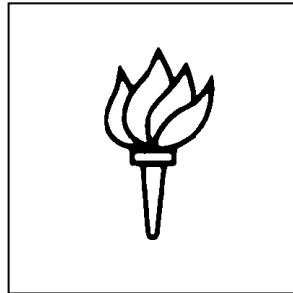


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What do you have in virtue of having a constitutional right?  
On the Place and Limits of the Proportionality Requirement

*Mattias Kumm*

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# What Do You Have in Virtue of Having a Constitutional Right? The Place and Limits of the Proportionality Requirement

Mattias Kumm

NYU School of Law

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## I. Introduction

What do you have in virtue of having a right? Are rights ‘trumps’ over competing considerations of policy?<sup>1</sup> Do they have priority over ‘the good’ in some strong sense?<sup>2</sup> Are rights ‘firewalls’ providing strong protections against demands made by the political community?<sup>3</sup> Even though there are interesting and significant differences between conceptions of rights in the liberal tradition, they generally<sup>4</sup> share the idea that something protected as a matter of right may not be overridden by ordinary considerations of policy. Circumstantial all-things-considered judgments on what is in the general welfare are generally insufficient grounds to justify infringements of rights. Reasons justifying an infringement of rights have to be of a special strength.

Yet this claim of a special priority of rights sits uneasily with a prominent feature of constitutional and human rights adjudication. As comparative constitutional scholars have pointed out, a general feature of rights analysis all over the world is some version of a proportionality test.<sup>5</sup> Though proportionality analysis does have a role to play in U.S. constitutional practice as well<sup>6</sup>, it is a more prominent and more explicitly embraced

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<sup>1</sup> R. Dworkin, *What Rights do we have?*, in: *Taking Rights Seriously* (1978), 266. See also R. Dworkin, *Principle, Policy, Procedure*, in: *A Matter of Principle* (1985), 72.

<sup>2</sup> J. Rawls, *Political Liberalism* (1993), pp. 173-211

<sup>3</sup> J. Habermas, *Faktizität und Geltung* (1992), 315.

<sup>4</sup> Exceptions include J. Raz, *The Morality of Freedom* (OUP 1986) and R. Alexy, *A Theory of Constitutional Rights* (OUP 2002)

<sup>5</sup> D. Beatty, *The Ultimate Rule of Law* (OUP 2004), N. Emilou, *The Principle of Proportionality in European Law* (Dordrecht: Kluwer 1996), W. Sadurski, *Rights Before Courts* (Springer 2005), pp. 266.

<sup>6</sup> T.A. Alenikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale LJ* 943, 967 (1987).

feature of rights reasoning under constitutions or Treaties established after World War II.<sup>7</sup> Proportionality is widely used as a test by judiciaries to determine the limit of a constitutionally guaranteed right. An act of a public authority that infringes the scope of a protected right can still be justified, if it can be shown to pursue legitimate purposes in a proportional way. Only acts by public authorities that are disproportionate will be struck down on the grounds that they violate an individual's right. But does the proportionality test provide an adequate structure for assessing rights claims? Can it do justice to the basic liberal intuition that rights enjoy some kind of special priority over consideration of public policy, and that reasons overriding rights must be of some special, compelling strength?

The article will proceed in two parts. The first will provide a brief description and further illustration of an account of rights that puts proportionality analysis front and center. The purpose of this part is to provide a better understanding of the proportionality test and its connection to rights. This part will draw on Robert Alexy's influential theory of constitutional rights. The second part will assess whether and to what extent such a conception of rights can adequately accommodate basic commitments of Political Liberalism. Within the tradition of Political Liberalism there are three basic ideas that are connected to the idea of the special priority of rights, which I will refer to as antiperfectionism, anticollectivism and anticonsequentialism respectively. The implications of each of these ideas for an adequate structure of rights will then be assessed. As will become clear, reasoning about rights has a more complex structure than the focus on proportionality analysis suggests. The proportionality structure is rightly a central feature of rights reasoning, but it is merely one of three distinct structural elements central to reasoning about rights as a matter of political morality. Other

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<sup>7</sup> For the claim that American constitutional rights jurisprudence is exceptional in its suspicion of proportionality, see L. Weinrib, *The Postwar Paradigm and American Exceptionality*, in Choudhry (Ed.), *The Migration of Constitutional Ideas* (CUP 2006). Explanations are provided by F. Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in: G. Nolte (Ed.), *European and US Constitutionalism* (CUP 2005), V. Jackson, *Ambivalence, Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality" Rights and Federalism* (1999) 1 U Pa. J. Const. L. 583. See also M. Kumm, *What's So Special About Constitutional rights in Private Litigation?*, in: Sajo (ed), *The Constitution in Private Relations* (2005).

structural features of rights discourse include the idea of excluded reasons and the prohibitions of certain means-ends relationships. Furthermore there are institutional considerations that sometimes justify imposing additional requirements on the justification for an infringement of a right, requiring reasons of special strength. There is no one structural element that is the defining feature of rights reasoning. Rights reasoning, as it occurs in the practice of courts and tribunals worldwide, reflects the structural richness of reasoning about political morality.<sup>8</sup> The language of rights in human and constitutional rights practice merely provides a way to structure the assessment of policy choices as they relate to affected individuals. What you have in virtue of having a right is as strong or as weak as the proposition of political morality that the claim is grounded in.<sup>9</sup> Analyzing the structure of rights reasoning helps provide a clearer understanding of the structural complexity of a liberal political morality. Additionally, it helps guard against a narrow understanding of rights that unconvincingly ties the very idea of rights to a particular moral structure.

## **II. Rights as Optimization Requirements: Proportionality**

1. Not all constitutional or human rights listed in legal documents require proportionality analysis or any other discussion of limitations. The catalogues of rights contained in domestic constitutions and international human rights documents include norms that have a simple categorical, rule-like structure. They may stipulate such things as: “No quartering of troops in private homes in peacetime.” “The death penalty is abolished.” “Every citizen has the right to be heard by a judge within 48 hours after his arrest.” Most specific rules of this kind are best understood as authoritative determinations made by the constitutional legislator about how all the relevant first-order considerations of morality and policy play out in the circumstances defined by the rule. Notwithstanding interpretative issues arising at the margins, the judicial enforcement of such rules is

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<sup>8</sup> What you have in virtue of having a right can be legally further complicated by legal tests reflecting institutional considerations of various kinds. For an overview of these tests in the context of US constitutional law see R. Fallon, *Implementing the Constitution* (HUP 2001), pp. 76-101.

<sup>9</sup> For a similar view see J. Raz, *The Morality of Freedom* (OUP 1986), pp. 193-216.

clearly not subject to proportionality analysis or any other meaningful engagement with moral considerations.

But at the heart of modern constitutional rights practice are rights provisions of a different kind. Modern constitutions establish abstract requirements such as a right to freedom of speech, association, and religion. These rights, it seems, cannot plausibly have the same structure as categorical, rule-like rights. Clearly there must be limitations on such rights. There is no right to falsely shout fire in a crowded cinema or to organize a spontaneous mass demonstration in the middle of Times Square during rush hour. How should these limits be determined?

Constitutional texts provide some illumination as to how those limits ought to be conceived. As a matter of textual architecture<sup>10</sup> it is helpful to distinguish between three different approaches to the limits of rights.

The first textual approach is to say nothing at all about limits. In the United States, the 1<sup>st</sup> Amendment, for example, simply states that “Congress shall make no laws ... abridging the freedom of speech ... [or] ... the free exercise of religion....”<sup>11</sup> Not surprisingly, it remains a unique feature of U.S. constitutional rights culture to insist on defining rights narrowly, so that there are as few exceptions as possible to them.<sup>12</sup>

The second approach is characteristic of Human Rights Treaties and Constitutions enacted in the period following WWII. These generally adopt a bifurcated approach. The first part of a provision defines the scope of the right. The second describes the limits of the right by defining the conditions under which an infringement can be justified. Article 10 of the European Convention of Human Rights, for example, states:

1. Everyone has the right to freedom of expression...

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<sup>10</sup> This formulation derives from F. Schauer, *supra*, note 7.

<sup>11</sup> 1<sup>st</sup> Amendment of U.S. Constitution.

<sup>12</sup> F. Schauer, *supra*, note 7. See also Charles Fried, *Right and Wrong* (HUP 1978).

2. The exercise of these freedoms...may be subject to such formalities, conditions, restrictions or penalties as prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety....

Similarly, Article 2, § I of the German Basic Law states:

“Every person has the right to the free development of their personality, to the extent they do not infringe on the rights of others or offend against the constitutional order or the rights of public morals.”

The first part defines the scope of the interests to be protected – here: all those interests that relate respectively to “freedom of expression” or “the free development of the personality”. The second part establishes the conditions under which infringements of these interests can be justified: “restrictions ... necessary in a democratic society in the interests of...” and “when the limitations serves to protect the rights of others, the constitutional order or public morals.” The first step of constitutional analysis typically consists in determining whether an act infringes the scope of a right. If it does, a *prima facie* violation of a right has occurred. The second step consists in determining whether that infringement can be justified under the limitations clause. Only if it cannot is there a *definitive* violation of the right.

Even though the term proportionality is not generally used in constitutional limitation clauses immediately after WWII, over time courts have practically uniformly interpreted these kinds of limitation clauses as requiring proportionality analysis. Besides the requirement of legality – any limitations suffered by the individual must be prescribed by law – the proportionality requirement lies at the heart of determining whether an infringement of the scope of a right is justified.

The third approach, typical of more recent rights codifications, often recognizes and embraces this development by substituting general default limitation clauses for rights-specific limitation clauses.<sup>13</sup>

Article II-112 of the recently negotiated European Charter of Fundamental Rights, for example, states:

“Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.”

A number of criticisms have been directed against an understanding of rights in which the real work in the deciding of concrete cases is done within the framework of proportionality analysis. Some have claimed that there are no rational standards available that allow for distinguishing between measures that are proportional from those that are not. Others have insisted that even if there are such standards, their specific content is likely to be subject to considerable disagreement, either abstractly or in application. To the extent that is the case, it is not clear why courts, rather than politically accountable actors, should have a comparative institutional advantage in assessing the proportionality of publicly endorsed policies. Still others have lamented that rights guarantees subjected to proportionality limitations are insufficiently specific to provide either citizens or legislatures with much guidance.

While these questions are important, I will ignore these here and focus on a different concern. I address the question whether a structure of rights that puts proportionality analysis front and center can adequately reflect the commitments central to Political Liberalism and the idea of a special priority for rights. Whatever additional function

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<sup>13</sup> The Canadian Charter prescribes in Section 1 that rights may be subject to “such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society.” Section 36 of the South African constitution states that rights may be limited by a “law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose.

rights may have, human and constitutional rights as they are understood in post WWII legal documents are first and foremost an attempt to legally institutionalize basic moral prerogatives ultimately grounded in the enlightenment tradition of Political Liberalism and its commitment to human dignity and autonomy.<sup>14</sup> Can such an attempt succeed, if the rights that are legally guaranteed provide little more protection than the proportionality test provides?

2. This requires further examination of how proportionality is connected to the idea of rights and how it actually operates as a test to assess the limits of rights. The connection between rights and proportionality analysis has been subjected to a rigorous analysis by Robert Alexy. Alexy's theory of constitutional rights was developed as a reconstructive account of the practice of the German constitutional court, but has widely been recognized as a theory that helps to shed light on human and constitutional rights practice more generally.<sup>15</sup>

According to Alexy, the abstract rights characteristically listed in constitutional catalogues are principles. Principles, as Alexy understands them, are optimization requirements. They require the realization of something to the greatest extent possible, given countervailing concerns. As optimization requirements, principles are structurally equivalent to values. Statements of value can be reformulated as statements of principle and vice-versa. We can say that privacy is a value or that privacy is a principle. Saying that something is a value does not yet say anything about the relative priority of that value over another value, either abstractly or in a specific context. Statements of principle, express an 'ideal ought.' Like statements of value, they are not yet "related to

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<sup>14</sup> This link is established specifically in the UN Declaration of Human Rights, G.A. Res. 217 (III 1948). Art. 1 states the basic premises of the enlightenment liberal tradition: "All Human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The Preamble of the European Convention of Human Rights in turn refers to the UN Declaration. The German Constitution in Art. 1 § 1: The dignity of human persons is inviolable. To respect and protect it is the duty of all state powers. §2: The German People therefore professes its allegiance to inviolable human rights as the basis of all human communities, peace and justice in the world.

<sup>15</sup> See for example, A.J. Menendez and E. Eriksen (eds), *Fundamental Rights Through Discourse* (Arena report No. 9, Oslo 2004).

possibilities of the factual and normative world.”<sup>16</sup> Whenever there is a conflict between a principle and countervailing concerns, the proportionality test provides the criteria to determine which concerns take precedence under the circumstances. In order to assess what individual principles require in particular circumstances, a proportionality test needs to be applied.<sup>17</sup> The proportionality test provides an analytical structure for assessing whether limits imposed on the realization of a principle in a particular context are justified.

Whereas the language of proportionality, necessity and balancing abounds in constitutional adjudication across jurisdictions, the specific structure of the proportionality test is not always clear.<sup>18</sup> According to Alexy, and indeed according to the German Constitutional Court, the proportionality test has four prongs. Two prongs - suitability and necessity - focus on empirical concerns. They express the requirement that principles be realized to the greatest possible extent relative to what is factually possible. The other two - legitimate ends and balancing – are normative and express the requirement that principles be realized to the greatest extent possible given countervailing normative concerns.

The link between constitutional rights as principles and proportionality thus conceived is *not* one of institutional convenience, but conceptual necessity. The fact that principles are optimization requirements *means* that their application requires proportionality analysis. The proportionality test is not merely a convenient pragmatic tool that helps provide a doctrinal structure for the purpose of legal analysis. If rights are optimization requirements, the proportionality structure provides an analytical framework to assess the necessary and sufficient conditions under which a right takes precedence over competing considerations as a matter of first-order political morality.

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<sup>16</sup> R. Alexy, *supra* note 7, at 58.

<sup>17</sup> *Id.*, at 66. See also the discussion of structural discretion at pp. 394-414.

<sup>18</sup> See J. Rivers discussing the case law of the European Convention of Human Rights and Canada in the Introduction, *id.*, at xxxii. For the U.S. see Alenikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L. J. pp. 943 (1987).

An example - drawn from the European Court of Human Rights (ECHR) illustrates how proportionality analysis operates in the adjudication of rights claims.

In *Lustig-Prean and Beckett v. United Kingdom*<sup>19</sup> the applicants complained that the investigations into their sexual orientation and their discharge from the Royal Navy on the sole ground that they were gay violated Article 8 of the European Convention of Human Rights (ECHR). Article 8, in so far as is relevant, reads as follows:

1. Everyone has the right to respect for his private...life...
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society...in the interest of national security,...for the prevention of disorder

Since the government had accepted that there had been interferences with the applicants' right to respect for their private life – a violation of a *prima facie* right had occurred - the only question was whether the interferences were justified or whether the interference amounted to a *definitive* violation of the right. Since the actions of the government were in compliance with domestic statutes and applicable European Community Law, and thus fulfilled the requirement of having been 'in accordance with the law,' the question was whether the law authorizing the government's actions qualified as 'necessary in a democratic society'. The Court had essentially interpreted that requirement as stipulating a proportionality test. The following is a reconstructed and summarized account of the court's reasoning.

The first question the Court addressed concerns the existence of a *legitimate aim*. This prong is relatively easy to satisfy in cases where the constitutional provision does not specifically restrict the kind of aims that count as legitimate for justifying an interference with a specific right. In this case the constitutional provision limits the kind of aims that count as legitimate for the purpose of justifying an infringement of privacy. Here the UK

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<sup>19</sup> LUSTIG-PREAN AND BECKETT v. THE UNITED KINGDOM - 31417/96;32377/96 [1999] ECHR 71 (27 September 1999).

offered the maintenance of morale, fighting power and operational effectiveness of the armed forces – a purpose clearly related to national security – as its justification to prohibit homosexuals from serving in its armed forces.

The next question then was whether disallowing homosexuals from serving in the armed forces is a *suitable means to further the legitimate policy goal*. This is an empirical question. A means is suitable if it actually furthers the declared policy goal of the government. In this case a government commissioned study had shown that integration problems would be posed to the military system if open homosexuals were to serve in the army. Even though the Court remained skeptical with regard to the severity of these problems, it accepted that there would be *some* integration problems if homosexuals were allowed to serve in the armed forces. Given this state of affairs there was no question that, as an empirical matter, these problems could be significantly mitigated, if not completely eliminated, by excluding homosexuals from the ranks of the armed forces.

A more difficult question was whether the prohibition of homosexuals serving in the armed forces is necessary. *A measure is necessary only if there is no less restrictive but equally effective measure available to achieve the intended policy goal*. This test is reflected in the requirement known to U.S. constitutional lawyers that a measure be narrowly tailored towards achieving substantial policy goals. In this case the issue was whether a code of conduct backed by disciplinary measures -- clearly a less intrusive measure -- could be regarded as equally effective. Ultimately the Court held that even though a code of conduct backed by disciplinary measures would go quite some way to address problems of integration, the government had plausible reasons to believe that it would not go so far as to qualify as an *equally* effective alternative to the blanket prohibition.

Finally, the court had to assess whether the measure was proportional in the narrow sense by applying the so-called balancing test, which involves applying what Alexy calls the

‘Law of Balancing’: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.”<sup>20</sup>

The decisive question in this case was whether on balance the increase in the morale, fighting force and operational effectiveness achieved by prohibiting homosexuals from serving in the armed forces justified the degree of interference in the applicant’s privacy, or whether it was instead disproportionate. On the one hand, the court invoked the seriousness of the infringement of the soldiers’ privacy, given that sexual orientation concerns the most intimate aspect of the individual’s private life. On the other hand, the degree of disruption to the armed forces absent such policies was predicted to be relatively minor. The Court pointed to the experiences in other European armies that had recently opened their armed forces to homosexuals, the successful cooperation of the UK army with allied NATO units which included homosexuals, the availability of codes of conduct and disciplinary measures to prevent inappropriate conduct, as well as the experience of successfully admitting women and racial minorities into the armed forces, which had caused only modest disruptions. On balance, the UK measures were held to be sufficiently disproportionate to fall outside the government’s margin of appreciation and the Court held the United Kingdom to have violated Article 8 of the ECHR.

This example illustrates two characteristic features of rights reasoning: First, a rights-holder does not have very much in virtue of having a right. More specifically, the fact that a rights holder has a *prima facie* right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified. But the fact that rights are not trumps in this sense does not mean that they provide no effective protection. The example demonstrates that in practice, even without such priority, rights can be formidable weapons. The second characteristic feature of rights reasoning is the flip side of the first. Since comparatively little is decided by acknowledging that a measure infringes a right, the focus of rights

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<sup>20</sup> R. Alexy, *supra* note 7, at 102. Alexy illustrates the Law of Balancing using indifference curves, a device used by economists as a means of representing a relation of substitution between interests. Such a device is useful to illustrate the analogy between the Law of Balancing and the law of diminishing marginal utility.

adjudication is generally on the reasons that justify the infringement. Furthermore, the four-prong structure of proportionality analysis provides little more than a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshaled to justify an infringement of a right are good reasons under the circumstances. Assessing the justification for rights infringements is, at least in the many cases where the constitution provides no specific further guidance, largely an exercise of general practical reasoning, without many of the constraining features that otherwise characterizes legal reasoning. Rights reasoning under this model, then, shares important structural features with rational policy assessment.<sup>21</sup>

3. Conceiving rights in this way also helps explain another widespread feature of contemporary human and constitutional rights practice that can only be briefly pointed to here. If all you have in virtue of having a right is a position whose strength in any particular context is determined by proportionality analysis, there are no obvious reasons for narrowly defining the scope of interests protected as a right. Shouldn't all acts by public authorities affecting individuals meet the proportionality requirement? Does the proportionality test not provide a general purpose test for ensuring that public institutions take seriously individuals and their interests and act only for good reasons? Not surprisingly, one of the corollary features of a proportionality-oriented human and constitutional rights practice is its remarkable scope. Interests protected as rights are not restricted to the classical catalogue of rights such as freedom of speech, association, religion and privacy narrowly conceived. Instead, with the spread of proportionality analysis, there is a tendency to include all kinds of liberty interests within the domain of interests that enjoy *prima facie* protection as a right. The European Court of Justice, for example, recognizes a right to freely pursue a profession as part of the common

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<sup>21</sup> That does not mean that the two are identical. There are at least four differences between substantive rights analysis and general policy assessments. First, courts are not faced with generating and evaluating competing policy proposals, but merely to assess whether the choices made by other institutional actors is justified. Second, they only assess the merit of these policy decisions in so far they affect the scope of a right. Third, specific constitutional rules concerning limits to constitutional rights or judicial precedence establishing rules that fix conditional relations of preference frequently exist. Fourth, proportionality analysis leaves space for deference to be accorded to other institutional actors. The ECHR refers to this as the 'margin of appreciation'.

constitutional heritage of Member States of the European Union, thus enabling it to subject a considerable amount of social and economic regulation to proportionality review. The European Court of Human Rights has adopted an expansive understanding of privacy guaranteed under Article 8 ECHR, and the German Constitutional Court regards any liberty interest whatsoever as enjoying prima facie protection as a right. In Germany the right to the ‘free development of the personality’ is interpreted as a general right to liberty understood as the right to do or not do whatever you please. It has been held by the Constitutional Court to include such mundane things as a right to ride horses through public woods<sup>22</sup>, feed pigeons in public squares<sup>23</sup>, smoke marihuana,<sup>24</sup> and bring a particular breed of dogs into the country.<sup>25</sup> In this way the language of human and constitutional rights is used to subject practically all acts of public authorities that affect the interests of individuals to proportionality review.

### **III. Political Liberalism and the Structures of Rights**

But does such a weak conception of rights do justice to the commitment of Political Liberalism? Does a liberal political morality, appropriately conceived, exhibit an optimization structure of the sort that the linkage between principles and proportionality analysis suggests? Here there seems to be cause for serious doubt. Liberal political rights are widely perceived as having special weight when competing with policy goals. The idea is expressed, for example, by Ronald Dworkins conception of rights as trumps and

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<sup>22</sup> BVerfGE 80,137 [BVerfGE refers to the official collection of the judgments of the Federal Constitutional Court. The first number refers to the Volume, the second refers to the page number on which the decision begins. A bracketed third number refers to the exact page on which a particular citation can be found). Particularly well-known cases are conventionally named either after the complainant or the core subject-matter addressed by the decision.]

<sup>23</sup> BVerfGE 59, 158.

<sup>24</sup> BVerfGE 90, 145.

<sup>25</sup> BVerfGE 110, 149 (Holding that when the legislator has reasonable grounds to assume that certain breeds of dogs pose a particular danger to people, a prohibition of the breeding and importation of certain breeds of dogs does not constitute a disproportional infringement of a general right to liberty, equality or the right to freely pursue your business to prohibit their breeding and importation. The Court insisted, however, that the legislator was under a duty to keep up with scientific findings relating to the issue. This concerns scientific insights relating to the extent to which the aggression of dogs is genetically determined or a feature of the conditions under which it is held as well as well as studies relating to the relative aggression of various species of dogs that may undermine the inclusion or exclusion of a particular breed of dog on the list of prohibited breeds. )

the corollary distinction between principles and policies,<sup>26</sup> or by what Rawls calls the ‘priority of the right over the good,’<sup>27</sup> or by Habermas’ description of rights as fire-walls.<sup>28</sup> Ultimately these ideas can be traced back to a theory, perhaps most fully developed by Immanuel Kant, grounded in the twin ideals of human dignity and autonomy viewed as side-constraints on the pursuit of the collective good. Yet nothing in the account of rights as principles prioritizes rights. Rights and policies compete on the same plane within the context of proportionality analysis.<sup>29</sup> The question is whether a conception of constitutional rights that does not capture the priority of rights is deficient in some way.

To address this issue, I distinguish three distinct ideas underlying the “priority of rights” thesis. The first concerns the relationship between justice and perfectionist ideals. Here the basic liberal idea is that rights protect individuals from strong paternalist impositions relating to how they should live their lives, in particular with regard to dominant religious practices. Questions relating to what it means to aspire to be the best person you can – to instantiate an example of human perfection — is not the proper subject matter of political decision-making and legal coercion. This exemplifies well the idea of the priority of the right over the good. The second idea concerns taking the individual seriously, and is anti-collectivistic. Here the basic idea is that rights are believed to enjoy priority over the ‘general interest’ or the ‘collective good’ in some way. The third idea concerns the anti-consequentialist or deontological nature of rights as side-constraints. Here the claim is that agent-neutral cost-benefit analysis is unable to take into account strong prohibitions on using persons as a means to achieve some desirable end. Using people as a means – sacrificing them for some greater good – is subject to significantly stronger constraints. Each of these ideas is internally complex and subject to considerable dispute. My purpose here is not primarily to uncover their complexity, or engage in these disputes. Even though it will be impossible to avoid contentious territory, my core purpose here is to focus on the implications of each of these ideas for the structure of rights.

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<sup>26</sup> R. Dworkin, *Taking Rights Seriously* (HUP 1977) and *A Matter of Principle* (HUP 1985).

<sup>27</sup> J. Rawls, *Political Liberalism* (Col. Univ. Press 1993), 173.

<sup>28</sup> J. Habermas, *Between Facts and Norms*, (HUP 1996), 254.

<sup>29</sup> In the U.S. Richard Fallon, *Individual Rights and the Powers of Government*, 27 GA. L. Rev. 343 (1993) has argued that rights and consequential interests are part of the same decisional calculus.

## 1. Antiperfectionism and “Rights as Trumps”: Excluded Reasons

a) An integral part of the of liberal justice is some form of a prohibition on imposing upon the individual a particular conception of the good life through the coercive means of the law. It is not within the jurisdiction of public authorities to prescribe what the ultimate orientations and commitments of an individual should be. In the tradition of Political Liberalism this idea finds its expression, for example, in Article 4 of the Declaration of Human and Citizens Rights of 1789, which prescribes: “Liberty consists in doing whatever does not harm another: In this way the exercise of natural rights of each person has no limits except for those limitations, that assure the exercise of the same rights by other members of society.” In a similar vein Kant writes: “Freedom ... insofar as it can coexist with the freedom of any other member of society under a general law is a right that every individual has.”<sup>30</sup> John Stuart Mill’s ‘harm’ principle expresses a similar idea. These formulations all insist that the class of reasons that can legitimately be used to limit individual liberty are few. It is more limited than the class of reasons that are of interest to someone trying to seek orientation and meaning in her life. One way to interpret this idea is to insist that reasons relating to the realization of demanding perfectionist ideals of any kind, may not be used to justify infringements of individual liberty. Such reasons are off limits for the purpose of justifying limitations of individual liberty.

To illustrate the point, imagine a public authority prescribes that the school day in public schools should begin with a common prayer, such as the Apostolic Profession of Faith. Legislative history and public debates reveal that there are three kinds of reasons invoked in support of this legislation. For some, the purpose of the legislation is to further a general commitment to a Christian way of life and help craft souls in the community that are worthy of salvation. Others invoke the importance of religion for themselves and their children and stress the importance of connecting something as basic an experience as public school education with their religious life in order to sustain and nourish it. Still

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<sup>30</sup> Kant, *Metaphysics of Morals*, 63.

others make claims about the instrumental usefulness of religion for general policy purposes, and point to the connection between religion in schools and low crime rates, low teenage pregnancy rates, and lower drop-out rates. The law passes after vigorous debate and protest by the minority of agnostics, atheists, Jews and Muslims.

How would a constitutional court called upon to assess whether an individual's right to religious freedom was violated rule? There is no doubt that the right to religious freedom is infringed by such a prayer requirement. The question is whether it can be justified. It can be expected that no court in a liberal constitutional democracy would address the theological and philosophical questions relating to whether compulsory school prayers of this kind are in fact suitable and necessary to help craft souls worthy of salvation. Nor would courts assess, whether, all things considered, the purpose of crafting souls worthy of salvation justified the significant infringement of an individual's freedom of religion. Instead, there is little doubt that any court in a liberal constitutional democracy would insist that any reasons that depend on the premise that a Christian way of life is the right way of life are simply irrelevant to the issue. Furthering a Christian way of life – or, for that matter, furthering any other perfectionist commitment - would not count as a legitimate government purpose. In US constitutional practice the idea that that the purpose of a government action has to be secular<sup>31</sup> captures much of the nonperfectionist commitment of Political Liberalism, though the idea of 'secular purposes' would have to be interpreted to also exclude secular perfectionist ideals.

But of course there are other potentially legitimate purposes in play. One possible justification for school prayer could be that the equal right to freely exercise religion requires respect for the majority's parental interest in having their children connect their educational experience with their religious commitments in order to sustain and nourish it. Here the central question would be whether such an exercise of religious liberty by the majority imposes a disproportionate burden on those parents and children who do not share that belief. Framed in this way, the issue becomes one of delimitating respective

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<sup>31</sup> This is the first prong of the so-called Lemon test, see *Lemon v. Kurtzback*, 403 U.S. 602, 612-613 (1971).

spheres of liberty between equal right-bearers. Public authorities have to be neutral in the sense that they are required to respect and take equal account of the competing interests in play and strike an appropriate balance between them. Here the proportionality framework and the idea of balancing in particular clearly provides a helpful structure for assessing the competing claims.

What this means for the resolution of the issue would, of course, depend on the particular features of the social world to which it applies. To the extent that no opt-outs are provided for those who do not share a belief, it is difficult to imagine a context in which compulsory common prayer would not impose a disproportionate burden on the minority. The issue becomes more complex once real opt-outs are provided and a general background culture of tolerance and inclusion minimizes the pressure on the non-believing minority to conform. Furthermore, arguments within the balancing exercise relating to beneficial secondary effects would also come into play. On one side, these could include, for example, lower drop-out and teen pregnancy rates, if duly supported by empirical evidence. On the other side of the equation, general policy concerns about keeping life in public institutions free from religious entanglement may have significant weight in a strongly pluralistic and deeply divided society.<sup>32</sup> Clearly, then, much of how this issue would be resolved would depend on contingent features of the social world, which would have to be assessed within the proportionality framework.<sup>33</sup> But even within proportionality analysis, the truth or falsity of religious beliefs and the desirability of a life that derives an ultimate purpose and meaning from religious revelation would not provide reasons that are part of the balancing equation.

Reasons related to the furtherance of specific perfectionist ideals, then, are excluded both at the first prong of the proportionality test, since they are not a legitimate purpose that

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<sup>32</sup> In the U.S. this requirement is the third prong of the Lemon test, see *id.*

<sup>33</sup> It follows that even such basic questions as whether a constitution should erect a wall between religion and the state or whether it should allow for the establishment of an official church is not a question that principles of Political Liberalism provide an *a priori* answer to. Instead an answer to that question depends on contingent features of the political community to which the constitutional rules are to apply. This explains why in the US the Establishment Clause has long been interpreted to erect a wall between churches and the state, whereas in Scandinavian countries there are established state churches, notwithstanding the guarantee to freedom of religion.

can justify infringements of individual liberty, and at the level of balancing, since furthering a particular perfectionist ideal is not a reason to weigh when assessing the proportionality of a measure furthering some other legitimate purpose. To the extent that Political Liberalism is understood as incorporating an antiperfectionist commitment, the idea of excluded reasons can help operationalize such a commitment within the context of the proportionality test.

b) The idea of excluded reasons as a structural feature of human and constitutional rights analysis has a central role to play in human and constitutional rights analysis beyond the operationalization of antiperfectionist commitments.<sup>34</sup> The idea of excluded reasons is, for example, also central to the right of freedom of speech and freedom of association. Generally, a law may not prohibit demonstrations or speech in favor of a wrongheaded cause defended by bad arguments. Reasons that discriminate between views on the basis of plausibility or correctness, are excluded as reasons that capable of limiting the freedom of speech or association. The justification for infringements of speech has to be viewpoint neutral. Proponents of a flat tax may be deeply mistaken that their reform proposals would further justice. The right view may well be that relatively aggressive progressive taxation is a considerably more just way to raise revenue, all other things being equal. Yet whether or not the views of flat tax proponents are right or wrong is completely irrelevant to the question of whether or not they should be able to articulate and defend them. Freedom of speech is not balanced against the harm done by proposing false ideas.

Whether or not there are limits to the idea of viewpoint neutrality is subject to disagreement both within and across liberal constitutional democracies. Proponents of militant democracy,<sup>35</sup> for example, defend the idea that viewpoint neutrality has its limits when speech questions the very foundations of liberal constitutional democracy. Fascists, communists, theocrats, advocates of presidential dictatorship, those advocating terrorism

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<sup>34</sup> For the relevance of the idea of excluded reasons in U.S. constitutional law see R. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 *Hastings Law Journal* (1993/94). See also R. Pildes, *The Structural Conception of Rights and Judicial Balancing*, 6 *Review of Constitutional Studies* (2002), 179.

<sup>35</sup> For a discussion of militant democracy in a variety of institutional contexts, see A. Sajo (ed), *Militant Democracy*, (Eleven 2004).

as a means of political change, may have their speech limited in some liberal constitutional democracies. Clearly, then, the domain over which a class of reasons should be excluded is to some extent a matter of constitutional debate. The resolution of the question of whether and where these limits should be drawn depends on a host of complex empirical and moral assessments.<sup>36</sup> But just as clearly the idea of viewpoint neutrality, and therefore the idea of excluded reasons, must have some purchase in the context of a right to freedom of speech and association.

c) Furthermore, even in the case of homosexuals in the military, as discussed by the ECHR, the idea of excluded reasons can plausibly help throw light on what many would claim is the central feature of that decision. The fact that the Court analyzed in some depth whether the prohibition of homosexuals in the military was justified by reference to the legitimate purpose of furthering morale, fighting power and operational effectiveness of the armed forces should not cover up the fact that justifications more directly linked to anti-homosexual sentiments in the army were *not* considered as reasons justifying the prohibition. The reasoning of the Court clearly suggests, for example, that arguments relating to homophobic traditions (we have a long tradition of not tolerating deviant sexual orientation in the military!), conventions (this is the way we do things here!) or preferences (our soldiers generally dislike homos!) are irrelevant to the justification of excluding homosexuals from the military.<sup>37</sup> They are, therefore, not discussed. Furthermore, it is not unlikely that exactly because the problems relating to ‘operational effectiveness’ etc. were the side-effects of illiberal homophobic sentiments, that the Strasbourg Court felt emboldened enough to claim that a question pertaining to the make-up of the national military, which involved complex empirical assessments, did not fall under a state’s margin of appreciation. Any justification relating to consequences of the existence of illiberal homophobic sentiments, the court could have said, should presumptively not affect the rights of homosexuals and will receive extensive scrutiny. The idea of excluded reasons, then, helps throw light on some core structural features of

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<sup>36</sup> An interesting second order question is whether the proportionality framework provides an adequate structure for discussing the domain over which a class of reasons ought to be excluded.

<sup>37</sup> For a similar point relating to ‘other-regarding’ interests more generally, see R. Dworkin, *Liberty and Liberalism*, Taking Rights Seriously, pp. 263 (1978).

liberal constitutional practice, features that the focus on proportionality alone tend to obscure.

d) But acknowledging that the idea of excluded reasons is central to an understanding of rights in liberal constitutional democracies does not mean the idea of excluded reasons can serve as a *substitute* for the idea of proportionality. Instead, proportionality and excluded reasons are complementary structural features of rights in liberal constitutional democracies. To illustrate the point: It is possible to understand the claim that rights are trumps as a claim that the idea of excluded reasons, rather than proportionality, is the defining feature of rights. Under such an approach, the scope of a right is defined by the reasons it excludes. The right to freedom of speech is the absolute right not to be constrained in one's speech on grounds relating to the content of the speech act. The right to privacy is an absolute right not to be subjected to limitations justified by reference to other-regarding preferences. The free exercise of religion is an absolute right not to be subjected to measures that have the purpose of furthering a particular religion. Rights conceived in this way leave no space for proportionality analysis.<sup>38</sup>

However, such a conception of rights would suffer from serious deficiencies. Those deficiencies are all related to the fact that rights conceived in this way would not protect against a core concern that rights are generally believed to protect against. Human and constitutional rights not only protect against public authorities acting on reasons that are inappropriate. At the very least they also protect against measures that are enacted for relevant reasons, when those reasons are massively disproportionate in relationship to the seriousness of an infringement of individual liberty. To illustrate the point: A is sentenced to several years of prison without parole for having run a traffic light. Assume that there was no traffic and no one was endangered. The reason for prosecuting and sentencing A are related to general and individual deterrence. A, as well as potential other offenders, should know that running a traffic light may have serious consequences. Ultimately the

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<sup>38</sup> There are some suggestions in the writing of R. Dworkin of such an approach. See for example R. Dworkin, *Is there a Right to Pornography*, in: *A Matter of Principle* (1985), pp. 335 and *Freedom of Speech*, in: *Freedom's Laws* (1996). See also R. Dworkin, *What Rights Do We Have?*, *Taking Rights Seriously* (1978), 271.

criminalization of such traffic offenses has the purpose to increase road safety. Clearly the government is acting for relevant reasons, when it decides to sanction traffic offenders by locking them away for a number of years. Yet it is equally clear that the nature of the infringement of a violator's liberty does not stand in a reasonable relationship to the relative increase of road safety achieved by the imposition of such draconian sanctions. A conception of constitutional and human rights that does not also protect citizens against these kinds of manifestly disproportional measures is deficient.

It is not surprising, therefore, that in practice proportionality analysis complements the idea of excluded reasons. In U.S. constitutional practice, for example, it may be true that the idea of viewpoint neutrality has a central role to play in the area of free speech. But even when the government acts for reasons that are viewpoint neutral, for example by establishing time, place and manner restrictions to ensure public order, these restrictions have to meet a version of the proportionality requirement.<sup>39</sup> Furthermore, in important areas of the law, such as the 8<sup>th</sup> amendment's prohibition of cruel and unusual punishment, the 6<sup>th</sup> Amendment's prohibition of unreasonable searches and seizures, the Supreme Court's analysis is strongly informed by proportionality related considerations, rather than the idea of excluded reasons. The idea of excluded reasons complements, but does not replace, proportionality as central to the understanding of constitutional and human rights.

## **2. Anticollectivism and “Rights as Shields”: Reasons of a Special Strength**

a) A second way rights are believed to enjoy priority is in relationship to collective goods or “the general interest”. Here the priority is clearly not of a categorical nature. If a collective good (public safety) is invoked as a justification for an infringement of a liberty interest (the over-the-counter sale and purchase of land-to-air missiles is prohibited), it is clear that under any plausible account of rights the liberty interest will have to yield at some point. Here the priority of rights can only mean that individual

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<sup>39</sup> In *U.S. v. O'Brien* the U.S. first established the canonical formula that such restrictions “must further an important or substantial government interest and must be no greater than is essential for the furtherance of that interest.”, 391 U.S. 367 (1968).

rights should not be treated lightly, but be given the weight they deserve a general conception of political justice grounded in the basic ideas of dignity and autonomy. This is an understanding of the priority of rights that proportionality analysis can easily incorporate. The application of the ‘balancing’ test is guided by the idea that the greater the degree of infringement, the greater the importance of the reasons supporting the infringement must be. Such a test provides a formal structure for the reasoned assessment of the competing concerns at stake. Whether or not a particular infringement is serious, requires an understanding of what it is about the particular interest at stake that matters morally, and what is lost when it is infringed. The same is true for assessing the importance of reasons that support a contested measure. The metaphor of ‘balancing’ should not obscure the fact that the last prong of the proportionality test will in many cases require the decision-maker to engage in theoretically informed practical reasoning, and not just in intuition-based classificatory labeling. At the level of evaluating the relative importance of the general interest in relation to the liberty interest at stake, the weights can be assigned and priorities established as required by the correct substantive theory of justice. The last prong of the proportionality test then provides a space for the reasoned incorporation of an understanding of liberties that expresses whatever priority over collective goods is substantively justified. The fact that proportionality analysis does not prioritize individual rights over collective goods on the structural level, then, does not mean that such a priority cannot be given adequate expression within that structure.

b) Furthermore, it is not clear what a more attractive competing structural account — one which better captures the priority of individual rights over collective interests — would look like. There is a competing structural account of rights according to which what you have in virtue of having a right is less than a trump, but more than what is required by the proportionality test. According to this intermediate conception of rights, only reasons that have a special kind of force are sufficient to override the position protected by the right.<sup>40</sup> To illustrate the point, and provide some context, compare the following provisions of the German and U.S. constitutions respectively.

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<sup>40</sup> See F. Schauer, A Comment on the Structure of Rights, 27 *Georgia Law Review* (1993), pp. 415-434. See also F. Schauer, *Rights as Rules*, 5 *Law & Philosophy* (1987), 115 and Schauer, *Exceptions*, 58 *University of Chicago Law Review* (1991).

Article 2, § 1 of Basic Law states:

“Every person has the right to the free development of their personality, to the extent that they do not infringe on the rights of others or offend against the constitutional order or public morals.”

The Fifth and Fourteenth Amendments of the U.S. Constitution state:

“No person...shall be deprived of liberty...without due process of law.”

When confronted with texts of this kind two questions present themselves. The first focuses on the scope of the right. How narrowly should it be conceived? What is meant by the free development of personality? What is meant by liberty? The second focuses on the broad or narrow understanding of the constitutional limitations of such a right. The texts mention ‘the rights of others, offenses against the constitutional order or public morals’ and ‘due process of law’ respectively. What does this mean for the purposes of articulating a judicially administrable test for acts by public authorities subject to constitutional litigation?

There are two kinds of answers that courts have given to these questions. The first has been to interpret broadly both the scope of rights and the scope of limitations permitted on that right. The German Federal Constitutional Court (FCC), for example, was quick to dismiss narrow conceptions of the “free development of personality” that limited the scope of the right to “expressions of true human nature as understood in western culture,” as had been suggested by influential commentaries.<sup>41</sup> Instead, the FCC opted for an interpretation under which the right guaranteeing the free development of the personality should be read as guaranteeing general freedom of action understood as the right to do or not do as one pleases.<sup>42</sup> This means that the scope of a general right to liberty

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<sup>41</sup> For further references see R. Alexy, *supra* note 7, at 224 fn.5.

<sup>42</sup> BVerfGE 6, 32 (Elfes).

encompasses such mundane things as the prima facie right to ride horses in public woods<sup>43</sup> and feed pigeons in public squares.<sup>44</sup> If public authorities prohibit such actions they would infringe the general right to liberty. As a corollary to the wide scope of the right, the court has opted for a broad interpretation of the limits of the right. Any infringement of the right is justified if it follows appropriate legal procedures and is not disproportionate. The three requirements stipulated by Article 2, § 1 (rights of others, constitutional order, public morals) in the jurisprudence of the court translate into the requirements of legality and proportionality. Here again it is important to point out that even though the substantive limit of proportionality is broad, it does have bite. It is not adequately compared to the analysis - or as many would claim, lack of it - that generally characterizes the application of the “rational basis” test in cases involving non-fundamental liberty interests.<sup>45</sup>

Another approach is to define narrowly both the scope and the permissible limitations of the rights. This has been the approach of the U.S. Supreme Court, which insists that only particularly qualified liberty interests — liberty interests that are deemed to be sufficiently fundamental — enjoy meaningful protection under the Due Process Clause. When an interest is deemed to be sufficiently fundamental, the limitations that apply are narrow too. They are narrow in the sense that the requirements that must be fulfilled to infringe a protected interest are demanding. Only “compelling interests” are sufficient to justify infringements of the right.

It is not obvious how to understand the “compelling interest” test. On one interpretation, the test translates into nothing more than a proportionality requirement. Given the initial determination of the importance of the interests at stake – it must be ‘fundamental’ to qualify as a right - the “compelling interest” requirement can be understood as merely pointing to the fact that the only reasons that are proportional under the circumstances are reasons so weighty to be appropriately classified as ‘compelling’. The conception of

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<sup>43</sup> BVerfGE 39, 1, BVerfGE 88, 203.

<sup>44</sup> BVerfGE 54, 143 (147)

<sup>45</sup> See L. Tribe, *American Constitutional law* (3<sup>rd</sup> ed. Vol. 1, Foundation press 2000), 1362.

rights as shields would amount to little more than the application of a conception of weak proportionality-limited rights to interests deemed sufficiently fundamental.<sup>46</sup>

A different interpretation of the ‘compelling interest’ test is structurally more interesting, but problematic from the point of view of substantive political justice. The test could suggest that a right really does provide protection against infringement beyond what proportionality requires. Under this interpretation, the “compelling interest” test loads the dice in favor of the protected right and raises the bar for justifying infringements when compared to the requirements of proportionality. A measure may be proportional, but not meet the “compelling interest” test. Rights could be thought of as exhibiting a rule-like structure. They would only be overridden and inapplicable in cases where it is immediately apparent that countervailing concerns have significantly greater importance than the protected interest. Such a conception would clearly be distinct from rights as principles. It is this conception that, following Fred Schauer, I will refer to as ‘rights as shields’.<sup>47</sup>

The question is whether such a structure for determining the limits of rights is morally attractive. If proportionality analysis taken seriously means that all relevant considerations must be taken into account and attributed the weight they deserve, then what could justify protecting an interest beyond what proportionality requires? If constitutional rights overprotect certain interests relative to what political justice requires, then there can be no justification for such a conception of rights on the level of political justice. As a matter of political morality, then, neither a conception of ‘rights as trumps’ or ‘a conception of ‘rights as shields’ provide a more attractive account of the structure of a right than ‘rights as principles’.

c) But there is still a way to make sense of the ‘rights as shields’ conception. Even if ‘rights as shields’ is not a plausible conception of rights for the purposes of a first-order

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<sup>46</sup> This seems to be Fallons understanding of the test, *supra* note 8.

<sup>47</sup> See F. Schauer, A Comment on the Structure of Rights, 27 Georgia Law Review (1993), pp. 415-434. See als F. Schauer, Rights as Rules, 5 Law & Philosophy (1987), 115 and Schauer, Exceptions, 58 University of Chicago Law Review (1991).

account of moral rights, it could still be the best account of judicially enforced legal rights. It is by no means obvious that the best structural understanding of legal rights simply mirrors the structure of rights as requirements of political morality. *Institutional considerations* may suggest that requirements of political morality are likely to be realized to a greater extent, all things considered, if constitutional rights are conceived as exhibiting a rule-like structure as described by a conception of rights as shields.<sup>48</sup> Just as the archer aims at a point above the target, it may well be the case that a court ought to design doctrines so as to over enforce some rights (and perhaps under enforce others). Constitutional texts and doctrinal structures are not merely embodiments of what constitutional legislators or courts deem political morality to require. To some extent they also reflect institutional considerations relating, for example, to biases of courts and other institutions or the guidance function of courts.

Some version of a ‘compelling interest’ test may, for example, helpfully complement the idea of excluded reasons in some instances: There is a temptation to undermine the idea of excluded reasons by exaggerating secondary effects of practices enjoying *prima facie* strong protection. The case involving homosexuals in the military may again help illustrate the point: Even though homophobic traditions, conventions and preferences are excluded as valid reasons justifying disadvantaging homosexuals, secondary effects relating to operational effectiveness emerge as reasons that, at least *prima facie*, provide respectable support for the legal entrenchment of anti-homosexual measures. In the real world it is often the case that reasons relating to secondary effects of protected activities serve as an intellectually respectable cover for attitudes that in fact deny the rights-holder his rightful position. That does not mean that reasons relating to secondary effects should not be regarded as relevant. They obviously are relevant. But in order for them to succeed, the requirement that they be of a special strength could serve to focus the attention of the court on whether these empirical claims are in fact true. The requirement for these reasons to be of a special strength helps counteract the epistemic biases in favor of finding such effects with regard to suspect activities of unpopular groups.

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<sup>48</sup> See F. Schauer, A Comment on the Structure of Rights, *supra* note 47.

Furthermore in many situations any real secondary effects produced by such protected activities are likely to be temporary and tend to decrease, or even disappear altogether, once the wider public has become accustomed to them. As the ECHR rightly pointed out, any disruption relating to the integration into the military of traditionally excluded persons based on race, ethnic identity or gender has tended to decrease over time. Similarly an open engagement with even the most atrocious political ideology over time may well function to lessen, rather than increase, its attractiveness. If these kinds of dynamics over time are characteristic of secondary effects, and if it is true that courts have the tendency to underestimate such dynamics, this would provide another reason for insisting on a ‘compelling interest’ test rather than proportionality analysis. Raising the bar by requiring reasons related to secondary effects to be ‘compelling,’ rather than just proportional, may well be a helpful doctrinal tool to institutionally ensure that rights are adequately protected.

The idea of ‘rights as shields’, then, points to a structure of rights reasoning – the requirements of reasons of a special strength - that may well deserve its place as part of a structurally complex institutional practice of rights adjudication. But to the extent that such a structure is appropriate in some contexts, it is appropriate not because it reflects first-order requirements of political morality, but because it reflects second-order concerns relating to institutional design.

### **3. Anticonsequentialism and Rights as Deontological Constraints: On the relevance of Means-Ends Relationships**

a) A further reason why the proportionality structure is inadequate is that it imposes a structure on rights reasoning that is consequentialist. As a consequentialist structure, it is unable to reflect the deontological nature of at least some rights. There is considerable disagreement over the nature of deontological constraints. But the basic idea is that there are restrictions connected to the idea of the inviolability of persons that impose constraints on actors seeking to bring about desirable consequences. Saving three lives

does not necessarily justify sacrificing one, and significant gains for many can't necessarily be justified by losses imposed on the few. At least one of the functions of human and constitutional rights is to reflect these deontological constraints. Yet the proportionality structure is unable to do so.

In order to gain a better understanding of the relationship between proportionality analysis and deontological constraints, the Trolley Problem may provide a helpful, if not particularly original<sup>49</sup>, point of entry. Consider the following two scenarios:

1. A runaway trolley will kill five people if a bystander does not divert it onto another track, where, he foresees, it will kill one person.
2. A runaway trolley will kill five people if a bystander does not push a fat man standing close by on to the track to stop the trolley. The fat man will foreseeable die in the process.

In both cases the intervention by the bystander foreseeable leads to the death of one person in order to save five. Yet it is a widely shared view that in the first case the bystander may divert the trolley, thereby killing one person (let's call him 'V' for victim), whereas in the second case he may not. There is something puzzling about this result. Why isn't it the case that what really matters morally is that in both scenarios V dies and five are saved? Would it not be more consistent to either allow the bystander to save the five in both cases if you're a consequentialist, or insist that the life of V cannot be traded off against another life, whatever the circumstances, if you believe in the existence of deontological constraints? There is considerable debate on what justifies making a distinction between these cases. The following can do no more than briefly present one central idea, without doing justice to the various facets and permutations of the debate.

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<sup>49</sup> The problem was first introduced by Phillipa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, in: *Virtues and Vices* (1978). For further illuminating discussions of the issue see Judith Jarvis Thompson, *The Trolley Problem*, 94 *Yale Law Journal*, 1395-1415 (1985) and F.M. Kamm, *Morality, Mortality*, Vol. II, pp. 143-171 (OUP 1996). See also T. Nagel, *The View from Nowhere* (1986).

A significant difference between the cases is that in the first the death of the one person is merely a contingent side-effect of the bystander's course of action. There is no doubt that it would be permissible for the bystander to divert the trolley if V did not exist. In the second example the fat man is being *used as a means* to bring about the end of saving the five. His being pushed and the trolley ramming into his body is a necessary condition for the success of saving the five. Without V's involvement there would be no rescue action to describe.

The reason why this difference is morally relevant lies in the different strength of the claims that V can make in these cases. Here the distinction between V as a *disabler* and as an *enabler* is central.<sup>50</sup> The claim of a disabler is considerably weaker than the claim of the enabler. In the first scenario V makes a claim that his being harmed is a reason to disable the otherwise permitted and desirable rescue action of the bystander. In the second scenario V makes a claim that he should not be used as a means to enable the rescue of others. Only the claims of the disabler are susceptible to proportionality analysis. The claims of the enabler impose significantly stronger restrictions.<sup>51</sup> No one can be forced to be a hero and sacrifice their life for others.

This is not the place to probe more deeply into the nature of deontological constraints. But if an account along these lines can make sense of the Trolley problem and deontological constraints more generally, there are constraints that cannot be captured by consequentialist accounts of morality. At the same time it has become clear that consequentialist reasoning does have a central role to play, even in situations where the life of individuals or similarly fundamental concerns are in play. The relevant question is not so much whether there are deontological constraints, but to identify the situations in which they are in play and distinguish them from situations in which they are not.

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<sup>50</sup> Here I follow A. Walen, *Doing, Allowing and Disabling: Some Principles Governing Deontological restrictions*, 80 *Philosophical Studies*, 183-214 (1995).

<sup>51</sup> It is disputed whether these kinds of deontological constraints are absolute or not. Can you push the Fat Man to save 1000 people, a million, the world? According to Kant, even the existence of the world would not provide a good reason to overcome deontological restrictions (*fiat iustitia pereat mundus!*). According to Nozick deontological constraints are overcome in exceptional circumstances to prevent "Catastrophic moral horrors", R. Nozick, *Anarchy, State and Utopia*, p. 29 (1974).

b) With regard to the structure of human and constitutional rights the question remains whether situations involving deontological constraints are sufficiently ubiquitous to be of relevance for an understanding of human and constitutional rights. It may well be that the proportionality structure is inadequate as a universal approach for the assessment of moral issues. But in the world of human and constitutional rights adjudication it is not just that Trolley problems rarely arise. It also seems to be evident that the daily work of courts rarely concerns moral conflicts involving deontological restrictions. It does not follow, however, that there are no constellations in which deontological constraints have a central role to play.<sup>52</sup> The following provides a sampling of some topical legal and political issues, in which deontological constraints are implicated. To illustrate how pervasive questions relating to deontological constraints are, all examples are narrowly drawn from topical debates loosely related to contemporary preoccupations with terrorism and responses to it.

(1) The first example concerns a law enacted in the wake of September 11th currently before the German Constitutional Court. The Air Security Act<sup>53</sup> allows for a passenger plane to be shot down by the German Airforce if this is the only way to avert a clear and present danger to human life and it is not disproportionate.<sup>54</sup> In part<sup>55</sup> the challenge to the law is grounded in the claim that the authorization to shoot down a plane necessarily constitutes a violation of the passengers' right to life. The argument is that even under circumstances in which shooting down the plane is the only suitable and necessary means to save a large number of persons, and even if the number of persons saved is considerably larger than the number of persons in the plane, such an action would still be unconstitutional. Saving many lives does not justify the killing of others. Here there are stronger constraints in play.<sup>56</sup>

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<sup>52</sup> For such a claim see T. Nagel, *Equality and Impartiality*, 141 (1991)

<sup>53</sup> Gesetz zur Neureglung von Luftsicherheitsaufgaben of 11th January 2005, BGBl. 2005I Nr.3 pp. 77 (hereinafter: Air Security Act or ASE)

<sup>54</sup> See §14 Sect. 2 and 3 ASE.

<sup>55</sup> In part it is grounded in constitutional concerns about the German military assuming police tasks on German territory generally within the responsibility of the states and their police force. This implicates the limits of Art. 35 Basic Law.

<sup>56</sup> See for example Wolfram Höfling and Steffan Augsberg, *Luftsicherheit, Grundrechtsregime und Ausnahmezustand*, 22 *Juristenzeitung*, 1080 (1081) (2005).

The case nicely exemplifies how arguments relating to deontological constraints can be misunderstood. It is true that the government may not require that a few be sacrificed for the many, if this implies using those few as a means, as enablers. But the claims made by the innocent passengers in the hijacked plane are not the strong claims of enablers. Theirs are the weaker claims of disablers. It seems clear that a hijacked plane about to be used as a weapon or as a platform from which a weapon is launched could be shot down if there was no one or only the hijackers on board. The claim by the passengers is that the fact that they are on board should disable the government from doing what otherwise it would be permitted to do. Claims of disablers, however, are subject to proportionality analysis and nothing stronger. A law that provides adequate procedural safeguards to rule out mistakes and ensures that authorization will only occur when a commensurate number of lives are saved does not violate the right to life.<sup>57</sup>

(2) Questions relating to deontological restrictions are also in play as nations struggle to agree on an appropriate definition of terrorism. The disputes on the appropriate definition are in part a dispute over whether the prohibition of terrorism is supported by strong deontological reasons or merely general policy concerns. Definitions informed exclusively by consequentialist considerations tend to focus on the illegality of a violent act and its harm to the state and its institutions.<sup>58</sup> Its core concerns are policy concerns related to upholding public order and security. A consequentialist justification of this kind is insufficient to plausibly support a *categorical* prohibition of terrorism. What if the public order is corrupt and the terrorists are freedom fighters seeking to establish a just order and carefully selecting their targets to ensure their actions are both effective and do

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<sup>57</sup> There is a further complication to the case. But it concerns the question whether the plane could be shot down even if the numbers saved by that act would be smaller than the number of people killed. The issue arises in cases where the airplane is used as a weapon to crash into buildings or nuclear power plants or similar scenarios. In these cases *those killed by being shot down would also have died if events had taken their course and the plane had flown into a building*. The question arises whether under those circumstances the number of lives lost by shooting down a plane whose passengers would have died anyway should count for zero, thus making it proportional to shoot down the plane even if only handful of people on the ground are threatened.

<sup>58</sup> The League of Nations Convention, drafted in 1937 but never coming into existence, for example defined Terrorism as “all criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.”

not cause disproportionate harm? Of course in the real world there is likely to be disagreement over whether the old order is really that corrupt and whether the ‘just cause’ is just another brutal ideology. There also may be disagreement about empirical questions relating to the effectiveness of terrorist methods and the balancing of the advantages of having some kind of public order versus the real possibility of a civil war. But in principle here, the saying that one man’s terrorist is another man’s freedom fighter, applies: Whether an act of violence against the state is justified depends on an assessment of the purpose it serves and the extent to which terrorism is an effective, necessary and proportionate measure of furthering it. This is one of the reasons why peoples who have known suppression may well believe that they are right to venerate the heroes of their respective liberation movement, even if their methods included terrorism. It is also the reason why categorical prohibitions of terrorism that do not make exceptions relating to liberation struggles are difficult to get agreement on.

But there is a very different, and in my view more convincing understanding of terrorism. According to this view, the central characteristic of terrorist acts is the particular nature of the means/ends relationship.<sup>59</sup> Such an approach is reflected in the ‘draft outcome document’ of the UN World Summit held in September 2005. It included the following statement:

“(W)e declare that any action intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to carry out or abstain from any act cannot be justified on any grounds and constitutes terrorism.”<sup>60</sup>

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<sup>59</sup> For a focus on the means/end relationship in the discussion of terrorism see J. Waldron, *Terrorism and the Uses of Terror*, 8 *Journal of Ethics*, 5-35 (2004).

<sup>60</sup> See A/59/HLP/CRP.1/Rev.2 of Aug. 5 2005, at Recital 65. The U.S. pushed aggressively, but, it seems, ultimately unsuccessfully for such a definition. This definition is not included in the final Document adopted by the General Assembly, see A/60/L.1 of 20 Sept. 2005, Recitals 81-92 (discussing terrorism issues).

The core idea underlying this categorical prohibition of terrorism is that it is never justified to use civilians and non-combatants *as a means – as enablers* - for the purpose of making the government or other people do or abstain from doing something.<sup>61</sup> The particular evil of terrorism lies not in undermining public order and security, though that would be bad enough in most cases, but rather in violating individuals as persons by treating them as a means to achieve political purposes. No one has the right to treat other persons the way that terrorists treat them: Killing or seriously harming them as a means to bring about certain effects in others in order to bring about political changes. The legitimacy of the purpose pursued by terrorists does not matter. Nor does it matter whether terrorists have any plausible alternative means to effectively fight oppression (terrorism is typically the weapon of the weak and there may not be other plausible options), or whether the actions are proportional. Even if all these requirements are met terrorism would remain a morally prohibited means of achieving legitimate ends. If such an understanding of deontological constraints is closely connected to commitments of Political Liberalism, it should not be surprising that there have been few liberal movements that have endorsed terrorism. Liberalism is a fighting faith and does not eschew the use of violence and revolution as a means of political struggle.<sup>62</sup> But the methods of terrorism, narrowly conceived, tend to be methods used by political movements whose understanding of the individual person is informed by ideologies that exhibit a more teleological, consequentialist structure.

One of the historically more prominent forms of state-sponsored terrorisms that even liberal democracies have succumbed to is terror-bombing. Terror-bombing, as opposed to strategic bombing, fulfills all the requirements of the above definition. In case of strategic bombing, the purpose of the bombing is to destroy military targets. Non-combatant

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<sup>61</sup> Note how under this definition of terrorism it is not evident that the September 11 attacks on the Pentagon constitute terrorist acts, even though the attacks on the World Trade Center clearly are paradigm examples. Note, furthermore, that once the idea of civilians and non-combatants is not understood as a reference to legally defined categories of persons, but more loosely as ‘those who are innocent in the sense of not actively participating in the enterprise of violent suppression’, then Trotsky’s arguments about the absence of innocent persons in the context of modern oppression have the effect to undermine this definition. See Leon Trotsky, *Terrorism and Communism*, in: R.G. Frey and Christopher Morris, (eds), *Violence, Terrorism and Justice* (CUP 1991).

<sup>62</sup> This is a point rightly insisted upon by Stephen Homes, *The Anatomy of Antiliberalism* (1993).

deaths that are the side-effect of such bombings – “collateral damage” – do not render such bombings impermissible, if those deaths are not disproportionate to the objectives pursued.<sup>63</sup> Terror-bombing, on the other hand, the purpose of which is to terrorize and demoralize the population in order to increase pressure on the political leadership to bring an end to the war, is impermissible. Victims of terror bombing are right to complain that their rights have been violated, and international criminal law rightly sanctions it. Victims of strategic bombing may suffer equally, but they are unable to make a similar claim.

(3) The final example illustrating the relevance of deontological constraints for contemporary rights debates concerns the protection against and prohibition of torture. On the one hand, international and domestic law in most countries categorically prohibits torture without exception. On the other hand, in the context of the current “war on terrorism” (but not only in that context<sup>64</sup>), it has become respectable to discuss whether or not torture is acceptable, at least in some situations.

The United Nations Convention against Torture and Other Cruel and Inhuman, or Degrading Treatment or Punishment defines torture as

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession ... when such pain or suffering is inflicted by or instigation

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<sup>63</sup> Note that with the development of weapons-technology the necessity prong of the proportionality test gains importance. Whereas carpet-bombing by B-52 bombers of industrial areas of major cities may have been permissible in WWII, it is unlikely to be permissible today. The general availability of satellite technology (think of Google World) in conjunction with technology ensuring the ‘surgical’ accuracy of targeting, significantly decreases the extent to which ‘collateral damage’ is acceptable.

<sup>64</sup> This concerns the discussion of the Daschner Case which created something of a stir in the German media in the second half of 2004. Daschner is a senior police official who had threatened the use of torture against a kidnapper in order to find the whereabouts of the kidnapped victim. The kidnapper confessed the deed and informed the police of the whereabouts of the –already dead – victim. Daschner was criminally prosecuted and convicted. But he received an extremely lenient sentence and suffered no further professional disciplinary proceedings or sanctions.

of or consent or acquiescence of a public official or other person acting in an official capacity.”<sup>65</sup>

The reasons why torture is condemned so widely are in many respects obvious. There are strong consequentialist reasons to insist on a general prohibition of torture. Torture involves the infliction of severe pain and suffering on persons who are in the custody of public authorities and at the mercy of public officials. Besides the immediate pain and fear, these experiences often leave deep psychological marks that make it difficult for the victim to ever engage in ordinary human relationships. The infringements of the tortured person’s interests is thus extremely severe. Furthermore there is always the possibility that the authorities are wrong to believe that the individual has the knowledge they seek. The information gained through torture is often unreliable. The possibilities of abuse, as well as the psychological corruption of the torturer, are very real, and the possibility of institutionalizing effective controls to cabin or limit torture may prove difficult to administer.

Under such circumstances there may be good institutional reasons to insist on an over-inclusive blanket prohibition of torture, even if, from a perspective of political morality, there may be specific instances in which torture is justified. There may even be a good case for establishing a general public taboo on the discussion of moral justifications for torture on these grounds, given that the public discussion of possible exceptions to a prohibition on torture may obscure and color the perception of clearly unjustified patterns of torture that occur in the real world.

But there are good grounds to be skeptical of any prohibition of torture grounded exclusively in consequentialist concerns. Those who insist that the prohibition of torture be grounded in stronger, deontological constraints can point to two features of torture. First, people don’t get tortured because they are dangerous. Even the most dangerous

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<sup>65</sup> Art. 1 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)] entered into force June 26, 1987.

criminal is no longer a threat once he is effectively in custody.<sup>66</sup> Even the most unruly prisoner can be put in chains and locked away. Assuming a captive is not simply tortured for the perverse delectations of sadistic officials, a captive is tortured because he refuses to cooperate with the authorities. He is tortured because he refuses to *enable* public authorities to draw on what he knows to more effectively realize their goals. Torture has the purpose to make the victim a “willing” means to the ends pursued by officials. Second, torture is a particularly invidious way to make an individual a means in the service of others. It does so in a way that betrays the very idea that the individual is an end in himself. As Sussman has recently argued, “torture forces its victim into the position of colluding against himself through his own affects and emotions, so that he experiences himself as simultaneously powerless and yet actively complicit in his own violation. So construed, torture turns out to be not just an extreme form of cruelty, but the pre-eminent instance of a forced self-betrayal, more akin to rape than other kinds of violence characteristic of warfare or police action.”<sup>67</sup> Together these features seem to provide a good case that torture is prohibited by something stronger than just consequentialist concerns.

Consequentialists tend to challenge the idea of a more deontologically grounded prohibition of torture by pointing to some version of the ‘ticking bomb’ hypothetical: Imagine a terrorist hides a bomb powerful enough to kill hundreds in a crowded metropolitan area. Having achieved his life plan, he then decides that he wants to savor his victory by being a witness to official helplessness. He thus walks into a police station and informs the police what he has done and that the bomb will detonate in three hours. He will not, however, tell the police where it is or how to defuse it. I share the view of consequentialists that in such a case the terrorist does not suffer injustice when he is tortured for the purpose of finding out where the bomb is located. But the example does not succeed in undermining the idea that the prohibition on torture is grounded in more than just consequentialist concerns. Instead the hypothetical’s insistence on the large

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<sup>66</sup> H. Shue, *Torture*, 7 *Philosophy and Public Affairs* 124-143 (1978) (arguing that the prohibition against an assault on the defenseless is what makes torture so morally reprehensible, and worse, for example, than killing someone in combat).

<sup>67</sup> David Sussman, *What’s Wrong with Torture?*, 33 *Philosophy and Public Affairs*, 1 at 4 (2005).

number of victims unhelpfully obfuscates the real point. Two alternative hypotheticals may help to get a better understanding how deontological constraints function in the context of torture. It is not the large number of victims that is doing the work in this hypothetical.

Instead of a terrorist that has hidden a powerful explosive device endangering hundreds, imagine a kidnapper of a sole child who was caught picking up the ransom money.<sup>68</sup> He admits to having buried the child alive making it foreseeable that the child will die by suffocation in a matter of hours if not rescued. The kidnapper refuses to reveal the whereabouts of the child. Even in this situation, where only one other life is at stake, it seems to me that torture is morally permitted as a last resort. A policeman that threatens or engages in torture may violate legal prohibitions that have been established for good institutional reasons. But he is not violating a moral right of the person he tortures. The point is, however, that the reasons for torture being permissible in this case does not lie exclusively in the fact that a life can be saved. The consequences alone are insufficient to justify torture. Saving a life may be a necessary condition<sup>69</sup>, but it is certainly not a sufficient condition to justify torture. The reason why torture may be morally permitted in this case lies in the *special relationship* between the kidnapper and his victim. The kidnapper is responsible for creating a life threatening situation for the child and refuses to remove it. Structurally the torture of the kidnapper is comparable to an act of third party self-defense. Torture is permitted, if it is a necessary and proportional means to fend off an ongoing attack on the life of the child by the kidnapper. The kidnapper is *personally responsible* for the *specific threat* that the victim faces. Any refusal to cooperate with authorities to do what is necessary and proper to rescue the child in effect perpetuates an attack against the child. Such a refusal to cooperate can be addressed by whatever measures are necessary and proportionate to save the child. The specific link between the personal responsibility of the person to protect others from the imminent danger he has created and the purpose of torture neutralizes deontological constraints

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<sup>68</sup> This scenario closely reflects the Daschner case, supra Fn. 63. In that case the kidnapper had not yet admitted, however, that he was in fact the kidnapper. Furthermore the police had merely threatened torture.

<sup>69</sup> Torture would not be justified, for example, to force a thief refuses to reveal where he has hidden the loot.

both in this case and in the case of the terrorist planting a bomb. Measures aimed at ensuring that a person complies with special duties of this kind are only subject to proportionality analysis. Under the circumstances the concrete danger of the loss of one life seems to outweigh whatever suffering the tortured kidnapper may have to go through. From a moral point of view, the prohibition of torture under these kinds of circumstances is relatively weak.

Now go back to the terrorist that has planted a bomb that threatens many hundreds of people. Imagine the terrorist turns out to be resistant to torture. Nothing can be done to make him reveal the hiding place of the bomb. But it turns out he has a seven year old daughter, whom he loves dearly. Is it permissible to torture her, in order to force the terrorist to reveal the whereabouts of the bomb, if this is the only serious option to prevent the deaths of many hundred people? I think not. Here, it seems to me, the full force of deontological restrictions kick in. Unlike the previous cases the child has no special obligation to those endangered by the terrorist acts grounded in her previous actions. She is not the attacker. The self-defense analogy does not apply. Here the prohibition against torture is of a more categorical nature. Even if the lives of many are at stake, the moral rights of the victim would be violated if she were tortured.

This suggests that in the ‘ticking bomb’ example the fact that a considerable number of people are threatened is not the decisive moral feature of the situation that explains why many believe that torture is permitted. Torture is permitted only because its purpose is to make the tortured person comply with his special obligation towards those whose lives he is threatening.

### c) Implications for the structure of rights

The purpose of the above discussions was not to provide a comprehensive account of any of the issues involved. It merely touched the surface of some contemporary debates highlighting their structural features. The discussion illustrates two points. First, it shows how deontological considerations are in play in the discussion of a number of

contemporary legal and political issues closely connected to the protection of human and constitutional rights.<sup>70</sup> The issues underlying the Trolley-problem are sufficiently ubiquitous to be of significance for an adequate account of the structure of human and constitutional rights. Second, it is not enough to be aware of the existence of deontological constraints. The task is to identify the situations in which they are relevant from situations in which they are not. What then does this suggest for an adequate account of the structure of rights?

The idea of deontological constraints can't be appropriately captured within the proportionality structure. The reasons why proportionality analysis and the balancing test in particular is insufficient to capture these concerns is that it systematically filters out means-ends relationships that are central to the understanding of deontological constraints. When balancing, the decision-maker first loads up the scales on one side, focusing on the intensity of the infringement. Then he loads up the other side of the scales by focusing on the consequences of the act and assessing the benefits realized by it. Balancing systematically filters out questions concerning means/ends relationships. Yet the nature of the means-ends relationship can be key. Whether the claims made by the rights-bearer against the acting authority are made as an enabler or a disabler, whether public authorities are making use of a person as a means, or whether they are merely disregarding the claim to take into account his interests as a constraining factor in an otherwise permissible endeavor, are often decisive. These questions only come into view once the structure of the means/ends relationship becomes the focus of a separate inquiry.

Furthermore it would be a mistake to think of the structural features of the situation as merely a factor to be taken into account within an overall balancing exercise. Whether the infringed person is an enabler or a disabler is not only relevant in the weak sense that it provides additional reasons to be put on the scale when balancing. Rather, the distinction between enablers and disablers completely changes the baseline to be used to assess rights infringements. In the case of torture and terrorist killing baseline change implies

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<sup>70</sup> Other rights-sensitive contemporary debates in which the existence of categorical constraints is rightly or wrongly believed to be in play concern stem-cell research, cloning and abortion.

something close to a categorical prohibition against coercively sacrificing an individual's life or integrity as a means to further a political purpose. It does not matter how legitimate the political purpose is and that such a sacrifice may be necessary to furthering that purpose.

This does not mean, of course, that there is a categorical prohibition against using people as a means- as enablers - to further a desirable purpose. We generally use people as a means to further our purposes all the time. For the most part, however, we do so with their consent. Even absent consent, there is no categorical prohibition on using people as a means. Provisions of tort law and criminal law that require a passer-by to suffer minor inconveniences to come to the aid of another person in serious distress, for example, raise no serious moral concerns. There is no general categorical prohibition on requiring people to make themselves available as a means to serve the needs of other people or the larger community. The point is merely that the baseline used to discuss these issues is very different from the baseline used in cases where individual citizens are not the instruments used to realize political purposes.

This leads to a final point. The proportionality test may be helpfully employed also to assess state measures in which individuals are used as a means. It still makes perfect sense to require that when individuals are drafted into the service of the community these impositions have to meet proportionality requirements. The individual may be used as a means by public authorities only if it is necessary to further a legitimate public purpose and is not disproportionate. The different moral baseline merely means that, on application, what counts as proportionate is very different from what counts as proportionate in situations where the individual person is not used as an enabler. It is central to the assessment of a government act whether it uses individuals as a means, that is, whether the individual is an enabler or a disabler. *Once this agent-relative feature of the situation is included in the description of the infringing act, proportionality analysis applies.* But the *substantive evaluation* of the competing concerns changes radically. More specifically, on application it suggests that the ultimate sacrifice of a citizen's life

or integrity is never, or nearly never,<sup>71</sup> justifiable. The citizens imagined as part of the social contract, those whose reasonable consent is hypothesized, did not sign on to a pact that includes provisions authorizing their sacrifice.

### III. Conclusion: The Structures of Rights

1. At the heart of the antiperfectionist and anticonsequentialist commitments of Political Liberalism is the basic idea that public institutions may not use their coercive powers to force citizens to become either saints or heroes.<sup>72</sup> From the perspective of Political Liberalism, what saints strive to be and heroes do is superogatory. The obligations they respond to and the acts they perform are not part of what we can claim from each other as free and equals. Public institutions may not enact legislation on the ground that a particular conception of the good is the right one, and they may not sacrifice the life of an individual for the community, even if this were to enhance the general welfare. If the argument presented here is correct, these central commitments of the tradition of Political Liberalism are not adequately reflected in a structure of rights that is exclusively focused on proportionality to determine the limits of rights. Instead the antiperfectionist aspect of Political Liberalism is appropriately operationalized<sup>72</sup> by the structural idea of *excluded reasons*. The anti-consequentialist aspect of Political Liberalism finds its expression in sensibilities to *means-ends relationships* and the distinction between claims of *enablers and disablers*. The anti-collectivist aspect of Political Liberalism, on the other hand, is appropriately reflected in the proportionality structure. If there is a justification for something like a ‘compelling interest’ test that imposes stronger requirements than the proportionality test, it must be a justification grounded in institutional concerns. The claim would have to be that ultimately the enforcement of rights as defined by the

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<sup>71</sup> There is disagreement over what happens in truly catastrophic situations. According to Nozick, for example, in case of ‘catastrophic moral horrors’ exceptions can be made. According to Kant, sacrificing an individual would not be justified even if it meant that the world must perish (*fiat iustitia pereat mundus*).

<sup>72</sup> It may be conceptually and practically impossible for legislation to coerce sainthood, though in the case of heroism coercion can plausibly play a greater role. Sainthood is too closely connected with inner struggles and conscience to be meaningfully and predictably responsive to anything that can be coerced. “Profess your sins, change your life and commit yourself to god who is love or you’ll be shot” may give rise to all kinds of pretensions and hypocrisies, but not a saintly life. On the other hand you can be a hero by fighting heroically as a soldier, even if the only reason you’re fighting heroically is that you expect to be shot if you attempt to desert and you expect to be killed by the enemy if you don’t do the same to him first.

proportionality test is better achieved by way of an institutional division of labor between courts and other institutions that requires courts to insist on reasons of a special strength to override certain protected interests.

Furthermore the discussion has made clear that the structural features of rights reasoning that reflect anti-perfectionist and anti-consequentialist commitments are a relatively pervasive feature of moral reasoning. The idea of excluded reasons and concerns about means-ends relationships have a pervasive influence on the discussion of political and legal issues framed in terms of human and constitutional rights.

This does not mean, however, that proportionality analysis is not central to reasoning about rights. It clearly is. But it should not detract from central features of rights reasoning that exhibit a different structure. Awareness of the idea of excluded reasons and the relevance of means-ends relationship in the assessment of rights claims help sharpen rights analysis. They help understand, for example, why the Strasbourg court was so strict in its scrutiny of the ‘combat effectiveness’ arguments in *Lustig Prean v. Beckett*. Combat effectiveness may matter for the purpose of justifying the exclusion of homosexuals from the military, but the homophobic resentments that give rise these problems do not. Furthermore, an understanding of the nature of deontological restrictions would also help the German Constitutional Court address the issue of the constitutionality of the Air Security Act. It would help the Court to distinguish between cases in which one life may not be sacrificed for the benefit of others from situations where the loss of a few lives may be justified when it is necessary to save many. A better understanding of the structures of political morality should help focus and improve the discussion of competing claims in the context of rights analysis.

Finally the discussion showed that it is a mistake to connect the idea of rights with the strength of a rights claim. *Rights are not optimization requirements, but nor are they trumps or shields.* Rights can serve as all of those things but should not be identified as or reduced to either. Rights are not the non-consequentialist component of morality. In many contexts a right can be overridden by general policy considerations. But in some

contexts – when the policy considerations are related to excluded reasons or involve using the rights-bearer as a means – rights provide stronger protections. What you have in virtue of having a position guaranteed as a right depends on the reasons that support that position in a particular context. These reasons are not only of different strengths in different contexts, they exhibit a variety of structures. A conception of human and constitutional rights that tries to make sense of and reconstruct the kind of judicial practice that has arisen after WWII in constitutional democracies worldwide would do well to give up trying to establish an analytical connection between the strength of a rights claim and its status as a rights claim.

There are two conclusions to be drawn from this. First, there is no plausible way to constitutionalize the protection of rights that reflect the commitments of a liberal political morality that excludes proportionality analysis as an important feature of rights adjudication. And second, rights analysis often requires more than just application of a proportionality test to determine the limit of a right.

2. There is a connection between what you have, in virtue of having a right and the rights you have. If you don't necessarily have much in virtue of having a right, the reasons to restrict the scope of rights become weaker. If rights do not refer to a morally privileged class of interests that enjoy a protection of special strength, why should not every legitimate interest be recognized as a right? Which interests ought to be protected as a judicially enforceable right becomes a question in which primarily institutional and other pragmatic considerations are determinative. Not surprisingly the scope of interests protected as rights in liberal democracies varies considerably. Some jurisdictions continue to remain skeptical about the judicial enforcement of rights and recognize only very limited interests as judicially enforceable rights. But there is a tendency in most post WWII liberal constitutional democracies to protect the vast majority of non-trivial individual interests as a right. Some go so far as to recognize a general right to liberty understood as the right to do or not do as you please. The point of according rights status to practically all non-trivial interests is intimately connected to a very basic idea underlying Political Liberalism: When the government acts in a way that detrimentally

effects the interests of an individual, those acts have to be justifiable in terms that take that individual seriously. All you need in order to make a rights claim is an interest that is sufficient to establish a duty in public institutions to take account of it.<sup>73</sup> Moral reasoning that exhibits the structural features described above helps assess whether the commitment to take individuals seriously was honored by public institutions in a particular case.

There is nothing new in understanding rights in this expansive way. In the French revolutionary tradition rights were understood in just this way. The French Declaration of the Rights of Man establishes that everyone has an equal right to liberty. The task of the political process in a true republic was to delimitate the respective spheres of liberty between individuals in a way that takes them seriously as equals and does so in a way that best furthers the general interest.<sup>74</sup> Courts, of course, had no role to play whatsoever in the exercise of determining the specific content of what it means to be free and equal in specific circumstances. Courts, discredited as part of the *ancien regime* – the *noblesse de robe* – were to function as the mouthpiece of the law as enacted by the legislature and nothing more. Even today, France is something of an outlier in the institutions it chooses to protect rights. In France the *Conseil Constitutionnel*, an institution that engages in rights analysis not very different from that described above<sup>75</sup>, is not referred to as a Court. Though it is a veto player in that it can preclude legislation from entering into force by holding it to be in violation of rights, it remains a ‘Council’ to the legislature and individuals may not bring cases.

3. But in the second half of the 20<sup>th</sup> century the vast majority of countries that have gone through the experience of either national-socialist, fascist-authoritarian, communist or simply racist rule, and made the transition to a reasonably inclusive liberal constitutional democracy have made a different institutional choice: To establish a Kelsenian type constitutional court and constitutionalize rights that generally authorize those whose non-

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<sup>73</sup> This understanding of the purpose of rights is very similar to that proposed by J. Raz, *The Morality of Freedom*, pp. 180-192.

<sup>74</sup> For a related account see T. Scanlon, *Rights, Goals, and Fairness*, in: Jeremy Waldron, ed., *Theories of Rights*, pp. 136-152. Oxford Readings in Philosophy. Oxford & New York: Oxford University Press, 1984.

<sup>75</sup> The reasons published by the *Conseil Constitutionnel* are, however, famously cryptic. For a discussion of this phenomenon see Mitch Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP 2004).

trivial interests are effected by the actions of public authorities to challenge them in court. The court would then assess whether, under the circumstances, the acts of public authorities, even of elected legislatures, can reasonably be justified. Of course the primary task of delimitating the respective spheres of liberty is left to the legislatures. Legislatures remain the authors of the laws in liberal constitutional democracies. But courts have assumed an important editorial function<sup>76</sup> as veto players. Courts, as guardians and subsidiary enforcers of human and constitutional rights, serve as institutions that provides a forum in which legislatures can be held accountable at the behest of affected individuals claiming that their legitimate interests have not been taken seriously. The point of human and constitutional rights is to focus and structure the court's assessment of whether the actions of public institutions are reasonable under the circumstances. The language of rights has provided the authorization for courts to play a role in protecting the legitimate interests of individuals, thereby helping to hold public institutions to standards of good government. Much more would need to be said both to gain a deeper understanding of the moral significance of having courts play such a role and to address institutional concerns<sup>77</sup> and the various doctrines of deference courts use to respond to these concerns.<sup>78</sup> Here it must suffice to establish that, from a moral point of view, such an understanding of the point of rights in liberal constitutional democracies is at least plausible and more closely connected to the practice of human and constitutional rights adjudication than alternative accounts. Such an understanding of rights practice reflects what could be called *a practice conception of rights*.

The practice conception of rights, then, has three defining features that concern respectively the structure, scope and point of rights. The structure of rights would be pluralistic, reflecting the antiperfectionist, anticollectivistic and anticonsequentialist

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<sup>76</sup> Phillip Pettit, *Republicanism: A Theory of Freedom and Government*, Ch. 6 (Clarendon Press 1997).

<sup>77</sup> The debate about the appropriateness of endowing courts with the authority to strike down acts of the legislature remains alive. See R. Dworkin, *The Constitutional Conception of Democracy*, in: *Freedom's Laws* (HUP 1996) on the one hand and J. Waldron, *The Constitutional Conception of Democracy*, in: *Law and Disagreement* (OUP 1999) on the other.

<sup>78</sup> See, for example R. Alexy, *A Theory of Constitutional Rights*, pp.394-425 (OUP 2002), D. Dyzenhaus, *The Unity of Public Law* (OUP 2004), pp.6-19 in the Canadian context. See also Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002).

commitments of Political Liberalism. The scope of rights such a conception would recognize is expansive and would come close to including any infringement by public authorities of nontrivial individual interests – any interest strong enough to establish a duty of public authorities to take it into account. And the point of rights would be to allow individuals to publicly contest acts by public authorities affecting their non-trivial interests in order for the court to provide a reasoned assessment whether such an act plausibly reflects appropriate respect and concern for them.<sup>79</sup>

Of course the practice conception of rights deserves to be confronted with serious challenges. Does it make sense to burden constitutional judiciaries with the jurisdiction of reviewing practically all acts by public authorities on rights grounds? Should not the institutional resources of the judiciary be focused in some other ways? Would it not make more sense to carve out some specific sub-set of interests in a way that specifically makes use of the comparative advantages of courts vis à vis legislators in certain domains? What are the institutional and cultural circumstances that favor the practice conception of rights? What features of the institutional and cultural environment in particular liberal democracies suggest a more limited role for rights? There are many liberal democracies, the U.S., New Zealand and Australia among them, that do not embrace the practice conception of rights and nothing said so far suggests that they may not have good reasons to reject it. The above does not present a general justification or assessment of the practice conception of rights either generally or in a particular context. It merely describes a conception of rights that makes sense of some characteristic features of rights practice as it takes place in many liberal constitutional democracies in Europe and beyond. And, as the core argument of the article makes clear, it suggests that there is nothing in the nature or structure of rights that casts doubt on such a conception.

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<sup>79</sup> J. Waldron in particular has drawn attention to the connection between Liberalism and the requirement to justify public authority to individual citizens here and now, see Waldron, *Theoretical Foundations of Liberalism*, in *Liberal Rights*, pp. 35-62 (1993). The practice conception of rights is a conception that draws on the idea of rights to operationalize such a commitment.