

Cambridge University Press

978-1-107-06407-2 - Proportionality and the Rule of Law: Rights, Justification, Reasoning

Edited by Grant Huscroft, Bradley W. Miller and GréGoire Webber

Index

[More information](#)

Index

- A v. United Kingdom*, 221
A.F. (No 3), 221, 232
 Administrative law. *See also*
 Reasonableness
 and proportionality, 235–237, 251,
 254–255
 bifurcation with constitutional law,
 257–258
After Virtue, 99
Alberta v. Hutterian Brethren of Wilson
 Colony, 383
 Aleinikoff, Alexander, 4, 17, 285–286, 298,
 301
 Alexy, Robert, 5, 24–26, 45, 46–47, 49–50,
 52, 53, 56–57, 58, 60–61, 97, 98, 99, 125,
 133, 156, 196, 223, 263, 270, 327, 354,
 389, 414–415
 Allan, T.R.S., 10–11, 13, 26, 63–64, 192, 241,
 256, 265, 350–351, 352–353
 Antaki, Mark, 12–13, 93
Anti-terrorism, Crime and Security 2001 Act,
 221
 Aquinas, 30, 127, 392
 Arendt, Hannah, 12, 287, 290, 294, 296, 298,
 301, 302, 307
 Aristotle, 127, 287, 303, 305–308, 392
 Autonomy
 and coercion, 106
 and justification, 266
 and moral agency, 164–165
 and public authorization, 113–114,
 115–116
 as negative freedom, 6–7, 92, 111–113
 as right, 157
 constitutional protection of, 210
 scope of, 162–163
Baker v. Canada (Minister of Citizenship
 and Immigration), 240
 Baker, Edwin, 406–407
 Balancing
 and arbitrariness, 4–5, 36–37
 and expertise, 256
 and moral reasoning, 6, 70, 88
 and uncertainty, 335–337
 private interests vs. innate rights, 118–119
 U.S. critique of, 263
 variations in interpretation, 24–26
 Barak, Aharon, 125, 133, 317–319, 327, 328,
 340, 384, 388, 389
 Beatson, Jack, 248, 249
 Beatty, David, 22, 125, 136–138, 292, 295, 301,
 327, 375
Begum v. Denbigh High School, 242,
 251–253, 255–256, 258
Bell ExpressVu Limited Partnership v. Rex,
 227
 Bills of rights
 as constitutional settlements, 191, 196,
 199–202
 as finite instruments, 10, 189, 192–193,
 200–202
 underlying political philosophies,
 393–394
 Bingham, Lord, 216, 221, 245–246, 247, 329,
 339
 Black, Justice Hugo, 403–404, 405–406, 411,
 412–413
 Blackstone, William, 79, 173–174, 177, 183
 Boyd White, James, 285–286, 298
 Brandeis, Justice Louis, 404
 Brooke, Lord Justice, 243–244, 249, 250, 251
 Brown, Lord, 338

Cambridge University Press

978-1-107-06407-2 - Proportionality and the Rule of Law: Rights, Justification, Reasoning

Edited by Grant Huscroft, Bradley W. Miller and GréGoire Webber

Index

[More information](#)

418

Index

- Canada (Attorney General) v. Bedford*, 382, 383, 384, 392–393
- Canadian Bill of Rights*, 225
- Canadian Charter of Rights and Freedoms*
and continuity of law, 394
and judicial review, 326
constitutional values, 227–228
equality protection, 191
limitations clause, 149, 280, 377
Notwithstanding clause, 276, 277
origins of, 190
presumption of innocence, 225–226
principles of fundamental justice, 213–214
- Clyde, Lord, 224, 226
- Cobbett, William, 216
- Cohen-Eliya, Moshe, 197, 202, 237, 262, 413
- Congruency principle, 234–235
- Constable, Marianne, 291
- Constitution, South Africa, 257. *See also* South African Bill of Rights
- Constitutionalism
common law, 11, 200–202, 208–209, 211–212
democratic, 260–261, 270, 275
experimental, 300–301
living, 194–195, 202
new Commonwealth model, 275, 276, 280
political, 275
- Cover, Robert, 285, 286, 297, 298
- Craig, Paul, 334, 335
- Critique of Judgment*, 296, 297, 298
- Critique of Practical Reason*, 296, 298
- Critique of Pure Reason*, 298
- Culture of authority, 237–238, 284, 287
- Culture of democracy, 12, 146, 198, 260, 261, 275
- Culture of justification
and broad interpretations of rights, 196–198, 251
and constitutional supremacy, 288
and public law, 234–235, 252, 256, 257–258
and rationalism, 284
and rights inconsequentialism, 264, 301
origins of, 288, 301–302
substantive requirements, 262
- de la Mare, Thomas, 27, 28, 29
- Dennis v. United States*, 404
- Devlin, Patrick, 382
- Dickson v. United Kingdom*, 37, 38
- Dickson, Chief Justice Brian, 225
- Double effect, doctrine of, 29–32
- Dudgeon v. United Kingdom*, 38
- Dworkin, Ronald, 46, 48, 49, 61, 62, 104, 126, 165, 174, 373, 374, 379, 386, 387, 388
- Dyzenhaus, David, 11, 13, 63, 64, 270
- Ekins, Richard, 13, 14, 15, 150, 371, 376
- Endicott, Timothy, 14, 15, 26, 354–355, 356, 357, 368, 369, 371, 372
- European Convention on Human Rights
and balancing, 313
and judicial review, 40, 311, 339
and the institutional premise, 326, 341
application of proportionality, 26, 43, 44, 216
compatibility with *Human Rights Act* 1998, 65, 66, 230, 232, 248
freedom of religious expression, 243, 244, 245
limitations clause, 148, 149, 231, 280–281
presumption of innocence, 224
prohibition on torture, 322, 330, 363
right to private and family life, 157, 158, 208, 217, 311, 312, 314
- Evans v. United Kingdom*, 37, 38, 40
- Exclusionary reasons, 38–39, 268–269, 280
- Federal Air-Transport Security Act*, 76
- Finnis, John, 151, 246–247, 362, 368, 391
- Fordham, Michael, 27, 28, 29
- Fortesque, John, 79, 173, 183
- Frank, Jill, 305–308
- Frankfurter, Justice Felix, 403, 404, 408, 412–413
- Franklin, Benjamin, 79, 173, 174, 183
- Frantz, Laurent, 407, 412
- Fried, Charles, 407
- Fuller, Lon, 11, 234–235
- Galston, William, 388
- Gardbaum, Stephen, 11, 12, 13, 63, 64, 144, 145, 146, 148, 149
- George, Robert, 391
- German Basic Law, 159, 280
- Goldsworthy, Jeffrey, 201
- Goold, Benjamin, 24
- Greer, Steven, 25

Cambridge University Press

978-1-107-06407-2 - Proportionality and the Rule of Law: Rights, Justification, Reasoning

Edited by Grant Huscroft, Bradley W. Miller and Grégoire Webber

Index

[More information](#)

Index

419

- Griffin, James, 161, 162, 166
 Gunn, T. Jeremy, 25
- Habermas, Jürgen, 263, 298
 Hale, Baroness, 232, 245, 246, 251, 315, 333
 Hale, Matthew, 78
Hamdan v. U.S., 87
 Hand, Judge Learned, 403, 404, 407, 408
 Harlan, Justice John Marshall, 403, 404–405, 406, 412
 Hart, H.L.A., 127, 352
Hatton v. United Kingdom, 157
 Heidegger, Martin, 298
HH v. Italy, 315
Hirst v. United Kingdom, 40
 Hoffmann, Lord, 214, 242, 247, 249
 Hohfeld, Wesley, 132
 Holmes, Justice Oliver Wendell, 292, 404, 408
 Hooper, Ben, 349
 Hope, Lord, 221, 229
Human Rights Act 1998
 and deference, 44, 225
 and judicial review, 278
 and proportionality, 65–66, 322, 335
 and written constitutionalism, 244
 compatibility with European Convention on Human Rights, 224, 230
Human Rights Protection in the United Kingdom, 248
 Huscroft, Grant, 9, 10, 11, 22, 236
- Iacobucci, Justice Frank, 227
 Incommensurability
 and analogy, 307
 and legislative reasoning, 358–359, 366
 and pathologies of proportionality, 14
 and social importance, 56–57, 317–319, 357
 and the rule of law, 316–317, 323, 340–341
 between public and private interests, 182–183, 316, 320
 radical, 319, 322, 325
 vague, 319, 320, 321, 322
 vs. incomparability, 222, 322–323
 Institutional premise, 14, 326, 329, 340, 341, 342
 Interim Constitution of South Africa (1993), 287
- International Covenant on Civil and Political Rights, 195–196
 Interpretation. *See* Definition stage
- Judicial review
 and deference, 55, 57–58, 216–218, 233, 237, 239, 339–340
 and democracy, 205, 210–211, 214–215, 233
 minimalism, 409–410
 strong-form, 261
 weak-form, 275, 276, 279
- Kahn, Paul, 287, 299–301, 302–303
 Kalven, Harry Jr., 411
 Kant, Immanuel, 106, 113–114, 115–116, 295–296, 297, 307
 Klatt, Matthias, 133
 Kompridis, Nikolas, 298
Konigsberg v. State Bar, 404
 Kumm, Matthias, 6, 7, 10, 49, 53, 61, 125, 133, 136, 138, 139, 140, 141, 169, 198, 199, 262, 287, 290–291, 294, 298, 366, 378, 385, 386, 389, 390, 391
- L'Heureux-Dubé, Justice Claire, 240
Lalonde v. Ontario (Commission de restructuration des services de sante), 35
 Lazarus, Liora, 24
 Leader, Sheldon, 253–254
 Legislation
 and the common good, 345–347
 purpose, 380–381, 383
 specificationism, 275, 279, 282, 358
 Letsas, George, 158
 Liberalism, 15, 67–68, 261–262, 290, 367, 372, 388
 anti-perfectionist, 388–394
Lochner v. New York, 402
 Luterán, Martin, 4, 5, 7, 354, 377
- MacIntyre, Alasdair, 99
 Madison, James, 407
 Maimonides, Moses, 79, 80
 Marshall, Chief Justice John, 326
 Mashaw, Jerry, 256
 Mathews, Jud, 136
 McKenna, Justice Joseph, 403
 Meiklejohn, Alexander, 134
 Meister, Moritz, 133
 Mendelson, Wallace, 407
 Meyer, Linda, 307–308

Cambridge University Press

978-1-107-06407-2 - Proportionality and the Rule of Law: Rights, Justification, Reasoning

Edited by Grant Huscroft, Bradley W. Miller and GréGoire Webber

Index

[More information](#)

420

Index

- Miller, Bradley, 14, 15
 Möller, Kai, 8, 9, 10, 125, 133, 136, 139, 140, 141, 142, 198–200, 266, 366
Motor Vehicle Act Reference, 213, 228
Multani v. Commission Scolaire Marguerite-Bourgeoys, 252
 Mureinik, Etienne, 196–197, 237, 257, 259
 Murphy, Justice Lionel, 216
- Narcotic Control Act* 1970, 225
 Neuborne, Burt, 410, 413
New Zealand Bill of Rights Act 1990, 149, 190
 Nicholls, Lord, 245
Nicomachean Ethics, 305–308
 Nietzsche, Friedrich, 298
Norris v. United States, 332
 Nozick, Robert, 126
- Oberdiek, John, 128
Odievre v. France, 40
On Human Rights, 161
On Revolution, 301
 Orwell, George, 293
Otto Preminger Institut v. Austria, 37
- Pavlakos, George, 6, 7, 353
 Perry, Stephen, 206
 Phillips, Lord, 221, 332
 Pildes, Richard, 39, 407
 Plato, 127, 392
Poetics, 305–308
 Porat, Iddo, 15, 197, 202, 237, 262
 Posner, Richard, 295
 Pound, Roscoe, 402–403, 408
Pretty v. United Kingdom, 230
Prevention of Terrorism Act 2005, 220–221, 232
Prison Act 1952, 212
 proportionality
 as moral filter, 6
 Proportionality
 and democratic values, 271–272
 and moral reasoning, 69, 374–376, 380, 384–385
 as balancing, 4, 23–26
 as moral filter, 6, 7, 90, 91, 92, 109, 110, 111, 112, 117, 118, 119, 165, 365, 367
 as rule of law constraint, 265–266
 as rule of weight, 179–181
 between means and ends, 4–5, 95–97, 99, 109, 346–347
- compared to equity, 303
 contradiction with rights, 46–49
 defining rights and, 55–56, 124, 132, 133, 149, 188, 189
 democratic critique of, 260–261
 in legislative process, 347–349
 justification and, 132, 135, 136–137, 164, 165, 188, 189
 limits on public purpose, 219–220, 231–232
 optimizing conception, 5, 23, 24, 51–52, 53, 56, 58, 60, 62, 63, 65
 origins of, 29, 236, 265, 284, 302–303
 state-limiting conception, 5, 23, 24, 51, 55, 58, 60, 62, 63, 65, 66
- R (Daly) v. Secretary of State for the Home Department*, 212
R (Huang) v. Home Secretary, 239–240, 241, 242, 312, 329, 339
R (Pretty) v. Director of Public Prosecutions, 229
R (Purdy) v. DPP, 352
R (Quila) v. Secretary of State for the Home Department, 320, 321–322, 323, 334, 335, 336, 338
R v. A (No 2), 364, 365
R v. Malmö-Levine, 141
R (Purdy) v. D.P.P., 230
R. v. Lambert, 224, 225–226
R. v. MB, 232
R. v. Oakes, 225
 Rationalism
 analogical judgment, 303–304
 antirationalism, 93
 as calculation, 294–295
 axiological, 289, 293
 demystification, 291–292
 instrumental, 94–95
 Rawls, John, 290, 388
 Raz, Joseph, 59, 60, 61, 62, 65, 101, 102, 103, 167, 388, 389, 391, 399, 400–401
 Reasonableness. *See also* Administrative law
 process vs. substance, 220–222, 251, 253
 Wednesbury, 43, 211–213, 239, 240
 Réaume, Denise, 330
 Regan, Donald, 407, 411
 Rights
 and justice, 128–129, 130–131
 and optimization, 46, 47, 48, 57, 61, 98, 99, 100, 196, 416

Cambridge University Press

978-1-107-06407-2 - Proportionality and the Rule of Law: Rights, Justification, Reasoning

Edited by Grant Huscroft, Bradley W. Miller and GréGoire Webber

Index

[More information](#)

Index

421

- as first-order considerations, 9, 15, 399, 400–401, 402, 405, 407, 412, 414
- as indeterminate, 272–274
- as innate, 117–118
- as principles, 46–47, 60–61, 98–99, 156, 196, 414–415
- as restricting/non-restricting claims, 73–74
- as second-order rights, 15
- as trumps, 48, 50, 61, 62, 68, 112, 126, 156, 160, 174, 268, 271, 273, 416
- compared to interests, 44, 45, 59, 61, 123, 125, 131, 132, 142–144, 176–178, 187, 213–214, 270, 335
- comprehensive model, 8, 160
- contradiction with proportionality, 46–49
- internal vs. external limits, 145–147
- moral vs. legal, 191–192
- objective vs. subjective, 127
- prima facie vs. definite, 139–142, 170–171
- specifications of, 364–365
- threshold model of, 9, 160–163
- two-term, 360–361
- Ripstein, Arthur, 115
- Rivers, Julian, 3, 5, 23, 24, 51
- RJR MacDonald v. Canada*, 187
- Roberts, Chief Justice John, 409–410
- Rodriguez v. British Columbia (Attorney-General)*, 230
- RS (Uganda) v. Secretary of State for the Home Department*, 313
- Rubinfeld, Jed, 411, 413
- Rule of law
 - and arbitrariness, 36–37, 214–216, 340–341
 - and incommensurability, 311
 - and legislation, 151
 - and parliamentary supremacy, 210–211
 - as constraint on judicial discretion, 238, 240
 - formal conception of, 209
- Saadi v. Italy*, 34, 40
- Sachs, Justice Albie, 286, 287, 288, 294–296, 297, 301, 302, 307–308
- Sahin v. Turkey*, 244
- Sales, Philip, 349
- Scalia, Justice Antonin, 412
- Scanlon, Thomas, 73
- Schauer, Frederick, 8, 9, 10, 12, 50, 268
- Schneider v. State*, 409
- Scott, Lord, 221
- Simms, 214
- Smith and Grady v. United Kingdom*, 217, 218
- Socrates, 290–291
- Socratic contestation, 138, 198, 262, 279, 290, 292
- South African Bill of Rights*, 147, 149, 191, 196–197
- Specificationist conception. *See* Legislation
- Starkie, Thomas, 173, 183
- Steyn, Lord, 212, 224
- Stone Sweet, Alec, 136
- Stone, Justice Harlan, 407
- Suicide Act 1961*, 229–230, 353
- Sunstein, Cass, 409
- Swiney, Gabriel, 24
- Taggart, Michael, 237–242, 254–255, 257–258
- The Justice of Mercy*, 307
- The Strange Alchemy of Life and Law*, 286
- Tsakyrakis, Stavros, 264
- U.S. Constitution
 - and the institutional premise, 326
 - First Amendment, 1, 134, 181, 398, 401, 403–406
 - Fourteenth Amendment, 402, 403
 - origins, 190
- Ultra vires doctrine, 211–212
- Unger, Roberto, 287, 299–300, 303, 304
- United Nations Convention against Torture, 322
- Universal Declaration on Human Rights, 148, 332
- Voltaire, 78, 79
- Waldron, Jeremy, 187, 216
- Walén, Alec, 6, 7
- Waluchow, Wil, 386–387
- Webber, Grégoire, 7, 8, 9, 10, 48, 168, 169, 170, 171, 187, 264, 267, 280–281, 289, 298, 299, 372
- Weber, Max, 286–287
- Wilson, Justice Bertha, 213, 214–215, 228
- Wilson, Lord, 338
- Young, Alison, 5, 7, 24
- Yowell, Paul, 348