

# WHY COURTS SHOULD NOT BALANCE RIGHTS AGAINST THE PUBLIC INTEREST

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*[Most bills of rights allow for the restriction of rights in the interests of the public. But how should courts decide when the public interest should prevail? This article draws on philosophical work on practical reasoning to argue against the popular view that courts should use a balancing test which weighs the consequences of protecting the right against the consequences of restricting it. Using two United Kingdom cases as illustrations, it argues that there are good reasons to 'overprotect' rights. Judges, in their reasoning, should assign more weight to rights and less weight to the public interest than they would on an application of the balancing model.]*

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## I LIMITS ON RIGHTS

It is a commonplace to observe that few rights are absolute, a commonplace which is expressly recognised in most bills of rights. One frequently used device to reflect the non-absolute character of rights is a general limitation clause. This is a clause applying to all the rights in a bill of rights, which sets out criteria that may justify the restriction of those rights. Both the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') contain a clause of this kind. In particular, s 28 of the *Human Rights Act 2004* (ACT) provides: 'Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society', and s 7(2) of the *Victorian Charter* provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including —

(a) the nature of the right; and

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- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Specific rights can also be made subject to limitation, either as an alternative to a general limitation clause or in addition to one. Provisions of this kind generally permit governments to interfere with specific rights in order to achieve certain specified purposes. Section 15(3) of the *Victorian Charter* follows this route in providing that the right to freedom of expression ‘may be subject to lawful restrictions reasonably necessary — (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality’.

Rights can also be defined in such a way that their coverage does not extend to certain kinds of circumstances or to certain classes of people.<sup>1</sup> For instance, both the *Human Rights Act 2004* (ACT) s 26 and the *Victorian Charter* s 11 protect against forced work, but define ‘forced or compulsory labour’ so as not to include certain kinds of obligatory work or service. Both also guarantee the right to life, but narrow its scope by limiting the protection to protection against ‘arbitrary’ deprivation of life.<sup>2</sup> The *Human Rights Act 2004* (ACT) s 9(2) further limits the entitlement to ‘a person from the time of birth’. These can be described as ‘internal limits’ on rights. They tell us when a right is applicable and therefore whether it has been infringed in the first place. ‘External limits’, by contrast, allow the government to act inconsistently with a right in order to promote a competing value.<sup>3</sup>

It is clear that the point of these and analogous devices is to assist in resolving two kinds of conflict: conflict between the rights of different individuals, and conflict between the rights of individuals and governmental goals which are not rights-based. Examples of such governmental goals are providing for economic well-being, protecting public safety and preventing crime. Section 15(3) of the *Victorian Charter* provides examples of both kinds of conflict: the right of one individual to freedom of expression may conflict with another’s right not to have their reputation impaired, and an individual’s right to freedom of expression may conflict with the government’s interest in protecting national security.

In this article, I will be concerned only with the second type of conflict — that between the rights of individuals and the government’s public policy objectives. The resolution of conflicts between different individuals’ rights is not as theoretically problematic, for reasons that will become evident in the course of this discussion. To illustrate my argument, I will discuss two cases in which the House of Lords confronted limitation issues under the *Human Rights Act 1998* (UK) c 42, which incorporates most of the rights under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (‘*European*

<sup>1</sup> For more on definitional restrictions: see Aileen McHarg, ‘Reconciling Human Rights and the Public Interest’ (1999) 62 *Modern Law Review* 671, 671.

<sup>2</sup> *Human Rights Act 2004* (ACT) s 9; *Victorian Charter* s 9.

<sup>3</sup> Stephen Gardbaum, ‘Limiting Constitutional Rights’ (2007) 54 *UCLA Law Review* 789, 801, 806.

*Convention*'),<sup>4</sup> as well as various articles from the *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>5</sup> and *Protocol No 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*,<sup>6</sup> into the domestic law of the United Kingdom. UK citizens can as a result now rely on these so-called 'Convention rights' in the UK courts. The aim is to draw some lessons for Australian courts bound to confront similar questions.

There are, of course, differences between the *Human Rights Act 2004* (ACT), the *Victorian Charter* and the *Human Rights Act 1998* (UK) c 42, but the differences are, for the purposes of this discussion, less important than the similarities. For example, although the *Human Rights Act 1998* (UK) c 42 does not contain a general limitation clause, it does contain a number of qualified rights which are subject to broadly framed limitations permitting them to be overridden on specified public interest grounds as well as to secure the rights and freedoms of others. Article 8, for instance, which provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence',<sup>7</sup> goes on to provide that:

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>8</sup>

Under the *Human Rights Act 1998* (UK) c 42, the rights to freedom of thought, conscience and religion;<sup>9</sup> freedom of expression;<sup>10</sup> freedom of assembly and association;<sup>11</sup> and to the enjoyment of property<sup>12</sup> are subject to limitation on similar public interest grounds. Even some of the rights which are not expressly qualified, such as the prohibition of discrimination under art 14, have been qualified in practice. Article 14 provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Yet despite the apparently absolute language, the European Court of Human Rights takes the view that art 14 does not entirely exclude differential treatment in respect of a *European Convention* right on the basis of a proscribed ground,

<sup>4</sup> Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

<sup>5</sup> Opened for signature 20 March 1952, 213 UNTS 262 (entered into force 18 May 1954).

<sup>6</sup> Opened for signature 28 April 1983, ETS 114 (entered into force 1 March 1985).

<sup>7</sup> *Human Rights Act 1998* (UK) c 42, sch 1 art 8(1).

<sup>8</sup> *Human Rights Act 1998* (UK) c 42, sch 1 art 8(2).

<sup>9</sup> *Human Rights Act 1998* (UK) c 42, sch 1 art 9.

<sup>10</sup> *Human Rights Act 1998* (UK) c 42, sch 1 art 10.

<sup>11</sup> *Human Rights Act 1998* (UK) c 42, sch 1 art 11.

<sup>12</sup> *Human Rights Act 1998* (UK) c 42, sch 1 art 1.

for different treatment will survive challenge if it is objectively justifiable.<sup>13</sup> UK courts have followed this approach.<sup>14</sup>

A second difference between the three bills of rights is of little significance in practice. This is the list of factors to which the *Victorian Charter* calls attention as relevant to the limitation enquiry.<sup>15</sup> Although there is no comparable guidance in either the *Human Rights Act 2004* (ACT) or the *Human Rights Act 1998* (UK) c 42, the *Victorian Charter*'s list of relevant factors is merely a codification of an established approach to limitation issues which has developed in the case law under international human rights instruments and in jurisdictions which have enacted bills of rights. These factors are therefore routinely investigated even when, as in the *Human Rights Act 2004* (ACT) and the *Human Rights Act 1998* (UK) c 42, there is no express mention of them.

Thus, Canadian judges have interpreted the very open-ended limitation clause in the *Canadian Charter of Rights and Freedoms*<sup>16</sup> (on which, in fact, the limitation clause of the *Human Rights Act 2004* (ACT) is modelled) by reference to factors of the kind to which the *Victorian Charter* explicitly calls attention. Section 1 of the *Canadian Charter of Rights and Freedoms* provides: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. In the seminal case of *R v Oakes*, Dickson CJC said that a limit must satisfy two criteria before it can pass the s 1 test.<sup>17</sup> First, the 'objective ... must be of sufficient importance to warrant overriding a constitutionally protected right or freedom'.<sup>18</sup> Secondly, 'the means chosen' must be 'reasonable and demonstrably justified'.<sup>19</sup> The latter involves, Dickson CJC said, 'a form of proportionality test'.<sup>20</sup> In particular, 'the measures adopted must be carefully designed to meet the objective in question';<sup>21</sup> the means 'should impair "as little as possible" the right or freedom in question';<sup>22</sup> and 'there must be a proportionality between the effects of the

<sup>13</sup> See, eg, *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium'* (1968) 6 Eur Court HR (ser A) 4, 34.

<sup>14</sup> See, eg, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 566 (Lord Nicholls) ('*Ghaidan*'). See also Part VI.

<sup>15</sup> *Victorian Charter* s 7(2). The relevant factors are the nature of the right (s 7(2)(a)), the importance and purpose of the limitation (s 7(2)(b)), the nature and extent of the limitation (s 7(2)(c)), the relationship between the limitation and its purpose (s 7(2)(d)) and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve (s 7(2)(e)).

<sup>16</sup> *Constitution Act 1982*, being sch B to the *Canada Act 1982* (UK) c 11, pt I.

<sup>17</sup> *R v Oakes* [1986] 1 SCR 103, 138 (Dickson CJC for Chouinard, Lamer, Wilson and Le Dain JJ).

<sup>18</sup> *Ibid.* The phrase 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' was cited by Dickson CJC from his judgment in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 352. In that case, Dickson CJC similarly delivered judgment for the majority: Beetz, McIntyre, Chouinard and Lamer JJ.

<sup>19</sup> *R v Oakes* [1986] 1 SCR 103, 139 (Dickson CJC).

<sup>20</sup> *Ibid.*, citing *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 352.

<sup>21</sup> *R v Oakes* [1986] 1 SCR 103, 139.

<sup>22</sup> *Ibid.*, citing *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 352 (Dickson CJC for Dickson CJC, Beetz, McIntyre, Chouinard and Lamer JJ).

measures ... and the objective which has been identified as of “sufficient importance”<sup>23</sup>

The European Court of Human Rights refers to similar considerations in interpreting the *European Convention* requirement that any interference with one of the qualified rights must be ‘necessary in a democratic society’. The Court interprets this as meaning that the measure must be proportionate to the pursuit of one of the specified purposes (‘legitimate aims’) for which infringement of a right is permitted.<sup>24</sup> It also frequently investigates whether the measure answers to a pressing social need.<sup>25</sup>

In testing whether a measure which interferes with one of the qualified rights is proportionate to the pursuit of a legitimate aim, the European Court of Human Rights investigates a number of factors. Typically, it asks whether the measure is likely to be effective in achieving the government’s purpose, whether there are less restrictive ways of achieving the purpose, and whether the cost to the right is justified by the public interest benefits.<sup>26</sup> These three prongs of the proportionality test are sometimes known as the tests of suitability, necessity and proportionality in the narrow sense.<sup>27</sup>

Proportionality, in the sense which encompasses all three enquiries, is also relevant when the Court considers whether different treatment in respect of a *European Convention* right on a proscribed ground is objectively justifiable. It takes the approach that different treatment will be objectively justifiable if it has a legitimate aim and bears a reasonable relationship of proportionality to that aim (although, in the case of art 14, the concept of ‘legitimate aim’ is not confined to a closed list of specified purposes, as it is in arts 8, 9, 10 and 11).<sup>28</sup> British courts have employed the same concepts, of legitimate aim and proportionality, in deciding whether limitations of *European Convention* rights under the *Human Rights Act 1998* (UK) c 42 are justifiable.<sup>29</sup>

My interest is in how courts should choose between rights and the public interest and the following discussion will therefore concentrate on the concept of proportionality in the narrow sense. This is the aspect of the proportionality enquiry which focuses on whether the burden imposed on the right-holder is

<sup>23</sup> *R v Oakes* [1986] 1 SCR 103, 139 (Dickson CJC). Virtually identical meaning was given to the only slightly less open-ended limitation clause in the *Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution)* (South Africa) in *S v Makwanyane* (1995) 3 SA 391 (CC) 436 (Chaskalson P). This interpretation subsequently influenced the framing of the limitation clause in the *Constitution of the Republic of South Africa Act 108 of 1996 (Final Constitution)* (South Africa), which reads very similarly to s 7(2) of the *Victorian Charter*.

<sup>24</sup> Walter van Gerven, ‘The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe’ in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 37, 44.

<sup>25</sup> *Ibid* 43.

<sup>26</sup> *Ibid* 37–9.

<sup>27</sup> Nicholas Green, ‘Proportionality and the Supremacy of Parliament in the UK’ in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 145, 146; Paul Craig, ‘Unreasonableness and Proportionality in UK Law’ in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 85, 99–100.

<sup>28</sup> Evelyn Ellis, ‘The Concept of Proportionality in European Community Sex Discrimination Law’ in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 165, 165–70.

<sup>29</sup> *Ghaidan* [2004] 2 AC 557, 605 (Baroness Hale); *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, 179 (Lord Nicholls), 193 (Lord Walker).

justified by the gains to the public. The tests of suitability and necessity prevent the government from restricting rights by the use of measures which are not well-suited or not necessary in order to achieve the government's public policy objectives. Should a court find that a measure which infringes rights is either ineffective or unnecessary, it would not be protecting rights in preference to the public interest, but rather eliminating the conflict between rights and the public interest altogether by announcing that it is possible to respect rights *and* achieve the government's goals.<sup>30</sup> By contrast, if a court finds that a measure which infringes rights is effective in achieving the government's purpose, and that there is no less restrictive way of achieving the purpose, then it does have to choose between the right and the public interest. It is this choice which is governed by the test of proportionality in the narrow sense (which I will simply call 'proportionality' from now on). Robert Alexy puts this point by saying that the tests of suitability and necessity focus on factual issues: namely, whether a measure promotes the government's goals and, if so, whether there are less restrictive ways of doing so.<sup>31</sup> The test of proportionality, by contrast, raises a normative question: do the gains to the public justify the interference with the right?<sup>32</sup>

I will argue against the widely held view that the enquiry into this normative question should take the form of a balancing exercise which requires courts to determine which of the competing considerations has more weight in the particular circumstances of the case.<sup>33</sup> I will argue that, instead of balancing rights against the public interest, courts should 'over-enforce' rights,<sup>34</sup> and downgrade the public interest arguments. In effect, this approach would give rights and the public interest different weights from the weight that they would attract on a balancing approach.

## II THE BALANCING MODEL

As T Alexander Aleinikoff explains in his classic article on balancing, the metaphor of balancing refers to theories that seek to identify, value and compare competing interests.<sup>35</sup> On these theories, '[e]ach interest seeks recognition on its own and forces a head-to-head comparison with competing interests'.<sup>36</sup> Richard

<sup>30</sup> Gardbaum, above n 3, 825–6, 849.

<sup>31</sup> Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, 2002 ed) 397–9 [trans of: *Theorie der Grundrechte*].

<sup>32</sup> *Ibid* 67–8.

<sup>33</sup> For another attack on the balancing metaphor in the context of discussing legal responses to terrorism: see Simon Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 76, 79–80; Simon Bronitt and James Stellios, 'Sedition, Security and Human Rights: "Unbalanced" Law Reform in the "War on Terror"' (2006) 30 *Melbourne University Law Review* 923, 955–6.

<sup>34</sup> I have borrowed the term 'overenforcement' from Richard H Fallon Jr, *Implementing the Constitution* (2001) 6–7. He uses it in the context of pointing out that some of the tests used by the United States Supreme Court to resolve constitutional issues go further than is required by the *United States Constitution's* meaning.

<sup>35</sup> T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943.

<sup>36</sup> *Ibid* 945.

H Fallon defends a balancing theory in the United States context.<sup>37</sup> As is well known, the *United States Constitution* contains almost no express limits on the rights that it protects,<sup>38</sup> yet it is clear that governmental goals can override constitutional rights in the US. Government can, for instance, ‘regulate even political speech ... to serve a compelling governmental interest’ and can use racial classifications for a sufficiently urgent need.<sup>39</sup> The only way to explain this, Fallon argues, is to suppose that both governmental powers and rights serve interests and that ‘the interests supporting government power [are] weighed against the interests underlying a constitutional guarantee’.<sup>40</sup>

In the European context, Alexy is the most sophisticated defender of the balancing model. His starting point is the notion of a principle.<sup>41</sup> Alexy argues that both rights and collective interests can be the subject matter of principles and that principles are ‘optimisation requirements’.<sup>42</sup> They require that the interests they protect ‘be realised to the greatest extent possible given the legal and factual possibilities’.<sup>43</sup> According to Alexy, when two principles come into conflict, the satisfaction of one must be at the cost of the other and it then becomes necessary to balance the competing interests.<sup>44</sup> He says that in such cases we need to decide which of the principles has more weight on the facts of the case.<sup>45</sup> He understands the concept of proportionality in the narrow sense as demanding such a balancing enquiry, which he sees as requiring a comparison between the ‘degree’ or ‘intensity’ of interference with a right and the ‘importance’ of satisfying the competing consideration.<sup>46</sup> He calls this the ‘Law of Balancing’, in terms of which, ‘[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other’.<sup>47</sup> Thus, on Alexy’s sliding scale approach, the more intensive the restriction, the weightier the reason for restricting it must be.

A key feature of the balancing model is the fact that it operates at the level of first-order reasons. In order to explain what I mean by this, I need to explain an important distinction Joseph Raz makes between two kinds or modes of practical reasoning.<sup>48</sup> One mode of practical reasoning involves determining what ought to be done on the balance of reasons. It is a fact of everyday life that our reasons for action often conflict. When I am deciding whether to do something — go to the cinema, say — all sorts of reasons will be relevant to this matter, some of these for going to the cinema, some against. They may derive from morality, or self-interest, or some other source. We can call these my first-order reasons.

<sup>37</sup> Richard H Fallon Jr, ‘Individual Rights and the Powers of Government’ (1993) 27 *Georgia Law Review* 343.

<sup>38</sup> Gardbaum, above n 3, 800.

<sup>39</sup> Fallon, ‘Individual Rights and the Powers of Government’, above n 37, 360.

<sup>40</sup> *Ibid* 362.

<sup>41</sup> Alexy, above n 31, 47–8.

<sup>42</sup> *Ibid* 50–1, 65.

<sup>43</sup> *Ibid* 47.

<sup>44</sup> *Ibid* 50–1.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* 67, 105.

<sup>47</sup> *Ibid* 102.

<sup>48</sup> Joseph Raz, *Practical Reason and Norms* (1975) 36.

Ordinarily, I decide what to do by assessing the relative strength of all my first-order reasons and doing whatever is supported by the strongest reason. Making such an ‘all-things-considered’ judgement on the basis of all the relevant considerations is what Raz means by determining what ought to be done on the balance of reasons.<sup>49</sup>

However, as Raz points out, sometimes people use a different mode of practical reasoning, which involves deciding what to do on the basis of second-order reasons. The most important kind of second-order reason for our purposes is what Raz calls an ‘exclusionary reason’. This is a reason to refrain from acting on one’s own view of what ought to be done on the balance of reasons.<sup>50</sup> Raz gives the example of a soldier who is ordered to do something by his commanding officer that the soldier thinks is not justified on the balance of reasons. Raz argues that the soldier may see the order as an exclusionary reason — a reason for him not to act on his own view of the balance of reasons. He will see it as excluding him, or preventing him, from taking into account relevant considerations he would otherwise have taken into account, requiring him to defer, instead, to the officer’s view of the matter.<sup>51</sup>

Raz argues that this is a genuinely different mode of practical reasoning.<sup>52</sup> Though the officer’s order does give the soldier a new first-order reason for doing the action he was ordered to perform (because one ought to obey the orders of one’s commanding officer), the reason why he performs the action is *not* because the first-order balance of reasons has been altered by the addition of the new first-order reason. It is not the case, in other words, that the soldier performs the action because of the great weight he has assigned to his commanding officer’s order as a new first-order reason, a weight which is sufficient to change his view of the balance of reasons, tipping it in favour of the action. Raz takes this to be proved by the fact that the soldier would still perform the action even if the new first-order reason were weaker than his competing reasons.<sup>53</sup> The second-order reason must therefore function by excluding consideration of all the soldier’s competing first-order reasons, leaving only the new one in the field. His competing first-order reasons have been banished from his deliberations, so that there is nothing to be balanced against the new first-order reason.<sup>54</sup> Raz calls this combination of the new first-order reason and the exclusionary reason for disregarding reasons against it, a ‘protected reason’.<sup>55</sup> A reason is protected, as Louis E Feldman explains, because it has ‘no viable opponents in the overall mix of reasons’.<sup>56</sup> When the soldier disregards his own assessment of the balance of reasons, and simply obeys the officer’s order, he treats the officer as what Raz

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 39.

<sup>51</sup> Ibid 38.

<sup>52</sup> Ibid 38, 44–5.

<sup>53</sup> Ibid 41–3.

<sup>54</sup> Ibid 42.

<sup>55</sup> Joseph Raz, *The Authority of Law* (1979) 17–18.

<sup>56</sup> Louis E Feldman, ‘Originalism through Raz-Colored Glasses’ (1992) 140 *University of Pennsylvania Law Review* 1389, 1398.

calls a ‘practical authority’ — someone whose commands are sufficient reason in and of themselves to act in accordance with them.<sup>57</sup>

As to whether this is ever justifiable, Raz thinks that there are obvious cases in which it is rational to act on exclusionary reasons in general, as well as authoritative commands in particular. We might, for instance, believe that an authority’s judgement on the merits is likely to be more reliable than our own.<sup>58</sup> If so, the authority performs a ‘service’ for us.<sup>59</sup>

It will be clear that the balancing model implicitly assumes that conflicts between rights and the public interest should be resolved by relying on the first mode of practical reasoning. Courts should assess the relative weight of these as competing first-order reasons, and resolve the conflict in favour of the stronger reason.

A further key feature of the balancing model is its exclusive focus on consequences. It takes the view that the way to choose between rights and the public interest is to weigh the consequences of protecting the right against the consequences of restricting it, with the aim of promoting the greatest balance of good over bad consequences. This is not to suggest that the model takes a narrowly utilitarian approach: it is not committed to the view that the value of different courses of action is a function only of the happiness they produce or the preferences they satisfy. It is committed, however, to the view that judges faced with conflicts between rights and the public interest should aim to promote the best overall consequences.

A final important feature of the balancing model is that it treats rights and the public interest as commensurable with each other. It assumes that there is a single scale on which the value of protecting rights and that of protecting the public interest can be measured, compared and balanced. This makes it a monistic theory — one committed to the view that there is some common coinage, or what Amartya Sen and Bernard Williams call some ‘homogenous magnitude’, in terms of which alternative courses of action can be compared.<sup>60</sup> Thus in Alexy’s view, as we have seen, the cost to a right is considered alongside the gains brought by its restriction within a single decisional calculus. And Fallon argues similarly that rights and governmental powers compete on the same plane and are weighed on the same set of scales, interests being, in his view, the common denominator or ‘mediating term’ which allows a balance to be struck between them.<sup>61</sup>

<sup>57</sup> Joseph Raz, *The Morality of Freedom* (1986) 35.

<sup>58</sup> *Ibid* 52.

<sup>59</sup> Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 214.

<sup>60</sup> Amartya Sen and Bernard Williams, ‘Introduction’ in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (1982) 1, 18.

<sup>61</sup> Richard H Fallon Jr, ‘Further Reflections on Rights and Interests: A Reply’ (1993) *Georgia Law Review* 489, 489.

## III THE REWEIGHTING APPROACH

I will argue against the three features of the balancing model described above: its assumption that rights are merely one factor to be balanced at the first-order level against other factors; its assumption that there is no reason to respect rights if the consequences of doing so are, on balance, detrimental; and its view that the value of rights and collective interests can be measured on the same scale. I want to suggest that courts confronted with conflicts between rights and the public interest should use the second, not the first mode of practical reasoning. They should treat a bill of rights as a 'practical authority', which can generate reasons to respect rights in circumstances in which judges believe that it would, on balance, be better to override them. I should make clear that Raz does not use his distinction between the two modes of practical reasoning in this context but that I hope to demonstrate its applicability.

An immediate obstacle to this claim is the fact with which we began — rights are not necessarily absolute. If rights are not necessarily absolute, it must follow that bills of rights do not exclude consideration of the government's public interest arguments. How, then, can they possess practical authority and block judges from striking the right balance between rights and the public interest, as they see it?

The answer to this question is that Raz's analysis of the second mode of practical reason needs refinement and that, once refined in this way, it becomes possible to conceptualise bills of rights as practical authorities while simultaneously accommodating the non-absolute character of rights. The refinement I have in mind is suggested by Stephen R Perry in the context of a discussion of different conceptions of precedent.

Perry begins with what he calls the weakest conception of precedent.<sup>62</sup> On this conception, a court should regard itself as bound by a previous decision decided on the balance of first-order reasons, unless convinced that the balance of reasons was wrongly assessed on the previous occasion and that the correct assessment would have led to the opposite result.<sup>63</sup> On the strongest conception of precedent, by contrast, precedents should be treated as exclusionarily binding in Raz's sense of the term: a court should regard the previous decision as disabling it from reconsidering the balance of reasons.<sup>64</sup> Perry points out, however, that these are not the only possibilities. Midway between these conceptions is a third conception, on which a court should not look upon a previous decision as *entirely* precluding it from reconsidering the underlying first-order reasons on which the previous decision was based.<sup>65</sup> However, on this third conception, the court should not depart from a previous decision unless it is satisfied that the weight of the first-order reasons supporting the opposite result is of *greater strength* 'than the weight which would otherwise be required to

<sup>62</sup> Stephen R Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 *Oxford Journal of Legal Studies* 215, 221–2.

<sup>63</sup> *Ibid* 221.

<sup>64</sup> *Ibid* 220.

<sup>65</sup> *Ibid* 222.

reach that result on the ordinary balance of reasons'.<sup>66</sup> The intuitive idea is that 'a court is bound by a previous decision unless it is convinced that there is a *strong* reason for holding otherwise'.<sup>67</sup> Perry says that this mode of practical reasoning can be characterised as 'action in accordance with a *weighted* balance of reasons'<sup>68</sup> and he explains this concept as follows:

One would be acting on this basis if one were to accept a second-order reason to give some first-order reason a greater or lesser weight than it would otherwise receive in an assessment of the ordinary balance of reasons. (By directing that a particular set of reasons, which would now be regarded as tipping the ordinary balance of reasons in favour of a given result, nonetheless has to attain a somewhat higher threshold of strength before being allowed to prevail, the ... [third] conception of precedent is, in effect, attaching to that set of reasons a lower collective weight than the one which it would ordinarily receive.)<sup>69</sup>

Perry's analysis shows that Raz's characterisation of the second mode of practical reasoning is too narrow. The two modes of practical reasoning are more accurately characterised as reasoning on the balance of reasons and reasoning on a weighted balance of reasons. When reasoning on the balance of reasons, decision-makers assign all reasons the weight which they think they actually deserve. By contrast, when reasoning on a weighted balance of reasons, some first-order reasons are artificially assigned a different weight from the weight they would ordinarily receive, and exclusionary reasons simply represent the limiting case in which a first-order reason or set of reasons has been assigned no weight at all.<sup>70</sup> Second-order reasons are therefore more accurately described as 'reweighting reasons', of which exclusionary reasons are merely one subcategory.<sup>71</sup>

I want to suggest that we should see a bill of rights as a source of second-order or reweighting reasons. Such reasons would instruct judges not to exercise their own judgement as to what the balance of reasons requires, but rather to assign a greater weight to rights and a lesser weight to the public interest than they would ordinarily think they deserve. Such an approach would acknowledge that bills of rights do not exclude consideration of the public interest, but would also build into rights adjudication a 'systematic bias' against permitting the infringement of rights.<sup>72</sup> The public interest is therefore a 'viable opponent' — as required by the non-absolute character of rights — but one operating with a handicap. I will call this the 'reweighting approach'. Whereas the balancing model sees a bill of rights as merely adding rights to the overall mix of reasons which judges are obliged to consider at the first-order level, the reweighting approach sees a bill

<sup>66</sup> Ibid.

<sup>67</sup> Ibid (emphasis in original).

<sup>68</sup> Ibid (emphasis in original).

<sup>69</sup> Ibid.

<sup>70</sup> Ibid 223.

<sup>71</sup> Stephen R Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 *Southern California Law Review* 913, 932.

<sup>72</sup> Ibid 944. Perry uses this phrase in explaining what is involved in adopting the third conception of precedent: it involves introducing a 'deliberate and systematic bias into [a judge's] practical reasoning' in favour of previous decisions about what the objective balance of reasons requires.

of rights as operating at the second-order level — as an instruction to *depart* from the weights which judges would accord if they were operating at the first-order level.

#### IV THE SUPERIORITY OF THE REWEIGHTING APPROACH

The reweighting approach may appear hard to justify. Why should judges avoid a case-by-case consideration of the strengths of the interests at stake? Why, in other words, should rights be treated as more like practical authorities or rules which should be respected and followed in at least some circumstances in which judges think that the balance of reasons indicates otherwise? How can it be morally justifiable to artificially inflate the importance of rights and downgrade that of collective interests? Is this not irrational ‘rights worship’?<sup>73</sup>

This is a powerful but not, I believe, an unanswerable challenge. It can be argued that the reweighting approach is a way of translating into practice the widely held view, defended by theorists like Ronald Dworkin and Jürgen Habermas, that rights enjoy substantial priority over collective interests. At one point Dworkin described rights as ‘trumps’ over utilitarian considerations,<sup>74</sup> although this is something of a misnomer because it is clear that he does not believe that rights must prevail over collective interests in all circumstances. He believes, rather, that they cannot be overridden except to secure the weightiest social goals,<sup>75</sup> and he argues that this is essential to our concept of rights. As he points out, we believe that a legitimate purpose, rationally pursued, is sufficient to override lesser interests, but we do not believe that rights can be overridden on a routine calculation of costs and benefits.<sup>76</sup> Therefore, although rights do not block all public interest arguments, they do block some uses of governmental power which would otherwise be reasonable.<sup>77</sup> This is because we use the concept of ‘rights’ as a marker for those interests which we think are so central to being recognised as full members of the human community that we do not expect individuals to sacrifice them merely to bring an overall benefit to the community as a whole. This, as Dworkin sees it, is the social price of rights — a heavy price which it makes sense to accept only because we believe that every person is owed respect by virtue of their common humanity.<sup>78</sup> Habermas likewise claims that rights have ‘greater justificatory force’ than ‘values’.<sup>79</sup> By this, he means that respect for rights has precedence for the most part over the pursuit of the

<sup>73</sup> See J J C Smart and B Williams, *Utilitarianism: For and Against* (1973) 10. Smart and Williams accuse rule-utilitarians of irrational ‘rule worship’ because they believe that rules should be followed even in circumstances where rule-following will not maximise utility. I have modelled the charge of rights worship on Smart and Williams’ idea of rule worship.

<sup>74</sup> Ronald Dworkin, *Taking Rights Seriously* (1977) xi.

<sup>75</sup> *Ibid* 92, 191.

<sup>76</sup> *Ibid* 191.

<sup>77</sup> *Ibid* 191–2.

<sup>78</sup> *Ibid* 198.

<sup>79</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, 1996 ed) 259 [trans of: *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des Demokratischen Rechtsstaats*].

general welfare. There is, according to him, a 'firewall', which insulates rights from interference for policy reasons.<sup>80</sup>

Frederick Schauer argues for the same position, but uses the more illuminating metaphor of 'rights as shields'.<sup>81</sup> In Schauer's view, rights are like shields or suits of armour against governmental interests. 'Wearing a suit of armor', he says,

would protect me against arrows, knives, blackjacks, fists and small bullets, and thus it is plain that wearing a suit of armor provides me with a degree of protection I would not otherwise have had. But that suit of armor does not protect me against large bore ammunition, bombs, or artillery fire and is as a result less than totally protective.<sup>82</sup>

Schauer goes on to claim that decision-makers who conceptualise rights as shields will *presumptively* but not *conclusively* ignore governmental interests.<sup>83</sup> They will be open to the possibility that the public interest might be relevant 'in a few extraordinary cases', but they will not take it into account unless 'it appears to a particularly great degree' or 'appear[s] in such a forceful way that [its] power cannot be avoided'.<sup>84</sup> The public interest will therefore be 'normally off the table and not under active consideration'.<sup>85</sup> An analogy may be drawn between rights and promises. We regard our promises as binding in all but exceptional circumstances and the thought of breaking them does not normally occur to us.

It might be wondered, however, whether there is such a large difference between the view on which rights have priority over collective interests and the balancing model. After all, the balancing model genuinely aims to do justice to the strength of the interests at stake. Since rights protect our most important interests, they will presumably not be overridden on the balancing model unless the countervailing public interest considerations are especially strong. Hence, it might be concluded that the balancing model *does* make the requisite distinction between rights and lesser interests and *does* give rights priority over collective goods. Stephen Gardbaum argues along these lines. He points out that balancing does not involve sacrificing rights for routine utilitarian reasons since, on a balancing model, only certain public policy objectives will be compelling enough to override rights.<sup>86</sup> Gardbaum writes:

it has never been suggested, for example, that economic benefit or avoiding a mere harm is a public interest objective capable in principle of overriding the right to free speech. The sort of objectives put forward are quite different and have an essential qualitative component ... The qualitative component in bal-

<sup>80</sup> Ibid 258–9.

<sup>81</sup> Frederick Schauer, 'A Comment on the Structure of Rights' (1993) 27 *Georgia Law Review* 415, 429.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid 429–30.

<sup>84</sup> Ibid 432.

<sup>85</sup> Ibid.

<sup>86</sup> Gardbaum, above n 3, 828.

ancing is that the objective must be important, pressing, or compelling, not any objective or net social benefit.<sup>87</sup>

Richard A Posner makes a similar point in the course of defending his pragmatic theory of adjudication, which, like the balancing model, takes the view that judges should focus on practical consequences when making decisions. Pragmatic adjudication, Posner points out, requires careful, informed consideration of consequences, not short-sighted, superficial analysis.<sup>88</sup>

Gardbaum is correct to say that the balancing model gives rights extra protection by comparison with lesser interests, and holds government to a higher burden in justifying their infringement. However, Dworkin, Habermas and Schauer mean more than this when they talk of the priority of rights. Though it is true that on the balancing approach the benefits have to be greater as the costs mount up, it is still a matter of comparing costs with benefits. Dworkin, Habermas and Schauer, by contrast, believe that it can be justifiable to protect rights *even when the consequences are, on balance, detrimental*. The reweighting approach is a way of giving effect to priority in this stronger sense.

Another way of getting at this difference is to say that, whereas the balancing model sees conflicts between rights, and conflicts between rights and the public interest as raising the same kind of issue and demanding the same methodology, theorists like Dworkin and Schauer take a different view. Alexy, it will be remembered, argues that balancing is necessary whenever there are 'costs', using this catch-all concept to cover all cases in which one principle comes into conflict with another principle, regardless of whether the principles protect rights or collective goods.<sup>89</sup> But for those who believe in the priority of rights, the nature of the cost makes a difference. For them, balancing is the appropriate methodology when one individual's right conflicts with another individual's right, for such a conflict is between interests of the same moral kind which enjoy the same special moral status. It therefore makes sense to decide which of the competing interests is weightier in the particular circumstances of the case, or who will suffer the greater disadvantage if their right is restricted.<sup>90</sup> But when rights conflict with the collective good, those who believe in the priority of rights hold that courts should not weigh the harm to the right-holder against the gains to the public, but should rather give substantial (though not necessarily absolute) priority to the right-holder's claims. Again, an analogy can be drawn with making a promise: although we do not regard a promise as *absolutely* binding, we do not in the *normal course of events* weigh the effects of breaking a promise against the potential countervailing considerations with a view to assessing whether they tip the balance. This kind of reasoning is different from that involved in 'weighing' or 'balancing'. We keep our promises as a matter of principle — based on the kind of person we wish to be — rather than by refer-

<sup>87</sup> Ibid. See also Matthias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574, 591–2.

<sup>88</sup> Judge Richard A Posner, *Law, Pragmatism, and Democracy* (2003) 63.

<sup>89</sup> See Alexy, above n 31, 50–1.

<sup>90</sup> See, eg, Dworkin, *Taking Rights Seriously*, above n 74, 193–4: in cases of conflict between the rights of members of society as individuals, government is obliged to protect the more important right at the cost of the less important one.

ence to their practical value or overall beneficial effects, and we break them only when it is glaringly obvious that that is the right thing to do.

*A Rejecting the Monist and Consequentialist Assumptions of the Balancing Model*

Priority of this kind can be defended in three ways. First, it can be defended by rejecting the monist and consequentialist assumptions of the balancing model. The balancing model, as we have seen, regards rights and the public interest as competing on the same plane. The opposite view is the pluralist view that there is a fundamental and qualitative difference between ‘the right’ (the realm of justice) and ‘the good’ (the realm of consequences).<sup>91</sup> On this view, rights and the public interest are incommensurable — the wrongness of violating rights is not measured in the same terms as the social gains that might be brought from violating them.<sup>92</sup> Defenders of pluralist moral theories, such as Thomas Nagel and Charles Taylor, argue that the source of value is not unitary. Values such as rights and the general welfare come, according to Nagel, ‘from two different points of view, both important, but fundamentally irreducible to a common basis’.<sup>93</sup> This does not mean that conflicts between these values have no solution. But, as Taylor says, it does mean that there can be no ‘single-consideration procedure’ for measuring them against each other.<sup>94</sup>

Most pluralist theories also reject the consequentialism of the balancing model — its assumption that consequences are all that matter. They usually take the deontological view that we are under certain obligations by virtue of their intrinsic merit, rather than by virtue of their good consequences. Deontologists further believe that in at least some circumstances it is more important to respect these obligations than to maximise overall good. Such obligations can therefore be morally binding despite the fact that the consequences are, on balance, detrimental.<sup>95</sup> This is what John Rawls means when he claims that the right is ‘prior to’ the good.<sup>96</sup>

This standpoint is heavily influenced by Kant’s moral philosophy, especially his views about the importance of human dignity, and the need to treat individuals as ‘ends in themselves’ if we are to show respect for their equal dignity.<sup>97</sup>

<sup>91</sup> John Rawls, *A Theory of Justice* (1971) 446–52.

<sup>92</sup> Frederick Schauer, ‘Commensurability and Its Constitutional Consequences’ (1994) 45 *Hastings Law Journal* 785, 790.

<sup>93</sup> Thomas Nagel, *Mortal Questions* (1979) 133.

<sup>94</sup> See Charles Taylor, ‘The Diversity of Goods’ in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (1982) 129, 143.

<sup>95</sup> See, eg, Charles Fried, *Right and Wrong* (1978) 9. A prominent deontologist, he explains that: ‘The goodness of the ultimate consequences does not guarantee the rightness of the actions which produced them’: at 9. See also Alexy, above n 31, 87–8. Although Alexy claims that principles are deontological, he does not use the term ‘deontological’ in the way in which I have used it, namely, to describe obligations which exist independently of their consequences. Alexy uses it in a much wider sense. For him, principles are deontological merely in virtue of imposing ‘requirements’.

<sup>96</sup> Rawls, above n 91, 31–2.

<sup>97</sup> H J Paton, *The Categorical Imperative: A Study in Kant’s Moral Philosophy* (1971) 154, 172, 176.

Rights are seen as a way of showing such respect. On the deontological view, there is therefore an independent, intrinsic reason to respect rights over and above whatever reason to respect them exists on the balancing model. This does not mean they can never be infringed, but it does mean that there is a reason against infringing them which has to be added to whatever consequential or practical reasons may otherwise exist. This is because there is not just the aggregate of consequences to consider, but also the more intangible insult to human dignity created by the invasion of rights.

It is this conception of rights that the reweighting approach reflects and I have explained how it can be defended by reference to deontological theory. But there are two other ways to defend it which do not depend on the truth of deontological assumptions — assumptions which the balancing model rejects. I now turn to these arguments.

### B *The Counterproductive Nature of the Balancing Model*

The second way of defending the reweighting approach, and the priority which it gives to rights, involves agreeing with the balancing model's premise that the goal of courts should be to bring about the best consequences on the balance of reasons, while disagreeing with the balancing model about the best strategy to achieve that goal. The balancing model seeks to achieve this objective by instructing judges to balance all the relevant considerations. But the more reliable way to ensure that rights are infringed only where the consequences are on balance beneficial might be to eschew a balancing approach. This would provide a reason to adopt the reweighting approach from the perspective of the balancers themselves. How might this be?

It might be the case that the balancing approach is not well-suited, as a decision-making procedure, to achieving its goals in the real world context of rights adjudication. This possibility can be elucidated by drawing on R M Hare's valuable work on the possible utilitarian reasons to inculcate in individuals a disposition to follow rules, even in situations where following a rule might seem to yield the worse outcome from the utilitarian point of view. As Hare points out, accurately determining what course of action will maximise happiness might be a possibility for archangels. However, ordinary, imperfect and inadequately informed human beings are likely to go wrong in a variety of ways if they try to maximise happiness on a case-by-case basis.<sup>98</sup> Adopting such a case-by-case or direct utilitarian decision-making procedure will therefore lead to frequent failures to achieve utilitarian goals. Of course, if individuals virtually always follow rules, making exceptions only in what Hare calls 'highly unusual' situations, there will also be occasions on which they fail to achieve utilitarian goals.<sup>99</sup> However, in the whole scheme of things and in the long run, Hare believes that utilitarian goals are likely to be better served indirectly by follow-

<sup>98</sup> R M Hare, 'Ethical Theory and Utilitarianism' in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (1982) 23, 32.

<sup>99</sup> *Ibid* 35–6.

ing a non-utilitarian strategy of rule-following than by directly attempting to determine the right outcome on a case-by-case basis.<sup>100</sup>

Likewise, in an ideal world of infallible decision-makers with perfect information, the goals of the balancing model would no doubt be achieved by charging judges with the task of assessing the relative strength of rights against the competing public interest arguments. But in the real world, this might be a counterproductive strategy, for it might well be the case that judges who attempt to calculate the costs of infringing rights against the social gains will frequently arrive at the wrong answer. In fact, their decisions might match the objective balance of reasons less often than those of judges who operate with the reweighting approach. Of course, on occasion, the reweighting approach will also lead to decisions which fail to achieve the goals of the balancing model. But it is quite possible that judges who decide to give rights more weight than they would ordinarily assign them may, overall and in the long run, do better by the standards of the balancing approach itself than judges who try to make the best all-things-considered decisions.

This is in part because the assessment of the relative strength of the interests at stake is an uncertain, complex and speculative matter, as attested to by the frequent disagreements among judges on these questions. It is surprising, as Steven Greer observes, that ‘jurists have uncritically endorsed the practice [of balancing] in spite of the fact that courts have generally been very reluctant to reveal how it occurs’.<sup>101</sup> More importantly, judges might be likely to go *systematically* wrong in attempting to assess the relative costs and benefits of infringing rights. Bills of rights exist to protect individuals from the political pressures of the moment, but judges are not archangels, immune to popular sentiment and fear. They might therefore be subjectively predisposed to underestimate the strength of rights when they come into conflict with governmental goals, especially in areas like preventing crime and protecting national security. If so, the reweighting approach would neutralise any in-built tendency to defer to the government’s public interest arguments. So if we consider the purpose of a bill of rights — which is to constrain the exercise of governmental power by singling out certain of our interests for special protection from the pursuit of social goals — the more reliable strategy for realising that purpose might be the reweighting, not the balancing, approach. If so, judges should adopt for instrumental reasons the conception of rights on which they enjoy the kind of priority accorded to them by deontologists.<sup>102</sup>

<sup>100</sup> Ibid 31–6. See also Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991) 149–55. Schauer provides a similarly indirect defence of the benefits of rule-following.

<sup>101</sup> Steven Greer, ‘“Balancing” and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate’ (2004) 63 *Cambridge Law Journal* 412, 412. See also Aleinikoff, above n 35, 982.

<sup>102</sup> For an instrumental justification of treating rights and the public interest as incommensurable: see Schauer, ‘Commensurability and Its Constitutional Consequences’, above n 92, 797–9. Schauer argues that a decisional framework in which individual rights and public interest claims are seen as commensurable is likely to result in the underprotection of rights, in which case there may be strategic reasons to treat these claims as incommensurable.

C *The Blurring of Law and Politics on the Balancing Model*

The third way to defend the priority given to rights by the reweighting approach, once again without presupposing the truth of a deontological moral framework, is to argue that even if courts could be relied on accurately to balance rights against the public interest, it is not their job to do so. Politicians are politically accountable and it is therefore legitimate for them to respond to the full range of moral and political considerations. But it is plausible to think that the legitimacy of the courts depends in part on law being more narrowly confined, so as to decrease the arbitrary influence of judges' personal moral and political views on their decisions. Schauer describes this conception of the law as one on which it is a 'limited domain'.<sup>103</sup> He goes on to explain that on the limited domain conception, legal argument and judicial decision-making are seen as 'constrained by norms of decision that make considerations of morality, policy and politics that would otherwise be part of a wise decision unavailable to the legal system'.<sup>104</sup>

In fact, Schauer's elaboration on the idea of a limited domain is too narrow. The norms of decision to which he refers are second-order norms of the kind discussed previously. As we saw, such norms are not necessarily norms which make certain considerations *unavailable* in the decision-making process. Rather, they make such considerations *less* available than they would otherwise be. Provided that judges treat such considerations as *normally* off the table, law would still be a limited domain compared with politics. And this is, of course, precisely what the reweighting approach prescribes in the specific context of rights adjudication.

The reweighting approach is therefore able to respond to the common objection that bills of rights blur the distinction between legal and political reasoning by requiring judges to resolve highly charged political controversies and freeing them to inject their personal moral and political views into the adjudicative process. In placing artificial constraints on judicial decision-making in the area of bills of rights adjudication, the reweighting approach makes it less vulnerable to this complaint. Although bills of rights require judges to engage in moral and political reasoning — and perhaps particularly when making choices between rights and the public interest — the reweighting approach puts a brake on this reasoning. It prohibits judges from engaging in finely-tuned, practical enquiries as to the relative merits of the considerations on both sides — enquiries which would inevitably involve speculative and subjective reasoning. Instead, it prescribes that judges should largely disregard what would ordinarily be regarded as valid policy reasons for infringing rights. The result will be that courts will allow infringements only when the need to do so is very obvious, substantially diminishing the subjectivity in the process.

On the balancing model, by contrast, judges are required to attend in an open-ended way to all the moral, political and factual considerations bearing on

<sup>103</sup> Frederick Schauer, 'The Limited Domain of the Law' (2004) 90 *Virginia Law Review* 1909, 1909.

<sup>104</sup> *Ibid.*

the right thing to do, as they see it, and therefore to play a role which is no different in kind from the legislative role. It is no accident, as Aleinikoff points out, that balancing became popular at a time when realism was the dominant jurisprudential theory in the US — a theory on which law ought to be viewed instrumentally and on which judges both do and should play a legislative role.<sup>105</sup> Defenders of balancing, such as Posner, concede this.<sup>106</sup> On Posner's pragmatic account of adjudication, the ultimate criterion is 'reasonableness'.<sup>107</sup> Judges should try to make the decision that is reasonable in the circumstances, all things considered, and there is therefore, in his view, 'no general analytic procedure distinguish[ing] legal reasoning from other practical reasoning'.<sup>108</sup>

In prescribing a different mode of practical reasoning for judges — one which gives their subjective views a lesser role — the reweighting model therefore places appropriate and desirable constraints on judicial reasoning and helps to preserve the distinction between law and politics. But there is also a second way in which it can be argued that the reweighting model requires judges to reason in a distinctively legal way. This is by virtue of the fact that it forces judges to prioritise principles over consequences in dealing with conflicts between rights and the public interest. It can be argued that judges, by virtue of their independence and impartiality, are particularly well-suited to decide matters in a principled way, and that a disposition to do so is a central characteristic of the judicial role. The decision-making of politicians, by contrast, is necessarily more responsive to transient pressures and pragmatic considerations. We see courts, as Dworkin points out, as a 'forum of principle'.<sup>109</sup> We believe that judges are under a duty to defend more fundamental and permanent principles than are likely to emerge from electoral politics.<sup>110</sup> If so, the presumption in favour of rights, which the reweighting approach imposes on judges, can be justified by reference to the special role of courts in our legal system. Theirs is a role which *ought* to bring with it a distinctive, rights-protective perspective.<sup>111</sup>

This proposition should be found plausible regardless of which view is adopted in the debate about the correct way to approach bills of rights — such as the *Human Rights Act 2004* (ACT), the *Victorian Charter* and the *Human Rights Act 1998* (UK) c 42 — which do not allow the courts to invalidate legislation but rely on two other remedial measures. The first places an obligation on courts to interpret legislation in a manner consistent with rights, to the extent that it is 'possible' to do so.<sup>112</sup> The second gives courts the power to declare legislation

<sup>105</sup> Aleinikoff, above n 35, 956, 958.

<sup>106</sup> Posner, above n 88, 369.

<sup>107</sup> *Ibid* 59, 65.

<sup>108</sup> *Ibid* 60.

<sup>109</sup> This is a chapter title in Ronald Dworkin, *A Matter of Principle* (1985) ch 2.

<sup>110</sup> In Denise Meyerson, 'State and Federal Privative Clauses — Not So Different after All' (2005) 16 *Public Law Review* 39, I argue that this is also true at common law, the common law being the repository of rights-based principles which constrain the exercise of governmental power.

<sup>111</sup> See Douglas W Vick, 'Deontological Dicta' (2002) 65 *Modern Law Review* 280, 286–7.

<sup>112</sup> *Victorian Charter* s 32(1); *Human Rights Act 2004* (ACT) s 30(1); *Human Rights Act 1998* (UK) c 42, s 3.

incompatible with human rights,<sup>113</sup> or incapable of being interpreted consistently with human rights,<sup>114</sup> but without affecting its validity or enforceability.<sup>115</sup>

As Tom Hickman has noted, there is controversy about the correct way to approach such bills. One school of thought takes the view that the prime remedial measure lies in the first of these provisions. It takes an expansive view of this provision, holding that courts should make maximum use of their ‘creative’ power to read legislation that is seemingly rights-incompatible in a manner that makes it rights-compatible, even if the legislation is not ambiguous and even if the resulting interpretations are linguistically strained.<sup>116</sup> The more broadly one reads provisions conferring interpretative powers of this kind, the more difficult it is for Parliament to pass laws which breach human rights. On the broadest reading, the only limit on a ‘possible’ interpretation is if the legislation expressly contradicts that interpretation.<sup>117</sup>

At the other end of the spectrum is the view that the courts should resist stretching their interpretative powers too far to correct defects in the law, because statutory bills of rights are primarily intended to provide a way for courts to participate in human rights debates in collaboration with the other branches of government. On this view, the declaration of incompatibility is the key provision, because it is the means whereby courts may raise arguments of fundamental principle with the political branches of government, while leaving it up to them whether to amend the legislation which, according to the court, breaches human rights. The assumption underlying this view is that courts should not assume that they have the monopoly on the meaning of human rights. Human rights, it is said, are inescapably contested and the political branches of government are entitled to their own, equally reasonable interpretations of these matters.<sup>118</sup>

This view does not imply, however, that the courts should whitewash legislative projects by accepting too readily that they are not a threat to human rights. On the contrary, if one believes that judges are not the source of the truth on human rights, then one should encourage them to play their distinctive rights-protecting role to the maximum. Thus Danny Nicol — who defends the view that courts should not have the final word on human rights issues — argues at the same time that judges should make maximum use of the power to declare legislation incompatible with human rights. For declarations of incompatibility:

<sup>113</sup> *Human Rights Act 2004* (ACT) s 32; *Human Rights Act 1998* (UK) c 42, s 4.

<sup>114</sup> *Victorian Charter* s 36.

<sup>115</sup> *Victorian Charter* s 36(5)(a); *Human Rights Act 2004* (ACT) s 32(3)(a), (b); *Human Rights Act 1998* (UK) c 42, ss 3(2)(b), (c), 4(6)(a).

<sup>116</sup> Tom Hickman, ‘Constitutional Dialogue, Constitutional Theories and the *Human Rights Act 1998*’ [2005] *Public Law* 306, 310–11.

<sup>117</sup> Aileen Kavanagh, ‘The Elusive Divide between Interpretation and Legislation under the *Human Rights Act 1998*’ (2004) 24 *Oxford Journal of Legal Studies* 259, 276. The *Victorian Charter* and the *Human Rights Act 2004* (ACT) may constrain the courts’ interpretative power more than the *Human Rights Act 1998* (UK) c 42 by insisting that a rights-consistent interpretation must be consistent with the purpose of the legislation: *Victorian Charter* s 32(1); *Human Rights Act 2004* (ACT) s 30(2). It remains to be seen, however, how this stricture will be interpreted: see Simon Evans and Carolyn Evans, ‘Legal Redress under the *Victorian Charter of Human Rights and Responsibilities*’ (2006) 17 *Public Law Review* 264, 268–9.

<sup>118</sup> Hickman, above n 116, 307–9.

enable the judge to throw the ball back into Parliament's court, and the fact that Parliament shoulders responsibility for whatever happens next should embolden judges to condemn without inhibition what they perceive as human rights violations.<sup>119</sup>

There are obviously large differences between these views — the one on which courts should make maximal use of their interpretative mandate and the other on which they should rely primarily on their power to declare legislation incompatible with human rights. I think it will nevertheless be clear that on both of these views, the constitutional role of the courts is not to try to stand in the legislature's shoes or to be more 'legislative-minded than the legislature', to adapt Lord Atkin's phrase in *Liversidge v Anderson*.<sup>120</sup> Rather, courts should adopt a stance protective of rights. If so, the reweighting approach is more in accord with our views about the principled nature of the judicial task than the balancing model.

#### V THE CASE OF *MARPER*

I argued in the previous Part that judges who attempt to balance rights against the public interest might be systematically disposed to strike the balance in the wrong place, as judged by the standards of the balancing approach itself. This is because the gains to the public are frequently salient and immediate, whereas the harmful consequences of restricting a right are often less obvious and more remote. Judges might as a result be led to underestimate the damage done to rights-holders by rights-restricting measures. I turn now to discuss the UK case of *R v Chief Constable of South Yorkshire; Ex parte LS; Ex parte Marper* ('*Marper*')<sup>121</sup> which illustrates this danger in my view. Obviously, I do not mean to suggest that an empirical claim of the kind I have described can be conclusively supported with only one example. *Marper* is nevertheless instructive in demonstrating how the government's public interest arguments can blind judges to what are really very serious inroads into rights.

*Marper* involved a challenge to s 64(1A) of the *Police and Criminal Evidence Act 1984* (UK) c 60, amended by s 82 of the *Criminal Justice and Police Act 2001* (UK) c 16. The section was amended to allow fingerprints and DNA samples taken from individuals suspected of having committed 'recordable' offences,<sup>122</sup> but who are not prosecuted or who are subsequently acquitted, to be retained indefinitely 'after they have fulfilled the purposes for which they were taken', provided that they 'shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution'.<sup>123</sup> The samples are used to construct DNA profiles

<sup>119</sup> Danny Nicol, 'Law and Politics after the *Human Rights Act*' [2006] *Public Law* 722, 747.

<sup>120</sup> Lord Atkin accused the majority of being more executive-minded than the executive in his Lordship's dissenting judgment in *Liversidge v Anderson* [1942] AC 206, 244.

<sup>121</sup> [2004] 4 All ER 193.

<sup>122</sup> Recordable offences cover most criminal offences including offences under the *Public Order Act 1986* (UK) c 64. See Mairi Levitt and Floris Tomasini, 'Bar-Coded Children: An Exploration of Issues around the Inclusion of Children on the England and Wales National DNA Database' (2006) 2 *Genomics, Society and Policy* 41, 41.

<sup>123</sup> *Police and Criminal Evidence Act 1984* (UK) c 60, s 64(1A).

which are used in 'speculative searches' for matches with samples from crime scenes in the same way that data from convicted criminals are used.<sup>124</sup>

The principal question considered by the House of Lords was whether s 64(1A) was compatible with the privacy right and right to non-discrimination contained in arts 8 and 14 of sch 1 to the *Human Rights Act 1998* (UK) c 42.<sup>125</sup> A separate question related to the policy of the Chief Constable to retain, save in exceptional circumstances, fingerprints and samples of acquitted individuals.<sup>126</sup> The question was whether the policy, which was in practice a blanket policy, was in breach of arts 8 and 14 of the Act.

The provision and the policy had been challenged by two people. S was an 11-year old boy, charged with the offence of attempted robbery, who had no previous convictions, cautions or warnings. Following a trial, he was acquitted of the charge. Marper was a man of good character who was arrested and charged with harassment of his partner. The case was discontinued, however, after his partner became reconciled with him. In both cases, the police refused to destroy the fingerprints and samples which had been taken from the suspects, adhering to the Chief Constable's policy.

Somewhat surprisingly, four of the five Law Lords found that the placing of the appellants' DNA profiles on the National DNA Database, and the retention of their fingerprints and DNA samples, did not contravene their right to respect for their private life under art 8(1). Lord Steyn, who delivered the main judgment, made much of the distinction between, on the one hand, taking fingerprints and DNA samples and using information derived from them, and, on the other hand, retaining, storing and keeping samples.<sup>127</sup> Taking samples, his Lordship conceded, involves an interference with privacy, and using them in certain ways could conceivably also involve interference, but retaining samples poses no such threat.<sup>128</sup> Nor was Lord Steyn concerned about the possible misuse of retained samples for purposes unrelated to the prevention or detection of crime.<sup>129</sup>

Only Baroness Hale took the view that, regardless of whether they can be justified, all of the following constitute an interference by the state in a person's right to respect for their private life: the taking of fingerprints and samples; the deriving of information from samples; the storage of samples and information; and the use of either samples or information for some particular purpose.<sup>130</sup> This is because DNA samples are taken or kept for the information they contain and, as Baroness Hale pointed out, the exercise of control over information about ourselves is an essential aspect of privacy,<sup>131</sup> '[t]here ... [being] little, if anything, more private to the individual than the knowledge of his genetic make-up'.<sup>132</sup>

<sup>124</sup> *Police and Criminal Evidence Act 1984* (UK) c 60, s 63A.

<sup>125</sup> *Marper* [2004] 4 All ER 193, 203 (Lord Steyn).

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid* 203–5.

<sup>128</sup> *Ibid* 204.

<sup>129</sup> *Ibid* 208.

<sup>130</sup> *Ibid* 215.

<sup>131</sup> *Ibid* 216.

<sup>132</sup> *Ibid.*

Insofar as the issue of discrimination was concerned, the appellants complained that the legislation discriminated in its effect on the right to privacy between them and other legally innocent people.<sup>133</sup> It allowed the police to keep their profiles and samples but not those of other members of the unconvicted population who happened not to be caught up in a criminal investigation.<sup>134</sup> Lord Steyn conceded that they had been differently treated from other members of the unconvicted public, but his Lordship found that the difference in treatment was not on a ground analogous to any of the expressly proscribed grounds listed in art 14, and that there had therefore been no breach.<sup>135</sup> Lord Carswell agreed with Lord Steyn's conclusion but gave a different reason. His Lordship said that the appellants had not been treated differently from anyone else who had had their fingerprints and bodily samples lawfully taken.<sup>136</sup>

Although much more could be said about the view of the majority that there had been no infringement of the rights to privacy and non-discrimination, I will not pursue this matter further because my interest is not in whether the rights were breached. It is rather in the judges' approach to the issue of proportionality: if there had been a breach of the rights, was the burden on the right-holder justified by the public interest benefits? Three of the Law Lords expressed a view on this matter.

Lord Steyn held that even if the retention of the samples did constitute an interference with private life, such retention would in any event be justified under art 8(2). His Lordship's starting point was the observation that the legislation 'must be approached with due deference to a policy decision made by Parliament'.<sup>137</sup> Stressing the legitimate aim of the legislation and the enormous benefits to the criminal justice system of an expanded national DNA database in the fight against crime, his Lordship downplayed the harm to the individual. His Lordship remarked that the retention and use of fingerprints and samples '[do] not affect the appellants unless they are implicated in a future crime, by a DNA sample found at the scene'.<sup>138</sup>

Baroness Hale agreed with Lord Steyn that the retention of the samples could be justified, saying this was 'readily done'.<sup>139</sup> In this regard, Baroness Hale thought it sufficient merely to state that:

the whole community, as well as the individuals whose samples are collected, benefits from there being as large a database as it is possible to have. The present system is designed to allow the collection of as many samples as possible and to retain as much as possible of what it has. The benefit to the aims of accurate and efficient law enforcement is thereby enhanced.<sup>140</sup>

<sup>133</sup> *Ibid* 203 (Lord Steyn).

<sup>134</sup> *Ibid*.

<sup>135</sup> *Ibid* 213.

<sup>136</sup> *Ibid*.

<sup>137</sup> *Ibid* 209.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* 218.

<sup>140</sup> *Ibid*.

In similar vein, Lord Brown noted ‘how very clear a case this seems to me to be’,<sup>141</sup> stating that he found it ‘difficult to understand why anyone would object to the retention of their profile (and sample) on the database’,<sup>142</sup> given the fact that the database would be used for the detection and prosecution of crime. ‘The more complete the database’, his Lordship said, ‘the better the chance of detecting criminals’.<sup>143</sup> The only ‘logical basis’ for objecting to the retention of one’s sample would be the illegitimate one that ‘it will serve to increase the risk of the person’s detection in the event of his offending in the future’.<sup>144</sup>

As far as the justifiability of any discrimination was concerned, Lord Steyn held that even if there had been a breach of art 14, the breach could be justified. In this regard his Lordship stated merely that the legislation ‘represents a measured and proportionate response to the legislative aim of dealing with serious crime’, this conclusion being supported by the need ‘to approach with due deference the policy decision made by Parliament in enacting s 64(1A) in the fight against serious crime’.<sup>145</sup>

I suggest that the Law Lords in *Marper* significantly underestimated the disproportionality between the harm done to the right-holder and the social benefits. This is most striking in the case of Baroness Hale, who thought that the storing of the samples and fingerprints was a significant intrusion on the privacy of the appellants. One would have expected from her, at least, more careful attention to the issue of whether the intrusion was justified, but her consideration of the matter was, in fact, the most exiguous. She made no attempt to consider whether the interference with the right to respect for private life was disproportionate in relation to the social benefits. Instead she focused only on the benefits of an expanded database.<sup>146</sup>

To the extent that the other Law Lords did attend to these questions, their treatment of them was unsatisfactory. All of the Law Lords accepted somewhat uncritically the government view that DNA evidence is of unprecedented utility in criminal investigations. No mention was made of the view of some experts that the National DNA Database Expansion has not resulted in the expected improvement in detection rates.<sup>147</sup> Furthermore, to the extent that Lords Steyn and Brown considered the burden imposed on the individual, both understated it, taking the sanguine view that the only people who might be harmed by the retention of their profile and samples are those who are worried about the increased risk of their being detected should they commit an offence in the future. This is unconvincing for the following reasons.

<sup>141</sup> Ibid 219.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid 220.

<sup>144</sup> Ibid 219.

<sup>145</sup> Ibid 213.

<sup>146</sup> Ibid 218.

<sup>147</sup> See Carole McCartney, ‘The DNA Expansion Programme and Criminal Investigation’ (2006) 46 *British Journal of Criminology* 175, 182–3.

First, as Charles Bourne points out, many people would feel disquieted at the thought that police investigations may start with them.<sup>148</sup> GeneWatch UK notes similarly that expanding the database puts increasing numbers of people on a permanent ‘list of suspects’, even if they have never been charged or convicted of a crime.<sup>149</sup>

Secondly, DNA profiling is not infallible. Mistakes may be made and police officers may behave unethically.<sup>150</sup> DNA material may, for instance, be planted to implicate a suspect. A discussion paper by the Law Reform Commission of Ireland, concerning a proposal to establish a national DNA database, mentioned this possibility, as well as various other possible sources of error in matching profiles on the database to samples from crime scenes. Such errors might lead to wrongful convictions.<sup>151</sup> Two months after the judgment in *Marper*, Sir Alec Jeffreys, the scientist who invented DNA matching, warned about the dangers of the huge expansion of the DNA database, and the use of just 10 different DNA markers to distinguish between individuals, saying that it could lead to miscarriages of justice.<sup>152</sup>

Thirdly, it may be even more difficult to justify storing the data of unconvicted juveniles as a proportionate response to the problem of crime. A comparison of *Marper* with a Canadian case, *R v RC*,<sup>153</sup> is instructive in this regard. *R v RC* dealt with a 13-year old boy, a first time offender, who had stabbed his mother in the foot with a pen after an argument and had been convicted of assault with a weapon. Under the Canadian *Criminal Code*, if an individual is found guilty of assault with a weapon, the trial court must make an order permitting DNA samples to be taken from the offender unless this would be ‘grossly disproportionate to the public interest in the protection of society and the proper administration of justice’.<sup>154</sup>

Observing that the taking and retention of a DNA sample is a ‘grave intrusion on the subject’s right to personal and informational privacy’,<sup>155</sup> the majority of the Supreme Court of Canada held that the principles and purposes of youth criminal justice legislation should inform the application to young offenders of the DNA provisions of the *Criminal Code*.<sup>156</sup> Their Honours took the view that protecting the privacy interests of young persons convicted of criminal offences does not run counter to the public interest, but actually serves it, because it increases their chances of rehabilitation and therefore contributes to the

<sup>148</sup> Charles Bourne, ‘Retaining Fingerprints and DNA Samples’ (2002) 152 *New Law Journal* 1693, 1697.

<sup>149</sup> GeneWatch UK, *Submission to the Home Affairs Committee Inquiry ‘A Surveillance Society?’* (26 April 2007) Genewatch.org <<http://www.genewatch.org/sub-539478>>.

<sup>150</sup> See Bourne, above n 148, 1697; see also McCartney, above n 147, 188–90.

<sup>151</sup> See Andrew Roberts, ‘Privacy and the DNA Database’ [2005] 4 *European Human Rights Law Review* 373, 383.

<sup>152</sup> Noticeboard, ‘Retention of DNA Samples after Acquittal’ (2005) 9 *International Journal of Evidence and Proof* 67, 67–8.

<sup>153</sup> *R v RC* [2005] 3 SCR 99. See also Nick Taylor, ‘Genes on Record — One Size Fits All?’ (2006) 156 *New Law Journal* 1354, 1355.

<sup>154</sup> *Criminal Code*, RSC 1985, c 46, s 487.051(2).

<sup>155</sup> *R v RC* [2005] 3 SCR 99, 115 (Fish J for McLachlin CJC, Major, Binnie and Deschamps JJ).

<sup>156</sup> *Ibid* 114, 118 (Fish J for McLachlin CJC, Major, Binnie and Deschamps JJ).

long-term protection of society.<sup>157</sup> The public interest concerns to which the Supreme Court of Canada alluded are, of course, even stronger in the case of those juveniles who should never have come under suspicion in the first place.

Finally, there is the fear that scientific advances might present the opportunity for stored DNA samples to be misused by the government. In order to understand this concern, it is necessary to understand the difference between the physical samples and the profiles obtained from them and held on a computer. By contrast with the profiles, the samples potentially contain much more personal genetic information about individuals than is needed for identification purposes, and it is likely that we will be able to access more of this information in the future. It might, for instance, become possible to deduce from a person's DNA sample that they have a genetic predisposition to violent behaviour. Yet it is not necessary to retain the samples indefinitely in order to identify people who are involved in crime, the profiles being sufficient for this purpose. It is the absence of any obvious reason to store the samples which leads to concerns about the use to which they might be put in the future.<sup>158</sup>

Yet, in response, Lord Steyn said merely that fears about the future misuse of retained samples are not relevant to their contemporary use in connection with the detection and prosecution of crime, and that if such possibilities should ever materialise they could be dealt with at that time.<sup>159</sup> Lord Brown was similarly dismissive, saying: 'Sufficient unto the day is the evil thereof'.<sup>160</sup> Neither addressed the point that the only reason to retain the samples is for the potential information over and above identification that they contain about individuals,<sup>161</sup> and both trivialised the widely shared disquiet about samples being exploited for this purpose.<sup>162</sup>

It goes without saying that DNA is a valuable tool in tackling crime. But it seems that it was a one-sided focus on the public benefits of a greatly expanded database which blinded the members of the House of Lords in *Marper* to the extent of the inroads which the legislation makes on human rights. If the public interest in a greatly extended database were as conclusive as the Law Lords thought, regardless of the fact that it includes people who have been mistakenly caught up in a criminal investigation and who are no more likely than other members of the public to offend in the future, then it would be justifiable for the government to force *all* citizens to give samples, to indefinitely retain them, and to enter their profiles on a DNA database. It is difficult to believe that this could be the case. The interference with privacy would surely outweigh the public interest, strong though it undoubtedly is, in detecting and prosecuting crime.

I conclude that the House of Lords in *Marper*<sup>163</sup> underestimated the extent to which the government's measures interfered with human rights. I also suggest

<sup>157</sup> Ibid 115 (Fish J for McLachlin CJC, Major, Binnie and Deschamps JJ).

<sup>158</sup> GeneWatch UK, above n 149.

<sup>159</sup> *Marper* [2004] 4 All ER 193, 207.

<sup>160</sup> Ibid 220.

<sup>161</sup> Allison Clare, 'House of Lords — Retention of Fingerprints and DNA Samples: Compatibility with *European Convention on Human Rights*' (2004) 68 *Journal of Criminal Law* 481, 483.

<sup>162</sup> *Marper* [2004] 4 All ER 193, 208 (Lord Steyn), 220 (Lord Brown).

<sup>163</sup> [2004] 4 All ER 193.

that if the judges had adopted the reweighting approach and made their primary focus the rights at stake rather than the competing interests which were ‘in the balance’, their Lordships would have been more likely to achieve the goal of the balancing model, namely, that of promoting the best overall consequences on the balance of reasons. *Marper* therefore illustrates some of the difficulties in performing the complex empirical calculations required by the balancing approach. Such difficulties may be so endemic as to make the reweighting approach the more attractive decision-procedure, not only for those who accept a deontological moral framework, but even for those who believe that the right course of action is that which produces the greatest balance of good over bad results.

#### VI THE CASE OF *GHAIDAN*

I turn now to contrast *Marper* with the case of *Ghaidan*.<sup>164</sup> In my view, this case exemplifies the virtues of an anti-balancing approach. *Ghaidan* involved a discrimination challenge to para 2(2) of sch 1 to the *Rent Act 1977* (UK) c 42. Juan Antonio Godin-Mendoza and Hugh Wallwyn-James had lived together in a stable homosexual relationship since 1972. In 1983 they moved into a flat in which they lived until the latter’s death. Wallwyn-James had been a protected tenant of the flat. Under the *Rent Act 1977* (UK) c 42 as originally enacted, the surviving spouse of the original tenant was entitled to succeed to a protected tenancy as a statutory tenant. In 1988, para 2(2) extended this protection to a person who was living with the original tenant ‘as his or her wife or husband’. The question in *Ghaidan* was whether such differentiation between cohabiting heterosexual and cohabiting same-sex couples was compatible with the latter’s *European Convention* right to non-discrimination. If this was not the case, was it possible for the Court to read the relevant provision in a way which eliminated the unlawful discrimination?<sup>165</sup>

It was common ground that art 14 of the *European Convention* was engaged. Although sexual orientation is not expressly mentioned as a prohibited ground of discrimination in art 14, it is accepted as such by the European Court of Human Rights.<sup>166</sup> Furthermore, although art 14 prohibits discrimination only in relation to the exercise of the other *European Convention* rights, the relevant provision of the *Rent Act 1977* (UK) c 42 fell within the ambit of the art 8 right to respect for a person’s home.<sup>167</sup> This therefore triggered art 14.

The only question, therefore, was whether different treatment of same-sex couples in respect of succession to protected rent tenancy could be justified. Did it have a legitimate aim and, if so, was the aim important enough to justify the

<sup>164</sup> [2004] 2 AC 557.

<sup>165</sup> Although this was a dispute between private individuals, not one between an individual and a public authority, the *Human Rights Act 1998* (UK) c 42 was applicable because courts are public bodies, bound by the Act when interpreting statutory provisions: Helen Carr, ‘Discrimination, Rented Housing and the Law’ (2004) 154 *New Law Journal* 454, 455. See also Ian Loveland, ‘Making It up as They Go Along? The Court of Appeal on Same Sex Spouses and Succession Rights to Tenancies’ [2003] *Public Law* 222, 231–2.

<sup>166</sup> See *Salgueiro da Silva Mouta v Portugal* (1999) IX Eur Court HR 311.

<sup>167</sup> *Ghaidan* [2004] 2 AC 557, 564–70 (Lord Nicholls).

costs imposed on the right-holder? It was argued that the aim of the legislation was to provide protection for the traditional family and that same-sex partnerships cannot be equated with family in the traditional sense because same-sex partners cannot have children with each other, and because there is a reduced likelihood of children being part of such a household.<sup>168</sup> The members of the House of Lords were extremely dismissive of these arguments and they all agreed that discrimination against the survivors of same-sex partnerships is contrary to their *European Convention* rights.<sup>169</sup>

Lord Nicholls began by emphasising the principle at stake. His Lordship said:

Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced.<sup>170</sup>

The stage was thereby set for his Lordship's finding that there was no justification for the difference in treatment of same-sex and heterosexual couples. Lord Nicholls rejected the argument that the legislation served the aim of protecting the family.<sup>171</sup> His Lordship observed that it conferred rights on unmarried couples as well as married couples, and that neither parenthood nor the presence of children in the home was a requirement of security of tenure for the survivor of the couple.<sup>172</sup> His Lordship further noted that the justification for the legislation, namely, that those who share their lives and make their home together deserve special protection, is equally applicable to the survivors of a same-sex relationship.<sup>173</sup> The more favourable treatment of heterosexual couples therefore 'fell at the first hurdle': it did not serve a legitimate aim.<sup>174</sup>

Like Lord Nicholls, Baroness Hale foregrounded the issues of principle, beginning her judgment with an explanation of what is wrong with discrimination, and stressing the way in which it strikes at human dignity.<sup>175</sup> She then went on to find that same-sex couples were in an analogous situation to cohabiting heterosexual couples for the purposes of the *Rent Act 1977* (UK) c 42, because both can have marriage-like as well as longstanding, interdependent relationships.<sup>176</sup> How, then, could the government justify singling out same-sex couples for less favourable treatment? Again agreeing with Lord Nicholls, Baroness Hale held that the para 2(2) to sch 1 of the *Rent Act 1977* (UK) c 42 was impossible to justify because it lacked a legitimate aim.<sup>177</sup> She said that the aim could not be to protect the traditional family because '[t]he traditional family is not protected by granting it a benefit which is denied to people who cannot or will not become a

<sup>168</sup> Ibid 561–2.

<sup>169</sup> Ibid 568 (Lord Nicholls), 573 (Lord Steyn), 593, 603–4 (Lord Rodger), 608–9 (Baroness Hale).

<sup>170</sup> Ibid 566.

<sup>171</sup> Ibid 567.

<sup>172</sup> Ibid 568.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid 604–5.

<sup>176</sup> Ibid 606–7.

<sup>177</sup> Ibid 608.

traditional family'.<sup>178</sup> She observed that the aim might have been to encourage people to form marriage-like as opposed to more transient relationships but, if so, that applies to same-sex as well as opposite-sex couples.<sup>179</sup> If the aim was to discourage same-sex relationships generally, that was, she said, incompatible with the *European Convention* right to respect for private life; a fortiori, therefore, it cannot be a legitimate aim of government to discourage stable, committed same-sex relationships.<sup>180</sup>

Having found that there were no legitimate public policy reasons justifying the discrimination against same-sex couples, the Law Lords then turned to the question of whether s 3 of the *Human Rights Act 1998* (UK) c 42<sup>181</sup> required the House of Lords to read para 2(2) of sch 1 in such a way that its reach extended to the survivor of a same-sex couple. Despite the fact that the provision was unambiguous, the majority answered 'yes'.<sup>182</sup> The provision had to be read as though the survivor of a same-sex couple were the surviving spouse of the original tenant, in this way eliminating the unjustified infringement of human rights.

I suggest that the Law Lords in *Ghaidan* did not approach their task using the balancing model. The legislation had a clear social and economic policy dimension. It reflected widely held views about what sorts of partnerships deserve the privileges of marriage and it sought not to encroach excessively on the interests of landlords. Yet the Law Lords did not address these concerns, nor did they hold that their Lordships were outweighed by the importance of the right to non-discrimination.<sup>183</sup> Instead, they virtually ignored the public policy arguments, taking the principled view that, regardless of the policy goals it may serve, discrimination on the ground of sexual orientation is invidious because of the way in which it strikes at human dignity and the value of equal respect.<sup>184</sup> In effect, the House of Lords treated the right not to be discriminated against as having rule-like status and refused to weigh the benefits of infringing it against the costs. It is possible that if the Law Lords had given more careful consideration to the public policy arguments, their Lordships would have found the social gains to be minor, in which case the legislation would also have been found unjustifiable on the balancing approach. But regardless of whether this is so or not, I suggest that the Law Lords reasoned in the right way. The value of anti-discrimination is so central to the kind of society we wish to inhabit that it

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Human Rights Act 1998* (UK) c 42, s 3 provides that all legislation must be read and given effect to in a way which is compatible with *European Convention* rights so far as it is possible to do so.

<sup>182</sup> *Ghaidan* [2004] 2 AC 557, 571–2 (Lord Nicholls), 577 (Lord Steyn), 603–4 (Lord Rodger), 608–9 (Baroness Hale).

<sup>183</sup> See David Mead, 'Swallowing the Camel, Straining at the Gnat: The Implications of *Mendoza v Ghaidan*' (2003) 5 *European Human Rights Law Review* 501, 514. Mead makes a similar point about the reasoning in the English Court of Appeal, saying that the judgment does not explain why the right not to be discriminated against trumped socioeconomic concerns.

<sup>184</sup> Nicholas Bamforth, 'Same-Sex Partnerships: Some Comparative Constitutional Lessons' (2007) 5 *European Human Rights Law Review* 47, 53–6. Bamforth stresses the fact that the House of Lords saw recognition of same-sex partnership rights as a matter of respect for human dignity and autonomy.

should not normally be weighed against the benefits that might come from infringing it. Governments may have a variety of policy reasons for discriminating but, by paying less attention to those reasons than they would have paid on a balance of reasons approach, the House of Lords played its distinctive, rights-protective constitutional role.

#### VII CONCLUSION

It follows from the arguments of this article that, despite the popularity of the metaphor, judges confronting limitation issues under a bill of rights should not see themselves as required to balance rights against the public interest. Though rights do not necessarily conclude a matter, they should not be viewed as merely one factor to be taken into account in a global consideration of all relevant factors, but as a factor which presumptively excludes consideration of factors that would otherwise be relevant. In discussing the limitations jurisprudence of the European Court and Commission of Human Rights, Aileen McHarg claims that these institutions have failed 'to develop a coherent set of tests for determining when rights prevail over the public interest and *vice versa*',<sup>185</sup> and she argues that the root cause is a failure to adopt a consistent underlying theory.<sup>186</sup> The aim of this article has been to provide such a theory and some normative arguments in favour of accepting it.

<sup>185</sup> McHarg, above n 1, 695.

<sup>186</sup> *Ibid* 696.