

## Constitutional Rights, Civility and Artifice

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**ABSTRACT.** *The value of civility is grounded upon acceptance of the legitimacy of moral disagreement and the need for mutual respect and cooperation in the face of such disagreement. The distinction between rights and goods plays a fundamental role in the form of civility espoused by liberal society. Current models of constitutional rights and proportionality, in a variety of ways, erode that distinction and thereby place the liberal model of civility in jeopardy.*

**KEYWORDS:** *Constitutional rights, proportionality, civility, commensurability, liberalism.*

### *After Eden*

A tradition of political thought that stretches back to Plato and Aristotle views the institutions of the political community as serving to foster excellent lives for human beings. Law plays an important part in this picture: it helps to inculcate habits of virtue; it helps to protect the virtuous from the predations of the wicked; and it helps to sustain other institutions (such as property, the market and the family) which themselves foster excellence and encourage virtuous habits. But law does none of these things alone. For this tradition, law is only one part of a more complex fabric of practices and institutions with its centre in a single set of values. Those values permeate the whole and provide the unity that makes political association possible.

From the early modern period, and partly in response to the Wars of Religion, a different way of thinking about politics starts to predominate. For a variety of reasons, some not fundamentally incompatible with the first tradition, this approach tries provisionally to set on one side ultimate questions about the nature of human perfection and to provide a framework of entitlements within which individuals can choose and pursue their own conceptions of a good life. Within this way of thinking law becomes utterly central, since it is law that has the task of establishing the relevant entitlements. Reflecting the centrality of law, juridical concepts (such as justice and rights) come to dominate the public discourse. An older language, of virtue and the common good, comes to be unduly neglected.

Although many think of these two traditions of thought as radically opposed, wiser souls view them as mutually enriching strands of thought. Both must play a part in any sound form of liberal democratic politics. Ideas of justice and rights are not self-sustaining: they become productive of illusions when they are isolated from a broader concern with human flourishing. At the same time, the distinct features of the juridical realm must be sustained if freedom is to be preserved. Rights must not be

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made conditional upon their virtuous exercise, nor dissolved into a goal-oriented focus upon the attainment of desirable states of affairs. In particular, the rule-based character of law must be respected. A polity that in this way respects the integrity of law thereby establishes a form of civic friendship for a world where justice is always contested.

Michael Walzer has described liberalism as an 'art of separation'.<sup>2</sup> It separates private life from public life; church from state; the family from the economy; the state from civil society; adjudication from legislation; and so forth. Each of these separable spheres derives its character from the distinct values towards which it is oriented. The pre-liberal view assumed a single right ordering of conduct directly informing every aspect of social and political life. Merchant, prince and peasant were to act upon a shared idea of Christian virtue, grounded in the teachings of the Church. The social order was conceived of 'as a highly articulated organism of members contributing in their different degrees to a spiritual purpose.'<sup>3</sup> But liberals came to understand that, while any tolerable political community must rest upon shared values, those public values are to some extent separable from many of the concerns which centrally inform the private lives of citizens. The need for virtue cannot be confined to the private realm, for there are distinct public virtues which ground mutually respectful interaction, along with political and mercantile probity. Such public virtues facilitate the peaceful pursuit of diverse private goals. But, being expressive of full mutual recognition and civic friendship, they also, in themselves, constitute a centrally important aspect of a flourishing life.

The various separations cherished by the liberal are not given by abstract reason but result from a mixture of accident and artifice. They require an 'artificial reason' of the kind that Sir Edward Coke ascribed to the law. Indeed, the taught traditions of the law have often played a large part in maintaining the stability of the relevant distinctions. But, for this very reason (and given the centrality of law to modern liberal society), an erosion of such distinctions within the law itself could have particularly far-reaching consequences.

To describe something as 'artificial' was once to say that the thing in question is a potentially admirable work of human ingenuity, manifesting the relationship between human freedom and the divine plan, and adding thereby to the glory of God's creation. It is in this light that we must understand Coke's idea of the law's 'artificial reason'.<sup>4</sup> For natural reason is, on its own, insufficient to resolve our problems. Reason reveals to us the need for mutually respectful cooperation, and for the conduct of our lives in friendship with others. But it does not offer us a blueprint for our lives together. We disagree about justice; and, on any sound understanding, the prescriptions of justice are plural and potentially competing. In consequence of this, we must devise our own solutions, even though our solutions will still be constrained by circumstance and answerable to very general requirements of reason.

Today, however, to say that something is 'artificial' is to say that it is fake, or lacking in real value.<sup>5</sup> We contrast 'artifice' with such things as authenticity and sincerity. Reflecting that outlook, many people today think that the law should directly reproduce the latitude and accessibility of popular discourse: a modern analogue of the 'natural reason' favoured by King James in his famous debate with Coke. They would see only exclusivity and elitism in an 'artificial reason' that must be 'gotten by long study'.

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<sup>2</sup> Michael Walzer, 'Liberalism and the Art of Separation' (1984) 12 *Political Theory* 315.

<sup>3</sup> R.H. Tawney, quoted in Tim Rogan, *The Moral Economists*, (Princeton and Oxford: Princeton University Press 2017) p.47.

<sup>4</sup> *Prohibitions Del Roy*, 77 ER 1342, [1607] EWHC KB J23, 12 Co Rep 64.

<sup>5</sup> See John Rawls, *Lectures on the History of Moral Philosophy*, (Cambridge, Mass.: Harvard University Press 2000) p.52.

And, to those who take that view, the introduction of 'human rights' to the law seems beneficially to disrupt the hard carapace of traditional legal thought, creating a conduit through which fundamental values, expressed in a currently familiar idiom, can enter the courtroom in a relatively unmediated form. Because the firm rules and clear watersheds, which are aspired to by the taught tradition of law, often fail accurately to trace the fluid contours of our ordinary concerns, those rules come to be regarded as regrettable obstacles ('artificial' in the pejorative sense) to the pursuit of what truly matters. A form of legal thought which balances values one against another comes to seem both more transparent and more focused upon the important issues. The boundary between juridical reason and social policy becomes blurred.<sup>6</sup> Coke's talk of 'artificial reason' begins to seem no more than a smokescreen wrapped around sectional interest.

The separations of liberal thought and practice have long been subjected to hostile scrutiny. Typically, in this genre, the various dichotomies are revealed to be products of historical contingency and are then attacked as having damaging and distortive consequences. Thus market freedoms can be portrayed as serving only to obscure the realities of domination and exploitation; the family can be painted, in sombre tones, as a realm of domestic tyranny and a source of distributive injustice; the private associations of civil society (such as churches and independent educational institutions) can be viewed as pernicious barriers to moral uniformity; the principled consistency of legal doctrine can be viewed as merely an illusory heaven of equal rights disguising material inequality. The critiques derive much of their power from the implied contrast with an imagined community, free from liberal separations, where the embeddedness of institutions within a uniform ethical fabric erases the harsh dichotomies of modernity. The critics tacitly lament the passing of a world of wholeness that supposedly preceded the division and fragmentation of the present; or they bemoan the unattainability of some such state, given our current situation on Dover Beach.

Dreams of all-encompassing unity are not restricted to the critics of liberalism. For, in lending great prominence to the idea of rights, and in appearing to suggest that the realm of rights can be entirely self-sustaining, the public discourse of liberalism can itself become a source of such illusions. We traverse a landscape where mirages are frequent. Evanescent glimpses and faint suggestions are taken for evident indicators. Can we not find our way to the well-watered land of perfect justice and moral unanimity? Does the virtually universal endorsement of the idea of human rights not point to that land as just over the horizon?<sup>7</sup> Is the path not already clear and open to us, provided that we are not discouraged by the voices of scepticism?

In this way, constitutional arrangements that were adopted, after the Second World War, to prevent a recurrence of totalitarian horror, come to be viewed as signposts to a future transformed, not simply by the absence of abhorrent evil, but by the positive realisation of perfect justice. To construe such constitutional provisions as merely extreme backstop defences against the worst atrocities is, from this perspective, to neglect their potential for effecting an all-encompassing transformation.

Reflective liberals of conservative disposition are unlikely to be seduced. They see abstract talk of justice and rights as failing to provide us with sufficiently determinate guidance. A high degree of convergence in the identification of truly gross injustice does not guarantee similar convergence in our opinions concerning perfect justice. Universal agreement upon general formulae (whether framed in terms of human rights, or freedom, or equality) is likely to fracture and disintegrate when the formulae must be unpacked and applied. Standards of justice are plural and permanently open to dispute. Public acceptance of that fact grounds the core political value of civility. Those who deny this,

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<sup>6</sup> A blurring which is encouraged by the most influential theories of law. See n.39 below.

<sup>7</sup> See Samuel Moyn, *The Last Utopia*, (Cambridge, Mass.: Harvard University Press 2012)

and believe themselves to be in possession of the whole and incontestable truth concerning justice, seem to misunderstand the human condition quite fundamentally. The pursuit of perfect justice seems more likely to destroy civility than to foster any values that might transcend it.

An elegiac strand of thought is fundamental to the cultural outlook of liberal conservatives: they find it natural to consider the most shimmering ideals to be illusory or irretrievably lost to us. Theirs is a politics of imperfection, grounded in a deep appreciation of the ease with which dreams can become nightmares. Purely celebratory or aspirational versions of liberalism (from which the elegiac motif and its associated scepticism are absent) become prominent from time to time. Mistakenly construing the dominant juridical discourse as embodying a self-sufficient vision of human community, rather than as one aspect of a complex web of dependencies and distinctions, these approaches quickly degenerate into vulgar sloganizing. They postulate all-encompassing political goals which possess a wide appeal only to the extent that their content remains unspecified (here the language of freedom, equality and human rights is especially popular). The supposedly happy conditions, which are vaguely envisaged by such language, are to be secured by the technical management of the state. This requires ever-increasing levels of intervention in the various aspects of social life which make up the liberal polity, thereby eroding the key separations (including the separation between state and civil society) upon which liberalism depends.

Technocratic management of this sort in turn requires an appearance of commensurability to be imposed upon the diverse forms of value composing our moral and juridical life. For, without such a semblance of commensurability (if the relevant values are not to lose their distinct identities, a *semblance* is all it can be), technocratic decisions are revealed as groundless exercises of power.<sup>8</sup> This misleading veneer of commensurability implies that demonstrably correct solutions are available to resolve core political issues, and that those who oppose such solutions are the enemies of justice: an erosion of civility is the inevitable result. The pretence of commensurability also obscures the diversity of forms that moral values typically exhibit and that a fully human life will encompass. For example, an adequately rich moral life will incorporate values that must be *honoured* or *respected* along with, but by contrast with, those that must be *promoted* or *advanced*; some values provide *goals*, while others constitute *constraints* upon the pursuit of goals. Within the outlook of technocracy, on the other hand, all values are to be 'optimised'.<sup>9</sup>

The wise liberal, sadly acknowledging that we are by nature fallen creatures who cannot return to Eden, finds a sense of loss to be entirely appropriate. This sadness must not divert us from the task of making the best of things, nor should it lead us to neglect or underrate such valuable practices as we already possess. We should not imagine that diverse values can, without losing their character, be stirred into a common pot. The imposition of a technocratic framework upon our values is not the replacement of unstructured intuition by articulate reason. Nor is it a successful convergence upon a common agenda that will lead to a promised land. Rather, it is a failure to understand the nature of our own cultural and political heritage. When reflectively understood, that inheritance (marked

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<sup>8</sup> Such a semblance of commensurability may consist in no more than a formally structured requirement that one should assess the 'importance' of different values, or the 'seriousness' of various possible encroachments upon such values. This is a characteristic feature of the doctrine of proportionality which now forms an integral part of the law of constitutional rights.

<sup>9</sup> Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, (Oxford 2002). Reliance upon the language of 'optimisation' (or similar language) need not involve a direct *denial* of the diversity of forms of value. Rather, the language can be deployed in such a way as simply to *abstract* from the relevant differences. But such abstraction is itself an implicit denial of the importance of those distinctions.

though it may be by the fact of human imperfection and the unavoidable reality of moral disagreement) embodies a unity that transcends mere uniformity.

As Milton makes clear in the closing lines of *Paradise Lost*, when we look back on Eden we are right to drop 'some natural tears'. But it is also right that we should 'wipe them soon'. For it is the loss of Eden that makes us fully human, and our humanity is not to be regretted. Bearing the burden of our humanity, but also cherishing that humanity, we must 'hand in hand, with wandering steps and slow' make our way through the world that lies before us. No single path is pre-ordained for us by reason, and no heavenly destination is secure. Our journey is not a march to some distant horizon where all that matters is the destination. It is a slow forging of bonds between the wanderers (bonds which are inseparable from memory, and attachment to the things that have been). The required posture of self-reliance, realistic hope, mutual supportiveness, and fortitude in the face of adversity, confers on us our most ennobling aspect.

To say that we must make our own way is not to say that our course is arbitrary. Nor is it to suggest that our course can be pursued only in a spirit of post-modernist 'irony'. The ways that we might follow are the product of some broad prescriptions of reason, but those prescriptions require us to establish the institutions of civility, and such institutions can take a variety of different forms. A concrete version of civility emerges through a mixture of practice, experience, local allegiance, and reflective dialogue. The separations upon which liberalism relies are indeed (as the critics have noticed) historical products rather than direct dispositions of reason. They are established as we go along, slowly woven into the texture of our lives, and found to be habitable before they become features of a philosophical understanding. Not everything of value needs to be an unmediated expression of natural reason: custom, shared attachment and habituation will always play a large part. The somewhat accidental inception of our practices will generally long precede our reflective understanding of their significance. But the attainment of that understanding does not convert our civil and political practices into mere applications of abstract principle. Indeed, they are to a large extent the groundwork of such principles, in detachment from which the principles themselves cannot be grasped or applied. We are the heirs of a complex history, and such spiritual depth as we possess is ours only in consequence of that history.

### *Rights and goods*

One of the key distinctions for the liberal 'art of separation' is that between the realm of rights, on the one hand, and the realm of goods more generally, on the other. The separation is necessary if individuals are to enjoy a sphere within which their will can be decisive; without such a sphere, liberty cannot be a reality. Consequently, rights, once conferred by law or publicly acknowledged, must give to the individual a secure domain wherein the majority's view of what is desirable no longer prevails. As John Rawls points out, we think of justice as requiring rights that are not subject to 'the calculus of social interests'.<sup>10</sup> For that to be possible, not all social interests or values can be treated as rights. There must be a difference between rights and those various things which are good and to be pursued by governments and individuals.

The difference is manifested in the differing logics that rights and goods obey. Rights are to be carefully delineated, acknowledged and respected. They have bounds which should not be violated. Rights offer each of us a domain of options which enjoy a significant degree of independence from the will of

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<sup>10</sup> John Rawls, *A Theory of Justice*, revised edition, (Oxford 1999) p.4.

others.<sup>11</sup> This is why the boundaries of a right must, so far as possible, be identifiable in advance of particular situations where the right must be invoked and relied upon.

The boundaries of a right are important, even though they may seem on occasion to be artificial disruptions of the continuities of natural reason. Moral issues, taken in the round, are usually too complicated and multi-faceted to admit of reduction to simple watershed rules. To recognise rights is to ascribe decisive significance to what may seem only a narrow aspect of the moral situation. For this reason, those who emphasise the importance of rights can sometimes appear to be blind to the complexity of the moral issues that we confront. An insistence on rights as overriding can strike us as dogmatic. And those who dream of Eden may feel convinced that we can find a more sensible and moderate way of accommodating rights within our polity. Here is the seed of error.

By contrast with rights, which should not be violated, goods are to be pursued but must consequently be weighed and balanced against each other. Within the discourse of goods all relevant considerations seem to be easily accommodated, making this approach appear to be considerably more flexible, and open to the complexity of human affairs, than is the discourse of rights. But this flexibility in *acknowledging* various aspects of the moral situation is then combined with an opaque strategy for *relating* those aspects one to another: we are simply told that they must be 'balanced'. In seeking to understand this form of reasoning, it proves remarkably difficult to penetrate beyond the metaphors of 'weight' and 'balancing'.

Amongst other separations, liberalism requires respect for the differences between two distinct forms of discourse: one where, unavoidably, we weigh and balance goods, and another where we acknowledge and respect rights. The boundary between these domains, and the notion of an individual right itself, are not things directly given by reason, but something that an emergent liberalism distils from an older discourse of right ordering.<sup>12</sup> At the same time the ideas in question are not arbitrary, but responsive to the needs of social creatures. Established and policed by the rule of law, rights are possible only as a result of the governance of rules (the rule of law being fundamentally the governance of rules). This is not to deny the possibility of moral rights apart from law. But our sense of the overriding importance of rights, and therefore of moral rights, is always dependent upon our familiarity with the idea of respect for rules as something apart from the weighing and balancing of goods. The most eloquent expression of what is involved in such respect is to be found in the traditions of law. Moral rights grow and have their being only under the aegis of the law. As Maitland pointed out, 'nothing that we can do will ever deprive the word "rights" of its legal savour.'<sup>13</sup>

The logic of rights is quite different from the logic of values more generally. In asserting that I have a right to act in a certain way, or a right to some performance on your part, I do both more and less than claim that the action in question would be good and valuable. I do less than this because we may have rights to perform actions that are without value and perhaps even highly undesirable. To some extent this is a consequence of the liberal's emphasis upon the value of free choice: freedom to choose must often include freedom to choose badly. But it is also a consequence of the liberal's commitment to governance by general rules rather than *ad hoc* decision-making. Governing rules need to be workably

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<sup>11</sup> See Simmonds, *Law as a Moral Idea*, (Oxford 2007) pp.104-109.

<sup>12</sup> The history and significance of this emergence is much disputed. See Annabel Brett, *Liberty, Right and Nature*, (Cambridge University Press 2003); Richard Tuck, *Natural Rights Theories*, (Cambridge University Press 1981); Brian Tierney, *The Idea of Natural Rights*, (Grand Rapids, Michigan: Eerdmans 1997); Leo Strauss, *Natural Right and History*, (University of Chicago Press 1953).

<sup>13</sup> F.W. Maitland, *A Historical Sketch of Liberty and Equality*, (Indianapolis: Liberty Fund 2000) p.90.

clear and simple, and will therefore often fail to exclude from the scope of their protection activities that have little or no value. Practical requirements here reinforce liberal values.

In claiming a right I also do *more* than claim that my action is valuable. For valuable things must be weighed against other valuable things with which they can clash and compete. The logic of rights is different. Rights possess preemptory force. They bring an end to weighing and balancing. The question is not one of how my interests are balanced against yours, but of whether I am within or without the scope of my rights. The boundary of a right is uniquely important. The special force of rights is precisely their resistance to balancing. As Bernard Williams puts it, 'If people have a right to something, then someone does wrong who denies it to them.' Rights do not, Williams observes, 'signal goods and opportunities which ....should be provided if it is possible.'<sup>14</sup>

This preemptory force is clearest of all in the case of legal rights. If I demonstrate to the judge that I have a legal right to plant tall trees along the perimeter of my land, depriving your land of light, we do not expect the judge to say "I accept that you have such a right and I will certainly take account of it when I decide whether you should be allowed to plant the trees." Once the right is demonstrated, the question at issue is conclusively resolved. When rights relate to the right-holder's own action, they are conclusive of the permissibility of that action.<sup>15</sup> And when they relate to the action of another, they are conclusive of the duty to perform that action. Rights on this model are best framed, not as rights to states of affairs, but as rights to the performance of actions (including, when the right is so defined, actions that secure the existence of a certain state of affairs).

The preemptory force of rights is grounded in the fact that law is primarily a body of rules. Rules, as Dworkin points out, apply in an 'all or nothing fashion': if the rule is both valid and applicable it dictates the outcome in the case.<sup>16</sup> A rule is not a reason for deciding the case one way which must then be balanced against other conflicting reasons. Collective judgments of good and bad are of course likely to underlie the community's decision to confer this or that right. But, once conferred, rights can be exercised as the right-holder chooses.<sup>17</sup> We expect the liberal polity to respect the integrity of rules, and we entrust a special responsibility for this to the guardians of artificial reason: lawyers, judges and legal scholars.

The rule of law, understood in terms of Lon Fuller's eight requirements,<sup>18</sup> and the existence of rights, are in this way intimately interconnected. To the extent that the rule of law is observed, the law as a

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<sup>14</sup> Bernard Williams, *In the Beginning was the Deed*, (Princeton 2005) p.64. We might wish to correct Williams' formulation in one respect. Rather than saying that one who denies a right to the right holder 'does wrong', it would perhaps be better to say that the right-holder 'is wronged' when their right is denied to them. Both formulations make it clear that a right is not simply a good to be optimised. But the latter formulation is compatible with the view that there may be situations where the violation of a right is justifiable, in spite of being a wrong to the individual concerned. This helps to distinguish rights with preemptory force from the absolute rights of the natural law tradition. There is a further respect in which legal rights possess preemptory force without being absolute: their binding force is dependent upon their basis in mutual civility. See n.22 below.

<sup>15</sup> Here I ignore certain complexities. For example, rights hold against other juridical persons. Thus I may have a right as against my neighbour but not in relation to some governing authority that requires planning permission for the planting of tall trees. Furthermore, rights can be Hohfeldian powers or immunities rather than claim-rights or liberties. Like claim-rights and liberties, powers and immunities are preemptory with respect to the issues that they govern. None of this affects the general point being made in the text.

<sup>16</sup> Ronald Dworkin, *Taking Rights Seriously*, (London: Duckworth 1977) Chap.2.

<sup>17</sup> Hence the French doctrine of 'abuse of rights' has sometimes been regarded as an illiberal subversion of the entire notion of a right: see F.H. Lawson, *Negligence in the Civil Law*, (Oxford: Clarendon Press 1950). But see Adam J. MacLeod, *Property and Practical Reason*, (Cambridge University Press 2015) Chaps.6 and 7.

<sup>18</sup> Lon Fuller, *The Morality of Law*, revised edition, (New Haven: Yale University Press 1969) Chap. 2.

whole becomes a complex system of rights and duties possessing peremptory force. And to the extent that I am governed in accordance with published, prospective rules, compliant with the eight requirements, I will enjoy a degree of freedom as independence from the power of others which can be enjoyed in no other way.<sup>19</sup> For this reason, rules form the core of legal doctrine, and juristic craftsmanship embodies the aspiration of making the rules as clear, and as straightforwardly applicable, as possible. Although legal reason is always structured and informed by considerations of justice and the common good, proficient lawyers strive to make legal doctrine rule-like, so far as possible. They tend to regard vague formulations and balancing formulae as at best placeholders that must in due course be replaced by clear rules, when the accumulation of wisdom and experience makes the formulation of such rules possible. As Neil MacCormick put it, 'Rival positions of principle, or rival views of the contextually appropriate balance or priority of principles, press towards settling rules that state a determinate position focused on determinate types of situation.'<sup>20</sup>

Being the product of rules, rights that possess peremptory force are assumed to form an internally consistent scheme. Legal systems have intellectual practices that go some way towards maintaining this consistency. Thus we treat the later enactment as modifying the earlier enactment; the more specific rule as derogating from the more general rule. And, when rules appear to conflict in a way that is recalcitrant to these techniques, we strive to interpret each rule in a way that removes the conflict. By contrast with this, when rights are construed as 'optimisation requirements' (as Robert Alexy construes constitutional rights, in his enormously influential work on this subject<sup>21</sup>) conflicts between rights can be allowed to proliferate and must then be resolved by 'balancing' the relevant values in individual cases.

The proposal that we think of rights as optimisation requirements to be balanced against each other, and against other considerations, may seem attractive. After all, when rights are given peremptory force, the precise location of the boundary of each right comes to be critically important (since the question to be addressed always concerns the scope of the right). But natural human concerns often fail to reflect the discontinuities established by rights, such discontinuities being the product of artifice. Our concerns tend to flow into one another, or to be marked by differences of degree rather than kind, making a focus upon clear boundaries seem misguided. Furthermore, however important rights may be, they are not absolute and are not the only things that we care about.<sup>22</sup> We care about many different things and sometimes we are forced to choose. So why not acknowledge this situation more clearly, by thinking of rights as factors to be weighed in a balance rather than as possessing peremptory force? Why concern ourselves with the precise (and, therefore, somewhat artificial) boundary of each right, when we could treat each right as simply flagging up an area of concern that may have quite vague and indeterminate limits? Why not think of the political community as an undifferentiated field of competing values, governed by natural reason, rather than as an assemblage

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<sup>19</sup> See Simmonds, 'Law as an Idea We Live By' in George Duke and Robert George (eds), *The Cambridge Companion to Natural Law Jurisprudence*, (Cambridge University Press 2017); Simmonds, *Law as a Moral Idea*, (Oxford University Press 2007).

<sup>20</sup> Neil MacCormick, *Legal Reasoning and Legal Theory*, second edition, (Oxford 1994) p.xi.

<sup>21</sup> Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, (Oxford 2002) p.54.

<sup>22</sup> As will become clear later in this essay, legal rights with peremptory force should not be equated with the absolute rights of the natural law tradition (rights which must in no circumstances be encroached upon). Theocentric natural law positions can argue that the future of the world is God's responsibility, while man's responsibility is one of obedience to God's law. But, in the absence of a belief in divine providence, a belief in absolute rights can seem puzzlingly fanatical. Legal rights are not absolute but bind in virtue of the value of mutual civility. When mutual civility genuinely breaks down, or the limits of mutual civility are exceeded, legal rights lose their peremptory force. See also n.14 above.



of distinct practices each with its own internal logic? Do the artificial distinctions that we have inherited really matter? Can a deeper moral unity not be achieved if those distinctions are abandoned?

In the face of such proposals, one who insists upon a particular usage (e.g. one who insists that rights must possess peremptory force) can appear to be merely dogmatic, as if they are simply invoking our ordinary usage and seeking to render that usage static and invulnerable to the flexibility of dialogue. The outright rejection of such dogmatism can seem sensible.

An understanding of the nature of rights, however, should never be detached from the broader political and juridical philosophy which gives to such an understanding its point. My aim, therefore, is not dogmatically to assert and cling to a traditional meaning, as if meanings are set in stone. Rather, the aim is to deepen our grasp of distinctions that have, in the past, been respected and embodied in our practice, and to give some indication of why those distinctions matter. This is not an exercise in dogmatic lexicography, but a contribution to the liberal art of separation.

### *Moral rights*

Of course, as I have already acknowledged, we may speak of moral rights as well as legal rights. Indeed, the centrality of law to the liberal vision of political community causes juridical notions, such as 'justice' and 'rights', to become dominant within public discourse. But here we find a dangerous dynamic within liberal society. For the emphasis upon the importance of rights within a liberal political community creates a popular culture wherein the language of rights can come to colonise every aspect of the moral discourse. To refuse to express a moral concern as a matter of 'rights' is now regarded as failing to take that moral concern seriously. Older moral concepts, such as 'virtue' and 'the common good', have an antiquated sound for modern ears. They are very little understood and may even have a vaguely troubling resonance for many. We find ourselves asking whether an emphasis on virtue might not be incompatible with the liberal's celebration of personal freedom. Or we ask whether an emphasis on the common good might not endanger individual interests that compete with the common good.

The delicate ecology of our inherited moral discourse is thus placed at risk by the steadily burgeoning discourse of rights. This is most certainly regrettable. For, apart from the other losses that the development entails, when all moral concerns are expressed as involving 'rights', we lose any sense of the precise way in which rights possess a special moral force. Rights come to be thought of as simply important interests that are to be balanced against other interests. The exact bounds of a right cease to be of real importance, since the right is fundamentally a factor to be weighed in a balance rather than a clearly defined domain of enforceable entitlement. Or, worse still, an assertion of 'rights' is thought of as simply a demand, indicative of strength of feeling but nothing more. A corrosive moral subjectivism here goes hand in hand with a public encouragement of intransigence.

The neglect of, or misunderstanding of, such concepts as 'virtue' and 'the common good' is equally lamentable. For liberal democracy *depends* upon the virtue of its citizens: in particular the virtues of tolerance, mutual civility, and respect for the inherited practices that constitute the polity. The proper functioning of political institutions is seamlessly connected to the common courtesies that inform daily intercourse. A declining emphasis upon the virtue of citizens suggests a belief that politics is exclusively a struggle concerning the use of governmental power, rather than a matter

which centres upon civil relations obtaining between citizens.<sup>23</sup> But liberal democracy is unlikely to survive the emergence of a culture where citizens accept no need for personal virtue, no requirement of common civility, and expect all problems to be resolved by technocratic solutions.

Similarly, the common good is not some sort of aggregate which can sensibly be contrasted with individual rights. It is not something that can be measured by economic indicators or by surveys of self-reported well-being. It is not the fruit of technocratic intervention. It is, at its core, an orderly structure of rights and practices grounded in the virtue of citizens. It must be oriented towards justice, but in a manner that acknowledges the contested nature of perfect justice and is therefore respectful of established laws. The common good is not the complete good for individuals, but nor is it merely an instrumentally important necessity. As an expression of civic friendship it is an essential constituent of individual flourishing: a constituent which can only be realised in common. It is the form of friendship obtaining between citizens who are independent yet mutually supportive. Our lives would be impoverished, and not simply impeded, without it.

Misunderstanding these things, we are in danger of losing our path. To possess a distinct role within moral discourse, rights must possess a peremptory force analogous to that of legal rights. They must be treated as conclusive of the issues that they govern. A liberal society requires legal rights (primarily the rights conferred by ordinary laws) that are not optimisation requirements but peremptory constraints upon such requirements. Such an understanding of the nature and status of legal rights is threatened when our seemingly most prominent and important rights, namely constitutional rights, lack peremptory force. Rights must be insulated from the calculus of social interests: they must not become factors within that calculus. Such rights depend upon the art of separation. And respect for the relevant separation is an expression of civic friendship.

The profligate invocation of moral 'rights' erodes significant distinctions and undermines mutual civility. Imbibing the general sense of rights as urgent and overriding, while ignoring its juridical substance, the insistence upon framing virtually every moral issue as one concerning 'rights' simply spawns an unwillingness to moderate demands or to concede the possibility of error. When every important interest comes to be spoken of as a right, the distinct logic of rights is obscured. In this way, the more celebratory and strident understandings of liberal values become the enemies of liberalism, destroying the political fabric that nurtured them. Haunted by a dream of moral wholeness, we too easily fall prey to an empty sloganizing which obliterates the established allegiances upon which civility depends. Setting our gaze upon remote horizons, we neglect the value of our familiar inheritance.<sup>24</sup> We allow the liberal 'art of separation' to dissolve in a toxic monoculture of asserted but illusory rights.

### *Constitutional rights*

After 1945 it was considered desirable to do something to prevent a recurrence of regimes resembling the Third Reich. Constitutional rights seemed to be part of the answer, and both the German Basic

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<sup>23</sup> Jeremy Waldron has recently remarked upon the 'drastically unmediated proximity' that obtains between individuals when they ascribe only instrumental importance to existing political structures. See Jeremy Waldron, *Political Political Theory*, (Harvard University Press 2016) p.15. We might think of this 'unmediated proximity' as the absence of mutual civility.

<sup>24</sup> See Simmonds, 'The Bondwoman's Son and the Beautiful Soul' (2013) 58 *American Journal of Jurisprudence* 111.

Law and the European Convention on Human Rights included a catalogue of such constitutional rights, drafted very much with the Third Reich in mind. The rights were not limited to the traditional civil and political liberties (the kind of rights that are thought to bolster the functioning of democracy). Nor were they framed, for the most part, by reference to permitted or required actions. Rather, they sought to identify certain fundamental human interests which were to be insulated from the most extreme hazards of legislative and governmental supremacy. This was a new turn in our politics and it posed some very new questions.

The solution was found in defining rights very broadly but making the majority of such rights subject to limitation by reference to certain specified legitimate state objectives. The various possible bases for limiting rights are themselves framed broadly, so that they include practically all of the relevant considerations upon which any government could legitimately act. Given the historical context in which these documents emerged, one might well have expected that they would be construed as aiming to prevent only the most gross injustices; and, given their drafting, one might have assumed that this was to be achieved by restricting governments and legislatures to actions genuinely motivated by a concern for legitimate state objectives (thereby ruling out such things as the evident persecution of particular ethnic or religious groups).

Instead of adopting such a reading, the courts concluded that the rights in question were to be applied only via a doctrine of 'proportionality'. Under this doctrine, the encroachment upon the right must not only be strictly necessary to the advancement of a relevant governmental objective, but the latter advancement must also be sufficiently important to justify the particular encroachment involved. The approach immerses the courts in the task of weighing and balancing what are acknowledged to be entirely legitimate state objectives; and the core question to be addressed concerns, not the sincerity of the legislature's ostensible purpose, but the soundness of the value judgements upon which their legislative decision rests. This model has been adopted in many jurisdictions around the world. The German Constitutional Court, the European Court of Human Rights, the Israeli Supreme Court, and the Canadian Supreme Court have all become highly influential exponents of what has been described as the 'global model' of constitutional rights.<sup>25</sup>

That description is not intended to suggest that all of these regimes are fundamentally the same, but that they do have some important and distinctive features in common. The description may also seem appropriate for a further reason. The interpretation of rights in both the German Basic Law and the European Convention on Human Rights (and in constitutional documents from a number of other regimes) reflects the general way in which rights are framed by the Universal Declaration of Human Rights. They are, for the most part, framed and interpreted as protecting fundamental interests of the right-holder rather than by reference to specific actions (permissible actions of the right-holder or required actions of a correlative duty-bearer).<sup>26</sup> And this common feature may suggest, as an ultimate guiding possibility, a monistic understanding of the relationship between international and domestic law, with the entire global structure centring upon human rights.

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<sup>25</sup> Kai Moller, *The Global Model of Constitutional Rights*, (Oxford University Press 2012).

<sup>26</sup> This is reflected in the idea that even those rights which might seem to impose only negative duties nevertheless require states to take positive steps to protect the relevant interests. Amartya Sen argues that, when rights are conceived of as defining or restricting permissible actions (rather than in terms of desirable outcomes), the rights conferred must nevertheless be selected by reference to their probable outcomes and are therefore parasitic upon the identification of desirable outcomes: Amartya Sen, *The Idea of Justice*, (London: Allen Lane 2009) Chapter 14. Even if this is true (which I doubt) it does not alter the fact that rights defined by reference to permissible and impermissible actions (or choices) can be given peremptory force, while the ascription of such force to rights defined by reference to outcomes is likely to be very problematic.

While it has its critics, the global model of constitutional rights also has many enthusiastic admirers. The reasons for the popularity of this model are not far to seek, even if we set on one side its suggestion of being a step on the way towards a rights-based global legal order. For it mirrors closely the popular culture of rights mentioned earlier, where rights come to be thought of as simply weighty interests that feature in a process of weighing and balancing. The popular discourse of rights, having developed in the shadow of the law, now threatens to become a parasite which fully colonises its host.

### *An illusory distinction?*

My argument depends upon a contrast between the domain of rights and rules (on the one hand) and the domain of goods and balancing (on the other). But it might be suggested that the contrast is overdrawn. For, in the first place, some rules are framed in terms which require balancing: the most obvious example being rules that employ concepts such as 'reasonableness'. However, given the task of interpreting and applying such rules, lawyers have often tended to develop, through precedent, subsidiary rules that unpack and concretise the requirements of 'reasonableness'. This tendency (which some will consider undesirable) illustrates the way in which legal thought is normally guided by the orienting idea of law as a system of rules: lawyers have traditionally, and rightly, resisted the idea of official discretion unrestricted by rules and have seen it as part of their responsibility to develop and articulate the law in the form of rules.

Robert Alexy envisages something similar happening, in the long term, in relation to the balancing of rights against governmental objectives, under his 'Law of Competing Principles'. This law states, in Alexy's formulation, that 'The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence.'<sup>27</sup> The suggestion is that, through the steady accumulation of judicial decisions on the applicability of constitutional rights, a body of rules will slowly emerge. Those rules would in turn give rise to rights possessing genuine peremptory force.

Even if Alexy was correct about this, we could scarcely rest easy with a deferral of secure rights into the indefinite, and probably quite remote, future. Nor are the current indications especially encouraging. Decisions on proportionality are often closely focused upon the specific facts of individual cases. Indeed, the proportionality doctrine does not seem to embody or encourage a sense of the lawyerly *responsibility* to develop and articulate workable rules for the guidance of future decisions. Judges cannot, of course, justify decisions by reference to non-universalisable features of the case (such as the date on which it was decided) since a requirement of universalizability is inherent in the very idea of justification. But they can justify their decisions by reference to complex assemblages of universalisable features, so that no workable rule which is likely to apply in future cases will emerge. And there are good reasons for expecting judges to adopt that course of action. For, if they allow binding subsidiary rules to develop, they will be abrogating for the future the very considerable political power that the balancing model gives them. Are we to ignore the possibility that judges may not wish to lay the shackles of law back on their own limbs, having once tasted the pleasures of political power without political responsibility?

In the light of these considerations it would be foolish to dismiss the worries that many commentators have about the largely discretionary character of constitutional rights decisions under the doctrine of proportionality. The fact that legal scholars might hope, in due course, to distil some rules from a long course of discretionary judicial decisions is no substitute for the judges feeling a responsibility to

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<sup>27</sup> Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, (Oxford 2002) p.54.

articulate such rules, and adhere to them, in the first place. Yet we find that enthusiastic admirers of the proportionality approach, far from urging judges to undertake such a responsibility, are inclined to be critical of the search for 'very sharp, categorical distinctions' and 'rigid and unbending rules'.<sup>28</sup>

It might be alleged that my picture of legal reasoning as rule-application is itself flawed. For rules are frequently modified in the course of application, and this is frequently done in the application of deeper legal principles. While rules apply in an 'all or nothing fashion', theorists such as Dworkin speak of the law as involving 'principles' in addition to rules: principles have a dimension of weight and are to be weighed against each other. Furthermore, Alexy analogises constitutional rights to principles in other areas of law such as private law, viewing them both as 'optimisation requirements'. So, from this point of view (it might be argued), the contrast between ordinary legal doctrinal thought and the balancing process established by the global model of rights is much less substantial than I am suggesting.

But, in private law, principles are not best understood as serving interests or states of affairs that are describable independently of the principles. The principle that 'no man shall profit from his own wrong' does not aim at any situation other than the one that consists in people not profiting from their own wrongs. The principle that 'contractual rights must be exercised in good faith' governs the standards obtaining within the contractual relationship, but it does not aim to advance any independently identifiable state of affairs that is likely to flow from that principle-defined relationship. The principle *volenti non fit injuria* aims to specify what will and will not count as a legal injury, but does not aim thereby to advance some situation that could be defined in terms not involving the ideas of 'injury' and 'consent'. We may loosely speak of the judge in the private law context as 'balancing' such principles one against another. But a more enlightening picture would be one of the judge or jurist seeking to frame rules that are appropriately *respectful* of the relevant principles. Even when the rules seek to *advance* certain goals in an instrumental fashion, the content of the rules will often be shaped by principles (perhaps by a plurality of partially competing principles) which are to be *honoured* and *respected* rather than advanced. The language of 'optimisation' obscures this important difference.<sup>29</sup> Here we see the imposition of a technocratic language upon juridical practices informed by more traditional moral conceptions.

It should be added that principles in private law are themselves extrapolated and generalised from the existing legal rules. They serve to give greater determinacy to the legal rules by ensuring that the interpretation and application of individual rules is informed and controlled by the system of laws as a whole. The articulation of principles proceeds on the basis of an assumption that, to enjoy legitimacy, the legal rules must be aimed at implementing some coherent conception of justice and the common good. Constitutional rights, by contrast, need have no organic connection with the existing legal rules.<sup>30</sup> They are introduced by enactment and their point is not to stabilise the interpretation of rules

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<sup>28</sup> David M. Beatty, *The Ultimate Rule of Law*, (Oxford 2004) p.41. It must be conceded that the US Supreme Court (Beatty's example of a rule-based approach) has not been very successful in articulating and adhering to such rules.

<sup>29</sup> See above n.9.

<sup>30</sup> The likelihood of any such organic connection is considerably reduced by the fact that the bulk of ordinary legal rights are rights to specific actions: liberties to perform actions, or claim-rights to the performance of such actions by determinate others. Constitutional rights, by contrast, tend to be rights to independently describable states of affairs, or to the performance of an indeterminate range of actions by indeterminate others. I include some further remarks on this (and other related matters) in 'Constitutional Rights and the Rule of Law' (2016) *Analisi e Diritto* 251.

but to measure those rules against an independent standard. Alexy's analysis of constitutional rights and legal principles as both being 'optimisation requirements' is therefore inherently misleading.

### *Justice and mutual civility*

Because constitutional rights are now required to be balanced against legitimate governmental objectives, their precise bounds are given less importance. The scope of the rights tends to spread until practically the whole law is entangled with issues of constitutional or human rights. This is especially true of those jurisdictions where the relevant catalogue of rights includes a general right to liberty. The tendency is greatly augmented by doctrines of 'horizontal application'. The phenomenon may be referred to as 'the radiating effect' of rights.

These very extensive rights now lack peremptory force: they settle nothing but are simply important considerations to be taken into account in a balancing process. We may well wonder whether anything is left here of the idea of 'a right.' The distinct logic of rights decomposes into the general balancing of values one against another.

Thus the editors of a recent volume of essays on the subject tell us that rights have now been 'overtaken' by the idea of proportionality.<sup>31</sup> One critical commentator has perceptively suggested that the entire catalogue of constitutional rights might be replaced by a simple provision to the effect that the law must observe the principle of proportionality.<sup>32</sup> And one very enthusiastic advocate of the current law tells us that we need to 'abandon the idea that rights hold a special normative force' and should adjust our expectations concerning rights.<sup>33</sup>

This is not simply a matter of constitutional rights falling short of the ideal we might have hoped for. If that were the case we might well say that they are not perfect, but they are better than nothing and we cannot see a way to improve them. The radiating effect of rights, and the doctrine of horizontal application, mean that practically the entire law comes to be subject to the proportionality test. So it is not just that we have got only part of what we might have wanted: constitutional rights but without the peremptory force of ordinary legal rights. We have in principle subjected *all* legal rights to a test of weighing and balancing against other values, thereby abandoning the distinctive logic of legal rights.

And here the heart of the problem may become clearly visible. The idea of 'proportionality' is now standardly construed in a technocratic fashion that implies some form of commensurability (even if it is only the largely empty form of comparing degrees of seriousness of encroachment upon the relevant values). This is especially so when rights are thought of as 'optimisation requirements'. But, if we set on one side the technocratic outlook that is suggested by such talk of proportionality, it might be said (as Aristotle might say) that proportionality is justice: a law which perfectly acknowledges all relevant interests and considerations, and exhibits respect for them in an appropriate way, is a perfectly just law.<sup>34</sup> Is the core idea underlying the new law of constitutional rights simply the idea of justice? A constitutional doctrine that allows the judges to strike down laws (or require the amendment of laws) whenever they consider them to be unjust seems to be an experiment fraught with danger. For we disagree about justice. To say this is not at all to espouse a non-cognitivist position which says that there is no truth concerning justice. It is simply to say that arguments concerning

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<sup>31</sup> G. Huscroft, B. Miller, G. Webber (eds.), *Proportionality and the Rule of Law*, (Cambridge University Press 2012) p.1.

<sup>32</sup> Gregoire Webber, *The Negotiable Constitution*, (Cambridge University Press 2009) p.4.

<sup>33</sup> Kai Moller, op. cit. n.26 above, p.73 and p.5n.

<sup>34</sup> Aristotle, *Nicomachean Ethics*, Book V.

justice are not algorithms; and, even if there is a truth, reasonable people will disagree about what the truth may be. This is not a contentious claim but a trite one. It is vital that we understand this, for it is the basis of the mutual civility upon which any liberal society must be built.

If we are to have rights, we need a shared set of rules. We need, as Finnis puts it, a shared plan for the common good.<sup>35</sup> A liberal society will favour a plan that establishes clear rules and avoids the conferment of extensive discretionary powers upon public officials (including judges). Hence the efforts of legislators, judges and jurists to articulate law in the form of a system of rules.<sup>36</sup> And, failing a degree of unanimity which is highly unlikely in a modern liberal society, some of those shared rules will be regarded by many as less than perfectly just. Mutual civility, grounded in a wise acceptance of reasonable disagreement concerning justice, then requires compliance with rules even though we may consider them unjust. Our compliance with the law is the primary expression of our civility or civic friendship.<sup>37</sup>

Mutual civility, and the requirement that the laws must be obeyed even when we consider them to be unjust, together rest upon the thought that my own views concerning justice may be mistaken. This thought in turn rests upon an idea of moral truth, for if there is no possibility of truth (if, for example, moral judgements are simple expressions of feeling without cognitive content) there can be no possibility of mistake. At the same time, the acknowledged possibility of error is an acknowledgment that moral arguments are not algorithms but depend upon an irreducible element of individual judgement that will vary from one person to another. By contrast with this, an entrenchment of proportionality doctrine at the heart of our law seems to imply a more technocratic view within which the systematic application of a prescribed analysis yields conclusions that do not admit of reasonable dispute. The falsehood thereby placed at the heart of our legal and political culture means that we build upon insecure foundations, permanently open to excoriating critique.

One thing that mutual civility does not require is compliance with enacted rules that are themselves a clear breach of mutual civility: rules which are so grossly unjust that no reasonable person could possibly consider them to be just; rules that could not plausibly be claimed to be good faith, albeit misguided, attempts to articulate the requirements of justice. This is perhaps the idea behind Gustav Radbruch's proposal that truly grossly unjust enactments should not be regarded as law at all.<sup>38</sup> Like the drafters of the German Basic Law and the European Convention on Human Rights, he had in mind the experience of the Third Reich. Radbruch viewed his formula as a proposal for extreme situations going well beyond the disagreements of ordinary democratic politics. He particularly emphasised the need for compliance (by judges as well as citizens) with rules that are considered to be unjust, though not grossly so.

Legal rights enjoy preemptory force in virtue of mutual civility. They should not be equated with the 'absolute' rights of the natural law tradition. Mutual civility finds expression in many ways, but one of them is the rule-based character of laws and the willingness of all citizens (judges included) to respect that character. An understanding of, and respect for, the rule-based character of law should be central to any decisions regarding the law-making effect of a statute, or a constitutional document: for how

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<sup>35</sup> See John Finnis, *Natural Law and Natural Rights*, second edition (Oxford University Press 2011); John Finnis, *Collected Essays, Volume 4: Philosophy of Law*, (Oxford University Press 2011) p.12.

<sup>36</sup> As noted by MacCormick n.20 above, and Finnis n.43 below.

<sup>37</sup> '(I)n complex societies, law is the only medium in which it is possible reliably to establish morally obligated relationships of mutual respect even among strangers.' Jurgen Habermas, *Between Facts and Norms*, translated by William Rehg, (Cambridge: Polity Press 1996) p.460.

<sup>38</sup> For the best defence of Radbruch's position, see Robert Alexy, *The Argument from Injustice*, (Oxford University Press 2003).

can one determine the law-making effect of such a document without considering the essential nature of law?<sup>39</sup>

One of Radbruch's contemporary defenders is Robert Alexy, who is also the author of by far the most influential monograph on rights in the German Basic Law, a monograph that has exerted a huge influence upon the global model of rights more generally.<sup>40</sup> Yet, in spite of his defence of Radbruch, Alexy seems to forget a large part of Radbruch's message when he turns to the subject of constitutional rights. For Alexy argues that, in applying proportionality doctrine, no weight is to be attached to the fact that the allegedly offending enactment has indeed been published as a law by the proper law-making authority. To give the mere positivity of the law any weight in this context would, in Alexy's view, negate the priority of the constitution over ordinary parliamentary legislation.<sup>41</sup>

Alexy's view is clearly question-begging, since it simply assumes that the proportionality doctrine, unmodified by any distinct concern for the need for certainty in law, is an appropriate test of constitutionality. Yet that is the very question in issue. Sound or not, Alexy's argument is influential and shows us the way the wind has been blowing, for a very long time.

Judges have been faced with the task of interpreting and applying constitutional documents which appear to create constitutional rights with one hand and then abrogate them with the other. This situation is perhaps regrettable. The documents might have been construed differently, as requiring genuine pursuit of legitimate state objectives rather than as inviting a judicial assessment of competing values.<sup>42</sup> Possibly, the relevant documents should have been drafted along different lines so as to facilitate the courts in giving constitutional rights hard edges and peremptory force. More probably, the idea of judicially enforced constitutional rights, framed by reference to fundamental protected interests, is attractive in the abstract but proves to be flawed when we consider the problems surrounding its implementation. The current situation, however, is unlikely to be reversed. So what should the judges now do? How should the judges interpret the various constitutional documents that gave rise to the global model of constitutional rights? My principal aim in this essay is to offer an analysis of the current situation and its illusions, not to prescribe solutions. But I might justly be criticised if I were to say nothing whatever about possible strategies for ameliorating that situation. The remarks which follow are therefore sketchy and speculative in intent.

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<sup>39</sup> In this essay, in the interests of simplicity, I try to avoid becoming entangled in the philosophical debate surrounding law's nature. It is, however, worth making a few remarks by way of clarification. In recent decades legal education has been influenced by a theory which claims that the interpretation and application of texts such as statutes and constitutions, beyond their 'core of settled meaning', involves open-ended policy choices. The approach rests upon a denial of the *reflexive* character of law (i.e. the need for doctrinal legal thought to be guided by reflection upon the idea of law). That denial, however, is misguided (as I have endeavoured to demonstrate in some of my other writings). A judge seeking to give effect to a statute or constitution must ask what the law-making effect of that document might be, and this necessitates reflection upon the nature of law. General policy considerations, if unconnected to the essential nature of law, are not, in themselves, pertinent in this context. On the other hand, the maintenance of law's peremptory force, and the avoidance of its collapse into a system of official (judicial) discretion, is of central importance. The judge's duty of fidelity to the idea of law (which is one manifestation of the duty of mutual civility incumbent upon every citizen) therefore requires the judge to seek an interpretation of constitutional rights that preserves, so far as possible, the peremptory and rule-centred character of law.

<sup>40</sup> Alexy, *op. cit.* n.9 above.

<sup>41</sup> Alexy, 'Comments and Responses' in M.Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, (Oxford University Press 2012) p.331.

<sup>42</sup> Such an interpretation is in many ways the most natural one to adopt. While undoubtedly creating problems of its own, it does at least focus judicial attention upon the issue of outright evil, and acknowledges the moral priority of mutual civility over this or that contestable idea of perfect justice.



One thing that judges might try would be to arrest the radiating effect of rights and give each right (and, consequently, the proportionality test) a narrowly limited domain. This would avoid the destabilising effects that constitutional rights can at present have upon practically the entire body of laws. Since we disagree about justice, a great many laws can (not wholly unreasonably) be challenged as unjust; and such challenges can always be framed as arguments about proportionality, provided that some of the interests encroached upon can be brought within the scope of a constitutional right. Attempts to restrict the scope of rights will, of course, face serious problems. But the problems may not be insuperable, and some attempt in this direction should be made.

Alternatively, or additionally, judges might try to develop, through their decisions on proportionality, a clear body of rules (reflecting Alexy's 'Law of Competing Principles') and not simply very general balancing guidelines. Judges might in this way acknowledge their duty of fidelity to the idea of law, understood as a system of rules and rights (both constitutional rights and ordinary legal rights) with peremptory force. They would contribute to the maintenance of a legal tradition within which determinate rules and doctrines are central: what Finnis has described as 'the vast legal effort to render the law ... relatively impervious to discretionary assessments of competing values.'<sup>43</sup> The development of such rules, however, will inevitably be the slow growth of time if it occurs at all; and, while time passes, the judges may become increasingly accustomed to, and comfortable with, their new and more free-wheeling role. As explained above, judges could easily avoid creating such rules and might well be expected to cling tenaciously to the power that they enjoy in the absence of such rules.

Finally, and particularly if (as is quite likely) the above strategies prove to be too difficult to implement, judges might replace the proportionality test with what might loosely be thought of as a test of gross disproportionality or (perhaps better) gross injustice.<sup>44</sup> In other words the question should not be 'is this law unjust?' but 'is this law so grossly unjust that no reasonable person could consider it to be just?'. This test should be construed as resembling the formula proposed by Gustav Radbruch, as his own proposal for avoiding a repetition of the horrors of the Third Reich. And, in the case of the German Basic Law and the European Convention on Human Rights, it would come closer than the present doctrine to capturing the original aims of the drafters, those aims being the prevention of a recurrence of abhorrent evil, and not the conferment on judges of a perfectly general power to review the justice of the laws. Radbruch's formula contemplated situations *in extremis*. It is unavoidably vague, but an objection grounded upon vagueness can scarcely lie in the mouths of those who advocate the doctrine of proportionality, which is no less vague and (in not being limited to extreme situations) of far wider scope and with far wider implications.

The virtues of a test of gross injustice, by comparison with the present law, are twofold. In the first place, it confines the impact of vague balancing tests to the extreme margin, leaving a broad swathe of ordinary political contexts where the rights conferred by statute or common law can enjoy genuine peremptory force without the constant risk of being overturned in a constitutional challenge. There can always be extreme situations where we are forced to choose between core values even though some of those core values may be of a kind that cannot without loss be integrated in a balancing or optimising framework. But, if the distinctive character of such values is to be preserved, one must try to ensure that the approach that is forced upon us *in extremis* does not become a feature of the value's

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<sup>43</sup>John Finnis, *Natural Law and Natural Rights*, second edition, (Oxford 2011) p.319.

<sup>44</sup> The term 'gross disproportionality', although I have employed it elsewhere, is less than ideal since it appears to imply a continued reliance upon the proportionality approach as conceived in the current doctrine, with the latter's implicit suggestion of some form of commensurability or monotonic comparison. For this reason the term 'gross injustice' is preferable.

diurnal role. Rights which possess peremptory force, but which may have to be set aside in situations of extremity, are not thereby reduced to optimisation requirements, or interests to be weighed in a general calculus of considerations.

Secondly, and very importantly, a doctrine along the lines of Radbruch's formula could represent a public articulation and endorsement of the value of mutual civility, rather than (as at present, under an unmodified proportionality test) a violation of mutual civility in the name of a supposedly perfect justice.

Some view me as pushing at an open door. I have been told by colleagues that a concern for truly gross injustice is what we have at present. Those who adopt this interpretation of the doctrine see the courts as already exercising the necessary severe self-restraint in applying the test of proportionality. I must confess that I do not share their understanding of current events or current doctrine. It is true that, in the law of the European Convention on Human Rights there has been talk of a certain 'margin of appreciation'. But this is normally linked to claims concerning the need for local communities to judge their own needs and circumstances if perfect justice is to be achieved. I see no acknowledgement here of the demands of mutual civility, or of the fact that mutual civility demands a willingness to comply with (and to enforce) laws that some will, not unreasonably, consider to be unjust.

Others appear to be rightly concerned about the capacity of proportionality doctrine greatly to enlarge the power of the judges.<sup>45</sup> Thus Kai Moller proposes a test of 'reasonableness' as opposed to 'correctness'.<sup>46</sup> But proposals of this sort, by working within the general framework of proportionality doctrine, appear to rest upon an endorsement of the idea that rights are optimisation requirements rather than peremptory constraints. They may seek to check the dangerous growth of judicial power, but they nevertheless do so within an intellectual framework that is in danger of obliterating the distinctive character of rights. The approach that I am advocating, by contrast, wholly rejects the idea that rights are optimisation requirements, while acknowledging that the binding force of rights is dependent upon a degree of mutual civility being respected and maintained. Outside of extreme situations of truly gross injustice, ordinary legal rights can then continue to enjoy peremptory force. Constitutional rights should be understood as providing a framework of positive law within which the issue of gross injustice can be addressed.

There are those who will say that evil must be nipped in the bud, and that this requires the courts to intervene as soon as the law appears to depart from justice: one cannot afford to wait for the evil to reach a truly gross level. But those who argue this way allow the *fear* of evil to become an evil in itself. They abandon the attainable virtue of mutual civility in pursuit of an ideal that fails to acknowledge the broad scope of reasonable disagreement. We do not inhabit the Garden of Eden, but a fallen world where we disagree. Nor do we seek eventually to find our way back to Eden. Rather, we willingly accept the burden of our humanity, and seek to make our habitation in full acknowledgment of our limitations. We aim to establish and strengthen the bonds of friendship within a world where

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<sup>45</sup> Meanwhile, many celebrate and seek to extend that power by invoking the image of a 'dialogue' between the courts and the legislature. The image gains plausibility from the fact that adjudicative reasoning should properly be guided by an assumption that the established rules serve some coherent conception of justice. This is a feature of adjudicative reason that Dworkin has chosen to describe in terms of 'collaboration' and 'partnership': see Ronald Dworkin, *Justice for Hedgehogs*, (Harvard 2011) p.136. But (as was pointed out above) it is the object of constitutional rights to provide a point of critical leverage upon established rules, not to explicate the conception of justice implicit within such rules. In this context, courts function as the critical censors of the legislature, not as their dialogic partners in a common project.

<sup>46</sup> Kai Moller, op.cit. n.25 above, Chap. 5.

individual reason is an imperfect guide. These are the basic facts of the human condition which require from us the virtue of mutual civility, and which make that value of greater relevance than perfect justice.

We should be careful not to place at the heart of our law and politics an institutional violation of mutual civility, whereby those with power (in this case, the judges) are willing to employ that power to overturn the reasonable, even if somewhat misguided, judgements of their fellow citizens. For, if we do that, how can civil compliance be expected of our citizens? What value can the judges invoke, as a basis for the binding force of their own (frequently contestable) decisions, when those decisions appear to deny the possibility of reasonable disagreement concerning justice?

If laws are disobeyed (whether by citizens or judges) on the grounds of their injustice (as opposed to gross injustice of a kind that violates mutual civility) this must be as a well-judged act of civil disobedience designed to draw attention to the law and combined with a willingness to accept the resulting punishment, or other consequences (resignation being the appropriate course of action for judges), as entirely legitimate. Civil disobedience can in this way be fully compatible with, and even serve to reinforce, the value of mutual civility.

The institutions which embody and express mutual civility are a product of artifice, informed by time and experience. Consequently, there is no blueprint for liberal democracy, and certainly not one that can be arrived at by pure theoretical reflection. For this reason I do not offer a set of detailed prescriptions, but merely some suggestions concerning the way in which our present unhappy situation might be ameliorated. Nevertheless there are certain aspirations which should shape the character of a liberal democracy. If I had to identify some of those aspirations I would say that they include (i) the rule of law, understood in a relatively austere way as governance by rigorously enforced rules compliant with Lon Fuller's eight requirements; (ii) secure rights with preemptory force (itself a consequence of the rule of law understood in that austere sense); and (iii) the practices of mutual civility, understood as requiring, amongst other things, respect for and compliance with established laws which we may consider to be of imperfect justice. All of these aspirations, it seems to me, are endangered by the currently influential model of constitutional rights.