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The Rule of Law Sold Short Book Reviews

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THE RULE OF LAW SOLD SHORT

A CRITIQUE OF PROPORTIONALITY AND BALANCING. By Francisco J. Urbina.¹ New York: Cambridge University Press, 2017. Pp. xii + 267. \$110.00 (cloth).

*Richard Stacey*²

INTRODUCTION

In his latest contribution to the theoretical literature on rights adjudication and the rule of law, Professor Francisco Urbina adds to the chorus of criticism levelled against the principle of proportionality and methods of judicial decision-making that rely on the balancing of constitutional rights and competing interests. To those unfamiliar with the background of this long-running jurisprudential debate, the principle of proportionality offers a heuristic for judges and lawmakers to determine whether the statutory limitation of a constitutionally protected right is justified by the benefits the rights-limiting measure produces. A court should uphold rights-limiting legislation if the extent to which the measure limits the affected right is proportionate to the good it produces, or, in other words, if the good achieved by limiting the right outweighs the harm it causes.

In *A Critique of Proportionality and Balancing*, Urbina argues that the principle of proportionality is fatally susceptible to a conspectus of objections, and that public law should accordingly abandon proportionality analysis altogether. Instead, we should conceive of constitutional rights as narrowly specified and absolute legal categories that a government is never justified in limiting. For Urbina, upholding rights and the interests they protect is a categorical imperative. In this respect he departs from the constitutional orthodoxy represented by the limitations clauses of post-war constitutional documents in Canada,

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Germany, Israel, South Africa and in the European Convention on Human Rights, for example, and prefers a model of rights adjudication more in line with the position in the United States.

Urbina devotes the majority of the book, Parts I and II, to surfacing proportionality's purportedly fatal flaw: either proportionality analysis is blind to the moral imperatives of human rights, or it can accommodate these important moral considerations only by compromising the rule-of-law values of predictability and certainty (p. 2). The principle of proportionality is thus caught on the horns of an irresolvable dilemma. Although Urbina leaves enough space in the final chapter of the book only to sketch the outlines of his alternative approach, it is a novel solution to the proportionality debate that moves it beyond arguments about which version of the proportionality test would be best to adopt, all things considered, and towards a more direct consideration of how a political community might best protect the rights to which it is constitutionally committed. The book is a valuable and thought-provoking contribution to the literature for this reason.

I have two concerns about Urbina's argument, however. First, his critique of proportionality analysis relies on a conception of the rule of law that ignores its connections to the deep normative principles of a legal system, selling the rule of law short by focusing only on the value of holding officials to the provisions of formal legal rules.³ Second, the alternative model of absolute rights that Urbina proposes seems to rely as much on proportionality and balancing as the limitations models he criticises. I present these concerns more fully below, following a careful summary of the core of Urbina's argument.

THE ASSAULT ON PROPORTIONALITY

In the opening pages of the book, Urbina sets out the standard analytical model through which courts and lawmakers assess the proportionality of rights-limiting statutory measures (pp. 4-9). This four-stage inquiry asks, first, whether the purposes for which a statutory measure limits a right is a legitimate or

3. I make the argument about the connections between proportionality analysis and a rich, normative conception of the rule of law more fully in Richard Stacey, *The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication*, __ AM. J. COMP. L. __ (forthcoming 2018).

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valuable one for a government to pursue; second, whether the measure is rationally connected to, or likely to achieve that objective; third, whether the means adopted to achieve the objective impair the affected rights as little as possible (the least restrictive means or minimal impairment test); and fourth, whether the balance between the good achieved by limiting a right and the harm caused by doing so is proportional “in the strict sense.”

A major element of the book’s architecture is the distinction Urbina draws between two conceptions of the principle of proportionality, and the alternate versions of the proportionality test that follow. One group of approaches adopts what he calls the “maximisation account of proportionality,” in terms of which a judge or lawmaker faced with a choice between upholding a right against limitation or allowing its limitation in pursuit of some competing interest is mandated to prefer the option that produces the most good. Any losses occasioned by either striking down or allowing a rights limitation must be compensated by the gains achieved by doing so. Maximization in this sense involves a quantitative comparison of the good each option would produce in order to come to a conclusion about where the greater good lies (pp. 18-21). Urbina offers the work of Robert Alexy, David Beatty and Aharon Barak as examples of the maximisation account of proportionality (chapter 2).⁴

The second conception of proportionality, which Urbina calls “unconstrained moral reasoning,” does not demand the application of one specific decision-making mechanism for determining the proportionality of a rights limitation. Rather, judges will engage directly with the reasons given by the parties and assess them through “practical reasoning unconstrained by a particular legal method or other legal categories. The idea of justification,” Urbina goes on, “is at the centre of the main theories of proportionality as unconstrained moral reasoning” (p. 126). While maximization accounts of proportionality rely on utilitarian calculations of public good to generate a preference for the limitation of a right or the striking down of rights-limiting legislation, this alternative group of approaches requires government to balance all the relevant moral considerations and

4. AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012); ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (2002); DAVID BEATTY, *THE ULTIMATE RULE OF LAW* (2004).

demonstrate that there are sufficiently strong reasons that justify the restriction of constitutional rights or the striking down of legislation passed by a democratically elected legislature. At the base of this requirement is a commitment to moral autonomy, both in the sense that any interference with the autonomy inherent in constitutional rights must be justified and in the sense that making moral arguments in support of one or other outcome recognises and responds to the human capacity for rationality and reason (pp. 126-31). Theorists in this camp, whose work espouses this “culture of justification,” include Mattias Kumm, Kai Möller, and Etienne Mureinik.⁵

As a small matter of jurisprudential taxonomy, I am not sure I agree with Urbina that the version of proportionality analysis described by Aharon Barak should be seen as a “maximisation account” rather than an account centred on moral reasoning. Barak’s view is that the outcome of the proportionality test should depend on whether upholding a right on one hand or allowing its limitation on the other is more “socially important” to the political community affected.⁶ It is, of course, true that preferring the option that is more socially important involves the maximization of social importance, but the morally rich question of how much socially important stuff each option delivers has to be answered before any morally neutral maximization can take place. Robert Alexy’s proposal for a “triadic” scale on which the benefits and disadvantages of a rights limitation may be compared also relies on an exercise in moral reasoning to work out whether the extent of the infringement is serious, moderate, or minor, and whether the importance of the public good sought to be achieved by the limitation is high, moderate, or low.⁷

5. Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 L. & ETHICS HUM. RTS. 141 (2010); KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* (2012); Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31 (1994). Urbina relies heavily on the work of Moshe Cohen-Eliya and Iddo Porat in this section of the book to describe the conception of proportionality as unconstrained moral reasoning: see MOSHE COHEN ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* (2013). However, in other work Cohen-Eliya and Porat are critical of these approaches to proportionality analysis and prefer an approach that depends on the more constrained and quantifiable legs of the proportionality test. *See infra* note 9.

6. BARAK, *supra* note 4, at 349, 361. See also the judgment of the Israeli Supreme Court in H CJ 14/86 Labor v. Israel Film & Theatre Council [1987] IsrSC 41(1) 421, 343.

7. ALEXY, *supra* note 4, at 402–11.

Disagreements in sorting proportionality theorists into one or other of the camps Urbina describes may flow from the fact that the standard model of proportionality analysis is capacious and flexible enough to accommodate both conceptions of proportionality (p. 7). There is no bright line between the two approaches, and indeed it remains a matter of some debate whether Canadian jurisprudence relies more on maximization or moral reasoning to settle rights disputes.⁸

Maximization accounts lend themselves to more quantifiable or mechanical application, and thus tend to avoid the flexible and wide-ranging final stage of the inquiry in favour of a focus on the first three legs of the inquiry. David Beatty prefers a version of the proportionality test that never reaches the inquiry into proportionality in the strict sense, and rests the outcome of the analysis on whether the government has adopted the mechanism of achieving legitimate objectives that limits rights as little as possible.⁹ A balance must be struck, on this view, between the means adopted to pursue an objective and the extent of the infringement of rights: judges and lawmakers need never consider the tricky and contentious question of whether a right is more valuable than the objectives the limitation purports to achieve.

Approaches to proportionality analysis that rely on moral reasoning, by contrast, focus attention on the fourth-stage inquiry into proportionality in the strict sense. Inquiries that are restricted to considering the relationship between the means adopted to pursue some valuable objective and its effect on rights do not capture all the moral implications of the policy alternatives. As Aharon Barak argues, it may well be that shooting an apple thief is the only and therefore least restrictive means of stopping the thief and pursuing the objective of a theft-free society (or at least a society in which thieves are brought to justice), but leaves open the question of whether shooting an apple thief is a morally acceptable response to the scourge of apple theft.¹⁰ It requires an exercise in moral reasoning to work out which of the competing

8. See, for example, Denise Reaume, *Limitations on Constitutional Rights: The Logic of Proportionality*, U. Oxford Legal Res. Paper Series, Paper No. 26/2009, August 2009, <http://ssrn.com/abstract=1463853>.

9. BEATTY, *supra* note 4; see also Moshe Cohen-Eliya, *The Formal and Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 ISRAEL L. REV. 262, 263 (2005).

10. Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 373 (2007); BARAK *supra* note 4, at 342–43.

interests a society should value more—a theft-free society and justice for wrongdoers on one hand, or respect for bodily integrity and due process on the other. Proportionality as moral reasoning thus favours the inquiry into proportionality in the strict sense, requiring a balance to be struck between the value of rights and the value of competing interests.

But whichever approach to proportionality is followed, and whatever considerations are thrown into the scales to be balanced, Urbina argues there are reasons to avoid proportionality analysis altogether. Maximization accounts of proportionality are susceptible, he argues, to two well-known criticisms: the incommensurability objection (chapter 3) and the problem of moral blindness (chapters 4 and 5). The incommensurability objection holds that there is neither a common metric nor a single unifying property against which the value of rights and competing social interests can be measured, compared, or balanced in a meaningful or comprehensible way.¹¹ It may well be that the objectives achieved by a measure that limits a constitutional right realizes some property or value to a greater degree than upholding the right would realize some completely separate property, but the comparison of these two properties is as meaningless as asking whether a lot of happiness is better than a moderate amount of blue paint (p. 47).¹² The value that protecting rights achieves is not commensurable with the value that fulfilling a competing interest produces. Any attempt to resolve rights disputes by attempting to maximize good (or utility or value) is undermined by the incommensurability of the goods between which lawmakers and judges have to choose.

11. The incommensurability objection is made in existing work, including some by Urbina. See, e.g., Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CON. L. 468 (2009); Grégoire N Webber, *Proportionality, Balancing and the Cult of Constitutional Rights Scholarship*, 23 CAN. J.L. & JUR. 179 (2010); and Francisco J Urbina, *Is it Really that Easy? A Critique of Proportionality and "Balancing and Reasoning,"* 27 CAN. J.L. & JUR. 167 (2014).

12. The metaphor that is often used to capture the problem of incommensurability is that it is impossible to compare the length of a piece of string to the weight of a stone. See Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GERMAN L.J. 1387 (2013). See also John Finnis, *Natural Law and Legal Reasoning*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P George ed., 1992); James Griffin, *Incommensurability*, in INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON (Ruth Chang ed., 1997); Stuart Woolman, *LIMITATION*, in CONSTITUTIONAL LAW OF SOUTH AFRICA (Stuart Woolman & Michael Bishop eds., 2nd ed., 2005).

The second objection, the problem of moral blindness, goes to the mechanical and formalistic nature of quantifying and comparing the value of rights and builds on the idea that we protect rights precisely because they have immeasurable value. Proportionality understood as maximization undervalues the intuition that there is some special normative force to the interests that rights protect, and which justifies according rights a special claim to pre-eminence in the legal system. Maximisation allows a legislature to ignore the special normative force of rights if there is a compelling reason to do so, and in turn undermines any commitment to rights as trumps,¹³ side constraints¹⁴ or spheres of individual inviolability¹⁵ (pp. 100-05).

Urbina accepts, however, that conceiving of proportionality as unconstrained moral reasoning can meet both of these objections (pp. 136-37). A decisionmaker need rely on a common scale or metric for comparing rights and competing interests only if her objective is to produce a quantified, cardinal ranking of rights and competing interests—what other scholars have called “interest balancing.”¹⁶ In this case, incommensurability between the value of rights and competing interests presents a serious obstacle. But cardinal rankings are not the only way to compare—or balance—rights and competing interests. It is possible to bring them into an ordinal relationship according to the extent to which each option fulfils a political community’s deeply held moral convictions. What others have called “balancing as reasoning”¹⁷ or Socratic “public reason oriented justification”¹⁸ requires decisionmakers to justify the choice between upholding a right or allowing its limitation on the basis that one or other option better fulfils these moral convictions. These justifications rely on “open-ended moral reasoning” rather than numeric quantification. For this reason, they need no quantitative metrics and sidestep the incommensurability objection. At the same time, open-ended moral reasoning is explicitly sensitive to the moral foundations of rights, and is not susceptible to the problem of moral blindness either.

13. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 193 (1978).

14. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 29 (1974).

15. JOHN RAWLS, A THEORY OF JUSTICE 24–25 (rev. ed., 1999).

16. Kai Möller, *Proportionality: Challenging the Critics*, 10 INT’L J. CON. L. 709, 715 (2012).

17. *Id.*

18. Kumm, *supra* note 5, at 143.

Open-ended moral reasoning is, however, susceptible to the third of the complaints that Urbina raises against proportionality analysis. The open-endedness of balancing as reasoning or public reason oriented justification makes it reliant, not on numeric or mechanical calculations, but on decisionmakers' unpredictable, freewheeling, unprincipled, ad hoc, impressionistic and subjective moral intuitions. The unpredictability of open-ended moral reasoning renders it inconsistent with the rule-of-law demand that the law deliver certainty and predictability to human relations.¹⁹ Urbina complains that meeting the incommensurability objection and engaging frontally with rights' moral imperatives leaves proportionality analysis without any legal guidance and open to a panoply of negative effects that flow from legally unconstrained adjudication (chapters 7 and 8). The dilemma that traps proportionality, Urbina argues, lies in the tension between guidance and moral reasoning:

Because constraint is the necessary consequence of guidance (if the law guides the judge towards a particular solution to the case, then other alternative solutions are excluded), the more specific the guidance provided by proportionality, the more it will constrain the reasoning of the judge, and thus the less it will allow for open-ended moral reasoning oriented towards justification (p. 139).

For Urbina, either proportionality analysis involves a predictable and systematic quantitative assessment of competing policy alternatives that is at best morally insensitive and at worst incomprehensible in the face of incommensurability, or it depends on unpredictable and unconstrained moral reasoning that undermines the rule of law.

With proportionality caught in this bind, Urbina proposes a formalistic and categorical approach to human rights adjudication that leaves no room for rights limitation at all (chapter 9). Rights should instead be specified narrowly, categorically protecting core interests from any interference no matter how compelling the reasons for interference might be. Urbina's proposal, "in short, is to specify human rights into a body of legal categories capable of providing legal guidance, and to apply such body of legal categories to the solution of human rights cases" (p. 216). He argues that this is nothing new to the law as a whole, since there

19. Beatty, *supra* note 4, at 171; Tsakyrakis, *supra* note 11, at 482.

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are numerous legal categories through which judges resolve disputes (pp. 218-23). And in some ways, this is nothing new to rights jurisprudence either, since rights adjudication in the United States is concerned more with clearly specifying the boundaries of constitutional rights and considering whether they have been breached than with questions of whether the breach of a widely and capaciously conceived right is justifiable (pp. 247-51).

URBINA'S IMPOVERISHED CONCEPTION
OF THE RULE OF LAW

Urbina's rationale for abandoning the principle of proportionality in rights analysis is that, however it is conceived, it cannot escape at least one of three serious objections. On the logic of Urbina's argument, though, if proportionality analysis can be shown to be consistent with the rule of law and to function just as predictably as other forms of legal analysis, then the principle of proportionality can be rescued from the dilemma in which Urbina finds it.

This is the first of two concerns I have with the argument in the book, and it flows from Urbina's reliance on an impoverished conception of the rule of law. While Urbina understands the rule of law to require the legal system to operate with predictability and certainty, predictability and certainty are better conceived of as products of a legal system that complies with the rule of law. The subjects of a legal system are ruled by law rather than the whim of individual rulers as long as they know what the law allows them to do, and as long as officials are constrained in what they are empowered to do by previously declared rules. Lon Fuller's eight principles of legality explain the qualities that a legal system must have if it is to ensure the rule of law and not the rule of officials. The first seven of these principles require the rules that govern peoples' interactions with one another to be clear, non-retroactive, stable over time and mutually consistent, to demand from people only what is not impossible, to apply generally to everyone and to be made known to the public.²⁰ Compliance with these principles, Fuller explains, allows a legal system to create order in society. The principle of congruence, the eighth of Fuller's principles, demands that official conduct is congruent with rules of law and that the exercise of public power remains

20. LON FULLER, *THE MORALITY OF LAW* (rev. ed., 1969).

within the limits set by the laws already made known to the public.²¹ People can take for granted the stable operation of the legal system and make life plans accordingly, precisely because official conduct is predictable as long as it remains bound by previously declared rules.

Moreover, the rule of law requires congruence not only between official conduct and formal rules, but also between official conduct and the normative principles on which the legal system is founded. This is especially so in the context of constitutional rights, precisely because constitutional rights are worded in general and abstract language.²² It is difficult to work out whether official conduct—the passage of legislation, for example—is congruent with constitutional rights without a process of interpretation that depends on something more than just the plain text of the constitutional provision concerned. Determining whether official conduct is congruent with constitutional rights must turn to an excavation of the deep normative principles on which rights are based.²³

Urbina's conception of the rule of law is much narrower. He not only understands the principle of congruence to require official conduct to adhere to only clear and unambiguous rules of positive law, but suggests further that any consideration of normativity is inconsistent with the rule of law. The "values

21. In the revised edition of *The Morality of Law*, Fuller calls the principle of congruence the "very essence of the Rule of Law," *id.* at 209–10. Further, holding officials to previously declared rules affirms the view of human beings as morally autonomous by ensuring that the plans they make, on the basis of their understanding of what the law allows them to do, will not be upset by official conduct that is incongruent with, and unpredictable in light of, previously declared rules, *id.* at 162–63. Note that predictability and certainty are not among Fuller's principles of legality, but are characteristics of a legal system that adheres to these principles of legality. See also Richard Stacey, *Popular Sovereignty and Revolutionary Constitution-making*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 161, 170–72 (David Dyzenhaus and Malcolm Thorburn eds., 2016).

22. HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 139 (William Eskridge & Philip Frickey eds., 1994); see also Grégoire Webber, *Rights and the Rule of Law in the Balance*, 129 *L.Q.R.* 399, 410 (2013).

23. In this sense, rights adjudication looks like the hard cases Ronald Dworkin and H. L. A. Hart argued about. While Hart submitted that in the penumbra of legal uncertainty outside the law's core of settled meaning, judges have an unfettered discretion to make new law, H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 607–15 (1958), Dworkin argued that judge-made law in these hard cases must remain congruent with the fundamental principles of justice that run throughout the legal system. DWORKIN, *supra* note 13, at 17.

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associated with [the rule of law]—such as certainty and predictability in human relations,” Urbina asserts,

are severely harmed, if not sacrificed, when we make law through legal categories that are so vague that they allow judges to reason morally on what is the best solution to the case, without any effective constraint imposed by the law. The law then becomes uncertain and unpredictable, and there is no guarantee that state power will be bound by clear and previously established legal rules, known by its subjects, and applied equally to those in the same situation (p. 148).

But rights cases often—perhaps usually—evoke deep disagreements about what the position in the law actually is.²⁴ The law requires that rights be respected and protected nevertheless. In these cases it is not possible to predict what the law allows or requires members of society and officials to do without first resolving disagreements about the content of rights. And because the plain text of rights evokes these very disagreements, coming to a conclusion about what the law requires and whether official conduct is congruent with it has to rely on arguments that go to the normative foundations of these rights. A consideration of the moral foundations of the law in general and rights specifically is thus not inevitably incompatible with a commitment to the rule of law, as Urbina believes it is, but may in fact be required by it.²⁵ Judges and lawmakers must pay attention to the moral foundations of the legal system if they are to ensure that the laws that constitute that system, which constrain the conduct of officials and guide the choices of the members of society, are congruent with the moral and normative foundations on which a political community is built. Urbina’s rejection of moral reasoning as inconsistent with the rule of law betrays a particularly formalistic conception of the rule of law that is by no means the

24. Jeremy Waldron’s work on the rule of law and rights adjudication begins from the premise that serious disagreements about the nature and content of rights are inevitable and must be taken seriously by any theory of law. See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *Moral Truth and Judicial Review*, 43 *AM. J. JURIS.* 75 (1998).

25. Richard Stacey, *Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Enforcement of Economic and Social Rights*, 31 *NOTRE DAME J.L. ETHICS & PUB. POL.* (2017) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2843765.

only game in town,²⁶ and in fact overlooks the connection between normativity and the rule of law, and thus, moral reasoning and the rule of law.

More than this, there is little reason to accept Urbina's contention that moral reasoning is any less predictable or certain than any other form of legal reasoning. Consider how the founding principles or values a political community sets out in its constitution aim to capture that community's moral and normative commitments at the same time as they aim to guide judicial decisionmaking and lawmaking. Public officials are bound by these fundamental normative principles just as much as by the formal rules of law set out in statutes. What is required by any particular formal rule therefore presupposes that that formal rule is congruent with underlying normative principles. This is, after all, what a commitment to constitutional supremacy means. The familiar process of legal interpretation that goes into working out precisely what a formal rule requires will often refer to these normative principles.²⁷

Legal interpretation, even of formal rules, is thus infused with the normative commitments at the foundation of the legal system. The moral reasoning that judges and lawmakers engage in when working out whether upholding a right or allowing its limitation is more closely aligned with the normative commitments set out as basic constitutional principles is therefore just as predictable and certain as many other instances of legal interpretation.

Another way of putting the concern with Urbina's argument is that he sees *unconstrained* moral reasoning as unpredictable, and for this reason necessarily incompatible with the rule of law. But surely moral reasoning directed towards upholding the principles already set out in a constitution is constrained by the interpretive limits of those principles? From a practical

26. See, e.g., Jeremy Waldron, *Why Law—Efficacy, Freedom, or Fidelity?* 13 L. & PHIL. 259, 275–80 (1994); T. R. S. Allan, *The Moral Unity of Public Law*, 67 U. TORONTO L.J. 1 (2017).

27. Consider the principle of statutory interpretation, set out for example by the South African Constitutional Court, that when a provision of positive law admits of two equally plausible interpretations officials must prefer the interpretation that is consistent with constitutional principles: *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC), paras 21–23.

perspective, the global jurisprudence of rights limitations provides a number of examples of constitutional principles that constrain and direct proportionality analysis: in South Africa, rights limitations must be consistent with the commitment to “human dignity, equality and freedom” in an “open and democratic society”;²⁸ in Canada, limitations must be justifiable in a “free and democratic society”;²⁹ and in Israel, limitations must befit “the values of the State of Israel” as “a Jewish and democratic state” and which in turn include “human dignity and liberty.”³⁰ These are capacious principles, to be sure, but they set limits to constitutional jurisprudence and guide judges in these jurisdictions all the same.

Urbina’s argument for abandoning proportionality depends on the irresolubility of the dilemma proportionality analysis faces, and on the conclusion that neither conception of proportionality can overcome all three objections. But proportionality as constitutionally constrained moral reasoning does meet all three complaints. Urbina’s primary reason for proposing the abandonment of the principle of proportionality in rights adjudication thus loses much of its persuasive force.

BALANCING IN THE SPECIFICATION OF LEGAL CATEGORIES

My second concern with Urbina’s argument goes to his justification for an alternative, categorical approach to rights. In *Taking Rights Seriously*, Ronald Dworkin famously makes the case for rights as trumps, setting out what looks to be something like a categorical imperative for the protection of rights. He states in various places, for example, that any infringement of rights in pursuit of collective social objectives “threatens to destroy the

28. Constitution of the Republic of South Africa, 1996, section 36.

29. Constitution Act of 1982, section 1 (Can.).

30. Basic Law: Human Dignity and Liberty (1992), articles 1, 1A and 8. For discussion of the values of the state of Israel and how the Supreme Court of Israel has attempted to provide concrete guidance to how they operate in assessing the constitutionality of laws, see Aeyal M Gross, *Global Values and Local Realities: The Case of Israeli Constitutional Law*, in AN INQUIRY INTO THE EXISTENCE OF GLOBAL VALUES THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW (Denis Davis, Alan Richter & Cheryl Saunders eds., 2015); AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., Princeton University Press, 2005); H.C.J. 6821/93 United Mizrahi Bank Ltd v. Migdal Cooperative Village IsrSC 49(4), 221 (1995); H.C.J. 212/03 at 354; H.C.J. 4112/99 Adalah – The Legal Center for the Rights of the Arab Minority v. Tel-Aviv-Jaffa Municipality IsrSC 56(5) 393 (2002).

concept of individual rights,”³¹ discards the position that rights are trumps,³² and is ultimately morally wrong.³³ But even Dworkin accepts that rights are not absolute, and that it is sometimes appropriate to resolve conflicts between two rights by balancing one right against another.³⁴ It is acceptable to limit a right, Dworkin says, for a “compelling reason . . . that is consistent with the supposition on which the original right must be based.”³⁵

One way of seeing Dworkin’s comments here is as a form of balancing as reasoning familiar to proportionality analysis. The trumps here are not the rights themselves so much as the principles and commitments that rights express. Whichever policy option represents the best way to fulfill these commitments is what we should accord the pre-eminence of trumps.³⁶ Another way of understanding Dworkin’s view is that we should continue to see rights as trumps, but only to the extent that they do protect or advance these fundamental normative commitments. And to the extent that they do this, they are absolute and categorically inviolable. This is the approach to which I suspect Urbina would be more sympathetic, since it preserves an illimitable core of rights that will never be balanced against competing interests.

But notice how the process of filling in the absolutely protected core of rights depends on coming to the conclusion that protecting certain interests and not others is the best way to achieve the normative commitments on which the pre-eminence of rights depends. This necessarily involves some degree of balancing among the competing alternatives, weighing up whether protecting something absolutely as a right or excluding it from the sphere of things a right protects and allowing the pursuit of some other interest better realises our normative commitments. The only way we can come to a view about what it is that rights protect absolutely involves some degree of proportionality analysis.

Somewhat surprisingly, Urbina seems to endorse this conclusion. Specifying the content of absolute rights, he says in

31. DWORKIN, *supra* note 13, at 197–99.

32. RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* (2006), 48–49.

33. *Id.* at 31.

34. DWORKIN, *supra* note 13, at 191, 199; DWORKIN, *supra* note 32, at 49–51.

35. DWORKIN, *supra* note 13, at 200.

36. See Jacob Weinrib, *When Trumps Clash: Dworkin and the Doctrine of Proportionality* (Aug. 30, 2016), <https://ssrn.com/abstract=2832405>.

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the closing pages of the book, “requires some open-ended moral and political reasoning on behalf of judges, since they need to come up with their own understanding of the specification of the relevant human rights” (p. 250). It is unclear how Urbina can be committed to a view of rights analysis that rejects open-ended moral reasoning in the balancing of rights and competing interests in particular cases of conflict, yet rely on open-ended moral reasoning in specifying the content of each right to be protected absolutely. The reasons for which he criticises proportionality as unconstrained moral reasoning would seem to apply as strongly to his alternative position. Urbina attempts to meet this concern by intimating that his alternative proposal for rights adjudication sidesteps rule-of-law complaints about predictability and certainty because judges “are guided by the legal categories in place” (p. 250). But surely, then, he must also be bound to admit that any version of proportionality analysis that is similarly guided by legal categories—such as the principles and values set out in a constitutional document—is just as consistent with the rule of law as his alternative.

Ultimately, Urbina is caught in an irresolvable dilemma all of his own: either his alternative model of rights adjudication is as reliant on unpredictable moral reasoning as the conceptions of proportionality analysis he criticises, or both proportionality analysis and his alternative model are equally consistent with the rule of law and there is accordingly no compelling reason to abandon morally rich, public reason oriented conceptions of proportionality analysis in the first place.