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Legal Reasoning and Bills of Rights

Grégoire C. N. Webber [*]

Abstract: The ideal of the rule of law speaks differently to law-makers and law-appliers. The judge, being the legal official tasked with the application of law by the court, is not in the law-maker's position of choosing what, legally, ought to obtain, but rather is tasked with furthering, by administering, what, legally, already obtains. This demarcation of responsibilities rests on the ability of the law-maker to settle authoritatively moral-political questions in such a way as to render possible the artificial *techne* of legal reasoning. Bills of rights are unusual law-making acts insofar as they deliberately fail to settle moral-political questions under law by declining to specify the general right 'P has the right to *x*'. How, then, have judges sought to satisfy their law-applying role in relation to disputed claims of rights? The approach shared by judges in Europe and much of the Commonwealth is to interpret the open-ended rights of bills of rights to include nearly all possible instances of conduct that could be related to the right, with the consequence that nearly all legislation, including legislative specifications of open-ended rights, could be held to infringe the bill of rights. In turn, the legality of legislation turns on judicially-created standards of proportionality and balancing, which lack the discipline afforded by technical legal reasoning. As a consequence, judges have assumed the function of law-makers, with all of the associated challenges to the rule of law when law-applying institutions make law in the very moment the legal subject is before them.

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INTRODUCTION

The various desiderata of the rule of law speak differently to law-making and law-applying institutions and officials. To the actors responsible for making law, the rule of law aspires that they approach their task with a concern for the form of legal rules, namely that legal rules be promulgated, clear, and prospective, that each new rule be made to cohere with the existing set of legal rules, that rules not be (otherwise) impossible to comply with, and – with the understanding that legal systems subsist *in* time – that the rules adopted by the law-maker be stable *over* time.[1] Fuller aptly captured the idea of *desiderare* as 'a morality of aspiration and not of duty' and by describing the various ends pursued by the rule of law as instances of 'legal excellence' in the making of legal rules.[2]

This orientation to the ideal of 'legal excellence' allows one to appreciate why each desideratum of the rule of law is one of degree. Legal rules should be *more or less* stable over time, given that changing circumstances will invite the law-maker to revisit previously adopted and promulgated legal rules. Similarly, the clarity of legal rules will be mediated by the subject matter of legal regulation and the intended (expert or lay) addressees. Promulgation will be *more or less* achieved by publicising legal rules and making them available in libraries and, also, by making known to subjects whom they may call upon (legal officials and jurists) to assist them in determining what legal rules are of special concern to them. The overarching orientation, captured in one formulation or another by most students of the rule of law, is that of guidance for the legal subject – concern for the subject's agency and capacity for self-direction, all of which contemplates the possibility of voluntary compliance without coercion (even if coercion will be necessary for some) in planning one's and the community's affairs.

This orientation to the possibility of voluntary compliance does not render the rule of law uninterested in the work of law-applying institutions and officials. The law sets out an ideal against which to measure the real actions of subjects, who will fail in some, perhaps many, respects to satisfy that which law would have of them. In affirming, say, 'It is an offence to [...]' or 'Anyone who [...] is guilty of an offence', the law-maker 'has in his mind's eye the pattern of a future social order, or of some aspect of such an order, and is attempting to reproduce that order'.[3] This pattern guides the law-maker in choosing the range of legal regulations in all fields of legal order. Throughout, the law articulates a standard of excellence in human affairs just as the rule of law sets out a standard of excellence in the design and implementation of legal affairs. Yet, in light of our fallibility in

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[1] See generally L.L. Fuller, *The Morality of Law* (rev ed, New Haven: Yale University Press, 1969), ch II; J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 270-276; J. Raz 'The Rule of Law and its Virtue' in *The Authority of Law* (Oxford: Oxford University Press, 1979).

[2] Fuller, ibid, 41, 43. John Finnis captures the thought by referring to the rule of law as 'the name commonly given to the state of affairs in which a legal system is legally in good shape': ibid, 270.

[3] Finnis, ibid, 282.

human affairs, the rule of law concerns itself with promoting compliance where voluntary efforts at compliance have failed (by error, inattention, or with intent). In this way, law-applying institutions and officials participate in helping to match, so far as possible, the ideal to the real; that is, to reproduce here and now the pattern of a future social order.[4]

The desiderata pertaining to the administration of legal rules echo the concern to provide the legal subject with guidance. Although the specifications of good administration are multiple and include judicial review of administrative action and the independence of the judiciary, legal excellence in administration relates primarily to the desideratum that rulings and decisions applicable to legal subjects be guided by rules complying with the first set of desiderata (the form of rules designed by law-makers) and that legal officials charged with the responsibility to administer the legal rules actually do so and do so consistently. The concern of the rule of law for the administration of legal rules is to maintain the guidance afforded by the law-maker to the legal subject at the point where the legal subject interacts with the legal official. The officials charged with the administration of the law should not act in a way that undermines the law-maker's craft.[5] To do so would not only frustrate the law-maker's ability to pursue the pattern of a future social order, but more fundamentally would upset the legal subject who, concerned to plan affairs and design a life-plan, would be frustrated at the very moment the law is authoritatively applied to those affairs and that life plan. Should law's administration proceed without concern for law – should justice be done not *according to law*, but according to the judge's best view of what justice requires – the legal official tasked with applying the law may be said to be acting upon rather than guiding the legal subject.

That the desiderata of the rule of law speak differently to law-making and law-applying institutions is captured, albeit in a different way, by the artificiality of legal reasoning. Legal reasoning rests on a distinction between the deliberative process leading to the decision to adopt (or not) this legal rule (rather than another or any at all) and the enactment and subsequent application by a law-making official or institution of that legal rule. The deliberative process is marked by its 'diversity and adversarial character' – it explores and proceeds in the circumstances of politics confronting reasonable disagreement with respect to whether the proposed enactment should be pursued or how or if it should be modified. By contrast, the enactment of the legal rule appeals to 'determinacy and univocality' in settling what should now prevail, until the law-maker revisits the issue.[6] Although the real and the ideal fail to meet too often in this respect, the rule of law contemplates that the contingency and tentativeness animating debates preceding

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[4] It bears mention that law-applying institutions and officials are themselves legal subjects, and their conformity with law is also required to realise the rule of law.

[5] At times, this commitment may require undermining the law-maker's immediate work so as to maintain the overarching commitment to the rule of law, including by 'going beyond the formulae of intersecting or conflicting rules [so as] to establish particular and if need be novel reconciliations': Finnis, n 1 above, 271.

[6] J. Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999), 40.

the enactment of a legal rule should be absent once the rule is adopted and legal subjects and officials seek to be guided by it. Stated otherwise: the rule of law contemplates a transition from the open moral-political reasoning that informs the decision about what a legal rule shall be to the legal reasoning that informs the official application of the chosen legal rule to those to whom it is addressed.

The artificial *techne* of law and legal reasoning guides the legal subject not only when the latter makes plans, but also when the subject confronts a legal official. Now before a legal official – either because the official is required to act on a request by the legal subject or because the legal subject is suspected of having run afoul of a legal rule – the subject looks to the official as an officer of the law. In this capacity, the *techne* of law and legal reasoning turns on nothing short of 'the principle – a principle of fairness – that litigants (and others involved in the process) should be treated by judges (and others with power to decide) *impartially*, in the sense that they are as nearly as possible to be treated by each judge as they would be treated by every other judge'.[7] The judge, being the legal office-holder (official) tasked with the application of law by the court, is not in the law-maker's position of choosing what, legally, ought to obtain, but rather is tasked with furthering, by administering, what, legally, already obtains.

The capacity of legal officials to treat like cases alike, to act as would any other legal official, turns in large part on the acts of the law-maker. Fuller captures this idea, albeit in a related context, by stating how the 'first and most obvious [route to disaster] lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis'.[8] The rule of law asks the law-maker to resolve *in law* moral-political debates alive in the community by employing the distinctive devices of law which rely on the artifice of legal-technical reasoning. In so doing, the law-maker allows the judge (and other legal officials) to rely on 'law's distinctive devices: defining terms, and specifying rules, with sufficient and necessarily artificial clarity and definiteness to establish the "bright lines" which make so many real-life questions *easy questions* [under law]'.[9] This technical orientation to legal reasoning seeks no less than 'to provide the citizen, the legal adviser, and the judge with an algorithm for deciding as many questions as possible – in principle every question – yes (or no), this course of action would (or would not) be lawful'.[10]

Although the idea of reciprocity in rule of law thought is often focused on the relationship between law-maker and legal subject,[11] a similar reciprocity extends to the relationship between law-maker and law-applying officials. The law-maker can be taken to say to the legal official: 'Apply the law, no more and less, as set out in

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[7] J. Finnis 'Natural Law and Legal Reasoning' in R.P. George (ed), *Natural Law Theory: Contemporary Essays* (New York: Clarendon Press, 1992), 150.
[8] Fuller, n 1 above, 39.
[9] Finnis, n 7 above, 142.
[10] ibid, 142. See further Finnis, n 1 above, 276-281.
[11] See Fuller, n 1 above, 39-40.

formal enactments', on the understanding that the legal official may expect of the law-maker: 'Design your legal rules with sufficient precision such that, as guided by legal reasoning, I can proceed to act as would any other official in my position'. Taking the view that law and legal systems subsist in time, the reciprocity between law-maker and legal official is understood to develop over time, as each informs the task at hand according to the prevailing canons of legal interpretation (informed by and reacting to new legal terminology and unforeseen applications) that allow the ultimate end of guidance to the legal subject to be better pursued.

Where the law-maker relies on law's distinctive devices and seeks to establish the 'bright lines' that render otherwise difficult questions easy questions *under law*, the legal subject is guided by law and the legal official may comply with the legal excellence expected of the office of law's administrator. However, where the law-maker fails to establish bright lines, where law is adopted and promulgated in a way that fails to resolve life's difficult moral-political questions as easy questions *under law*, the rule of law is challenged: the legal subject will be unable to rely on law for much guidance and, because the same lack of guidance will complicate the legal official's task, the legal subject will be unable to predict just how the official will administer the law in the case implicating the subject. In this important respect, bills of rights challenge the rule of law.[12]

LAW-MAKING AND BILLS OF RIGHTS

With few exceptions, bills of rights are without bright lines. Amongst the variously worded guarantees 'P has the right (or freedom) to *x*' (where *x* is substituted for the concepts equality, liberty, life, conscience or the general act-descriptions speech, vote, assemble), one searches in vain for the sufficient and necessarily artificial clarity and definiteness contemplated by the *techne* of legal reasoning. Indeed, law-makers charged with the task of articulating the rights and freedoms of a bill of rights have generally avoided defining terms and specifying rules. Be it at the international, regional, or domestic (legislative or constitutional) levels, bills of rights have been proposed and adopted in such a way as to leave the relationship between rights and disputed claims of rights open and unresolved.[13] A bill of rights is often proposed at the deliberative stage and adopted at the enactment stage in a manner that maintains near all of the tentativeness and contingency of moral-political questions surrounding rights. Indeed, this is captured, albeit obliquely, by the more or less common appeal to the lexicon of

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[12] A different perspective on this challenge is explored in J. Goldsworthy, 'Legislative Sovereignty and the Rule of Law' in *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010), 68-78, who reviews how rights-based judicial review may frustrate the law's predictability.

[13] The following draws on the more encompassing discussion in G.C.N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009), esp 1-12 and 160-173.

'moral rights' in legal scholarship and judgments relying on bills of rights.[14] This rather inaccurate description of what are, in law, 'legal rights' (even if bills of rights are concerned to give legal form and expression to moral rights) captures how little work the law-maker has undertaken to specify which rights, amongst the variously plausible and reasonable specifications of 'P has the right to *x*', should obtain in law.

MAINTAINING HARD QUESTIONS UNDER LAW

Among the triumphant declarations of rights common to most bills of rights are the freedoms of expression, association, and peaceful assembly; the rights to life, liberty, and security; and the rights to equality and to vote. Yet, the legal form given to these various rights and freedoms leaves unresolved the various contested claims of rights that many will contend and others will deny fall within the scope and content of the bill of rights. For example, the right to life is formulated in way that avoids providing definite legal answers to moral-political debates over euthanasia, abortion, capital punishment, and assisted suicide; freedom of expression is formulated in a manner that offers no determinate legal answers to debates surrounding hate speech, pornography, and libel. And so it is with the various formulations of other rights, all of which (with few exceptions) avoid resolving in law disputes over the range of familiar contested claims of rights. Whilst it would be far too strong to suggest that bills of rights play no part in resolving these (and other) disputed claims of rights, it nevertheless remains the case that bills of rights bear on but do not resolve these contests. Legal subjects (and their counsel) and legal officials (including judges) looking to a bill of rights to resolve contested claims of rights cannot appeal to the familiar tools of the lawyer's trade to provide answers of the certitude 'yes (or no), this course of action would (or would not) be lawful'. The law-makers responsible for bills of rights have provided neither legal subjects nor legal officials with the tools to answer these questions.

On bills of rights, law-makers have more or less unanimously preferred to proceed largely in abstractions, seeking agreement on grand formulations in a way that avoids the great debates (and disagreements) animating rights. Stated otherwise: law-makers have declined to render the difficult moral-political debates easy questions under law. To be sure, the resolution of rights-disputes is not avoided because these contests are unimportant or unforeseen or, in turn, because they are predicted to abate with time. It rather seems that bills of rights are proposed and adopted without being wholly worked out in large measure *because* rights-disputes are so persistent and their resolution so important. Whilst there is

[14] This view is celebrated by R. Dworkin in 'The Moral Reading and the Majoritarian Premise' in *Freedom's Law* (Cambridge, Mass.: Harvard University Press, 1996). But note that Dworkin also says: 'Most cases at law—even most constitutional cases—are not hard cases. The ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction' (ibid, 11).

widespread agreement on the right to *x*, there is widespread disagreement on what, precisely, this should be understood to mean (both in law and in political morality). These debates animating rights do not dissipate the moment a bill of rights is drafted and adopted, and so bills of rights are framed in a manner that does little to resolve, in law, moral-political disagreement, except to provide an additional (more or less legal) platform on which the disagreement may play out.

In this way, law-makers have tended to frame and adopt bills of rights in a manner that leaves the legal resolution of rights-disputes *to a later day*. They do so, not on the hope that these disputes will not arise or require resolution, but precisely on the understanding that answers to these disputes will be required – contingent and contested answers in the circumstances of reasonable and persistent disagreement. Of course, law-makers confront contingent and contested answers in the circumstances of reasonable and persistent disagreement on a quotidian basis. How then are rights different? As we shall see, law-makers do not so much avoid resolving disputed claims of rights as avoid resolving them *in bills of rights*. But as a consequence, bills of rights provide little guidance to those seeking answers to the contested moral-political questions alive in the community, questions the resolution of which demarcates the scope and content of the guaranteed rights.

Hence the query: where are bright lines to be found if not in a bill of rights?

LEGISLATION AND THE LIMITATION OF RIGHTS

The New Zealand Bill of Rights, the Canadian Charter of Rights and Freedoms, and the European Convention on Human Rights, together with many other domestic and international bills of rights share the following in common: their law-makers saw fit to signal, explicitly, that the relationship between the bill of rights and contested claims of rights remained unresolved in law. They did so primarily by way of (one or more) limitation clauses.[15]

Consider the following, familiar formulation of a limitation clause: 'the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[16] Different bills of rights appeal to slightly different formulations, at times appealing to the different range of ends that are candidates for justification in a free and democratic society (as do the various limitation clauses of the European Convention[17]) or informing the 'factors' that will inform the justification of a right's limitation (as does the limitation clause of the South

[15] An overview of different limitation clauses is undertaken in Webber, n 13 above, 59-65. Note that the law-makers of the first series of Amendments to the US Constitution did not explicitly signal the underdeterminacy of their work, but the underdeterminacy can nevertheless be taken 'to speak' for itself. Limitation clauses, in this respect, make the implied explicit.

[16] New Zealand Bill of Rights Act 1990, s 5. This formulation is inspired, in great measure, from s 1 of the Canadian Charter of Rights and Freedoms.

[17] These include morals, health, public order, public safety, and the rights and freedoms of others: European Convention, arts 6(1), 8(2), 9(2), 10(2), 11(2).

African Bill of Rights[18]). Whilst limitation clauses have been described as 'the statement of political conflict pretending to be a resolution of it',[19] they are better understood as statements, *within* a bill of rights, that the law-makers of the bill of rights have delegated to others the resolution of political conflict surrounding which among the possible moral and legal meanings of 'P has the right to *x*' will be favoured in law. In this way, the law-makers responsible for the bill of rights signal that this difficult work remains to be completed by subsequent law-makers.[20]

How do limitation clauses frame the work of subsequent law-makers concerned to complete the bill of rights project left open by the bill of rights itself? The overlapping formulations of limitation clauses all appeal to the concepts of *limitation* ('limitation', 'restrictions, formalities, conditions, penalties'), *justification* ('as can be demonstrably justified', 'justifiable', 'necessary'), *free and democratic society* ('democratic society', 'free and democratic society', 'open and democratic society'), and *prescribed by law* ('prescribed by law', 'provided by law', 'in accordance with law'). Whilst formulations differ in precision and formulation, the directive contemplated by a limitation clause is simple enough: subsequent law-makers are instructed to specify in law the scope and content of the guarantee 'P has the right to *x*' so as to provide it with *jural structure*. In so doing, subsequent law-makers must satisfy themselves (and may be called upon to satisfy legal officials, especially judges) that the specification of each right is justifiable against the standard of a free and democratic society – a society that is free and democratic in part because the various rights and freedoms of the bill of rights have been specified and given effect *in law*.

What is required of subsequent law-makers tasked by bills of rights to prescribe by law the limitation of the open-ended guarantees of rights and freedoms? Essentially, the task is none other than that which falls on the law-maker in every other respect: to translate moral-political questions into easy questions in law by employing law's distinctive devices that will allow legal subjects and officials to be guided by the law. In undertaking this task, the law-maker must be sensitive to the subject matter of legal regulation. On the topic of rights, not only is the law-maker tasked to resolve, in law, the open-ended moral-political debates animating rights, but the law-maker is equally tasked with translating the two-term stipulation 'P has a right to *x*' in a bill of rights into a qualified three-term relationship in law. As Hohfeld reminded us long ago, legal rights may be understood as a relationship between two persons (P and Q) with respect to a

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[18] The factors include the nature of the right, the importance of the purpose of the limitation, and the nature and extent of the limitation: Constitution of the Republic of South Africa, s 36(1).
[19] J.A.G. Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 14.
[20] I refer to 'subsequent' law-makers throughout to simplify the text. Of course, because legal systems subsist in time and a bill of rights is not introduced at time 'naught', the specification of rights left open by a bill of rights will in many cases be achieved both in subsequently and *previously* enacted legislation.

given activity (specific act-description) in some set of specified circumstances.[21] This determinate quality of legal rights is absent in the bill of rights' affirmation that 'P has a right to *x*', which has 'hundreds if not thousands of possible *moral meanings*', relating to hundreds if not thousands of possible *legal meanings*.[22] Selecting among these meanings is the task left to subsequent law-makers.

Take, for example, the guarantee 'Every citizen has the right to vote'. Among the moral meanings that the law-makers must adjudicate on are the disputed claims of minimum age qualifying one as eligible to vote, whether persons convicted of criminal activity should have their right suspended whilst imprisoned, how closely to conform to 'one person, one vote' in designing electoral districts, and so on. Whilst the bill of rights may avoid resolving these disputes, the legal system cannot and so law-makers are called upon to complete the task left open in the bill of rights. In so doing, law-makers not only resolve in law the moral-political questions afflicting debates and disagreements animating rights, they also appeal to law's distinctive devices to set out bright lines. To do so, they appeal to the following six features identified by Finnis as in need of specification:

> (a) the identity of the duty-holder(s) who must respect or give effect to [P]'s right; (b) the content of the duty, in terms of specific act-descriptions, including the times and other circumstances and conditions for the applicability of the duty; (c) the identity or class-description of [P], the correlative claim-right-holder(s) [...]; (d) the conditions under which a claim-right-holder loses his claim-right, including the conditions (if any) under which he can waive the relevant duties; (e) the claim-rights, powers, and liberties of the claim-right-holder in the event of non-performance of duty; and, above all, (f) the liberties of the right-holder, including a specification of the limits of those liberties, i.e. a specification of his duties, especially of non-interference with the liberties of other holders of that right or of other recognized rights.[23]

These six features do not do all the work necessary to translate 'P has the right to *x*' into a series of specified rights with jural structure *qua* relationships between P and Q and specific act-descriptions. Nevertheless, they make clear the responsibilities of law-makers concerned to complete the bill of rights.

As is well understood by students of human rights law even when it is not explicitly acknowledged, much of the work specifying the rights and freedoms of a bill of rights is found in legislation. Legislation gives these rights life in law by setting out various modes of *legal regulation* (criminal sanctions, civil guarantees, licensing schemes), the protected or forbidden or regulated *instances* of engaging in specific act-descriptions (when and where one may speak, when and where one

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[21] See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919).

[22] J. Finnis, 'Some Professorial Fallacies About Rights' (1972) 4 *Adelaide Law Review* 377, 385-386.

[23] Finnis, n 1 above, 218-219.

may cast one and only one ballot), the *time, place and manner* for such activity (of protests and marches during rush hour, of reasonable assault in self-defence), and so on. Through various enactments in criminal law, contract law, tort law, and other fields of overlapping legal regulation, the legislature specifies the open-ended guarantee 'P has the right to *x*' and, in so doing, gives content to the jural structure of the right. Without such specification, the right relates to no class of persons P and no class of persons Q and no circumstances in which P and Q are in a relationship with respect to P's or Q's specific act-description. Without legislation,[24] there simply is no relationship in law expressing P's right and Q's correlative duty, P's privilege and Q's no-right, P's power and Q's liability, or P's immunity and Q's disability (no-power), all specified to hold (and not) in defined circumstances.

Legislation, thus understood, does not affront the bill of rights. It completes it. And in so doing, it gives the various rights and freedoms affirmed in a bill of rights legal life – it constitutes these rights and freedoms by limiting their scope and content in such a way as to harmonise them one with the other given the vast multitude of persons who will claim rights and be under duties, will be empowered to change legal relations and liable to those changes, or will be disabled from so doing and immune from attempts at such changes. Legislation does no more and no less than take the abstracted and reified affirmations of rights in a bill of rights and render them apt and cognisable in law by specifying their scope and content.[25]

When asked to advise on whether the legal subject can undertake this or that activity in the name of 'the right to *x*' under the bill of rights, counsel will look, primarily though not exclusively, to legislation and *not to a bill of rights*. In so doing, counsel will search out, in legislation, the various attempts by the legislature to set out algorithms for answering the range of questions legal subjects and officials will seek to answer in relation to bills of rights. These legislatively prescribed 'answers' constitute the right as they complete the open-ended guarantee within the bill of rights. They seek to provide for the *techne* of legal reasoning even in this most non-technical aspect of law.

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The underdetermined feature of bills of rights raises a challenge to the rule of law. That challenge is answered, in great measure, by reading bills of rights as but the beginning rather than the end of the law-maker's undertaking to set out, in law, the scope and content of various rights and freedoms. By signalling via limitation

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[24] As supplemented and supported by courts developing the common law (and also by executive regulations mandated by legislation and prerogative). The primary function of courts as law-applying institutions renders problematic, for the rule of law reasons reviewed above, its secondary function of law-maker.

[25] See further Webber, n 13 above, ch 4. An excellent review of related issues for moral rights is found in J. Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28 *Oxford Journal of Legal Studies* 127.

clauses that the specification of 'P has the right to *x*' is only partially and minimally undertaken by the bill of rights itself, bills of rights delegate to subsequent law-makers the task of completing open-ended rights into specified relationships apt to guide legal subjects concerned to determine their rights and duties, privileges and no-rights, powers and liabilities, and immunities and disabilities. Legal officials concerned to reason according to law may now do so: whilst the bill of rights fails to provide them with bright lines, it directs them to legislation that does.

LAW-APPLYING AND BILLS OF RIGHTS

How do law-applying institutions – primarily courts – undertake the task of applying bills of rights? One here confronts a well-known, but nevertheless counterintuitive, aspect of judicial review under bills of rights: judges are asked to determine whether legislation specifying the scope and content of open-ended rights conforms with open-ended rights. To those familiar with the work of courts reviewing legislation for compliance with bills of rights, this reality is likely not appreciated as counterintuitive, although it should readily be seen to be the case when divorced from this special context. After all, among the familiar tools of legal reasoning is the maxim *lex specialis derogat generali*, which would give legal subjects reason to conclude that legislation specifying the open-ended stipulation 'P has the right to *x*' cannot thereafter be made subject (and subordinate) to that more general formulation. Nevertheless, legislation is said to be subject to bills of rights, no doubt because bills of rights of whatever rank (legislative, constitutional, international) often affirm themselves to be (and, in any event, are often taken to be) part of the 'supreme law' of a legal system and therefore superior in legal status to legislation, even as legislation seeks to complete the rights left open and underspecified by the bill of rights itself.

As a result, judges confront questions like the following: are legislative regulations respecting holocaust denial, pornography, libel, and the range of other expression-related, but disputed claims of expression consistent with or in violation of freedom of expression? Of course, the various legislative regulations seek precisely *to answer that question* and to do so in a manner that allows legal subjects and legal officials to be guided by law's familiar distinctive devices. However, for the judge confronting the question of the law's compliance with the bill of rights, claimants will appeal (and ask the judge to appeal) to the guarantee of freedom of expression itself, unmediated by legislation, to determine the lawfulness of these regulations.

Now, it should not be forgotten that limitation clauses themselves can be read as inviting some form of judicial review. The question contemplated by a limitation clause is rather precise and formulated as follows: is the legal exclusion (by criminalisation) of hate propaganda a specification of freedom of expression that is demonstrably justifiable in a free and democracy society? Of course, that

question, too, has been answered by the legislature: the enactment of legislation itself stands as an affirmation that the law-maker considers its regulations to be justifiable in a free and democratic society. Indeed, as highlighted above, the legislature constructs a society as free and democratic by specifying rights, such that the standard of a free and democratic society can only problematically (and, thus, with great care) be held out as a standard against which to evaluate such specifications. Just how a judge should approach the question of justifiability is far from obvious – the limitation clause provides little guidance. If a limitation clause can be read to provide any guidance at all, it is rather closer to the mode of judicial review contemplated by James Bradley Thayer so long ago: policing the boundaries of the demonstrably unjustified in a free and democratic society.[26] This, too, of course belies the *techne* of legal reasoning.

Although that is how the bill of rights can be understood to construct the relationship between rights and legislation, that is not how the relationship is contemplated in so much of European and Commonwealth case law and scholarship concerning bills of rights. Rather, the judge tasked with reviewing the lawfulness of legislation specifying 'P has the right to *x*' is asked to confront (and resolve) whether legislation specifying 'P has the right to *x*' is consistent with the unspecified guarantee 'P has the right to *x*'. Yet, because the stipulation in the bill of rights itself contains no determinate answers to the legislation's lawfulness – in truth, the stipulation 'P has the right to *x*' contains far too many possible answers given the decision to maintain disputed claims of rights as within the range of possible specifications – the judge is left unable to appeal to the familiar devices of legal reasoning to resolve this ostensibly legal question. How, then, have judges resolved to administer bills of rights?

JUDICIAL REASONING UNDER BILLS OF RIGHTS

Almost without exception, courts (aided by scholars) have adhered faithfully to what may be called the *received approach to the limitation of rights*.[27] This approach adopts the view that 'P has the right to *x*' stands, in law, for no less than the all-encompassing and limitless right of P to each and every activity related to *x*-ing which, in turn, resists all legislative attempts to specify the jural structures of the right into relationships with Q that hold (*and not*) in specified circumstances. Thus, according to judicial reasoning under the received approach, 'P has the right to *x*' is best understood to encompass all possible instances (specific act-descriptions) of *x* and to resist, in the name of one's *right*, all possible regulation denying some or qualifying other instances of *x* with time, place, and manner requirements. In this way, the received approach transforms an open-ended and underdetermined

[26] For a fuller discussion of this view and of the kind of judicial review contemplated by limitation clauses, see Webber, n 13 above, ch 6.
[27] See ibid, ch 2.

guarantee of a yet-to-be-specified right into an all-encompassing general right to everything, anytime, everywhere. No reasonable law-maker would seek to adopt a bill of rights with such a radically deficient understanding of the scope and content of rights.

By way of illustration, consider the guarantee 'Everyone has freedom of expression'. The received approach does not take this guarantee as an underspecified right in need of further specification so as to resolve debates whether pornography, hate speech, and libel are instances of expression within or without the scope and content of free expression. Rather, judicial reasoning under the received approach takes the guarantee as *settling* the scope and content of the freedom: all instances of expression are within and all possible modes of regulation are without. As a result, all legislation specifying which among the possible moral meanings and which among the possible legal meanings should obtain in law run afoul the bill of rights.

Judicial reasoning under a bill of rights therefore declines to appreciate 'P has the right to *x*' as in need of further specification and, in so doing, introduces to law a 'species' of right more or less heretofore unknown to legal systems and reasoning: a right without jural structure (no correlative duty, no qualifying circumstances, no defined class of right-holders or duty-holders, and so on). Instead of understanding a two-term right – 'P has a right to *x*' – as a placeholder for various specified relationships between P and Q under defined circumstances that are yet to be spelled out, the received approach takes the placeholder as setting out the specification of the right itself. In so doing, judicial reasoning introduces a species of right that is silent respecting the duties of others (including the duties of legal officials) and the circumstances in which the right can be claimed (and duties compelled), which is taken to signify that the right applies in all circumstances. The resulting view favoured by judicial reasoning under bills of rights has been that rights extend everywhere, that there is hardly any instance of human conduct that cannot find a corresponding '*x*' in the bill of rights and that, in turn, almost every instance of legal regulation runs afoul one or more guaranteed rights. Stated otherwise: near all legal regulation becomes a candidate for review by judges for compliance with the open-ended rights of the bill of rights.

Legislation 'limiting' the scope and content of 'P has a right to *x*' is taken to 'infringe' or 'violate' the right. For this reason, limitation clauses are looked upon with suspicion and regret within judicial reasoning – they are seen to contemplate the possibility that legislation infringing otherwise expansive rights may be upheld, *despite the infringement*, as lawful. For some, limitation clauses signify *exceptions* to otherwise expansive rights,[28] for others they represent 'political compromises' that burden rights with 'important qualifications'.[29] Limitation clauses 'claw back' the

[28] See eg S. Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 1999).
[29] R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2006), 48-49.

otherwise generous scope and content of (limitless) rights by allowing the legislature's infringement of a right to be 'saved' or 'defended' in the pursuit of some justifiable end in a free and democratic society, such as national security, public health, or morals. As a result, courts which favour an exaggerated reading of rights have come to require a 'high' burden of justification before infringing legislation can be upheld. According to the logic of judicial reasoning under bills of rights, any limitation clause 'inquiry must be premised on an understanding that the impugned limit violates [...] rights'.[30] The court therefore positions itself as the defender and protector of rights (think 'forum of principle') and positions the legislature as the antagonist of rights (think 'forum of policy'), subject to the forum of principle evaluating the justification of a right's violation pursued in the name of policy.

Although limitation clauses provide little direction on the mode of justification for a right's infringement or violation, judicial reasoning has settled on the regulative ideas of *proportionality* and *balancing* to guide the process of justification.[31] This overlap in judicial reasoning under bills of rights across jurisdictions in Europe, the Commonwealth, and beyond is surprising not only because the possibilities for justification in practical reasoning are many, but also because limitation clauses make no obvious appeal to these regulative ideas. And yet, despite some disagreement and differences in formulation across jurisdictions, most courts have settled on the following four components of the principle of proportionality to evaluate the justification of legislation's infringement with 'P has the right to *x*': first, the public interest pursued by the impugned legislation must be of sufficient importance to justify infringing the right; second, the legislative means in service of the public interest should be rationally connected to that principle (suitability); third, among the range of possible means pursuing the public interest, the impugned means should be the least restrictive (necessity); and fourth, the degree of interference with the right should be outweighed by the importance of satisfying the public interest (balancing).

STRUCTURE AND MORAL-POLITICAL REASONING

Beyond repeating the four stages of the principle of proportionality, judicial reasoning from one case to the next (and, less importantly, from one jurisdiction to the next) is less predictable. Insofar as David Beatty's reconstruction of the case law from various jurisdictions is accurate,[32] the judicial inquiry under the principle

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[30] *R* v *Oakes* [1986] 1 SCR 103 [63] (Supreme Court of Canada).

[31] See generally R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) and D. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004). For a critical overview of both accounts, see G.C.N. Webber 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) XXIII *Canadian Journal of Law and Jurisprudence* 179.

[32] And there is reason to doubt it is: see R.A. Posner, 'Review Article: Constitutional Law From a Pragmatic Perspective' (2005) 55 *University of Toronto Law Journal* 299.

of proportionality is fact-specific and delegates to the parties before the court all substantive evaluation. The judicial inquiry is said to be 'an empirical one of establishing whether there are better policy alternatives than the law the government chose to enact'.[33] By emphasising empirical evidence and the parties' own understandings of the significance of the law for them, the principle of proportionality is factual and does not (according to Beatty) require evaluation: the facts speak for themselves and the judge will 'know just by looking, just by sight' which answer (the claim of right succeeds or not) is correct.[34]

In turn, if one follows Robert Alexy's reconstruction of the case law of the German Federal Constitutional Court, the most important stage of the proportionality analysis – balancing – is not fact-specific; indeed, it cannot be. It invites judges to engage in 'value-judgments', leaving the principle of proportionality 'open in respect of morality'.[35] Proportionality and balancing, on this understanding, are reflective of the 'structural richness of reasoning about political morality'.[36] From this, some take proportionality to be no more and no less than a gateway to an 'exercise of general practical reasoning' and 'rational policy assessment'.[37] In short, judicial reasoning is directed towards determining whether legislation, all things considered, is 'reasonable' and strikes a 'fair balance'.

These different understandings of the principle of proportionality play themselves out in the case law. In this respect, scholars struggling with reconstructing case law cannot too quickly be dismissed as passing off their preferred prescriptions under the cover of description, although it may be said that Beatty and Alexy (among others) choose to emphasise some and de-emphasise other aspects of the case law (as must all reconstructive accounts). Indeed, judicial reasoning under the principle of proportionality reveals a range of different approaches; '*the* principle of proportionality' conceals a range of *proportionalities*.

At times, judicial reasoning looks to the particulars of the claimant and questions whether it is justified that *this claimant's* right is infringed. At other times, judicial reasoning takes the claimant as representative of a class and questions whether it is justified that the rights of *this class of persons* are infringed. And again, judicial reasoning oscillates, from one case to the next, in just how generously to formulate the class to which the claimant belongs. Take, for example, a recent decision of the Supreme Court of Canada respecting the legal requirement that one be photographed to obtain a driver's license.[38] Having concluded that the requirement infringed the claimants' right to religious freedom (the court accepted the claim that the claimants' religious beliefs prevented them from being photographed), the principle of proportionality allowed for any of the following

[33] Beatty, n 31 above, 92.
[34] ibid, 92, 172, 184, 73.
[35] Alexy, n 31 above, 365-366.
[36] M. Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in G. Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007), 133.
[37] ibid, 140.
[38] *Alberta* v *Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567.

three (if not more) approaches. The court could have asked whether the legal requirement, as applied to the claimants before the court, was justified in light of the legislative objective of maintaining a digital databank of facial photos to reduce identity theft and related ends. In turn, the court could have asked whether the legal requirement, as applied to the claimants *qua* representatives of all members of this (and similarly situated) religion(s) was justified. Or again, the court could have queried the justification by taking the claimants as representative of all members of the legal community as a whole (religiously affected and not). Depending on the approach taken, the court could be tasking itself with determining whether the claimant (taken alone or as a member of a small class of persons) should be *exempt* from the scheme or with discerning whether there exists an alternative ('fairer', 'more reasonable') scheme for the claimants and all other members of the legal community.[39]

The variety of approaches to judicial reasoning under the principle of proportionality extends further still. In addition to the range of questions the court may ask itself in identifying the so-called competing interests between claimant and government, it may rely on different sources of reasons to seek out answers to those questions. At times, a court seeks to answer its own questions; at other times it asks the defender of the legislative scheme (usually government counsel) to do so. By adopting the latter pose, a court is sometimes said to engage in some form of 'Socratic contestation'.[40] Socrates, in challenging the positions held by his interlocutor, sought out and challenged *his interlocutor's* reasons, in a series of exchanges. The court, on this model, at times appears to attempt as much, calling upon the government to carry the burden of argumentation for the infringing legislative scheme (even though Parliament, not the government, adopted the scheme). At other times, however, the court is more ambitious and can be taken to search out whether good reasons *can be found* to support the government's position (even if those reasons are not *held by* the government or Parliament now or at the time the scheme was adopted).

Beyond these different modalities of judicial reasoning under the principle of proportionality, one could add variances in how concretely or abstractly the court identifies the claimant's claim of right (is it religious freedom *simpliciter*, or the religious freedom from being photographed, or from being photographed for a driver's license, and so on), how concretely or abstractly the court identifies the public interest pursued by legislation (is it deterring crime, creating a database of facial photos to assist in deterring crime, collecting as many photos as there are

[39] The somewhat dated debates in U.S. journals exploring the indeterminacy of balancing along these lines remain ever so pertinent today: see eg T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943; H. Black, 'The Bill of Rights' (1960) 35 *NYU Law Review* 865; L.B. Frantz, 'The First Amendment in the Balance' (1962) 71 *Yale Law Journal* 1424; P.W. Kahn, 'The Court, the Community and the Judicial Balance' (1987) 97 *Yale Law Journal* 1; F.M. Coffin, 'Judicial Balancing: The Protean Scales of Justice' (1988) 63 *NYU Law Review* 16.

[40] M. Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studies* 1.

licensed drivers, collecting photos of the claimants before the court), whether the claimant is taken to represent a class of potential claimants or not, how 'weight' is assigned to competing interests in the circumstances of the case, how 'weight' is assigned to the interests 'in the abstract', whether to identify some greater number of conflicting interests beyond two (as though legislation ever rests on so simple a challenge as *two* competing interests), and so on for the full range of considerations animating balancing.

The important point to retain here is that judicial reasoning under the principle of proportionality, *despite the emphasis on the constraints provided by the structure of proportionality's four stages*, reveals the full range and richness of practical reasoning. No one path is obviously wrong under the principle of proportionality, precisely because the principle of proportionality is open with respect to various paths. It is perhaps relying on this very flexibility that some affirm without embarrassment that moral reasoning under the principle of proportionality is 'unavoidable'[41] because there is 'no other rational way in which the reason for the limitation can be put in relation to the [...] right'.[42] If the principle of proportionality stands for nothing short of 'reasoning', then indeed it is unavoidable: judges can do none other than reason when asked to rule on the justification of legislation infringing the bill of rights.[43] However, the reasoning expected of judges under the principle of proportionality is not the reasoning expected of a law-applying official.

THE ABSENCE OF LEGAL REASONING'S *TECHNE*

The reasoning employed by judges under the principle of proportionality does not (because it cannot) appeal to the *techne* of legal reasoning. Reasoning according to underdetermined formulations of the kind 'P has the right to *x*' and according to the open-ended principle of proportionality is unable to rely on the usual tools and reference points of legal reasoning. Two judges, tasked with the same evaluation under the principle of proportionality, cannot be predicted to arrive at the same conclusion. No doubt, some will contend the same to be true of much legal reasoning,[44] but whatever limited force this claim has in general, matters are plainly worse for the sort of general moral-political reasoning expected of judges under the principle of proportionality. What is more, whereas legal reasoning aspires that two judges tasked with the same legal question arrive at the same legal answer, the same cannot be said of the aspiration of general moral-political reasoning. After all, the task of the law is to render the difficult moral-political questions confronting the community easy questions *under law*. Legal reasoning relies on law's artificial commensuration of the incommensurable.

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[41] Alexy, n 31 above, 82.
[42] ibid, 74.
[43] I leave aside abdications of the responsibilities of judicial office, like flipping a coin.
[44] For an overview and reply to this objection, see J. Finnis 'On the "Critical Legal Studies Movement"' (1985) 30 *American Journal of Jurisprudence* 21.

Consider whether the impartiality and fairness of the *techne* of legal reasoning is possible with judicial reasoning under the principle of proportionality. The open-ended process of judicial reasoning favoured by proportionality and balancing confronts countless choices between rationally appealing but unranked alternatives in each and every case (tempered, if at all, only by a commitment to follow precedent from one case to the next). The consequence: judicial decisions must be 'genuinely creative' in much the same way that the decisions of law-makers must be. Judicial decisions under the received approach to bills of rights cannot be 'the product of anything that was already "there"'[45] – neither the underdeterminate legal stipulations of rights nor the open-ended stages of proportionality and balancing commensurate the incommensurable and render difficult questions easy questions under law. Judicial *choice* is required to settle what, under law, should obtain. Prior to that choice, judges can rely on nothing as having already settled what, legally, should obtain. But note: this choice is being undertaken not in advance of a legal subject's interaction with a legal official, but at the very moment the legal subject is before the legal official.

The absence of anything already *there* determinative of choice (anything there to eliminate alternative options as reasonable and thus as live candidates for choice) and the availability of multiple creative *choices* are common (because necessary) features of law-making institutions; institutions devoted to determining what the law shall be in advance of its authoritative application. Because of this potentiality, the rule of law aspires that this open-endedness be absent so far as possible from law-applying institutions. The latter should seek to further the guidance offered by law-making institutions by appealing to law's ability to eliminate in legal reasoning the choices that confront moral-political reasoning. This commitment is absent from judicial reasoning under the received approach to bills of rights; indeed, as one of proportionality's proponents puts it, the 'exercise of general practical reasoning' favoured by proportionality and balancing proceeds 'without many of the constraining features that characterize legal reasoning'.[46] The received approach asks legal officials (judges) to undertake the law-maker's task of determining what, legally, ought to obtain rather than the law-applying official's task of applying what, legally, already obtains.

The judge engaging in general moral-political reasoning under a bill of rights confronts situations (few in number) where reason provides the only answer but the central case is otherwise: reason will exclude some options as 'beyond the pale' but otherwise will take one only so far. The conscientious judge will discover that reason supports multiple alternatives; after all, 'P has a right to *x*' has hundreds if not thousands of possible moral and legal meanings. Moreover, the conscientious

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[45] J. Finnis, *Fundamentals of Ethics* (Washington D.C.: Georgetown University Press, 1983), 138.

[46] M. Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574, 582. See further J. Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2 and W. Sadurski, 'Rights and Moral Reasoning: An Unstated Assumption' (2009) 7 *International Journal of Constitutional Law* 25.

judge will discover that the choice *between* these rationally supported alternatives will not be determined by reason. Reason will rank some possible meanings relative to others as better or worse, but will be unable to do so for all. Reason will do no more and no less than 'hold the ring, disqualifying countless "solutions" as contrary to reason and wrong, but identifying none as *uniquely* right'.[47] By contrast, the *techne* of legal reasoning aspires to allow all legal questions to be reasoned through to a *uniquely* right legal answer.

The commensuration by law of incommensurables in moral-political reasoning reveals the moral-political *choice* – choice guided but not determined by practical reasoning – necessary for the making of law. Incomplete commensurability obtains in 'the absence of any *rationally* identified metric for measuring, or scale for "weighing", the goods and bads in issue'.[48] Such a metric is possible where:

> (1) goals are well-defined, (2) costs can be compared by references to some definite unit of value (for example, money), (3) benefits too can be quantified in a way that renders them commensurable with one another, and (4) differences among the means, other than their measurable costs, measurable benefits, and other aspects of their respective efficiency as means, are not counted as significant [...][49]

These conditions apply especially in the technical domain, but not in moral-political reasoning.[50] If they did, 'morally significant choice would be unnecessary and [...] impossible [given that] one option could be shown to be the best on a single scale which, as all aggregative reasoning does, ranks options in a single, transitive order'.[51]

Law seeks to provide that order, such that legal reasoning can rely on it. However, in the absence of such direction afforded by law, 'the instruction to balance (or, earlier, to weigh) can legitimately mean no more than "Bear in mind, conscientiously, all the relevant factors, and *choose*." Or, in the legal sphere, "Hear the arguments, sitting in the highest court, and then *vote*."'[52] In this important way, proportionality and balancing do not avoid the challenges of incomplete commensurability. Whilst it is true that the appeal to balancing trades on 'connotations of quantity and precision',[53] no amount of talk of weight, interests, or value employed in judicial reasoning can deny the creative choice that confronts the judge attempting to determine whether legislation seeking to specify the open-

[47] J. Finnis, 'Commensuration and Public Reason' in R. Chang (ed), *Incommensurability, Incompatibility, and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1997), 232.
[48] Finnis, n 7 above, 146.
[49] Finnis, n 47 above, 219. See also Finnis, note 7 above, 146.
[50] Finnis, n 47 above, 219; n 7 above, 146.
[51] Finnis, n 7 above, 146.
[52] ibid, 145. Finnis here discusses Dworkin's instruction to judges to 'balance' between 'fit' and 'justification' in coming to legal conclusions in hard (and other) cases.
[53] J. Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191. T.A. Aleinikoff reviews a range of different uses of the 'balancing metaphor' in n 39 above, 975-976.

ended guarantee 'P has the right to *x*' is consistent, because 'proportional', with that very open-ended guarantee. As a result, judges must rely, by necessity and as bounded only by the requirements of reason and conscientious decision-making, on their own sense of right and wrong.[54]

When analysed closely, the received approach to bills of rights 'fully exposes judges as lawmakers'.[55] To avoid the impression that judicial appeals to moral-political reasoning rest, as they must, on the person assuming judicial office, judges have appealed, from time to time, to the 'social science-like methodology' of looking for values 'out there', suggesting that moral-political reasoning is, for the judge, 'primarily descriptive'.[56] The emphasis on empirical evidence provides a 'could-not-have-been-otherwise' gloss on the result, *even as* majority and dissenting judges argue between themselves that matters really could-not-be-otherwise than as they see them.

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By the law-making act of choosing between incompletely commensurable alternatives, the law is partly 'self-constitutive'.[57] The choice between alternative options establishes an (albeit contingent) answer for the chooser and those on behalf of whom the choice is made. In legislating in this reasonable way rather than that, the law-maker constitutes not only the specification of the right, but also the free and democratic society in which the law is authoritative. When legal officials then confront that 'choice' again, it becomes obvious which reasonable alternative should be favoured because a commensuration in law has been established by the law-maker. The legal official may then appeal to second-order reasons – reasons relying on the *choice* already made – and conclude that the community is no longer confronted with a choice: a legal answer, determined via legal reasoning, is at hand.

This demarcation between law-making and law-applying institutions and officials is foreign to the received approach to bills of rights, as is the conception of legal reasoning on which the demarcation rests. Judicial reasoning under the received approach is not legal reasoning of the familiar kind. It is, rather, the open moral-political reasoning of the law-maker.

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[54] On this point, see J. Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 6: 'Most conceptions of this [rule of law] ideal, however, give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own [...] sense of right and wrong.' See further R. Ekins, 'Legislative Supremacy and the Rule of Law' (2003) 119 *Law Quarterly Review* 127, 147-150.
[55] A. Stone Sweet and J. Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73, 77, 88. See also Aleinikoff, n 39 above, 962-963, 973.
[56] Aleinikoff, ibid, 962-963 (see also 993). See further M. Antaki, 'The Turn to "Values" in Canadian Constitutional Law' in L.B. Tremblay and G.C.N. Webber (eds), *The Limitation of Charter Rights: Critical Essays on* R v *Oakes* (Montreal: Thémis, 2009).
[57] Finnis, n 47 above, 220.

CONCLUSION

Two different readings of bills of rights have been explored. Both take the underdeterminacy of 'P has a right to *x*' as a starting premise. Under the received approach to judicial reasoning under bills of rights, this starting premise is also a conclusion to the scope and content of the rights, subject to open-ended judicial evaluations of the proportionality between legislation infringing the general right and the importance of the general right being infringed. In so doing, the judge's role under a bill of rights is not to pursue an 'interpretive enterprise' guided by legal reasoning but rather to pursue 'a general discussion of the reasonableness of government conduct' guided by moral-political reasoning.[58]

A different reading of bills of rights is on offer. This reading takes bills of rights as setting out only preliminary statements of rights, statements subject to subsequent refinement and specification; on this understanding, a bill of rights stands as a promise of law, not as a statement of law. The legislature is a necessary actor in the implementation and actualisation of a bill of rights; it undertakes the difficult, contested, and contingent task of determining which contested claims of rights are within and without the scope and content of rights. Legislation does so by taking up the deliberative process left open at the time the bill of rights was adopted and by seeking to answer, in law and in advance of the bill of rights' authoritative application to legal subjects, questions surrounding which among the hundreds and thousands of possible moral and legal meanings should obtain for the legal community. The aim of legislation is to assist legal officials – including judges – by rendering these hard questions into easy questions *under law*.

In so doing, the legislature seeks to maintain the rule of law's concern to demarcate the activities of law-making and law-applying institutions and officials. The legislature is friend not foe of the rule of law; it is an institution that furthers rather than obstructs the various desiderata of the rule of law. And, despite the received approach's presumption that the legislature is the antagonist of rights, legislation establishes the determinacy of relationships between persons which all legal rights require to guide legal subjects.

The demarcation pondered by the rule of law between law-makers and law-applying officials is founded on a concern for the rights of legal subjects, including the self-direction, autonomy, and respect for agency which so many bills of rights contemplate. This respect is furthered, not obstructed, by seeking from judicial officers that they administer justice *according to law* by appealing to the tools of legal reasoning made available to them by the law-maker. The law-maker seeks, via the law's distinctive devices, to assist legal subjects to identify legal answers even where moral-political answers remain elusive or open-ended. The importance of this aim is not qualified when seeking to set out which rights and freedoms obtain in the community; that is, in setting out which relationships of claim and duty, privilege and no-right, power and liability, and immunity and disability (no-power)

[58] Aleinikoff, n 39 above, 987.

obtain between persons and in what circumstances. After all, 'legal thinking (i.e. the law) brings what precision and predictability it can into the order of human interaction by a special technique: the treating of (usually datable) past acts [...] as giving, *now*, sufficient and exclusionary reason for acting in a way *then* "provided for".'[59]

To ask judges to do otherwise is unavoidable at times, but to expect that the legislature does not seek to allow legal officials to rely on this special technique is to give insufficient concern to the rule of law. It is also to give insufficient concern to the respect for the rights of legal subjects that the rule of law contemplates when promoting the *techne* of legal reasoning so absent from judicial reasoning under bills of rights.

[59] Finnis, n 1 above, 269.