and Ethical Conceptions (London: Swan Sonnenschein, 1903), p. 249n., that the phrase is known from its quotation by John Stuart Mill in Chapter V of Utilitarianism. "The maxim seems to belong," Ritchie says, "to the unwritten doctrine of the Utilitarian master." Mill himself offered the following gloss on the principle:

It may be more correctly described as supposing that equal amounts of happiness are equally desirable, whether felt by the same or by different persons. This, however, is not a presupposition; not a premise needful to support the principle of utility, but the very principle itself; for what is the principle of utility, if it be not that 'happiness' and 'desirable' are synonymous terms? If there is any anterior principle implied, it can be no other than this, that the truths of arithmetic are applicable to the valuation of happiness, as of all other measurable quantities.

John Stuart Mill, Utilitarianism, in Vol. III of his Dissertations and Discussions (New York: Henry Holt, 1882), Ch. V, pp. 388-9 n.

<sup>4</sup> Immanuel Kant, Groundwork of the Metaphysics of Morals, edited by Mary Gregor (Cambridge: Cambridge University Press, 1997), \_\_\_\_.

<sup>5</sup> John Locke, Two Treatises of Government ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), I, paragraph \_\_ and II, paragraphs 6 and . See also Jeremy Waldron, God, Locke, and Equality: Christian Foundations of Locke's Political Thought (Cambridge University Press, November 2002).

<sup>6</sup> For this distinction, see Vlastos, "Justice and Equality," op. cit., at pp. 49-60

<sup>7</sup> Ibid., p. 54.

surrounding the legal concept of status, and ask whether those issues and perplexities carry over into its use in morality as an explication of basic equality. There is a further question whether the legal concept can help us with some of the issues and perplexities surrounding the moral idea of basic equality. For example: those who talk about basic equality, and about all of us having the same array of rights and duties, capacities and liabilities, have to have something intelligent to say about the position of those humans whose age (e.g., their infancy) or condition (e.g., their profound mental disability) seems to distinguish them not only descriptively but normatively as well from the general run of persons. I will suggest that some distinctions pertaining to the legal idea of status can help us with this.

There is also a serious analytic challenge to be faced. In law and perhaps in morality too, status seems to operate as an abbreviating concept: it sums up information about a person's legal or moral position. Abbreviations can be helpful for certain practical purposes, but it seems odd to invoke an abbreviation as a way of explicating something which is supposed to be fundamental. Surely what is fundamental is the precise array of rights, duties, capacities, and liabilities that we all have and the principles that generate them. Focusing on status is at best a surrogate for that, and at worst misleading because by summarizing information it can distort it or obscure the importance of the detail that is inevitably shoved aside for the pragmatic convenience of this essentially shorthand idea. This criticism, originating with John Austin (so far as legal status is concerned)<sup>8</sup> and pressed on me by Joseph Raz (so far as moral status is concerned),<sup>9</sup> can be presented in a more or less damaging way. In its less damaging form, it challenges us to look for a better way of explicating basic equality than the idea of a single-status community. In its more damaging form, Professor Raz's criticism begins with status as its target but ends up undermining the very idea of basic equality. Not that Raz is an egalitarian: the substance of his position is not much different from the position of those who profess and call themselves believers in basic equality. But Raz thinks that the idea of basic equality is subject to the same sort of criticism as the idea of status (or single-status): it is either redundant or it is misleading because it compresses and abbreviates important matters of moral detail.<sup>10</sup> What matter in the end are the substantive moral principles that apply to us. Some of those principles may be irreducibly egalitarian in their content. But others are not: they simply attach normative consequences to conditions and they do so universalizably: "Anyone who satisfies condition C is entitled to A or has a duty to do B," and so on. Such principles apply to persons in virtue of their content (i.e. the principles' content) not in virtue of any status that the persons hold. And if they apply equally to x and y, they do so simply because the principle is expressed in universal form and both x and y satisfy C, not because of anything about equality of x and y. According to Raz, it is these detailed

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<sup>8</sup> See below, section 3.

<sup>9</sup> In conversation and in a seminar on "Equality of Respect," which Raz and I taught together in 2003 at Columbia Law School.

<sup>10</sup> See Joseph Raz, The Morality of Freedom (Oxford: Clarendon Press, 1986), Ch. 9.

principles and their application that are fundamental in morality. Once they are granted, propositions about equality add nothing.

This critique deserves to be taken seriously. To deal with it, I shall argue that propositions about status expressive of the idea of basic equality – especially propositions about single-status – play an important role in generating moral conclusions, a role that is obscured somewhat by the rather static model embodied in Raz's critique.

## 2. Legal Status

The term "status" has looser and tighter meanings in law. Sometimes -- and this is the looser sense -- "the status of X" means nothing much more than "the legal situation with regard to X." X can be anything -- persons, things, relationships, texts. So we talk about the status of autograph wills, the status of surrogate motherhood, the status of the wet foreshore, and the status of young offenders. If we ask "What is the status of X?" we expect an answer that sets out all or the most important legal rules, principles, and doctrines applying to X. In this sense, the use of the term "status" does not indicate that we are abbreviating or expecting to abbreviate anything. A complete account of X's status just is a complete account of the law relating to X.

A tighter and more technical sense of status is that in which we talk about the statuses<sup>11</sup> of infancy, lunacy, and so on – or, historically, the statuses of slavery, bastardy or nobility. Historically, in English law, to be a married woman or a monk or a villein or the monarch was to occupy a particular status. Even today the law recognizes that aliens (resident and non-resident non-citizens), members of the armed forces, adjudged bankrupts, and convicted felons occupy a distinct status. Of course we can use the looser meaning here as well. We can ask what is the status of infants, soldiers, or felons, and expect the sort of detailed answer that I talked about in the previous paragraph. But now our question is partly like asking "What is the status of this or that status?" (If someone asks what is the status of slavery, we might answer that the legal status (in the looser sense) of the status (in the tighter sense) of slavery is that slavery no longer exists and its re-establishment in the United States is constitutionally prohibited.)

The tighter sense of status is what interests me in this paper. A status comprises a set of rights, duties, capacities, incapacities and liabilities which the law has determined should be borne by people of a certain class<sup>12</sup> or in a situation or predicament. "Status" has been defined by one jurist as

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<sup>11</sup> "Statuses" or "statūs"? Who cares? For what it's worth, The OED says: "Pl. (*rare*) **status** ... now usu. **statuses**..."

<sup>12</sup> Although status is sometimes associated with social class (villeinage, nobility, etc.), the term "class" in this definition should be understood set-theoretically, in the first instance. The same is true of the common formulation which says that status is the legal characteristic of members of a certain group. That is actually a poor formulation, for it suggests that status applies to people in virtue of communal characteristics. This may be so for some statuses (e.g. the status of being a resident Christian or Jewish merchant in Islamic law, or the status of being tangata whenua in New Zealand). But many statuses do not involve group membership at all, except in a purely set-theoretic sense (e.g., the group of all bankrupts, the group of all minors, etc.).

a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law... whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents thereof are a matter of sufficient social concern.<sup>13</sup>

Notice two things about this definition. First, the reference to "social concern." R.H. Graveson argues that status is essentially a public law idea (even though it obviously has private law implications, as for example in an infant's incapacity to enter into contracts). The determination that the legal position of persons with certain characteristics or in certain predicaments should be determined largely as a matter of law (rather than by contract, for example)<sup>14</sup> is a matter of public policy, in the broadest sense.<sup>15</sup> (I mean the broad sense of policy in which we say public policy can be embodied in a common law doctrine.) It is done out of public concern for the individuals concerned and/or public concern for those who have dealings with them or may be affected by their actions.

Secondly, the definition cited in the previous paragraph refers to status as a "special condition, ... differing from the legal position of the normal person" implying that legal status is differentiated from the incidents of legal personality ordinarily attributed to natural persons. English writers tend to put particular emphasis on this, and accordingly they distinguish their notion of status from Roman law notions, which also comprised the status of free man.<sup>16</sup> I have never<sup>17</sup> understood why the English writers take this view. Ordinary legal personality seems to me to satisfy every other aspect of the definition of legal status. The law determines the background rights (e.g. human rights, civil liberties), background duties (e.g. duties under tort law and criminal law), and background capacities (e.g. standard freedom of contract, testamentary capacity, etc.) of the ordinary person in the first instance without his consent, and it does so as a matter of public policy concern, just as it does for the alien or the orphan. It's true that the ordinary legal person has a greater ability to create rights and duties by contract than (say) a bankrupt has or than a married woman used to have. But (i) this is a difference of degree, (ii) it is itself determined as a matter of law and regulated legally, and anyway (iii) some special statuses such as nobility do not involve any lack of capacity of this sort.

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<sup>13</sup> R.H. Graveson, Status in the Common Law (London: Athlone Press, 1953), p. 2 (original emphasis)

<sup>14</sup> Status doesn't altogether exclude contract. Status can arise out of contract (e.g. certain contracts of employment or service), or out of something like contract such as marriage: see Salvesen v. Administrator of Austrian Property [1927] AC 641. Also there are variations in the extent to which capacity to enter into contracts is or is not associated with a given status, and is or is not restricted for persons of that status.

<sup>15</sup> *Ibid.*, pp. 6, 47 and 114-116..

<sup>16</sup> *Ibid.*, p. 2-3 and 5.

<sup>17</sup> Having studied the matter for a few days...

I take this position for obvious reasons. On the approach taken by the English jurists, the phrase "single-status community" -- which is our real interest here -- is going to look like an oxymoron (rather like "standard exception"). I don't think we should accept that it is ruled out by definition, and I don't see any important reason for ruling it out.

### 3. Skepticism about Legal Status

Some jurists are skeptical about status. This should interest us, because it may correspond to the sort of scepticism that Joseph Raz has expressed about using "status" to express egalitarian ideas. The most trenchant legal skepticism is expressed by the nineteenth century philosopher of law, John Austin. Austin wrote in his Lectures on Jurisprudence:

After the best consideration which I have been able to give to the subject, and after an extensive examination of the opinions of others, I still find no mark by which a status or condition can be distinguished from any other collection of rights and duties. The sets of rights and duties, or of capacities and incapacities, inserted as status in the Law of Persons, are placed there merely for the sake of commodious exposition. ... The sets of rights and duties called ... status have no common or generic character which determines what a status ... is.<sup>18</sup>

It is purely a matter of expository convenience, says Austin: "Certain sets of rights and duties are detached for convenience from the rest of the legal system, and these sets of rights and duties are styled status."<sup>19</sup> Using a status word to refer to a collection of rights and duties which we have detached (for expository convenience) from the rest of the law is just "an ellipsis (or an abridged form of expression)."<sup>20</sup> It's a "device of legal exegetics."<sup>21</sup> The furthest concession that Austin is willing to make to the idea of status is that what makes the separate (expository) treatment of a given set of rights and duties convenient is "that they give a conspicuous character to the individual, or extensively influence his relations with other members of society."<sup>22</sup> But this is largely a matter of the expositor's

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<sup>18</sup> John Austin, Lectures on Jurisprudence, or The Philosophy of Positive Law, 5<sup>th</sup> edition, ed. Robert Campbell (London: John Murray, 1885, vol. II, Lecture XL, p. 687-8

<sup>19</sup> *Ibid.*, p. 688. Another way Austin describes the matter is the following: "For the sake of commodious arrangement a set of rights or duties ... might be detached from the body of the law and placed in a chapter apart" (*idem*). That setting apart may be useful for some people who cannot be expected to know the whole of the law but may have a legitimate interest in learning the law particularly applicable to people like them or people in their position. (*Ibid.*, p. 692).

<sup>20</sup> *Ibid.*, p. 700.

<sup>21</sup> This is Allen's rendering of Austin's position, in C.K. Allen, Legal Duties and Other Essays in Jurisprudence (Oxford: Clarendon Press, 1931), p. 34.

<sup>22</sup> *Ibid.*, p. 689. (For this reason, Austin is prepared to accept the point, which I criticized in the previous section that status must be distinct, and defined by contrast with ordinary legal personality.)

subjective interest or point of view: "This last property is, I think, not essential: and would not be regarded in a body of law rationally constructed."<sup>23</sup>

Is there a response to Austin's position? It is no good saying that those who have a given status form a class in the eyes of the law and so status is about legal classes -- for as Austin points out, "[a]ny rights and duties, not singular, or peculiar to a specific or determinate individual, are properly determined to a class of persons." A class is formed by the terms of any legal norm: "Anyone in situation C must do A" establishes a legally interesting class of persons in situation C.<sup>24</sup> In British law, the operator of a television set must pay a license fee; but that doesn't make "owner of a television set" a legal status (in any interesting sense).<sup>25</sup>

One possibility that Austin does not pursue is the idea, later emphasized by Graveson and others, that a status is a set of rights, duties, capacities, and liabilities attaching to a member of a class as a matter of public policy.<sup>26</sup> We might want to say that what distinguishes status from other merely exegetical devices in the exposition of law is that the rights, duties, capacities, and liabilities of a given status accrue to persons in view of a certain public concern about their characteristic or condition. For example, we know that the situation of an infant or a lunatic is special and calls for special care and solicitude: the determination of the legal incidents associated, respectively, with lunacy and infancy flow from this. We used to think that society required serfdom, nobility, and *couverture* for various reasons; and in each case the importance of those reasons determined the legal rights, duties, capacities, and liabilities of serfs, nobles, and married women. Austin might respond: "Well, no doubt every law has its reasons." But that misses the point that the reasons or concerns just alluded to are not just reasons or concerns for legal provisions one at a time (which might then be expounded *seriatim* or together, according to expository convenience), but they are reasons and concerns for generating the whole package of rights, duties, capacities, and liabilities of the person concerned.

Jeremy Bentham held a view of this kind. Now, John Austin was one of Bentham's most faithful disciples, but this question of status seems to have occasioned a sharp disagreement between them: "Mr. Bentham ..., I am forced to admit, appears to me to be inconsistent and obscure in all he says on the subject."<sup>27</sup>

It is remarkable that Bentham (who has cleared the moral sciences from loads of the like rubbish) adopts this occult quality under a different name. In the chapter in the Traité de Législation, which treats of États (or of status or conditions), he defines a

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<sup>23</sup> *Idem*.

<sup>24</sup> See also note 12 above.

<sup>25</sup> The example is adapted from Allen, Legal Duties, *op. cit.*, p. 44 (though Allen writes about the ownership of "wireless receiving-sets").

<sup>26</sup> Graveson, Status in the Common Law, *op. cit.*, pp. 114-6.

<sup>27</sup> *Idem*.

status thus: "Un état domestique ou civil nest qu'une base idéale, autour de laquelle se rangent des droits et des devoirs, et quelquefois des incapacités."<sup>28</sup>

According to Austin, Bentham's definition "is merely a case of the once current jargon about occult qualities."<sup>29</sup> Austin says he rejects the view that the rights, duties, capacities, and liabilities incident to the status are not themselves the status: but the status is rather "a quality which lies or inheres in the given person, and of which the rights or duties, capacities or incapacities, are merely products or consequences."<sup>30</sup> But that is not quite Bentham's view. For Bentham, the "base idéale" is a reason informing the attribution of the rights etc., not just a quality on which they are, so to speak, supervenient.

All this suggests to me that status is in some ways a dynamic idea in law and skepticism about legal status tends to suggest itself from a purely static point of view.<sup>31</sup> If all the law were given – all the rules, doctrines, principles, etc – and all of it was settled and known, the notion of status would seem to be redundant. We would just refer to the particular rule that determines whether a person of certain age can enter into a certain sort of contract, or to the particular rule that determines in what circumstances a given person is liable to deportation. Some people in some circumstances are liable to deportation; others in other circumstances are not. If we know all that – if indeed we know all such rules – we don't need to learn anything additional about alienage. But the idea of alienage tells us something about the rationale of these provisions; it makes sense of them; it indicates their ground or reasons. And the same is true of all statuses. They work dynamically. Their primary structural presence in the law is justificatory: it works to package certain arrays of rights, duties, etc. under the auspices of a certain entrenched concern in the law. An analogy might help. It has often been remarked that once we have all the information there is about legal duties, we don't need any additional information about rights. But legal rights are important as a way of presenting the underlying interest that is the rationale for the imposition of a duty.<sup>32</sup> And status may work similarly. No doubt Austin is right that status also has an exegetical use, in helping us organize and present legal knowledge in treatises etc.. But its expository function is not just mnemonic. It expounds the law by presenting it in justificatory packages.

When I talk about the dynamic justificatory role of status (or for that matter of rights) in the law, I don't mean to associate "justificatory role" with anyone's particular opinion as to why a given set of legal provisions is or might be justified. I mean something

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<sup>28</sup> Ibid., p. 699, original emphasis. (Compare Jeremy Bentham, The Theory of Legislation, ed. C.K. Ogden (London: Kegan Paul, Trench, Trubner & Co., 1931), p. \_\_\_\_.)

<sup>29</sup> Austin, Lectures on Jurisprudence, op. cit., p. 697.

<sup>30</sup> Ibid., p. \_\_.

<sup>31</sup> For the distinction between static and dynamic points of view in law, see Hans Kelsen, The Pure Theory of Law (\_\_\_\_), pp. \_\_

<sup>32</sup> Cf. Joseph Raz, "Legal Rights" in Ethics in the Public Domain: Essays in the Morality of Law and Politics (Oxford: Clarendon Press, 1994), pp. \_\_.

more like legally-established justification – like a legally recognized purpose or policy.<sup>33</sup> I mean something which is not just present in politics to persuade people that the law is good and right, but rather suffuses the law itself with a sense of purpose and operating as an integral part of what it is to grasp and understand the law. Justification in this sense has a more solid and established presence in the law than the arguments anyone might come up with, though of course ultimately it amounts to the legal recognition and currency of such arguments as aspects of the legal system.<sup>34</sup>

The point about justification hooks up with a point I alluded to a moment ago about packaging. Austinian positivism would ultimately give us no more information about the law than the recognized existence of particular provisions one-by-one. But particular provisions often hang together: the legal disabilities of a bankrupt are understood in relation to the process of adjudication in bankruptcy; the contractual incapacities of infants are understood in relation to the duties of their parents to make the provision for them that for most of us is made by our own ability to enter into contracts. Abstracted from the whole package, no particular incident of a given status makes much sense, though of course we can always ask why the package has to be shaped thus-and-so. In other words, our response to Austin's claim that legal status is useless for anything except exegetical convenience, is to say that they embody important information about the legally recognized concerns that underlie the packaging of distinct sets of right, duties, capacities, and liabilities. The packaging of the particular legal incidents is important, for the law (not just for its exposition) and its importance cannot be grasped in a piecemeal static way.

#### 4. Sorts and Conditions<sup>35</sup>

Assuming then for the moment -- or at least for the sake of argument -- that we can make sense of the idea of legal status, it may be helpful to divide legal statuses into two broad categories: condition-status and sortal-status.

Some legal statuses apply to individuals in virtue of certain conditions they are in, that they may not be in or have been in forever, or into which they may have fallen by choice, hazard, or happenstance: bankruptcy is one, military service is another, lunacy is a

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<sup>33</sup>I mean legal policy, as when we talk about "the well established policy of English law of imposing a more extensive liability on intentional wrongdoers than on careless defendants" (Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 3) [2003] 2 A.C. 1 (HL), at 162), or as when it is said that it is the general policy of the law that it is preferable that a successful defendant should suffer the injustice of irrecoverable costs than that a claimant with a genuine claim should be prevented from pursuing it (Hamilton v. Al Fayed (No 2) [2003] Q.B. 1175 (CA) 1178), or that "[t]he policy of the law is to prevent A being judge in his own cause of the value of his life over B's life or his loved one C's life, and then being executioner as well" (In Re A (Children) (Conjoined Twins: Surgical Separation) [2001] Fam 147 CA , at 200).

<sup>34</sup>For a discussion, see Ronald Dworkin's observations on "institutional support" for legal principles in Taking Rights Seriously Revised Edition (Harvard: Cambridge University Press, 1977), pp. 40-45.

<sup>35</sup>Cf. the phrase is adapted from the "Prayer for all Sorts and Conditions of Men" in the old Book of Common Prayer, which begins: "O God, the Creator and Preserver of all mankind, we humbly beseech thee for all sorts and conditions of men: that thou wouldest be pleased to make thy ways known unto them, thy saving health unto all nations. ..."

third, felony a fourth, being an alien a fifth, and so on. I shall call these condition-statuses. They tell us nothing about the underlying personhood of the individuals who have them: these statuses arise out of conditions into which anyone might fall. The fact that someone bears a condition-status at a given point in his life does not imply that he or she bears it or has borne it at every point in his or her life. The category of condition-statuses may include a status that almost everyone is in for a large portion of their lives – such as the status of being married -- less true now than it used to be. It may for that matter include infancy and minority, which are statuses that everyone necessarily goes through.

Condition-status may be contrasted with sortal-status. Sortal-status categorizes legal subjects on the basis of the sort of person they are, rather than on the basis of the conditions they have undertaken or fallen into. One's sortal-status defines the baseline from which condition-status might seem a lapse, change, or deviation. Modern notions of sortal-status are hard to find, but earlier in the paper I mentioned a few historical examples: nobility, villeinage, and slavery. Racist legal systems such as that of apartheid-era South Africa or American law from 1776 until (at least) 1867 recognized sortal-statuses based on race: the status of being white and the statuses of being black or colored. Some legal systems ascribe separate status to women. And so on. These are all distinct from condition-statuses because they apply to a person for the whole of that person's existence; they represent the person's permanent situation and destiny so far as the law is concerned. They are not acquired or lost depending on actions, relations, circumstances, or vicissitudes in the way that condition-statuses are. Crudely put, the idea behind sortal-status is that there are different sorts of person.

Now it is precisely this last claim that the principle of basic equality denies.<sup>36</sup> There are not different kinds of person, at least not different sorts of human person.<sup>37</sup> And the principle of legal equality might be seen as an expression of this in the realm of law. We once thought that there were different sorts of human – slaves and free; women and men; commoners and nobles; black and white – and that it was important that there be public determination and control of the respective rights, duties, capacities, and liabilities associated with personhood of each sort. We no longer think this. There is basically just one sort of human person in the eyes of the law.

Sure, some distinctions of condition-status remain: bankruptcy, alienage, infancy, and maybe marriage, lunacy, and felony. But these are understood as deviations from a single sort of legal personality, reflecting the more important legal consequences of some of the ordinary stages of an ordinary human life (infancy), or some of the choices that are made in an ordinary life (marriage, felony), or some of the vicissitudes that ordinary

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<sup>36</sup> Elsewhere -- in Jeremy Waldron, Two Essays on Basic Equality, unpublished manuscript -- I have expressed this by saying there is no fundamental sortal distinction among humans of the sort that is widely thought to exist as between human and non human animals. (The proponent of basic equality isn't necessarily committed to the proposition that there is a fundamental distinction between human and non-human animals. They simply invoke the widespread idea of such a distinction and deny its application within the human realm.)

<sup>37</sup> But various kinds of corporate personality might define sortal-statuses, even in an egalitarian society. See Graveson, Status in the Common Law, op. cit., pp. 72-8

humanity is heir to (lunacy) or that through bad luck or bad management may afflict one's ordinary dealings with others (bankruptcy).

Following Maine, people sometimes describe the decline of multiple sortal-statuses as a "movement from status to contract."<sup>38</sup> The idea is that once upon a time one's rights and duties were determined by one's status, but now they are determined as freely undertaken obligations (and their correlatives), embodied for example in contract and the voluntary exercise of other legal powers: every person is free to determine, according to his own will, his rights and duties towards his fellow men.<sup>39</sup> However, the persistence of condition-status casts some doubt on this as an exact formulation. There are still choices, stages, and vicissitudes whose consequences are determined by operation of law, reflecting a public determination about the rights, duties, capacities, and liabilities that should be born by those who have made those choices (marriage), are at that stage of their lives (infancy), or have suffered those vicissitudes (lunacy). Maine's position is more accurate with regard to sortal-status. We have certainly moved to a situation in which differences in people's rights and obligations are determined more by differences in the undertakings they have entered into, than by differences in sortal-status. Still, it would be wrong to say that all or even most of one's rights and obligations are determined by voluntary undertaking in this way. Most of them are determined by operation of law: criminal law, public regulation, tort law, and so on, and many of these cannot be varied by agreement. Even one's ability to determine rights and obligations by choice reflects the standard application of a capacity to contract, whose existence of course is due to the operation of law and is not subject to voluntary control. This is why I am inclined to the opinion (which I set out at the end of section 2) that there is such a thing as a single normal status, in which considerable portion of rights and obligations are conferred by law but which also contains the capacity to vary some of these by the exercise of contractual powers (which are themselves governed by law). It is not that status has been superseded by contract; it is rather that freedom-of-contract is now the normal or normative status.

F.A. Hayek goes a little further: "The true contrast to a reign of status is the reign of general and equal laws, of the rules which are the same for all."<sup>40</sup> Now, Hayek seems to have thought that a status-system could not work with "abstract general rules." I guess in theory that's wrong: a status system can have general rules on the basis of which people are assigned to a given status (e.g. by birth) and general rules defining the incidents of each status; and Hayek himself acknowledges elsewhere that abstract general rules can differentiate between groups on the basis of universalizable characteristics. But one can see his point. The idea of a system of general rules applicable to everyone, in virtue of characteristics which anyone might have or acquire, is quite different from the idea of a legal system which uses one set of generalizations to sort people into groups and another set of generalizations (the bulk of the law) to define separate sets of rights and duties for the

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<sup>38</sup> Maine, Ancient Law, \_\_\_\_\_

<sup>39</sup> This is Allen's expression of Maine's view in Allen, Legal Duties, op. cit., p. 36.

members of each group. Both may be formally universalizable, but the second embodies a much more robust idea of equality before the law than the first does. No doubt, equality before the law as an ideal falls well short of the various material equalities that most modern egalitarians are concerned with. But it is important nonetheless; there is a miserable degradation and demoralization in the sense that one is being held to norms that are different from those to which one's fellow citizens are held – held to duties that are more rigorous than theirs and accorded rights that are less generous – and it is not mitigated at all by the thought that there are general background principles that determine who in general is held to what duties and who is accorded what rights.

### 5. From Law to Morality

We are talking about distinctions of status (and the decline of distinctions of status, or at least the decline of distinctions of sortal-status), because we are interested in using a legal idea to explicate a moral one: basic equality.

Graveson reminds us that status is of course something determined entirely by legal principle. He says positivistically that there is no such thing as natural status in the eyes of the law: "Whatever its bases may be, whether natural disability as in the case of an infant..., or disability legally imposed in the interests of public and social security, as in the case of bankrupts, status is essentially a conception of law, not a question of fact."<sup>41</sup> (As we saw, though, at the very end of section 3, this does not mean that status is equivalent to legal rules; it is equivalent rather to the relation between legal rules and legally recognized policies.)

So status is a legal idea. What then are we doing using it to explicate a moral idea? My answer is that there might be a normative parallel in morality to the role that status plays in the law. Morality recognizes rights, duties, capacities and liabilities which operate normatively much in the way that their legal counterparts operate; and I believe an idea of moral status can be explicated which stands in a relation to them which is parallel to that in which legal status stands to legal rights, duties, capacities and liabilities. (This sort of parallelism is already well-understood. Law and morality as normative systems exhibit similar phenomena and are often structured in similar ways.) And what I want to say is that, just as law has moved progressively from a diversity of sortal-statuses to a single sortal-status, so too in morality the idea of a single normative status is also ascendant.

In the moral case, to be sure, we might not want to talk about a progressive movement from a diversity of statuses to a single status; or rather if we do talk that way, it is clear we are talking about positive morality or received moral ideas, rather than objective or critical morality, which is conceived as true and therefore timeless.<sup>42</sup> It used to be the case that moral philosophers conceived of multiple sortal-statuses, so far as right ethical and political reasoning were concerned: Aristotle believed this (distinguishing the moral

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<sup>41</sup> Graveson, Status in the Common Law, op. cit., p. 114.

<sup>42</sup> Compare Finnis's defense of the proposition that natural law has no history: John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980), pp. \_\_\_.

status of woman and natural slaves from that of ordinary men)<sup>43</sup> and so did some reputable moral philosophers until disreputably recently.<sup>44</sup> But we now think they were wrong – and that they were always wrong – about what morality really required.<sup>45</sup>

## 6. Condition-Status in Morality

On the face of it, morality certainly seems to recognize some condition-statuses. I remember being told by a woman friend that I shouldn't treat her children (then about eight years old) as though they were grown-ups: I shouldn't make the same demands on them, respond to insulting remarks about my appearance in the way that I would if they were adults, expect them to remember the same things, and so on; I should still treat them morally but morality required me to pay attention to this important difference. She was quite right. And there are all sorts of other cases we can think of – ranging from the mundane to the tragic in which morality treats classes of people quite differently on the basis of their condition. We say that the moral rights of people in a coma are quite different from those of ordinary functioning adults. And the moral rights of an elderly person with profound Alzheimer's might be different again.

True, morality doesn't have anything directly equivalent to the statuses of bankrupt or convicted felon. Morality does not have the juridical structure or apparatus to found statuses on established verdicts in that way. There are informal forms of moral outlawry, for example, but that is hardly the same thing. But that just shows that morality operates differently from the law. Sometimes law attributes condition-statuses by the straight operation of law on some natural characteristic: one does not need to be adjudged an infant, for example. And sometimes law attributes status by a formal determination that someone is to be regarded as having a given status. Morality lacks the latter possibility, but it still has the former.

Because there is no such thing as formal moral status like felony or bankruptcy, we have no choice but to deal with each untrustworthy person, each bad person, each psychopath, on their merits, as it were. We figure out what is owed to them and what moral transactions it is appropriate to enter into with them, case by case, situation by situation. Some untrustworthy people are less untrustworthy than others: it's a matter of degree; there

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<sup>43</sup> Aristotle, The Politics, Book I, \_\_\_\_\_

<sup>44</sup> Hastings Rashdall, The Theory of Good and Evil: A Treatise on Moral Philosophy, Second Edition (Oxford University Press, 1924), Vol. I, p. 237-8: "It is becoming tolerably obvious at the present day that all improvement in the social condition of the higher races of mankind postulates the exclusion of competition with the lower races. That means that, sooner or later, the lower Well-being - it may be ultimately the very existence - of countless Chinamen or negroes must be sacrificed that a higher life may be possible for a much smaller number of white men. It is impossible to defend the morality of such a policy upon the principle of equal consideration taken by itself and in the most obvious sense of the word."

<sup>45</sup> We are not done with this point, however, and I shall return to it in section 7, because it will be important to ask whether this sense of timeless objective moral truth precludes a moral equivalent to the sort of dynamic role which I attributed to legal status (at the end of section 3, above).

is a scale or an array of scales; not a single threshold marked by an institutional determination in the way that bankruptcy is.

Some may see this as a problem. Others may see in it an opportunity: it means we can take a more nuanced and sensitive approach in our moral dealings with people, than law can with its crude divisions of status.

Reflecting on that, we may want to revisit the examples (of moral condition-status) that we set out at the beginning of section 6. Children are not all the same; some twelve year olds are morally more competent than some twenty years olds, and some minors need less protection than others. Surely it would be better to approach our moral dealings with any particular with generalized principles commanding sensitivity to degrees of competence, rather than with crude ideas of moral status.

### **7. Skepticism about Moral Status**

In general, it is not hard to imagine a skepticism about status in morality corresponding to Austin's scepticism about legal status. The skeptic I am imagining is no at all skeptical about Morality generally: he just doesn't believe that propositions about status add anything. His argument goes like this.

Suppose we grant all the true propositions or principles there are about who ought to do what (who has which moral duties, obligations, etc.) and why (what moral reasons there are), but say nothing about status. Will we have left anything out? Won't we already know what ought to be done in regard to all persons and situations? I don't want to trivialize this skepticism: the skeptic is not just pointing out that if we already know all there is to know about what ought to be done, there is nothing more to know about what ought to be done. The skeptic is not asking us to assume that we are already in position of all particular moral knowledge -- that x is not to be hit, or that y must keep this particular promise made to z. Even if it is granted only that we are in possession of all general moral principles of obligation or right, or general moral principles that indicate kinds of reason for action, the skeptical claim is that that will suffice. We can use that general moral knowledge (plus knowledge of facts) to generate all necessary moral conclusions. We don't need, in addition, propositions about moral status.

The skeptic's strategy here has a certain analytic respectability. We analyze the meaningfulness of a particular proposition, P, by seeing what P adds to any set of propositions to which it is conjoined, or, to put the other way round, what (if anything) would be lost or how the conjoint claim would be different if P were subtracted from a conjunction of propositions of which it was initially a member. If P adds nothing, if nothing would be lost were it taken away, then P can be dispensed with.

Responding to Austin's skepticism about legal status, we said that even if in some notional sense propositions about status are replaceable by arrays of propositions about rights, duties, capacities, and liabilities – replaceable by, and in some ways much less informative than – still status embodies important information about the legal rationale of some set of propositions attributing rights, duties, capacities, and liabilities to the members of a particular class. Statically, status may seem dispensable; but from a dynamic point of

view, it connects packages of legal rules to legal policy in an important way. However, it may seem that this response is out of the question for the moral case, for the reasons we explained at the end of section 5. Morality is timeless. It does not have a dynamic dimension. Moral reason and moral norms are what they are; they don't all for an additional layer of moral policy or moral justification; on the contrary they provide the terms for justificatory discourse.

One way to respond to this would be to challenge the underlying view of objective timelessness. A constructivist conception of morality might not find it all that easy to eschew the dynamic dimension. On a constructivist approach, it may be important in moral life to understand not just what the moral norms and moral reasons are but how they are generated. For example: knowing both that we are morally required to be protective of small children and also that we are morally required to treat them differently for the purposes of their promise-keeping may not be enough: to apply these rules sensitively, we may need to know that their underlying reason is basically the same and that it depends on a moral view of children, a view which is a justificatory base for generating an open-ended set of distinctive moral concerns and reasons regarding them.

Even if one does not accept moral constructivism, something of this may work. Morality need not be understood as just a timeless array of rules and principles; it also comprises moral reasons, not organized into the specific packages of (say) rules, but operating in a freelance way that pervades the whole normative edifice. Some of these reasons may best be understood -- if we have to formulate them -- along the lines of "There is something (morally) special about infancy..." or "There is a distinctive sort of concern pertaining to the agency of those suffering from serious moral illness..." The systemic importance of such reasons, and their relation to more detailed moral principles telling us to look out for this or that, or mitigate the rigor of an otherwise applicable principle in this or that way in such-and-such circumstances may add up to something which does for moral reasoning a version of what legal status does for our reasoning in law. It is not exactly the same. But it is not dispensable either.

## **8. Single Moral Status**

My aim in this paper is not to defend the idea of status as such – legal or moral – but to defend the idea of a single-status moral community as an explication of the principle of basic equality. It may be thought that the latter task is even more difficult than the former. For, as we saw in the case of law, there may not be much to choose between the claim that morality knows no distinctions of status and the claim that the idea of status does no work. The English jurists thought status was only important to the extent that it represented a recognized deviation from normal legal personality; they did not think the notion of legal status was necessary for the explication of normal legal personality.<sup>46</sup> I said at the end of section 2 that I thought they were wrong about this, for the legal case. I now want to explain why I think the equivalent view is wrong for the moral case.

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<sup>46</sup> See above, towards the end of section 2.

We have already seen that morality might recognize something like condition-status. And at the end of section 5, I mentioned that most modern moral philosophers do not recognize distinctions of sortal status. That combination may be important. Consider, for example, the proposition that children are to be brought up in a way that prepares them for the responsibilities of adulthood. This is a proposition about the condition-status of minority, but it reminds us that the diversity of moral statuses (e.g., minority, lunacy, ordinary moral personality etc.) does not correspond to, or license us to think in terms of, a diversity of normative destinations so far as the moral upbringing of children concerned. John Locke said of his egalitarianism: "Children, I confess, are not born in this full state of equality, though they are born to it."<sup>47</sup> The lack of distinction of sortal status reminds us that boy-children and girl-children are born to the same status of normal human personality even though they are not born in it. Special moral concerns about their infancy are to be oriented to the destination of general human equality. I mention this because it is not uncommon to hear people arguing that since we recognize a status distinction between children and adults anyway, why not also recognize status distinctions among adults?<sup>48</sup> To my mind, the distinction between condition-status and sortal-status in the moral realm helps reveal how sloppy this sort of thinking is; but it could not do so if we were to say that the notion of sortal-status has no grip in this realm whatsoever.

Still this is negative work. What does the work is the denial of distinctions of sortal-status, rather than the active presence of the idea. I happen to think that the negative work is very important, on account of the constant temptation to think in terms of sortal-status distinctions. We know that the temptation has often been yielded to, in the case of sex and in the case of race, and it is a temptation against which we have to constantly be on the alert. The proposition that ultimately there are not different kinds of person is one that properly pervades modern morality. It may be only negative and cautionary; but a lot of morality is negative and cautionary too. Someone claiming a special privilege for himself, which patently could not be distributed to all the millions of those who inhabit the moral universe with him, might be tempted to ask, "Well is there not some basic distinction which might allow this for a relatively small number of persons, of which I am a member, while denying it to others?" needs to be told that the answer "No, there are no such basic distinctions" is not just something we laboriously infer from morality, after examining each of its general propositions, but one of its leading principles in its own right. Of course, it is always open to such a person to show that there is some feature of him or his situation which entitles him to special treatment; but he needs to know that his thinking about distinctions of this kind must be undertaken against the background of a general moral set against distinctions of status (just as our thinking about the special status of infants or those who are mentally ill is undertaken against the background of a

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<sup>47</sup> Locke, *Two Treatises*, op. cit., II, sect. 55, p. \_\_\_.

<sup>48</sup> Cite?

denial that there is a diversity of normal statuses, apart from infancy, lunacy, and other conditions).

More affirmatively, one can argue along the following lines that there is content to the idea of a single sortal-status. Let me focus on one aspect of what I think is the sortal-status of standard human moral personality. We believe in human rights, which is to say that we believe there is a standard set of rights which pertain to every human person in view of their humanity. These rights form a package, in the sense aleday discussed: they make sense in the light of one another are not easily separable.<sup>49</sup> They are moreover quite demanding. No ordinary person's standing as a human being is to be taken lightly: it imposes serious duties on other people and on political organizations too. We know that besides basic human rights – which, on my account, are the incidents of normal human status – we all enjoy the potential benefit of an array of moral principles of the form

(F): For all x, if x is in situation S or if x has characteristic C, then x is entitled to A.

And, for reasons of analytic parsimony it is tempting to try and render all moral truths about persons (including human rights claims) in that form. We might say:

For all x, if x is human, then x is entitled to H

where H is the content of some human right. That can be done, I guess, and if it is done carefully enough there will be no real loss of content. Still, it is misleading. (F) is a conditional formulation, and it is important that we think about human rights propositions as unconditional. I am not disparaging form (F): claims of form (F) have an important place in morality too, to mark the significance of morally relevant distinctions. But that role is different from the more categorical human-rights role, and nothing is gained – except a spurious analytical uniformity – in assimilating the two.<sup>50</sup>

## 9. Conclusion

There is of course much more to be said about the idea of a single-status moral community. In this paper I mainly wanted to defend it against a set of analytical criticisms, analogous to or arising out of analogies with John Austin's critique of status generally in normative thinking. Further work to be done includes the "community" element in "single-status moral community" (which has to do, not with what we would call modern communitarian ideas, but rather with the systemic and interactive nature of human equality). And much more work needs to be done about the contents and incidents of the basic sortal-status itself. In section 8, I invoked the idea of human rights, which enabled me to make certain

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<sup>49</sup> There are other elements in the package too besides human rights. First and foremost, there are the duties correlative to human rights. And there are also the moral capacities to enter into other sorts of obligation (and also obtain further entitlements), e.g. by promising – moral equivalents of standard contractual capacity in law.

<sup>50</sup> Compare Vlastos, "Justice and Equality," *op. cit.*, pp. 49 ff., on the distinction between merit and basic human worth. We could describe the latter as a sort of *ur-merit*, in order to unify our account in this area, under the auspices of merit and nothing else. But this too would be a distortion.

analytical points fairly easily. But it has to be acknowledged that there may be more to the basis sortal status than that<sup>51</sup> and it is possible that there is less to it than that. (The latter possibility invites us to consider single-status in the context of utilitarian moral theory, which need not accept the idea of human rights at all. For a utilitarian, basic human status is simply the equal considerability of interests.)<sup>52</sup> Finally, there is work to be done on the descriptive underpinnings of the single-status idea: given the evident differences between us, in virtue of what is it sensible to treat our moral community as a single-status moral community? I hope to have made a start on that with the distinction between condition-status and sortal-status, and elsewhere I have argued that we need to establish a general distinction between ordinary differences among humans (handled by conditional principles of form (F) above) and sortal-differences among humans (denied as a matter of our commitment to human equality).<sup>53</sup>

I have not produced a knock-down argument against the Austin-inspired Raz argument that we can eliminate all talk of status and much talk of equality (and single sortal-status) from moral discourse without losing anything important. I think Joseph Raz might be right that we can do this if we are careful enough. I hope I have shown, though, that one role that equality and single-status play in our moral thinking is to remind us what is at stake in the care that must be taken if we want to perform this essentially reductive analytical exercise.

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<sup>51</sup> See note 49 above.

<sup>52</sup> See note 3 above, and accompanying text.

<sup>53</sup> Waldron, Two Essays on Basic Equality, op. cit.