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The Right to Life Between Absolute and Proportional Protection

Kai Möller*

Abstract: One of the puzzles of human and constitutional rights law is whether there are any rights which are absolute. The question is important not only for practical purposes but also for the theory of human and constitutional rights: an absolute right presents a departure from what is now the 'default' in constitutional and human rights law around the world, namely the proportionality approach according to which an interference with a right is justified if it serves a legitimate goal and is proportionate to that goal. This paper tries to shed some light on the issue by focussing on the right to life. It proceeds by first presenting an account of the leading case in this area, namely the judgment of the German Federal Constitutional Court in the Aviation Security Act case, where the Court held that shooting down an airplane which was likely to be used as a terrorist weapon was a violation of the right to life in conjunction with the human dignity of the innocent passengers aboard. It then offers a few thoughts on the Court's reasoning, specifically with regard to what it has to say about the idea of absolute rights. Having concluded that the judgment offers little help in illuminating this problem, it presents some approaches to absolute rights from moral philosophy and applies them to human and constitutional rights law. The conclusion is that the right to life will under certain circumstances be absolute or near-absolute, but that these circumstances occur less frequently than is sometimes assumed.

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INTRODUCTION

One of the puzzles of human and constitutional rights law is whether there are any rights which are absolute, ie rights which must never be interfered with. Some of the candidates which come to mind are the right not to be tortured¹ and the right to life. The question of absolute rights touches upon issues which have become practically highly relevant especially since the terrorist attacks of 11 September 2001 and the subsequent changes in the attitudes of some states towards torture and killings, and this alone would merit a close analysis. But furthermore, the issue is important for the theory of human and constitutional rights. Few ideas have spread as quickly and pervaded an entire area of law as thoroughly as the proportionality approach in constitutional rights law around the world. Robert Alexy's model of rights as principles which have to be balanced against conflicting principles is one of the most influential theoretical accounts of this development.² While I am critical of some aspects of Alexy's model,³ I do accept and subscribe to the desirability of balancing in constitutional rights law. But this does of course not imply that *all* constitutional rights are open to balancing in *all* situations; rather, it may turn out that some are and some are not, or some are in most but not all situations. But then we need a theory which distinguishes absolute from non-absolute rights.

This paper will try to shed some light on this question by focussing on the right to life. It will proceed by first presenting an account of the leading case in this area, namely the judgment of the German Federal Constitutional Court (FCC) in the Aviation Security Act case, where the Court held that shooting down an airplane which was likely to be used as a terrorist weapon was a violation of the right to life in conjunction with the human dignity of the innocent passengers aboard. I will then offer a few thoughts on the Court's reasoning, specifically with regard to what it has to say about the idea of absolute rights. Having concluded that the judgment offers little help in illuminating this problem, I will present some approaches to absolute rights from moral philosophy and apply them to human and constitutional rights law. My conclusion will be that the right to life will under certain circumstances be absolute or near-absolute, but that these circumstances will be rarer than sometimes thought.

¹ cf Article 3 of the European Convention on Human Rights.

² R. Alexy, *A Theory of Constitutional Rights* (Julian Rivers, trans, Oxford: OUP, 2002).

³ See my 'Balancing and the Structure of Constitutional Rights' (2007) 5 *International Journal of Constitutional Law* 453.

I.

One of the German laws passed as a response to the attacks of 11 September 2001 is the Aviation Security Act (Luftsicherheitsgesetz). Its most controversial part was §14(3) which gave the Minister of Defence permission to order the shooting down of passenger planes if according to the circumstances it had to be assumed that the aircraft was to be used against the lives of people and if the shooting down was the only effective defence against the threat. This part of the statute was declared void by the FCC in 2005.⁴ To understand the decision, some doctrinal background regarding German constitutional jurisprudence is helpful. First, according to the wording of the Basic Law, the right to life is not guaranteed absolutely, but can be interfered with pursuant to a law.⁵ Taken literally, this would mean that as long as there is a law authorising it, the state could kill unrestrictedly. This is where the doctrine of proportionality comes in. It means that each interference with constitutional rights must not only be prescribed by law, but must also be proportional, that is, it must serve a legitimate goal; it must be suitable to further this goal; it must be necessary in that there is no other, less restrictive means to reach the goal; and it must be proportionate *stricto sensu* in that its costs must not clearly exceed its benefits. Applying the proportionality test to the case of a hijacked airplane seems to indicate that the shooting down could easily be justified at least in those cases where the number of people likely to die in the terrorist attack for which the plane is being used exceeds the number of passengers on board.⁶ But it is exactly this conclusion that the petitioners opposed. Relying on a well-established principle of German criminal law according to which lives must never be balanced, they argued that the proportionality principle has no application in the case of the intentional killing of innocents.

Article 1(1) of the Basic Law accords a special place to human dignity.⁷ The official English translation⁸ does not quite capture a subtle difference of language made in the original text: In German legal terminology, there is a distinction between ‘inviolable’ (*unverletzlich*) and ‘untouchable’ (*unantastbar*), the former meaning that the state may sometimes interfere with the object of the right, provided that it comes up with a legitimate justification, and the latter meaning that any interference will automatically amount to a violation of the right. Human

⁴ For an analysis of the case, cf. K. Möller, ‘On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the Federal Constitutional Court’ (2006) 51 *Public Law* 457.

⁵ Article 2(2) of the Basic Law: ‘Every person shall have the right to life and physical integrity [...] These rights may be interfered with only pursuant to a law.’

⁶ There is an additional problem, namely whether those aboard the plane should count, which may be disputed in light of the fact that they are going to die in the attack anyway.

⁷ There is an ongoing discussion in German academia whether Article 1(1) stipulates a right to human dignity or merely dignity as a (nevertheless binding and justiciable) constitutional value. The debate is of no practical relevance, however, as there is a consensus to the effect that wherever human dignity is violated, there will necessarily also be a violation of one of the explicit rights in the subsequent articles of the Basic Law.

⁸ Basic Law, n 5 above, Article 1(1): ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.’

dignity, as the ‘superior value’ of the Basic law, is ‘untouchable’, and an interference can therefore never be justified. Note the radical consequences of this approach: in principle, even when one could save the lives of thousands by one violation of human dignity, it must not be carried out. Furthermore, even when one could prevent the violation of the *dignity* of thousands by violating one person’s dignity, this would not be permissible.⁹ Therefore, it does not come as a surprise that in light of this doctrinal approach to human dignity it seems necessary to interpret dignity quite narrowly. No general theory of what is and is not part of human dignity has yet been successfully put forward. The most widespread definition, employed by the FCC in many decisions, is the one first proposed by Günter Dürig in the 1950s who, employing the Kantian distinction between treating persons as ends and as means to an end, argued that dignity required treating persons as subjects rather than objects.¹⁰ The notorious difficulty in defining human dignity has not, however, prevented the concept from becoming both one of the cornerstones of German constitutional jurisprudence and a major export, in particular to the new South African¹¹ and Eastern European¹² constitutions. The German FCC regards human dignity as the basis of all constitutional rights and the central value of the Basic Law, and has referred to dignity as a principle guiding the interpretation of other provisions of the basic law in many contexts, for example in its abortion decisions¹³ and its privacy jurisprudence¹⁴.

The Court based its decision in the Aviation Security Act case on two grounds. First, it argued that the law was unconstitutional because the Federation lacked the legislative competence for it.¹⁵ The second and more spectacular ground concerns the violation of constitutional rights. The Court held that §14(3) of the Aviation Security Act violated both human dignity and the right to life in so far as it permitted the shooting down of aircrafts in situations where there were innocent persons on board.

The Court begins its assessment with some general remarks on the right to life and human dignity. It stresses that the right to life is guaranteed only pursuant to law, but moves on immediately to argue that any law which interferes with it must be interpreted in light of both the right to life and human dignity: ‘Human

⁹ This is the traditional doctrine which is still endorsed by the majority of commentators but has been challenged in the Jakob von Metzler case and the ticking bomb case to which I will briefly refer below. cf W. Brugger, ‘May Government Ever Use Torture? Two Responses from German Law’ (2000) 48 *American Journal of Comparative Law* 661.

¹⁰ G. Dürig, ‘Der Grundrechtssatz von der Menschenwürde’ (1956) 81 *Archiv des Öffentlichen Rechts* 117, 127.

¹¹ s 10.

¹² cf C. Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart, 2003) ch 3.

¹³ BVerfGE 39, 1, 88, 203.

¹⁴ cf W. Schmitt Glaeser, ‘Schutz der Privatsphäre’ in J. Isensee and P. Kirchhof (eds) *Handbuch des Staatsrechts, vol. 6* (Heidelberg: C.F. Müller, 1989) 41, 46-47.

¹⁵ BVerfG, 1 BvR 357/05 of 15/02/2006 at [89]-[117].

life is the vital basis of human dignity as the primary structural principle and superior constitutional value.¹⁶ This assumed close connection between the right to life and human dignity is the bridge which enables the Court to leave the right to life behind and concentrate, in what follows, on dignity. It does not give a general definition of human dignity but stresses the necessity to decide on a case-by-case basis. However, it then relies on the old doctrine of treating persons as subjects rather than objects. Citing its own jurisprudence, the Court declares:

Starting from the ideas of the founders of the Basic Law that it is a part of human nature to determine oneself in freedom and to freely develop oneself, and that the individual can demand as a matter of principle to be recognised in the community as an equal member with his own value, the duty to respect and protect human dignity generally excludes the possibility of making human beings the mere object of the state. Thus, any treatment of persons by public authorities which categorically questions their quality as subjects, their status as subjects of the law [...] is plainly prohibited.¹⁷

Having set out the doctrine in general, it now takes the Court a mere two paragraphs to apply the facts of the case to the formula:

The passengers and crew members who are exposed to such a mission are in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner. This makes them objects not only of the perpetrators of the crime. Also the state which in such a situation resorts to the measure provided by §14(3) of the Aviation Security Act treats them as mere objects of its rescue operation for the protection of others [...] Crew and passengers cannot sidestep these actions of the state [...] but are defencelessly and helplessly at the mercy of the state with the consequence that they will be shot down together with the aircraft and therefore be killed with near certainty. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.¹⁸

In the following section, the Court relies on an additional reason. It argues that it will be practically impossible to judge whether the statutory conditions for the shooting down have been met. In light of the fact that Germany is a relatively small country and that accordingly the time window in which to make the decision

¹⁶ *ibid* at [119].

¹⁷ *ibid* at [121].

¹⁸ *ibid* at [123]-[124].

will be very small, there was, for the Court, an immense pressure to decide quickly and therefore a very real danger of rash decisions.¹⁹

The Court then sets out to consider and refute some objections to its conclusions. It rejects as unrealistic the proposition that passengers who enter an aircraft knowing that they will be shot down should it be hijacked thereby implicitly consent to being shot down.²⁰ The argument that those who are onboard an aircraft are going to die anyway if the aircraft is used as a terrorist weapon is dismissed on the ground that human life and dignity must enjoy the same degree of protection with no regard of the probable remaining lifespan.²¹ The assumption that someone who is in an aircraft which is used as a weapon is himself part of that weapon and has to accept being treated accordingly ‘shows blatantly that the victims of such an incident are no longer regarded as humans, but as a part of a thing, and are therefore made objects’.²² The idea that an individual was under a duty to sacrifice himself where this is the only option to prevent attacks on the community which aim at its destruction is regarded by the Court as too far removed from the point of the Aviation Security Act which was not concerned with attacks on the state as such.²³ Finally, the argument that there was a positive duty towards those who would be the victims should the terrorist attack be carried out is refuted with the counterargument that although such a duty exists, the means used to comply with the duty must be constitutional and not violate human dignity.²⁴ Each of these objections raises serious points and could have been the basis of long discussions; however, the Court does not engage with them any more than absolutely necessary and in most cases restricts itself to one counterargument.

In the final section of the judgment, the Court sets out why in those cases where only the hijackers are on board the aircraft, the shooting down would be justified in constitutional terms. In such cases, the Court does not regard the shooting down as a violation of dignity because the criminals are not being treated as objects: ‘On the contrary, it corresponds to the position of the aggressor as a subject to make him accountable for the consequences of his autonomous actions.’²⁵ Therefore, as dignity is not involved, proportionality analysis becomes applicable. In a lengthy analysis, the Court concludes that in those cases where there is reason to assume that the aircraft will be used to kill people, the shooting down would be proportionate. For the Court, this follows from the fact that, although the shooting down would be a ‘serious’ interference with the basic rights of the hijackers (because it would almost certainly lead to their deaths), the

¹⁹ *ibid* at [125]-[129].

²⁰ *ibid* at [131].

²¹ *ibid* at [132].

²² *ibid* at [134].

²³ *ibid* at [135]-[136].

²⁴ *ibid* at [137]-[139].

²⁵ *ibid* at [141].

interference would be justified given that the hijackers themselves caused the necessity of the state interference and that it would lie in their hands to give up their criminal plan and thus prevent being shot down.²⁶

II.

Courts often find themselves in a difficult position when dealing with national security issues: if they make a mistake and overprotect human rights at the cost of national security, the price in terms of human lives to pay for this mistake might be very high. The fact that they are not experts on issues of national security, taken together with their composition as bodies of unelected judges, explains the tendency of being very careful in intervening in national security questions. But this is only one side of the story: in a constitutional democracy, it is the proper role of the courts to enforce constitutional rights, and they cannot simply abdicate that responsibility on the ground that they feel incompetent to do so, that they are not elected, or that the majority might disagree with their conclusions. This is particularly true when an important right such as the right to life is at stake. For reasons whose analysis and defence is beyond this paper, the German FCC does not normally hold institutional deference in high regard, nor does it normally regard the fact that it is made up of unelected judges as a problem. Broadly speaking, it sees its role as enforcing the basic rights of the Basic Law, interpreted in a way which focuses on the *substance* of these rights, as opposed to considerations of institutional competence or democratic accountability. This explains, negatively, why the Court will not shy away from interfering with the will and expertise of the elected branches. But positively, it does not yet answer the question of what, if anything, justifies holding the right to life of the innocent passengers aboard the plane to be absolute, as a matter of the substance of human rights.

Nothing in the wording of Article 2(2) BL indicates that the right to life could be absolute. The constitutional ‘default’ in this case is therefore the proportionality doctrine. In order to knock out the proportionality principle and come to the conclusion of an absolute right, the Court needs a special doctrinal tool, and it finds this tool in the principle of human dignity: since human dignity is absolutely protected, whenever a killing amounts to a violation of human dignity, it must be constitutionally illegitimate. The problem here is that the content of the dignity clause is notoriously unclear. The Court itself relies on the old Kantian formula of treating people not as means but as ends to justify its conclusion that human dignity is violated. This formula is not only the most common approach to human dignity, but it has also been criticised for its lack of substance and guidance and the corresponding danger of delivering exactly the answer that happens to suit the

²⁶ *ibid* at [144]-[153].

interpreter's personal moral or political views best.²⁷ The Court itself had noticed its vagueness and declared in an earlier judgment that 'it is not rare for persons to be mere objects not only of the circumstances and social developments but also of the law in that they must comply without regard to their interests'.²⁸ From a doctrinal perspective, it is disappointing that the Court did not even attempt to provide some clarity in this area.

III.

I will come back to what I regard as the main mistake in the judgment further below. In this and the following sections, I would like to take a step back from the Aviation Security Act case and address the general question of whether there is sometimes an absolute right not to be killed, meaning that the proportionality test which is normally applied to determine the limits of rights must be modified or abandoned for these cases.

The proportionality principle is at least loosely connected to consequentialism²⁹ (some would go further and claim that it represents consequentialist thinking). Take the example of whether it is permissible to kill one innocent person to prevent five innocent persons from being killed. Under a straightforward consequentialist approach, what counts are outcomes, and it seems that we should prefer the outcome of one dead person over the outcome of five dead. Therefore, killing the one would be permissible.

This conclusion seems to be problematic. The point is not so much that it would necessarily be wrong to kill the one person; rather it seems that coming to this result simply by comparing numbers ('five dead is worse than one dead') misses some important moral considerations. Intuitively, it seems that killing an innocent person is morally wrong, even if this killing leads to an outcome that is overall preferable. Killing innocent persons may be morally impermissible as an *action* independently of the *outcomes* produced. Robert Nozick's theory of rights illustrates such a deontological approach. He provides the following example:

A mob rampaging through a part of town killing and burning will violate the rights of those living there. Therefore, someone might try to justify his punishing another he knows to be innocent of a crime that enraged a mob, on the grounds that punishing this innocent person would help to avoid even

²⁷ cf N. Hoerster, 'Zur Bedeutung des Prinzips der Menschenwürde' (1983) *Juristische Schulung* 93, 95.

²⁸ BVerfGE 30, 1, 25-26.

²⁹ Consequentialism holds that the moral rightness or wrongness of an action depends exclusively on its consequences.

greater violations of rights by others, and so would lead to a minimum weighted score for rights violations in the society.³⁰

Nozick presents two possible routes to the solution of this problem. The first he calls ‘utilitarianism of rights’. While classical utilitarianism is interested in maximising happiness, this new version would have the goal of maximising rights protection: the non-violation of rights is simply built into the desirable end state to be achieved. Under this version punishing the innocent man would be justified because, although punishing him violates his rights, the number and weight of rights that would otherwise be violated by the mob is even greater.

Nozick prefers the second view according to which rights function as ‘side constraints upon action’. Under this view, rights determine which actions are permissible independently of the outcomes produced. So according to this approach, violating one right is impermissible even if this would lead to preventing a larger number of rights violations. Thus, under this approach, punishing the one innocent person would be impermissible. How does Nozick justify his view?

Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable.³¹

But why may not one person violate persons for the greater social good? Individually, we each sometimes choose to undergo some pain or sacrifice for a greater benefit or to avoid a greater harm: we go to the dentist to avoid worse suffering later; we do some unpleasant work for its results; some persons diet to improve their health or looks; some save money to support themselves when they are older. In each case, some cost is borne for the sake of the greater overall good. Why not, similarly, hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good? But there is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that this is the only life he has. He does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him – least of all a state or government that claims his allegiance (as

³⁰ R. Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974) 28-29.

³¹ *ibid.*, 30-31.

other individuals do not) and that therefore scrupulously must be neutral between its citizens.³²

This understanding of rights as side constraints may have intuitive appeal; however, the reason Nozick gives is deficient.³³ Assume that his argument that violating a constraint treats a person as a means and not as an end was correct. So the point is that treating people in a certain way disrespects them. But then, why not conclude that we should minimise instances of disrespect? By disrespecting the one innocent person in Nozick's example, we can prevent many instances of disrespect to the people whose rights would otherwise be violated by the mob. Similarly, in the example of whether it is permissible to kill one to prevent five from being killed, we can prevent five instances of disrespect by committing one such instance. Nozick may be right in everything he says about the need to treat people as ends, but he does not show a link between this and his claim that treating people as means is always morally wrong independently of the consequences.

Nozick's failure is instructive about the traps on the way to a coherent justification of an absolute right not to be killed. The problem is that if one focuses on the interests of the potential victim, one can set his interests against the interests of those who would be saved if the one were killed. Focussing on the prevention of suffering, pain, the respect owed to him as a human being, his chances to live his life, and so on, does not help because the same points can be used on the other side of the equation. If there is a sound way to defend an absolute right not to be killed, it must avoid this fallacy.

IV.

It may be helpful to separate the approaches to justify an absolute prohibition on killing into two categories. First, the justification may lie in something relating to the person who commits the killing, for example his integrity, responsibility, or intention (let me call these *agent-focussed approaches*). Second, one can turn to the victim and ask whether there is something pertaining to the victim which gives the victim the right not to be killed even if by killing him one could save more from being killed (I shall refer to these as *victim-focussed approaches*). In this section, I will examine two agent-focussed approaches.

One possible agent-focussed consideration relies on the distinction between actions and omissions: arguably, it is impermissible to actively kill the one person,

³² *ibid*, 32-33.

³³ cf A. Walen, 'Doing, Allowing, and Disabling: Some Principles Governing Deontological Restrictions' (1995) 80 *Philosophical Studies* 183, 185-186.

but it is permissible to let the five die. While this argument may have some intuitive plausibility, it is however partly question-begging. If I come to a lake and see my son who has just fallen into the water, I am morally obligated to pull him out of the water, just as I am morally obligated not to push him into the water in the first place. The real issue is one of responsibility. Often, we are responsible for what we do and not for what we let happen; but as the example shows, this is not always so. Therefore we need a theory which explains under which conditions we are responsible for preventing a particular outcome. While the distinction between actions and omissions might be relevant within that theory, it cannot in itself do all the moral work.

Another approach is to draw a distinction between two points of view: an objective and a subjective one. In his book *The Rejection of Consequentialism*, Samuel Scheffler defends an agent-centred prerogative:

It might be suggested that [...] consequentialism ignores the independence of the personal point of view. This suggestion might be developed in the following way. Each person has a point of view, a perspective from which projects are undertaken, plans are developed, events are observed, and life is lived. Each point of view constitutes, among other things, a locus relative to which harms and benefits can be assessed, and are typically assessed by the person who has the point of view. This assessment is both different from and compatible with the assessment of overall states of affairs from an impersonal standpoint.³⁴

Scheffler's idea has some plausibility in the world of personal ethics because it limits the seemingly endless demands that consequentialism imposes upon every person. But his approach cannot be applied to the state. The state, as an abstraction, does not have a personal point of view. The people acting in the name of the state (for example the minister of defence who wonders whether he ought to order the shooting down of a plane) do of course have such a personal point of view, but when acting in their capacities as representatives of the state we demand of them to take an objective as opposed to personal perspective. We think that if it were objectively the right thing to shoot down the plane or to kill one innocent person to prevent five from being killed, then the government official in charge must leave worries about his personal viewpoint aside and do what is objectively right. If he is not prepared to do this, then he is the wrong person for the tough job of governing a country. A further reason why the idea of an agent-centred prerogative is unhelpful is that it does not capture the real concern of those opposed to state-conducted killings, who want to argue that such killings are impermissible, whereas Scheffler's argument just defends a prerogative not to kill.

³⁴ S. Scheffler, *The Rejection of Consequentialism* (Oxford: OUP, 1982) 20.

V.

What about victim-focussed approaches? Can it plausibly be argued that there is something about the victim which makes it impermissible to kill him, even if by doing so one could prevent five other killings from happening? Frances Kamm has made an important contribution to this debate. For her, one must distinguish between the person's actually being killed on the one hand, and the person's *status as inviolable* on the other hand. She admits that when it is permissible to kill one person to prevent five killings, one might save lives. However, even if lives are saved, something else suffers: the general status of persons as inviolable.

The realm of status is *not* what happens to people. If many are killed in violation of their rights because we may not kill one to save them, their status as individuals who should not be killed does not change. If it were permitted to kill the one to save them, their status would change. We may be concerned about what happens, but be unwilling to prevent it in a way that is only consistent with a change in status. It is a mistake to see an opposition between the rights of the one person and the rights of all others, since the status of everyone is affected by the way it is permissible to treat one person.³⁵

Kamm is interested not in what is done (one killing rather than five), but what is allowed to be done. For her, if it were *permissible* to kill one to prevent five killings, this would imply that persons are violable. This would mean that they had a lower status compared to a situation where it was not permissible to kill one to prevent five killings. Therefore, she concludes, if we want to protect people's status as inviolable, we must accept that we must not kill one to prevent five killings. This obviously involves a sacrifice: sometimes we must let people die where we could save a greater number of lives. What is it about the status that justifies this sacrifice?

If we are inviolable in this way, we are more important creatures than more violable ones; this higher status is in itself a benefit *to us* [...] It is having the status itself which is a benefit, not just its being respected [...] Having the status is a benefit, in part, because it makes one worthy of respect, owed respect [...] Furthermore, the world is, in a sense, a better place for having more important creatures in it. Our having higher status is a benefit to *the world*.³⁶

³⁵ F.M. Kamm, *Morality, Mortality, vol. 2* (Oxford: OUP, 1996) 272 (emphasis in the original).

³⁶ *ibid*, 272 (emphasis in the original).

Two points have to be noted to clarify the theory and avoid misunderstandings. First, inviolability is not an all-or-nothing concept: one can be more or less inviolable. Kamm discusses the example that it is permissible to kill one to prevent ten killings.³⁷ Compared to a case where it is only permissible to kill one to prevent one million killings, the inviolability of the person is low in this case. However, compared to a situation where it is permissible to kill one to prevent two killings, it is high. Second, it is important to see that Kamm's point is not that her status argument applies to all instances of killings. For example, it surely does not apply to a killing carried out in self-defence: nobody would claim that in order to preserve the status of humans as inviolable, one must tolerate being killed by an aggressor rather than kill the aggressor in self-defence. Similarly, it is not obvious whether Kamm's argument applies to the Aviation Security Act case (more on this below). So her argument is not that the permissibility of each and every killing affects the status of humans as violable; rather it is an argument justifying the general, deontological claim that *sometimes* an action *may* be impermissible even though it would lead to better outcomes. But the argument as to when this is the case still needs to be made independently: 'Simple talk about inviolability is not enough. Restrictions and constraints are better explained by inviolability against impositions that create inappropriate relations between victim and beneficiaries.'³⁸

So the question is under what circumstances would killing one to prevent five from being killed lead to an inappropriate relationship between persons? There exists a vivid, controversial, and ongoing debate about these questions in moral theory, which cannot be done justice here. Much of this debate focuses on some of the countless variations of the so-called Trolley Problem:³⁹ suppose a trolley is heading towards a group of five people. It is going to kill them unless it is redirected to a second track where it will kill one person instead. Is it morally permissible or required to redirect the trolley? Compare this case to the Fat Man Case: again, a trolley is heading towards the five, but this time the only way to stop it is to take a fat man and throw him onto the tracks. The trolley will crash into the man and come to a halt; the fat man will die, but the five will remain uninjured. In both cases one has the possibility of killing one in order to prevent five from being killed; yet most people would be prepared to redirect the trolley in the first case but not to throw the fat man onto the tracks in the second case. The trolley cases come in countless modifications whose purpose it is to show the appeal or non-appeal of the various principles which have been suggested to find satisfactory solutions to the question of when it is permissible to kill some in order to save many from being killed.

Mattias Kumm has recently subscribed to one of these approaches as particularly helpful for the discussion of whether there are absolute rights in

³⁷ *ibid*, 275.

³⁸ *ibid*, 274.

³⁹ *ibid*, ch. 6; J. Thomson, 'The Trolley Problem' (1985) 94 *Yale L.J.* 1395; Walen, n 33 above.

human rights law.⁴⁰ He refers to an approach first presented by Alec Walen, who draws a distinction between enablers and disablers.⁴¹ This distinction can be explained with regard to the two trolley cases introduced above. In the first scenario, it would doubtless be permissible (or required) to redirect the trolley if there was no person on the other track. The claim of the one person on that track is therefore that his being on the track should *disable* the otherwise permissible rescue action. Compare this to the Fat Man Case: here the fat man is instrumental to the success of the rescue action. He is being *used as a means* to stop the trolley and thus *enable* the rescue action. Kumm argues that as a matter of human rights law, proportionality analysis applies to the case of disablers being killed, but that there is a deontological constraint against killing an enabler.⁴² Applying this logic to the case of the Aviation Security Act he concludes that the German FCC got it wrong: the Court argued that the innocent people aboard the plane are being used as a means. However, in reality their claims are only those of disablers: there is no doubt, indeed the FCC itself expressly states, that the shooting down would be justified if there were no innocent passengers on board. Therefore the claim of the passengers is that their presence on the plane should make the otherwise permissible shooting down impermissible. The passengers are, contrary to the argument of the German FCC, not being used as objects or means. They are not being used at all because their presence makes no difference to the rescue action, and their death is only a regrettable side effect.⁴³

On this point, the Aviation Security Act case is quite a spectacular failure. Note that this failure does not affect the outcome of the case because, as explained above, the relevant part of the Aviation Security Act was also declared unconstitutional for other reasons. However, imagine a scenario in which a misguided interpretation of the Kantian formula controls the outcome: not only would the Court protect a right which does not exist, it would also put national security at risk in a way which not only the legislature could not fix by amending the statute, but worse, which could not even be fixed by amending the constitution: under German constitutional law, the guarantee of human dignity in Article 1(1) BL is unamendable according to the so-called ‘eternity clause’ of Article 79(3), which states that ‘[a]mendments to this Basic Law affecting [...] the principles laid down in Articles 1 and 20 shall be inadmissible’.

I agree with much of Kumm’s methodology; in particular he deserves credit for taking the discussion about absolute rights in human rights law in a very promising direction by linking it to current debates in moral theory. However, I also think that the matter, especially with regard to the Aviation Security Act case,

⁴⁰ M. Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’ in Paulson and Pavlakos (eds), *Law, Rights, Discourse: Themes of the Work of Robert Alexy* (Oxford: Hart, 2007) 131, 153-164.

⁴¹ Walen, n 33 above.

⁴² Kumm, n 40 above, 154.

⁴³ *ibid.*, 155-156.

might be even more complex. While it seems to be uncontroversial that it is indeed impermissible to kill enablers, it is not clear that it is always permissible to resort to consequentialist balancing in the case of disablers. In the Car Case, a person is rushing to the hospital to save five, foreseeing that he will run over and kill one person on the road.⁴⁴ The one person on the road is a disabler: his claim would have to be that his presence on the street makes the otherwise permissible rescue action impermissible. Yet it seems impermissible to kill him.⁴⁵ Another case introduced by Kamm is the Grenade Case: a runaway trolley will kill five people unless we explode a grenade that will kill an innocent bystander as a side effect.⁴⁶ Again, the bystander would be a disabler; yet Kamm argues it would be impermissible to explode the grenade.

There is a remarkable parallel between the Grenade case and the Aviation Security Act case. One difference between them is that in the Aviation Security Act case, the passengers are part of the weapon. I wonder whether the real reason for the permissibility of balancing in the Aviation Security Act case is not that the innocent passengers are disablers, but rather that they are part of the weapon. Kamm stresses that for the doctrine of double effect, which is closely related to the distinction between enablers and disablers, to have any plausibility, one must allow ‘for the permissibility of intending harm to the guilty and in self- or other-defense against even moral innocents who are threats’.⁴⁷ I cannot resolve the issue here; nor am I sure that the debates in moral theory would provide us with a resolution to this moral puzzle (mainly because real life scenarios as the one envisaged by the Aviation Security Act tend to be more complex than those discussed in moral philosophy); rather, I just want to point out the complexity of the issue. Intuitively I do agree with Kamm’s conclusion that there is no deontological constraint against shooting down the plane; but I tend to think that the reason for this lies not in the role of the passengers as disablers but rather in the fact that the passengers are part of the weapon.

There are more unresolved problems with the prohibition to use people as enablers in situations outside killing. Very often the state uses people as means in unobjectionable ways. Kamm is aware of this and acknowledges that there is nothing wrong with requiring a passer-by to suffer minor inconveniences to aid another person in serious distress.⁴⁸ He argues that using people as a means is not always absolutely prohibited but that ‘the distinction between enablers and

⁴⁴ The example was first used by Philippa Foot; see her *Moral Dilemmas* (Oxford: OUP, 2002) 81. The formulation used here derives from F. Kamm, *Intricate Ethics* (Oxford: OUP, 2007) 22.

⁴⁵ Walen, n 33 above, 203, discusses this case and modifies his understanding of disablers to the effect that while the one ‘seems to be a disabler since you could save the five perfectly well if he were not in your way’ (204), ‘you are only free to respond to the needs of some if you have a right to use the necessary means’ (205), and ‘the means of saving the five includes getting to them, and that aspect of the means is what would kill the one’ (207). While this reasoning may be correct in explaining the correct outcome of the case, I wonder if it in substance abolishes the distinction between enablers and disablers and introduces a new, more complex principle, evaluating which is beyond the scope of this essay.

⁴⁶ Kamm, n 35 above, 151.

⁴⁷ *ibid.*, 150.

⁴⁸ Kamm, n 40 above, 163.

disablers completely changes the baseline to be used to assess rights infringements'. Take the case of a terrorist plausibly threatening to blow up a city unless a specific innocent and nonthreatening person is tortured or killed. Torturing or killing this person would mean to use him as an enabler, and this is prohibited. Similarly, in the widely discussed transplant case,⁴⁹ killing one healthy person in order to use his organs to save five other persons would be impermissible. By way of contrast, requiring a passer-by to make a phone call to request an ambulance in order to save a person who has just suffered a heart attack seems permissible in spite of the fact that this also uses the passer-by as a means. So in this light we might say, with Kumm, that the distinction between enablers and disablers changes the baseline, rather than completely outruling the use of enablers. But it often seems to be the case that we use people in ways which are much more intrusive than requiring them to make phone calls. In countries with compulsory military service, every citizen must for a certain time forgo his freedom of profession in order to serve in the army and risk his life, and this is often justified by reference to certain assumed gains compared to the alternative policy of a professional army. But those gains are at best relatively modest and are hard to justify even in light of the proportionality principle; they would certainly be entirely impermissible under the 'changed baseline' approach. Similar problems arise with regard to taxation which uses the taxpayers as means, or enablers, to otherwise legitimate state goals.⁵⁰ My point is not that Kumm's approach is wrong, but I want to point to one aspect in which generalising it leads to other puzzles, which might or might not be resolvable.

Here is a further puzzle. Kumm applies his approach to torture cases.⁵¹ The most widely discussed case in this context is the imaginary 'ticking bomb case': the police have caught a terrorist who has hidden a bomb in the centre of a city, and the only way to prevent the bomb from going off and killing many people is to torture the terrorist in order to make him reveal the whereabouts of the bomb. Kumm explains, to my mind convincingly, that our focus, at least initially, should not be on the numbers of people we could save by torturing the terrorist.⁵² Rather, it should be on the special relationship between the terrorist and the victims, and this relationship is independent of whether there are one or one million victims. So it might be helpful to focus on a case with only one victim, and as it happens, there is a real and, again, German case at hand. In the notorious Jakob von Metzler case, the police had threatened a suspect accused of kidnapping a young boy with torture (and was prepared to carry out that threat) should he not reveal the whereabouts of his victim who was erroneously believed to be still alive. Under the threat, the suspect confessed.

⁴⁹ Kamm, n 35 above, 143; Walen, n 33 above, 187-188.

⁵⁰ This brings us back to Nozick's concerns about the welfare state and his theory of rights, discussed above.

⁵¹ Kumm, n 40 above, 158-164.

⁵² *ibid.*, 160.

As a preliminary point, Kumm is aware of the fact that there might be good policy reasons for prohibiting torture in all cases, such as reasons relating to the extreme suffering of the victim, slippery slope arguments, and practical or symbolic concerns.⁵³ His question is therefore whether there is a deontological constraint against torture in this case, and this he denies: while it is true that the kidnapper is used as a means – one of the terrible things that torture does is that it coerces people to commit self-betrayal in order to serve the purposes of the torturer – the deontological constraint is, according to Kumm, neutralised because of the personal responsibility of the kidnapper for the threat.⁵⁴

I believe that this is partly but maybe not entirely correct. Let us modify the example. Suppose that the kidnapper is not captured by the police but by the father of the boy. There is no time left to call the police, and the only way for the father to save his son is to torture the kidnapper in order to make him reveal the whereabouts of his son. I think that most would agree (although I acknowledge this would require further argument) that it is permissible for the father to torture the kidnapper. So for this scenario I believe that Kumm is correct to say that because of the personal responsibility of the kidnapper for the boy there is no deontological constraint against torturing the kidnapper. But I am not sure about what is right when the kidnapper is in the custody of the police. There may be a difference between what is permissible to do to a person in the name of the state, and what is permissible to do as a private person, and I do not think that this difference is explainable only in terms of institutional or policy considerations such as slippery slope arguments. Rather, my intuition is that there is an additional constraint at work here which leads to everyone's, including the kidnapper's, status as inviolable requiring that torture be impermissible if carried out (or authorised) by the state. Put differently: I tend to think that if it were permissible to torture the kidnapper in the name of the state in the Jakob von Metzler case, this would affect *everyone's* (and not only kidnappers') inviolability: human beings would become beings whom the state may sometimes permissibly torture; and my intuition is that this is too high a price to pay for the protection of lives, except maybe in catastrophic scenarios (eg a nuclear bomb in London). Again, this does not even come close to a watertight argument because one could reply that the permissibility to torture the kidnapper affects only the status of kidnappers and comparable aggressors, as opposed to the status of everyone. I repeat that I do not claim to resolve the issue here but only point out some of the puzzles in the area of deontological constraints. It appears to be a possibility that deontological constraints apply in different ways to private persons and the state.

⁵³ *ibid.*, 159.

⁵⁴ *ibid.*, 161.

VI.

In spite of the many open questions, I think that Kumm's and Walen's distinction between enablers and disablers points to one important conclusion: the status of innocent and non-threatening persons as inviolable requires that they not be killed when killing them would involve using them as a means (as enablers). This does not necessarily amount to an absolute right because, as I pointed out above, inviolability is not an all-or-nothing concept; persons can be more or less inviolable. But what can be concluded is that while maybe not absolute, the right to life certainly offers to enablers more than simply proportional protection: enablers cannot justifiably be killed on the ground that this leads to a reduction in the overall number of people getting killed. It is therefore correct to say that the right to life is sometimes absolute or near-absolute.

For the reasons given above I am not convinced that consequentialist balancing is always permissible in the case of disablers. I do however think that there are at least some scenarios where it is permissible to kill innocent disablers, such as in the one envisaged by the Aviation Security Act case. This conclusion will leave many opponents of state-conducted killings unsatisfied because they want to stop the state from engaging in the business of killing innocent, non-threatening persons altogether. I cannot think at the moment of any realistic case where the state would seriously consider killing enablers (one would have to think of examples such as terrorists threatening to commit a devastating attack unless one innocent person is killed). The fact that such cases are not realistic in the sense that no state would comply with such requests shows that deontological constraints have a firm place in our moral and legal reasoning, including our reasoning about what human rights require. But they cannot be extended to cover all cases of killing innocents.