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Proportionality and Absolute Rights

Grégoire Webber^{*}

Abstract: What is the relationship between absolute rights and the principle of proportionality? Proponents of proportionality in human rights law adopt one of two answers to this question: proportionality is inapplicable to absolute rights or absolute rights are no more than generalised predictive conclusions of proportionality analysis. Both answers share the following in common: proportionality is incompatible with absolute rights. That incompatibility is a function of the dominant conception of rights in proportionality analysis, a conception that divorces rights from the relationships between persons constitutive of rights and right relations. My argument begins by reviewing how absolute rights earn their claim to being absolute in part because they identify duties held by persons not to perform certain acts (sec. I). The relationship between absolute rights and the specification of rights is explored next by reviewing the ways in which the doctrine of proportionality struggles with absolute rights (sec. II). This review highlights how rights are imperfectly constituted by proportionality proponents (sec. III) and in need of proper specification so as to align their normative force and scope (sec. IV). This account of specified rights as candidates for absolute status is then defended against criticism by Aharon Barak and Kai Möller (sec. V), before exploring how the specification of rights is secured both by morality and by law (sec. VI).

Keywords: human rights, absolute rights, proportionality, balancing, specification

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I. DUTIES NOT TO ACT

In surveying the thirty articles of the Universal Declaration on Human Rights, one observes two different sets of formulations employed by the drafters: ‘Everyone has the right to ...’ and ‘No one shall be ...’.¹ The first formulation identifies some abstract *thing* that all have a right to: liberty, life, equality, freedom of religion, freedom of association, etc. The second formulation differs by identifying some *action* that is prohibited, an injunction against a deed, a duty not to perform a given act. The difference is significant.

The Universal Declaration’s list of prohibited acts include: *holding* another in slavery or servitude; *performing* torture or cruel, inhuman or degrading treatment or punishment; arbitrarily *arresting*, *detaining*, or *exiling* another; *finding* another guilty of a retroactive criminal offence or *imposing* a retroactive criminal penalty on another; arbitrarily *interfering* with another’s privacy, family, home or correspondence or *attacking* another’s honour and reputation; arbitrarily *depriving* another of his or her nationality or *denying* him or her the right to change nationality; arbitrarily *depriving* another of his or her property; and *compelling* another to belong to an association.² By contrast, the provisions of the Universal Declaration that employ the formulation ‘Everyone has the right to ...’ contain no verb other than the possessive ‘to have’. No action or inaction by anyone or any groups of persons is highlighted as giving content to the rights that each and everyone has.³ But what is it ‘to have’ a right to freedom of association, equality, freedom of religion, etc? The Declaration does not say.

The same two formulations are employed by the European Convention on Human Rights, with the negative injunctions deployed with respect to intentionally *depriving* another of life; *engaging* in torture, inhuman or degrading treatment or punishment; *holding* another in slavery or servitude; *placing* another in forced or compulsory labour; and *finding* another guilty of a retroactive criminal offence or *imposing* a retroactive criminal penalty.⁴ In the case law of the European Court of Human Rights and of domestic courts interpreting and applying the Convention,

¹ Variations of one or the other formulation are also found in the Declaration, including ‘All are ...’, ‘Everyone is entitled to ...’, and ‘No one may be ...’. In addition, some Articles employ formulae that could have been, but were not, re-worked in keeping with the rest of the Declaration, e.g. Art. 16(3): ‘The family is the natural and fundamental group unit of society’; Art. 21(3): ‘The will of the people shall be the basis of the authority of government’.

² G.A. Res. 217 A, at 4, 5, 9, 11(2), 12, 15(2), 17(2), 20(2), (10 December 1949) (hereinafter UDHR).

³ But see UDHR, Art. 13(2) (‘Everyone has the right to leave any country, including his own, and to return to his country.’) Here the right-holder’s right corresponds not to an abstract thing, but to an act (‘to leave’, ‘to return’), which in turn directly implies a corresponding relationship with government agents responsible for securing the border (their Hohfeldian ‘no-right’ that one not perform these acts). Of course, this leaves a range of associated matters unspecified, including passport controls, conditions for loss of the right to leave if charged with a criminal offence, etc.

⁴ UDHR, Arts. 2, 3, 4, 7. See also Protocol no. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, ETS No. 114, March 28, 1983, Art. 1 (abolition of death penalty)).

some of these negative injunctions are interchangeably referred to as ‘absolute prohibitions’ and ‘absolute rights’.⁵ The interchangeable use of these two expressions is warranted, notwithstanding the absence of the word ‘right’ in the Convention articles in question. Taken together, the two expressions signal what it is that one has a right to: a right correlative to another’s duty of inaction, duty *not* to perform certain acts. This correlation between right and duty is made explicit in those human rights instruments that do not employ the ‘No one shall ...’ formulation in relation to torture and cruel and unusual punishment. The Canadian Charter of Rights and Freedoms provides that ‘Everyone has the right *not to be subjected to* any cruel and unusual treatment or punishment’;⁶ the New Zealand Bill of Rights Act guarantees that ‘Everyone has the right *not to be subjected to* torture or to cruel, degrading, or disproportionately severe treatment or punishment’;⁷ and the South African Bill of Rights provides that ‘Everyone has ... the right ... *not to be tortured* in any way; and *not to be treated or punished* in a cruel, inhuman or degrading way’.⁸ This explicit correlation of right and duty highlights who the right holder is (everyone) and what the right requires (a duty of inaction).⁹ Implied in the formulation is who is duty-bound: everyone (including especially those with *de jure* authority to punish and *de facto* power to torture).

Human rights law reserves the label ‘absolute’ to a small number of rights, including the rights not to be tortured, not to be subject to cruel and unusual punishment, and not to be held in slavery or servitude. There are good reasons for the restricted appeal to the claim of ‘absoluteness’, but they are not the reasons formulated by the European Court of Human Rights. In reference to the Article 3 prohibition against torture, the Court explains that the right is ‘absolute’ because, ‘[u]nlike most of the substantive clauses of the Convention and of Protocols’ such as Articles 8, 9, 10, and 11, Article 3 makes ‘no provision for exceptions’.¹⁰ The ‘exceptions’ referred to by the Court are the limitations on rights referred to in the second paragraphs of Articles 8, 9, 10, and 11, limitations that may be upheld if prescribed by law and necessary in a democratic society. In addition, the European Court recalls that, unlike the great number of Convention rights, Article 3 is not subject to derogation in times of war or other public emergency threatening the

⁵ E.g., *Chahal v. UK*, (22414/93), 15 November 1996 (GC); *Soering v UK* (14038/88), 7 July 1989 (Plenary).

⁶ Canadian Charter of Rights and Freedoms, section 12, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (hereinafter Canadian Charter of Rights and Freedoms) (emphasis added).

⁷ New Zealand Bill of Rights Act 1990, s. 9 (emphasis added).

⁸ S. Afr. Const., 1996, s. 12 (emphasis added).

⁹ I leave to one side the question whether the duty of inaction is best understood as a duty not *intentionally* to torture, etc., rather than a duty not to allow a state of certain affairs to obtain where torture would be committed (by another). See JOHN FINNIS, *Judicial Law-Making and the ‘Living’ Instrumentalisation of the ECHR*, in LORD SUMPTION AND THE LIMITS OF THE LAW (N. W. Barber, Richard Ekins & Paul Yowell eds., forthcoming 2016), for a discussion of how the latter reading could result in contradictions.

¹⁰ *Chahal v United Kingdom* (Application no. 22414/93) (1996) 23 E.H.R.R. 413, paras. 79–80. See also AHARON BARAK, PROPORTIONALITY 24–25 (2012) (hereinafter BARAK, PROPORTIONALITY) (“The [Universal] Declaration contains a list of human rights that seem, at first glance, absolute. But a general limitation clause relating to those rights appears at the end of the Declaration.”).

life of the nation, thus maintaining its absolute status irrespective of circumstance.¹¹

These formal-structural considerations are relevant, but they do not have the importance attributed to them by the European Court. (By way of illustration, other courts have rightly concluded in favour of the absolute nature of the prohibition against cruel and unusual punishment despite the applicability of a ‘provision for exceptions’ and despite the applicability of a ‘notwithstanding clause’ that would allow the legislature to legislate notwithstanding the guarantee against cruel and unusual punishment even absent a public emergency threatening the life of the nation.¹²) Rather, more telling for concluding in favour of the absolute status of certain rights is their formulation. As guaranteed in human rights instruments, the few rights generally agreed to be absolute achieve what the formulation of other rights does not: clarity on what is to be done (or not) by whom in the name of the right-holder’s right.

In articulating duties not to act, each one of the negative injunctions articulates what the right-holder’s right is correlative to. In so doing, the negative injunctions help *define* the right in a way that formulations of rights to abstract things do not. This is not to deny that the meaning of ‘torture’ or ‘cruel and unusual punishment’ or ‘servitude’ is open-ended in some respects. It is. But the interpretive exercise proceeds on the understanding that the right has been defined by the terms in need of interpretation. Compare this to the rights to freedom of expression, or freedom of religion, or security of the person. What is to be done in the name of these rights? The question cannot be answered by interpreting the meaning of the key words ‘expression’, ‘religion’, or ‘security of the person’. What is also required is a process of specifying what it is that the rights require of *others*. That process begins and is informed by the meaning of each guarantee’s key terms, but even settling on their meaning will not settle which relationships between persons are required to realise each right. What is missing is an account of what is to be done by whom. As between rights to *duties not to act* and rights to *things*, there is a fundamental difference: the latter must be specified so as to identify which relationships between persons and which actions are included in the right so as to realise it. As formulated, rights to things cannot be absolute. They are not suitable candidates for making a non-defeasible claim against another: they fail to identify who is to do or refrain from doing what to whom.

¹¹ Art. 15: ‘No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.’

¹² See, e.g., *R. v. Smith (Edward Dewey)* [1987] 1 S.C.R. 1045, para. 81 (Can.) (“It may well be said that, in s. 12, the Charter has created an absolute right, that is, a right to be free or exempt from cruel and unusual punishment.”) and para. 86 (“It was intended as an absolute right to all to be protected from that degree of excessive punishment and treatment which would outrage standards of decency.”) (The Charter’s limitation clause (s. 1) and notwithstanding clause (s. 33) both apply to s. 12.). But c.f. *Suresh v Canada*, [2002] 1 SCR 3, para. 58 (Can.).

The relationship between specified rights and absolute rights is explored by reviewing how the doctrine of proportionality struggles with the idea of absolute rights (sec. II). This review will highlight how rights are imperfectly constituted by proportionality proponents (sec. III) and in need of proper specification so as to align their normative force and scope (sec. IV). This account of specified rights as candidates for absolute status will be defended against criticism by Aharon Barak and Kai Möller (sec. V), before exploring how the specification of rights is secured both by morality and by law (sec. VI).

II. ABSOLUTE RIGHTS, PROPORTIONALLY UNDERSTOOD

Absolute rights earn their claim to being absolute in part because they identify duties held by persons not to perform certain acts. No one is to torture anyone. No one is to subject anyone to cruel and unusual punishment. No one is to hold anyone in slavery or servitude. How does this understanding of absolute rights cohere with the received approach to human rights law,¹³ an approach that reduces rights to interests (aspects of human well-being, human needs, goods, values, principles) and evaluates the justification for interferences with rights-qua-interests against the principle of proportionality and its insistence that one ‘balance’ competing interests? Many of the leading defenders of the received approach make one of two claims: either absolute rights are an exception to proportionality analysis or absolute rights are the result of proportionality analysis.¹⁴

The first claim has some formal-structural support. As reviewed above in relation to the European Court’s reasoning on Article 3, some Convention rights are paired with a limitation clause (a so-called ‘provision for exceptions’) and others — like the rights not to be tortured, subject to cruel and unusual punishment, etc. — are not. Proportionality, it is said, evaluates when the infringement of a right-qua-interest is justified, with such justification being available only if there is a provision allowing for it: the limitation clause. Where no such clause is available, then no justification for infringing a right is possible. Support for this reading is offered by Möller, who argues that it is an ‘overstatement to say that proportionality is applied to all rights’, citing ‘the rights to freedom from torture and inhuman or degrading treatment or punishment’ and ‘the rights not to be held in slavery or servitude and not to be required to perform

¹³ This is the expression employed in GRÉGOIRE WEBBER, *The NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* ch. 2 (2009) (hereinafter WEBBER, *NEGOTIABLE CONSTITUTION*).

¹⁴ Other proponents of proportionality may hold a third (or fourth or ...) view, perhaps insisting on a divide between the ‘essence’ or ‘core’ of a right (which is not subject to proportionality) and other aspects of a right (which are). I suspect, but do not here defend the claim, that insofar as these other views fail to understand rights as relationships between persons, they will be liable to at least some of the concerns and objections outlined in this and the next sections.

forced or compulsory labour’ as examples of rights that are ‘absolute and thus not limitable’.¹⁵ True to his reasoning, he might instead have said: ‘not limitable and thus absolute’.

In turn, Barak argues along similar lines in maintaining that the distinction between ‘absolute’ and ‘relative’ rights turns, in large measure, on the presence of a limitation clause. Barak does not rely only on *explicit* formal-structural support; he argues that a ‘constitution’s silence regarding limitation clauses (general or specific) does not render the constitutional rights absolute’, for it is open to the courts to read-in a limitation provision.¹⁶ But the basic idea is clear enough: a ‘limitation clause expresses the notion of the relative — as opposed to absolute — nature of constitutional rights’.¹⁷ Stated from the other perspective, ‘[w]henver a right is absolute ... there is no room for proportionality’.¹⁸ These positions assume that a limitation clause sanctions the justified *infringement* of rights, an assumption I return to and challenge in section IV.

The second claim — that absolute rights are not an exception to, but rather the result of proportionality analysis — does not rely on the formal structure of a bill of rights. Rather, it confidently relies on the claim that there is no way to think about rights other than through the prism of proportionality. The positions of proportionality proponents in this respect are well known: for Beatty, ‘[i]t is all and only about proportionality’;¹⁹ for Kumm, ‘what could justify protecting an interest beyond what proportionality requires?’;²⁰ for Alexy, 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’.²¹ When Möller is not deferring to the case law of the European Court of Human Rights (as in the above cited passages), he reconstructs the account of absolute rights in the frame of proportionality. In explicating the absolute right not to be subject to slavery, Möller sketches an argument in favour of understanding the right as absolute *because* the balance of

¹⁵ KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 180 (2012) (hereinafter MÖLLER, GLOBAL MODEL). See also Kai Möller, *U.S. Constitutional Law, Proportionality, and the Global Model* in this volume (hereinafter Möller, *U.S. Constitutional Law*) (“While it is true that some rights are absolute – for example the right to freedom from torture, – most rights – including the rights to life, physical integrity, privacy, property, freedom of religion, expression, assembly and association – can be limited in line with the proportionality test.”).

¹⁶ BARAK, PROPORTIONALITY 35, 135.

¹⁷ BARAK, PROPORTIONALITY 166 (footnote omitted). See also BARAK, PROPORTIONALITY 198 (“Those rights are not absolute. They can be limited.”) and *id.* 203 (“Those rights are mostly phrased in “absolute” terms. However, the declaration has a general limitation clause”) (a similar pairing of absolute vs. limitation is to be found in many other passages in the book.).

¹⁸ BARAK, PROPORTIONALITY 471.

¹⁹ DAVID BEATTY, THE ULTIMATE RULE OF LAW 170, 171 (2004) (hereinafter BEATTY, RULE OF LAW).

²⁰ Matthias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 EUROPEAN JOURNAL OF LEGAL STUDIES 1, 11 (2007) (hereinafter Kumm, *Socratic Contestation*); and Matthias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in LAW, RIGHTS, AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 151 (George Pavlakos ed., 2007).

²¹ ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 48, 49, 57, 74. (2002).

interests will (almost) always favour the would-be slave: ‘While theoretically the prohibition of using others as a means is not absolute but can be overcome in extreme cases, it is implausible to assume that such an extreme case could ever occur’ because ‘the harm imposed on the autonomy of a slave is so enormous’.²² Here, the reason why we conclude that the right to be free from slavery is absolute is *not because* we have identified an exceptionless duty not to enslave (‘No one shall be ...’) but rather *because* the balance of interests is, so far as we can predict, always in favour of the would-be slave. This is in line with the claim Möller makes in this volume: ‘proportionality is not just an isolated standard of review but part and parcel of a conception of rights that must be adopted or rejected as a whole’.²³

On this view, the ground for the absolute nature of the right does not proceed by identifying what is not to be done and by whom, but rather by balancing the interests of the would-be slave and the interests of the would-be slave-owner and concluding that, in all or near all conceivable cases, the balance tips the same way. That the would-be slave-owner has a duty not to enslave, is proposing to engage in conduct that is not choice-worthy, or is proposing to act contrary to basic requirements of reasonable action does not figure in the proportionality analysis. To attempt to reformulate each one of these wrongs (violation of duty, unchoice-worthy acts, unreasonable action) as themselves the outcomes of proportionality analysis is to deny that there can be wrongs independent of proportionality reasoning, a denial that would itself collapse a philosophical divide as basic as the one between deontologists and consequentialists.²⁴ It would be a denial of that aspect of the inviolability of persons secured by non-defeasible duties to persons.

Another version of this argument is developed by Alexy and expanded upon by Klatt and Meister. It affirms that what are thought to be absolute rights are, in truth, only ‘apparently absolute’ and warrant their convincing appearance because the outcome of the proportionality analysis is, almost without exception, in favour of the right-holder. There is, on this view, ‘a whole host of conditions under which we can say with a high degree of certainty that the human dignity principle takes precedence’.²⁵ Replace ‘human dignity’ with ‘not being subject to torture, or slavery, or cruel and unusual punishment’ and the argument stands. This view is consistent with the claim, which it invites, that in some circumstances the balance

²² MÖLLER, GLOBAL MODEL 148. *See also, Id.*, 148 (‘...[T]he institution of slavery is by its nature not something that can plausibly be set up for a short time in order to address an emergency but, where it exists, is usually a long-term structural feature of the way in which a given society is organized.’) (offering a second reason in support of his conclusion).

²³ MÖLLER, *U.S. Constitutional Law, Proportionality, and the Global Model* in this volume.

²⁴ For discussion, see Matthias Kumm & Alec D. Walen, *Human dignity and proportionality: deontic pluralism in balancing*, in *PROPORTIONALITY AND THE RULE OF LAW* (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014) (hereinafter Kumm & Walen, *Human dignity*).

²⁵ MATTHIAS KLATT & MORITZ MEISTER, *THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY* 31 (2012) (hereinafter KLATT & MEISTER, *CONSTITUTIONAL STRUCTURE*). *See also* ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 48, 49, 57, 74. (2002) (hereinafter ALEXY, *CONSTITUTIONAL RIGHTS*).

of interests might favour a violation of human dignity, or recourse to torture, or to cruel and unusual punishment.²⁶ There is, in short, ‘no such thing as an absolute principle’, only the appearance of one based on the likely outcome of the balance of interests in a vast majority of cases.²⁷ As Alexy otherwise puts it, ‘[c]riteria that do without balancing [such as: duties not to act, conclusions that some deeds are unreasonable and not choice-worthy] are thus *always* categories of outcome which rest on a preceding balancing of interests and which at best summarize those outcomes rather too broadly’.²⁸ Here again, a slave-owner’s categorical duty not to enslave or the absence of any true reasons to favour enslaving another do not figure otherwise than by earning their place *through* the balancing of interests, a balancing that proceeds on the assumption that one can have an interest in enslaving another. The countervailing interest against being enslaved may, on the facts, never be defeated and so appear absolute, but it is never to be mistaken for being in principle *non-defeasible*.²⁹

These two positions on the relationship of proportionality to absolute rights — proportionality is inapplicable to absolute rights or absolute rights are no more than generalised predictive conclusions of proportionality analysis — share the following in common: proportionality is incompatible with absolute rights. Such incompatibility is a function of the animating understanding of rights, whereby non-absolute rights are equated with interests.³⁰ Altogether missing is the understanding that rights are to be understood not by exclusive reference to one person’s interests, but rather by reference to relationships between persons, whereby one person owes another a duty of action or inaction.³¹ In turn, limitations are understood as infringements of rights-qua-interests rather than as attempted definitions of incompletely constituted rights to things. All of this proceeds against a backdrop of insufficient attention to and care for the question of what constitutes a right.³²

²⁶ KLATT & MEISTER, CONSTITUTIONAL STRUCTURE 31. *See also* ALEXY, CONSTITUTIONAL RIGHTS 196.

²⁷ KLATT & MEISTER, CONSTITUTIONAL STRUCTURE 32.

²⁸ ALEXY, CONSTITUTIONAL RIGHTS 75.

²⁹ *E.g.*, Robert Alexy, *Thirteen Replies*, in LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 341-344 (George Pavlakos ed., 2007) (Alexy sometimes qualifies his account by allowing for the possibility that some interests (‘values’) have ‘infinite weight’. One may question why Alexy insists on maintaining the proportionality analysis as the way to make sense of absolute norms.).

³⁰ *See* JACOB WEINRIB, DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW (forthcoming 2016) (hereinafter WEINRIB, DIMENSIONS OF DIGNITY) and MALCOLM THORBURN, *Proportionality*, in PHILOSOPHICAL FOUNDATIONS OF PUBLIC LAW (David Dyzenhaus & Malcolm Thorburn eds., forthcoming) (hereinafter THORBURN, *Proportionality*) for two new voices attempting to justify proportionality on a non-interest based account of rights, drawing instead on Kant’s political philosophy. The criticisms I outline here are, for these proponents, suitably qualified.

³¹ To alleviate the text, I focus on the Hohfeldian correlative of claim-right to duty.

³² *See* JEAN THOMAS, PUBLIC RIGHTS, PRIVATE RELATIONS (2015) for an illuminating investigation into the constitution of rights.

III. THE CONSTITUTION OF RIGHTS

How do proponents of the received approach conceive of rights prior to the conclusion that they have been infringed? Alexy reconstructs the case law of the German Federal Constitutional Court to equate rights with principles, understood as ‘optimization requirements’, which depend for their realisation on what the circumstances allow, taking into account competing principles and their optimization.³³ Möller, in turn, reconstructs the case law of the European Court of Human Rights and select other courts so as to equate (near) all rights with autonomy interests, which are to be balanced against competing interests according to the principle of proportionality.³⁴ Other proportionality proponents — including Beatty, Kumm, and Klatt and Meister — similarly begin with the case law. Insofar as their accounts are accurate reconstructions of the case law, they give rise to no objections *as reconstructions*: that which is described may be unreasonable, unsound, and unbecoming of our commitment to rights, but that constitutes no objection to the description.³⁵ Those failings are grounds to criticise what is being described, but the *critical* project sets out to answer different questions than the *descriptive* project. And yet, proportionality proponents, on the whole, claim to be doing more than faithfully reconstructing the case law; they each defend their reconstruction as representing a sound theory of rights and it is here that objections may be registered. To see why, consider the way in which Barak contrasts the scope of a right and the extent of a right’s protection.

For Barak, most rights ‘enjoy only partial protection’, meaning that they ‘cannot be realized to the full extent of their scope’.³⁶ Barak’s claim here is true to the legal reality that a Convention right may permissibly be infringed *if* the infringement is justified. An action may be wrong from the perspective of the right without being unjustified. The reach of the right is not coextensive with the reach of the right’s normative force. By contrast, absolute rights achieve perfect symmetry between scope and protection: the ‘extent of their protection or realization is equal to their scope as their limitation [= infringement] cannot be justified’.³⁷ This call to think of rights in terms that allow for asymmetry between scope and protection is the result of too little investigation into what constitutes rights, what allows a claim to count as a claim *of right* rather than a claim of one’s interest or well-being or good or need, etc. This divide helpfully highlights that which, in my view, proponents of proportionality pay too little attention to: what constitutes a right.

³³ ALEXY, CONSTITUTIONAL RIGHTS ch. 3.

³⁴ MÖLLER, GLOBAL MODEL. See also Möller, *U.S. Constitutional Law, Proportionality, and the Global Model* in this volume (“...[U]nder the global model, all autonomy interests are protected as rights.”).

³⁵ See Grégoire Webber, *Asking Why in the Study of Human Affairs*, 60 AMERICAN JOURNAL OF JURISPRUDENCE 51 (2015) (esp. sec. III).

³⁶ BARAK, PROPORTIONALITY 27.

³⁷ BARAK, PROPORTIONALITY 27.

Can *equating* a right with one's interest or an aspect of one's well-being helpfully direct inquiry into the constitution of rights? Many proponents of the received approach appear to think so and are guided in part by the formulation of many rights' guarantees: 'Everyone has the right to ...'. The formulation, they suggest, directs one to look only to one (class of) person (the right-holder signified by 'Everyone') and the interest (or value or principle or good or aspect of well-being) captured by the abstract *thing* referenced in the guarantee (life, liberty, security of the person, expression, etc). That is not to deny that other considerations are relevant to one's consideration, but — as we shall see — they are pushed away from the inquiry into the *constitution of rights* and are introduced only to evaluate whether rights will ultimately carry the day in a dispute.

This approach constitutes a rather unstable foundation for an understanding of rights. Without doubt the semantic reach of key terms like 'liberty', 'association', and 'expression' should *inform* one's evaluation of the constitution of rights. It is quite another proposition to maintain that everything within the semantic reach of such key terms should be included within the corresponding rights. The key word 'expression' might semantically extend to 'political criticism', 'sports commentary', and 'murder and rape',³⁸ but it would be an error in reasoning 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'.³⁹ 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 right as if one were maximizing a single value',⁴⁰ as though each and every instance of regulation of 'expression' wrongs or upsets 'freedom of expression'. What is more, even if one was 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 is familiar: all these other considerations are considered *not* as part of the right, but as part of what may justify the infringement of a right under the principle of proportionality. Möller captures the received approach in saying: 'all autonomy interests are protected as rights; however, this protection is not absolute

³⁸ See *Irvin Toy v Quebec*, [1989] 1 SCR 927, at 970 (Can.) where the Supreme Court of Canada, after ruling that "the guarantee of free expression protects all content of expression", added that "a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen".

³⁹ Alexander Meiklejohn, *The First Amendment is an Absolute*, SUPREME COURT REVIEW 245, 261 (1961).

⁴⁰ Francisco J. Urbina, *A Critique of Proportionality*, 57 AMERICAN JOURNAL OF JURISPRUDENCE 49, 65 and more generally 63–65 (2012).

or near-absolute; rather, rights can be limited as long as the limitation is proportionate.⁴¹ (The reference to ‘autonomy interests’ can be replaced with ‘aspects of well-being’, ‘values’, ‘human goods’, etc.) However, and this bears emphasis: one engages with proportionality analysis only if one concludes that the right has been *infringed*, that the right-holder has been *wronged* in some way.⁴² A limitation on an ambitiously defined right is thus understood to frustrate a right, to render it ‘less than fully realized’.⁴³ The limitation is ‘external’ to the right and not, in any sense, constitutive of the right. But what justifies this understanding of rights, rights that are non-relational, that are grounded in a one-sided view of interests (aspects of well-being, values, principles)? What sound reason can there be for understanding relationships between persons as a restriction on rights, as circumventing their scope and restricting their otherwise ‘limitless’ reach?

Compare this understanding of rights with the understanding of the few acknowledged absolute rights: these latter rights are defined by relationships between persons centred on acts and deeds. The difference is telling. Those rights that are absolute are defined according to what persons owe each other; those rights that are not absolute and subject to proportionality are defined not according to relationships between persons but rather according *only* to interests (aspects of human well-being, etc.) evaluated *only* for the right-holder. Can it be right that once relationships between persons centred on acting and doing are introduced, rights are said to be *infringed* by those relationships?

No it does not and, on close inspection, I do not believe that even proponents of proportionality can consistently believe that it does. Let me focus on two proponents who have defended not only the principle of proportionality, but more exactly a *right to proportionality*. In explaining his understanding of the ‘point of rights-based proportionality review’, Kumm has developed the ‘idea of Socratic contestation and the *right to justification*’, where ‘right’ is appealed to first (‘rights-based proportionality review’) in the sense of an interest subject to proportionality review, and second in what, on my reading, must be a different sense of right.⁴⁴ For surely the *right to justification* cannot be equated with nothing more than a defeasible *interest* in justification, an interest that can be realised only if the principle of proportionality favours it in the circumstances. Why? Because it is precisely recourse to proportionality that is necessary in order to determine the weight awarded to the interest. If the right-qua-interest to justification was to hold only when justified according to the principle of proportionality, we would need

⁴¹ Möller, *U.S. Constitutional Law, Proportionality, and the Global Model* in this volume.

⁴² See THORBURN, *Proportionality* 308 (footnote omitted) (“Before we consider questions of justification, of course, the party challenging the state must establish that a constitutional right has, in fact, been infringed. This simply follows from the logic of justification: it is the justified infringement of constitutional rights that we are concerned with here.”).

⁴³ Aharon Barak, *Proportionality and Principled Balancing*, 4 *LAW & ETHICS OF HUMAN RIGHTS* 1, 5 (2010) (“...[T]he limitations imposed on [a right] by law that prevent its full realization.”).

⁴⁴ See Matthias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 *LAW AND ETHICS OF HUMAN RIGHTS* 2 (2010) (hereinafter Kumm, *Idea of Socratic Contestation*).

yet a more basic right to justification in order to apply the principle of proportionality to it, a right that must be more than an interest subject to the principle of proportionality. So as to avoid an endless chain whereby proportionality is applied only because one has a right-qua-interest that it be applied, a right-qua-interest that would itself be subject to the principle of proportionality, which is applied only because one has a more basic right-qua-interest that it be applied, etc., Kumm *needs* at least one right to be awarded a status different than the status he awards to all other rights. For this one right to proportionality, it simply cannot be the case that the right-holder has *no* ‘kind of priority over countervailing considerations of policy’ and that an ‘infringement of the *scope of a right* merely serves as a trigger to initiate an assessment of whether the infringement is justified’.⁴⁵ So: what distinguishes this *one* right from all of the others contemplated by Kumm? The answer illustrates the argument I have been developing: this one right is defined according to what persons owe each other. In this case, Kumm’s right to justification is correlative to a duty of justification, a duty on state authority to apply the principle of proportionality. The scope of the right here is defined according to the deeds others owe to the right-holder and not according to an interest. If this reading of Kumm’s right to justification is correct, then it gives rise to this unanswered question: why should it be thought that *every other* right cannot also be defined according to relationships between persons centred on acting and doing?

Consider now Möller’s broadly similar position. Möller affirms that every person has a ‘right to challenge acts of public authorities before courts’, a ‘right’ he elsewhere terms, following Kumm, a ‘right to justification’, making explicit what in Kumm is implied: this right is correlative to a ‘duty of justification’ on the legislature.⁴⁶ Möller quotes the thought that the ‘entire constitutional rights-project could be simplified by replacing the catalogue of rights with a single proposition: The legislature shall comply with the principle of proportionality.’⁴⁷ On the strength of this encompassing proposition, he affirms that ‘laws that are “proportionate” respect constitutional rights and those which are “disproportionate” violate them’.⁴⁸ The statement requires correction because there is, on Möller’s account, at least *one* right that is not subject to proportionality: *the right to proportionality* itself. It is only *every other right* (right-qua-interest) that is respected or violated depending on the outcome of the proportionality analysis. By necessity, the right to proportionality cannot be grounded in the outcome of a proportionality analysis, on pain of regress. So while all other rights may lack ‘special importance’ and ‘special normative force’ on Möller’s account,⁴⁹ there is at

⁴⁵ Kumm, *Idea of Socratic Contestation* 150.

⁴⁶ MÖLLER, GLOBAL MODEL 208.

⁴⁷ MÖLLER, GLOBAL MODEL 178, n.3 citing WEBBER, NEGOTIABLE CONSTITUTION 4.

⁴⁸ MÖLLER, GLOBAL MODEL 178.

⁴⁹ MÖLLER, GLOBAL MODEL 87.

least one right that must have such importance and force. What allows for this conclusion? It is the willingness to articulate the scope of this right *not* in terms of interests, but in terms of a relationship between the right-holder (every legal subject) and another (the legislature) and a duty of justification. The question confronting Kumm also confronts Möller: why allow only one right to correlate to another's duty and deny this account of rights to every other right?

On Kumm's and Möller's accounts, the right to proportionality is a candidate for being absolute: it articulates what another is to do in the name of another's right. I suspect that this duty of justification is, for them, exceptionless and not itself subject to justified infringement. By contrast, no such candidate can emerge from an account of rights that equates them with interests. For what I am to do in the name of your interests? Everything? Nothing? Something in-between? Before *that* determination is made, what ground is there for concluding that a right can be infringed? Granted, an interest or value or aspect of human well-being may fail to be satisfied or promoted or secured, but for this to constitute the infringement of *a right*, it must first be concluded that one has a duty to satisfy or promote another's interest or a value or an aspect of human well-being in this or that way, a duty that must itself be specified in terms of what must be done or not done so that one can determine whether the act or deed or omission has been performed or not as required by the right. This mode of reasoning requires that one attend carefully to the constitution of the right. It is this attention that, in my view, has been missing from the accounts of rights promoted by proportionality proponents.

IV. THE SPECIFICATION OF RIGHTS

'A theory of rights is not simply a list of demands', Waldron rightly argues.⁵⁰ The special status awarded to rights in moral and political and legal thought (human rights law excepted) affirms the action-determining quality of rights. On this account, a right is directive of conduct, of what ought to be done by one person to another. A right will be conclusive in argument: to wrong a right is wrong. The failure of the received approach to human rights law to award rights this status is a function of the premature ascription of the title 'right' to what, in truth, is an interest and so only partially determinative of the constitution of rights.

As reviewed above, the received approach constitutes rights on the basis of the interests or well-being of one person only (the right-holder), relegating all other persons and their interests and well-being to considerations that may justify the infringement of the right. On this view, action that is justified, that is *not*

⁵⁰ Jeremy Waldron, *The Role of Rights in Practical Reasoning: "Rights" versus "Needs"*, 4 THE JOURNAL OF ETHICS 115, 132 (2000).

wrong, may nonetheless wrong a right. Evaluating action from the perspective of the right may yield a conclusion at odds with evaluating that same action from the moral perspective. This is indeed familiar territory for the received approach, which regularly concludes that the infringement of a right is *justified* and so *not* wrong despite wronging a right-holder. On this approach, a right may be defined in such a way that the considerations relevant to justified action are irrelevant to the right. Truly justified action can be determined, on this account, only by stepping out of the right and appealing to other reasons, reasons not considered when the scope and content of the right are defined. On this understanding, rights are both aspects of our moral universe yet independent of what morality requires; they require as intermediate conclusions about interests and aspects of human well-being what need not obtain as final conclusions.⁵¹ And yet, despite the resistance to these reasons in the constitution of rights, rights are nonetheless liable to be defeated by them. Rights both resist those reasons and cannot be wholly understood without them.

For some, divorcing rights from what is just and justified constitutes progress in our thinking on rights. I dissent from that view. It has been a mark of regression to allow our understanding of rights to break rank with right relations between persons that give to each his or her due. Just interpersonal relationships capture the peremptory and conclusive status of rights in much moral, political, and legal thought. When framed as right relations rather than as one person's interests or well-being, rights are situated in a community of persons. This understanding of rights acknowledges that 'my right imposes something on you. My claim corresponds to your duty. But because I am not alone in exercising this right, I also come to appreciate that my right is also your right; my claim, your claim; your duty, my duty.'⁵² Conceiving of a right as relational and as holding true not only for me but for you and for others like us (accused, detained, imprisoned, employed, parent, child, citizen, human), rights give expression to the foundational equality of persons and to the joint enterprise of life in community. It is a conception of rights that affirms that whilst interests and aspects of well-being are defeasible premises in evaluations of what ought to be, rights are more: they are conclusive, determinative, and worthy of the status awarded to them when contemplated as right relationships between persons.

It is in this context that I have argued that one merely *begs the question* in affirming as conclusive that one has a *right to* privacy, liberty, and so forth to conclude disputes about how far one's privacy goes or how far one's liberty goes. The truly practical question is what, specifically, is to be established and brought

⁵¹ See Grégoire Webber, *On the Loss of Rights*, in PROPORTIONALITY AND THE RULE OF LAW 142, 143 (Grant Huscroft, Bradley W. Miller, & Grégoire Webber eds., 2014) (hereinafter Webber, *Loss of Rights*).

⁵² WEBBER, NEGOTIABLE CONSTITUTION 140.

into being in order to realise one's and everyone's rights.⁵³ To answer this question, it is helpful to reformulate claims of rights as claims of justice, for claims of justice look both ways along a relationship between persons. Such claims deny that the interest or well-being or needs of one person can, without more, conclude evaluations into just interpersonal requirements; to be just, such requirements must also attend to and be informed by the interests or well-being or needs of the *other* person. On this understanding, in evaluating what justice requires in communities of persons, one cannot 'start with rights'. As conclusions of practical reasoning about what ought to be done, rights — like justice — earn their peremptory and decisive status because they 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 explanations of, the justifiability of certain actions'.⁵⁴

It is on the strength of this understanding of rights that I have argued that one cannot understand the true significance of bills of rights unless one reads the guarantees of rights holistically with their limitation clause. The subject matter and content of any one right's guarantee cannot responsibly be defined until one has taken into account the limitations justifiable in a free and democratic society, being a society that is free and democratic in part because everyone has rights. The need to attend to the limitations of rights so as to understand the justified constitution of rights is at odds with the received approach, which looks upon limitations as restrictive, even prohibitive of rights. Rights, on the received understanding, are independent of their limitations — independent of the many *justified* actions by *others* that regularly and justifiably infringe rights. On this view, rights both command and are unable to command, both require as intermediate conclusions what should not obtain as final conclusions.⁵⁵

By contrast, on the understanding that rights are specified and constituted by limitations, the two questions that the received approach insists must be kept separate are combined: 'the question of a right's content and the separate question of a right's normative implications'.⁵⁶ So when it is concluded under the received approach that contribution limits to political parties and candidates are justified infringements of the right to freedom of expression, the conclusion is in truth that the right to freedom of expression does not go so far as to preclude such limits. When it is concluded that the requirement that tobacco products carry health warnings is a justified infringement of the right to freedom of expression, so too is this in truth an affirmation that the right to freedom of expression does not go this far. The justified limitation of a right constitutes the right's *delimitation*; its scope is aligned with its normative force.

⁵³ Webber, *Loss of Rights* 129.

⁵⁴ John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD JOURNAL OF LEGAL STUDIES 127, 135 (2008) (hereinafter Oberdiek, *Specifying Rights*) (emphasis in original).

⁵⁵ WEBBER, *NEGOTIABLE CONSTITUTION* 140.

⁵⁶ Oberdiek, *Specifying Rights* 128.

V. TWO DEBATES

The understanding of rights as constituted, not infringed by relationships between persons centred on acting and doing has been criticised by two important defenders of proportionality. Engagement with their careful criticisms helps highlight some of the assumptions animating their alternative understanding of rights.

One line of criticism is articulated by Möller. Möller begins by faithfully reporting my position that ‘invoking the concept of a right for something to which a person has no definite but only an (often quite weak) *prima facie* entitlement is inappropriate because the *prima facie* right does not exhibit what ... is a crucial component of the concept of a right, namely its connection with justice’.⁵⁷ He accepts that it would be possible to reformulate rights-qua-interests as (what I take them to be) interests *simpliciter* rather than as rights.⁵⁸ So: where Möller employs the expression ‘the right to life’ to mean no more than ‘right to have one’s autonomy interest in life adequately taken into account’, he acknowledges that it would be possible to employ the truer, more accurate longer expression. The same holds, on Möller’s view, with ‘the right to feed birds or the right to murder: properly understood, we would have to speak of a “right to have one’s autonomy interest in bird feeding / murder adequately taken into account”, or, again, a “right to a justification of the prohibition of bird feeding / murder”’.⁵⁹ There is, Möller acknowledges, ‘nothing suspicious about this’ at ‘the level of an accurate use of the concept of a right’.⁶⁰ Indeed, as we have seen, for Möller the right to have one’s autonomy interests taken into account in proportionality analysis is the one true right: it identifies what another is to do in the name of one’s right.

Why, then, does Möller resist the ‘accurate use of the concept of a right’? Why does he insist on labelling as ‘rights’ what are nothing more than interests? He offers two reasons: first, ‘the transactional costs of changing a globally dominant semantic practice would be very high’; and second, ‘Webber’s alternative — to replace the language of a right to life, freedom of expression, and so forth with a right to have one’s interest in life/expression/and so forth adequately taken into account — [would be] semantically impossibly awkward’.⁶¹ Neither argument succeeds.

The first (on transactional costs) may well be true, but I understood neither Möller’s nor my commitment to rights to be deflected by the prospect of success before the European Court of Human Rights. With only minor quibbles, I am

⁵⁷ Kai Möller, *Proportionality and rights inflation*, in PROPORTIONALITY AND THE RULE OF LAW 168 (Grant Huscroft, Bradley W. Miller, & Grégoire Webber eds., 2014) (hereinafter Möller, *Proportionality*).

⁵⁸ Möller, *Proportionality* 169.

⁵⁹ Möller, *Proportionality* 169.

⁶⁰ Möller, *Proportionality* 169.

⁶¹ Möller, *Proportionality* 169–170.

quick to agree the accuracy of Möller's reconstruction of the case law of the European Court on Human Rights and of many other courts.⁶² My argument rather turns on what the makers of the Universal Declaration, European Convention, and countless other bills of rights set out to do: to guarantee *rights*, and not to set out a long list of defeasible interests. I should think that mere interests are insufficient to sustain the Universal Declaration's affirmation, in its preamble, that 'disregard and contempt for *human rights* have resulted in barbarous acts which have outraged the conscience of mankind'. The moral injunction against such disregard and contempt does not ring true if 'human rights' is replaced with 'interests', including any so-called interest in bird feeding or murdering or, as is consistent with Möller's view, in any number of other 'interests' in acts that would themselves outrage the conscience of mankind. Möller's second argument fails on its own terms: there is nothing 'semantically impossibly awkward' in reformulating rights-qua-interests as interests except the phrase 'semantically impossibly awkward'. More telling is Möller's development of this idea. He explains that, 'when designing a new constitution or human rights treaty, or when discussing issues of rights with fellow citizens, we would have to give up including or referring to the right to freedom of religion, property, and all other commonly acknowledged rights'.⁶³ Möller attributes to me the view that drafters would have to instead include the longer phrases deployed above ('Everyone has the right to have his or her interest in ... taken into account'). I hold no such view. Rather, I have defended the argument that the open-ended guarantees of rights must be read holistically with limitation clauses such that the justified limitation of a right concludes the definition of a right, a definition that is only partially completed in the formulation of the right's guarantee. The completeness of a right as formulated in a bill of rights is a question of degree. Some rights are delimited only to a minimal extent and others are delimited to a considerable degree. Compare, for example, the guarantee of 'the right to freedom of peaceful assembly and to freedom of association with others' in Article 11 of the Convention, which specifies only that the right includes 'the right to form and to join trade unions for the protection of his interests', with the guarantee of the 'right to life' in Article 2, which specifies at paragraph (2) that:

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

⁶² There are few points of divergence between Möller's reconstruction of the case law in MÖLLER, *THE GLOBAL MODEL* and my own: *c.f.*, WEBBER, *NEGOTIABLE CONSTITUTION* ch 2.

⁶³ Möller, *Proportionality* 169. ('...[E]xcept of course those that even under the global model are absolute (such as the rights to freedom from torture and inhuman and degrading treatment and freedom from slavery)').

- (b) in order to effect a lawful arrest or to prevent escape of a person unlawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The distinctions between more and less specification in the wording of a right's guarantee have important consequences for the role of a limitation clause and the responsibility of legal actors with authority *to complete* the process of specification begun, but not completed by the authors of the bill of rights.⁶⁴ There is, on my understanding of rights, no need to draft constitutional rights or human rights treaties differently. The only need is to understand limitation clauses *not* as authorising the infringement of rights, but rather as inviting subsequent lawmakers to complete incomplete rights.

Möller correctly reports that the concept of rights that I defend maintains that the claim that 'A has a right to X', if true, necessarily implies that 'it is just that A enjoy X'. He objects that 'we may have made progress in our understanding of the concept of a right', such that there is now understood to be a weaker 'connection between *prima facie* rights[-qua-interests] and justice', one that 'operates in a different way, namely via the duty of justification – which is itself a requirement of justice – that is triggered by an interference with the *prima facie* right[-qua-interest]'.⁶⁵ In order to evaluate whether this is indeed 'progress' in our understanding of rights, Möller highlights that much will 'depend on whether this usage illuminates the structure of the moral-political issues at stake'.⁶⁶ Against that standard, I think the answer clear: in equating rights with interests, the received approach loses precisely what is distinctive about rights, a loss that may well come to undermine the *one* right that Möller thinks stronger than a defeasible interest — the right to justification. I can detect no progress in a global model of rights that obscures moral-political issues by framing all rights disputes as contests between two competing interests without regard to the relationships between persons that frame what we owe each other in the name of each other's rights. Möller's own willingness to entertain the plausibility of a 'right to murder' is reason enough to doubt the claim of progress.

A different line of criticism is articulated by Barak. He correctly reports my view that the definition of a constitutional right is a matter of interpreting both the constitutional text and the 'limitations constructed by the legislator', limitations

⁶⁴ See, e.g., Canadian Charter of Rights and Freedoms s. 23 (which guarantees minority language educational rights and achieves a degree of specificity usually reserved for legislation). See WEBBER, *NEGOTIABLE CONSTITUTION* 161–165, for further discussion.

⁶⁵ Möller, *Proportionality* 170.

⁶⁶ Möller, *Proportionality* 170. See also, *Id.*, 170 ("...[T]his is a substantive question that is not Webber's concern in his contribution to this volume") (appearing in the same volume as my essay Webber, *Loss of Rights*. But was my contribution to the volume in question not devoted to demonstrating how equating rights with interests did all but illuminate the moral-political issues at stakes in claims of right? Was not the essay's title, 'On the loss of rights', not a clear signal to this effect?).

that, if justified, ‘are a part of the constitutional right’.⁶⁷ Such legislative acts must comply with a limitation clause, which requires the legislature to ‘demonstrate the justification for the right as it exists in a free and democratic society’. The ‘boundaries’ of the right are thus set ‘in accordance with the right’s proper interpretation and the [justified] limitations set by legislation’. With such boundaries in place, Barak concludes that, on my view, the ‘right becomes absolute’.⁶⁸

Barak argues that ‘any legal system that would adopt such an approach is seriously risking undermining the constitutional nature of its rights’.⁶⁹ My account of rights, he claims, does not so much offer ‘any real alternative to proportionality and balancing’ as offer ‘an alternative to the constitutional nature of the bill of rights’.⁷⁰ Barak’s concerns reach their climax in a succession of three short sentences: ‘Webber’s approach is therefore characteristically extreme. It does not take human rights seriously. Nor does it take democracy seriously’.⁷¹

Barak’s disquiet here is with what he takes to be the institutional consequences of my account of rights: on his reading, it would restrict the role of judges under a bill of rights. That does not follow from my understanding of rights. My argument is that, when it is concluded that legislation *justifiably limits* a right, legislation is to be understood as *justifiably defining* an under-defined right. In this frame, judicial review is devoted to evaluating the justification of a purported legislative definition of an underdefined constitutional right. This position has no consequences for the scope of judicial review. The institutional-practical questions about judicial review and the philosophical-conceptual questions about rights are happily separated.

In *The Negotiable Constitution*, I developed a separable argument on the scope of judicial review.⁷² I there recalled how the ‘favoured basis for judicial review rests on the idea of conflict between legislation and a constitutional right’, but that, ‘given the underdeterminacy of most rights-provisions, the possibilities for conflict seem restricted’.⁷³ I argued that, on ‘those matters deliberately left open by the constitution’, there is reason to ‘counsel against the view of removing [matters] from democratic debate’, especially where that democratic debate is rigorous and provides a ‘vibrant backdrop of reasonable disagreement’.⁷⁴ The argument I developed there (and elsewhere⁷⁵) is sensitive to the reasons and conditions

⁶⁷ BARAK, PROPORTIONALITY 493.

⁶⁸ BARAK, PROPORTIONALITY 493.

⁶⁹ BARAK, PROPORTIONALITY 495.

⁷⁰ BARAK, PROPORTIONALITY 495.

⁷¹ BARAK, PROPORTIONALITY 495. *See also, Id.*, 495 (“...[A]s it does not protect the individual’s right *vis-à-vis* the public — a protection found in democracy’s foundation’. I do not know what I have done to warrant the claim that my position is not only ‘extreme’, but ‘characteristically extreme’.”).

⁷² *See, WEBBER, NEGOTIABLE CONSTITUTION* ch. 6.

⁷³ WEBBER, NEGOTIABLE CONSTITUTION 203, 204.

⁷⁴ WEBBER, NEGOTIABLE CONSTITUTION 206, 209.

⁷⁵ *See, Grégoire Webber, Rights and the Rule of Law in the Balance* 129 LAW QUARTERLY REVIEW 399 (2013).

informing Jeremy Waldron's 'core of the case'⁷⁶ account of the merits of judicial review, together with the reality that democratic debate is not always rigorous and responsible.

Criticising my argument on judicial review, however, does not amount to criticising the understanding of rights that informs it any more than criticising the expansive scope of judicial review defended by proponents of proportionality amounts to criticising their account of rights. So what, then, does Barak object to in relation to my account of rights? The objections here are less forthcoming. He correctly reports that, on my view, 'the legislator's limitations constitute a development of the right rather than its limitation', which renders 'the difference between the development of and the limitation of a right nearly superfluous' (I would say: non-existent).⁷⁷ It follows, concludes Barak, that this 'view, in practice, is not that different from that which considers every constitutional right as absolute if the courts have agreed that its limitation was [justified]'.⁷⁸ I think this broadly right, but I fail to see the force of Barak's conclusion: the 'absoluteness of the constitutional right according to Webber is trivial at best',⁷⁹ a view Barak otherwise formulates as 'a truism, a trivialization of the notion of an absolute right'.⁸⁰ Instead, Barak prefers to identify a right as absolute only if 'the extent of its protection ... is equal to its scope'.⁸¹ I can see no great difference between that understanding and my own, for the question of the right's scope is the very matter that requires settling.

The great difference for Barak, on my reading, is formal and confuses proper attention to the difference between a constitution and legislation with improper conclusions about the meaning of rights. Barak pays special attention to the distinction between what he terms the 'constitutional level' (the constitutional bill of rights) and the 'sub-constitutional level' (legislation, the common law). On his view, the scope of a right is determined — *exhausted* — by the best interpretation of its terms as outlined at the constitutional level, even if those terms yield an expansive and unreasonable scope. Barak does not allow anything at the sub-constitutional level to constitute the scope of the right. There is indeed reason to pay attention to what is determined by the constitution versus what is determined legislatively and at common law. Among those reasons are that legislation must comply with the constitution. But when the constitutional provision is under-defined and does not answer the question a legislative provision attempts to answer — for example, whether hate propaganda is protected by the right to freedom of expression; whether affirmative action is inconsistent with the right to

⁷⁶ Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE LAW JOURNAL 1346 (2006).

⁷⁷ BARAK, PROPORTIONALITY 495–496.

⁷⁸ BARAK, PROPORTIONALITY 496 (in my reformulation, 'justified' replaces 'proportional').

⁷⁹ BARAK, PROPORTIONALITY 496.

⁸⁰ BARAK, PROPORTIONALITY 27.

⁸¹ BARAK, PROPORTIONALITY 27.

equality; whether a 17-year-old has a right to vote — I see no reason to deny that legislation can be read as attempting to complete the scope of the right left under-determined at the constitutional level. The completion is not at the *constitutional* rank, without doubt, but that does not deny that it can constitute the completion of an under-completed right.

Consider the legal provision that ‘any service of a military character [or] any work or service which forms part of normal civic obligations’ does not constitute ‘forced or compulsory labour’. Does this constitute part of the right not to be subjected to ‘forced or compulsory labour’? In order to answer this question, Barak would have us ask first *where* the provision is situated. If it is situated in the text of the European Convention, then *yes*: it constitutes part of the right’s scope. If it is situated in legislation, then *no*: it cannot constitute part of the right’s scope, but instead *infringes* the right. I should think that the prior question is whether the provision is justified as part of the right. If it is not, then it should be changed, either by way of amendment to the bill of rights or by way of amendment to the legislation. But if it is justified, then I can see no reason for saying that it *infringes* the right if it is in legislation but *defines* the right if it is in the Convention.

VI. TWO MODES OF ABSOLUTE RIGHTS

The argument I have developed in the previous sections is simple: there is a relationship between the constitution of a right and the right’s claim to being absolute. I have argued, *contra* proportionality proponents, that the conclusion that a right-qua-interest has been infringed rests on an insufficiently defended account of what constitutes a right. If a right is understood to outline what it is that one owes another in terms of act or deed, the right is a candidate for being absolute. There are two paths to this claim, the first available to select moral and legal rights, the second to all legal rights.

The first path focuses on the small set of commonly acknowledged absolute rights. They are all rights correlative to duties *not to act*. These duties are sometimes identified as being absolute because *exceptionless*, meaning that there are no justified exceptions to the duties of inaction. These duties are categorical and hold in all instances and all circumstances.⁸² One ground for this affirmation is that it is always unreasonable to choose directly against certain aspects of human well-being and, because it is *always* unreasonable to do so, one *always* has a duty not to do so. There is no need here to arbitrate the merits of this or other plausible lines of

⁸² The thought is well formulated in Steven Greer, *Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law?*, 15 HUMAN RIGHTS LAW REVIEW 101, 109 (2015) (“There is little dispute that an absolute right is one which is subject to no exception in any circumstance whatever and that an absolute obligation is one which always and in all circumstances overrides all other obligations with which it may conflict.”).

argument to sustain the view that some rights are absolute because correlative to exceptionless duties. What matters at present is the recognition that such duties are candidates for being exceptionless in part because they are all duties *not to act*. It is always possible for me not to torture, not to engage in cruel and unusual punishment, not to hold another in slavery. My duties not to act cannot come into conflict with each other.

Matters are rather different when rights correlate to duties *of action*, duties to perform some act or deed. These duties, on one view, must ‘inevitably be conditional, relative, defeasible, and prioritized by rational criteria of responsibility’ given the possibility of conflict between them and other responsibilities.⁸³ These defeasible duties are conditional, not categorical, and therefore correlative to *non-absolute* rights. It is in reaction to this conclusion that a second path to absolute rights can be pursued, one that builds on the first, but dissents from the conclusion that only negative duties (duties not to act) can be correlative to absolute rights. This second path is in no way inconsistent with the first, but continues where the first ends by attending to the relationship of moral rights to legal rights in a manner that allows legal rights to achieve what moral rights cannot: to settle, for *this* community, absolute rights correlative to duties that are conditional, relative, defeasible, and prioritised *in morality* but that can be unconditional and exceptionless in law. For though these duties may *in morality* be subject to conditions and exceptions, the law can specify these duties to hold only in those instances when the conditions are fulfilled and the exceptions are not. Legislative determinations of what is just and justified can establish, authoritatively and for this community, what is not itself a requirement of morality but is in compliance with those requirements.

There is no doubt that the specification of relations between persons and what they positively owe each other, because it draws on evaluations of what is just and justified according to time, place, person, and circumstance, is liable to change: the responsible legislature will keep under ready evaluation every legal settlement of relationships between persons that seek to give effect to the rights of each and all, schemes that only partially comprise absolute negative duties and regularly include affirmative duties that are conditional and subject to exceptions. This ‘dynamic’ or ‘negotiable’ quality of rights may be thought to challenge the promise of absolute rights.⁸⁴ Indeed, insofar as ‘absolute’ is meant to communicate ‘unchanging’, then these rights will not be absolute. But if ‘absolute’ communicates

⁸³ 3 JOHN FINNIS, *Introduction*, in HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS OF JOHN FINNIS 7 (2011).

⁸⁴ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 171 (1988), and Oberdiek, *Specifying Rights* 153 where both appeal to the ‘dynamic aspect of rights’. The expression ‘negotiable’ is similarly inspired and draws on the discussion in WEBBER, *NEGOTIABLE CONSTITUTION* 27–30.

‘non-defeasible’ and ‘unconditional’,⁸⁵ then carefully crafted positive duties can correlative to absolute rights. If those duties are specified so as to obtain only in those cases when the duty will not be defeated, then the right, *as specified*, is non-defeasible. Each re-evaluation of a right in response to changing circumstances will aim to re-establish a just and justified definition of right relations between persons so that the right is non-defeasible once specified.

It is in this way that, albeit with many failings, law can achieve what morality cannot or can do only imperfectly: the settlement, for this community, of when such positive duties hold and not. By tracking a distinction drawn by Aquinas, it can be said that some rights are absolute because they are correlative to duties that bind always and for every situation (*semper et ad semper*) and other rights can be *made* absolute if the correlative duties are specified so as to hold only in those situations and relative to the time and place in which they properly hold (*semper, sed non ad semper, sed pro loco et tempore*).⁸⁶ If the thought that rights can be absolute and yet subject to change sounds troubling, consider this near equivalent way of putting the same idea: justice is always to be done,⁸⁷ but what justice in community requires will change as the community’s circumstances and membership changes. This truth does not tempt one to deny that justice is to be realised. Rather, it invites one to say that the requirements of justice can relate to time and place and circumstance. So, too, with the truths that some rights are correlative to unconditional non-defeasible moral duties not to act and other rights are correlative to conditional moral duties that the law can realise, by specifying, as unconditionally non-defeasible.

VII. CONCLUSION

In calling attention to some of the assumptions animating the view of rights defended by proponents of proportionality, I have been reminded of Aleinikoff’s warning that, as with so many aspects of life, ‘familiarity breeds consent’ and of his corresponding hope that, by raising enough questions about balancing and its implications for rights, one can ‘force a re-opening of the balancing debate’.⁸⁸ One of my aims has been to highlight how the animating conception of rights under the received approach awards too little concern for duties. Informing one’s

⁸⁵ Synonyms appealed to by H.L.A. Hart, *Are there any natural rights?*, in THEORIES OF RIGHTS 78 (Jeremy Waldron ed., 1984).

⁸⁶ See JOHN FINNIS, AQUINAS 164 (1998). See also JOHN FINNIS, *Moral Absolutes in Aristotle and Aquinas*, in REASON IN ACTION: COLLECTED ESSAYS OF JOHN FINNIS 189 (2011). See also Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZONA LAW REVIEW 209, 210 (1995) (“[W]ith ‘full factual specification . . . rights are always absolute, i.e., are of the utmost stringency and can never be morally overridden.’”).

⁸⁷ I leave to one side the idea that ‘mercy seasons justice’: WILLIAM SHAKESPEARE, *The Merchant of Venice*, act 4, sc. 1.

⁸⁸ T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE LAW JOURNAL 943, 945 (1987).

understanding of rights with a concern for duties and relationships between persons opens up different pathways for aligning the constitution of rights with their normative force, pathways that, in turn, direct one to thinking through how rights, by their very nature, aspire to be peremptory and conclusive of what ought to be done. Another way of putting this same thought is to say that, by their very nature, rights aspire to be absolute.