

Kumm, Mattias; Walen, Alec D.

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## Human Dignity and Proportionality: Deontic Pluralism in Balancing

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## 4 Human Dignity and Proportionality: Deontic Pluralism in Balancing

Mattias Kumm and Alec D. Walen

The proportionality test is at the heart of much of contemporary human and constitutional rights adjudication.<sup>1</sup> It is the central structural feature of a rights-based practice of justification.<sup>2</sup> Notwithstanding its widespread acceptance, a number of challenges have been brought forward against it.<sup>3</sup> Perhaps one of the most serious is the claim that an understanding of rights that makes the existence of a definitive right dependant on applying a proportionality test undermines the very idea of rights.<sup>4</sup> In the liberal tradition, rights are

<sup>1</sup> For the spread of the proportionality test, see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) at 175–210; see also, Alec Stone Sweet and Jud Matthews, “Proportionality Balancing and Global Constitutionalism,” 47 *Columbia J. Trans. L.* 72 (2008–2009). A reconstructive structure-focused theory of rights that places the proportionality test at the heart of rights practice was first provided by Robert Alexy for the German constitutional context in *Theorie der Grundrechte* (1985), translated into English by Julian Rivers: *A Theory of Constitutional Rights* (2002). For a normatively richer reconstructive claim and argument that proportionality is at the heart of a global model of constitutional rights, see Kai Möller, *The Global Model of Constitutional Rights* (2012).

<sup>2</sup> For the turn from interpretation to public reason-oriented justification see Mattias Kumm, “Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review,” (2010) 4 *Law & Ethics of Human Rights* 141. On the idea that a right to justification grounds human rights, see Rainer Forst, *The Right to Justification: A Constructivist Theory of Justice* (2011). For the connection between rights, proportionality, and a culture of justification, see the contribution by David Dyzenhaus in Chapter 11 in this volume; see also Moshe Cohen-Eliya and Iddo Porrat, “Proportionality and the Culture of Justification,” 59 *Am. J. Comp. L.* 463 (2011).

<sup>3</sup> See, e.g., Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (2012) at 45–71, who distinguish between eight types of criticisms of balancing: that balancing tends to go together with a broad definition of rights, its indeterminacy undermines the rule of law, morality is not about balancing, balancing gives a false impression of calculability, the idea of balancing is incompatible with a core of inviolable rights, balancing gives up the standard of correctness in favor of a weaker standard of appropriateness or adequacy, and balancing tends to swallow up other prongs of the proportionality test.

<sup>4</sup> See Grégoire Webber’s contribution, “On the Loss of Rights,” Chapter 6 in this volume.

widely imagined as “trumps” over competing considerations of policy.<sup>5</sup> They are claimed to have priority over “the good” in some strong sense.<sup>6</sup> They are described as “firewalls” providing strong protections against demands made by the political community.<sup>7</sup> And they are thought to be grounded in human dignity,<sup>8</sup> which in turn is held to be inviolable.<sup>9</sup> Even though there are interesting and significant differences between conceptions of rights in the liberal tradition, they generally<sup>10</sup> share the idea that something protected as a matter of right may not be overridden by ordinary considerations of policy. Circumstantial all-things-considered judgments regarding what serves the general welfare are generally thought to present insufficient grounds to justify infringements of rights. If human dignity is inviolable, and rights are grounded in human dignity, must they not provide for very strong, perhaps even absolute, constraints on what governments may impose? Can a human and constitutional rights practice that puts proportionality analysis front and centre capture this core deontological feature of rights grounded in human dignity? Is not the proportionality test a misguided and dangerous invitation to balance away human dignity?

In an earlier article<sup>11</sup> one of us argued that any plausible structure of rights must be able to accommodate core anti-perfectionist, anti-collectivist, and anti-consequentialist ideas underlying the liberal democratic rights tradition. Whereas proportionality analysis could adequately accommodate anti-perfectionist commitments (by screening out, as illegitimate ends, perfectionist

<sup>5</sup> Ronald Dworkin, “What Rights Do We Have?” in *Taking Rights Seriously* (1977) at 266; see also Ronald Dworkin, “Principle, Policy, Procedure” in *A Matter of Principle* (1985) at 72.

<sup>6</sup> John Rawls, *Political Liberalism* (1993) at 173–211.

<sup>7</sup> Jürgen Habermas, *Faktizität und Geltung* (1992) at 315. English translation: *Between Facts and Norms* (1992).

<sup>8</sup> See Art. 1 of the Universal Declaration of Human Rights: “All men are born free and equal in dignity and rights”; Art. 1 of the German Basic Law declares: “Human Dignity is inviolable. To respect and protect it is the duty of all public authority”; Art. 1 of the European Charter of Fundamental Rights states: “Human dignity is inviolable. It must be respected and protected”; Art. 1 of the Constitution of South Africa states: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.”

<sup>9</sup> Kant, for example, insisted that although everything that has a value has a price, that which has dignity is above all price and thus, presumably, above competing values. See *Grundlegung zur Metaphysik der Sitten*, in Immanuel Kant, *Werke*, Wilhelm Weischedel (ed.), vol. IV, Wiesbaden 1956, 51 (BA 68).

<sup>10</sup> Exceptions include Joseph Raz, *The Morality of Freedom* (1986), and Robert Alexy, *A Theory of Constitutional Rights* (2002).

<sup>11</sup> Mattias Kumm, “Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement” in George Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (2007) 133.

purposes in the first prong of the proportionality test) and anti-collectivist commitments (by weighing correctly the relevant considerations when conducting the balancing test), there were certain structural features of political morality that could not be adequately captured by the proportionality framework. More specifically, there existed a distinct class of cases, characteristically involving the protection of human dignity, where even measures meeting the proportionality test could still constitute a violation of rights. The idea of human dignity, it was argued, was connected to deontological constraints in a way that the proportionality test could not adequately take into account. The task was to distinguish those types of cases from ordinary cases to which proportionality analysis properly applied. If that distinction was not made, there was indeed a danger that human dignity would be balanced away. Because this is a position that embraces the proportionality test generally, but insists on carving out a distinct category of cases involving human dignity in which rights provide stronger, more categorical protection, this position might be called *human dignity exceptionalism*.

Others have since then either endorsed<sup>12</sup> or criticized<sup>13</sup> this position. We argue here that human dignity exceptionalism is false. Whereas it was right to insist that the structure of political morality is not automatically captured by the four prongs of the proportionality test – at least not if the balancing prong is used in a fundamentally consequentialist way – the proportionality test and the idea of balancing in particular is flexible enough to allow for the structural complexities of political morality to be taken into account. The article was misguided in carving out a relatively narrow set of issues and limiting the idea of deontological constraints to them. Here we will illustrate how constraints that are not merely consequentialist operate in very different ways and inform the reasoning that takes place within the balancing test across a much wider range of cases. Deontology is ubiquitous, and there is nothing in the idea of balancing that precludes taking it into account. Indeed, balancing properly understood requires it to be taken into account.

This chapter seeks to establish two core points about balancing. The first is negative. Balancing is not a mechanical exercise: it is a metaphor we use to describe a residual category within rights analysis that registers the importance of the various concerns at stake. But the idea of balancing itself says nothing about what kind of things are relevant or what weight to assign the relevant concerns. When balancing is misunderstood as a technique that somehow

<sup>12</sup> Barak, *Proportionality*, *supra* note 1 at 471.

<sup>13</sup> Robert Alexy, “Thirteen Replies” in George Pavlakos (ed.), *Law, Rights, Discourse: The Legal Philosophy of Robert Alexy* (2007) at 344.

allows lawyers and courts to avoid substantive moral reasoning or engagement with policy, it is likely to lead to bad results.<sup>14</sup>

The second point is positive. This chapter shows that balancing ought to be understood as thoroughly deontological. But deontology, if taken seriously, is not captured by a single, simple concept, such as the restriction against using people simply as a means. Rather, it covers a range of reasons for giving some interests more or less priority over others. In that sense, we argue for an understanding of deontology as itself structurally pluralist (call this “deontic pluralism”). Although we believe it is true that in some contexts simple interest-based balancing is the correct way to proceed, there are a variety of contexts in which special weight is accorded to one side because of structural features of the situation. We offer no complete typology of structures, let alone a comprehensive conception of balancing that determines what the right balance will be in all cases. We argue only that the balance will have to make appropriate reference to constraints that arise out of what is required to respect dignity and illustrate what that means across the range of chosen cases.

In order to establish these points, we discuss three clusters of cases, raising distinct structural issues. We focus on these three sets of cases because of the diversity of deontological reasons that they raise. All the reasons are grounded in respect for human dignity, but none can be reduced to the others. The first set of cases concerns *instrumentalizing* individuals against their will, making them means for public ends in a way that is incompatible with their dignity. The second addresses the question of how to make sense of the relatively strict, but not maximally strict, standards of proof in criminal proceedings. And the third addresses questions of long-term detention and the conditions under which it can be legitimately authorized. In each of the cases our point is not to enter controversial substantive debates, even though that will in part be inevitable, but to highlight some structural features that any balancing exercise must take into account if it is to be plausible.

## I. HUMAN DIGNITY AND NONINSTRUMENTALIZATION

It might seem that balancing is a consequentialist form of reasoning that does not fit the deontological nature of at least some rights. The rights in question capture the idea that people are inviolable in a way that imposes constraints on actors even if they are seeking to bring about desirable consequences. To

<sup>14</sup> For a similar emphasis, see Möller, *Global Model*, *supra* note 3 at 134–177, in particular at 177; see also Klatt and Meister, *supra* note 3 at 51–56.

give some non-contentious examples: Individuals may not be used for the purposes of medical experiments without their free and informed consent, even if using them in such a way would save very many lives. The death of a terminally ill patient may not be actively hastened by a doctor seeking to save the lives of three or four others by way of transplanting the organs of the terminally ill person to those others. Accidental witnesses to the crimes of a dangerous killer who refuse to cooperate with the police for fear of retaliation may not be forced to reveal what they saw by way of torture or threat of torture by the authorities, even if such coerced cooperation would save the lives of many future crime victims. Given that in each of these cases the rights of one person not to be killed, seriously harmed, or endangered stand against policies seeking to avert similar harm to a greater number of others, would balancing not inevitably lead to the result that such actions would, at least sometimes, be permitted, if necessary to avert greater harm? Our answer is no. There is a way to frame even such uncompromising rights within the proportionality framework.

In order to gain a better understanding of the relationship between proportionality analysis and these sorts of deontological constraints, the trolley problem may provide a helpful, if not particularly original,<sup>15</sup> point of entry. Consider the following two scenarios:

1. A runaway trolley will kill five people if a bystander does not divert it onto another track, where, she foresees, it will kill one person.
2. A runaway trolley will kill five people if a bystander does not topple a massive man standing close by onto the track to stop the trolley. The massive man will foreseeably die in the process.

In both cases, the intervention by the bystander foreseeably leads to the death of one person in order to save five. Yet it is a widely shared view that in the first case the bystander may divert the trolley, thereby killing one person (let us call him “V” for victim), whereas in the second case she may not.<sup>16</sup> There is something puzzling about this result – hence the name the trolley *problem*. Why is it that the only thing that matters morally is not the fact that in both

<sup>15</sup> The problem was first introduced by Philippa Foot in “The Problem of Abortion and the Doctrine of Double Effect” in *Virtues and Vices* (1978). For further illuminating discussions of the issue, see Judith Jarvis Thompson, “The Trolley Problem,” 94 *Yale L. J.* 1395 (1985); and Frances M. Kamm, *Morality, Mortality*, vol. II (1996) at 143–171. See also Thomas Nagel, *The View from Nowhere* (1986).

<sup>16</sup> For just one example of the vast empirical literature supporting this claim, see Fiery Cushman, Liane Young, and Marc Hauser, “The Role of Reasoning and Intuition in Moral Judgments: Testing Three Principles of Harm,” (2006) 17 *Psychological Science* 1082.

scenarios V dies and five are saved? Would it not be more consistent either to allow the bystander to save the five in both cases if you are a consequentialist, or to insist that the life of V cannot be traded off against another life, whatever the circumstances, if you believe in the existence of deontological constraints? There is considerable debate on what justifies making a distinction between these cases. The following can do no more than briefly present one central idea, without doing justice to the various facets and permutations of the debate.

A significant difference between the cases is that in the first, the death of the one person is a contingent side effect of the bystander's choice to turn the trolley away from the five. In the second example, the massive man is being used as a means – he is being instrumentalized to bring about the end of saving the five. His being toppled onto the tracks in front of the trolley is the means by which the five would be saved. Without V's involvement there would be no rescue action to describe in the second case, whereas the five can be saved just as well without V's involvement in the first case.

But why should there be such a strong justificatory hurdle for using people as a means, as opposed to harming people as a side effect of pursuing a good end, as in the case of turning a trolley from five onto one? There are two ways to conceive of what it means to “use another as a means,” and once they are distinguished it becomes quite puzzling that the relationship of “using as means” should carry any moral weight.

The two interpretations of what it means to use another as a means are a subjective, intention-focused interpretation and an objective, causal role-focused interpretation, and both face potent objections.<sup>17</sup> The objection to the subjective interpretation is that although of course it matters morally what intentions an agent has with respect to others, intentions have only derivative or secondary significance.<sup>18</sup> What fundamentally matters is what is done to a rights-holder, not what intentions an agent has. The claim that intentions are fundamentally significant misdirects agents to focus inwardly on how they think about others as they act, rather than outwardly on how to act in ways consistent with the respect that others deserve.<sup>19</sup> The objection to the objective interpretation is that it is not obvious why causal role should matter morally.

<sup>17</sup> This paragraph is substantially drawn from Alec Walen, “Transcending the Means Principle,” *Law and Philosophy* (forthcoming).

<sup>18</sup> See Thomas Scanlon, *Moral Dimensions* (2008) at 29.

<sup>19</sup> See Judith Jarvis Thomson, “Self-Defense,” (1991) 20 *Philosophy and Public Affairs* 283 at 293. For a fuller discussion of this, see also Alec Walen, “Intentions and Permissibility,” retrieved from <http://peasoup.typepad.com/peasoup/2012/04/intentions-and-permissibility.html#more>.

As Thomas Scanlon puts it: “being a means in this sense – being causally necessary – has no intrinsic moral significance”.<sup>20</sup>

It is our view that the causal interpretation is descriptively accurate, but that to see why a victim’s causal role in an agent’s actions matter, one must examine the structural role played by the claims of the rights claimant. The key is in the distinction between restricting and non-restricting claims. A restricting claim has the normative effect of “pressing” to restrict an agent from doing what she could otherwise permissibly do to achieve some good end, given competing property or property-like claims over the means she would need to achieve it. What she has a right to use, taking into account all competing property and property-like claims over the possible means to her end, establishes her baseline freedom to pursue that end. A restricting claim presses to restrict an agent relative to this baseline freedom. It has the potential, if respected as a right, to make other people, who would benefit by her pursuing that end, worse off against this baseline. This potential impact of restricting claims on the welfare of others explains why they are weaker than non-restricting claims.<sup>21</sup>

Illustrating again with the trolley problem, the role of V’s claim in the first hypothetical is potentially to make the others, the five who might be saved by the agent, worse off than they would be if his claim did not restrict the bystander. For if his claim did not restrict the bystander, the latter would not only be permitted to use the switch to save the five, she would likely be obliged to do so. Even if we assume that the switch is owned by someone else, the owner, if not harmed himself, can have no complaint if the bystander uses the switch to save a net four lives. Against that baseline, V’s claim not to be killed presses to restrict the bystander so that she may not do what she otherwise could permissibly do, if his claim were not an obstacle, namely to divert the trolley and save the five. In other words, they press to disable her, making those who have such claims potential disablers.<sup>22</sup>

On the other hand, non-restricting claims, if respected as rights, would not restrict an agent relative to her baseline freedom to pursue an end. This is for

<sup>20</sup> Scanlon, *supra* note 18 at 118; see also H.L.A. Hart, “Intention and Punishment” in *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 124; and Victor Tadros, *The Ends of Harm* (2011) at 152–155.

<sup>21</sup> This formulation of the “restricting claims principle” departs from that used in “Transcending the Means Principle”. We now view that appeal to what the agent could do if the claimant were absent as flawed.

<sup>22</sup> This terminology was first introduced by Alec Walen in “Doing, Allowing, and Disabling: Some Principles Governing Deontological Restrictions,” (1995) 80 *Philosophical Studies* 183.



the straightforward reason that non-restricting claims are property or property-like claims over the means she could use. The underlying normative idea is that there is a limited range of things agents are normally free to use: things they own or have rented, unowned things, things in the public domain, things that others own but the use at issue would do little harm to the owner's interests. Agents do not normally have a right to use the property or bodies of others if the cost to the owner or person whose body is being used is substantial. A claimant's claim over his own body, to withhold that from the range of things than an agent is free to use, does not press to restrict the agent from making use of the things he has a baseline right to use.

Again, illustrating with the trolley problem, in the second hypothetical, V's rights claim not to be used to stop the trolley does not press to restrict the agent from doing anything she could permissibly do using the means she has a baseline right to use. She does not have the right to use the body of another without that person's consent, and maybe not even then. The massive man and those who would likewise be used as a means without their consent are not potential disablers; they are potential enablers.

This account does not simply invoke the difference between using people as a means and harming them as a side effect; it tries to explain why those who are harmed as a side effect have weaker claims not to be harmed in the context of a world in which agents are normally free to use some things and not others. Claims not to be harmed as a side effect press to restrict agents even further than the baseline restriction on what they are free to use. That puts the competing restricting claims on a kind of par, in a kind of competitive balance, which explains why those with restricting claims can permissibly be harmed for the sake of others even when those with non-restricting claims cannot.

Another way to put it is to say that a rights-bearer with a restricting claim cannot lay claim to the fundamental claim to be left alone to lead his own life – an idea closely connected to human dignity – in the way that a rights-bearer with a non-restricting claim can. The rights-bearer with the restricting claim does not do anything to make others worse off, but he has a claim that presses to make others worse off. Accordingly, his claim has to be treated as substantially weaker than an otherwise identical non-restricting claim. Or, looking at it from the other side, because non-restricting claims can be respected without making anyone else worse off against the relevant baseline, they should, when life or serious bodily harm are involved, give rise to rights that are absolute, or nearly absolute.<sup>23</sup>

<sup>23</sup> It is disputed whether these kinds of deontological constraints are absolute or not. Can you push the massive man to save 1,000 people, a million, the world? According to Kant, even the

This is not the place to probe more deeply into questions concerning the use of persons as a means. But if an account along these lines can make sense of the trolley problem, and of the (often) categorical rights-based constraints relating to instrumentalization more generally, then it justifies constraints that cannot be captured by consequentialist accounts of morality. But what follows from this for balancing? In an earlier article one of us argued, on the basis of an analysis similar to the one above that:

[t]he idea of deontological constraints cannot be appropriately captured within the proportionality structure. The reasons why proportionality analysis and the balancing test in particular is insufficient to capture these concerns is that it systematically filters out means-ends relationships that are central to the understanding of deontological constraints. When balancing, the decision-maker first loads up the scales on one side, focusing on the intensity of the infringement. Then he loads up the other side of the scales by focusing on the consequences of the act and assessing the benefits realised by it. Balancing systematically filters out questions concerning means-ends relationships. Yet the nature of the means-ends relationship can be key. Whether the claims made by the rights-bearer against the acting authority are made as an enabler or a disabler, whether public authorities are making use of a person as a means, or whether they are merely disregarding the claim to take into account his interests as a constraining factor in an otherwise permissible endeavour, are often decisive. These questions only come into view once the structure of the means-ends relationship becomes the focus of a separate inquiry.<sup>24</sup>

What is correct about the analysis is that there is nothing in the idea of balancing itself that helps create awareness for the way means-ends relationships matter. What was misguided, however, was the claim that questions concerning the moral significance of the means-ends relationship cannot be taken into account when balancing. It can be. But to see how, one must recognize that whether the infringed person is an enabler or a disabler is not only relevant in the weak sense that it provides additional reasons to be put on the scale when balancing. The distinction between enablers and disablers completely changes the way the balancing should take the competing interests into account. The relevant baseline for comparing or weighing the competing

existence of the world would not provide a good reason to overcome these kinds of deontological restrictions (*fiat iustitia pereat mundus!*). According to Nozick, deontological constraints are overcome in exceptional circumstances to prevent "catastrophic moral horrors": Robert Nozick, *Anarchy, State and Utopia* (1974) at 29.

<sup>24</sup> Kumm, "Political Liberalism", *supra* note 11 at 162.

interests depends on whether the interests are represented in the balance by restricting or non-restricting claims.

Note that this does not mean that there is a categorical prohibition against using people as a means – as enablers – to further a desirable purpose. We generally use people as a means to further our purposes all the time. For the most part, however, we do so with their consent.<sup>25</sup> Even absent consent, there is no categorical prohibition on using people as a means. Provisions of tort law and criminal law that require a passer-by to suffer minor inconveniences to come to the aid of another person in serious distress, for example, raise no serious moral concerns. There is no general categorical prohibition on requiring people to make themselves available as a means to serve the needs of other people or the larger community. Nor is there a general categorical prohibition on treating them as they may be required to treat themselves. The point is merely that the baseline used to discuss these issues is very different from the baseline used in cases where individual citizens are not the instruments used to realize political purposes. It still makes perfect sense to require that when individuals are drafted into the service of the community these impositions have to meet proportionality requirements. The individual may be used as a means by public authorities only if it is necessary to further a legitimate public purpose and is not disproportionate. The different moral baseline merely means that, on balance, what counts as proportionate is very different from what counts as proportionate in situations where the individual person is not used as an enabler invoking a non-restricting rights claim, but as a disabler invoking a restricting rights claim.

It is central to the assessment of a government act whether it uses individuals as a means; that is, whether the individual is an enabler or a disabler. Once this feature of the situation is included in the description of the infringing act, proportionality analysis applies. But the substantive evaluation of the competing concerns changes radically. More specifically, on application it suggests that the ultimate sacrifice of a citizen's life or physical integrity, when the person is used as a means of achieving some good without his consent, is never, or nearly never, justifiable.<sup>26</sup>

<sup>25</sup> Think of ordinary contractual relationships. When I buy apples in the market, I use the seller as a means to satisfy my craving for apples, but I do so by paying the agreed upon sum of money, as part of a consensual exchange.

<sup>26</sup> The German Constitutional Court endorsed a version of this principle in striking down §14(3) of the Federal Air-transport Security Act of 2005: 59 *NEUE JURISTISCHE WOCHENSCHRIFT* 751 (2006). This section of the Act “empowered the minister of defense to order that a passenger plane be shot down, if it could be assumed that the aircraft would be used against the life of others and if the downing is the only means of preventing this present danger.” But the

One may object that we have described one way of conceiving of deontological restrictions, but that we have not shown that one must proceed this way. One might suggest that the position that one of us took before, that they work as “side-constraints”<sup>27</sup> on balancing is still an option. Indeed, one might argue it is a better option because the right not to be used as a means, without one’s consent, when the harm to one would be large, is rarely if ever justifiable. But this model of side constraints is appealing only if one thinks of deontological restrictions as operating essentially in an all-or-nothing fashion. If they change the way interests are taken into consideration, but do not rule out certain kinds of actions categorically, then balancing is a better model. We noted above that the restriction on harming an enabler with non-restricting claims is not, in fact, categorical. To further demonstrate that this is a core point about deontology, and not some marginal phenomenon, we turn now to two other categories of action in which deontological considerations are clearly relevant and yet cannot be represented as side constraints. Instead, the only plausible way to represent them is as affecting the balance of interests, so that it is not a mere impartial weighing up of consequences.

## II. CRIMINAL LAW’S STANDARD OF PROOF BEYOND A REASONABLE DOUBT

The constitutionally required standard of proof in criminal cases in liberal democracies is generally proof “beyond a reasonable doubt” (BARD).<sup>28</sup> This standard strikes a balance between competing interests that is neither absolutely tipped in the direction of protecting innocents from being wrongly punished, nor equally concerned with the interests of all involved. If the balance were absolutely tipped in favor of protecting the innocent from wrongful punishment, there could be no institutionalized practice of punishment: The only way never to convict the innocent is not to convict at all.<sup>29</sup> Most would

Court mistakenly asserted that shooting down a weaponized plane treated the persons aboard it merely as a means. In truth, the passengers on the plane have restricting claims, and the Act is consistent with their dignity.

<sup>27</sup> This is the terminology Robert Nozick introduced in *Anarchy, State, and Utopia*, *supra* note 23.

<sup>28</sup> See *In re Winship*, 397 U.S. 358 (1970).

<sup>29</sup> There are some who interpret the BARD standard to be maximally strict while still allowing for criminal convictions in those cases in which the jury can find no reasonable doubt about the defendant’s guilt. See, e.g., Laurence Tribe, “A Further Critique of Mathematical Proof,” 84 *Harv. L. Rev.* 1810 (1971). Authors of this ilk take a position that would nonetheless make it much harder to incapacitate dangerous criminals than any existing court does. See Larry Laudan, “The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond

insist, however, that this would impose unacceptable costs. There is value in criminal punishment both to deter potential criminals and to incapacitate, at least for a period of time, those who have committed serious crimes, thereby preventing them from striking again.<sup>30</sup> If one is a retributivist, as most criminal law theorists today are,<sup>31</sup> then one also wants to add that criminals *deserve* punishment. That provides *some* reason to punish the guilty, even if it is a reason that is relatively easily outweighed by other concerns, such as the costs of providing prosecutorial and penal resources.<sup>32</sup> Yet if we accept that the interests served by deterrence and incapacitation, not to mention those served by retributive desert, justify convicting people with less than proof to a moral certainty, we need to know *how much less certain* the finder of fact may be. Why is BARD the right way of striking a balance between competing concerns? Why not a lower standard, perhaps “clear and convincing evidence”, “preponderance of the evidence”, or even “plausible evidence”? Should anything less than BARD be held to violate a defendant’s right to a fair criminal trial or the right to liberty?

To feel the force of the problem, consider an instance in which the state is prosecuting someone for a heinous crime that bears all the marks of a serial murder with a high probability that if the murderer is released, more murders will be committed. Does the insistence on BARD not violate the protective duties of the state vis-à-vis potential future victims, if there is a preponderance of the evidence suggesting the defendant is guilty? How should we think about striking the balance in these kinds of cases? On what grounds is it plausible to insist on BARD as the correct standard?

A wide range of views on the correct trade-off between false positives (convicting innocent defendants) and false negatives (letting a guilty defendant go free) has been offered over the years.<sup>33</sup> Voltaire held: “Tis much more Prudence to acquit two persons, tho’ actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent.”<sup>34</sup> Matthew Hale

a Reasonable Doubt Doing More Harm than Good” in Leslie Green and Brian Leiter (eds.), *Oxford Studies in Philosophy of Law*, vol. 1 (2011) 195–227.

<sup>30</sup> Of course, most prisons do not incapacitate them from harming fellow prisoners.

<sup>31</sup> See David Dolinko, “Three Mistakes of Retributivism,” 39 *U.C.L.A. L. Rev.* 1623 at 1623 (1992).

<sup>32</sup> Kant famously wrote, “woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment”: *The Doctrine of Right*, Academy, at 331 (*Metaphysical First Principles of the Doctrine of Right: Part I of the Metaphysics of Morals*, trans. Mary Gregor 1991). But even the most hard-core retributivists today accept that point. See, e.g., Michael Moore, *Placing Blame* (1997) at 151.

<sup>33</sup> The following have all been taken from Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (2006) at 63. A similar range is discussed in Frederick Schauer, “Proportionality and the Question of Weight,” Chapter 8 in this volume.

<sup>34</sup> *Zadig* (photo. reprint 1974) at 53.

wrote: “It is better that five guilty persons should escape punishment than one innocent person should die.”<sup>35</sup> William Blackstone got the better of these two in the popular imagination by writing: “It is better that ten guilty persons escape [punishment] than that one innocent suffer.”<sup>36</sup> But the numbers go up from there. John Fortesque opined that he would “prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly.”<sup>37</sup> Benjamin Franklin upped the ante, writing: “It is better a hundred guilty persons should escape than one innocent person should suffer.”<sup>38</sup> But highest honors belong to Moses Maimonides, who wrote: “It is better . . . to acquit a thousand guilty persons than to put a single innocent man to death.”<sup>39</sup>

What can one say in the face of such a range? On the one hand, it is unclear that we are comparing apples to apples, because it is unclear if all of these writers were concerned about the future crimes that the guilty who are allowed to go free would likely commit, crimes that would otherwise be prevented by punishment. It is also unclear what they would say if so many of them were not focused on capital punishment as the relevant form of punishment, and considered instead lesser, alternative punishments. On the other hand, we might notice an interesting signal in the norms implicitly used by the lower and higher ends of the range. Voltaire spoke of prudence, which suggests a utilitarian calculus, whereas Maimonides wrote from a religious point of view, one presumably far removed from the utilitarian calculus.

Let us start, then, with Voltaire’s end of the spectrum. One way to get his ratio is to suppose that, on average, an offender who is not punished will go on to commit one more comparable offense. If we suppose that the harm of being punished for a particular crime (whether murder or theft or anything in between) when one is innocent is on a par with the harm the victims of unpunished criminals who commit such a crime would suffer, and if we suppose that these are the only relevant consequences, then the ratio is a straightforward consequence of the assumptions. For if we convict an innocent person, then he suffers a serious harm, and a guilty person is presumably left free to victimize another – giving us two victims. But if we let a guilty person go free, then we can expect him to victimize another – giving us one victim. Hence the ratio is two-to-one.<sup>40</sup> If we adopt the retributive premise that there

<sup>35</sup> 2 Hale PC 290 (1678).

<sup>36</sup> *Commentaries on the Laws of England*, c. 27, at 358 (margin).

<sup>37</sup> *De Laudibus Legum Angliae* 65 [1471] (S. Chimes ed. and trans. 1942).

<sup>38</sup> Letter from Benjamin Franklin to Benjamin Vaughn (March 14, 1785), in *The Works of Benjamin Franklin* vol. 11, 11 at 13 (John Bigelow, ed., fed. edn., 1904).

<sup>39</sup> Moses Maimonides, *The Commandments*, vol. 2 (Charles Chavel, trans., 1967) at 270.

<sup>40</sup> See Richard Lippke, “Punishing the Guilty, Not Punishing the Innocent,” (2010) 7 *Journal of Moral Philosophy* 462 at 468.

is some additional value in punishing the guilty, we do not really change the ratio, because the guilty go unpunished if either error is committed – although one could argue that the ratio moves in the direction of one-to-one. The ratio would move further in that direction if we suppose that if we let the guilty go free then they will victimize many. Then the number of victims caused by the unpunished criminals would tend to swamp the harm to the innocent who are punished. On the other hand, if we suppose either that being wrongfully punished is worse than being a victim of crime, or that unpunished criminals will commit, on average, less than one other similar act, then the ratio would climb toward Maimonides's.

The problem with this sort of utilitarian thinking is that it could easily, at least in certain categories of cases, suggest that the state should use preponderance of the evidence as the relevant evidential standard. And if we were to be truly utilitarian about punishment, we would realize that the evidence of guilt has to rise to more than 50 percent likelihood only if we remain committed to punishing only one person for a given crime (discounting extra punishments for complicity). If we free ourselves of that fundamentally retributive assumption, and allow ourselves to think of the criminal law as fundamentally a tool for incapacitation and deterrence, then we could punish more than one person for a given crime or set of crimes, as long as there is sufficient evidence for each person that he did it. What would constitute sufficient evidence? Evidence such that we are confident we will protect more innocent people overall. Given that we are trying to incapacitate someone such as a serial killer or serial rapist, we might want to prosecute every suspect who does not have a conclusive rebuttal of the evidence against him. Accordingly, we might want to instruct the jury that it can convict more than one of them, to ensure that the true criminal does not escape justice, as long as it believes that a particular defendant *might* have committed the crimes at issue.

This pure utilitarian position is shocking to contemplate. But even if we add the premise that only one person may be convicted for a given crime, the utilitarian approach would allow juries to convict on mere preponderance of the evidence. This is not a shocking position, but it is one so at odds with our current practices, that it strongly suggests that we should look for another way of balancing the competing concerns.<sup>41</sup> So we are back to the question: How can we find a weighting factor owed the innocent, protecting them from a false

<sup>41</sup> Lippke offers pragmatic reasons to use proof beyond a reasonable doubt as a hedge against the state's potential to abuse its power. But that argument seems wrongly to allow lesser standards of proof to be used if other ways of ensuring that the state does not abuse its power can be found.

conviction, which strikes the right middle note between preponderance of the evidence and conviction only on proof that leaves *no* rationally defensible doubt?

The answer, we believe, is connected to what it means to *punish* people; it requires something pretty much along the lines of a BARD standard. Punishment is not just the act of harming a person. It is an act with a distinctive significance for both the person who is punished and for the rest of the community. In part, it is a communicative act, communicating censure for the commission of a crime.<sup>42</sup> This presupposes that the basis for the censure, the conviction, is reliable. In addition, punishment is in part the intentional infliction of suffering, justified in a retributive framework by the idea that the defendant *deserves* it. Again, to justify doing that the presupposition is that the fact finder must positively believe that the person *deserves* such punishment. It would be jarringly disconcerting if the state were willing to do that even though the fact finder thought the defendant simply *might* deserve it, or even asserted that he *probably* deserved it.

It might be thought that what is at work here is an appeal to the agent-centered distinction between doing and allowing, or the parallel patient-centered distinction between the claim not to be harmed and the claim to be helped. Focusing on the agent-centered distinction first, one might suggest that the state has special reasons to avoid dirty hands, and that it should therefore be more willing to *allow* criminals to go free, allowing *them* to cause unjust harm, than to cause harm directly by punishing the innocent. But agent-centered deontology, as noted above, seems to get the very idea of deontology backward. Agents should not be obsessively concerned with how dirty their hands are; they should be concerned with respecting the rights of those with whom they interact. This is at least as true when the state acts as the agent of us all as it is for any private agent. Instead, we should shift the focus to the patient-centered distinction between positive and negative claims. Those who would be harmed by criminals unless they are convicted and incapacitated have a positive claim on the state to be saved from those private harms; those innocents who would be unjustly harmed by the state itself if they are wrongfully punished have a negative claim on the state not to harm them. Arguably, negative claims are stronger, all else equal, than positive claims. This could be offered as *the* explanation of the priority the state should show for not convicting the innocent over not allowing the guilty to go free.

<sup>42</sup> For the leading statement of this view, see Anthony Duff, *Punishment, Communication, and Community* (2003).



We think this is *part* of the story – and notice, it, too, appeals to a deontological tipping of the scales. But it would be a mistake to take it as all of the story. The priority negative claims have over positive claims, at least when all the claims are restricting, seems fairly weak. The principle of necessity or less evil in criminal and international law seems to allow negative claims to be outweighed by even slightly greater interests protected by positive claims. In the context of criminal trials, that might allow the use of a standard of proof not much higher than preponderance of the evidence if that would predictably reduce the overall incidence of innocent people being harmed – whether by criminals or the state.

Our position, then, builds on the significance of the distinction between positive and negative claims. It adds the thought that the claim not to be wrongfully punished is particularly strong not just because it is a claim not to be harmed, but because it is a claim not to be treated in a particular way without high level of confidence, on the basis of empirically sound reasons, that the treatment is warranted. The expressive content of punishment, the dimension of censure, the claim that the sanction is deserved, these all require a high level of confidence that the punishment *is* deserved. That high level of confidence is captured by the BARD standard.

Many defenders of BARD seem to think that they are defending the highest possible standard of proof, one which requires that there be no practical possibility that the innocent will be convicted.<sup>43</sup> We are not taking that position. We acknowledge that BARD does and should give some weight to the importance of obtaining convictions, and thus tolerates a certain amount of error. The point is that the finder of fact should feel highly confident, beyond the level of confidence derived from mere “clear and convincing” evidence, that the defendant is guilty before agreeing to say that he *deserves* punishment.

Bringing this back to the balance in proportionality analysis, our point is that BARD should be required as the correct constitutional standard for a criminal conviction because that level of proof is required to respect the dignity of criminal defendants. This is not merely because of their welfare interests. It is not because it is, in some objective sense, worse to be an innocent person convicted than to be an innocent person victimized by crime. It is because of the moral import of a criminal conviction, which presupposes that the finder of fact *believe*, on the basis of proof that leaves no reasonable doubt, that the defendant committed the crime for which he is to be punished. The

<sup>43</sup> See, e.g., Tribe, *supra* note 29. See also Alex Stein, *Foundations of Evidence Law* (2005), at 175; Rinat Kitai, “Protecting the Guilty,” 6 *Buffalo Crim. L. Rev.* 1163 (2003). For a stinging critique of this position, see Lauden, “The Rules of Trial,” *supra* note 29.

right standard gives substantial priority to the claims of the innocent not to be punished, while tolerating some accidental false convictions in order to obtain many true ones, because that is required to act on a concept of punishment that takes seriously the need to make punishment consistent with respect for the dignity of persons.

### III. LIMITS ON PREVENTIVE DETENTION

Preventive detention is a policy that, like criminal punishment, can incapacitate the dangerous. But unlike criminal punishment, it is not premised on a claim that the detainee *deserves* to lose his freedom. Instead, it is premised simply on the thought that some people are *too dangerous* to be allowed to move about in society, and therefore must be detained. Given that it lacks the moral import of punishment, one might think that the implication of the previous section would be that the right balance to strike when considering a detainee's claim not to be detained is simply a neutral, utilitarian balance of competing interests.<sup>44</sup> But in liberal constitutional democracies, it is rightly considered fundamentally unjust to subject mentally sane persons to long-term preventive detention (hereinafter LTPD) on grounds that are no stronger than a simple utilitarian balance of competing interests.<sup>45</sup> The question is why that is so.

Our answer runs as follows. For a state to respect the dignity of people with autonomous or free wills, at least if it is obliged to act on the assumption that they have a right to be in the state's territory, it must not subject them to LTPD if it can hold them accountable for wrongful choices after the fact. Using LTPD instead of the criminal law would deny them the presumption to which they are entitled, namely that they will use their free will to choose to act only in lawful ways. We call the account of detention that justifies this position on LTPD the Autonomy Respecting (AR) model of detention.<sup>46</sup>

It might seem that the AR model implies an absolute tipping of the balance against LTPD of autonomous and accountable individuals. But of course, as in the criminal justice area, there is a range of difficult issues. First, there is the question of the standard of proof. If someone can be shown not to possess some threshold level of autonomous capacity, and then subjected to LTPD

<sup>44</sup> Some writers do seem to think this is the right position to take. See, for example, Benjamin Wittes, *Law and the Long War* (2008), at 35.

<sup>45</sup> See, e.g., European Convention on Human Rights, Art. 5 (limiting the use of preventive detention).

<sup>46</sup> One of us spelled out this position most fully in Alec Walen, "A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists," 70 *Maryland L. Rev.* 871 (2011).

if the danger she poses to herself or others outweighs her liberty interest, one needs to know both what the threshold level is and what the standard of proof is. Is it preponderance of the evidence? Proof beyond a reasonable doubt? Some standard in between?<sup>47</sup> But we do not want to focus on the standard of proof issue in this section. We want, instead, to focus on the question of what it means for someone not to be accountable, not because of their intrinsic incapacity as a moral agent, but because of the extrinsic fact that adequate policing capacity is not available to hold her accountable. This is a central prong in our AR model of detention, but it leaves an important substantive issue to be settled: How much security must the police be able to provide in order to say that a person can be held accountable? The answer to *that* question, we argue, requires an intermediate weighting factor, somewhere between neutral and the (nearly) absolute weighting due to those with non-restricting claims.

Before we can try to explain why the minimal amount of security for accountability should be set using an intermediate weighting factor, we need to explain a bit more about how the AR model is supposed to work.<sup>48</sup> At its most basic, the AR model holds that individuals who can be adequately policed and held criminally liable for their illegal choices, as normal autonomous actors, and who can choose whether their interactions with others will be impermissibly harmful or not, can be subjected to long-term detention *only if* they have been convicted of a crime for which (a) long-term punitive detention, and/or (b) the loss of the right not to be subject to long-term preventive detention is a fitting punishment.

This can be broken down into its constituent parts as follows: Punitive detention, as long as it is in response to the violation of a just criminal law and proportional to the convicted criminal's culpability for her crimes, respects a person's dignity because it is on the basis of the convicted criminal's autonomous choice to commit a crime. Preventive detention, as noted above, is not in that way based on desert, but instead only on dangerousness.

As far as we can see, LTDP is justifiable in only four conditions, namely when:

1. People lack the normal autonomous capacity to govern their own choices;

<sup>47</sup> The U.S. constitutional law standard is "clear and convincing evidence." See *Addington v. Texas*, 441 U.S. 418 at 432–433 (1979).

<sup>48</sup> The next three paragraphs are substantially similar to ones found in Alec Walen, "Reflections on Theorizing About the Moral Foundations of the Law: Using the Laws Governing Detention as a Case Study," in *The Ethicalization of Law* (S. Voneky et al., eds.) (2013).

2. They have, in virtue of one or more criminal convictions, lost their right to be treated as autonomous and accountable;<sup>49</sup>
3. They have an independent duty to avoid contact with others, because such contact would be impermissibly harmful (e.g., those with contagious and deadly diseases), and LTPD simply reinforces this duty; or
4. They are incapable of being adequately policed and held accountable for their choices by any country obliged or willing to police them like any other free resident of the territory.

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

The paradigmatic type of person to fall into the fourth category is the captured enemy combatant or prisoner of war (POW).<sup>50</sup> A combatant under the traditional law of war is, and will remain until the war is over or he is released from military service, privileged to engage in combat with the detaining power.<sup>51</sup> If he is released or escapes from detention, he has the right to take up arms again.<sup>52</sup> This means that not only can the detaining power not hold him criminally responsible for his past violent actions – at least as long as those acts do not violate the laws of war – but also that the detaining power may not hold him criminally responsible for any *future* acts of violence that conform to the law of war. The state is not required to allow itself to be attacked. Therefore, it can subject POWs to LTPD to prevent them from attacking. And it can do so without disrespecting them as autonomous people because their legal status makes them unaccountable.<sup>53</sup>

More normative difficulty arises when dealing with what lawyers in the administration of George W. Bush more broadly called “enemy combatants,” (i.e., suspected terrorists [STs]) who have no right to use military force. We divide these into two categories: alien STs who come from countries where

<sup>49</sup> This is certainly the most controversial of the four prongs. It matches the practice in the United States and elsewhere, but many theorists consider it clearly unjustifiable for a person to be subject to LTPD as a result of a past criminal action. One of us argues, however, that we can see loss of the normal right not to be subject to LTPD as an element of punishment that can complement the more standard use of prison terms and fines. See Alec Walen, “A Punitive Precondition for Preventive Detention: Lost Status as an Element of a Just Punishment,” 63 *San Diego L. Rev.* 1229 (2011).

<sup>50</sup> This paragraph is taken, with minor modifications, from Walen, “Unified Theory of Detention”, *supra* note 46 at 922.

<sup>51</sup> Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflict* (2008) at 361.

<sup>52</sup> *Ibid.*

<sup>53</sup> There are complications that concern the possibility of a combatant giving up his combatant status, but these need not worry us here.

the police power is largely dysfunctional, such as Yemen,<sup>54</sup> and those that come from countries with normally functioning police powers, such as those of Western Europe and the United States. We believe that no country has an obligation to release into its territory, and police, those who are not its citizens (with the rare and limited exception of cases in which a country has special responsibilities for certain noncitizens who it would otherwise wrong if it does not admit them).<sup>55</sup> Thus, we think that if the United States has captured Yemeni STs, and no country with a normally functioning police force volunteers to take them in and police them, then the United States can treat them as unaccountable, because they will not be adequately policed in the country that has a duty to take them in and police them: their home country. This licenses LTPD of STs from such countries, provided there is sufficient evidence that they are indeed dangerous – a separate and difficult question, but analogous to the idea that in times of invasion or rebellion, when the normal policing capacity of a state is overwhelmed, rights connected to ending LTPD, paradigmatically habeas rights, can be suspended. What is not permitted according to the AR model is LTPD of STs from countries that do have adequately functioning police forces. But this now gets us to the heart of the matter for present purposes. What does it mean for a state to lack the ability to provide adequate policing of STs?

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

It is a little hard to imagine how a government could have sufficient evidence that it had captured someone who was dangerous to a degree far exceeding that seen among normal criminals and yet not have evidence of crimes that should be sufficient for a conviction of a serious felony. This is especially true in this age of expanded counterterrorism crimes, such as providing material

<sup>54</sup> See Department of Justice et al., *Final Report: Guantanamo Review Task Force* 23 (January 22, 2010) at 18 (explaining that the “security situation in Yemen had deteriorated” in such a way that the release of the Yemeni detainees at Guantánamo Bay represented a “unique challenge”), retrieved from <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

<sup>55</sup> We think the Uighurs held in Guantanamo fit this description, pace the holdings of U.S. courts.

support to terrorist groups.<sup>56</sup> But it is not completely beyond imagining how such a situation could come about. Perhaps the government feels it cannot put on a trial without risking too much sensitive information,<sup>57</sup> perhaps the relevant law was not on the books when the person committed the acts for which the state would like to prosecute,<sup>58</sup> or perhaps, like many a mafia boss, there are lots of reasons to suspect a particular individual, but all on the basis of hearsay or the testimony of uncooperative witnesses that will not yield a conviction.

Whatever the reason, imagine that the government has a person that it takes itself to have very good reason to believe is a charismatic terrorist mastermind, the kind who, if allowed to move about outside of a maximum-security prison, would likely conspire with others to kill thousands of innocents, or maybe orders of magnitude more than that. How are we to weigh the lives of thousands or more innocent victims against his liberty? Is normal policing “adequate” when it would be so much less effective at ensuring that he does no harm than LTPD in a maximum-security facility?<sup>59</sup>

This is a point at which we think the sane person admits that there may be cases in which normally adequate policing is not adequate. But that then opens up the key question: How do we get a measure for that? The neutral, utilitarian answer would be: policing is adequate if we expect that it will do more harm to a supposedly dangerous person to subject him to LTPD than would likely result to others if the state were to rely on the police’s ability to deter him or intercept him before any plans to commit violent acts reach fruition – modulo, of course, the dangers that accompany allowing LTPD ever to be used on autonomous and accountable individuals who have a right to be in a given country. This measure, however, undermines almost the whole point of the AR model of detention. It’s not clear why we don’t end up simply doing a full utilitarian analysis, which would fully undermine the point of the AR model.

<sup>56</sup> See 18 U.S. §2339B.

<sup>57</sup> See Michael Mukasey, “Jose Padilla Makes Bad Law,” *Wall St. Journal*, August 27, 2007 (p. A15).

<sup>58</sup> A situation such as this recently arose with respect to Yasim Hamdan, whose conviction in a military tribunal for providing material support to al Qaeda was overturned because that was not a crime under the law of war at the time he was a driver for Osama bin Laden. See *Hamdan v. U.S.*, 696 F.3d. 1238 (DC Cir. 2012).

<sup>59</sup> Even British “control orders,” which put those subject to them under something close to house arrest, have limitations as security measures. See Alec Walen, “Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention,” (2011) 101 *The Journal of Crim. L. and Criminology* 803 at 823–824.

A better answer goes back to the basis of the AR model and says that what is crucial is that once the state accepts that it has an obligation to police someone, it must seek to respect that person as an autonomous and accountable agent if he has at least a threshold level of autonomy and if the state can in fact hold him accountable for any wrongful choices he might make. Doing otherwise is inconsistent with respecting his dignity. In practice, that has to mean providing as much police surveillance – including perhaps limits on his freedom and intrusions into his privacy that are normally not permissible in a liberal society, but that are far easier to justify than LTPD – as can be afforded, consistent with other priorities for the state. Those efforts would be judged inadequate only if the state could prove to a properly constituted neutral body, by a sufficiently high degree of proof – another issue we leave to the side here – that the person of concern is likely to try to commit a major terrorist act, and that the danger to his fellow citizens of *not* subjecting him to LTPD *far outweighs* the harm to him of being subjected to LTPD. This last balance term, “far outweighs”, is still vague, but we think it captures the relevant middle space in approximately the right way. It captures the idea that the state is committed to respecting the dignity of autonomous individuals by not simply predicting what they will do and then acting on a utilitarian calculus.

#### IV. CONCLUSION

The previous three sections illustrate that balancing is not mechanical but requires the decision maker to appropriately take into account everything relevant that is not already addressed in the first three prongs of the proportionality test. But the fundamental lessons to draw from these discussions go significantly beyond that. First, deontology is not in tension with balancing. It is a mistake to believe that human rights are bifurcated: mostly subject to balancing, but deontological with regard to some aspects, in particular with regard to human dignity. Instead, the kind of moral reasoning that balancing requires is thoroughly deontological and always grounded in human dignity. Second, human dignity-related deontology, if taken seriously, is not limited to a simple structure (persons being used as a means for others' ends) covering only a relatively small part of rights practice, as one of us had previously argued. Human dignity-based deontology is structurally diverse and considerably more ubiquitous.

In the classic cases typically associated with human dignity, cases such as those involving the use of persons for medical experiments, organ harvesting, the torture of innocents, or targeting of non combatants, and so forth, the rights claimant invokes not only fundamental interests, but makes non-restricting

claims: He insists on a nearly absolute right not to be required to make himself an instrument for the use of others (a means to another's end), if that involves the sacrifice of his life, his physical integrity, or other fundamental interests. It is the non-restricting nature of these claims that justifies assigning to them a weight so great that it is never (or nearly never) outweighed by countervailing concerns. But human dignity-based deontology is not only relevant in cases that involve non-restricting claims; it comes into play in a far wider range of cases. In these cases claims are not absolute, but still considerably stronger than neutral interest balancing would suggest. We discussed two main examples. An appropriate standard of proof in criminal law strikes a balance between the right of the accused not to be convicted erroneously and the interest of the community to ensure a sufficient number of criminals get convicted. However, the right-bearer's interest in not being falsely convicted and baselessly punished may not be neutrally balanced against the interests of those who would benefit from more criminal punishments being doled out. The defendant's interests should be treated as substantially more weighty, because that is the only way to respect the moral preconditions of punishment. Furthermore, if the rights-bearer's claim is the claim not to be subject to LTPD as a resident in a liberal democracy, then his interest in not be subject to LTPD should not be neutrally balanced against the interests of those who could expect to benefit from his LTPD. Taking the rights-bearer seriously as an autonomous and accountable agent requires the state to subject him to less harmful treatment unless the threatened harm to others far outweighed the harm to him of being subjected to long-term preventive detention.

We provided neither a moral theory of human dignity as it relates to balancing nor a comprehensive typology of structures as they relate to balancing. The types of cases we focused on served merely to highlight some of the structural complexity involved in balancing. In all cases, the correct way to balance depends on standards that only substantive reasoning can establish. There are two conclusions to be drawn from the argument presented. The first is negative: Human dignity is not primarily about rule-like absolutes and balancing is not primarily about simple interest balancing. The second is positive: Once the potentially complex nature of the balancing exercise is understood, there is no tension between human dignity and balancing. Indeed, respect for human dignity requires balancing.