

Dignity and Proportionality

By Alec Walen, Ph.D., J.D.

“The idea of deontological constraints cannot be appropriately captured within the proportionality structure.”¹

I. Introduction

I argue here, contrary to the claim by Mattias Kumm, above, that the deontological constraints that a state must respect if it is to respect the dignity of those under its power can be properly and fruitfully understood using the framework of proportionality analysis. Indeed, proportionality analysis, if it is to be about rights at all, *must* incorporate the range of deontological weighting factors that are essential to what I call the “Mechanics of Claims.”² These weighting factors reflect the same basic political liberal commitment to the dignity of persons as other principles properly represented in proportionality analysis, such as “the basic idea that public institutions may not use their coercive powers to force citizens to become either saints or heroes.”³ They express them in a different step in the analysis, but they belong to the analysis just the same.

The argument will proceed as follows. First, in the remainder of this section, I discuss methodology. Next, I review the structure of proportionality analysis, and explain those aspects of rights that Kumm thinks it does not properly handle. Then, I will describe the *Mechanics of Claims*, the framework I use to apply weighting factors, and explain how it can be integrated into the last stage of proportionality

¹ Mattias Kumm, “Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement,” in *Law, Rights, Discourse: Themes of the Work of Robert Alexy* (S. Paulson and G. Pavlakos, ed., Hart, 2007), p. 162.

² I, along with my co-author, David Wasserman, introduce the *Mechanics of Claims* in “Agents, Impartiality, and the Priority of Claims over Duties; Diagnosing Why Thomson Still Gets the Trolley Problem Wrong by Appeal to the ‘Mechanics of Claims,’” *The Journal of Moral Philosophy* (forthcoming).

³ Kumm, “Political Liberalism and the Structure of Rights,” p. 164.

analysis. In section IV, I will explain why at least two weighting factors—one corresponding to the distinction between positive and negative claims, the other corresponding to what I call the distinction between restricting and non-restricting claims—must be accepted to make sense of one of the foundational principles that must be respected to respect the dignity of persons. In section V, I will explain why two other cases—the requirement of proof beyond a reasonable doubt for criminal convictions and limits on preventive detention—require us to recognize a spectrum of deontological weights to capture the full import of human dignity. Finally, I conclude by pointing out how one has to be careful not to confuse requirements that flow from dignity as a status with the idea that dignity explains why certain things are of value.

Before proceeding, then, I start with a methodological point. This paper will be primarily a study of the foundations and structure of *moral* rights. That is fitting for a discussion of dignity, which is the foundational *moral* value of international human rights.⁴ One might nevertheless worry that this would distort the discussion of proportionality, as neither constitutional rights nor human rights practice, nor the norms associated with them, can simply be read off a theory of moral rights.⁵ But I am not suggesting that they *can*. I am suggesting only that insofar as constitutional and human rights are normatively grounded in the moral concept of dignity, one can look to the way moral rights must be structured if they are to respect human dignity to inform the discussion of constitutional and human rights.

The assumption that one can study moral rights in small-scale, private interactions and then scale the principles that emerge up to apply to the actions of

⁴ This is signified by the fact that Article 1 of the UN Declaration of Human Rights, GA Res 217 (III 1948), states that “All human beings are born free and equal in dignity and rights.” See also Article 1, para 1, of the German Basic Law, which states that “The dignity of human persons is inviolable.”

⁵ Charles Beitz presses this point in *The Idea of Human Rights* (Oxford University Press, 2009), ch. 3.

states is common among academic, analytic philosophers.⁶ But care must be used if one is to follow this practice. For the state properly has powers that no individual should possess. It must be because it is tasked with addressing a problem that no individual could address on his own without becoming a tyrant: the problem of establishing and maintaining just terms for social coordination and cooperation. The powers necessary to address that problem include the power to take property in the form of taxes, and the power to require and prohibit a range of actions that morality itself would neither require nor prohibit. Nonetheless, the essence of the tradition of moral, constitutional *and* human rights thought is that these powers of the state must be limited.⁷ They must be limited not only in the classic sense, dating back at least to Plato, that those who wield power in the state must rule in the interest of the ruled. They must also be limited in the sense that the state may not violate the fundamental moral rights of individuals. It is no simple matter to explain why, for example, progressive taxation does not violate the fundamental rights of individuals, while taking property for public use without just compensation does.⁸ But I believe such lines must be drawn, and I will argue on the assumption that the moral rights I discuss below are the kind of fundamental moral rights that the state, just like an individual, must respect.

I note before moving on that this methodology may be seen as fitting for a paper that is one of a series of papers concerned with rethinking the national/

⁶ See, e.g., Jeff McMahan, *Killing in War* (Oxford University Press, 2009) (on just war theory), and Victor Tadros, *The Ends of Harm* (Oxford University Press, 2011) (on punishment theory).

⁷ See William Edmundson, *An Introduction to Rights* (Cambridge University Press, 2004), ch. 2.

⁸ Robert Nozick, in *Anarchy, State, and Utopia* (Basic Books Inc., 1974), argued that taxation to support anything other than a minimal state was unjust on a par with theft, while John Rawls, in *A Theory of Justice* (Oxford University Press, 1972), argued that taxation was just as long as it helped achieve a just distribution of basic goods (one in which the worst off could expect to have the best possible life-chances, comparing the position of the worst-off in society across a range of possible policies for taxation, regulation, and spending). I think Rawls clearly had the better of argument, but it is still no simple matter to explain why.

international divide. Here, I treat the divide as of no import whatsoever: the points made about proportionality analysis as a tool for making sense of the moral commitments grounded in dignity apply equally well to the state as held to constitutional norms and the state as held to norms of international human rights.

II. Proportionality Analysis

There are four steps or questions that must be asked by a court engaging in proportionality analysis.⁹ First, does the law have a legitimate aim (the legitimate ends test)? For example, if the law's aim were simply to disadvantage a politically disfavored group of people, or to promote a particular religious faith, then the law would fail this test and should be struck down. Second, are the means the law seeks to use to achieve its aim suitable (the suitability test)? If they are clearly unrelated to the aim, then again, the law cannot stand. Third, is there an alternative means that is less restrictive of the rights of those negatively affected by a law and that is, at the same time, equally effective and equally cost effective for the state (the necessity test)?¹⁰ If so, then the law cannot stand. Importantly, this test is not of necessity in the sense that the government has to show that the legitimate end could be achieved in no other way. It is a test of necessity in the sense that it is necessary to use this law to avoid some loss; i.e. there is no Pareto-superior alternative for achieving the end, avoiding costs, and respecting rights. Finally, if the law passes those three steps, the court goes to step four: is the law proportional in the narrow sense (the balancing test)? The balancing test holds that "[t]he greater the degree of non-satisfaction of, or detriment to, one principle [or value], the greater must be the

⁹ This paragraph is taken, with minor modifications, from Alec Walen, "Judicial Review in Review: A Four-Part Defense of Legal Constitutionalism. A Review Essay on *Political Constitutionalism*, by Richard Bellamy," *International Journal of Constitutional Law* 7 (2009): 337-338.

¹⁰ I add the cost-effective element to what I take to be the standard treatment of this third element because failure to do so would allow courts to strike down laws that are slightly more restrictive of rights than some equally effective alternative when the alternative would so costly as to be prohibitive.

importance of satisfying the other.”¹¹ In other words, the negative effects on those whose rights are infringed by a law must not be disproportionate to the value of the legitimate aim that would justify the law.

The central question of this paper is how well this structure can take into account what, following Kumm, I will call the three structural elements of rights within that political liberalism holds that a state must respect: anti-perfectionism, anti-consequentialism, and anti-collectivism. Anti-perfectionism is the idea perhaps most closely associated with political liberalism: that the state may not justify the use of its coercive powers to pursue comprehensive conceptions of the good life. Anti-consequentialism is the idea that there are limits to when the state may justify acts that impose costs on some by appeal to the fact that those costs are outweighed, from some impartial or agent-neutral point of view, by benefits to others.¹² And anti-collectivism is the related idea that laws must be justified to each individual, and that each individual has a right to contest laws that adversely affect her.

Kumm thought, at least at one point in time, that proportionality analysis captures only the last of these three features of rights. This might be thought surprising in two ways. On the one hand, if one takes Kumm to have made a strong normative claim that proportionality analysis captures anti-collectivism in the strong sense that it provides the best way to operationalize anti-collectivism, then one might doubt the claim. That is, one might doubt whether proportionality analysis, per se, is what the government in general, and courts in particular, have to engage in if it or they are to respect the idea that people must be treated as

¹¹ Kumm, “Political Liberalism and the Structure of Rights,” p. 139 (quoting Robert Alexy, *A Theory of Constitutional Rights* (Oxford Univ. Press 2002), p. 102.)

¹² Consequentialism would also allow harms to some to be outweighed by goods that accrue to no one, but that are simply good in themselves. For example, one might conceive of environmental protection as being good in ways that outstrip the benefits (e.g. the ability to hike in pristine woods) that any individuals get from it. Consequentialism must also make sense of value to future persons who do not even exist at the time of a decision. But for simplicity we can assume that it is predominantly concerned with balancing goods and harms to particular, existing individuals.

individuals. One might think that a weaker set of principles, such as those connected with the right to vote on a regular basis, would suffice to treat people as individuals.¹³ Or one might think that the right to vote plus certain constitutional protections for free speech and other political rights would suffice.¹⁴ Or one might think that judicial review of a more robust form is required, but think that the courts should seek to avoid engaging in substantive weighing of values, as presupposed by proportionality analysis, by following the U.S. model and using tests that tip the scales so that certain kinds of laws will presumptively pass constitutional muster, while others will presumptively fail.¹⁵ In the end, Kumm himself seems to back away from the claim that courts must use proportionality analysis to treat people as individuals. He is willing to countenance that departures from the balancing test—in particular departures that would require the state to show a “compelling interest” before it can infringe a right—might be justified by “institutional concerns.”¹⁶ Indeed, if one adds to this the thought that only certain rights call for such a departure, and that courts should otherwise tip the scales in favor of legislation by adopting a “margin of appreciation” for legislative judgments, then one has more or less recreated the U.S. model. I am happy to grant that Kumm can answer this set of challenges¹⁷—except insofar as he actually accepts the last qualification on the role of proportionality analysis. But it is at least worth noting that the challenges have to be met.

¹³ This is the view of Richard Bellamy in *Political Constitutionalism* (Cambridge University Press, 2007).

¹⁴ This is more or less the view of John Hart Ely in *Democracy and Distrust* (Harvard University Press, 1980).

¹⁵ Richard Fallon, in “Strict Judicial Scrutiny,” *UCLA Law Review* 54 (2007), p. 1270, explains that this was the fundamental motivation of the U.S. Supreme Court in the development of its rational basis and strict scrutiny approaches to judicial review.

¹⁶ Kumm, “Political Liberalism and the Structure of Rights,” p. 164.

¹⁷ For his most recent defense against these challenges, see “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights based Proportionality Review,” *Law and Ethics of Human Rights* 4 (2010): pp. 141-175.

On the other hand, it is distinctly surprising that Kumm, at least at one time, rejected the idea that proportionality analysis naturally captures anti-perfectionism. The legitimate ends test seems exactly suited to that task. It takes on board that certain sorts of reasons are excluded as illegitimate in a political liberal society. Kumm did clearly state that proportionality analysis did not capture this feature of rights: "Other structural features of rights discourse [other than proportionality] include the idea of excluded reasons..."¹⁸ His more recent work, however, indicates that he has since come to accept that proportionality analysis is perfectly suited to handle the exclusion of perfectionist reasons.¹⁹

This leaves the last structural element of rights, anti-consequentialism. This element, which Kumm equates with the principle that people may not be used as a means, is key to treating people with dignity. But Kumm thinks of this as sitting outside of proportionality analysis, as a sort of extra principle that the state must respect. In one place he shifts tone and suggests that it might be brought into proportionality analysis:

The proportionality test may be helpfully employed also to assess state measures in which individuals are used as a means. It still makes perfect sense to require that when individuals are drafted into the service of the community these impositions have to meet proportionality requirements. The individual may be used as a means by public authorities only if it is necessary to further a legitimate public purpose and is not disproportionate. [But a] different moral baseline merely means that, on application, what counts as proportionate is very different from what counts as proportionate in situations where the individual person is not used as [a means].²⁰

This is fundamentally correct. The problem for Kumm, however, is two-fold.

¹⁸ Kumm, "Political Liberalism and the Structure of Rights," p. 133.

¹⁹ Kumm, "The Idea of Socratic Contestation and the Right to Justification," p. 160.

²⁰ Kumm, "Political Liberalism and the Structure of Rights," p. 163.

First, he usually does not treat anti-consequentialism in this way. For example, he says that the centrality of proportionality analysis to reasoning about rights “should not detract from central features of rights reasoning that exhibit a different structure,”²¹ features like anti-collectivism. And even more clearly, he says what I quoted at the head of this paper: “The idea of deontological constraints cannot be appropriately captured within the proportionality structure.”²² One of my central points in this paper is that this is mistaken.

Second, the idea of a baseline shift only for being used as a means misses a range of deontologically significant categories. It may be true, when the cost to a person of being used as a means is substantial, that he has an absolute (or nearly absolute) right not to be so used.²³ But there are other cases in which the balance of interests is neither on a par for all involved, nor tilted completely (or nearly completely) in one direction. This is where weighting factors come in, and making room for them *in* the balancing test is key to the balancing test being morally sound. In other words, it is key to understanding how the balancing test should work that it not be taken to operate in only one of two modes: tipped more or less completely in favor of those with a claim not to be used as a means, or an even consequentialist balance of interests. The balance should reflect the kinds of claims involved and weigh them accordingly. This idea is decidedly inconsistent with Robert Alexy’s idea that “[s]tatements of value can be reformulated as statements of principle and vice versa,”²⁴ at least if value in this context is meant to be understood as it is in consequentialist theory. But it fits comfortably into Kumm’s broader claim that “proportionality analysis taken seriously means that all relevant considerations

²¹ *Id.*, p. 165.

²² *Id.*, p. 162.

²³ I address the issue of absoluteness of this right in the next section.

²⁴ *Id.*, 136. (describing Alexy’s theory that principles are “optimization requirements.”) [original quote from Alexy would be good]

must be taken into account and attributed the weight they deserve.”²⁵ Explaining how to give claims the weight they deserve will be the focus of the rest of the paper.

III. The *Mechanics of Claims*

A deontologically weighted balance of competing claims is exactly what the *Mechanics of Claims* is designed to offer. It articulates a model of how claims compete to determine who ultimately has a first-order Hohfeldian right: either an agent with a privilege—no duty to another to do or not to do something—or a patient (someone acted upon by an agent) with a claim-right that imposes a corresponding duty on an agent.²⁶

Two terminological points should be addressed right away. First, for those well versed in Hohfeldian terminology, it may seem jarring to use the term “claim” as the generic; Hohfeld used it to designate one species of right, that of a patient, corresponding to a duty in an agent. But I think that “claim” serves as the best generic term in common parlance, so I beg the reader’s indulgence.

Second, on the *Mechanics of Claims*, the notion of a right being “infringed”—i.e. of a right that an agent rightly chooses not to respect—has no place.²⁷ This is because rights are the conclusion of the weighing, such that the considerations that would justify denying them have already been taken into account. A right can only be respected or violated, and it is morally mandatory not to violate rights. This does not fit easily into the familiar moral and legal patterns of speech according to which we have rights, for example, to free speech, or not to be killed, which it is often permissible for the state or an individual to infringe. These rights are inputs into the moral balance, not conclusions thereto. But the difference here is merely

²⁵ Id, p. 151.

²⁶ Wesley Hohfeld introduced his analysis of rights into four pairs (two first-order; two second-order) of “jural opposites” and four pairs of “jural correlatives,” in two papers: “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *Yale Law Journal* 23 (1913), pp. 16 - 59; and “Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *Yale Law Journal* 26 (1917), pp. 710 - 770.

²⁷ I say this despite having used the notion of an “infringed” right in the text above.

terminological. There is no reason not to treat what are normally called rights as claims, which are in effect pro tanto rights. And much confusion can be avoided if we use language this way.²⁸ Thus from here on I shift my terminology to treat all pro tanto rights as claims.

Turning to the substantive position, the operation of the *Mechanics of Claims* can be illustrated using the examples that make up the *Trolley Problem*.²⁹ The *Trolley Problem* is the challenge of explaining why it is permissible to kill one person, without his consent, for the sake of five other people in the first but not the second of the following two cases (named for the means the agent would use).

Trolley Switch: a bystander at a switch can throw the switch and thereby turn a trolley that is hurtling down a hill out of control away from five innocent people onto one innocent person on a side track (the “side-track man”), thereby killing the side-track man and saving five.

Massive Man: a bystander at a switch can throw the switch and thereby cause a massive man to topple into the path of a trolley that is hurtling down a hill out of control, thereby killing him and saving five.

Most people believe that it is permissible, but not required, for the bystander to turn the trolley from five onto the side-track man in *Trolley Switch*.³⁰ The challenge is to explain why. I will turn to providing a substantive answer in the next section of the paper. For the moment, the key thing is to note that the structure of the answer will be that despite the fact that the side-track man and the massive man have the same interest in not being killed—using the notion of interest to reflect an

²⁸ I argue this claim explicitly in *Transcending the Means Principle*. See also Russ Shafer-Landau, “Specifying Absolute Rights,” *Arizona Law Review* 37 (1995): 209-225.

²⁹ This problem was originally framed by J.J. Thomson in “Killing, Letting Die, and the Trolley Problem,” *The Monist* 59 (1976): 204-17

³⁰ For just one example of the vast empirical literature supporting this claim, see F. Cushman, L. Young & M.D. Hauser, “The Role of Reasoning and Intuition in Moral Judgments: Testing Three Principles of Harm,” *Psychological Science* 17 (2006): 1082-1089

objective moral assessment of the interest, not their subjective valuation of their lives—the massive man’s claim not to be killed must count as much stronger in the balance of claims that the bystander faces than the side-track man’s claim.

One thing that is noteworthy about both cases is that all the patient claims in the balance are “impartial” patient claims. This is the kind of claim I focus on for most of what follows, but it is important to notice that there is another kind of patient claim, which I call “special” patient claims. Special patient-claims reflect special relationships an agent may have with particular patients, such as that of promisor to promisee, or parent to child. The thought is that someone who has a special claim on an agent can constrain the liberty that an agent otherwise would have, but does not have the ability to give the agent liberty that she would not otherwise have, given the balance of impartial patient-claims on her. We can illustrate that with the cases in the *Trolley Problem*.

The normal assumption about *Trolley Switch* is that the bystander is permitted, but not required, to turn the trolley away from the five and onto the side-track man. But if her son were among the five, it seems plausible to say that her liberty not to turn the trolley would be gone; her son’s special claim on his mother’s aid would require her to act. At the same time, if her son were the side-track man, his special claim on her would deprive her of the liberty to turn the trolley away from the five. But the limits of his special claims show up if the case is switched to the *Massive Man* case. Even if the bystander’s son were among the five in that case, it would still be impermissible to topple the massive man down in front of the trolley. She has no liberty to do that on the basis of the balance of the impartial patient-claims on her, and his claim for her help can no more license her to topple the massive man in front of the trolley than it can license her to cut open a stranger to steal his organs and give them to her son if that was what he needed.

Impartial patient-claims, which set the limits within which special patient-claims can operate, are those patient-claims that do not depend on having a special

relationship with the agent. Their strength reflects the welfare interest of the patient, modified by whatever impartial weighting factors are relevant.

On a formal level, then, the *Mechanics of Claims* works as follows, at least in paradigmatic cases where it is only the balance of competing claims that determines what privileges and duties an agent has:³¹ An agent A has a privilege to perform some act X (where X can include *not* performing some act Y) if and only if her agent-claim to be permitted to do X, augmented by all the impartial patient-claims that would also have her do X, outweighs the combined force of all competing impartial patient-claims that would impose on her a duty not to do X. And a patient P has an impartial claim-right that A do X, giving rise to a corresponding duty in A to do X, if and only if his patient-claim that A do X, augmented by all other patient-claims that weigh in favor of A doing X, outweighs A's agent-claim not to be required to do X, augmented by all patient-claims that weigh against A doing X.

There can be non-paradigmatic cases, because the rights and duties of agents often reflect more than the balance of claims. For example, an agent may not have a right to do X if doing so free-rides on the sacrifices of others and thus takes unfair advantage of them. Because her duty not to free ride is owed to an ill-defined group,³² it seems unhelpful to try to pick out the members of the group who have a claim-right that she pay her fare. It seems more fitting simply to say that an agent can be constrained by other considerations beyond patient-claims, such as fairness. Courts considering constitutional challenges will normally be considering non-paradigmatic cases. But before saying more about those, I want to say something

³¹ This and the next paragraph are taken substantially from Walen and Wasserman, "Agents, Impartiality, and the Priority of Claims over Duties."

³² In a literal case of free riding on a bus, would the duty be owed to the others who pay their fare to ride on that bus? What about those who normally pay their fare, but sometimes free ride? What about taxpayers who support the service? Would it also include those who pass through a town and pay sales tax on an item of clothes, if that tax offsets others taxes, freeing up more money to support the bus service? What about those who never come to town but pay taxes at a federal level that support local services? It gets very hard to say just who the claimants are on the other side.

more about the perspective of the agent, because that too changes when moving from private cases to state-action cases.

Private agents are not mere nodes for the balance of competing impartial patient-claims on them. They have their own agent-claims too. These basically take the form of negative claims *not* to be required to do things they do not want to do.³³ To see how important these are, let us return to *Trolley Switch*. Suppose that the five positive patient-claims to be saved outweigh the side-track man's negative claim not to be killed. That would explain why it is permissible for the bystander to turn the trolley onto the side-track man. But it would not explain why it is permissible for her *not* to turn the trolley onto him (i.e. why the bystander is not *required* to turn the trolley onto him). To explain that, I appeal to the thought that she has a weighty agent-claim *not* to be required to be an agent of death. She may appeal to that claim to tip the balance away from turning the trolley, but she may waive that claim, allowing her to act on the balance of impartial patient-claims.

One substantial difference between private agents and the state as an agent is that private agents have their own lives to lead; that grounds their agent-claims not to be required to do whatever the balance of impartial patient-claims on them would direct them to do. States are not agents in the same way. They exist only to serve the interests of their citizens (though once they have been created they must respect the claims of all persons). That would seem to imply that states must simply do whatever the balance of patient claims on them is. Thus we might imagine that a state-agent, for example, a police officer, in the position of the bystander in *Trolley Switch* would be required to switch the trolley from the five onto the one.

There are, however, two reasons why things are more complicated than that. First, state agents are still people. They may be expected, in their professional lives, to do a wide range of things, but that does not mean that state agents have put all

³³ The argument that there are no substantial positive agent-claims is given in Walen and Wasserman, "Agents, Impartiality, and the Priority of Claims over Duties," § II.

their particular agent-interests on hold for as long as they are on active duty. It might be more than can be expected of an average police officer that she become an agent of death in a *Trolley Switch* situation. Whether it does expect too much of her depends on, for example, how foreseeable such situations are when the agent takes the job, whether they fit the job description, whether there are ample opportunities for other lines of work, etc.

Second, states have state resources that they use with some discretion. It would be too simplistic to say that the balance of patient-claims on the state fully determines what the state must do with its resources. Part of the project of democratic self-governance is allowing the people, whether through direct democracy or through the actions of their legislators, to *choose* both what resources to acquire, and how to direct the allocation of those resources that are collected. This puts some limit on the extent to which impartial patient-claims on a state can require state action, and also provides some space for special patient-claims upon the state.

Nonetheless, the idea that the state is a node for competing claims on it is a useful approximation for many cases that would come up in court and that might be considered using proportionality analysis. In those cases, we can say that the *Mechanics of Claims* represents a specific way of spelling out how to carry out the balancing test in the last stage of analysis.

Moving back, then, to the framework of proportionality analysis brings us back to the fact that much of what a state deals with in cases that might be contested as a matter of constitutional or human rights law are non-paradigmatic cases, in which the interests on one or both sides are not fully represented by the claims of particular patients. Consider, for example, whether a state is permitted to restrict someone's freedom of speech. On the one side is the plaintiff/patient, with a claim to free speech (standing in for all who would likewise be affected by that law). On the other side are all who stand to benefit from the law, at least insofar as their

particular benefits are the sorts of benefits the state can count in favor of the law.³⁴ Now an important point about the *Mechanics of Claims* is that the balance should not be weighed as if it is one individual plaintiff/claimant on one side, and all who will benefit from a law on the other. It is a balance of all considerations on both sides.

I will return to the topic of free speech rights in the last section of the paper. What I go on to discuss in the next section is why we should recognize two basic kinds of patient-claims as having very different kinds of weights in the *Mechanics of Claims*. I also, in that section, explain why one cannot have a simple consequentialism of rights or claims. I explain, that is, why claims must be weighed as they are made on a given agent. Then, in the next section I come back to two other kinds of cases that call for more intermediate range of claim strengths.

IV. Two Structurally Important Dimensions of Patient-Claims and their Foundation in Liberal Principles

The two dimensions of patient-claims that are most important for understanding liberal rights are the distinction between positive and negative claims, and the distinction between what I call restricting and non-restricting claims (which explain why it is harder to justify using someone, without his consent, as a means than it is to justify causing him a similar harm in other ways). Both are straightforwardly grounded in one of the three principles that I take to lie at the foundation of liberal moral thought. I start this section, then, by describing these foundational principles, and then I explain how the one principle in particular grounds these two dimensions of claims.

³⁴ Those would include incidental benefits, but not benefits that accrue, say, to racists who desire to keep racial minorities oppressed, or to thieves who will better be able to steal property.

A. *The Foundational Liberal Principles*

As I understand the liberal tradition, going back at least to Kant, it is based on three fundamental principles: (a) the welfare principle: that human welfare matters—in Kant reflected in the highest good, which is that people be happy in proportion to their virtue; (b) the liberty principle: that each person is fundamentally free to lead her own life in pursuit of her own ends—in Kant reflected in the ideas that morality is condition on the worthiness to be happy, and that we are all ends in ourselves; and (c) the equality principle: that each is fundamentally equal to all others in terms of her status as a rights-bearer—in Kant reflected in the idea that we are all equally members of the kingdom of ends.³⁵ Of course, not all liberals have seen these three as equally fundamental. Ronald Dworkin, for example, gives priority to equality over liberty.³⁶ And John Stuart Mill gave priority to human welfare and equality, using them to derive the protection for liberty.³⁷ But failure to understand the fundamental significance of the liberty principle has a seriously distorting impact on moral theory, as the basic *structure* of the *Mechanics of Claims* depends on it.

One can see how important the liberty principle is by seeing what happens if it is left out, as it is in utilitarian theory. Utilitarianism notoriously fails to match moral common sense insofar as it treats people as resources for achieving the common good. It does so both as agents, who are to see themselves as living not for themselves but for the common good, and as patients, who can be used by others as a means of achieving the common good. Though Mill's utilitarian arguments in favor

³⁵ John Rawls likewise draws on all three principles. He uses the notion of primary goods to capture the idea that human welfare matters; his rejecting utilitarianism for failing to “take seriously the distinction between persons” (*A Theory of Justice* (New York: Oxford University Press, 1972), p. 27) reflects the thought that each person is fundamentally free to lead her *own* life; and his two principles of justice reflect the fundamentally equal status of all as rights-bearers.

³⁶ Hence the name of his book, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2002).

³⁷ See *On Liberty* (originally published in 1869).

of liberty have some merit, he failed to come to terms with just how demanding and disrespectful his utilitarian philosophy can be. The failure was the result of not building in, from the ground floor of morality, the understanding that each person has her own life to lead.

To see that this failure is primarily one that concerns the *structure* of the *Mechanics of Claims*, it helps to compare the *Mechanics of Claims* to the idea of a utilitarianism of rights.³⁸ A utilitarianism of rights cannot make sense of the kind of deontological restrictions that operate in *Massive Man*, barring the bystander from sacrificing the massive man regardless of why the five are endangered, that is regardless of whether they are endangered because of an accidental breakdown in the runaway trolley's breaks, or because some villain is trying to kill them as a means to some plan of his. If claims not to be used as a means had some negative value, and that value explained why it was so important not to use them as a means, then it should be permissible for the bystander to topple the massive man in the latter scenario, because that would reduce the overall disvalue in the situation by reducing the number of people who are used as a means from five to one.³⁹ The origin of the threat to the five, however, makes no noticeable difference to the permissibility of toppling the massive man in front of the trolley. So this sort of utilitarianism of rights must be wrong.

What allows rights to make sense of deontological restrictions is that claims are made on particular agents, and they have their normative force in that context, not as a matter of value for some sort of impartial weighing. The reason that solves the problem is that the five do not have a claim not to be used as a means that is

³⁸ One of Tim Scanlon's important mistakes was to try to work out such a view. See "Rights, Goals, and Fairness," reprinted in S. Scheffler ed., *Consequentialism and its Critics* (Oxford University Press, 1988).

³⁹ This way of framing rights, and the puzzle it raises about how deontological restrictions work, was originally raised by Robert Nozick in *Anarchy, State, and Utopia* (Basic Books Inc., 1974), but it was developed as a purportedly insoluble problem by Samuel Scheffler in *The Rejection of Consequentialism* (Clarendon Press, 1982).

addressed to the bystander. If she allows them to die, she does not use them as a means of not killing the one. She could just as easily not kill the one if they were somehow to get out of harm's way. The massive man, in contrast, has a claim against her that she not use him as a means of saving the five. If that claim on her is stronger than the five's claim on her for aid, then there is no puzzle at all about why she may not topple him in front of the trolley to save them. But again, this solution works only if we think of claims as not only having a particular nature—claim for aid, claim not to be used as a means—but a particular addressee. And this, again, is the structure captured by the *Mechanics of Claims*.

This explains how the structure of the *Mechanics of Claims* allows us to make sense of deontological restrictions, but it does not explain the connection between that structure and the liberty principle. That connection is as follows. The idea that each person has her own life to lead requires that morality not treat people as though their luck is pooled. Rather, it says to the five who are facing a threat from the trolley: that is first and foremost their problem. Morality cannot license the bystander to use the massive man as a resource to save them unless he is in some sense responsible for having put them in the condition in which they need help. If he has been living his own life, without making them worse off than if he were not present, then they must carry the burdens that came their way either themselves or with the help of those who freely volunteer to help them. The stark libertarian implications of the liberty principle are softened by the welfare principle, which says that all human welfare matters. The welfare principle provides a moral basis for imposing some positive duties of aid on agents who can help, and on patients who can have their welfare sacrificed for the sake of others in greater need. But if the welfare principle is not to eat the liberty principle, there must be limits on the duty to aid, and the right not to be harmed for the sake of others must be robust. Both must leave agents and patients fundamentally intact, with their own lives to lead. And the only way to achieve that, to avoid the pooling of welfare, is to use the structure of the *Mechanics of Claims*.

The implication of what has been said so far is that the purpose of rights is to articulate a normative space designed to respect three fundamental principles of liberal morality—the relevance of the equality principle being primarily that all people have impartial claims that count the same, modulo the type of claim it is and the interest at stake. These principles collectively constitute our dignity. But it is the structure and content of the system of rights that they ground that must be respected to respect the dignity of each individual.

It is of fundamental important to be clear that dignity as a ground for rights in this way is not a value, but a status.⁴⁰ Again, Alexy's idea that principles "[s]tatements of value can be reformulated as statements of principle and vice versa,"⁴¹ is fundamentally off the mark. The normative force of dignity is not that it should be optimized. It is a status reflected in the three basic principles of liberal morality. And it is to be respected by respecting the rights that these principles ground. This is not to deny that dignity can also be used to ground value judgments: some things are valuable because they are instrumental to or constitutive of living a dignified life. People have an interest in these things, and people have claims that reflect these interests—both ideas that I come back to in the last section. But dignity as a matter of status works at a different level. It requires that rights be structured a particular way, that interests be translated into claims that are weighed with weighting factors reflecting not only than the quantity of the interest but the nature of the claim, and that agents respect the patient-rights that result from that balance of claims on them.

B. Positive and Negative Claims

One of the dimensions of rights implicit in the foregoing account of the structure of rights is described by the distinction between positive and negative

⁴⁰ This conception of dignity as a matter of status has been most influentially developed by Frances Kamm in "Non-consequentialism, the Person as an End-in-Itself, and the Significance of Status," 21 *Phil. & Pub. Aff.* 21 (1992), pp. 382–83.

⁴¹ *Supra* note 24.

claims. This distinction, and its moral weight, can be illustrated with a variation on *Trolley Switch*. Suppose that the trolley were headed to merely 1 person, and that to turn it away from that one the bystander would have to turn it onto the side-track man. If the idea of having one's own life to lead is to mean anything from the point of view of patients, then the positive claim the one on the track straight ahead has on the bystander, a claim to be helped, must be weaker than the side-track man's claim not to be harmed. And that difference must be great enough that no agent, neither a private nor a public one, would be permitted to turn the trolley from the one ahead onto the side-track man. Indeed, it must also be the case that it is impermissible to flip a coin to decide who should die. The die have already been cast by the fact that the trolley is headed towards the one straight ahead. The side-track man's fundamental right to have his own life implies that it is wrong to re-run life's lottery.

This distinction can easily be, but should not be, confused with another distinction, that between doing and allowing. This latter distinction is an agent-centered distinction. It is easier for the state to justify prohibiting an agent from performing some act, A1, that would cause harm H1, than it is for the state to prohibit someone from allowing something equally harmful, H2, to occur. That is because the prohibition on allowing H2 to occur is a requirement that the agent do some particular narrow range of acts that would suffice to prevent H2. Agents have a stronger claim not to be required to do something in particular, or some narrow range of things, than they do not to be prohibited from doing something in particular. This is because the former requirement precludes all other options in that way maximally restricts their liberty and treats them as a tool of achieving some end, while the latter requirement allows them to retain all other options in that way minimally restricts their liberty and does not treat them as a tool of achieving some end.

Of course, the ban on turning the trolley onto the side-track man is a prohibition on doing something. But that does not explain what matters in the one-on-one variation of *Trolley Switch*. For the relevant alternative to the prohibition on

turning the trolley is not a requirement that the agent turn onto the side-track man (if it were, then the distinction between doing and allowing would matter); rather, the relevant alternative is that the agent be permitted to turn the trolley onto the side-track man. That alternative only gives the agent *more* freedom, and thus from the agent's point of view it should be unobjectionable. That permission is objectionable only from the side-track man's point of view.

Finally, it is noteworthy that the negative claim of the side-track man does not seem to be *much* stronger than the claim of the man on the track straight ahead. If it were, it wouldn't be outweighed in the event that there were more people on the track straight ahead. By contrast, the claim of the massive man seems to be *much* stronger than the claims of those on the track straight ahead. Something else, therefore, must be operating to explain why negative claims are sometimes only slightly stronger than competing positive claims, all else equal, and at other times are much stronger than competing positive claims.

C. *Restricting and non-Restricting Claims*

The imperative not to treat people as a means, without their consent, sits at the core of deontological morality, as illustrated by the *Massive Man* case. Kumm gives two helpful examples of how it also is significant in constitutional and human rights law: (1) terrorism is best thought of as a kind of act that uses harm to innocent civilians to promote political ends;⁴² and (2) the ban on torture is most compelling and absolute when it bans the torture of innocents whom the torturer intends to use to extract information or concessions from others.⁴³

The question is: why should there be such a strong justificatory hurdle for using people as a means, as opposed to harming people as a side-effect of pursuing a good end, as in the case of turning a trolley from five onto one? The Means Principle (MP) has been the standard way of capturing the difference, but its standing as a

⁴² Kumm, "Political Liberalism and the Structure of Rights," p. 157.

⁴³ *Id.*, pp. 161-162.

sound moral principle has been challenged of late, and with good reason: it is not clear how one can interpret the relationship of “using as means” so that it carries any moral weight.

There are two ways to interpret what it means to use another as a means—a subjective, intention-focused interpretation and an objective, causal-role-focused interpretation—and both face potent objections.⁴⁴ The objection to the subjective interpretation is that while, of course, the MP has implications for how an agent should form intentions with respect to others, intentions have only derivative or secondary significance.⁴⁵ What fundamentally matters is what is done to a patient, not what intentions an agent has. The claim that intentions are fundamentally significant misdirects agents to focus inwardly on how they think about others as they act, rather than outwardly on how to act in ways consistent with the respect that others deserve.⁴⁶ The objection to the objective interpretation is that causal role has no obvious moral significance. Tim Scanlon put the point even more starkly: “being a means in this sense—being causally necessary—has no intrinsic moral significance...”⁴⁷ To avoid this dilemma, I defend what I call the Restricting Claims Principle (RCP).⁴⁸ The RCP provides a moral framework for making sense of why causal role matters.

⁴⁴ This paragraph is substantially drawn from A. Walen, “Transcending the Means Principle,” unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372416.

⁴⁵ See T. M. Scanlon, *Moral Dimensions* (Harvard University Press, 2008), p. 29.

⁴⁶ See Judith Jarvis Thomson, “Self-Defense,” *Philosophy and Public Affairs* 20 (1991): 283-310, p. 293. For a fuller discussion of this, see my blog entry “Intentions and Permissibility,” available at <http://peasoup.typepad.com/peasoup/2012/04/intentions-and-permissibility.html#more>.

⁴⁷ Scanlon, *Moral Dimensions*, p. 118. See also H.L.A. Hart, “Intention and Punishment,” in *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968), p. 124; and, more recently, Victor Tadros, *The Ends of Harm* (Oxford University Press, 2011), pp. 152-155.

⁴⁸ I offered an earlier version of the RCP in “Doing, Allowing, and Disabling: Some Principles Governing Deontological Restrictions,” *Philosophical Studies* 80 (1995):

The core idea of the RCP can be explained as follows. It marks a distinction between restricting and non-restricting claims. To a first approximation, restricting claims, if respected as rights, would restrict an agent from doing what she could otherwise do if the agent were absent, while non-restricting claims, if respected as rights, would leave the agent as free as if the agent were not present. The RCP holds that restricting claims are substantially weaker than non-restricting ones.

The moral explanation for this difference rests on the fact that restricting claims have the potential, in a way that non-restricting claims do not, to restrict what an agent can do for herself or others (my examples focus on others), and therefore press to make those others worse off than they would be if the claimant were not present. In that sense a patient with a restricting claim cannot lay claim to the fundamental right, corresponding to the liberty principle, to be left alone to lead his own life in the way that a patient with a non-restricting claim can. The patient with the restricting claim does not *do* anything to make others worse off, but he has a claim that, if treated as a right, would make others worse off than if he were not present. Accordingly, his claim has to be treated as substantially weaker than an otherwise identical non-restricting claim.

This can be illustrated more concretely with *Trolley Switch* and *Massive Man*. The massive man's claim is non-restricting because respecting his claim not to be used as a means, without his consent, as a right would not restrict the bystander from doing what she could otherwise, in his absence, do to save the five. Either there is something else she could permissibly do, such as turn the trolley onto another track, in which case respecting his claim not to be killed would not bar her from saving the five, or there is nothing else she could permissibly do, in which case,

183-215, using the concept of “disabling” rather than “restricting.” I have changed the label to avoid confusing my notion with the idea of a “disabling reason” as found in the practical reason literature. The differences here go well beyond a mere shift in terminology, however. My understanding of the principle has evolved significantly since that earlier presentation. This earlier paper was cited, however, by Mattias Kumm in “Political Liberalism and the Structure of Rights,” p. 154, n.30, as the basis for defending the MP.

again, respecting his claim as a right would not restrict her relative to the baseline of his not being present. In contrast, the side-track man's claim is restricting because, if she had to respect it as a right, she would not be permitted to do what she could otherwise, in his absence, permissibly do for the five, namely turn the trolley onto the other track.

The most important difference between the RCP and the MP concerns the way the RCP broadens the frame of morally relevant considerations. The MP describes a moral fact about a dyadic relationship between an agent and a patient. There is a certain kind of action, using another merely as a means, which it takes to be morally extremely problematic. The RCP broadens the frame of relevant considerations to the global balance of claims on an agent, as required by the *Mechanics of Claims*. What matters for the permissibility of an agent's acts is the balance of competing patient-claims on her, and her own agent-claims. There is still a dyadic relationship between an agent and every person who has a right against her not to be treated in a certain way. But those rights have to be understood as arising in the context of a larger balance of competing claims.

Now, I said above that non-restricting claims, when the interest at stake is substantial, are absolute, or nearly so. Two comments should be made about that claim. First, when the interests are not substantial, the welfare principle can license harming someone with a non-restricting claim not to be harmed for the sake of a greater good just as it can license imposing a duty on an agent to make a small sacrifice for the sake of a greater good. Second, many think that if the good to be achieved is large enough, even someone with a non-restricting claim not to be harmed may be made to suffer substantial harms for the sake of the greater good. Thus many think that if it were necessary to topple the massive man in front of the trolley to save thousands or millions of lives, then it would be permissible to do so.⁴⁹ I actually think it is more complicated than that. In my opinion, the liberty principle implies that it is straightforwardly permissible to impose a substantial loss on

⁴⁹ CITE Nozick.

someone with a non-restricting claim not to suffer that loss *only if* the claims on the other side of the balance are also non-restricting.⁵⁰ The case in which the bystander would have to kill the massive man to save thousands is actually, in my opinion, a tragic dilemma.⁵¹ It is wrong to kill him, and wrong not to. This is qualitatively different from *Trolley Switch*, in which it is straightforwardly permissible to turn the trolley onto the side-track man. I think, that is, that what is called “threshold deontology” should be understood as involving dilemmas, not merely high weighting factors. But be that as it may, the main point is that the RCP has an account of why the massive man’s claim should be weighed as absolutely or nearly absolutely dominant over competing claims for help.

I need to make two further points about how the RCP works before I can finish describing how it should fit into proportionality analysis. First, the claims of *all* patients with claims on an agent have to be assessed in terms of whether they are restricting or not. Illustrating again with the cases in the *Trolley Problem*, the claims of the five must be assessed too, and they are restricting. Their being restricting follows from the fact that if the bystander had to respect their claims to be saved as rights, that would restrict her from doing what she could otherwise, if they were not present, do for the one, namely *not* turn a trolley in his direction in *Trolley Switch* or *not* topple him in the trolley’s path in *Massive Man*. True, the side-track man’s claim, if respected as a right, would limit what she could do *for* others, while the claims of the five would limit what she could *not* do *to* others. But they are all restricting claims in the sense that they all have the potential, if treated as rights, to affect the welfare of others, compared to a background in which those with the competing claims are not present.

⁵⁰ I discuss a case like that in “Transcending the Means Principle.”

⁵¹ In this way I take a position different from that of Nozick, and of Kant, who said, “*fiat iustitia pereat mundus*” (do justice though the world perish). CITE.

Second, the distinction between restricting and non-restricting claims is logically independent of that between positive and negative claims.⁵² *Trolley Switch* and *Massive Man* can be used to illustrate most of the possible combinations needed to establish this point. As I just pointed out, the claims of the five in both cases, and of the side-track man in *Trolley Switch* are all be restricting, even though the five's claims are positive and the side-track man's is negative. *Massive Man* provides an example of a negative claim that is non-restricting. To finish the set of possible combinations, we need a case with a positive claim that is non-restricting. For that, consider:

Possible Organ Donor: Doctor A could save the possible organ donor (POD) by giving him a drug, but she could also allow him to die and then harvest his organs to save others.

The POD's claim on the drug is a positive claim for help, but it is also non-restricting because giving him the drug would not prevent Doctor A from doing what she could otherwise do, in his absence, to save the five, i.e. nothing. In contrast, the claims of the five, that Doctor A allow the POD to die so she can then take his organs, are restricting because respecting them as a right would prevent her from doing what she could otherwise do for him, namely give him the drug. The fact that his claim is non-restricting, while their claims are restricting, explains the intuitive judgment that it would be impermissible for her to withhold the drug from him, even if doing so would allow them to gain access to his organs and thereby allow her to save their lives.⁵³ In saying this, I am not claiming that there are no reasons that would justify withhold the drug from him. If someone else needed it as well, that could justify withholding it from the POD. Relative to each other, the POD and the

⁵² Failing to see this was one of the mistakes I made in "Doing, Allowing, and Disabling."

⁵³ Recognition of the need to treat such positive claims as akin to the claims of the massive man goes back at least to Foot's introduction of this example in "Morality, Action and Outcome," in T. Honderich, ed., *Morality and Objectivity* (Routledge & Kegan Paul, 1985), p. 25.

other who need the drug have restricting claims. It is only with respect to the five that the POD's claim is non-restricting and dominant.

Now with the RCP so described we can better understand three different ways that the fundamental right to lead one's own life, grounded in the liberty principle, plays out in the space of moral rights. First, from an agent's point of view, she has to be free not to treat herself as a tool for the general welfare. She may have to take the welfare of others as important, but not to such a degree that it undermines her ability to pursue her own ends. Second, from a patient's point of view, he has to be free from being sacrificed for the sake of others insofar as his claim not to be so sacrificed is non-restricting. He too may have to accept being forced to endure small harms for the sake of others, but morality may not license agents to inflict on him harms so great as to undermine his ability to enjoy his own life. An important insight of the RCP is that these two principles are just the agent and patient analogs of each other. Both can be overcome insofar as the person has made herself, by her actions or special relations with others, liable to greater duties of aid or to being harmed for the sake of others. But insofar as one is leading her life independently of others, not causing others to depend on her or to be worse off for her presence, then the weighting factor in favor of both sorts of claims is very strong.

In contrast, restricting patient claims should be treated as relatively weak, all else equal. Thus even a great number of people relying on the massive man have no right that he be sacrificed to save them, unless the harm to him would be relatively small. Nevertheless, when restricting claims compete, negative ones must still be treated as weightier than positive ones, all else equal. Otherwise people's luck would too often be pooled. It is permissible to turn a trolley from five onto one because the one's claim, if treated as a right, would make the five worse off than if he were not there. That means that his claim should not get automatic priority over their competing claims. But if the situation were one-on-one, the dominance of negative over positive patient-claims makes it impermissible to turn the trolley.

We can now shift our frame of reference back to the frame of a court deciding whether a law is constitutional or consistent with human rights, and using proportionality analysis. At the last stage of the analysis it has to weigh the competing claims on the state. The state's agent-claims, as noted in the last section, are not as important as in the private moral rights discussion. They can be treated as irrelevant for most purposes. But that leaves us with competing patient-claims on the state. If the claims are non-restricting and concern substantial interests, then the court must assume that those claims will win against (almost?) all competing considerations. But even if all claims involved are restricting, negative claims should still have some priority over positive claims. Thus, all else equal, if the state seeks to harm some to help others, it should not be permitted to do so.

V. A Broader Spectrum of Deontological Weights

The previous section concluded with the claim that proportionality analysis should recognize two weighting factors: the normally dispositive weight owed to non-restricting patient-claims, and the tie-breaking weight owed to negative patient-claims over positive patient-claims. But if we assume that courts owe legislatures a margin of appreciation, there may be few ties. Thus it may seem that, in effect, there are simply two realms of operation: balancing when dealing with competing restricting patient-claims, and a separate regime in which balancing is not to be done when dealing with non-restricting claims on one side of a case. If that were the case, then Kumm would have stated things correctly when he said:

The idea of deontological constraints cannot be appropriately captured within the proportionality structure. The reasons why proportionality analysis and the balancing test in particular is insufficient to capture these concerns is that it systematically filters out [or better: fails to take notice of

the] means-ends relationships that are central to the understanding of deontological constraints.⁵⁴

I will argue in this section that this cannot be correct, because the balancing stage needs to actively filter *in* the right kind of weighting factor before taking the balance of the competing interests. To make that argument, I will discuss two other cases—the requirement of proof beyond a reasonable doubt for criminal convictions and limits on preventive detention—both of which require us to recognize a spectrum of deontological weights to properly respect human dignity.

A. *Proof Beyond a Reasonable Doubt*

The constitutionally required standard of proof in criminal cases, at least in the United States, proof beyond a reasonable doubt,⁵⁵ strikes a balance between competing interests that is neither absolutely tipped in the direction of protecting innocents from being wrongly punished, nor equally concerned with the interests of all involved. The balance cannot be absolute tipped in favor of protecting the innocent from wrongful punishment because the only way not to convict the innocent, at least from time to time, is not to convict at all. This, however, would impose unacceptable costs on the population at large, which depends on criminal punishment both to deter potential criminals and to incapacitate, at least for a period of time, those who have committed serious crimes, thereby preventing them from striking again.⁵⁶ If one is a retributivist, as I am and as most criminal law theorists today are, then one also wants to add that criminals *deserve* punishment. That provides *some* reason to punish the guilty, even if it is a reason that is relatively easily outweighed by other concerns, such as the costs of providing prosecutorial and penal resources.⁵⁷ Yet if we accept that the interests served by deterrence and

⁵⁴ “Political Liberalism and the Structure of Rights,” p. 162.

⁵⁵ CITE *In re Winship*.

⁵⁶ Of course, most prisons do not incapacitate them from harming fellow prisoners.

⁵⁷ Kant famously wrote “woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from

incapacitation, not to mention that served by retributive desert, justify convicting people with less than proof to a moral certainty, we need to know *how much less certain* the finder of fact may be.

A wide range of estimates for the tradeoff have been offered over the years.⁵⁸ Voltaire held: "'Tis much more Prudence to acquit two persons, tho' actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent."⁵⁹ Matthew Hale wrote: "It is better that five guilty persons should escape punishment than one innocent person should die."⁶⁰ William Blackstone got the better of these two in the popular imagination by writing: "It is better that ten guilty persons escape [punishment] than that one innocent suffer."⁶¹ But the numbers go up from there. John Fortesque opined that he would "prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly."⁶² Benjamin Franklin upped the ante writing: "It is better a hundred guilty persons should escape than one innocent person should suffer."⁶³ But highest honors belong to Moses Maimonides, who wrote: "It is better ... to acquit a thousand guilty persons than to put a single innocent man to death."⁶⁴

What can one say in the face of such a range? On the one hand, it is unclear that we are comparing apples to apples, because it is unclear if all of these writers were concerned about the future crimes that guilty who are allowed to go free would commit, crimes that would otherwise prevented by punishment. It is also

punishment..." (2d Critique—FULL CITE). But none today take this point too seriously.

⁵⁸ The following have all been taken from Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2006), p. 63.

⁵⁹ *Zadig* (1749).

⁶⁰ 2 Hale P.C. 290 (1678).

⁶¹ *Commentaries on the Laws of England*, c. 27, margin p. 358.

⁶² *De Laudibus Legum Angliae* 65 [1471] (S. Chimes, ed. and trans. 1942).

⁶³ Letter from Benjamin Franklin to Benjamin Vaughn (March 14, 1785), in 11 *The Works of Benjamin Franklin* 11, at 13 (John Bigelow, ed., fed. ed., 1904).

⁶⁴ 2 Moses Maimonides, *The Commandments* (Charles B. Chavel, trans., 1967), at 270.

unclear what they would say if so many of them were not focused on capital punishment as the relevant form of punishment, and considered instead lesser, alternative punishments. On the other hand, we might notice an interesting signal in the norms implicitly used by the lower and higher ends of the range. Voltaire spoke of prudence, which suggests a utilitarian calculus, and Maimonides wrote from a religious point of view, one presumably far removed from the utilitarian calculus.

Let us start, then, with Voltaire's end of the spectrum. It may seem to make sense that the ratio should be roughly two to one, at least if one is worried about releasing violent offenders who would go on to victimize other innocents if not punished. The harm to innocents of acquitting the guilty calls for ensuring that not too many guilty go free. And this harm has to be balanced against the harm to the innocent of punishing them.

The problem with such a utilitarian approach is that it could actually call for the state to use a standard that would, conceivably, in some cases, allow the state to convict 10 innocent rather than allow a guilty person to go free. Imagine the following scenario. Suppose social science discovers that a particular profile of criminal is likely to kill, on average, 10 innocent persons before his criminal career is over. And suppose someone is accused of having committed a murder in such a way that, if he really is the killer, then he would fit this profile. How confident must the jury be in his guilt to consider it, on balance, justifiable to convict him? If it lets him go, and he is guilty, it can expect nine more innocents to die before his career as a killer is done. On the other hand, if it convicts him and he is innocent, and the punishment is, say, life in prison, then one innocent will lose his freedom for life. If we suppose that death of an innocent is worse than life in prison for an innocent, then the odds, one might think, could be as low as or lower than 10% confidence that he is guilty.

Of course this thought experiment ignores many details. For example, there might be a middle way between acquittal and life in prison. Perhaps someone who seems likely to have committed the kind of crime that is a signature of a serial killer

could be kept under the kind of close surveillance that would be very likely to prevent further crimes. In addition, the prospect of being convicted and sentenced to life in prison on the basis of 10% confidence that one committed a crime might be very unsettling for respect for the law, which could undermine the law's general effectiveness.⁶⁵

Nevertheless, even if we add such details to the calculus, one has to wonder how low the ratio could go. If someone so dangerous was still free to move about in society, and if, given that freedom, he would be likely to commit another murder or two before being caught and convicted, then there is reason to take the disutility of a false acquittal very seriously. Could it then be that it would be justifiable to convict on *less* than a preponderance of the evidence? In other words, could it be that it is better that a few innocent be convicted to prevent a guilty person from going free? That would seem to be a possible implication of a straight utilitarian balance of the competing interests involved.

I take this to be a *reductio ad absurdum* of the straight balancing position. And as already noted, it is too impractical to take the position that the balance must be struck so that the innocent are never falsely convicted. So we are back to the question: how can we find a weighting factor owed the innocent, protecting them from a false conviction, that strikes the right middle note?

One might try to find the right weight by appealing to the priority of negative restricting claims over positive restricting claims. The claim not to be falsely convicted is surely a negative claim. And it is not non-restricting. The question is not whether prosecutors may frame innocent people to achieve some greater social good—the claim not to be used in that way is a non-restricting claim. The question is whether courts may instruct fact finders to use a burden of proof that will achieve a good in a just way (punishing the guilty) in many cases, but that will have the side-effect of causing some innocents to suffer a harm that they do not deserve. Those innocents have a claim not to be so harmed, one that, if it had to be respected as a

⁶⁵ CITES.

right, would prevent the government from doing what it could otherwise do for potential victims of crime by preventing the prosecution of guilty people. Thus it seems reasonable to consider the claim not to be falsely convicted to be a negative, restricting claim.

The problem is that negative, restricting claims do not have enough priority over positive-restricting claims against which they would have to be weighed. The priority of the former over the latter, all else equal, would at least help buoy up the standard of proof for a criminal conviction. But as noted in the last section, the extra weight due to negative restricting claims over positive restricting claims is relatively small, and not too hard to outweigh. That means that this distinction, alone, would still allow the state to convict using a burden of proof *below* preponderance of the evidence if the dangerousness of those who do commit certain types of crimes is high enough. If we think that is unacceptable, then we have to look elsewhere for the explanation.

I suggest that we need to seek the answer by thinking about what it means to *punish* people. Punishment is not just the act of harming a person. It is an act with a distinctive significance for both the person who is punished and for the rest of the community. In part, it is a communicative act, communicating censure for the commission of a crime.⁶⁶ This presupposes that the basis for the censure, the conviction, is reliable. In addition, punishment is in part the intentional infliction of suffering, justified in a retributive framework by the idea of redressing a wrong by laying low one who dared to put himself above the law.⁶⁷ Again, to justify doing that the presupposition is that the fact finder must positively believe that the person *deserves* such punishment. It would be jarringly disconcerting if the state were willing to do that even though fact finder thought the defendant simply *might* deserve it. And finally, punishment is in part an act of affirmation, assuring the

⁶⁶ For the leading statement of this view, see Anthony Duff, *Punishment, Communication, and Community* (Oxford University Press, 2003).

⁶⁷ This is my personal take on retributivism, which draws somewhat on the work of people such as Jean Hampton and Jeffrey Murphy, CITE, but is less expressivist.

community that the norms of the criminal law, and the rights it seeks to protect, matter and must be respected. The penalties it metes out for those who break the law reinforce, both through deterrence and by following through on stated penalties, that the law must indeed be respected. And this aspect of punishment, like the other two, presupposes that the justifying conditions are truly believed to obtain.

The formula of “proof beyond a reasonable doubt” may seem empty or conclusory. How much doubt is too much to be “reasonable”? But I think it is more apt than this question implies. Empirical evidence indicates that juries do in fact take it to be the highest standard of proof, higher than alternatives such as “clear and convincing evidence.”⁶⁸ Thus it seems effectively to convey the idea that a fact finder should seek to be as certain as necessary to form a firm belief that the accused did actually commit the crime in question. This does not require that ten guilty be set free for every one innocent convicted. But it does set a qualitative standard that holds that if a fact finder can see particular, non-fanciful reason to doubt that a particular defendant is guilty of a particular crime, then she should acquit him; she should convict him only if the government has proven every element of the crime to such a degree that all such doubts have been allayed.

Evidence of the significant number of false convictions, as established of late by DNA evidence,⁶⁹ suggests that fact finders have been too quick to conclude that proof was established beyond a reasonable doubt. To correct for that, it is not enough to use DNA evidence where available. Jurors should also be instructed about how unreliable certain forms of eye-witness testimony are.⁷⁰ Identification procedures used by the police should be improved.⁷¹ Detectives should be educated about ways in which they may lead themselves to lock onto a particular suspect too early, looking only for confirmatory evidence rather than seeking to disprove the

⁶⁸ CITE.

⁶⁹ CITE.

⁷⁰ Pace Perry v. New Hampshire XX U.S. XX (2012).

⁷¹ Id.

hypothesis they have formed.⁷² These and other changes would help to ensure that when a fact finder finds that a defendant is guilty beyond a reasonable doubt, that finding is well made. But the standard itself seems right.

My point for the purposes of proportionality analysis is that proof beyond a reasonable doubt should be required as the correct constitutional standard for a criminal conviction. It provides the right interpretation of what is required to respect the dignity of criminal defendants. This is not because of their welfare interests, *per se*. It is not because it is worse to be an innocent person convicted than to be an innocent person victimized by crime. It is because of the moral import of a criminal conviction, which presupposes that the finder of fact *believe*, on the basis of proof that leaves no reasonable doubt, that the defendant committed the crime for which he is to be punished. The weighting factor required in this context is then neither the neutral one that corresponds to a simple weighing of the interests of innocent defendants and those who need to be protected from the criminals, nor an absolute priority for innocent defendants. Instead it gives substantial priority to the claims of the innocent not to be punished, while tolerating some accidental false convictions in order to obtain many true ones.

Now one might want to object that I have not argued for a weighting factor at all; I have simply argued in defense of a particular standard for the burden of proof. A weighting factor, one might say, should allow us to know how many guilty must be set free per innocent convicted. *That*, one might say, shows how to weigh their respective interests. And we can make this objection more concrete. Suppose a state were to decide that certain crimes, a set of terrorist crimes, should be prosecuted to a lower standard than proof beyond a reasonable doubt, say preponderance of the evidence. And suppose a plaintiff complained to a constitutional court. I have not given the court any way to assess whether this particularly dangerous set of crimes may indeed be prosecuted to a lower standard by offering the court a weighting factor by which to estimate how much more important it is that innocents not be

⁷² CITE.

punished than that people be protected from terrorism. I have simply said that proof beyond a reasonable doubt is the right standard, because it respects the moral presuppositions of punishment.

My response is that this objection presupposes something too literal by weighting factor. True, I do not offer a literal multiplier, as if courts should do utilitarian analysis with a multiplier on the side of certain rights. But a weighting factor is implicit in the idea of proof beyond a reasonable doubt because the standard still allows for some innocents to be convicted. It does not require absolute certainty of guilt. And that is because it recognizes that the needs of those who are protected by the conviction of the guilty matter. So it is a qualitative weighing, requiring firm belief in guilt because of the moral nature of punishment, but allowing for some false convictions because of the moral importance of obtaining convictions.

B. Limits on Preventive Detention

Preventive detention is a policy that, like criminal punishment, can incapacitate the dangerous. But unlike criminal punishment, it is not premised on a claim that the detainee *deserves* to lose his freedom. Instead, it is premised simply on the thought that some people are too dangerous to be allowed to move about in society, and therefore must be detained. Given that it lacks the moral import of punishment, one might think that the implication of the previous section would be that the right balance to strike when considering a detainee's claim not to be detained is simply a neutral, utilitarian balance of competing interests.⁷³ In some contexts, I agree, that *is* the right way to judge whether someone may be detained. But when dealing with the long-term preventive detention (LTPD) of morally responsible people who could instead be policed—meaning that they would be monitored and if there is probable cause to believe they have committed a crime, then arrested and tried, and if convicted punished and deprived of their liberty—by

⁷³ Some writers do seem to think this is the right position to take. CITE Wittes.

a state that is willing or obliged to police them as free residents of that territory, I think that the simple utilitarian balance is fundamentally unjust. It is an open invitation to states to bypass the criminal justice system, offering people less procedural protections, and stripping away their liberties with inadequate justification. To respect the dignity of people with autonomous or free wills, the state must not subject them to LTPD if it or another state is obliged or willing instead to hold them accountable for wrongful choices after the fact. I call the account of detention that justifies this position on LTPD the Autonomy Respecting (AR) model of detention.⁷⁴

It might seem that the AR model implies an absolute tipping of the balance against LTPD of autonomous and accountable individuals. But of course, as in the criminal justice area, there are a range of difficult issues. First, there is the question of the burden of proof. If someone can be shown not to be autonomous, and then subjected to LTPD if the danger she poses to herself or others outweighs her liberty interest, one needs to know what the burden of proof is. Is it preponderance of the evidence? Proof beyond a reasonable doubt? Some standard in between?⁷⁵ But I don't want to focus on the burden of proof issue in this section. I want, instead, to focus on the question of what it means for someone not to be accountable, not because of her intrinsic incapacity as a moral agent, but because of the extrinsic fact that adequate policing capacity is not available to hold her accountable. This is a central prong in my AR model of detention, but it leaves an important substantive issue to be settled: How much security must the police be able to provide in order to say that a person is accountable? The answer to *that* question, I argue, requires an intermediate weighting factor, somewhere between neutral and the (nearly) absolute weighting due to those with non-restricting claims.

⁷⁴ I spelled out this position most fully in Alec Walen, "A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists," *Maryland Law Review* 70 (2011): 871-938.

⁷⁵ The U.S. constitutional law standard is "clear and convincing evidence." See *Addington v. Texas*, 441 U.S. 418, 432-33 (1979).

Before I can try to explain why the minimal amount of security for accountability should be set using an intermediate weighting factor, I need to explain a bit more about how the AR model is supposed to work.⁷⁶ At its most basic, the AR model holds that individuals who can be adequately policed and held criminally liable for their illegal choices, as normal autonomous actors, and who can choose whether their interactions with others will be impermissibly harmful or not, can be subjected to long-term detention *only if* they have been convicted of a crime for which (a) long-term punitive detention, and/or (b) the loss of the right not to be subject to long-term preventive detention is a fitting punishment.

This can be broken down into its constituent parts as follows: Punitive detention, as long as it is in response to the violation of a just criminal law and proportional to the convicted criminal's culpability for her crimes, respects autonomy because it is based on the convicted criminal's autonomous choice to commit a crime. Preventive detention, as noted above, is not in that way based on desert, but instead only on dangerousness. To see when it can be justified, we need to start by distinguishing short-term preventive detention (STPD) from LTPD. STPD is justifiable with less process, including, most importantly, a lower burden of proof on the state, than the criminal law provides for.⁷⁷ This is because even innocent people with non-restricting claims can be expected to make small sacrifices for the sake of the greater welfare, and thus there is less need to be certain that innocent (i.e. non-threatening) people are not subjected to STPD than to LTPD. LTPD, by contrast, is a significant burden on the detainee. How to draw the line between STPD

⁷⁶ The next three paragraphs are substantially similar to ones found in "Reflections on Theorizing About the Moral Foundations of the Law: Using the Laws Governing Detention as a Case Study," in *Ethicalization of Law* (Springer Press, forthcoming).

⁷⁷ I do not mean to be cavalier about the process required for short-term detention. Even short-term detention can be onerous. Therefore procedures should be used which minimize the chances of abuse while allowing important government ends to be met. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739 (1987) (upholding the federal Bail Reform Act, allowing for the pre-trial detention of criminal defendants judged to be dangerous).

and LTPD is, naturally, a matter that cannot be settled with any definitive clarity. These are inherently vague notions. But they are meant to distinguish qualitatively different impositions on the detainee, and general practice indicates that six months provides a reasonable marker.⁷⁸

The question that I take to be more important than how one draws the line between STPD and LTPD is how LTPD can be justified. As far as I can see, it is justifiable in only four conditions, namely when:

1. People lack the normal autonomous capacity to govern their own choices;
2. They have, in virtue of one or more criminal convictions, lost their right to be treated as autonomous and accountable;⁷⁹
3. They have an independent duty to avoid contact with others, because such contact would be impermissibly harmful (e.g., those with contagious and deadly diseases), and LTPD simply reinforces this duty; or
4. They are incapable of being adequately policed and held accountable for their choices by any country obliged or willing to police them like any other free resident of the territory.

It is only the fourth of these possibilities that concerns me here.

The paradigmatic type of person to fall into the fourth category is the captured enemy combatant or prisoner of war (POW).⁸⁰ A combatant under the traditional law of war is, and will remain until the war is over or he is released from

⁷⁸ See Walen, "A Unified Theory of Detention," at 915-916.

⁷⁹ This is certainly the most controversial of the four prongs. It matches the practice in the United States and elsewhere, but many theorists consider it clearly unjustifiable for a person to be subject to LTPD as a result of a past criminal action. I argue, however, that we can see loss of the normal right not to be subject to LTPD as an element of punishment that can complement the more standard use of prison terms and fines. See Alec Walen, "A Punitive Precondition for Preventive Detention: Lost Status as an Element of a Just Punishment," *San Diego Law Review* 63 (2011): 1229-1272.

⁸⁰ This paragraph is taken, with minor modifications, from "A Unified Theory of Detention," pp. 922.

military service, privileged to engage in combat with the detaining power.⁸¹ If he is released or escapes from detention, he has the right to take up arms again.⁸² This means that not only can the detaining power not hold him criminally responsible for his past violent actions—at least as long as those acts do not violate the laws of war—but also that the detaining power may not hold him criminally responsible for any *future* acts of violence that conform to the law of war. The State is not required to allow itself to be attacked. Therefore, it can subject POWs to LTPD to prevent them from attacking. And it can do so without disrespecting them as autonomous people because their legal status makes them unaccountable.⁸³

I take it that there is little that is ambiguous about combatants as traditionally defined. More normative difficulty arises when dealing with what the second Bush Administration more broadly called “enemy combatants,” i.e. suspected terrorists (STs) who have no right to use military force. I divide these into two categories: alien STs who come from countries where the police power is largely dysfunctional, like Yemen,⁸⁴ and those which come from countries with normally functioning police powers, like those of Western Europe and the United States. I believe that no country has an obligation to release into its territory, and police, those who are not its citizens (with the rare and limited exception of cases in which a country has special responsibilities for certain non-citizens who it would otherwise wrong if it does not admit them).⁸⁵ Thus I think that if the U.S. has captured Yemeni STs, and no country with an normally functioning police force volunteers to take them in and police them, then the U.S. can treat them as unaccountable, because they will not be adequately policed in the country which has a duty to police them, their home country. This licenses LTPD of STs from such

⁸¹ The Handbook of Humanitarian Law in Armed Conflict, at 361.

⁸² *Id.*

⁸³ There are complications that concern the possibility of a combatant giving up his combatant status, but these need not worry us here.

⁸⁴ CITE.

⁸⁵ I think the Uighurs held in Guantanamo fit this description, *pace* the holdings of U.S. courts.

countries, provided there is sufficient evidence that they are indeed dangerous. What is not permitted according to the AR model is LTPD of STs from countries that do have adequately functioning police forces. But this now gets us to the heart of the matter for present purposes. What does it mean for a state to lack the ability to provide adequate policing of STs?

One way of asking that question is to ask when a state's ability to provide police protection has been so degraded that it shifts from the kind of state where the policing capacity is adequate to one where it is inadequate. I want to focus on another way of asking the question, however: how does adequacy of policing capacity relate to the threat posed by a particular individual? Are there individuals who are so dangerous that they may be subject to LTPD even though others who pose more mundane threats may not, because the policing capacity is adequate with respect to the latter but not the former?

It is a little hard to imagine how a government could have sufficient evidence that it had captured someone who was dangerous to a degree far exceeding that seen among normal criminals and yet not have evidence of crimes that should be sufficient for a conviction of a serious felony. This is especially true in this age of expanded counterterrorism crimes, such as providing material support to terrorist groups.⁸⁶ But it is not completely beyond imagining how such a situation could come about. Perhaps the government feels it cannot put on a trial without risking too much sensitive information,⁸⁷ or perhaps it has mistreated the defendant in certain ways that preclude it introducing certain key evidence,⁸⁸ or perhaps, like many a mafia boss, there are lots of reasons to suspect a particular individual, but all based on hearsay or the testimony of uncooperative witnesses that will not yield a conviction.

⁸⁶ CITE US Material Support law.

⁸⁷ CITE worries of judge X.

⁸⁸ KSM troubles b/c of waterboarding.

Whatever the reason, imagine that the government has a person that it takes itself to have very good reason to believe is a charismatic terrorist mastermind, the kind who, if allowed to move about outside of a maximum-security prison, would likely conspire with others to kill thousands of innocents, or maybe orders or magnitude more than that.⁸⁹ How are we to weigh the lives of thousands or more innocent victims against his liberty? Is normal policing “adequate” when it would be so much less effective at ensuring he does no harm than LTPD in a maximum-security facility?⁹⁰

This is a point at which I think the sane position yields and admits that there may be cases in which normally adequate policing is not adequate. But that then opens up the key question: how do we get a measure for that? The neutral, utilitarian answer would be: policing is adequate if we expect that it will do more harm to a supposedly dangerous person to subject him to LTPD than would likely result to others if the state were to rely on the police’s ability to deter him or intercept him before any plans to commit violent acts reach fruition. This measure, however, undermines almost the whole point of the AR model of detention. The only thing it leaves intact is an argument that adequate resources ought to be devoted to providing adequate policing. But given that those resources might come at the cost of, say, schooling or health care, it’s not clear why we don’t end up simply doing a full utilitarian analysis, which would fully undermine the point of the AR model.

A better answer goes back to the basis of the AR model and says that what is crucial is that once the state accepts that it has an obligation to police someone, it must seek to respect that person as an autonomous and accountable agent if it can. Doing otherwise is inconsistent with respecting his dignity. In practice that has to mean providing as much police surveillance—including perhaps limits on a person’s freedom and intrusion’s into a his privacy that are normally not permissible in a liberal society, but that would be burdensome on a par with STPD, and thus far

⁸⁹ This is the view some have of KSM... CITE.

⁹⁰ Discuss limits even of British “control orders”

easier to justify than LTPD—as can be afforded, consistent with other priorities for the state. And then that would be judged inadequate only if the state could prove to a properly constituted neutral body, by a sufficiently high degree of proof, that he is likely to try to commit a major terrorist act, and that the danger to his fellow citizens of *not* subjecting him to LTPD *far outweighs* the harm to him of being subjected to LTPD. This last balance term “far outweighs” is still vague. But I think it captures the relevant middle space in approximately the right way. It is a straightforward weighting factor, and it captures the idea that the state is committed to respecting the dignity of autonomous individuals by not simply predicting what they will do and then acting a utilitarian calculus.

VI. Conclusion

The fundamental lesson to draw from the previous two sections is that the right way to perform the balancing test in the last stage of the proportionality analysis should depend on the nature of the claims involved. If the plaintiff’s claim is the claim not to be convicted upon inadequate proof, the plaintiff’s interest in not being falsely convicted and baselessly punished should not be neutrally balanced against the interests of those who would benefit from more criminal punishments being doled out. The plaintiff’s interests should, in effect, be treated as substantially more weighty, as that is the only way to respect the moral preconditions of punishment. If the plaintiff’s claim is the claim not to be subject to LTPD, and he is a citizen of the country that is considering detaining him, and that country’s ability to police its residents is functioning in a way that is normally adequate, then the plaintiff’s interest in not be subject to LTPD should not be neutrally balanced against the interests of those who could expect to benefit from his LTPD. The plaintiff’s interests should again be magnified by a substantial but not overwhelming weighting factor, one that would require the state to subject him to less harmful treatment unless the threatened harm to others far outweighed the harm to him of

being subjected to LTPD.⁹¹ In yet other cases, like those involving the torture of innocents or the targeting of noncombatants, the plaintiffs' claims are non-restricting, and thus they should be accorded a weighting factor that is even stronger, one that is absolutely (or nearly absolutely) dominant. In yet other cases, a more neutral weighing will be appropriate. In still other cases, a middling weighting factor will be appropriate.

A court can determine what weighting is appropriate only by understanding exactly how a particular kind of claim is connected to dignity. The factors that derive from the structure of the *Mechanics of Claims* and the liberty principle are generalizable because they are connected with the difference between negative and positive claims, and the difference between restricting and non-restricting claims. Punishment and LTPD are more sui generis. Punishment presupposes a fairly strong sense of desert. Not all things a state does to inflict harm have to be so clearly deserved, as is shown by the lower hurdle for subjecting someone to STPD. The weighting factor in LTPD trades on the need to treat autonomous and accountable individuals as such. Again, the weighting factor for that is different from that which would be fitting for STPD. It is unfortunate that the moral landscape is this complicated; it means that courts are certain to get misled on a regular basis. But it would be worse than unfortunate, it would be unjust, for courts not to try to get the weighting factors right.

This leads me into one last important distinction, that between dignity as a status, that grounds weighting factors that should be used in the balancing stage of a proportionality analysis, and other ways in which dignity should matter for proportionality. First, it is worth mentioning that dignity is also relevant for establishing the first step in proportionality analysis, the legitimate ends test. The fundamental right to lead one's own life, by one's own lights, does not *simply* mean

⁹¹ I suspect that the claim against racial profiling, for example, should be weighted more heavily than a neutral weighing of the interest itself, more or less along the lines of the claim not to suffer LTPD.

that the government needs to justify policies that will interfere with one's ability to pursue happiness as one defines it. It does mean that, but it *also* means that the state may not take it as a basic goal of its to shape how one conceives of a good life at all. That is simply an illegitimate end. It may pursue shaping what one takes to be a good life insofar as that is necessary to achieve the sort of civic education necessary to preserve a stable, liberal society.⁹² But it may not justify laws by appeal to the idea that a certain conception of the good life is *right* or *best*.

The other important distinction concerns dignity as a basis for taking someone to *have* an interest that is morally significant at all. This is a matter of dignity functioning to establish a value, rather than to establish rules that must be respected. It is dignity *as* a value to be protected, rather than dignity as a foundational status for constitutional and human rights.⁹³

To illustrate this distinction, and the kinds of confusion that should be avoided, I bring up one more substantive topic: free speech rights. Thomas Nagel tries to connect free speech to dignity and status. He writes that "freedom of expression is inseparable from freedom of thought. To stifle communication is to stifle an essential aspect of the process by which free thought operates..."⁹⁴ This leads him to claim, for example, that "censorship of a fanatical bigot is an offense to us all."⁹⁵ And this in turn leads him to conclude that "even if such restrictions did some social good, on balance... the offense would remain."⁹⁶ The implication he clearly wants us to draw is that some weighting factor should be used in favor of free speech. And this is because: "To admit the right of the community to restrict the

⁹² Cite Rawls on civic education and stability.

⁹³ For an interesting discussion of the different roles of dignity, see J. B. Heath, "Mapping Expansive Uses of Human Dignity in International Criminal Law," in *Ethicalization of Law* (Springer Press, forthcoming).

⁹⁴ "Personal Rights and Public Space," in *Concealment and Exposure; And Other Essays* (Oxford University Press, 2002), p. 43.

⁹⁵ *Id.*, p. 44.

⁹⁶ *Id.*, p. 45.

expressions of convictions or attitudes on the basis of their content alone is to rob everyone of authority over his own mental life. It makes us all, equally, less free.”⁹⁷

I accept Nagel’s claim about the connection between freedom of speech and freedom of thought. He is right to think that our dignity requires the state to value the interest we have in freedom of speech highly. It is not like some whimsical interest a person might have in collecting matchbooks, and it presumably matters more to many people than their interest in “commodious living.” It should matter on a par with anything else that can fundamentally shape an individual’s ability to lead a good and dignified life. I also accept that it is inconsistent with respect for dignity to have the government aim to restrict thought because of its content. That sort of justification for a law should fail the legitimate ends test.

Where I *might* disagree with Nagel is in his claim that the state may not restrict freedom of speech if, on balance, it would do more social good to do so. It is not enough to say that free speech is important to living with dignity to conclude that the interest in free speech should trump other interests, such as the interest in physical safety. More must be said to conclude that restricting freedom of speech would *offend* our dignity, even if done to protect other important interests. Perhaps the case can be made. If so, my sense is that it would have to turn on the thought that censorship presupposes an inability to use autonomous judgment. The alternative reading of the argument, according to which we *care* more about free speech than about other goods, like safety,⁹⁸ is actually simply a version of a utilitarian argument. It may be based on the *value* of being able to live with dignity, but that should not be confused with the need to rule out certain actions because the justifications for them cannot be made consistent with respecting our *status* as beings with dignity. Dignity as a source of value is not to be belittled. But it is also not to be confused with dignity as the ground for rights.

⁹⁷ *Id*

⁹⁸ Cite quote about preferring to freedom over life itself.