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On the Loss of Rights

Grégoire Webber^{*}

Abstract: This chapter defends a simple proposition: rights matter. It is a troubling reflection of the current state of juridical thought that it is in relation to *human rights law* that the proposition is defended. In an effort to reclaim rights from the position of inconsequence to which they have been relegated by the received approach to human rights law, the chapter draws attention to the equivocation in the use of the term ‘right’ in the catch-phrases ‘Everyone has a right to ...’. In reasoning towards the states of affairs and sets of interpersonal actions, forbearances, and omissions that realise rights in community, one merely begs the question by affirming as conclusive that one has a right to life, liberty, etc. The practical question is what, specifically, is to be established and brought into being in order to realise one’s rights. The chapter’s main contention is that rights are conceptually interrelated to justice and acknowledge the foundational equality of persons by delimiting what is due to each member of a political community. This frame of analysis is deployed to criticise proponents of the received approach and to re-order the relationship of rights to law.

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I – INTRODUCTION

Two questions can now be asked that in times past would not have been asked: Do rights matter?² Can one reason about rights otherwise than by appealing to the proportionality of means to ends and balancing all relevant considerations? The difference between past and present is marked not only by the sudden relevance of these questions, but also by the answers that many will give: to the first, a qualified no; to the second, a near unqualified no.¹ What may be called the received approach to human rights law² — or, more or less synonymously, the ‘global model of constitutional rights’,³ the “‘best-practice standard” of global constitutional law’,⁴ the ‘conventional view’,⁵ the ‘near-universal’ or ‘very widely adopted’⁶ judicial practice — reduces rights to defeasible interests, values, or principles and evaluates the justification for interferences with rights so defined against the principle of proportionality and its insistence that one ‘balance’.

The defenders of this approach (model, view, practice) dissent from moral-political understandings that award rights special status and from the range of other modes of reasoning employed in philosophical, legal, and everyday argument. In so doing, their strongest argument lies in tracking the judicial practice of human rights law. That practice is not unanimous in all respects and there is reason to doubt the claims that there is but one global model.⁷ Nonetheless, descriptions of a ‘received’, ‘near-universal’, and ‘taken-for-granted’ approach to human rights law are not misplaced. Allowing for the reconstruction of varying judicial practices within and ranging from Canada, the United States,⁸ Israel, South Africa, and the many countries within the jurisdiction of the European Court of Human Rights, that approach may be said to encompass the following: (a) evaluating whether legislation (or other government action) violates

¹ These questions and answers relate to human rights law interpreting and applying human rights documents of international, constitutional, and legislative rank. As will be seen below, legal rights (in contract, tort, property, and so forth) are not so afflicted.

² This is the expression employed in Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, 2009).

³ See Kai Möller, *The Global Model of Constitutional Rights* (Oxford, 2012). See also Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 72, 74 (a ‘defining feature [...] of global constitutionalism’), 79 (a ‘global constitutional standard’), 76 (a ‘taken-for-granted feature of constitutionalism’).

⁴ Jud Mathews and Alec Stone Sweet, ‘All Things in Proportion? American Rights Review and the Problem of Balancing’ (2011) 60 *Emory Law Journal* 797, 808.

⁵ Aharon Barak, ‘Proportionality (2)’ in Michael Rosenfeld and András Sajó (eds), *Oxford Handbook on Comparative Constitutional Law* (Oxford, 2012) 740.

⁶ Stephen Gardbaum, ‘Proportionality and Democratic Constitutionalism’, this volume.

⁷ Among those reasons: careful comparative analysis suggests that notwithstanding its superficial commonality, ‘the language of balancing might well mean very different things at different times and in different places’: Jacco Bomhoff, ‘Genealogies of Balancing as Discourse’ (2010) 4 *Law & Ethics of Human Rights* 107, 113 (emphasis in original removed).

⁸ On the United States and the received approach, see Iddo Porat, ‘Mapping the American Debate Over Balancing’, this volume; Stephen Gardbaum, ‘The Myth and the Reality of American Constitutional Exceptionalism’ (2008) 107 *Michigan Law Review* 391; Mathews and Stone Sweet ‘All Things in Proportion?’ *supra* note 4.

a right proceeds by way of a two-stage inquiry: the first stage evaluates whether a right has been infringed, the second whether the infringement can be justified; (b) the distinction between the two stages draws on the understanding that the limitation of a right is synonymous with its infringement, which may or may not be justified — if justified, the infringement stands; if unjustified, the infringement constitutes a violation; (c) by divorcing the question of the scope and content of the right from the question of what the right conclusively requires, the received approach favours a generous reading of rights, with the consequence that rights encompass many activities that are regularly and justifiably infringed by legislation; (d) the justification analysis at the second stage proceeds by way of a proportionality evaluation, with its all-important ‘balancing’ stage; and (e) it is only at this stage that the right and the right-holder are socially situated and that ‘all the relevant circumstances’ may be taken into account; at the first stage, the rights of others and the other requirements of a free and democratic society are not controlling — indeed, their consideration is discouraged.

There are many other features of judicial practices under the received approach and the scholarly interpretation and defence of those practices, some of which will be reviewed below. At present, it is sufficient to note that these five features are endorsed by those who share a basic commitment to the negative answers to the two questions posed above: rights more or less do not matter and proportionality analysis is, quite simply, unavoidable. For Alexy, rights are not ‘definitive’ requirements but only ‘optimisation’ requirements and balancing is ‘unavoidable, since there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right’;⁹ for Beatty, rights hold ‘no special status’ and ‘[i]t is all and only about proportionality’;¹⁰ for Barak, rights ‘cannot be realized to [their] fullest extent’ and a ‘limitation on a constitutional right by law [...] will be constitutionally permissible if, and only if, it is proportional’;¹¹ for Kumm, ‘comparatively little is decided by acknowledging that a measure infringes a right’ and, he asks rhetorically, ‘what could justify protecting an interest beyond what proportionality requires?’;¹² and for Möller, rights have neither ‘special importance’ nor ‘special normative force’ and ‘proportionality

⁹ Robert Alexy, *A Theory of Constitutional Rights* (Oxford, 2002) 48-49, 57, 74.

¹⁰ David Beatty, *The Ultimate Rule of Law* (Oxford, 2004) 171, 170.

¹¹ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge, 2012) 40 (the point is made with respect to freedom of expression, but can be generalised), 3.

¹² Mattias Kumm, ‘Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review’ (2007) 1 *European Journal of Legal Studies* 1, 11; and Mattias Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’ in George Pavlakos (ed), *Law, Rights, and Discourse: The Legal Philosophy of Robert Alexy* (Hart, 2007) 151. A similar rhetorical question is put by Matthias Klatt and Moritz Meister, ‘Proportionality—a benefit for human rights?’ (2012) 10 *International Journal of Constitutional Law* 687, 701: ‘How, after all, could one arrive at a specific narrow definition without using balancing for delineating the scope of the right?’.

analysis must be employed at the justification stage in order to assess whether a policy pays adequate respect to the right-holder's autonomy interest'.¹³

This chapter defends a simple proposition: rights matter. It is a troubling reflection of the current state of juridical thought that it is in relation to human rights law that the proposition is defended. I argue that rights are conceptually interrelated to justice and, in this frame, argue that rights acknowledge the foundational equality of persons by delimiting what is due to each member of a political community. After introducing the relationship of objective right and subjective right (sec. II), the chapter reviews how human rights law-in-action reduces rights to defeasible interests and fails to capture the moral priority of rights (sec. III). Notwithstanding this approach to rights, the practice and discourse of human rights law-in-action at times appeals to the priority of rights, leading to a confusion of thought and discourse by many defenders of the received approach (sec. IV). A conceptual re-ordering of human rights law is proposed so as to reclaim rights from the position of inconsequence to which they have been relegated, with the most important re-ordering being a reaffirmation of the need for law to realise rights in community (sec. V-VI).

II – RIGHTS AND IUS, JUSTICE AND JUSTIFICATION

The conception of rights contemplated by the received approach is not in keeping with moral-political understandings that, albeit with many discordant voices, affirm the conclusive, peremptory, and decisive quality of rights. This much is readily acknowledged by defenders of the received approach, who recognise the 'sharp contrast to the conceptions of rights proposed by most if not all moral and political philosophers'¹⁴ and how the 'special priority of rights sits uneasily with a prominent feature of constitutional and human rights adjudication'¹⁵ — namely that, under the received approach, rights are awarded no special priority.

To understand how much is lost with the conception of rights promoted by the received approach, let us begin with the understanding of rights that is lost. To this end, one need not appeal to Dworkin's theory of rights as trumps,¹⁶ Nozick's

¹³ Kai Möller, 'Proportionality and Rights Inflation', this volume; also published at LSE Working Paper Series, No. 17/2013, available online at <http://ssrn.com/abstract=2272979>.

¹⁴ Möller, *Global Model*, *supra* note 3, 1.

¹⁵ Kumm, 'Political Liberalism,' *supra* note 12, 131. For an attempt to overcome this bifurcation, see Mattias Kumm and Alec Walen, 'How Not to Balance Away Human Dignity', this volume.

¹⁶ For a summary account, see Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford, 1984). On close inspection, 'trump' for Dworkin means either (a) to award rights special weighting, with a consequential recourse to balancing or (b) to exclude certain reasons. A careful analysis of Dworkin on rights is provided in Paul Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 *American Journal of Jurisprudence* 93.

theory of rights as side-constraints,¹⁷ or other competing and compelling understandings of rights, all of which share a commitment to the special status of rights. My present aim is to recall how the concept of right has special significance, a significance that these and other understandings of rights explore but that the received approach abandons. By tracing the history of our language's appeal to the term 'right(s)', I aim to suggest that there lies a deep conceptual (not merely etymological) relationship between rights and another concept, one with an undeniable claim to conclusiveness and peremptory status: justice.

The English word 'right' translates the Latin *iūs* (*jus*), being the root of the words 'justice' and 'justification', as well as 'jurist', 'juridical', and 'jurisprudence'. In exploring the relationship of 'right' to 'justice', we could follow HLA Hart in tracing 'right' back to Plato and Aristotle, not in the sense of 'a right', but rather in the sense of 'the "right action" or "the right thing to do"'.¹⁸ Hart's invitation to focus on 'acting' and 'doing' is welcome and is captured, albeit less transparently, in the comparatively more recent uses to which 'right' (*iūs*) was put by Aquinas and other contemporaries.¹⁹ In this frame, the historically primary meaning of *iūs* was understood as 'the just thing itself, where 'thing' signals acts, objects, and states of affairs, all 'subject-matters of relationships of justice'.²⁰ In this usage, *iūs* looks to states of affairs and evaluates them as just, in the right. One may term this the 'objective' sense of *iūs*, meaning that the acts and arrangements, with all of their contemplated and actualised interpersonal actions, forbearances, omissions, and relationships, are 'themselves' right, as signalled by our modern language's expressions: 'this is the right decision', 'it is right that this be done'.

The Latin word *iūs* developed a second, now prevailing meaning: in alleged contrast to the 'objective' sense, a second 'subjective' sense refers to a right that someone (the subject) has. Here, *iūs* is possessed by a person rather than attributed to a state of affairs (an object), as captured by our modern language's frequent recourse to the formulation: 'Everyone has the right to ...'. Notwithstanding the different grammatical and syntactic uses to which this second meaning can be put, one would be mistaken to assume any sharp conceptual break between the primary and second meanings. A 'subjective' right does not take the right-holder outside of the domain of what is 'objectively' right; instead, it situates evaluations of justice explicitly 'in the hands' of a person and provides a perspective (that of the right-holder) for evaluating states of affairs. It relates the primary meaning 'exclusively to the beneficiary of the just relationship',²¹ the person whose right the relationship respects. It translates the impersonal ('objective') third-person perspective of justice into the first-person ('subjective') point of view and provides a complimentary and ultimately synonymous way of speaking about giving to each

¹⁷ See Robert Nozick, *Anarchy, State and Utopia* (Basil Blackwell, 1974) ch 3.

¹⁸ HLA Hart, 'Legal Rights' in *Essays on Bentham* (Oxford, 1982) 163.

¹⁹ This account draws on John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford, 2011) 206-210, 423-424, 465-466; John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford, 1998) 132-138; John Finnis, 'Aquinas on *iūs* and Hart on Rights' (2002) 64 *Review of Politics* 407.

²⁰ Finnis, *Natural Law and Natural Rights*, *ibid.*, 206.

²¹ *Ibid.*, 207 (emphasis omitted).

his due. In so doing, the second meaning of *iuris* captures how providing ‘persons with that which they are justly owed’ can be equivalently stated as ‘respecting the rights of persons’.²²

The academic career of *iuris* allows the substitution of claims of right for claims of justice and vice versa: what one formulation affirms from the ‘subjective’ point of view, the other affirms from the ‘objective’ point of view. Rights, like justice, are relational: they concern the domain of the interpersonal. In affirming that one has a right, one affirms one’s right relationship with another; synonymously, one affirms that this relationship is a requirement of justice. On this understanding, I may not affirm my right *before* having considered the rights and freedoms of others, for all of these others are members of my society and justice requires that they, like me, be given what is their due (that is: their rights). The appeals to the indivisibility and interdependence of human rights common to international human rights instruments and institutions capture, even if with some exaggeration, the view that one’s rights cannot be in conflict with another’s or with the other requirements of justice in a free and democratic society. Stated otherwise: justice does not demand and deny the same action.

By appealing to the conceptual relationship between rights and justice, my intention is not to favour one or another of the moral-political philosophies awarding rights special status. Rather, the highlighted conceptual inter-definability seeks to bring that special status to light, a status that affirms the conclusiveness of rights in evaluating what is to be done. In his insightful account of moral rights, John Oberdiek is, I think, similarly motivated when he appeals not to ‘justice’ but to ‘justification’,²³ a word (and idea) also indebted to the Latin *iuris*. On Oberdiek’s account, rights relate to one’s (or another’s) justified acts and deeds, such that one cannot be said to be acting contrary to rights when one acts justifiably. What is permitted by one’s rights is what is justified: justified conduct delimits the content of rights, such that the scope and significance of rights are in unison. Now, much will turn on one’s view of what is justified conduct, just as much will turn on one’s understanding of what justice requires, but in both accounts rights matter precisely because they are the product of reasoning about what justice or justification requires. Along similar lines, one could appeal generally to ‘conclusions of

²² Bradley Miller, ‘Justification and Rights Limitations’ in Grant Huscroft (ed) *Expounding the Constitution* (Cambridge, 2008) 115.

²³ Unfortunately, Oberdiek repeatedly suggests that the justifiability of acts and deeds animating his account of rights is limited to ‘necessity’, a term which frames ‘justification’ as responding to something akin to an ‘emergency’. Consider, in addition to the title of the essay ‘Specifying Rights Out of Necessity’ (2008) 28 *Oxford Journal of Legal Studies* 127, the following passages: *ibid.* 136 (‘it is necessity that triggers the qualification [...] and circumstances of necessity are quite rare’), *ibid.*, 146 (‘[c]ases of necessity, in particular, highlight the way in which justifiable behaviour specifies property rights’) and John Oberdiek, ‘Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights’ (2004) 23 *Law and Philosophy* 325, 329 (‘one could maintain that the right is specified precisely so that it does not stand in the way of “necessary” conduct’). Notwithstanding these passages, I understand Oberdiek’s argument as promoting an understanding of ‘justification’ in a more encompassing way than ‘necessity’.

practical reasoning’ to capture this emphasis on the practical point of rights: to be determinative of what it is right (just, justified) to do.²⁴ In what follows, I appeal interchangeably to justice and justification to capture this conclusive quality about rights, a quality that signals the peremptory and decisive status of rights as providing undefeated reasons for action.

But what of appeals to rights that are at some distance from justified and just conduct, appeals that take rights (as does the received approach) as premises in argument about what is justified and just? Is this not how bills of rights employ the idea of rights? Yes and no. Bills of rights appeal to subject matters of relationships of justice — life, liberty, security, expression, association, peaceful assembly, and so forth — which persons (‘Everyone’, ‘Every citizen’, ‘Every accused person’) are identified as having a *right to*. Yet, this mode of appeal to ‘subjective’ rights is liable to omit from view the ‘objective’ relationships between persons necessary to realise one’s own and everyone’s rights. Under the generality of *one* subject-matter of justice (life, liberty, equality, expression, association) that ‘everyone’ is declared to have a ‘right to’ lies a *multiplicity* of possible acts and arrangements that, if just, will respect, protect, and comply with everyone’s rights. The journey from the open-ended appeal to ‘life’, ‘liberty’, and so forth to the specific relationships between persons that realise a just state of affairs is, needless to say, complex. It is a journey guided by the understanding that to neglect or to fail to realise these subject matters of justice in our community truly is *unjust* and *unjustified*, and that justice requires that one determine the claim-rights, duties, liberties, powers and so forth of each and every member of the community in a manner that is in harmony with every other member’s. Relationships between persons must be arranged so that I can respect and comply with your rights as you respect and comply with mine. Such harmony is a requirement of reason in community.

In reasoning towards the states of affairs and sets of interpersonal actions, forbearances, and omissions, one merely begs the question by affirming as conclusive that one has a *right to* life, liberty, etc., for the practical question is what, specifically, is to be established and brought into being in order to realise one’s rights. Awareness of the equivocation in the use of the term ‘right’ in the catch-phrases ‘Everyone has a right to ...’ is necessary to resist the hazards of overreach in formulating claims of rights. This equivocal use of the term ‘right’ has guiding force only insofar as it identifies the end (life, liberty, etc.) that is to be secured, an end that can only be secured by ‘a process of rational decision-making which cannot reasonably be concluded simply by appealing to any one of these rights (notwithstanding that all are “fundamental” and “inalienable” and part of “everyone’s” *entitlement*)’.²⁵ That process of rational decision-making is a process of practical reasoning that requires one to situate the would-be right-holder in a community of other actual and potential right-holders. As we will see below (sec.

²⁴ That is the approach adopted in Webber, *The Negotiable Constitution*, *supra* note 2, ch 4 (‘Constituting Rights by Limitation’).

²⁵ Finnis, *Natural Law and Natural Rights*, *supra* note 19, 212 (footnote omitted, emphasis in original).

VI), the law-makers responsible for a community bear a special responsibility to settle, justly and authoritatively, the right relationships between persons that establish rights in law.

The willingness to reformulate one's ('subjective') claims of rights into ('objective') claims of justice can serve as a ready corrective to overreach. For justice, unlike the now common currency of rights, sits less easily as a premise in evaluating what to do: it directs one to what, conclusively, is to be done. So, when the question is: 'Should racist propaganda be permitted in our community?', the answer cannot be: 'Yes *because* I have right to free expression.' For the question is equivalent to asking: 'What are the requirements of justice in relation to racist propaganda in our community?', and one cannot, true to reason, claim as premise what is a conclusion. The conclusion to practical reasoning about the place of this 'speech' in our community will be that one *either* is at liberty to engage in racist propaganda *or* has a duty not to, a conclusion evaluated in contemplation of the potential victims of racist propaganda and their correlative no-right against another's racist propaganda *or* correlative claim-right not to be subject to such expression.²⁶ The conclusion may be more complex as we contemplate differences in civil and criminal duties and allow for criminal liberties in combination with civil duties. Nevertheless, the central idea is straightforward: many claims of right must be subject to a process of specification so as to warrant the peremptory and conclusionary status that is the true normative force of rights. In this way, whilst open-ended claims of right may play a 'helpful heuristic role in normative argument', it must be recalled that they are a 'kind of normative shortcut' to what is one's true right:²⁷ the conclusion of practical reasoning about what ought to be done, what is justified, what is just and in the right.

The peremptory and decisive status of rights is warranted when and because rights are conclusions of practical reasoning about what ought to be done. Whilst it is possible to speak of rights as intermediary conclusions about those requirements (as with expressions like: 'Everyone has a right to life'), those conclusions are not determinative; they do not warrant peremptory or conclusionary status.²⁸ To achieve that status, the intermediate conclusion must be carried through to a final conclusion. Here, genuine rights are 'designated only after the *final* interaction of *all* of the reasons bearing upon the justifiability of a given action' and enter the stage 'as conclusions about, and not as potential

²⁶ I accept that the correlatives here are not as straightforward as the paradigmatic examples in Hohfeld's scheme. I appeal to the idea of correlatives to signal how one's conclusion on the question of hate propaganda establishes a relationship between persons, even if it is one that is not as immediate or direct as contemplated by Hohfeld. I here bracket the question of the directionality of duties and associated debates surrounding the 'interest' and 'will' theories of rights.

²⁷ John Oberdiek, 'Specifying Constitutional Rights' (2010) 27 *Constitutional Commentary* 231, 240.

²⁸ In *The Morality of Freedom* (Oxford, 1988), Joseph Raz explores the claims that '[a]ssertions of rights are typically intermediate conclusions in arguments from ultimate values to duties'.

explanations of, the justifiability of certain actions'.²⁹ On this understanding, in evaluating what justice requires in communities of persons, one cannot 'start with rights' or reason 'from rights'; in truth, one reasons — and, taking the focal meaning of rights, can only reason — 'towards rights'.³⁰

As we will now turn to see, the question of rights under the received approach is burdened by the assumption that rights are much simpler than philosophers have long understood them to be. One's thinking enters muddled waters when one denies the relational character of rights, brackets questions of justice and justification, and equates rights with defeasible interests, values, or principles understood only from the perspective of the 'right-holder'. The hazards of this understanding of rights are not to be discounted as mere semantics. The hazards are philosophical and, rights being a part of practical philosophy, practical too: a conception of rights grounded in a theory of justice can be expected to provide for different duties and obligations than one grounded in a theory of defeasible interests.³¹

III – ON THE LOSS OF RIGHTS

The received approach to human rights law does not maintain the inter-definability of justice and rights. It does not situate rights as conclusions of what is justifiable according to practical reason. It does not award peremptory or conclusionary force to rights. It does not understand rights as relations between persons. Instead, rights are equated with interests (or values or principles, terms employed more or less interchangeably),³² are divorced from the moral-political context in which they are claimed, are regularly infringed once situated in that moral-political context, and are reduced to defeasible premises in reasoning about proportionality. The consequence is straightforward: the received approach reifies rights and regularly divorces rights from *what is right*.

²⁹ Oberdiek, 'Specifying Rights Out of Necessity', *supra* note 23, 135 (emphasis in original). Miller echoes this point in concluding that 'rights' at this preliminary stage 'can only generate a tentative, intermediate conclusion that some *claim* of constitutional right is a candidate for qualification as a genuine right on further analysis': 'Justification and Rights Limitation,' *supra* note 22, 95.

³⁰ Oberdiek, 'Lost in Moral Space', *supra* note 23, 340, 339; Oberdiek, 'Specifying Rights Out of Necessity', *supra* note 23, 141.

³¹ In his reply to this chapter, Möller summarises my argument as claiming that he and others engage in 'semantic sloppiness' and misunderstand the concept of rights: 'Proportionality and rights inflation', *supra* note 13, part V. The two are related: semantic sloppiness being the consequence of, not ground for, conceptual confusion. Consider, for example, Möller's paradigmatic duty correlative to rights: the duty of government to take everyone's autonomy interests adequately taken into account. A concept of rights grounded in a theory of justice would not identify this as a paradigmatic claim-right.

³² See e.g. Alexy, *Theory of Constitutional Rights*, *supra* note 9, 86: 'statements of the Federal Constitutional Court about values can be reformulated in terms of principles and vice versa without loss of meaning.' For a critical review, see Mark Antaki 'The Turn to "Values" in Canadian Constitutional Law' in Luc Tremblay and Grégoire Webber (eds), *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (Thémis, 2009).

This animating conception of rights turns on a distinction between a right and its limitation, corresponding to the two stages of human rights law-in-action: at the first stage, the right is *defined* and its scope and content *determined*; at the second stage, any limitation on (equivalently: interference with, infringement of)³³ the right is evaluated as justified or not because the relation of interests and burdens is proportionate or not. By conceiving of rights as belonging exclusively to the ‘right-holder’, the received approach omits from view the relationships between persons that are a defining mark of rights. The other whom, with the right-holder, constitutes the right relationship is either discounted or omitted, and so too is the essential inter-definability of one’s rights and another’s duty, to recall but one of Hohfeld’s correlatives.³⁴ For the reason that evaluations of what is right (‘in the right’) look both ways along a relationship between persons, the ‘interests’ of one person are insufficient in and of themselves to conclude that another has a duty to (or other Hohfeldian correlative with) that person. This willingness to hold others in view in thinking through one’s rights is lost under the received approach: one person’s interests are now the mark of rights.³⁵

Why does the received approach assume rights to be far simpler than philosophical analysis has long assumed them to be? At one level, it would seem that the account of rights under the received approach is explicable by a somewhat exceptional understanding of the interpretation of legal text. A generous reading is given to the legal guarantee of a right so as to include within its scope and content all that fits within the semantic reach of the words ‘Everyone has a right to x ’, where x stands for life, liberty, free association, free expression, etc. Klatt and Meister tell us that a ‘broad definition’ of rights ‘interprets the constitutional text without taking conflicting considerations into account’;³⁶ Barak argues that the ‘scope of a constitutional right is determined in accord with the principles of constitutional interpretation’ but that ‘[i]n determining scope, one should not take account of any opposing constitutional right or conflicting public interest’;³⁷ Alexy advocates for a ‘broad and comprehensive’ reading of rights;³⁸ Kumm maintains that the definition of ‘the scope of the interests to be protected’ includes ‘all those interests that relate [for example] to “freedom of expression” or “the free development of the personality”’;³⁹ and Möller argues that ‘the scope of freedom

³³ See e.g. Barak, *Proportionality*, *supra* note 11, 101: ‘A limitation of a constitutional right by law also means its infringement.’

³⁴ See WN Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919).

³⁵ It bears noting that even on Raz’s influential interest theory of rights, ‘[i]f conflicting considerations show that the basis of the would-be right is not enough to justify subjecting anyone to any duty, then the right does not exist’: *The Morality of Freedom*, *supra* note 28, 183 (emphasis added).

³⁶ Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford, 2012) 47.

³⁷ Barak, ‘Proportionality (2)’, *supra* note 5, 740. See also Barak, *Proportionality*, *supra* note 11, 71: ‘interpretation should reflect the spectrum of reasons underlying the right’s creation.’

³⁸ Robert Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131, 131-132.

³⁹ Kumm, ‘Institutionalising Socratic Contestation’, *supra* note 12, 7.

protected by rights must extend to everything which is in the interest of a person's autonomy'.⁴⁰

This is an unconventional understanding of the art and technique of legal interpretation. In other contexts, one would reject as unreasonable readings of legal text that lead to the inevitable inconsistency of two or more directives of a single legal instrument or of that instrument's directives with the family of standing legal directives within the legal system. To do so would frustrate the rule of law's commitment to coherence (non-contradiction) and the related requirements that law not be impossible to comply with.⁴¹ Yet, it seems not to trouble those who insist on a generous reading of rights that it is inevitable that rights so defined will conflict with each other and will stand opposed to many settled instances of legal regulation. On this reading, rights are not, without more, controlling; they are not promoted on the expectation that one ought to comply with them. In short, the resulting *legal* interpretation of *legal* rights takes them some distance from what is a defining mark of the central case of *law*: that it outlines what is to be done, identifying some action or omission as mandatory, non-optional. On the interpretation of rights promoted by the received approach, not only do rights fail to provide one with reasons for action, one may have conclusive reasons for acting *contrary* to the right.

Now, without doubt the semantic reach of key terms like 'liberty', 'association', and 'expression' should *inform* one's evaluation of the scope and meaning of rights. But the assumption that everything within the semantic reach of such key terms should be included within the scope and content of rights is unsound. The key word 'expression' might semantically extend to 'political criticism', 'sports commentary', and 'murder and rape',⁴² but it would be an elementary mistake to assume that the phrase 'freedom of expression' extends to all such activities. As Meiklejohn would argue in relation to the First Amendment, an individual may not rely on the freedom of speech 'to advocate some public policy [...] by interrupting a church service, or a classroom, or a sickroom, or a session of Congress or of the Supreme Court, or by ringing a doorbell and demanding to be heard'.⁴³ It simply does not follow that all 'expression' is the concern of 'freedom of expression', just as it does not follow that more 'talk' signals a freer community. It is simply 'unsound to maximize every instance of a

⁴⁰ Möller, *Global Model*, *supra* note 3, 76. At 88, Möller argues in favour of simplifying the interpretive task, claiming that '[n]othing would be lost in theory by simply acknowledging one comprehensive prima facie right to personal autonomy'. See also Möller, 'Proportionality and Rights Inflation', *supra* note 13.

⁴¹ In his contribution to this volume, David Dyzenhaus focuses on the rule of law desideratum of 'congruence', being the congruence between the administration of rules and the rules as announced: 'Proportionality and Deference in a Culture of Justification'. Missing from Dyzenhaus's analysis is concern for the other desiderata of the rule of law and an interrogation whether, under the received approach, there are any 'rules' to be administered. This question is examined in Grégoire Webber, 'Rights and the Rule of Law in the Balance' (2013) 129 *Law Quarterly Review* (forthcoming).

⁴² See *Irvin Toy v Quebec*, [1989] 1 SCR 927, 970 where the Supreme Court of Canada, after ruling that 'the guarantee of free expression protects all content of expression', added: 'a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen'.

⁴³ Alexander Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245, 261. He adds: 'The Amendment, I repeat, does not establish "an unlimited right to talk".'

right as if one were maximizing a single value',⁴⁴ as though each and every instance of regulation of 'expression' wrongs or upsets 'freedom'. But what is more, even if one were tempted to *inform* one's understanding of rights by appealing to everything within the semantic reach of key terms like 'expression', why should one accept that this should *exhaust* one's understanding of rights? Why deny that other considerations are relevant to one's understanding of rights?

The answer: within the logic of the received approach, these considerations are for the second stage of analysis. They constitute the 'external' limitation of a right, as opposed to what is sometimes termed the right's 'internal' limitation as framed by legal interpretation (see sec. VI). At the second stage, all that has been omitted from the first is considered, including the rights and freedoms of others and the other requirements of a free and democratic society. However, and this bears emphasis: one engages with this second stage only if one concludes (or assumes *arguendo*, as courts sometimes do) that the right as defined at the first stage has been *infringed* (interfered with, 'externally' limited), that the putative right-holder has been *wronged* in some way. A limitation is thus understood to frustrate a right, to render it 'less than fully realized'.⁴⁵ The limitation is 'external' to the right and not, in any sense, constitutive of the right. Stated otherwise: the relationships between persons that are a defining mark of rights become, under the received approach, a restriction on rights, circumventing their scope and restricting their otherwise 'limitless' reach.

Now, the conclusion that a right has been infringed is itself inconclusive; it does not create a presumption that the infringing act (or omission) should cease. Indeed, under the received approach, rights are regularly and, in many instances, continuously infringed. After all, the infringement of a right is not an exceptional conclusion; many infringements are not only justified, but anticipated because necessary — the inevitable conflicts between rights will, after all, have to be resolved, leaving one or the other right infringed. Recall how little informs the scope and content of a right: there is no concern to resolve potential conflicts between rights or between rights and the other requirements of a free and democratic society; there is no concern to situate the right-holder in a series of relationships; there is no concern to situate the right in community. *These* are the very considerations that are liable to infringe the very many interests equated with rights at the first stage. In some, perhaps many instances, the infringement of a right will be justified, with the consequence that, under the received approach, it is not uncommon to conclude that what rights require is not what justified action requires; that reasoning 'within the right' provides one answer, whereas reasoning 'within practical reasonableness' provides another. Not only is it the case that to

⁴⁴ Francisco J. Urbina, 'A Critique of Proportionality' (2012) 57 *American Journal of Jurisprudence* 49, 65 and more generally 63-65.

⁴⁵ Barak, 'Proportionality (2)', *supra* note 5, 739. See also Barak, 'Proportionality and Principled Balancing' (2010) 4 *Law & Ethics of Human Rights* 1, 5: 'the limitations imposed on [a right] by law that prevent its full realization'.

comply with rights one may have to do more than act justly or justifiably, it is also the case that in complying with rights one may be acting *unjustly* or *unjustifiably*; stated otherwise, *not* to infringe a right may be unjust and without justification.

What picture of rights emerges from all this? At one level, the picture is remarkably simple: one has many rights, but no right is controlling *as a right*. In the words of proponents of the received approach, the ‘fact that a person has a right thus does not imply that he holds a position that gives him *any kind of priority* over competing considerations’.⁴⁶ Animated by similar reflections, Beatty writes that the concept of rights is rendered ‘almost irrelevant’ and is liable to ‘disappear’ except as ‘rhetorical flourish’;⁴⁷ for Kumm, ‘a rights-holder does not have very much in virtue of his having a right’;⁴⁸ a conclusion endorsed by Stone Sweet and Mathews;⁴⁹ and for Möller, ‘rights operate on the same plane as [...] policy considerations’.⁵⁰ Everything is ultimately decided at the second (justification) stage, which sets out ‘the conditions under which infringements of these interests [i.e. rights] can be justified’.⁵¹

This second stage gives ready cover to the willingness to include more within the scope and content of a right. When in doubt, acknowledge that a right is in play; exaggerated claims of right will be infringed and the justification analysis will discriminate between the true and the false. But what is more, because the first stage is the gateway to justification, and because we are told that ‘all acts by public authorities affecting individuals [should] meet the proportionality requirement’,⁵² all that ‘affects’ an individual should be acknowledged to be an infringement of that individual’s right(s): there are, Kumm insists, ‘no obvious reasons for defining narrowly the scope of interests protected as a right’.⁵³ So, when Beatty affirms that it is ‘all and only about proportionality’,⁵⁴ he is not far off the mark. Notwithstanding the familiar refrain that judicial practice proceeds according to a two-stage inquiry, the second stage seems to overpower the first, more or less collapsing analysis into a single inquiry into justification. However, unlike the

⁴⁶ Klatt and Meister, *Constitutional Structure of Proportionality*, *supra* note 36, 16 (emphasis added, footnote omitted).

⁴⁷ Beatty, *Ultimate Rule of Law*, *supra* note 10, 160, 171, 171.

⁴⁸ Kumm, ‘Political Liberalism’, *supra* note 12, 139; Matthias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’ (2010) 4 *Law & Ethics of Human Rights* 140, 150.

⁴⁹ Matthews and Stone Sweet, ‘All Things in Proportion?’ *supra* note 4, 809: ‘a right gives a right-bearer an entitlement to have her claim evaluated under the proportionality framework, and nothing more’.

⁵⁰ Möller, ‘Proportionality and Rights Inflation’, *supra* note 13.

⁵¹ Kumm, ‘Institutionalising Socratic Contestation’, *supra* note 12, 7. For this reason, it can be claimed that human rights law-in-action can be reduced to one right: ‘a right to proportionality’: see Webber, *Negotiable Constitution*, *supra* note 2, at 4 and Möller, *Global Model*, *supra* note 3, 178.

⁵² Kumm, ‘Political Liberalism’, *supra* note 12, 140.

⁵³ Kumm, ‘Idea of Socratic Contestation’, *supra* note 48, 151. See also Klatt and Meister, ‘Proportionality—a benefit for human rights?’, *supra* note 12, 702: ‘[t]his avoids “black holes” of non-protection’. Notwithstanding Kumm’s widely shared assertion, Gardbaum is correct to note that ‘[t]here appears to be nothing inherent in the framework itself to prevent a more stringent approach to the first step’: ‘Proportionality and Democratic Constitutionalism’, *supra* note 6.

⁵⁴ Beatty, *Ultimate Rule of Law*, *supra* note 10, 170. See also Möller, *Global Model*, *supra* note 3, 178: ‘It is therefore partly correct to say that human and constitutional rights law is all about proportionality.’

inquiry into the requirements of justice and justification that concludes in the *identification* of a right, this inquiry is into the justification of the *infringement* of a right. Rights matter, on this account, as weak gatekeepers to the second stage, where they are considered only because infringed. The framework question is no longer ‘what is the right?’, but rather: ‘is the right’s infringement justified?’.

IV – CONFUSING RIGHTS

Two understandings of rights are on offer: one, controlling in political morality, according to which rights matter; another, controlling in human rights law, according to which they do not.⁵⁵ Given that the gulf between them is so great, one might be forgiven for thinking that it is but an accident of language that both accounts appeal to the word ‘right’. Consequently, the potential for confusion might be thought to be a standing concern; one might conclude that overzealous definitions of rights to everything would be liable to trade on ‘the higher prestige and greater strength of a moral right that provides an undefeated reason for action’,⁵⁶ with the perils of mistakenly concluding that there is true loss whenever one concludes that a right has been infringed. In turn, one might express concern that the ready, regular, expected, and unavoidable infringement of rights will numb one’s reaction to the infringement of true, genuine rights, taking it as granted that rights are less than philosophical argument has long assumed them to be and, so, never provide conclusive reasons for action. The dangers of the juxtaposed accounts of rights are therefore two-fold: one may erroneously conclude that the infringement of a right is conclusive of the *unjustifiability* (the *injustice*) of infringing legislation or one may conclude that there really are no rights that are controlling and conclusive of what is right, just, justified.⁵⁷

We are told that these concerns are misplaced, as we are assured that these dangers are unlikely to manifest themselves: all depends on how the word ‘right’ is used and, in any event, the suggestion that anyone would be misled is ‘unsubstantiated’.⁵⁸ There is reason to question the assurance. Consider how

⁵⁵ Frederic Schauer’s contribution to this volume can be taken to argue for a ‘middle ground’, according to which rights protect not all, but only *special* interests. That middle ground collapses into the position defended by Kumm, Möller, and others insofar as it also frames rights unilaterally and not relationally. It commits less errors than the ‘all interests’ account of rights, but it nonetheless fails to relate rights to justice and to others in community.

⁵⁶ Miller, ‘Justification and Rights Limitations’, *supra* note 22, 96.

⁵⁷ Although Panaccio does not endorse this concern, he documents it well: Charles-Maxime Panaccio, ‘In Defence of Two-Step Balancing and Proportionality in Rights Adjudication’ (2011) 24 *Canadian Journal of Law and Jurisprudence* 109, 114, 116.

⁵⁸ Möller, *Global Model*, *supra* note 3, 5 n16. See also Charles-Maxime Panaccio, ‘Book Review’ (2010) 8 *International Journal of Constitutional Law* 988, 990: ‘Rights could be both premises and conclusions, as long as one is clear about the context in which one speaks of them. And I doubt, seriously, that variable uses of the same word (“right”) leads to confused communication or moral decay.’ But

Beatty, in the same breath that he affirms the ‘irrelevance’ of rights, insists that his fact-focused approach to proportionality will ‘maximise the rights of those who ask for their protection’.⁵⁹ The intelligible force of the claim presupposes that one put to one side Beatty’s assertions, elsewhere, that rights hold ‘no special status’. Consider, in turn, how for Kumm the ‘point of rights-based proportionality review’ is explained by the ‘idea of Socratic contestation and the *right to justification*’, where ‘right’ is appealed to first in the sense of a weak, defeasible, non-controlling interest subject to proportionality review and second as conclusive and determinative of what is to be done.⁶⁰ To distinguish the weak from the strong senses of right, Kumm sometimes substitutes the weak version of ‘right’ with the language of ‘burden’, reserving the word ‘right’ for what is conclusively required, as when he speaks of ‘the burdened parties’ right to justification’.⁶¹ The ‘right to justification’ is elsewhere reformulated as the ‘right to contest’,⁶² both of which trade on an understanding that, contrary to what Kumm otherwise insists upon, rights *do* ‘imply that [the right-holder] holds a position that gives him [...] priority over countervailing considerations of policy’.⁶³ Along similar lines, Möller affirms that every person has a ‘right to challenge acts of public authorities before courts’, a ‘right’ he elsewhere terms a ‘right to justification’ correlative to a ‘duty of justification’ on the legislature, all of which assumes, notwithstanding what is elsewhere affirmed, that rights *do have* ‘special importance’ and ‘special normative force’.⁶⁴ It would seem that the pull towards the philosophical understanding of rights is great, even for those who insist that it plays no part under the received approach. The confusion is liable to misrepresent the requirements of justice in community.

These illustrations may not be enough to ‘substantiate’ the concern that the juxtaposed account of rights is liable to confuse, but they highlight the potential to do so. Perhaps in an effort to demarcate weak from strong understandings of rights, Möller and to an uncertain extent Kumm have introduced a distinction between ‘*prima facie* rights’ and ‘definite rights’, corresponding to the two-stages of analysis under the received approach.⁶⁵ In doing so, they take their distance from

compare Möller in this volume, where he acknowledges ‘the problem that ordinary citizens without legal training could occasionally get confused about rights’ and ‘accept[s] that this is a problem’: ‘Proportionality and rights inflation’, *supra* note 13.

⁵⁹ Beatty, *Ultimate Rule of Law*, *supra* note 10, 73. At 92, he speaks of ‘how seriously a law adversely affects the constitutional rights of those who fall within its terms’.

⁶⁰ Both uses of right are employed in Kumm’s title: ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review,’ *supra* note 48.

⁶¹ Kumm, ‘Idea of Socratic Contestation’, *ibid.*, 168. See also Matthias Kumm, ‘Alexy’s Theory of Constitutional Rights and the Problem of Judicial Review’ in Matthias Klatt (ed), *Institutionalised Reason: The Jurisprudence of Robert Alexy* (Oxford, 2012) 168.

⁶² Kumm, ‘Alexy’s Theory of Constitutional Rights’, *ibid.*, 213.

⁶³ Kumm, ‘Idea of Socratic Contestation’, *supra* note 48, 150.

⁶⁴ Möller, *Global Model*, *supra* note 3, 208, 87.

⁶⁵ The distinction draws on Alexy, *Theory of Constitutional Rights*, *supra* note 9, 60: ‘Decisions about rights presuppose the identification of definitive rights. The route from the principle, that is, the *prima facie* right, to the definitive right runs by way of the relation of preference.’ But compare Barak, ‘Proportionality (2)’, *supra* note 5, 739: ‘That a constitutional right is relative does not mean, however,

the vocabulary of courts, which otherwise grounds their account of rights. On this reconstructive account, the first-stage of analysis interrogates not rights *simpliciter*, but rather ‘*prima facie* rights’; the label ‘definite rights’ is reserved for the end of the inquiry into justification. In this way, Möller and Kumm seek to reframe their and others’ discussions dismissing rights as ‘irrelevant’ and without ‘priority’, ‘special importance’, or ‘special normative force’ as pertaining *only* to *prima facie* rights, thus paving the way for re-instituting the priority and special importance and force of (definite) rights.

The willingness to rescue the concept of rights from the position of inconsequence to which the received approach has relegated it is welcome. The qualification ‘*prima facie*’ signals that the speaker is hedging the claim of right, acknowledging that what is now being claimed as a right might, *with justification*, be defeated, not be a right. Yet, despite this promise, Kumm’s and Möller’s own usage of the qualifiers ‘*prima facie*’ and ‘definite’ is not always consistent, such that it is not always clear what the qualifier qualifies. For example, Kumm speaks of (a) ‘a *prima facie* violation of a right’,⁶⁶ (b) the ‘domain of interests that enjoy *prima facie* protection as a right’,⁶⁷ and (c) ‘a violation of a *prima facie* right’,⁶⁸ oscillating between qualifying the protection afforded by a right, the right itself, and its violation. In turn, however, Kumm speaks only of (a) the ‘*definitive* violation of the right’,⁶⁹ omitting to speak of (b) the ‘definitive protection’ of interests or (c) of a ‘definitive right’. The focus for Kumm remains on the *violation* of a right, something the received approach already captures by distinguishing between the ‘infringement’ and ‘violation’ of a right.

Möller’s usage is more regularly fixed on ‘*prima facie* right’ and ‘definite right’, although he sometimes appeals, more or less equivalently, to the ‘*prima facie* scope of constitutional rights’⁷⁰ and to the ‘*prima facie* stage of rights and the justification stage’;⁷¹ at other times, Möller omits to draw any distinction, as when he affirms that ‘to defend the claim of a *right* to autonomy, one must abandon the

that it is a *prima facie* right. A relative right is still a definite right.’ See further Barak, *Proportionality*, *supra* note 11, 39–42.

⁶⁶ Kumm, ‘Institutionalising Socratic Contestation’, *supra* note 12, 7; Kumm, ‘Idea of Socratic Contestation’, *supra* note 48, 146; Kumm, ‘Political Liberalism’, *supra* note 12, 135. See also Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’, *supra* note 3, 75: ‘In the paradigmatic situation, PA [proportionality analysis] is triggered once a *prima facie* case has been made to the effect that a right has been infringed by a government measure’ (footnote omitted).

⁶⁷ Kumm, ‘Institutionalising Socratic Contestation’, *supra* note 12, 12; Kumm ‘Political Liberalism’, *supra* note 12, 140. This idea is echoed in Klatt and Meister, ‘Proportionality—a benefit for human rights?’, *supra* note 12, 702: ‘The state faces a duty to give reasons for not protecting rights only if certain behavior is protected *prima facie*.’

⁶⁸ Kumm, ‘Institutionalising Socratic Contestation’, *supra* note 12, 9; Kumm ‘Idea of Socratic Contestation’, *supra* note 48, 148.

⁶⁹ Kumm, ‘Institutionalising Socratic Contestation’, *ibid.*, 7; Kumm, ‘Idea of Socratic Contestation’, *ibid.*, 146.

⁷⁰ Möller, *Global Model*, *supra* note 3, 134.

⁷¹ *Ibid.*, 23.

idea that rights hold a special normative force’,⁷² that ‘[p]roportionality is simply a structure that guides judges through the reasoning process as to whether a policy does or does not respect rights’,⁷³ that ‘the point of rights is to enable people to live their lives autonomously’,⁷⁴ and that a murderer ‘should be punished because he violates the rights of others’.⁷⁵

Notwithstanding these ambiguities in exposition, the point Möller and Kumm seek to make is communicated clearly enough: true, genuine rights are identified only as the conclusion of what is justified. With this in mind, Möller’s claim that there is a ‘right to murder’ is less sensational than it might otherwise appear. He insists that ‘nobody can possibly have a *definite* right’ to murder,⁷⁶ such that his claim is only that one has a ‘*prima facie* right to murder’. Now, the tragedy of Möller’s argument lies less in the claim itself than in how he arrives at it following a plausible reconstruction of the received approach. This is not to suggest that courts are likely, as a predictive manner, to make the jump from a ‘right to feed pigeons in public squares’ and a ‘right to smoke marijuana for recreational purposes’ to a right to kill.⁷⁷ However, Möller’s reconstruction makes clear how, true to the conception of rights they have developed, they could.⁷⁸ The weakness awarded to *prima facie* rights allows for the ready inclusion within the category of ‘rights’ of many activities that are definitely not *in the right*, precisely because what is in the right is determined only after the infringement of a right has been concluded and evaluated. On Möller’s reconstructive account, a *prima facie* right is simply synonymous with ‘interest’. And whilst there is reason to question the claim that one can have an ‘interest’ in murdering (where murder is understood, as Möller invites us to understand it, as intentionally taking the life of an innocent person), it is clear that the headline ‘an interest to murder’ has far less traction than ‘the right to murder’. For ‘interest’, on Möller’s reading of the received approach, approximates one’s wants or preferences; in its radical subjectivity, it makes no

⁷² *Ibid.*, 73 (emphasis in original).

⁷³ Kai Möller, ‘Proportionality: Challenging the Critics’ (2012) 10 *International Journal of Constitutional Law* 709, 726 (emphasis omitted).

⁷⁴ Möller, *Global Model*, *supra* note 3, 23.

⁷⁵ *Ibid.* 78. A similar ambiguity is to be found in Klatt and Meister *Constitutional Structure of Proportionality*, *supra* note 36, 48: ‘the state faces a duty to give reasons for not protecting rights when certain behaviour is protected *prima facie*.’

⁷⁶ Möller, ‘Proportionality and Rights Inflation’, *supra* note 13. See also Möller *Global Model*, *supra* note 3, 77.

⁷⁷ ‘Kill’ better captures what Möller attempts to communicate with ‘murder’. On pigeon-feeding: see eg BVerfGE 54, 143; on smoking marijuana: see e.g. *R v Malmo-Levine* [2003] 3 SCR 571 (Supreme Court of Canada). Although the majority of the Supreme Court affirms that ‘[t]here is no free-standing constitutional right to smoke “pot” for recreational purposes’, it proceeds to the justification stage of analysis on the grounds that the threat of imprisonment triggers a ‘liberty interest’, thereby muting much of the force of its previous assertion. For present purposes, nothing turns on whether the justification for the infringement of the right to liberty is undertaken within s 7 or s 1 of the Canadian Charter of Rights and Freedoms.

⁷⁸ Barak’s laboured efforts to deny a ‘constitutional right to steal’ seem to support Möller’s argument: *Proportionality*, *supra* note 11, 42–43.

room for the possibility that one may be simply wrong or misguided.⁷⁹ What is more, this radical subjectivity implies that the upright community member, concerned to play his part and to give to each his due, will have fewer ‘interests’ than the corrupt community member, who is selfish, without care for others, and intent on willing and doing evil and seeking more than his fair share. Of course, Möller can reply that both the upright and the corrupt community members will be more or less aligned in their claims to *definite* rights, but it remains an open question why one should dignify raping, torturing for pleasure, trafficking children, and enslaving a population—all of which Möller would admit as consistent with his account of ‘interests’—as cognisable ‘rights’, even if qualified by ‘*prima facie*’. To do so is to give up on the notion that one bears a special responsibility when making claims of right.

V – RECLAIMING RIGHTS

The distinctions between the infringement and the violation of a right, between what ‘reasoning within the right’ requires and what ‘reasoning within practical reason’ requires, between a *prima facie* right and a definite right, and between the premise that one ‘wrongs’ a right-holder by infringing his right and the conclusion that one’s wrongful action is right because justified all trade on a simplified understanding of rights that, in turn, ‘makes the moral universe more complicated’.⁸⁰ The moral universe is complicated by the availability of two potentially incompatible answers to the same practical question: What ought to be done? The potential for the incompatibility is the result of how little informs the answer to this question from the perspective of the right and of how much informs the answer from the perspective of what one is justified to do. The ‘subjective’ and ‘objective’ meanings of ‘right’ are now wholly divorced. And yet, under the received approach, the two perspectives on this question must be considered, for one is never justified in acting only in the name of one’s or another’s (‘subjective’) rights; one is only ever truly justified in acting in the light of what is truly (‘objectively’) right. Rights, on this view, both resist their limitations (infringements, impairments) and cannot fully be understood without them: all the while insisting that a right is informed only by its ‘internal’ limitation and without engaging at all with its ‘external’ limitation, the received approach acknowledges that the ‘external’ limitation of a right is an inevitable part of understanding rights.

⁷⁹ Although Möller states that his account of the ‘self-conception of the agent’ is ‘different from one focussing exclusively on what people *want*’ and is ‘equally different from one focussing on a person’s *preferences*’, he allows that any activity will qualify as an ‘interest’ if ‘it affects or reflects something which the agent considers to be giving meaning and value to his or her life’: *Global Model*, *supra* note 3, 61.

⁸⁰ Oberdiek, ‘Lost in Moral Space’, *supra* note 23, 327.

On this understanding, rights are both aspects of our moral universe yet independent of what morality requires; they require as intermediate conclusions what need not obtain as final conclusions all the while insisting that we hold on to the defeated intermediate conclusion. We should not. Rights, like justice, are situated in a community of persons and should be understood in such a way as to be in harmony with the moral universe that gives them sense. Because the received approach promotes a definition of rights exhausted by one's interests, a definition that is uninterested in context, others, relationships, and what is ultimately just and justified, there seems to be no reason to award the label 'right' when another word would seem more suitable: interest. The word 'interest' captures the controlling idea in the account of rights under the received approach: all that is advantageous for, beneficial to, or the concern of an individual. An individual's interests, we might say, are fixed, stable, and unchanging *insofar as* they are the individual's and do not depend on others or on context (though their satisfaction may well). They are regularly frustrated in the circumstances of community life, as one's relationships with others and the need to take others into account demarcate whether, when, and how one's interests will be realised. *But such is life in community.* If under the received approach 'rights' are only another way of talking about what is already covered by 'interests' — and the received approach's frequent appeal to the discourse of 'conflicts of interests' suggests this to be the case — then little is gained and much is lost. For rights — true, genuine rights — acknowledge the foundational equality of persons by delimiting what is due to each in the light of one's being in community with others who also have 'interests' and rights. Interests are defeasible premises in evaluations of what is just, but rights, properly understood, are not: they are conclusive, determinative, and worthy of the status awarded to them when contemplated as right relationships between persons. They give expression to what is due to each in community as a matter of justice. This concern for persons is at risk of being lost if rights are equated with interests.

How might the received approach reorient itself so as to reclaim rights, their priority and conclusiveness? A conceptual re-ordering of human rights law is proposed, one that rejects the analysis of the received approach, but makes sense of the two-stages commonly appealed to by court and scholar. In so doing, I seek to demonstrate how rights can be conceived as conclusions of practical reasoning about what justice requires all the while being claimed by persons against legislation (or other government action).

A claim of right should not be confused for a right. The first stage of analysis under the received of approach should be reoriented away from the assumption that it evaluates one's rights for, in truth, the only matter evaluated at the first stage is a claimant's defeasible claim of right. Without doubt, the claimant aspires to be a right-holder and, so, aspires that the claim of right be recognised *as a right*. Gardbaum sees this more clearly than many others in affirming that 'what an individual has by virtue of being able to claim protection of a constitutional right

[...] is an important *prima facie* legal claim'.⁸¹ There may be good reasons to set the threshold low for allowing an individual to make a claim of right, and different reasons are on offer.⁸² They are not my present focus. I aim to highlight how, no matter the strength of those reasons, they do not translate a defeasible claim of right into a defeasible right.

By understanding the first stage of analysis in the frame of a claim of right, the conclusions arrived at the second stage of analysis are also reframed. So: rather than concluding that the 'infringement' of a 'right' is *justified*, one should affirm the *defeat* of a claim of right.⁸³ If it is concluded that what is just or justified according to practical reasoning is not what the claimant seeks, then the conclusion is that the claimant has *no right*. This is not to suggest that the claimant's claim of right was spurious or ill-intentioned (though some will be). Rather, because there lies a multiplicity of possible just acts and arrangements that will give effect to one's rights, authority will be required to choose between them so as to give to each and all their rights. (Consider, for example, the range of reasonable alternative schemes for realising fair trial rights, fair election procedures and the right to vote, the provision of healthcare and the right to life, and so forth.) One's claim of right may be defeated because another scheme of acts and arrangements was selected, one that falls within a range of reasonable alternatives. The authority responsible for making that choice may be the legislature or the court or the legislature subject to override by the court, depending on the community's constitution and practice. Whoever is identified as having responsibility for the community in such matters will exercise authority in identifying the rights of each and all and, so, will reject some claims of right in part because *this* scheme rather than *that* scheme of acts and arrangements was adopted for the community.

What of the conclusion, under the received approach, that the 'infringement' of a 'right' is *unjustified*? In the straightforward case, that conclusion should be reframed thus: the claimant's claim of right is recognised *as a right*. The impugned act is unjustified because contrary to the claimant's right. The conclusive, peremptory, and decisive reason for action that is the right has been disrespected and, so, the author of the impugned act committed a wrong. The legislation is to be denied its status of law (either by judicial declaration or by legislative repeal): it

⁸¹ Stephen Gardbaum, 'The Comparative Structure and Scope of Constitutional Rights' in Rosalind Dixon and Tom Ginsburg (eds), *The Research Handbook in Comparative Constitutional Law* (Edward Elgar, 2011) 388; Stephen Gardbaum, 'A Democratic Defense of Constitutional Balancing' (2010) 4 *Law & Ethics of Human Rights* 77, 79.

⁸² Among them: Kumm seeks to subject *all* acts (and omissions) of public authorities to 'Socratic contestation'; Panaccio defends shifting the burden of proof from the claimant to public authorities ('In Defence of Two-Step Balancing', *supra* note 57).

⁸³ See Miller, 'Justification and Rights Limitations', *supra* note 22, 96: '[t]o contend that state action limiting a person's claim to a benefit or liberty of action is *justified* is precisely to make the claim that there are competing demands or reasons that defeat the *claim* of constitutional right' (emphasis in original).

fails to provide members of the community with reasons for action because it violates the reasons for action that constitute the right.⁸⁴

These corrections to the errors of human rights law-in-action go some way: they reorient the frame of analysis from premature ascriptions of ‘rights’ to ‘claims of rights’ and allow for the conclusion that claims of rights may be defeated or recognised *as rights*. But this conceptual re-ordering does not go far enough, for it conceives of only two possible conclusions following judicial evaluations of a claim of right: either the claimant has no right (the claim of right is defeated) or the claimant’s right has been violated (the claim of right is successful). This discloses a most curious and unfortunate feature of the received approach: *we come to know what rights truly, justifiably require only through their violation*. Altogether missing from the received approach is a third alternative: the affirmation of one’s rights together with the affirmation that they are respected. To grasp this alternative requires further re-ordering: the ‘external limitation’ of rights — what is otherwise termed the infringement of a right — must be acknowledged to be enabling and constitutive of rights.

Gardbaum articulates the distinction between the ‘internal’ and ‘external’ limitation of rights with welcome clarity. Tracking the case law of the received approach, he explains that internal limits are about the ‘scope and definition’ of rights as determined by legal interpretation of text and that external limits are ‘constitutionally permissible restrictions on rights’ — in short, ‘infringements’ of rights.⁸⁵ External limitations are ‘inconsistent’ with the right and constitute a legislative power to ‘override’ a right. The distinction turns primarily on ‘an essentially interpretive function’, such that whatever limits cannot find an ‘internal’ textual anchor are ‘external’ to the right-as-guaranteed.⁸⁶ Breaking stride with other proponents of the received approach, Gardbaum recognises that ‘there is nothing obvious or self-evident [...] about the proposition that legislatures should be empowered to act inconsistently with entrenched rights’.⁸⁷

I agree and add that there is no reason to conclude that any legislature is so empowered. Thankfully, the error in Gardbaum’s faithful reporting of the received approach is quickly diagnosed (and does not impugn his otherwise compelling account of how rights can promote a ‘culture of democracy’⁸⁸). The analysis confuses the distinction between what is settled and unsettled in a bill of rights with what is and is not a right. Bills of rights are inchoate legal instruments: for many of the reasons recognised by the received approach, two-term rights

⁸⁴ In the less straightforward case, the conclusion that the ‘infringement’ of a ‘right’ is unjustified cannot be reframed as the affirmation of the claimant’s right. For sometimes, the unjustifiability of the ‘infringement’ is the result not of the act or deed required or prohibited by legislation, but of the *reasons* animating the choice of the impugned scheme intended to realise the rights of each and all. Here, the affirmation of ‘unjustifiability’ does not necessarily signal that the claimant’s right was violated: alternative reasons or schemes may be available that would defeat the claimant’s claim of right.

⁸⁵ Stephen Gardbaum, ‘Limiting Constitutional Rights’ (2007) 54 *UCLA Law Review* 789, 795, 801. For similar usage of the ‘internal’ and ‘external’ distinction, see Barak, *Proportionality*, *supra* note 11, 36.

⁸⁶ Gardbaum, ‘Limiting Constitutional Rights’, *ibid.*, 811.

⁸⁷ *Ibid.*, 794.

⁸⁸ See Gardbaum’s contribution to this volume.

(‘Everyone has a right to x’) provide one with no conclusive or determinative reason for action. They do not conclude the scope and content of rights and to think otherwise is to mistake an open-ended formulation of a right for an open-ended right. Bills of rights follow a regular pattern of settling little, minimising what Gardbaum labels ‘internal’ limits and channelling the resolution of what rights require to ‘external’ limits. But properly understood, these ‘external’ limits, *when justified*, perform a task no different than ‘internal’ limits: they define the right. The opened-ended formulations of rights in bills of rights are inchoate as law; a bill of rights stands not as a statement of law, but as a promise of law.

To conceive of justified external limits as infringing, derogating from, breaching, contravening, encroaching upon, impairing, or overriding a right is to commit oneself to a ‘formalist’ understanding of legal rights. If a bill of rights guarantees ‘freedom of expression’ without specifying further the definition of the right, Gardbaum and others⁸⁹ would label all such further specification an ‘external’ limit that ‘infringes’ or ‘overrides’ the right. So: the legislative determination that freedom of expression *does not* extend to (a) propaganda for war, (b) incitement of imminent violence, or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm is to be conceived as ‘wronging’ the ‘right-holder’ in some way, as frustrating the right’s realisation. However, if this same determination is incorporated into the bill of rights, as is the case with the South African Bill of Rights,⁹⁰ then it constitutes an ‘internal’ limitation that defines the scope and content of the right. The difference between the definition and the infringement of a right turns, it would seem, on whether the determination of what is just and justified is in legislation or the bill of rights.

Now, there is reason to attend to the difference between the interpretation of text in a bill of rights and such further specification of rights as provided for in legislation, but that difference is not one of *defining* or *overriding* right. Only a misguided formalism would lead to the conclusion that the deprivation of life resulting from ‘the use of force which is no more than absolutely necessary’ is a *definition* of Article 2’s right to life *because* stipulated in the European Convention rather than a justified *infringement* of the right *because* in legislation. The same could be said of the Article 4 right not to be ‘required to perform forced or compulsory labour’ which is specified in the Convention ‘*not [to] include* [...] any service of a military character [or] any work or service which forms part of normal civic obligations’. So too with the familiar references to the rights against ‘*unreasonable* search and seizure’ and ‘*arbitrary* detention’ and to ‘*peaceful* assembly’: they define the rights no less and no more than legislation with the same content. If these

⁸⁹ This same misguided formalist afflicts Barak’s insistence on a distinction between the ‘constitutional level’ (which defines ‘the scope of the right’) and the ‘sub-constitutional level’ (which accounts for ‘the extent of the right’s protection’): *Proportionality*, *supra* note 11, 23-24 *et passim*. See also 34, where Barak examines the very provision of the South African Bill of Rights reviewed in this paragraph.

⁹⁰ South African Bill of Rights, s. 16(1).

various specifications are justified, they define the right; if they are unjustified, they do not. That is the only controlling distinction.

There is no denying that this aspect of the intellectual disorder of human rights law-in-action takes its cue from the grammar and structure of bills of rights. That cue is three-fold: first, rights are drafted as two-term relations between a right-holder and a subject-matter of justice, omitting from view the ‘third term’ that is the other who is in a relationship to the right-holder in order *to realise* the right-holder’s right; second, the focus on subject-matters of justice (life, liberty, security, association, and so forth) overshadows the need to focus on persons acting and doing, such as what the ‘third term’ (the other) must *do* or refraining from *doing* to satisfy his duty to the claim-right-holder; and third, the attempt to acknowledge the ‘other’ and ‘acting and doing’ is undertaken in limitation clauses that employ the ‘uncraftsmanlike language’ of ‘interference’ and ‘restriction’ to signal the relationship of the ‘third term’ to rights and right-holders.⁹¹

Consider this uncraftsmanlike language. Notwithstanding its powerful contributions to our understandings of rights in many other respects, the Universal Declaration on Human Rights is liable to readings that misconceive of the ‘other’ and ‘acting and doing’. At its Article 29(1), the Declaration recognises that ‘[e]veryone has duties to the community in which alone the free and full development of his personality is possible’. Now, whilst the emphasis on *duty* and its *necessity* for each and every person in community is rightly highlighted, the affirmation that duties are owed to ‘the community’ may obfuscate the more exact point that one owes those duties to each and every *member* of the community in satisfaction of their rights, just as each and every member of the community owes duties to oneself in satisfaction of one’s rights. The missed opportunity here pales in comparison with the misguided conception of ‘others’ in Article 29(2):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Albeit acknowledging the importance of acting and doing by appealing to the idea that rights are to be ‘exercised’, this limitation clause frames the mind of the reader around the idea that such limitations are restrictive of an otherwise limitless right, as limitations are said to be ‘subject only’ to select ‘purposes’. Even the invitation to look to ‘acting’ and ‘doing’ misfires by focusing on the *right-holder’s* exercise of his rights when, for so many of our rights, the right’s ‘exercise’ is to be undertaken *by others* who owe duties to us to act or to refrain from acting in satisfaction of our rights.

⁹¹ See John Finnis, ‘Human Rights and their Enforcement’ in *Collected Essays of John Finnis, vol. III: Human Rights and Common Good* (Oxford, 2011) 45.

These errors are magnified by the European Convention on Human Rights. Here, ‘duty’ makes only an exceptional appearance⁹² and the relationship of others in community to right-holders is framed in even more suspicious terms. The limitation clauses found in the second paragraphs of Articles 8, 9, 10, and 11 speak variously of ‘*interference* by a public authority with the exercise of this right’, of ‘*subjecting*’ the ‘exercise of these freedoms [...] to such formalities, conditions, *restrictions* or *penalties*’, and of how ‘*restrictions* shall be placed on the exercise of these rights’. Gardbaum is correct to highlight that these terms carry the mind of the reader away from the specification and delimitation of rights to the interference with and infringement of *already specified and delimited* rights.⁹³ Human rights law-in-action is all the worse for it.

That the drafting process of the European Convention and many other bills of rights ‘mangled into an ungrammatical shambles’ the relationship of limitations and rights is a truth of human history.⁹⁴ It bears partial responsibility for guiding courts under the received approach to the mistaken two-stage analysis reviewed above. But in no way should such errors be controlling of our understanding of rights, for the mistake is obvious: assertions of ‘infringement’, ‘impairment’, ‘interference’, and so forth all assume the very point in dispute — *the definition of the right*. Unless one commits the errors reviewed above (among them, assumes that the semantic reach of two-term rights sets out the definition of a right), there is no conclusive reason to conclude that limitation clauses, properly understood, direct one to evaluate *interferences* with rights. Whilst Gardbaum is correct to highlight that the key term ‘limitation’ does not, for many, lend itself on its ‘most compelling or plausible reading’ to the synonyms ‘specification’, ‘delimitation’, ‘boundary’, and ‘definition’,⁹⁵ *that* is what limitation clauses concern themselves with. The force of this claim does not depend the fact that the received approach’s appeals to the vocabulary of ‘violate’, ‘derogate from’, ‘contravene’, ‘impair’, ‘deny’, ‘override’, and so forth are themselves not in keeping with the actual key terms used by the limitation clauses of the European Convention, Canadian Charter, the New Zealand Bill of Rights Act, or South African Bill of Rights. Rather, the full force of the claim rests on the straightforward mistake that limitations are ‘external’ and ‘restrictive’ if omitted from text of the bill of rights but ‘internal’ and ‘constitutive’ if stipulated within the text and on how, by

⁹² And without signalling anything close to a duty’s relationship to another’s right: Article 10(2): ‘The exercise of these freedoms, since it carries with it duties and responsibilities [...]’.

⁹³ Gardbaum, ‘Proportionality and Democratic Constitutionalism’, *supra* note 6.

⁹⁴ Timothy Endicott, ‘Proportionality and Incommensurability’, this volume. Endicott makes the point with respect to Article 8 of the European Convention and draws special attention to the Article’s reference to ‘respect for’. Notwithstanding this, his point can be generalised, as disclosed by the conceptual truth of his conclusion: ‘Legitimate [I would say: justified, just, right] actions taken in the interests listed in [Article] 8(2) are not “interferences” with the “exercise” of the right to respect, but actions that are compatible with respect for privacy and family life and the home.’ The words ‘to respect’ can be removed from Endicott’s conclusion without detracting from its force.

⁹⁵ Gardbaum, ‘Proportionality and Democratic Constitutionalism’, *supra* note 6.

rejecting such formalist commitments, one can align what is in the right (just, justified) with the definition of rights.

The journey to reclaim rights under the received approach begins by re-ordering defeasible rights as defeasible *claims* of rights and by reframing the conclusion on justification as either the defeat or the recognition of such claims. It includes acknowledging that what is labelled the ‘limitation’ or ‘infringement’ or ‘impairment’ of rights under the received approach can be and when justified is the constitutive ‘definition’ of a right. But this is not enough: the relationship of rights to law must be rehabilitated.

VI – LEGISLATING RIGHTS

It is telling that Ekins, in his contribution to this volume, is compelled to insist that ‘[t]he reasonable legislature does not set out to infringe rights, but to act in compliance with them, including by giving effect to the rights of each and all in legislative acts’.⁹⁶ Having primary responsibility for the community, the legislature is tasked with settling, decisively, what each and every member is to do in those matters of concern to the community as a whole. Among those matters are the subject matters of justice regularly affirmed in bills of right, matters that each and all have a ‘right to’. To legislate reasonably is to settle upon one among a range of reasonable schemes of acts and arrangements according to which all members of the community get what is theirs by right; stated otherwise, legislating is the ‘function of judging just’.⁹⁷ That function is not exhausted by outlining various subject-matters of justice — life, liberty, security, association — and declaring that each and every member of the community has rights. For the community members will ask: What are we to do in the name of our rights? What are we to do so as to respect the rights of each other? To answer these questions in law, the legislature must translate the open-ended references to the subject-matters of justice into rights — that is, the legislature must provide the jural structure that characterises law: the determination of right relations between persons oriented around acting and doing. That structure and determination are to be pursued in keeping with the principles of legality, principles which highlight law’s guiding and facilitative function to give to each his rights; stated otherwise: to provide for justice according to law.

Law, on this understanding, is the act of judging and implementing the requirements of justice in community. As outlined above (sec. II), the Latin *iūs* (*jūs*) is the root not only of ‘right’ and ‘justice’, but also of the legal terms ‘jurist’, ‘juridical’, and ‘jurisprudence’. This linguistic relationship of right(s) and law is perhaps more evident in the French, Spanish, Italian, and German vocabularies,

⁹⁶ Richard Ekins, ‘Legislating Proportionately’, this volume.

⁹⁷ Jeremy Waldron, *The Dignity of Legislation* (Cambridge, 1999) 86.

where what in English is encompassed by the single term 'law' is therein expressed as both *droit*, *derecho*, *diritto*, *Recht* ('right', 'just') and as *loi*, *ley*, *legge*, *Gesetz* ('a law', 'a statute'). These vocabularies signal how legal directives, albeit with many failings, aspire to respect and comply with, *by authoritatively establishing*, that which is right. And that which is right concerns not only giving to each and all their *rights*, but also establishing for others *duties*.

In this frame, Finnis rightly insists that 'laws and decisions declaring and giving effect to human rights have the complexity characteristic of positive law'.⁹⁸ The appeal to 'human rights' here is not to bills of rights — which have none of the complexity of positive law — but to the particulars of legislation and other instances of positive law that establish right relations between persons. That legislation and positive law will settle, *inter alia*, (a) the description of the class of persons who have a claim-right, liberty, power, or immunity; (b) the description of the class of persons who are under a correlative duty, no-right, liability, or disability; (c) the content of the relationship in terms of the act-description to be performed (or not) by one or the other class of persons; and (d) an account of the circumstances and conditions (time, place, and manner) for the performance of the act-description. To these principal specifications outlining the relationships between persons and act-descriptions that *are* the right relationship must be added: (e) the circumstances and conditions (if any) under which the right-holder may waive or forfeit or otherwise lose his right; (f) the secondary relationships that will obtain between the two classes of persons (or some such third parties, such as a prosecutor or judge) if duties are not performed; and, *at each and every stage*, (g) an evaluation whether the relationships and act-descriptions just specified cohere and are consistent with the family of relationships and act-descriptions *already* existing in the community so that each and every one can *have* rights and can *respect* the rights of others.⁹⁹ By resolving these various instances of specification defining rights and by doing so in compliance with the rule of law, law shares the appeal to conclusiveness and decisive and peremptory status that is the mark of rights. To achieve this, the law seeks to identify, with sufficient specificity, what each is to do in satisfaction of the rights of others, ensuring that one's duties to one's fellow community members are in harmony with one's duties to another as well as in harmony with one's own rights.

Now, none of this assumes that the legislature — even the reasonable legislature — will not err.¹⁰⁰ The legislature will err straightforwardly when it

⁹⁸ John Finnis, 'Introduction', in *Collected Essays of John Finnis, vol. III: Human Rights and Common Good* (Oxford, 2011) 3.

⁹⁹ This paragraph draws on Finnis, *Natural Law and Natural Rights*, *supra* note 19, 218-219.

¹⁰⁰ On this point, misreadings of the argument developed in *The Negotiable Constitution*, *supra* note 2 are to be found in Tom Hickman, 'Negotiable Rights, What Rights?' (2012) 75 *Modern Law Review* 437, 440 '[Webber argues that] the legislature should *never* be regarded as infringing constitutional rights [...] legislation that gravely restricted the rights of the defence would have to be regarded as necessarily compatible with and indeed *defining* what our rights to a fair trial are' (emphasis in original), 449 'on Webber's view [a legislative specification] will be a proper limitation simply by dint of being embodied

mistranslates a determinate moral right into legal form, for example by failing to ‘outlaw’ murder, rape, torture, or slavery or by outlawing such moral wrongs selectively, leaving some members of community outside the scope of legal protection. (This does not deny that the process of translating a determinate moral right into legal form will require the exercise of judgment when appealing to legal language, concepts, and categories, none of which are, in all of their detail, wholly determined by reason.) The legislature will err less straightforwardly when morality underdetermines what is required to secure one’s rights, such as when the legislature must choose from among a range of reasonable schemes any one of which would be reasonable even if it could reasonably be different in many respects. Here, the legislature errs in selecting from outside this range, for example by failing to attend to all participants in determining a fair trial process or by failing to review a previously enacted reasonable scheme now that circumstances have changed. Even if it mischaracterises this process in almost every other respect, the received approach’s invitation to examine the *reasons* supporting legislative action is one welcome aspect of human rights law-in-action, for it correctly points to the process of practical reasoning leading towards the legislatively-established rights as the focus of analysis (even if it distorts that process by insisting on proportionality as the only mode of reasoning).¹⁰¹

Against the standard and measure of reason, many legislative directives in community will ‘stand to the right they purport to enforce as more or less unsatisfactory would-be specifications which, on a better understanding of that or other rights, would be reversed or amended more or less extensively’.¹⁰² Of this there can be no doubt. But this truth need not be understood to cast a shadow so long and dark as to hide from view another truth: many legal directives in community stand to the right they purport to enforce as true, just, justified, genuine specifications of right relationships giving effect to the subject-matters of justice outlined in bills of rights. When the law does so, it unites *droit* and *loi*, *derecho* and *ley*, *diritto* and *legge*, *Recht* and *Gesetz*, right and law.

Now, there is no doubt that the specification of right relations between persons, because it draws on evaluations of what is just and justified according to time, place, person, circumstance, and community, is liable to change: the reasonable legislator must keep under ready evaluation every legal settlement of schemes of acts and arrangements that seek to give effect to the rights of each and all. This ‘dynamic’ or ‘negotiable’ quality of rights in no way undermines the

in primary legislation’ and Barak, *Proportionality*, *supra* note 11, 494: ‘Webber [...] views the scope of constitutional rights as determined by the legislator – the very same body that expresses that type of tyranny of the majority [...] [the legislature is] permitted to act as it pleases.’ The argument defended in *The Negotiable Constitution* is that legislation, *when justified*, defines the open-ended rights in bills of rights. When *unjustified*, it does not, which is not to deny that it is best read as having attempted to do so justifiably.

¹⁰¹ The distortions of proportionality reasoning are well documented in the contributions to this volume by Timothy Endicott, Richard Ekins, and Bradley Miller.

¹⁰² Finnis, ‘Introduction,’ *supra* note 98, 3.

promise of uniting right and law.¹⁰³ It is in this way that, albeit with many failings, law can achieve what morality cannot: the settlement, for this community, of determinate right relations between persons across the range of subject matters of relationships of justice.

VII – CONCLUSION

In uniting right and law, legislation may realise absolute rights. It is a defining feature of the received approach that no right is absolute,¹⁰⁴ but that understanding rests on an account of rights that divorces the definition of rights from what is just and justified. When the definition of (‘subjective’) rights is realigned with what is (‘objectively’) right, the claim that rights are absolute is within reach and not only for the rights that make regular claim to being absolute (such as the rights to be free from torture and rape). I will not here say enough about this claim to sustain it, but hope — by recalling some of the arguments charted in this chapter — to set the stage for a subsequent development of the claim.

Those arguments include: (a) the received approach reifies rights and regularly divorces rights from what is right; (b) when rights are united with what is right, they stand as conclusions of practical reasoning about what ought to be done; (c) rights, like justice, are relational and concern the domain of the interpersonal; (d) a conception of rights grounded in a theory of justice can be expected to provide for different duties and obligations than one grounded in a theory of defeasible interests; (e) some of those duties will be unchanging (e.g. the duty not to torture) and, so, will be correlative to unchanging rights; (f) other duties will change as the circumstances of the community change and, so, will be correlative to changing rights. Now, if the thought that rights can be absolute and yet subject to change troubles some, consider this near equivalent way of putting the idea: justice is always to be done, but what justice in community requires will change as the community’s circumstances and membership changes. In this as in many other ways explored in this chapter, understanding rights in the frame of justice resists the loss of rights.

¹⁰³ Both Raz *Morality of Freedom*, *supra* note 28, 171 and Oberdiek, ‘Specifying Rights Out of Necessity’, *supra* note 23, 153 appeal to the ‘dynamic aspect of rights’. The expression ‘negotiable’ is similarly inspired and draws on the discussion in Webber, *Negotiable Constitution*, *supra* note 2, 27-30.

¹⁰⁴ I do not mean to deny that judicial practice affirms that the injunctions against torture and rape are absolute, meaning ‘not subject to proportionality analysis’. But that is the point: insofar as proportionality is a defining feature of the received approach and insofar as proportionality is excluded when it comes to absolute rights, so it is a defining feature of the received approach that no right is absolute.