HART STUDIES IN CONSTITUTIONAL THEORY

VOLUME 8

Edited by Dimitrios Kyritsis

Essays on Freedom and Proportionality

OPEN ACCESS

ESSAYS ON FREEDOM AND PROPORTIONALITY

This open access book explores the connection between proportionality and the moral concept of freedom from a variety of philosophical perspectives. It views proportionality as more than a technical, legalistic formula but as infused with moral meaning. It asks: Is the proportionality test committed to a particular philosophical conception of freedom?

Some contributors argue that proportionality subscribes to a morally defensible 'right to everything'. Others see in this a serious shortcoming of contemporary proportionality discourse. They claim instead that fundamental rights doctrine should abandon proportionality and adopt a less individualistic notion of freedom that is inherently limited by the reasonable interests of others.

The volume showcases novel attempts to combine proportionality and freedom that are inspired by Immanuel Kant, John Rawls and Bernard Williams. It also situates its central question within debates about the legitimacy of judicial power and considers the use of proportionality analysis by the courts to resolve pivotal issues about the meaning of human rights. Individual chapters are in dialogue with each other, offering readers a holistic examination of this important issue of human rights theory and practice.

Hart Studies in Constitutional Theory: Volume 8

Hart Studies in Constitutional Theory

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In memory of Stavros Tsakyrakis

FOREWORD

The concept of freedom has long exerted a powerful pull on the thinking of philosophers, who have debated the inevitability of choice in this regard as well as the need to accept moral responsibility for exercises of will and for judgements arrived at – good or otherwise. In a similar vein, the criterion of proportionality has engaged the intellectual faculties of legal and moral thinkers since Aristotle and Thomas Aquinas as a pertinent criterion to ascertain the presence of fairness and justice in the activities under scrutiny. This collection of essays brings these two notions into conversation with one another, asking what kind of understanding of freedom undergirds the proportionality analysis, as well as inquiring whether the former is unbridled or bounded by the reasonable interests of others. Dimitrios Kyritsis has brought together an impressive cast of contributors to reflect on these questions from a range of philosophical perspectives. Some powerfully advocate for proportionality, while others are critical of its application and use. The chapters also feature diverse approaches to identifying the possible foundations of moral justification and the values that should be engaged with in realising freedom, which also relates to particular conceptions of the community and the demands that it is capable of placing, and entitled to place, upon the individual. Yet all chapters share a commitment to probe how legal doctrine relates to moral reasoning. It is this common methodological outlook, as much as the considered views articulated in the volume, that should be of keen interest to all who are invested in constitutional theory and that is worthy of emulation, both as it relates to the complex interplay between freedom and proportionality and beyond.

Maartje De Visser
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November 2024

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This volume evolved out of a workshop that took place over two days in Molyvos, the late Stavros Tsakyrakis' hometown on the island of Lesvos, under the auspices of an annual retreat in his memory. I am grateful to Essex Law School and the Greek monthly review *The Books' Journal* for their generous financial support, and to the Molyvos Tourism Association and its President Mr N Molvalis for making available to us its cultural centre 'Desmos' in the scenic port of Molyvos. I am also extremely grateful to the Tsakyrakis family and Professor Antonis Karabatzos, George Nikolou and Nikiforos Panagis, the organisers of the retreat, for all the enthusiasm and love with which they embraced this project. George Nikolou, in particular, worked tirelessly, with skill and dedication, to make the workshop a success from its inception. I owe special thanks to Popi Roussomani for giving permission to reprint a previously published chapter by Tsakyrakis. Finally, I wish to thank all the participants in the workshop who made the long trip to Molyvos, braving the hot weather, for their original and thoughtful papers and our many fruitful discussions.

I would like to acknowledge the amazing professionalism and assistance of Hart Publishing, and in particular Verity Stuart and Kate Whetter, for seeing the volume through, and Catherine Minahan for her excellent copy-editing work. The book's publication is supported by the University of Essex's open access fund, and I am delighted that, thanks to it, its contents will be freely accessible.

The volume is dedicated to Tsakyrakis, an original and inspiring constitutional theorist, a great teacher and friend to many of us.

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Introduction

DIMITRIOS KYRITSIS

I. Overarching Questions and Key Themes

Given its global success as a test for determining the content and permissible limitations of human rights, it is no surprise that proportionality has been the object of intense jurisprudential interest. But for the most part, philosophical analysis of proportionality has mainly drawn on the theory of practical reason, treating proportionality primarily as a formal method of argumentation.[1]

This collection of essays focuses on a hitherto underexplored philosophical aspect of proportionality, namely, its relationship with the moral concept of freedom.[2] In recent years this connection has come to the fore, for example in controversies over the lawfulness of government measures aiming to tackle the COVID-19 pandemic, such as restrictions of movement and economic activity and compulsory vaccinations. The issue is typically framed in terms of the proportionality between the public benefit of these measures and the intensity of the interference with human rights such as privacy. However, for many scholars this framing is deeply problematic. It assumes that such restrictions amount to losses of valuable rights, which must be offset by an overriding public benefit. But, so the argument goes, we do not have even a prima facie right to be a public threat, for example by carrying a contagious virus; to think otherwise is to assume an antisocial notion of personal freedom. It is precisely this assumption to which, for these scholars, the proportionality doctrine is committed, because it typically adopts a not particularly discriminating definition of what counts as a prima facie interference with human rights. As a result, almost any activity or personal preference, however harmful, triggers a proportionality assessment.

[1] Notable examples from the vast bibliography in English, which often make reference to the seminal work of Robert Alexy, include A Huscroft, *Proportionality and the Rule of Law: Rights Justification, Reasoning* (New York, Cambridge University Press, 2014); G Pavlakos (ed), *Law, Rights, and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007); M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford, Oxford University Press, 2012); M Klatt, *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press, 2012).

[2] An important exception is K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2015), in which Möller provides a thoughtful and philosophically sophisticated philosophical defence of a 'right to everything' as the moral basis of the proportionality assessment.

A characteristic version of this critique has been put forward by one of proportionality's most ardent critics, the late Stavros Tsakyrakis. In a chapter entitled 'Disproportionate Individualism',[3] he criticises proportionality for embracing an overly individualistic – and therefore implausible – conception of freedom, which he calls 'total freedom', the freedom to do everything one wants. Tsakyrakis argues that total freedom misconstrues the moral character of human rights. It gives individuals wide-ranging licence to obstruct social aims, even for the sake of frivolous pursuits such as driving uptown on Lexington Avenue. Furthermore, it yields an indefensible aggrandisement of the role of courts that are called upon to protect it. Tsakyrakis juxtaposes proportionality's alleged individualism and the notion of 'liberal sociability', which draws on Ronald Dworkin's theory of rights. According to liberal sociability, 'we start … by thinking about how we should regulate the practices of sharing and accomplishing things with others and do so to make them just'.[4] Total freedom has no place in such a scheme, says Tsakyrakis, because it assumes that the content of our prima facie rights is worked out from the perspective of what each individual wants, without regard to the reasonable interests of others. By contrast, liberal sociability takes the view that individual action cannot but be restricted in the context of social interaction. However, it insists that such restrictions be regulated in a way that safeguards human dignity, by affording everyone equal concern and respect. Rights are an indispensable component of this exercise because they allow individuals to pursue their own life plans.

Thus, for Tsakyrakis, the debate about the relationship between proportionality and freedom is not merely theoretical. Underlying it are urgent issues of practice about the balance between the individual and society, the correct interpretation and application of rights, and the role of courts and other state institutions in their protection. We want the doctrine of proportionality to get these issues as right as possible. By ensuring that proportionality best reflects the concept of freedom, properly understood, we seek to morally vindicate it[5] and guide its use towards the optimal results.

Implicit in this aspiration is an important methodological assumption, namely, that moral philosophy can and should inform legal doctrine. This assumption may be easier to accept in the context of human rights law, where the moral stakes are obvious and high. In fact, it may be thought that in this area, philosophy and legal doctrine are even more closely intertwined, such that moral reasoning is essential for determining the correct legal outcome in cases arising under a bill of rights or a human rights treaty. On this view, it becomes imperative to identify the best conception of the moral principles that govern the law. If our doctrines are wedded to the wrong conceptions, we risk making legal mistakes.

However, even those who shy away from such a tight connection of moral and legal reasoning are unlikely to deny that legal doctrines are properly assessed for

[3] S Tsakyrakis, 'Disproportionate Individualism', ch 1 of this volume.

[4] ibid, section II.

[5] Moral vindication of proportionality will, of course, likely involve other moral concepts apart from freedom.

the extent to which following them increases compliance with moral norms. If it does not, we have good reason to amend them. At a minimum, then, an investigation of the relationship between freedom and proportionality is key for law reform. As a piece of legal doctrine, proportionality is neither unchallengeable nor immutable. It must be tailored to help us attain the moral purposes of the law. Among other things, it must track the correct conception of freedom.

The volume shares Tsakyrakis' view about the importance of the relationship between freedom and proportionality, and it has the same dual ambition, to elucidate legal doctrine through philosophical scrutiny and to improve it. To this effect, it explores the following overarching questions:

- Is the proportionality test committed to a particular philosophical conception of freedom? If so, is that conception morally justified?
- Is there a morally valuable – albeit overridable – freedom to engage in antisocial behaviour, or should the concept of freedom be inherently limited by the reasonable interests of others?

Embracing the relevance of philosophical inquiry for understanding, evaluating and reforming the doctrine of proportionality, the contributors to this volume construct their own original answers to these questions from a number of very different philosophical perspectives, either defending the role of something like a right to everything or arguing against it. They also differ with respect to which aspect of the relationship between proportionality and freedom they focus on and the level of abstraction at which they pitch their contributions, with some tackling head-on philosophical questions about the meaning of freedom and others taking their cues from more applied issues of doctrine and legal practice. Often they take Tsakyrakis' claims as their point of departure. I include summaries of each chapter in section II. Here, I wish to draw out some key themes that emerge from the entire collection.

A. Relationship between Legal Doctrine and Moral Justification

How should we go about attributing a certain moral conception of freedom to a legal doctrine as widespread in its use and as varied in its application as proportionality? How do we know whether a moral conception is properly attributed to it or not?[6] These are crucial methodological challenges about the relationship

[6] The challenge is common to other areas of legal scholarship. See for instance T Khaitan and S Steel, 'Theorizing Areas of Law: A Taxonomy of Special Jurisprudence' (2022) 28 *Legal Theory* 325; J Kraus, 'Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis' (2007) 93 *Virginia Law Review* 287. I have addressed this challenge in the course of defending what I label 'moralised constitutional theory' in D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford, Oxford University Press, 2017) ch 1; and D Kyritsis, 'Constitutional Law as Legitimacy Enhancer' in D Kyritsis and S Lakin (eds), *The Methodology of Constitutional Theory* (Oxford, Hart Publishing, 2022) 211.

between legal doctrine and moral theorising that both proponents and sceptics of proportionality must confront. Arguably, in order for something to be an account *of* the doctrine of proportionality, it must be sensitive in the right way to how the test is conceived of and applied in legal practice. Clearly, there must be space for a proponent of proportionality to dismiss some of what is happening on the ground as errors, departures from an otherwise morally sound practice. But at the same time, we cannot be said to vindicate the doctrine if we ignore whole swathes of it. This kind of over-idealisation would amount to a change of subject: what we are actually doing is proposing the revision of doctrine. Conversely, as several contributors to this volume note, sceptics of proportionality are attacking a strawman if they isolate aspects of the practice and generalise from them to make judgements about the (morally deficient) concept of freedom that they claim is embedded in it as a whole.

Moreover, moral accounts of proportionality must explain what it takes for a moral justification to 'fit' the doctrine. Some scholars proceed from the premise that this entails identifying moral rights that correspond to the legal rights that we have under, say, the European Convention on Human Rights (ECHR) or the German Basic Law. So, if the ECHR or the German Basic Law recognises a legal 'right to everything', morally justifying that right requires identifying a moral right to everything. However, this notion of 'fit' is controversial. Arguably, fit with a doctrine can be satisfied even if a moral justification does not take some of its elements 'at face value'.[7] It may, for instance, be that recognising a certain legal right is morally justified because it is instrumental for the achievement of some moral purpose, where that purpose may refer to more than one moral right or, in fact, values other than moral rights.

Finally, one ought to take into account that although proportionality is of course closely associated with human rights law, it is used in other areas of law, not readily related to human rights. How do we account for this fact? How does this affect efforts to connect proportionality and a particular conception of moral freedom?

B. The Different Sources of Moral Justification

As individual chapters demonstrate, there are various ways to morally evaluate a doctrine such as proportionality, even if one restricts one's attention to freedom. Freedom is a contested and multi-faceted moral principle and contains many different strands that can be developed independently to shed light on the moral merit of legal practice. Thus, for some contributors freedom is best cashed out in terms of autonomy; for some in terms of dignity; while for others in terms of the more political ideal of non-domination. In this respect, the debate about the moral

[7] D Kyritsis, 'Whatever Works: Proportionality as a Constitutional Principle (2014) 34 *OJLS* 395, 410 ff.

underpinnings of proportionality becomes another battleground for broader debates in moral and political philosophy, for example about the priority of the right over the good, paternalism and neutrality.

At the same time, though, and circling back to a point made above, freedom is arguably not the only value that we need to take into account when we explicate and calibrate the doctrine of proportionality. Sooner or later, the relationship between freedom and proportionality will need to be integrated in a broader network of values and considerations, including considerations about the institutions charged with governing us. A number of contributions explore how our concern for freedom interacts with and is sometimes constrained by other principles that we also care about.

C. The Individual and Community

A philosophical debate about the limits of freedom in its interaction with other values that figures prominently in the volume concerns the demands that community places on the individual. But the moral character of community and its influence on individuals can itself be understood in a variety of ways. Does community have its own good? And, if so, how does its good relate to individual good? In what circumstances may appeals to the good of the community override the claims of individuals for the free pursuit of their own good? If community is not spelled out by reference to the good, how can we give it content? One suggestion is that community should be understood in political terms. Whether or not a political society has a distinct good, it may be that it has special characteristics that make a difference to the kind of freedom human rights law should be in the business of protecting. Finally, however one conceptualises community, one must then give an account of whether the doctrine of proportionality can adequately capture its demands and balance them against individual rights. Here is where community meets the relationship between freedom and proportionality. Is it true that, by subscribing to a certain conception of freedom, proportionality ends up distorting the moral character of community and discounting its demands? This is a key plank of Tsakyrakis' critique. But that critique is subjected to critical scrutiny by other contributors.

II. Structure

The collection is divided into four parts:

A. Freedom and Balancing
B. Freedom and Individualism
C. Freedom and Politics
D. Beyond 'Total Freedom'.

Part A juxtaposes Tsakyrakis' critique of total freedom and the defence of versions of that notion by Kai Möller and Matthias Klatt. Möller grounds it in a moral right to justification; a general right to liberty vindicates such a right because it ensures that any limitation of a person's freedom will trigger the duty of justification. Tsakyrakis' alternative approach is not superior, says Möller, because it is very difficult to tell whether a government measure on its face negates equal concern and respect. You might as well assess the justification of each restriction, as proportionality analysis prescribes. A measure is then a negation of equal concern and respect if it lacks adequate justification. In fact, according to Möller, there are certain failures of equal concern and respect that Tsakyrakis' approach cannot pick out. That approach is most at home when the government acts on moralistic and paternalistic grounds. But it insists on excluding certain ethical choices from the scope of rights altogether – that is what its rejection of total freedom amounts to. However, for Möller, such categorical exclusion, even if it can be convincingly executed, will often leave without protection genuine moral claims based on individual circumstances. By contrast, a general right to liberty and the broader right to justification on which it rests can accommodate them.

On the other hand, Klatt mounts a multi-pronged defence of the general right to liberty. First, he seeks to bolster the sensitivity of proportionality analysis to substantive moral argument, by drawing on the distinction he has proposed in earlier work between internal and external justification. Internal justification, by reference to the formal criteria of proportionality analysis, may be neutral but it will necessarily be supplemented by external justifications that add premises about the seriousness of the right infringement and the cogency of the competing government aim from a moral point of view. Nor, says Klatt, does proportionality prioritise individual liberty claims over community interests. Rather, it is Tsakyrakis who ends up overvaluing the demands of community. By contrast, balancing allows the true weight of competing moral demands to be taken into account. To show this, Klatt insists on the crucial distinction that the balancing method draws between justified and unjustified infringements. Since proportionality analysis provides a method for settling which are which, there is no harm in starting from a broadly defined right to liberty. When we are faced with an infringement of a minor interest, morally speaking, the kind of interest that Tsakyrakis worries total freedom overvalues, proportionality analysis assigns it little weight and thus allows that it will be easily overridable by competing public interests.

Part B comprises two chapters that discuss the link between freedom and society, a link so central in Tsakyrakis' 'liberal sociability'. In his chapter, Mark Tushnet resists the suggestion that vindicating this link requires abandoning a general right to liberty. Each of us, he says, has self-defined interests, which include our life projects. We think that satisfying an interest will make our lives go better. For that reason, a setback to any of our interests is a prima facie violation of our rights. Tsakyrakis counters this thought by arguing that some interests are 'worthless or ill-founded', like feeding pigeons in the park. However, for Tushnet,

identifying which interests count as worthless or ill-founded seems quite difficult, and Tsakyrakis cannot help himself to intuitive notions about such judgements to motivate his critique. Rather, we must start from the premise that the interests we actually have are produced by the social setting within which we live (or have grown up). Were social arrangements different, we might not have the interests we actually do. So, for example, the interest in feeding pigeons arises for a social arrangement in which a person can be so lonely that setting a life-project of feeding pigeons is indeed a way of making his life go better. And, generally, the 'worthless or ill-founded' interests people today actually have are (or might be) the products of a particular set of social arrangements. We cannot assess whether setbacks to such interests should be treated as infringements without having at hand an assessment of overall social justice. In this way Tushnet seeks to reconcile a general right to liberty with our social nature.

My chapter offers a sympathetic reconstruction of Tsakyrakis' liberal sociability. It explains that liberal sociability views rights not as inhering in the isolated individual but as emerging from the relationship of interacting persons. Its central insight is that what we do in social interaction unavoidably affects others in morally significant ways, and so it would be morally obtuse – indifferent to those morally significant effects – to insist on being free to do what we want, as 'total freedom' maintains. Hence, freedom must be situated from the outset within a social framework, and the claims we can properly press against others ought to be worked out from a moralised understanding of different types of social interaction. Our aim is to identify the morally relevant interests, as these are implicated in social interaction, and in light of those interests prescribe a system of organising social interaction that affords all participants equal concern and respect and thus upholds their dignity. The chapter argues that, thus understood, liberal sociability does not hold personal life hostage to community visions of the good life. It is antithetical to communitarianism in so far as the latter negates the equal concern and respect that flows from human dignity. Nor does it privilege the gregarious over the eccentric and the recluse. It does not presuppose an ethically thick social context or promote togetherness. Rather, it insists that social interaction has limits, beyond which others cannot have a say in what individuals do.

The chapters in Part C accept that proportionality should be animated by a morally appealing conception of freedom; however, their starting point is the political role that the concept of freedom should play. For Malcolm Thorburn that role is underwritten by a broadly Kantian conception of the grounds of legitimate state authority. On this conception, state legitimacy is conditioned on respect for a type of freedom that is very different from the 'total freedom' that is the object of Tsakyrakis's critique: it is not the freedom to pursue whatever aims we might like, but the freedom from anyone else interfering with our ability to set and pursue our own aims. On this account, the traditional opposition of freedom and state purposes instituted through law dissolves, for the justifying purpose of the state just is to make freedom possible through law. This account shares Tsakyrakis' critique, when aimed at some court practices and at the work of some

proportionality theorists. However, it insists that proportionality is not a uniform idea. Rather, it is deeply contested among constitutional and human rights theorists. Indeed, it is so deeply contested on virtually all its key commitments that it makes very little sense to say much of anything about proportionality *tout court*. For Thorburn, we can thread into the notion of proportionality and constitutional rights the alternative conception of freedom that he endorses, and thus make it immune from the charge that it leads to rights inflation.

Silje Langvatn explores the challenges of squaring proportionality and Rawlsian public reason, which in turn sees liberties as part of political conceptions of justice. She contrasts her preferred political normative approach to proportionality with what she labels 'moral philosophical' and 'institutional-instrumentalist' approaches. The former seek to formulate one or more basic moral values or principles that can ground, justify and inform our reasoning about proportionality, while the latter regard proportionality in instrumental terms, as a doctrine device that mediates between substantive moral principles and the way those principles are being implemented in an institutional setting. A distinctly political normative approach, on the other hand, asks what it is we owe each other as citizens, or as members of a particular type of political or rule-regulated cooperative practice. Political normative approaches try to give interpretations of the basic or constitutive values and principles of a particular type of polity, and accounts of the rights, freedoms and duties that citizens must have as citizens for these constitutive values and principles to be realised. Unlike moral philosophical approaches, they insist on a crucial gap between what justifies setting up a practice in the first place and what we ought to do within that practice once it is up and running. Langvatn argues that distinctly political normative approaches have not been given sufficient focus in what has been called 'the normative turn' in proportionality scholarship, and explores a political liberal version of the political normative approach to proportionality. This version is inspired by John Rawls' latest writings and differs significantly from Mattias Kumm's earlier attempt at bringing political liberalism into the debate about proportionality. Its hallmark is that in conditions of reasonable pluralism, political legitimacy cannot be made to depend on everyone's agreeing on the same political conception of justice. Rather, our institutional practice must foster broad public deliberation about matters of political justice. It is through this lens that we must justify proportionality. Langvatn claims that the political moral approach would construe the proportionality doctrine such that it allows a greater diversity of reasonable interpretations of our fundamental values to stand (provided, perhaps, that they have been produced in a way that meets certain standards of public deliberation) and welcomes such interpretations from actors beyond the courts that instantiate deliberation of the right sort. In this sense, she argues, it exposes key limitations of moral philosophical approaches.

In his chapter, Damian Cueni aims to map the political role of the general right to liberty by zeroing in on the presumption of liberty, which is commonly thought

to be part and parcel of proportionality analysis and is the target of Tsakyrakis' critique that proportionality incorporates a disproportionate individualism and an excessive valorisation of 'total freedom' into the political and legal framework of modern liberal democracies. However, this critique focuses on only one dimension of the presumption, which Cueni calls substantive. The substantive dimension concerns a presumption in favour of actually granting individuals a greater sphere of liberty. But Cueni discerns two further dimensions along which the presumption may be analysed: the institutional dimension concerns a presumption in favour of granting individuals an institutional right to complain against restrictions of their liberty; and the expressive dimension, drawing on Bernard Williams's account of liberty as a political value, concerns the degree to which the official organs of the state acknowledge and respect individual costs in liberty. Cueni suggests that modern liberal democracies generally have good reason to include such a presumption in their political and legal frameworks along some dimensions yet not others, and briefly illustrates two different ways of institutionalising the presumption, using the examples of Switzerland and Germany.

Finally, Part D assesses proportionality not at the level of moral theory but in terms of its institutional implications, especially regarding the role of courts in scrutinising the decisions of the political branches. Vassiliki Christou examines these implications, as they arise from the use of proportionality as a standard with which state action must comply even if it does not implicate human rights. Proportionality is characteristically used in this way in European Union (EU) law as a means of establishing that the European legislator, due to the powers of the EU being conferred, is more suitable and effective than the national legislator to address a specific public policy matter. In this sense, proportionality goes hand in hand with subsidiarity. Christou queries whether this sense of proportionality applies to the Member State level as well. She notes that the national legislator's standpoint is not comparable to that of the European legislator. The national legislator has full authority or, as often said, is presumed as competent. So subsidiarity does not seem to justify the use of proportionality in this case. Moreover, this expansion of proportionality poses a number of risks, mainly for the principle of democracy. It requires that every national law has to be suitable and necessary to achieve the goal set, and that the judiciary may review such suitability and necessity. However, by requiring that legal change is only permissible if necessary, it creates a tendency towards preserving the status quo. And by requiring that a hitherto unregulated field may only be regulated if necessary, it creates a tendency towards a minimal state, which is not a constitutional principle and may contradict the current democratic will.

By contrast, Corrado Caruso and Chiara Valentini claim that, alongside proportionality as applied to substantive questions about the content of rights, we must introduce an institutional principle of proportionality that regulates interventions by state bodies, Just as we need to achieve a balance between rights claims and public aims, we must achieve a balance among principles concerning

institutional competences. In the latter institutional sense, proportionality analysis sets – in terms of suitability, necessity and stricto sensu proportionality – the formal conditions under which institutions are competent to act and take legitimate decisions interfering with the decision-making competence of other institutions. When courts apply the proportionality test in cases involving rights, they can temper any risks to separation of powers and other formal principles concerning the legitimate exercise of judicial power in constitutional democratic systems by ensuring that their action does not disproportionately interfere with the action of other institutions through the use of institutional proportionality. Caruso and Valentini expound institutional proportionality, as it applies, specifically, to the interaction between the judiciary and other branches of government. Moreover, drawing on relevant doctrines and decisions of the Italian Constitutional Court, they elucidate the different ways in which courts may adjust the scope and intensity of their action to comply with institutional proportionality. Third, they outline how the application of institutional proportionality to some controversial cases would have impacted the Court's decisions and changed the course of its action. In this way, they seek to show that institutional proportionality helps blunt many of Tsakyrakis' critiques about the negative effects of proportionality.

PART A

Freedom and Balancing

1

Disproportionate Individualism

STAVROS TSAKYRAKIS*

I. A Tale of Two Societies

Since at least the publication of Alexis de Tocqueville's famous work *Democracy in America*, common wisdom has it that the United States is an individualistic society par excellence.[1] The judiciary has had more than a fair share in shaping and entrenching this belief, especially during the *Lochner* era (1905–37), when it all but embraced laissez-faire economics,[2] thus giving effect to a strongly individualistic moral philosophy, which praised economic liberty and the right to property. The main tenets of this philosophy can be described as follows: liberty's foundation lies with natural law and consists mainly in the freedom of the individual to acquire property. Accordingly, property rights are elevated to the quintessence of individual freedom. The jurisprudence of American courts has mirrored the priority of property rights. While freedom in other areas, such as freedom of speech, association and personal life, was systematically curtailed in the *Lochner* era without much resistance from the courts, limitations on property rights were automatically deemed problematic.

We can trace the origin of this philosophy to John Locke. Locke insists that 'the reason that men enter into society is the preservation of their property'.[3]

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[1] Tocqueville's description of individuals' mentality in a democracy is that '[t]hey owe nothing to any man, they expect nothing from any man; they acquire the habit of always considering themselves as standing alone, and they are apt to imagine that their whole destiny is in their hands'. Such a democracy 'throws [man] back forever upon himself alone and threatens in the end to confine him entirely within the solitude of his own heart'. A de Tocqueville, *Democracy in America,* vol 2 (New York, NY, Alfred A Knopf, 1945) 99.

[2] Recall Oliver Wendell Holmes's famous saying, 'The 14th Amendment does not enact Mr Herbert Spencer's Social Statics … [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizens to the State or laissez faire'. *Lochner v New York* 198 US 45 (17 April 1905), 75.

[3] J Locke, *Two Treatises of Government*, ed P Laslett (Cambridge, Cambridge University Press, 1980) para 222. *cf* paras 85, 94, 124, 134 and 138.

It is true that he also uses the term 'property' in a broad sense, meant to include the life and liberty of individuals. Thus, within 'the general Name, Property', he includes the 'Lives, Liberties and Estates' of persons.[4] Nevertheless, it was around the narrow sense of possession that individualism developed. Whilst Locke's individualism was far from extreme in so far as it acknowledged that the 'perfect freedom' of individuals in the state of nature was within the limits of natural law,[5] and although he explicitly allows for the regulation of property,[6] there is no doubt that for him political society has a limited aim; namely, guaranteeing the freedom individuals enjoy in the state of nature.

Contrary to the United States, there has not flourished in Europe an individualistic tradition championing property as the pinnacle of human rights.[7] Notwithstanding the fact that the French Declaration of the Rights of Man deems property to be an 'inviolable and sacred right',[8] the political mainstream never seriously questioned society's right to regulate and restrict private property. Most modern European constitutions enshrine welfare rights (at least for citizens). Restrictions of property have typically been understood to have a distributive task.

However, individualism comes in many different forms. In this chapter I want to argue that recent years have seen the rise in Europe of a type of individualism which, following a conception of freedom that owes more to Thomas Hobbes, ends up being more extreme than Locke's. Needless to say, it goes well beyond the scope of this chapter to map its presence in all fields of social life. So what I propose to do is to indicate its pervasiveness in human rights adjudication. Just like the American courts of the *Lochner* era, human rights courts in contemporary Europe can be seen as the bellwether of an intellectual shift that is under way. Indeed, recent European adjudicative practice carves out a notion of individualism that is at odds with a sound theory of justice.

The touchstone of this peculiarly European brand of adjudicative individualism is the principle of proportionality. Proportionality is not narrowly European. It has become the word of the day in human rights law. It is the prevailing method of human rights adjudication all over the world and has come to shape a whole theory of human rights.[9] That does not make it correct. In fact, proportionality offends

[4] ibid para 123.

[5] ibid para 87.

[6] ibid para 3: '[P]olitical power then I take to be a right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property'.

[7] The most illustrative example of this is the European Convention of Human Rights (ECHR) itself, which reflects the common constitutional traditions of the signatory (European) states on fundamental rights. Art 1 of Protocol No 1 to the ECHR sets out the principle of peaceful enjoyment of property (para 1), but at the same time it subsumes its use under state control so that it be 'in accordance with the general interest' (para 2). The case law of the European Court of Human Rights (ECtHR) has always reaffirmed this view (see, inter alia, *Sporrong and Lönnroth v Sweden* App nos 7151/75 and 7152/75 (ECtHR (PL), 23 September 1982), para 61).

[8] Declaration of the Rights of Man and of the Citizen, Art 17.

[9] 'By the end of the 1990s, virtually every system of effective constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of P[roportionality]

our most elementary convictions about human rights. Its failure derives from its individualistic approach to freedom. I start by elaborating this understanding of freedom, which I shall call total freedom, and bringing out its individualistic bias. I argue that total freedom has a striking similarity with the one that Hobbes attributes to human beings in the state of nature. From the state of nature, proportionality lets Hobbes into the city, so to speak. Furthermore, I suggest that due to its individualism, total freedom assumes and reinforces a skewed perception of society and social justice. To bring the defects of total freedom into sharper relief, I contrast it with a different conception that draws primarily on the philosophy of Ronald Dworkin. I argue that the latter has significant advantages and should be preferred.

This chapter does not engage in a close examination of how proportionality is used in the case law.[10] It takes as given that proportionality is the guiding principle of European human rights adjudication. I hope this assumption is not too hard to swallow. To be convinced of its soundness, one need only take a cursory look at the jurisprudence of the most famous European courts adjudicating human rights, such as the ECtHR, the German Constitutional Court and the UK Supreme Court.[11] Equally, this chapter does not take up the broader project of explaining why individualism has taken hold in Europe, what political and intellectual developments have made it possible. Instead it suggests that individualism has found in proportionality the perfect partner in crime.

II. A Prima Facie Right to Everything?

Proportionality is a new label for an old idea. The old idea is balancing. In the 1950s and 1960s, in the context of First Amendment law, American judges routinely employed balancing. Absolutists and balancers debated its pros and cons. Absolutists claimed that the First Amendment contained a set of narrowly defined categorical rules. By contrast, for balancing aficionados like Justice Frankfurter, its necessity derived from the fact that human rights are not absolute, so the only way to determine their limits is to balance the value of the right against the value of competing individual and public interests. Frankfurter's approach was criticised for its lack of clarity on a series of issues: what is to be weighed (interests, principles, rights, considerations); how it is weighed (with what metric); who should do the balancing (judges or legislators). Moreover, balancing seemed to leave obscure

A[nalysis]'. A Stone and S-J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73, 74.

[10] For an overview of the use of proportionality in the case law of the ECtHR, see S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468.

[11] See, in general, T Hickman, 'Proportionality: Comparative Law Lessons' (2007) 12 *Judicial Review* 31, 32–34.

a more basic issue, which concerns the meaning and import of the relevant constitutional provisions. Even if rights in general are subject to balancing, this does not necessarily mean that our constitutional rights must be balanced. Maybe those who enacted those provisions had already made a balancing judgement about, say, the priority of freedom of speech over other public goals. On the basis of that judgement, they may have intended to entrench certain determinate legal standards that conferred something concrete to the right holder. If that was the judgement that the provisions stood for, should not judges be pre-empted from second-guessing it? To most of these questions proponents of proportionality rehash old answers. They stress the indeterminacy of human rights norms, which, as Robert Alexy puts it, 'command … that something must be realised to the highest degree that is actually and legally possible',[12] and come to the conclusion that balancing is inherent in the concept of human rights. This is no different from the claim that, since human rights are not absolute, their content can only be determined through balancing. To the question what shall be placed on the scales, the answer is also much the same: every conceivable individual or public interest. Finally, since proportionality started life as a method of adjudication, it is taken for granted that judges should do the balancing.

The only fresh proposal concerns the specific method of balancing. At this point the concept of proportionality is introduced. Proportionality is a mathematical concept that refers to the relation of two variables to a stable constant. Its use in the context of rights adjudication expresses the idea that some kind of equilibrium is disturbed whenever someone's freedom is restricted in a way that is unsuitable, unnecessary or excessive compared to the benefit that the restriction achieves.

By using the concepts of balance, scale and weight (all concepts coming from the natural sciences), proportionality enjoins us to investigate whether something is adequate, intensive or far-reaching instead of whether it is right or wrong. What are we to make of this shift in focus? Some theorists seem to think that conflicts of values can be reduced to questions of intensity or degree and, more importantly, that intensity and degree can be measured by a common metric (something like a natural force) and that this process will reveal the solution of the conflict. Thus, they argue, proportionality is neutral, objective and rational, and allows us to bypass moral reasoning.[13]

More plausibly, others use the natural science language of balance, scale and weight metaphorically. The value of proportionality, they contend, is that it offers a structure for legal and moral argumentation.[14] But even on the latter view, proportionality is a mistake. That is because its structure is problematic and distorts our reasoning about rights. It is problematic inasmuch as it indiscriminately takes

[12] R Alexy, 'Rights, Legal Reasoning and Rational Discourse' (1992) 5 *Ratio Juris* 143, 145.

[13] See D Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004).

[14] See M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights- Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 141.

into account any human interest, even those that are worthless or ill-founded. It distorts moral reasoning inasmuch as it requires that we examine to what extent pursuing a competing interest would result in a serious, intermediate or light interference with the right in question. But by placing all interests on the scales and by assigning each of those interests some weight, we have already skewed the outcome of the balanc- ing process. Take Dworkin's example of an interest in killing those who criticise me. Are we prepared to assign weight to outrageous interests such as this one in the first place? Once we start going down this road, it makes little difference to assign such interests only a slight weight. The damage will already have been done. So for instance, a small fine for expressing a controversial opinion may start to appear like a minor interference with the right to free speech. Conversely, it may seem to us relevant that the indignation of those who disagree with that opinion is grave. By framing the balance in terms of interests and relative weights we are distracted from proper moral reasoning.[15]

What has gone wrong? At the heart of proportionality's woes is its philosophical starting point, which we can label *Hobbes in the city*. Proponents of proportionality introduce within organised society an idea that Hobbes had reserved for the state of nature, namely that 'every man has a right to everything, even to one another's body'.[16] I shall refer to the contemporary variant of this right as the right to total freedom. However, there are two important differences between Hobbes in the state of nature and in the city. First, contemporary proponents of proportionality take the right to total freedom to be only prima facie. Second, unlike Hobbes, who did not believe that freedom in the state of nature was of any particular value and was perfectly willing to sacrifice it for the sake of security within a political order, proponents of proportionality maintain that total freedom is of such value that it ought to be optimised along with the freedom of other individuals and other values. It follows from this that any interference with what someone wishes to do is a potential abridgement of her rights, or at least the starting point of a human rights inquiry. Activities such as 'falconry',[17] or feeding pigeons on public squares[18] or spitting on the public sidewalk[19] raise human rights issues just as do torture or censorship. From the perspective of this conception, then, there are no specific human rights; rather, individuals have a general right to this kind of total freedom, from which we can derive its more specific emanations after balancing it against competing interests and values to determine in each case whether it will prevail or not. In this sense, it is not far off the mark to say that a prima facie right to everything is equivalent

[15] See Tsakyrakis (n 10).

[16] T Hobbes, *Leviathan*, ed E Curley (Indianapolis, IN, Hackett Publishing, 1994) 80.

[17] Falconry is the sport of hunting with falcons. Men train the birds to do the hunting. See F Michelman, 'Foxy Freedom?' (2010) 90 *Boston University Law Review* 949, 965. Michelman discusses the activity inspired by a case that was brought before German courts.

[18] BVerfGE 54, 143, 2 BvR 854/79 (23 May 1980).

[19] Spitting on public sidewalks is not an example drawn from an actual case but a spirited example of Michelman (n 17) 952.

to a prima facie right to nothing in particular. The flipside is that this conception erodes the distinctiveness of human rights as opposed to other human interests.

Is it possible to arrive at a concept of society (let alone a fair society) with Hobbes as our starting point? That is, starting with the notion that society is an aggregate of individuals who by nature have 'a right to everything, even to one another's body' and then trying to figure out how to come together to form a commonwealth. Hobbes' own solution was drastic: a commonwealth is possible only if individuals forfeit not just the right to everything but also all their rights. This was considered his weak point, because the absolutism he proposed was not only unattractive but also incompatible with the principle of individualism he assumed as his starting point. What is the use of having a right if it only serves to licence its forfeiture?

Hobbes' absolutism never became popular. Still, his scheme seems to persist in public discourse, albeit with one basic adjustment. If a peaceful social organisation is possible without forfeiting every right, then such forfeiture is unnecessary. Individuals need only forfeit those rights the exercise of which is incompatible with peaceful political co-existence, but they may hold on to the rest of them. The scheme becomes clearer if it is recast in terms of freedom. Individuals have an immense amount of freedom; they enjoy total freedom. In a society they are enjoined to sacrifice not their total freedom but just the amount that is necessary to secure the mutual enjoyment of the remaining portion of their freedom under the auspices of a commonwealth. The modified Hobbesian scheme is the basis of what could be called an 'individualistic liberalism'. Its motto is the following: 'the less freedom we give away, the more just a society is'. On this view, the minimal state becomes not merely an efficient social organisation but something valuable, a realisation of justice.[20]

By adopting the Hobbesian idea that individuals have a prima facie right to total freedom, proportionality subscribes to an individualistic liberalism. But this kind of individualism is a methodologically flawed abstraction that makes social justice incomprehensible and, just as was the case with Hobbes, ends up granting no rights to individuals. It is methodologically flawed since it ignores the fact, so well captured by Aristotle, that man is a social being and cannot be conceived of as outside society. It is society that comes first, not the individual. This means that practices of sharing and accomplishing things with others are prior to the individual pursuing her self-interest. Consequently, we cannot start from the notion of total freedom, since social beings constitutively lack it and society is not the right place to search for it.

[20] The collapse of communism lent additional support to the idea that what distinguishes a 'minimal' from an 'expansive' state is not efficiency but freedom. Indeed, it was freedom and not welfare that was offered to individuals in exchange for the misery that followed the end of communism.

Individualistic liberalism is not the only form of liberalism around. I propose we start instead by thinking about how we should regulate the practices of sharing and accomplishing things with others and do so to make them just. Our answers will vary from one social context to the other. We should expect that individual rights will appear further downstream. But, again, the content of those rights will be determined by a notion of fairness in different social contexts. Take intimate relationships. Couples, we often say, are unions that are supposed to strive for the fullest integration towards the achievement of many shared goals. At the same time, though, we insist that persons remain distinct and independent even in intimate relationships. From this we draw more concrete conclusions. We contend, for instance, that one's private correspondence does not belong to the other, or that it is inappropriate for one to spy on the other, even if it is for the purpose of knowing them better.

Political justice follows the same pattern. Theories of justice are theories about our legitimate demands against our fellow citizens. These demands cannot be properly articulated unless we conceive of everyone as a separate person whose life is of special importance. Thus, we come to a notion of individuality that derives from and relates to a notion of fair sociability. Basic liberties that grant individuals rights are a cardinal element of a fair society; they are indispensable social arrangements that enable all persons to conduct the plan of life that they deem valuable. The maximisation of liberty is not valuable in itself but only in so far as it is supported by this notion of fair sociability. We could call such an approach that reconciles the affirmation of individual rights with the primacy of social life liberal sociability. The thrust of liberal sociability, then, is that individual rights are derived from a conception of a just society (one in which everyone has the status of free and equal), rather than from a doctrine that gives methodological priority to the individual and her total freedom. Under liberal sociability, justice and solidarity find their proper place. We care for justice and solidarity because we are the sort of beings that participate in collective endeavours, which constitutively constrain our liberty and implicate our interests and the interests of others. By contrast, in the individualistic view justice gets a bad name and solidarity is all but eliminated.

There is no space here to make a positive case for this conception of *liberal sociability*, as I call it. My purpose in introducing it is to show that individualistic liberalism is a highly contentious doctrine. In fact, as I argue in the following section, individualistic liberalism propounds a very problematic understanding of human rights.

III. The Liberty of Human Rights

Does individualistic liberalism with its commitment to total freedom help us grasp the concept of human rights? Take, for example, traffic regulations.

Dworkin uses the example of prohibiting driving uptown on Lexington Avenue.[21] Is it helpful to start with a prima facie freedom to drive however someone wishes, including uptown, and then to examine whether the specific prohibition infringes someone's right? The proponents of proportionality will answer 'yes'. They will balance the loss of freedom of driving uptown with the convenience or order in traffic produced by the existence of the traffic rule, and they will probably find that these values outweigh the loss of freedom. Even so, they will maintain that a loss of freedom has occurred, albeit one that was easily exchangeable for the purpose of optimising freedom overall. Suppose now that new research has indicated that the restriction was misguided, and convenience and order in traffic would be better served by the opposite rule, one prohibiting driving downtown. Are we prepared to say that prohibiting driving uptown was a violation that Human Rights Watch should denounce?

What makes us think that a loss of freedom to drive as we wish, even if it is proved to be grounded on mistaken assumptions, is not particularly grave? Why can we live with it? I guess the answer is that nobody feels offended by the prohibition; nobody feels that the prohibition denies her dignity as a moral agent.[22] On the contrary, someone will feel deeply offended if she is not free to worship the God she wishes to worship or to express her political ideas. The conclusion is that not every curtailment of freedom raises a human rights issue but only the abridgement of certain basic liberties.

Which are these basic liberties? How are we going to distinguish which liberties are basic (or fundamental or preferred) for a society to be just and which are not? Rawls suggests two ways: (i) we can use the list of the various bills of rights and declarations of the rights of man;[23] (ii) we can 'consider which liberties are essential social conditions for the adequate development and full exercise of the … moral personality over a complete life'.[24]

Ronald Dworkin goes one step further in specifying the basic liberties and thus buttressing the contrast between the idea of total freedom and the alternative conception suggested above. He understands total freedom to be the power to act as we wish unimpeded by others or by a political community. He maintains that we

[21] R Dworkin, *A Matter of Principle* (Cambridge, MA, Harvard University Press, 1985) 189.

[22] 'It is not demeaning for you to accept that a majority of your fellow citizens has the right to fix traffic rules and enforce the rules they fix, provided that the rules they chose are not wicked or desperately foolish.' R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, Harvard University Press, 2011) 367.

[23] 'Throughout the history of democratic thought the focus has been on achieving certain specific liberties and constitutional guarantees, as found for example, in various bills of rights and declarations of the rights of man.' J Rawls, *Political Liberalism* (New York, NY, Columbia University Press, 1993) 292.

[24] ibid 293. Quite instructively, Rawls felt compelled to utilise the notion of basic liberties in the light of HLA Hart's famous critique of the initial formulation of the liberty principle in *A Theory of Justice*. See HLA Hart, 'Rawls on Liberty and Its Priority' (1973) 40 *University of Chicago Law Review* 551, 553; and J Rawls, 'The Basic Liberties and Their Priority' in J Rawls, *Collected Papers*, ed S Freeman (Cambridge, MA, Harvard University Press, 1999). In important respects, my critique of total freedom echoes Hart's view. The failure he identified in Rawls' original proposal is the one I attribute to the principle of proportionality.

do not actually ascribe value to such freedom. We do not think, he says, that there is any moral loss when the state forbids me to kill my critics. 'If nothing wrong has taken place when I am prevented from killing my critics, then we have no reason for adopting a conception of liberty that describes the event as one in which liberty has been sacrificed.'[25]

The liberty we value is, according to Dworkin, an interpretative concept that is not and should not be co-extensive with total freedom. The liberty we should be committed to is 'the area of [a person's] freedom that a political community cannot take away without injuring him in a special way: compromising his dignity by denying him equal concern or an essential feature of responsibility for his own life'.[26] This is not another formulation of the list of basic liberties. True, in so far as the traditional basic liberties (freedom of speech, freedom of religion, etc) guarantee the 'essential social conditions for the adequate development and full exercise of the … moral personality over a complete life' (Rawls), these are also included in the Dworkinian formula. Still there are substantial differences.

First, Dworkin's formula seems broader since any interference that denies equal concern and respect qualifies as giving rise to a claim of human right.[27] Second, and more important, it does not allow that 'fundamental or preferred liberties' be determined by collective views. It is not that from the immense amount of freedom we pick some liberties because they seem to us more valuable than others. Doing so would be like imposing on others a certain view about what is a good and valuable way of life. But this would contradict our stated aim, because it would fail to respect everyone's personal responsibility to make the best of their own lives.

But even more fundamentally, Dworkin's formula provides a robust philosophical basis for the kind of liberty we should value. For Dworkin, it is not the role of political society to satisfy our preferences simply because they are manifestations of our freedom. In fact, political society may and does use its coercive force for all sorts of purposes and restricts freedom in all sorts of ways. There is nothing prima facie problematic about that. What a political society may not do is deny a liberty, when being denied that liberty would compromise our dignity. In turn, an act is an assault on dignity when it denies someone 'equal respect and concern or an essential feature of responsibility for his own life'.[28] What we really value is dignity. Dignity is the central concept for human rights and all the more specific 'valued liberties' are connected with it. So when, for example, we come to consider that on matters of intimacy we should be free from governmental interference, our view expresses rather the conclusion of an interpretation of the concept of dignity. One of the characteristic ways in which a political society may fail in its duty to act

[25] R Dworkin, *Justice in Robes* (Cambridge, MA, Harvard University Press, 2006) 115.
[26] Dworkin (n 22) 366.
[27] But see Michelman and his Malthus Act hypothetical, arguing that sometimes Dworkin's formula could be narrower and not include traditional core liberties. Michelman (n 17) 968–70.
[28] Dworkin (n 22) 366.

consistently with dignity is when it acts on discriminatory or moralistic grounds. The first type of ground compromises equal standing, whereas the latter vitiates the principle of personal responsibility for one's own life.

These observations help vindicate the view that rights characteristically operate as trump cards.[29] It is not because rights are infinitely more important than the considerations they trump, but because a state that acted on those considerations would thereby assault dignity, and the recognition of the right serves to act as a bulwark against that assault. Consider moralistic and paternalistic laws. These are based on impermissible justifications because they do not respect the ethical responsibility of individuals and thus injure their dignity. So, for example, if the justification for prohibiting bird feeding in the park is that this kind of activity is worthless or a waste of time, this would be an insult to the ethical responsibility of the individuals. The state cannot restrict my choices on the basis that they are not worthy. To do so, would be for the state to make a judgement which the principle of personal responsibility commands that each one of us make for ourselves. But the state can restrict my choices when its reason for doing so does not assume any ethical evaluation. This means that there is no general or prima facie right to feed the birds, to engage in falconry or 'to paint my Georgian house purple'.[30] A state typically prohibits or at any rate regulates those activities on the basis of considerations that do not compromise dignity (such as environmental protection, public health and urban planning). However, the very same activities raise human right issues whenever their justification is based on ethical evaluations. Again, what counts is not freedom as such (the same activity can be restricted without injury) but the protection of ethical responsibility.

Now, someone could say that feeding the birds or falconry is the basic plan of her life; it is not just a preference, like drinking soda instead of orange juice. Does the state show lack of respect for someone's ethical responsibility when, although it abstains from any ethical evaluation, it forbids or makes more difficult on other grounds the pursuit of a central element of my conception of the good life? What is the use of not allowing the state to make ethical judgements about my conception of the good life if it can forbid it altogether for some other reason? This is a question that again shifts our focus from dignity to total freedom. Our claim towards society is not freedom but respect for our status as moral agents. So, if for example the state acknowledged our freedom to feed the birds, stating that even worthless activities such as this one should be allowed, such an outcome would certainly entail an insult to ethical responsibility, although freedom would be intact.

If we take for granted that every society regulates most of the activities of its members, it would be a disaster to consider every individual preference as an ethical choice that raises a claim of right. We will end up 'moralising' every measure

[29] See R Dworkin, 'Rights As Trumps' in J Waldron (ed), *Theories of Rights* (Oxford, Oxford University Press, 1984) 153.

[30] Painting one's Georgian house purple is Dworkin's example. See Dworkin (n 22) 346.

and unavoidably the majority will have to take a stance on every ethical choice. The deliberation would be something as follows: Is your life's plan feeding the birds? Then it gives you a prima facie right, but so does our life's plan, which is to play football. For us, playing football is more valuable and, since we are many, our choice must have the upper hand. Put differently, if society takes every individual preference as an ethical choice – and thus worthy of protection as a prima facie right – I doubt that the result will be more freedom. Everybody, sometimes, will be deeply offended because others will oppose their choices on the basis of their own ethical valuations. The right to nothing in particular will then morph into a right to nothing *tout court*.

It is true that the alternative strategy to forbid regulations that are based on ethical justifications does not guarantee or facilitate any plan of life based on any preference. But the real claim we have from society is not to provide everything we need for the success of our plan, even prima facie. Our claim is not, to use Dworkin's metaphor, to have all possible colours in our palette but to be able to design our life on the basis of our own value judgements with the colours that are available to all.[31]

IV. Human Rights and the Courts

Now, if we accept that only a few basic liberties are 'essential social conditions' of moral personality in Rawls' sense, or are needed to protect against violations of dignity in Dworkin's sense, it is less problematic to subscribe to a constitutional arrangement whereby courts are called to safeguard them from eventual abridgement by entrenching them against the legislative will. In other words, this idea fits well with our traditional ideas of representative democracy and judicial review. By contrast, the concept of total freedom that is implicit in the principle of proportionality renders any interference with a person's total freedom a potential human rights vio- lation, or at least the starting point for a human rights inquiry. That definitely seems to reflect the position of the German Constitutional Court, which, as Mattias Kumm notes, 'regards any liberty interest whatsoever as enjoying prima facie protection as a right'.[32] In other words, as Kumm acknowledges, 'the recognition of a general right to liberty and a general right to equality means practically all legislation can in principle be challenged on human rights grounds, leading to an assessment of its justification in terms of public reason as prescribed by the proportionality tests'.[33]

[31] ibid 367.

[32] Kumm (n 14) 151: 'In Germany,' Kumm says, 'the right to the "free development of personality" is interpreted as a general right to liberty understood as the right to do or not to do whatever you please. It has been held by the Constitutional Court to include such mundane things as a right to ride horses through public woods, feeding pigeons on public squares, or the right to trade a particular breed of dogs.' (Notes omitted.)

[33] ibid 164.

If in principle every piece of legislation gives rise to a human rights issue, then the judiciary must decide on virtually any question of public policy, from fines for parking violations to the fluctuation of interest rates. Furthermore, in doing so, it is bound to employ a standard that is much more intrusive than mere rational connection. As a result, the boundary between review and appeal is automatically blurred, as is, along with it, the basis of the courts' legitimacy. Legitimacy concerns are intensified when it is supranational courts such as the ECtHR that are tasked with protecting human rights. Having to rely on an expansive understanding of the scope of human rights, they end up becoming the ultimate arbiters of the legality of every piece of national legislation.[34]

Independently of whether such a development would be desirable or not, there is no doubt that it dramatically alters the way we conceive of judicial review, the power of political majorities, the very concept of representative democracy and, ultimately, the role of supranational human rights courts. In reality, this shift would surreptitiously make proportionality not merely the 'ultimate rule of law'[35] but the over-arching method for the moral assessment of any form of human conduct.

V. Conclusion

To conclude, I have tried to draw a distinction between two understandings of human rights. On the understanding I favour, limits to 'total freedom' do not necessarily constitute an 'invasion' of valued liberties. Rather, we have to determine which restrictions of freedom count as injuries to the dignity and autonomy of individuals. For a proponent of total freedom, freedom is understood in quantitative terms; the more of it we have, the better. This account, I have argued, is ill-equipped to make distinctions between kinds of invasion of freedom depending on their justification, and on this basis to exclude some justifications as incompatible with the very idea of rights such as freedom of expression, religion and privacy. In fact, in so far as the proportionality test is meant to be neutral and to take at face value a wide range of interests, it lacks the resources to exclude

[34] This is not to say that judges are eager to take up such an intrusive role or that they actually exercise it. In fact, judges typically devise strategies to limit their interference with political decisions. This applies with even more force at the supranational level. The doctrine of the margin of appreciation is a characteristic example. Often those strategies bear the mark of their origin. They replicate the philosophical confusion and dead ends of the principle of proportionality. If we abandon the principle of proportion- ality, the usefulness and cogency of such strategies is likely to be greatly diminished. Conversely, when sometimes judges assume an expanded notion of judicial review and proceed to apply proportionality, their judgment seems totally ad hoc and arbitrary. See, eg, in *Mamidakis v Greece* App no 35533/04 (ECtHR, 11 January 2007), where the amount of a fine, although found by the Greek courts to be proportionate, was held to be excessive by the supranational Court purely on the basis of its amount.

[35] Beatty (n 13).

any consideration whatsoever. Thus, it exposes all our rights to a very dangerous vulnerability. More fundamentally, it seems to presuppose a perverse conception of the relationship between the individual and society, one that builds up from a radical individualism. This starting point is deeply misguided. For social beings like us, total freedom is not a value, nor do we want our courts to enforce it. An organised society routinely constrains our freedom; it imposes limits on the ways we can use our shared social, natural and aesthetic environment. Being members of such a society, we should be more concerned that we can live our unavoidably constrained lives in dignity.

Some political ideas have the tendency to recur with slight adjustments in a variety of contexts. Individualism is one of them. Europe prides itself for never succumbing to the extreme individualism that underpinned laissez-faire economic arrangements. It may still be susceptible to individualism, though, if it allows the ascendancy of a philosophy the hallmark of which is the prima facie right to everything. If Europe succumbs to individualism it will be exposed to a much graver risk than those associated with a free market: the risk of having the concepts of justice and solidarity seriously undermined.

2

Driving Up Lexington Avenue (Again)

KAI MÖLLER

I. Introduction

There are controversies about rights that simply will not go away. I do *not* have in mind the well-known disputes about specific rights issues, such as abortion, hate speech or religious symbols in public spaces. Rather, I mean controversies about the theory of rights. One of the questions that has kept rights theorists busy is about the nature of rights: are they trumps (as argued by Ronald Dworkin),[1] or are they principles (as held by Robert Alexy)?[2] Another question, and the one that is the topic of this chapter, concerns the scope of rights: do rights protect *any* liberty interest, such that any limitation of a person's freedom to do as he or she pleases constitutes a limitation of a right and requires a justification? Or is the scope of rights narrower, with the consequence that many activities that people routinely engage in are not protected by rights and their limitation is accordingly simply a matter of policy?

Early in his career, Ronald Dworkin forcefully took a stance on this question. In *Taking Rights Seriously*, he argued against a right to liber*ty* and instead defended a right to (distinct) liber*ties*. The example that he used to illustrate his argument concerned Lexington Avenue in New York City:

> I have no political right to drive up Lexington Avenue. If the government chooses to make Lexington Avenue one-way down town, it is a sufficient justification that this would be in the general interest, and it would be ridiculous for me to argue that for some reason it would nevertheless be wrong.[3]

[1] See, eg, R Dworkin, 'Rights as Trumps' in J Waldron (ed), *Theories of Rights* (Oxford, Oxford University Press,1984) 153.

[2] R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) ch 3.

[3] R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 269.

'Driving up Lexington Avenue' has captured the imagination of rights theorists.[4] Stavros Tsakyrakis, too, invokes it in 'Disproportionate Individualism',[5] his final essay on the theory of rights, in order to make his case against a right to liberty or, as he calls it, 'total freedom'. His work is particularly relevant because, unlike Dworkin's, it is well-informed of and engages with contemporary scholarship on proportionality-based rights adjudication and presents its criticisms of a right to liberty as part of an assault on this way of conceptualising rights.

This chapter returns the favour and engages directly with Tsakyrakis' challenge. I have not been able to withstand the pull of the Lexington Avenue example, and accordingly, I will use it to build my case against Dworkin's and Tsakyrakis' views. I will first give an overview of the case in favour of a general right to liberty as proposed by the literature on the culture of justification and the right to justification (section II). This will be followed by a summary of Tsakyrakis' challenge (section III) and my case for why I believe this challenge to be unsuccessful (section IV).

II. The Case for a General Right to Liberty

As a matter of the history of ideas, the case for a general right to liberty was developed *not* as a free-standing argument about rights but as an attempt to make sense of a globally successful *practice* of rights adjudication. This practice, which in previous writings I have labelled 'the global model of constitutional rights',[6] prominently displays two features. The first is *rights inflation*,[7] which means that in the practice of rights adjudication the scope of rights has become very broad. The best-known and most extreme example is the German Federal Constitutional Court's interpretation of the German Basic Law as protecting a right to freedom of action. This is, of course, precisely the 'right to liberty' that Dworkin and Tsakyrakis reject. Article 2(1) of the German Basic Law provides 'Everyone has the right to freely develop his personality.' As early as 1957, the Court decided to interpret this right as a right to freedom of action, arguing that an earlier draft of the provision had stated 'Everyone can do as he pleases'.[8] The Court repeatedly affirmed this ruling and famously declared that Article 2(1) included the rights to feed pigeons in a park[9] (an example that Tsakyrakis picks up in his essay) and to go riding in the woods.[10] The second feature is the use of the doctrines of *balancing* and

[4] See, eg, DN Husak, 'Ronald Dworkin and the Right to Liberty' (1979) 90 *Ethics* 121, 128–29; DH Regan, 'Glosses on Dworkin: Rights, Principles, and Policies' (1978) 76 *Michigan Law Review* 1213, 1216–17.

[5] Tsakyrakis, 'Disproportionate Individualism', ch 1 of this volume.

[6] K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012) ch 1.

[7] ibid 3–5.

[8] BVerfGE 6, 32 (36–37) (*Elfes*).

[9] BVerfGE 54, 143 (*Pigeon-Feeding*).

[10] BVerfGE 80, 137 (*Riding in the Woods*).

proportionality in order to determine the permissible limitations of rights.[11] The limitation of a right is justified if it is proportionate, that is, if it serves a legitimate goal (legitimate goal stage), is a suitable means of achieving the goal (suitability stage), is necessary to achieve the goal (necessity stage) and if the importance of the goal outweighs the severity of the limitation (balancing stage; sometimes called proportionality in the strict sense).

The emerging structure of rights (wide scope of rights plus use of balancing and proportionality) sits in some tension with most, if not all, philosophical theories of rights, including Dworkin's: where contemporary rights adjudication endorses a general right to liberty, Dworking rejects this and prefers more narrowly defined rights to liberties; and where contemporary rights adjudication wants to balance rights against competing interests, Dworkin rejects balancing[12] and argues that rights operate as trumps.[13] The debate about proportionality, in which comparative constitutional lawyers and constitutional theorists have engaged since roughly the beginning of this century,[14] can be seen as an attempt to come to terms with the success of the global model and either make a coherent case for it, thus defending a globally successful practice, or show its theoretical deficiencies, thus adhering to conventional philosophical wisdom about rights.

The case for rights inflation can be made, and has been made in the literature, in more than one way, just as one can climb to the peak of a mountain from more than one direction. One route adopts a negative strategy and demonstrates the incoherence of any attempt to limit the scope of rights to a set of especially important interests.[15] If there is no right to liberty but only a right to (distinct) liberties, then we need a test that tells us which liberty interests are protected by rights and which are not. This points to the necessity of a 'threshold' that delineates rights from mere interests. It turns out that it is at least very difficult and perhaps impossible to develop a coherent threshold: all existing attempts have failed, and fairly obviously so. Best known is James Griffin's theory of rights as protecting

[11] Möller (n 6) 13–15.

[12] R Dworkin, 'It is absurd to calculate human rights according to a cost-benefit analysis' *The Guardian* (24 May 2006) at www.theguardian.com/commentisfree/2006/may/24/comment.politics.

[13] See Dworkin (n 1).

[14] Representative publications include Alexy (n 2); A Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge, Cambridge University Press, 2012); D Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004); M Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in G Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 131; K Möller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709; A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008-9) 47 *Columbia Journal of Transnational Law* 72. See also the following edited collections: G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge, Cambridge University Press, 2014); VC Jackson and M Tushnet (eds), Proportionality: *New Frontiers, New Challenges* (Cambridge, Cambridge University Press, 2017).

[15] Möller (n 6) 74–77.

personhood.[16] Griffin argues that human rights protect personhood, which in turn requires liberty. Which liberty interests? Griffin's answer: those liberty interests that are important for personhood. This reasoning is obviously circular, and Griffin offers no principled way of distinguishing liberty interests that are required for the protection of personhood from interests that are not.[17] Of course, the failure of Griffin's theory in this regard does not demonstrate that there could not be some other, more convincing theory or threshold. But as long as no convincing threshold is put forward, it is perhaps permissible to embrace rights inflation and work on the assumption that there is, indeed, a general right to liberty.

The second, and more positive, case in favour of a general right to liberty flows from the twin ideas of the culture of justification and the right to justification. This theory was first proposed by Mattias Kumm as an attempt to make sense of the practice of human and constitutional rights adjudication with its focus on a broad scope of rights and the use of balancing and proportionality.[18] Kumm argues, drawing on the work of the German philosopher Rainer Forst, that every person's foundational right is the right to justification. This means that whenever the state places a burden on a person, it owes him or her a substantive justification, and it is the role of the courts, and ultimately the constitutional or supreme court, to assess the reasons put forward by the state and to strike down any unjustifiable laws.

Take as an example the famous and above-mentioned German case about the right to feed birds in a public park. Assume that you would like to feed birds in your local park and that a public authority has prohibited this activity. It seems clear that bird feeding is not the kind of activity that would ordinarily attract the protection of rights *if* we understand rights as protecting a set of narrowly defined, especially important interests. But the right to justification does not subscribe to this starting point. Rather, it argues that *any* limitation of your ability to do as you please requires justification. Intuitively this is surely plausible: as a would-be bird feeder, you might ask 'How dare they prohibit me from feeding the birds? They better have a good justification!' And you would be entirely right to demand a good justification, because if no such justification exists, the legitimacy of the state's act would at least be questionable. Under the right to justification, you could take your case to court, and the court's role would be to uphold your right to justification, that is, to strike down a law that unjustifiably burdens you.

To this one might object that the justification that you are entitled to is that the law that limits your ability to feed the birds has democratic pedigree.[19] Put bluntly, the justification is that a democratic majority voted for this law.

[16] J Griffin, *On Human Rights* (Oxford, Oxford University Press, 2008) 32–37.

[17] J Raz, 'Human Rights Without Foundations' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) 321, 326–27; R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, Harvard University Press, 2011) 474, fn 5; Möller (n 6) 74–77.

[18] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 141.

[19] For a discussion of this issue, see K Möller, 'Justifying the Culture of Justification' (2019) 17 *International Journal of Constitutional Law* 1078, 1088–92.

The response that proponents of the right to justification and the culture of justification give to this point is that democratic pedigree is a necessary but not sufficient condition. In addition to democratic (majoritarian) decision-making processes, the law must be reasonably justifiable. This, too, makes intuitive sense if you place yourself in the shoes of the bird feeder: if there was simply no substantive reason for the prohibition on bird feeding, you would not consider the law justified and you would consider the prohibition as illegitimate. By way of contrast, you would regard the law as legitimate if there was a good enough reason justifying it, even if you disagree with the policy and would have voted against it. This is because you understand that there is *reasonable disagreement* about what justice requires and that your personally favoured views will not always prevail.

The right to justification can explain and make sense of the practice of human and constitutional rights law with its endorsement of a right to liberty and the doctrines of balancing and proportionality. It requires a general right to liberty because this ensures that *any* limitation of a person's freedom will trigger the duty of justification. And the proper application of the principle of proportionality ensures that disproportionate laws, that is, laws that are not reasonably justifiable, are struck down.

III. Tsakyrakis' Challenge

In this section I will present Tsakyrakis' two central objections to rights inflation. I will briefly respond to the first, relating to the relationship between the individual and the community, at the end of the following subsection. However, the main focus of the remainder of this chapter will be on his second criticism, which relates to the relationship between rights, freedom and dignity; this will be discussed in section IV.

A. Rights, the Individual and the Community

Tsakyrakis argues that 'total freedom' and proportionality underestimate the value of community. He invokes an analogy that I find useful and productive: he compares a political community with intimate relationships. While couples are supposed to be as close to each other as possible, the partners nevertheless remain 'distinct and independent even in intimate relationships'.[20] For example, it would be inappropriate for the partners to spy on each other or to read each other's private correspondence.[21] A parallel point, Tsakyrakis argues, applies for

[20] Tsakyrakis, ch 1 of this volume, section II.
[21] ibid.

a community-based conception of political justice, and he uses the term 'liberal sociability'[22] for this. A fair society aims for the greatest possible integration of its members while simultaneously insisting that each member remain distinct and independent. To this end, 'basic liberties' are indispensable: they 'enable all persons to conduct the plan of life that they deem valuable'.[23]

Even though Tsakyrakis does not cite Dworkin here, his idea appears to be influenced by Dworkin's work. In the famous 'Introduction' to his book *Freedom's Law*,[24] Dworkin provides a defence of judicial review that focuses on the value of political community. The question he addresses is the old question of the tension between the judicial protection of rights and democracy. Dworkin reconciles the two by arguing that the value underlying democracy must be community, and that a genuine community must be one of moral members. Moral membership, in turn, requires upholding three principles. The first is the principle of participation: no one can be a moral member of a community unless he has the 'opportunity to make a difference in the collective decisions'.[25] The second is the principle of stake. This is what in his earlier writing was the right to equal concern and what in his later work became the dignitarian principle of intrinsic (and equal) value: it holds that 'collective decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all'.[26] The third is the principle of independence. This principle is identical to the right to equal respect in his earlier writings and the principle of personal responsibility in his later work. It holds that a genuine political community must be 'a community of independent moral agents';[27] this prohibits moralism and (some forms of) paternalism. Accordingly, the judicial protection of rights should be geared towards protecting the conditions of moral membership. If it does this successfully, it does not undermine but rather strengthens democracy.

The question that Tsakyrakis can be seen as raising here is whether proportionality-based rights adjudication or the right to justification have a 'story' about community, too. In his view, the philosophy underlying proportionality-based judicial review is one of 'the minimal state' or 'individualistic liberalism'. But that strikes me as incorrect, even from an empirical perspective. The country that subscribes more than any other to those values is the United States, which at the same time follows a theory of rights that is much closer to Tsakyrakis' preferred theory. And conversely, the country best known for proportionality-based judicial review, Germany, has never adopted any philosophy resembling the 'minimal state' or 'individualistic liberalism'. From a normative perspective, too, Tsakyrakis' claim is unconvincing. As pointed out above, the first theory of proportionality-based

[22] ibid.
[23] ibid.
[24] R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA, Harvard University Press, 1996), 'Introduction'.
[25] ibid 24.
[26] ibid 25.
[27] ibid 26.

judicial review and the right to justification was put forward by Mattias Kumm.[28] He makes this case by invoking the value of democracy, which, Kumm argues, starts with the idea of consent: the consent of the people. However, because insisting on everyone's consent is impractical and unrealistic, the requirement of everyone's consent must be replaced by two conditions, one procedural and one substantive, which have to be cumulatively fulfilled. Procedurally, a law must have been passed by a majority; and substantively, the law must be such that those most burdened by it could reasonably have consented to it.[29] Kumm then shows that this requires proportionality-based judicial review. So while his theory is presented as concerned with democracy and not community, it can easily be rephrased in the language of community: to be a true community, the laws that we give ourselves must be justifiable to everyone, in particular to those who object to them and/or voted against them. If we enforce unjustifiable laws against those who object to those laws, we do not treat them as equal members of our political community.

B. Freedom, Dignity and Rights

Tsakyrakis makes the following, Dworkin-inspired case against 'total freedom'. Imagine the government makes Lexington Avenue a one-way street. Proportionality and the culture of justification would consider this a limitation of the general right to 'total freedom' and ask whether this limitation is proportionate. But there seems something wrong with this logic, according to Tsakyrakis. Even if the government made the wrong call here as a matter of policy, this mistake would not appear to be violation of rights. He asks the rhetorical question 'Are we prepared to say that prohibiting driving uptown was a violation that Human Rights Watch should denounce?'[30] The answer is 'no' because 'nobody feels offended by the prohibition; nobody feels that the prohibition denies her dignity as a moral agent'.[31] From this he infers 'The conclusion is that not every curtailment of freedom raises a human rights issue but only the abridgement of certain basic liberties.'[32]

This conclusion appears at first sight to be the conventional endorsement of a set of narrowly defined basic liberties, such as freedom of religion, freedom of association, freedom of speech and so on. However, as Tsakyrakis makes clear later in the same section, this is not what he and Dworkin have in mind. He rejects lists of basic liberties: 'Dworkin's formula seems broader since any interference that denies equal concern and respect qualifies as giving rise to a claim of human right.'[33] This is correct and important. What matters for Dworkin (and Tsakyrakis) is not whether an act by the state restricts a narrowly defined right. Rather, what

[28] Kumm (n 18).
[29] ibid 168–70.
[30] Tsakyrakis, ch 1 of this volume, section III.
[31] ibid.
[32] ibid.
[33] ibid.

matters is whether the act by the state is consistent with equal concern and respect. Accordingly, lists of liberties do not help us, or in any case are not determinative.

Instead, we have to look at the meaning of 'equal concern' and 'equal respect', which together sum up the requirements of human dignity. (Here Tsakyrakis pulls together elements of Dworkin's early theory of rights, where Dworkin spoke of equal concern and respect (without invoking dignity) and his later work, which introduced human dignity with its two prongs, first, equal and intrinsic value (which was equal concern in Dworkin's earlier work), and second, personal responsibility (which was equal respect in Dworkin's earlier work).)

A law violates equal *concern* (equal and intrinsic value) if it is discriminatory. Since there is nothing to indicate that the prohibition on driving up Lexington Avenue is discriminatory, equal concern is not violated.[34] Equal *respect* is violated in the case of a law that is moralistic or paternalistic. Here we can see the appeal of Tsakyrakis' claim that for there to be a rights violation, the law in question must be offensive to the dignity of the right-holder and an affront to his or her moral agency: moralistic and (inappropriately) paternalistic laws certainly have that quality. In the Lexington Avenue example: since making Lexington Avenue a one-way street would not be motivated by moralism or paternalism, there is no violation of equal respect. Accordingly, there is no right to liberty, and there is no violation of rights in the Lexington Avenue example.

IV. The Right to Drive Up Lexington Avenue

My argument in this section will proceed in two steps. First, I will show that the gap between the culture of justification and Tsakyrakis/Dworkin is considerably narrower than Tsakyrakis makes it seem. Second, I will show that to the extent that there remains a difference, Tsakyrakis' (as well as Dworkin's own) interpretation of Dworkin's principle of personal responsibility is too narrow.

A. Narrowing the Gap

i. Equal Concern and Respect

Tsakyrakis' claim that there is no right to drive up Lexington Avenue needs to be qualified, on the basis of his own theory. Remember that he correctly rejects the

[34] For the record, I have argued in earlier writings that Dworkin's first principle of human dignity (the principle of intrinsic value) should be interpreted as requiring that laws be proportionate: any law that is disproportionate in the strict sense (ie, which fails at the final stage of the proportionality test) attaches too little weight to the interests of the right-holder and accordingly treats his interests as less important than those of others; this constitutes a violation of his status as an equal. See K Möller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2018) 12 *Law & Ethics of Human Rights* 281, 292–96.

conventional philosophical view that rights protect only certain narrowly defined activities or liberties, such as speech, religion, association, privacy and so on. Under that view, it would certainly be correct to state that there is no right to drive up Lexington Avenue: this activity would simply not be among the range of activities protected by rights, and therefore any argument that the government violated rights when it made Lexington Avenue a one-way street would be a non-starter.

But, to repeat, this is not how Dworkin and Tsakyrakis see it. They do not believe in lists of liberties, despite Dworkin's occasional references to them. Rather, they believe that what matters is whether the governmental policy violates equal concern and respect. This implies that under certain conditions, making Lexington Avenue a one-way street could indeed violate rights. If the NYC government argued that driving up Lexington Avenue had been prohibited because it hates drivers (say, because drivers vote disproportionately Republican) and it wants to make their lives more difficult, then this would be discriminatory and would accordingly have failed to show equal concern for drivers. Or if the government had argued that the reason for its policy was that it thought driving was a bad lifestyle and people should cycle instead, then this moralistic or paternalistic motivation could (arguably) have violated equal respect.

What this shows is that for Tsakyrakis and Dworkin, we cannot exclude in advance the possibility that making Lexington Avenue one-way violates rights. It all depends on the reasons for the restriction. How come, then, that Tsakyrakis is so confident that making Lexington Avenue a one-way street does not violate rights? The answer is that we frequently make assumptions about what the government's motives typically are in enacting a law. On the basis of those assumptions, we are confident that we want the government's motives or reasons closely scrutinised when it censors speech, regulates religious practice or bans certain forms of consensual sexual conduct. But we remain largely unsuspicious about the government's motives with regard to planning decisions. Tsakyrakis states:

> So, for example, if the justification for prohibiting bird feeding in the park is that this kind of activity is worthless or a waste of time, this would be an insult to the ethical responsibility of the individuals. The state cannot restrict my choices on the basis that they are not worthy. … But the state can restrict my choices when its reason for doing so does not assume any ethical evaluation. This means that there is no general or prima facie right to feed the birds, to engage in falconry or 'to paint my Georgian house purple'. A state *typically* prohibits … those activities on the basis of considerations that do not compromise dignity … However, the very same activities raise human rights issues whenever their justification is based on ethical evaluations.[35]

This is somewhat puzzling and appears contradictory: on the one hand, there is no prima facie right to feed the birds, but on the other hand, prohibiting bird feeding can in certain circumstances violate rights. How can this be? How should a Dworkinian-Tsakyrakisian judge who has to assess whether a prohibition on

[35] Tsakyrakis, ch 1 in this volume, section III (emphasis added, footnotes omitted).

bird feeding violates rights structure her inquiry? The judge has to work with a bill of rights that presumably includes a right to 'liberty' (as in the Due Process Clause of the Fourteenth Amendment to the US Constitution) or 'private life' (as in Article 8(1) of the European Convention on Human Rights) or 'the right to develop one's personality' (as in Article 2(1) of Germany's Basic Law). She now has two options. The first is that she states that 'there is no prima facie right to feed the birds', in which case none of the rights that she is tasked to protect is applicable and the case is over. The problem with this is that she never gets to the crucial question of whether the prohibition violates equal concern and respect; and accordingly this route is not acceptable. She therefore has to choose the other route, which is to accept that one of the rights in the bill of rights is engaged, in order then to proceed to ask whether the law in question respects equal concern and respect. My point is: we can obsess as long as we wish over the moral coherence of claims such as 'there is/isn't a prima facie right to feed the birds', but given how bills of rights are drafted, this will not be helpful to judges. The positive law obligates them to determine in a first step whether a right is engaged, and in a second step whether it has been violated. And their (stipulated) Dworkinian-Tsakyrakisian commitment obligates them to determine whether the law violates equal concern and respect. I see no alternative to their acknowledging in a first step that any limitation on 'total freedom' (doing as one pleases) engages rights, and then examining in a second step whether the limitation respects equal concern and respect.

What follows is that the gap between proportionality-based judicial review and Tsakyrakis/Dworkin is smaller than it initially seemed. Both approaches acknowledge that a limitation on feeding the birds or making a street one-way could potentially violate rights: it all depends on the kind and strength of the reasons on which the government relies. Proportionality-based judicial review would engage in an all-things-considered assessment of whether the reasons that the government relies on justify the policy under consideration, whereas Tsakyrakis and Dworkin would engage in a narrower inquiry as to whether the reasons are consistent with equal concern and respect.

The problem deepens. Tsakyrakis and Dworkin want to exclude moralistic and paternalistic reasons. But how can a court determine whether a given law is motivated by moralism or paternalism? Granted, if the court is lucky, the government will admit its own moralism. In practice, this is very unlikely and happens almost never. As Mattias Kumm has pointed out in the context of the 'gays in the army' case of *Smith and Grady v United Kingdom*,[36] it seems likely that the relevant political discussions in the United Kingdom in the 1980s were influenced by homophobia, dislike of homosexuality, and moralism. But of course these 'reasons' do not appear in the United Kingdom's submission to the European

[36] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

Court of Human Rights. Kumm observes, 'Once forced into the game of having to justify a practice in terms of public reason, participants are forced to refocus their arguments, and what comes to the foreground are sanitized arguments relating to "operational effectiveness and morale".'[37]

I find the controversy about assisted suicide instructive in this regard. Let us assume that a law that prohibits assisted suicide is motivated in part by moralism (for example, a religious view that it is wrong to commit suicide or assist with it) and in part by a concern about protecting vulnerable people from abuse (under the logic that if assisted suicide were to be legalised, this could be abused by carers or family members). Under Tsakyrakis' and Dworkin's framework, the law violates rights if it violates equal respect, that is, if it is moralistic. But how should this be determined? It seems to me that there is no alternative to go beyond the subjective motivations of the decision-makers and engage in an assessment of whether the concern about protecting vulnerable people from abuse is substantively convincing enough to justify the policy. This, however, is precisely what proportionality-based judicial review and the culture of justification would do: in a first step (at the legitimate goal stage), any moralistic or paternalistic reasons would be declared illegitimate and would be excluded from the further proportionality assessment, and at the three following stages (suitability, necessity, and balancing/proportionality in the strict sense) the court would examine whether the legitimate reason (protecting people from abuse) justifies the policy. The general point towards which I am steering is: sometimes, assessing whether a law is moralistic and/or paternalistic requires engagement with the strength of the other, non-moralistic and non-paternalistic reasons as well. This further narrows the gap between Tsakyrakis/Dworkin and proportionality-based rights adjudication, especially in cases that potentially involve moralism or paternalism.

ii. Proportionality

The previous subsection showed that the application of Tsakyrakis' and Dworkin's theories, on a closer look, shares some of the features of proportionality-based judicial review. This subsection narrows the gap between the two theories further by focusing on proportionality and the culture of justification. In his example regarding Lexington Avenue, Tsakyrakis correctly states that for proponents of the culture of justification, making Lexington Avenue one-way is a limitation of freedom and accordingly requires proportionality analysis to establish whether it is justifiable. He helpfully points out that in most scenarios, there will be a good reason for making a street one-way, and therefore, for the example to 'work', we need to stipulate further that 'new research has indicated that the restriction was misguided'.[38]

[37] Kumm (n 18) 160.
[38] Tsakyrakis, ch 1 in this volume, section III.

In fact, we will have to go even further. Because planning decisions are complex and require considerable expertise, courts will generally be slow to interfere with such decisions and will defer to a considerable extent to the relevant decision-maker. A court could not just replace the government's assessment of this empirically (as well as, to some extent, normatively) complex question with its own. First, the court is not the primary decision-maker but only engaged in a review of the primary decision-maker's decision. In the culture of justification, this implies that the court asks *not* if the primary decision-maker made the 'correct' or 'best possible' decision but only if its decision was reasonable, that is, one of (usually) a range of reasonable decisions.[39] Second, where the original decision-maker has considerable expertise, the court will be even slower to interfere. Tsakyrakis mentions 'new research', and this points in the right direction. But bearing in mind the complexity of these decisions and knowing that often even 'new research' will be controversial and/or not necessarily provide the final word on an issue, it is more likely that a court would interfere only where the mistake of the planning authority is obvious and indisputable. To make the example work, let us say that making Lexington Avenue a one-way street causes traffic pollution on parallel streets during rush hour that leads to severe delays for drivers driving uptown; that this could have been avoided at a marginal cost by keeping Lexington Avenue a two-way street; and that there are no other relevant considerations. In such a scenario, under proportionality-based rights adjudication, a court would come to the conclusion that making Lexington Avenue a one-way street did indeed violate rights because, even taking into account the court's institutional limitations in terms of expertise and the corresponding deference that should be given to the original decision-maker, the court could confidently conclude that the policy was not justifiable. In reality, such cases are rare, and it is important to make this clarification in order to avoid the misleading impression that under the culture of justification, courts would routinely replace the relevant government agency's assessment with their own. This further narrows the gap between proportionality-based judicial review and Tsakyrakis' and Dworkin's conception of rights.

iii. Conclusion

This section has shown that the distance between Tsakyrakis and the culture of justification is smaller than he makes it seem. However, there is still a difference between them. In the Lexington Avenue example, it is imaginable that in certain cases, a court following Tsakyrakis' preferred view would reach the opposite conclusion of a court endorsing proportionality-based judicial review. The next section will therefore take a closer look at Tsakyrakis' and Dworkin's conception of rights and point out why I believe it to be flawed.

[39] Möller (n 19).

B. Personal Responsibility

Both the culture of justification and Tsakyrakis take the view that rights protect the status of every person as free and equal. But the two theories give different interpretations to what this means. For the culture of justification, protecting each person's status as free and equal means that every act that limits that person's freedom must be reasonably justifiable to him or her. For Tsakyrakis, the protection of a person's status as free requires something else. He interprets Dworkin's right to equal respect as requiring respect for the ethical responsibility of each person for his or her own life. This is consistent with Dworkin's own writings, including his later work, where he replaces the right to equal respect with the second principle of human dignity, the principle of personal responsibility. Personal responsibility holds, for Dworkin, 'that each person has a special responsibility for realising the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him'.[40] Most people will agree with this principle in this abstract formulation, but it is very difficult to establish how to apply it to specific policies in order to establish whether they respect or violate personal responsibility. In this context, we have to consider Dworkin's idiosyncratic distinction between ethics and morality. Morality is concerned with the duties we have towards others, whereas ethics is about the duties we have to ourselves.[41] For example, if I kill or injure you, I have violated an obligation towards you, that is, a moral obligation. But if I decide to go to church and pray to God, then this concerns a duty I have to myself. For Dworkin, the state can in principle enforce moral obligations (for example, by prohibiting murder) but it has to abstain from enforcing ethical ones.

From this starting point it follows, as Dworkin and Tsakyrakis correctly point out, that moralism and (at least some forms of) paternalism are impermissible. To use that somewhat dated example: if the state prohibits homosexual sex because it considers it to be against God's will, then it violates the principle of personal responsibility because it is each individual's personal responsibility to figure out whether or not homosexual sex is ethically valuable for him or her. So far, so good. The argument I want to develop in this section is that the principle of personal responsibility is not necessarily exhausted by the prohibition of moralism and paternalism.

Tsakyrakis foresees this challenge and provides two reasons why it fails. I have difficulty fully understanding the first, and accordingly I will quote his argument in full:

> [I]t would be disaster to consider every individual preference as an ethical choice that raises a claim of right. We will end up 'moralising' every measure and unavoidably the

[40] R Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton, NJ, Princeton University Press, 2008) 10.

[41] ibid 20–21.

> majority will have to take a stance on every ethical choice. The deliberation would be something as follows: Is your life's plan feeding the birds? Then it gives you a prima facie right, but so does our life's plan, which is to play football. For us, playing football is more valuable and, since we are many, our choice must have the upper hand. Put differently, if society takes every individual preference as an ethical choice – and thus worthy of protection as a prima facie right – I doubt that the result will be more freedom. Everybody, sometimes, will be deeply offended because others will oppose their choices on the basis of their own ethical valuations. The right to nothing in particular will then morph into a right to nothing *tout court*.[42]

Tsakyrakis' starting point is correct: any claim that there is a right to trivial activities such as feeding birds or driving up Lexington Avenue must proceed on the assumption that there is ethical value in this activity, from the perspective of the right holder. It would indeed be strange to protect something as a right which the right holder does not regard as relevant for the purpose of creating value and meaning in his life. What the culture of justification denies is that only ethically important activities (such as those relating to religion, speech, privacy, etc) 'count' or matter in this regard. But it is certainly true that people feed birds because they regard that activity as something of ethical importance (otherwise they would not engage in it), and people try to get home after work in a timely manner (wishing they could drive up Lexington Avenue) because they regard that activity or what it enables (say, spending more time in the evening with their families) as ethically valuable.

I understand Tsakyrakis' next point as acknowledging that if we are so generous as to include ethical choices as rights, then there will often be conflicts of rights. So, to use his example, if there is a green pitch and it could be used either as a park where people can feed birds or as a football pitch, then there is a conflict. He is also right in so far as numbers matter in this regard: if there is only one would-be bird feeder but 100 people want to use the pitch for football, this is a strong argument to designate it as a football pitch. So it is true that if rights are defined as broadly as the culture of justification would have it, everybody would frequently lose out because other people's rights would frequently outweigh his or her rights. This could not be otherwise – the only scenario where I would not frequently or at least occasionally lose out in this way is where I am the dictator. What the culture of justification adds to this is the insistence that courts should review the policy choices that the majority makes, in order to ensure that everyone's interests have been adequately taken into account. If there are already nine football pitches and the last green spot is about to be converted into the tenth, removing the last remaining spot where animal lovers can feed birds, then perhaps this would be a situation where the courts should step in to protect the ability of animal lovers to give their lives meaning by feeding birds. I fail to see how this leads to a 'right to nothing'.

[42] Tsakyrakis, ch 1 in this volume, section III.

Tsakyrakis' second argument is this:

> It is true that the alternative strategy to forbid regulations that are based on ethical justifications does not guarantee or facilitate any plan of life based on any preference. But the real claim we have from society is not to provide everything we need for the success of our plan, even prima facie. Our claim is not, to use Dworkin's metaphor, to have all possible colours in our palette but to be able to design our life on the basis of our own value judgements with the colours that are available to all.[43]

I agree that 'regulations that are based on ethical justifications' should be impermissible. States should be neutral in questions of the good life. But this does not mean that states cannot, or need not, take into account people's ethical preferences when making policies. In the above example, where 100 people want to play football and 1 person wants to feed the birds, the question for the state is not whether football playing or bird feeding is ethically better. Rather, the state has to decide which designation of the pitch of land is best, given the ethical preferences that people in the community have. Without taking sides in the ethical question, the state can decide that the just solution in this scenario is to designate the pitch for football.

Not only is there no contradiction; there are good reasons to be open to considering the importance of people's ethical convictions in political decision-making as well as judicial review. Let us return to the Lexington Avenue example. If just one person wants to drive uptown in order to get home, it may seem far-fetched to claim that the impossibility of doing so has anything to do with his status as free and equal. Tsakyrakis and Dworkin would say you do not have a right to that 'colour in our palette'. Now assume that the person needs to get home to spend time with his wife. Make the wife about to seek divorce because she never sees her husband because of the traffic jams in NYC. Add needy children and sick parents. An under-stimulated dog. Now assume it is not just one person but everyone working in lower Manhattan: NYC designed a traffic policy that makes everyone's marriage fall apart, ruins their relationships with their children and leads to old people dying neglected as well as animal cruelty. And NYC did this without any discernible benefit – it is simply its 'policy'. I do not find it absurd to think that such a policy might violate Dworkin's and Tsakyrakis' principle of personal responsibility, according to which the state has to respect every person's personal responsibility to create meaning in their own lives. If the state creates conditions where it is exceedingly (disproportionately) difficult to create meaning in one's life, what stops us from saying that the state failed to protect this principle? After all, states design traffic policies precisely in order to enable people to get to work and to get home after work (and a number of other reasons). So the point of traffic policies, in the final analysis, is to facilitate people's living their lives: to enable them to create value and meaning in their lives. Accordingly, if the state

[43] ibid.

designs a traffic policy that does not facilitate the living of one's life but makes it harder – in other words, which torpedoes people's ability to take responsibility for their lives – then it appears to me that the principle of personal responsibility would condemn this state of affairs.

V. Conclusion

I conclude that 'total freedom' and the general right to liberty have survived Dworkin's and Tsakyrakis' assaults unscathed. My first, and more preliminary, point is that the gap between their preferred theory of rights and the right to justification with its endorsement of a general right to liberty and proportionality turns out to be smaller than it may initially seem. Second, I have suggested that the conventional interpretation of Dworkin's principle of personal responsibility as requiring the exclusion of moralism and paternalism is too narrow and that a state that enacts disproportionate policies fails to live up to its obligation to create conditions where people can accept personal responsibility for their lives.

But be that as it may. It is a great loss for proponents of the culture of justification, the right to liberty and the principle of proportionality that we will not be challenged by Stavros Tsakyrakis any longer. By making his insightful and powerful case against proportionality and 'total freedom', he has left his mark in the field. His work will continue to be grappled with, as will the intriguing problem of the right to drive up Lexington Avenue.

3

Hobbes in the City – Hercules in the Courts

A Reply to Tsakyrakis' Second Balancing Critique

MATTHIAS KLATT

I. Introduction

Proportionality-based balancing is the dominant method of rights reasoning nearly globally.[1] Notwithstanding its triumphant success, scholars have raised numerous objections against it. One of the most important critical voices belonged to Stavros Tsakyrakis. In a widely discussed paper published in 2009 in the *International Journal of Constitutional Law*, he submitted that proportionality was nothing less than an assault on human rights.[2]

Tsakyrakis renewed his critique in his 2015 essay, 'Disproportionate Individualism'.[3] His criticism is inspired by a deep concern that we should cherish and share: the loss of social justice by putting too much value on individual libertarian rights.

In this chapter, I demonstrate that Tsakyrakis' criticism goes astray. I will discuss three fundamental points of disagreement between him and the balancing theory. They concern the role of moral reasoning in balancing (section II); the capability of balancing to accommodate the tensions between liberalism and

[1] M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford, Oxford University Press 2012) 1–5; A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 73–74.

[2] S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; for my reply, see M Klatt and M Meister, 'Proportionality – A Benefit to Human Rights?: Remarks on the ICON Controversy' (2012) 10 *International Journal of Constitutional Law* 687.

[3] S Tsakyrakis, 'Disproportionate Individualism' in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Oxford, Hart Publishing, 2015) 235, reproduced with minor amendments as ch 1 of this volume.

communitarianism (section III); and the charge of overvaluing individual freedom by accepting a general right to freedom (section IV).

II. Moral Reasoning in Balancing

A. An Old Misunderstanding

The first point of disagreement regards the role of moral reasoning in balancing. Referring to Beatty,[4] Tsakyrakis alludes to the old misunderstanding that 'proportionality is neutral, objective and rational, and allows us to bypass moral reasoning'.[5] Tsakyrakis seems to distance himself from this misunderstanding ('Some theorists seem to think … More plausibly …'[6]). In the same section, however, he embraces the view that 'By framing the balance in terms of interests and relative weights we are distracted from proper moral reasoning.'[7]

These two statements seem to be self-contradictory. Bypassing moral reasoning and getting distracted from it seem to result in the same thing: a detachment of legal reasoning from moral argument. Tsakyrakis seems to deny and confirm such detachment. To clarify Tsakyrakis' position, a recourse to his earlier writings may be helpful. He cites his 2009 article in the footnote accompanying his remark on getting distracted from moral reasoning.[8] In that article, Tsakyrakis had stated:

> The principle of proportionality assumes that conflicts of values can be reduced to issues of intensity or degree … Thus, it pretends to be objective, neutral, and totally *extraneous to any moral reasoning*.[9]

He also criticised that

> the rhetoric of balancing in the context of proportionality … obscures the moral considerations that are at the heart of human rights issues, and it thus deprives society of a moral discourse that is indispensable … our judges … try to *bypass the moral arguments* ….[10]

Here, we even find the exact wording of the 'bypass' reproach. Furthermore, Tsakyrakis maintained that 'balancing is typically portrayed as a morally

[4] I have doubts whether the reference to Beatty is accurate. Beatty's remarks on the neutrality of proportionality stress its capacity for impartiality, but I doubt Beatty would agree that no moral reasoning was required in proportionality analysis. cf DM Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004) 166 ff.

[5] Tsakyrakis, ch 1 of this volume, section II.

[6] ibid.

[7] ibid.

[8] ibid fn 15.

[9] Tsakyrakis (n 2) 474 (emphasis added).

[10] ibid, 493 (emphasis added). See also ibid 475: 'tends to neglect any moral reasoning', 'risks neglecting the complexity of moral evaluation'.

neutral exercise'[11] and warns against 'mask[ing] moral discourse with the rhetoric of proportionality'.[12]

In light of these earlier remarks, I assume that Tsakyrakis still tended much towards his earlier position when writing 'Disproportionate Individualism', which is why I would like to comment on it.

B. External Justification and the Inheritance Thesis

The view that balancing excludes or disguises moral reasoning is a misunderstanding, because most balancing exercises necessarily include moral reasoning to some degree.

The reproach of exclusion or disguise may be true of individual examples of adjudication. Concrete balancing decisions can be objectionable, at times to a high degree. We should acknowledge that Tsakyrakis is concerned, at least in his 2009 article, not so much with constitutional method and theory *in abstracto* but mainly with the *use* of that method in the case law of the European Court of Human Rights.[13] No doubt, we find in that Court's practice, as in any court's practice, examples in which judges do not lay open their substantive moral reasoning but prefer to hide behind a superficial, shallow reference to proportionality.[14] Elsewhere, however, Tsakyrakis stated that his worry is of a more general, theoretical nature.[15]

Bad practice is nothing for which we could blame the theory of balancing. I find the tendency to do just that, explicitly or implicitly, objectionable in Tsakyrakis' writings. This tendency rests on a frequent misunderstanding.[16] Nothing in the theory of balancing and proportionality prevents paying attention to the substantive moral arguments. Just the contrary is true: by providing a clear analytical structure for argumentation, balancing allows us to identify, address and resolve substantive tensions and moral conflicts.[17] The formal structure helps make explicit the implicit normative premises that require substantive

[11] S Tsakyrakis, 'Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla' (2010) 8(2) *International Journal of Constitutional Law* 307, 308.

[12] ibid.

[13] He refers to two practical examples in Tsakyrakis (n 2) 491–92.

[14] Compare ibid 492; see also Tsakyrakis (n 11) 310.

[15] '[M]y interest is not with individual cases or decisions …': S Tsakyrakis, 'Is there a general right of non-disclosure?' in D Spielmann, M Tsirli and P Vogiatzis (eds), *La Convention européenne des droits de l'homme, un instrument vivant: Mélanges en l'honneur de Christos L. Rozakis = The European Convention on Human Rights, a living instrument* (Bruxelles, Bruylant, 2011) 653, 660.

[16] Tsakyrakis' point is shared by GCN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179, 191.

[17] For details see Klatt and Meister (n 1) 51–56; M Klatt, 'An Egalitarian Defense of Proportionality-Based Balancing: A Response to Luc B. Tremblay' (2014) 12 *International Journal of Constitutional Law* 891, 899.

justification.[18] It lays open the required moral and substantive discourse in rights reasoning. Thereby, balancing facilitates greater rationality in the application of rights.[19]

Moral reasoning is a necessary component of constitutional rights adjudication.[20] As I had argued in my answer to Tsakyrakis' 2009 article, we can clarify this point with the help of the special case thesis. Quite tellingly, this thesis has nothing to do with proportionality in particular. It concerns legal argumentation in general, and only its first part is relevant here.[21] The latter holds that legal discourse is a case of general practical discourse.[22] Since balancing requires legal argumentation, balancing is a case of general practical discourse. Afonso da Silva has made this point very clear:

> [Tsakyrakis] completely ignores that, just as almost everything in legal reasoning, the definition of degrees of satisfaction and non-satisfaction of a principle will always be subject to fierce disputes, which will involve all types of arguments that may be used in legal argumentation in general, including the moral considerations he misses so much.[23]

To further deepen this point, I want to highlight the distinction between internal and external justification.[24] Although it was developed in the context of argumentation by means of syllogism, this distinction also applies to balancing.[25] Internal justification concerns whether we can deduce the balancing result from the premises according to the three-question structure. Any judgement that addresses these three questions (and not others) and deduces the result correctly is internally justified.[26]

However, this neutral form of argumentation is only a *necessary* condition of a fully justified balancing decision. For *sufficient* conditions, we must add external justification. External justification concerns the truth or correctness of the

[18] Klatt and Meister (n 1) 55; see also D Kyritsis, 'Whatever Works: Proportionality as a Constitutional Doctrine' (2014) 34 *OJLS* 395, 413.

[19] Klatt (n 17) 899.

[20] R Dworkin, *Freedom's Law: The moral reading of the American Constitution* (Cambridge, MA, Harvard University Press, 1996) 14; Beatty (n 4) 25–33.

[21] Klatt and Meister (n 2) 693; see also Klatt (n 17) 895.

[22] R Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford, Oxford University Press, 1989) 212–20.

[23] V Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 *OJLS* 273, 288.

[24] For details see also M Klatt, 'Proportionality and Justification' in E Herlin-Karnell and M Klatt (eds), *Constitutionalism Justified: Rainer Forst in Discourse* (Oxford, Oxford University Press, 2019) 178; M Klatt, 'Judicial Review and Institutional Balance: Comments on Dimitrios Kyritsis' [2019] *Revus* 21, 28–30 at journals.openedition.org/revus/5180.

[25] M Klatt and J Schmidt, 'Epistemic Discretion in Constitutional Law' (2012) 10 *International Journal of Constitutional Law* 69, 74; Klatt and Meister (n 2) 693–94.

[26] The three questions are: How serious is the infringement with the first principle (the right)? How important is the realisation of the competing principle (the legitimate aim)? Which principle gains preference? For details, see Klatt and Meister (n 1) 10–13.

premises used for evaluating both the seriousness of the infringement and the importance of realising the legitimate aim.

The critical point is that moral reasoning will impact the external justification of a balancing decision because the latter depends on the justified evaluation of intensities and weights. We must fill the formal, neutral balancing structure with moral arguments and considerations of weight and value. Balancing is an argumentative exercise and always requires substantive argument.[27] Since courts cannot dispense with justifying their decisions both internally and externally, they will inevitably have to address the moral complexities of the cases before them.[28]

Tsakyrakis is right when he stresses that a court's reasoning is more precise 'the more explicit the moral considerations of a case are made'.[29] He goes astray, however, when he assumes that balancing was no help in that respect. He describes external justification as a 'black box' filled with 'impressionistic assessment'.[30] Since the external justification of balancing decisions requires theoretically informed practical reasoning,[31] any rights theory must connect to a general legal argumentation theory. Principles theory combines proportionality analysis and balancing with a Habermasian discursive legal argumentation theory.[32] The forms and rules of rational-legal discourse[33] may not be able to justify a single correct outcome for each balancing exercise; we do face complex cases. Nevertheless, discourse theory provides far more clarity and rationality than many sceptics assume. External justification is neither a black box nor filled with impressionistic assessments.

As a side remark, I would like to stress that the criticism is *not* directed against the internal structure of balancing but concentrates upon the external justification. For that reason, the criticism does not even specifically address its target, *viz*, balancing. It is only a reflex of the scepticism directed against the rationality of legal argumentation in general.

By reference to discourse theory, my reply to the black-box reproach gives rise to a separate worry, to which Tsakyrakis also alludes. This worry claims that

[27] Afonso da Silva (n 23) 288.
[28] Klatt and Meister (n 2) 694.
[29] Tsakyrakis (n 11) 310.
[30] Tsakyrakis (n 2) 482.
[31] Klatt (n 17) 898–99; R Alexy, *A Theory of Constitutional Rights*, tr Julian Rivers (Oxford, Oxford University Press, 2002) 105, 109; R Alexy, 'Thirteen Replies' in G Pavlakos (ed), *Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 333, 344; M Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirements' in G Pavlakos (ed), *Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 131, 148–49; M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574, 575.
[32] cf M Klatt, 'Robert Alexy's Philosophy of Law as System' in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press, 2012) 1.
[33] Alexy (n 22).

a discursive balancing model, relying on a Dworkinian, holistic approach, could not work because it overburdened the judges. Tsakyrakis mentions the claim that it was 'not feasible to ask of judges that they engage every time in a full-scale moral discourse calling upon all our basic moral values before they reach a decision'.[34] He cites McHarg: 'To expect judges to develop their own unifying theory, on the other hand, is simply unrealistic – a task for Hercules perhaps, but not ordinary judges.'[35] The fear is that balancing transforms rights adjudication into a 'microcosm of all the disagreements found within contemporary political philosophy'.[36]

The worry of overburdening the judges is why some scholars have called for 'a simple, structured, and manageable method to adjudicate human rights issues that does not embroil judges in deep moral questions with all their complexity and contestability'.[37] Sometimes, they even identify the balancing method as having this very advantage. Tsakyrakis cites Coffin for this view: 'As a practising judge with a backlog of opinions to write and cases to decide, I hope for forgiveness if, pending the results of theoretical investigations …, I continue to resort to balancing.'[38] Similarly, Tremblay defended balancing as having the advantage of moral neutrality: 'The judges can avoid almost all difficult epistemological and normative questions …, and the courts are not compelled to impose certain controversial moral, political, or philosophical substantive views ….'[39]

I have labelled this view the relief thesis.[40] Balancing could relieve judges from 'the slippery slope of substantial, politically contested moral argument'.[41] Like Coffin, Tremblay sees this relief effect as a reason *for* the balancing method. However, it follows from the special case thesis and the necessity of external justification that the relief thesis is mistaken.[42] Balancing is neutral as far as its formal structure goes. However, the structure needs to be filled with arguments, which will depend on theoretically informed practical reasoning. Balancing, as legal argumentation in general,[43] does not relieve us from moral discourse. On this point, I agree with Tsakyrakis, who stressed against the relief thesis that 'the

[34] Tsakyrakis (n 2) 490.

[35] A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *MLR* 671, 681.

[36] LB Tremblay, 'An Egalitarian Defense of Proportionality-Based Balancing' (2014) 12 *International Journal of Constitutional Law* 864, 880.

[37] Tsakyrakis (n 2) 490.

[38] FM Coffin, 'Judicial Balancing: The Protean Scales of Justice' (1988) 63 *New York University Law Review* 16, 22; Tsakyrakis (n 2) 491 with fn 68.

[39] Tremblay (n 36) 887.

[40] Klatt (n 17) 897.

[41] ibid 898.

[42] ibid 897–99.

[43] M Klatt, 'The Rule of Dual-Natured Law' in ET Feteris et al (eds), *Legal Argumentation and the Rule of Law* (The Hague, Eleven International Publishing, 2016) 27.

balancing methodology is no less taxing on the intellectual powers of judges than the full-scale moral argument'.[44]

To conclude, my evaluation of Tsakyrakis' argument is twofold. First, I share the morale behind his criticism, which he had made explicit in the last sentence of his 2009 article, namely a forceful call for an open and transparent debate of moral disagreements in adjudication.[45] Second, in sharp contrast to Tsakyrakis, I maintain that balancing is the best tool to begin with, engage in, control and resolve moral disagreements transparently and rationally.

III. Liberalism and Communitarianism

A. Disproportionate Individualism

The very title of his chapter reveals the main argument of Tsakyrakis' second balancing critique: 'Disproportionate Individualism'. He bases his new balancing critique on a fundamental antagonism between two political philosophy theories. On the one hand, a highly individualistic theory places individual freedom front and centre. It follows a laissez-faire economics, prioritising property rights and economic freedom. It was inspired by John Locke and followed by the United States (US) Supreme Court in its *Lochner* era (1905–37).[46]

On the other hand, and in contrast to the US, European political philosophy has juxtaposed such unfettered individualism with 'society's right to regulate and restrict' private property.[47] As Tsakyrakis rightly underlines, modern European constitutions enshrine welfare rights that implement distributive justice and sociability.

Tsakyrakis is crystal clear on which of the two theories he prefers, namely, the second. His model of 'liberal sociability' stresses social cooperation and values shared in a community. It uses this understanding to criticise 'contemporary societies [which] have individuals [rather than sociability] as their starting point'.[48] It is no surprise, then, that he laments articulately a new development in Europe that, according to him, moves European political practice towards the individualistic US system, thus damaging the achievement of social justice. Most notably, he identifies a cause for this detrimental process in Europe: the principle of proportionality:

> I want to argue that recent years have seen the rise in Europe of a type of individualism which, following a conception of freedom that owes more to Thomas Hobbes, ends

[44] Tsakyrakis (n 2) 491.
[45] ibid 493.
[46] Tsakyrakis, ch 1 in this volume, section I.
[47] ibid.
[48] See Tsakyrakis (n 15) 655–59.

> up being more extreme than Locke's. … Indeed, recent European adjudicative practice carves out a notion of individualism that is at odds with a sound theory of justice.
>
> The touchstone of this peculiarly European brand of adjudicative individualism is the principle of proportionality.[49]

So, in a nutshell, Hobbesian individualism is on the rise, and proportionality is to blame for this. Proportionality, according to Tsakyrakis, 'lets Hobbes into the city'.[50] Once there, the Hobbesian rights adjudication *qua* proportionality test implements an individualism that is at odds with principles of social justice. Proportionality 'offends our most elementary convictions about human rights. Its failure derives from its individualistic approach to freedom.'[51] The totality of freedom brings about an 'individualistic bias' in adjudication, reinforcing 'a skewed perception of society and social justice'.[52] A distorted individualism 'has found in proportionality the perfect partner in crime'.[53] The danger he wants to warn us about is that with proportionality and individualism, we arrive at 'a very impoverished idea of society and social cooperation'.[54]

B. Analysis

i. Proportionality's Symmetry

Tsakyrakis' argument is puzzling because it is the very mission of proportionality to bring balance into a conflict between an individual right and a public value.[55] Public values *include* the community's social interests, so the latter are part and parcel of proportionality analysis from the outset. Its very first prong, the legitimate aim test, is devoted to identifying the social values the state calls on for infringing upon an individual right. In the last prong, balancing, social interests and community values are considered just as well as individual rights, provided the constitution likewise protects them.[56]

In contrast to Tsakyrakis' claim, there is no bias in the internal structure of the proportionality test that would unduly favour individual rights while disvaluing the social interest. Far from total neglect, proportionality reasoning necessarily includes the social values Tsakyrakis rightfully cherishes. His chapter presents

[49] Tsakyrakis, ch 1 in this volume, section I.
[50] ibid.
[51] ibid.
[52] ibid.
[53] ibid 237.
[54] Compare Tsakyrakis (n 15) 660.
[55] Klatt and Meister (n 1) 15–44; M Klatt, 'Balancing Rights and Interests: Reconstructing the Asymmetry Thesis' (2021) 41 *OJLS* 321, 322.
[56] Otherwise, the lex superior rule excludes balancing, for details, see my analysis in Klatt (n 55) 327–33.

proportionality in a highly one-sided way.[57] He does not mention that proportionality is about settling a conflict between individual rights and social values. Instead, Tsakyrakis exclusively concentrates his argument on the individual right. In the language of the principles theory, Tsakyrakis put things as if balancing only addresses P_i (the right) but forgoes taking into view P_j (the community's social interests). His argument seems blind to the fact that balancing always considers both P_i and P_j.

The internal balancing structure ensures a complete symmetry between individual rights and social values. An unjustified bias towards individual rights can occur in particular cases whenever the external arguments invoked to justify the weights of the competing principles are biased in the way Tsakyrakis laments. Nevertheless, we cannot blame proportionality theory for bad practice.

ii. Two Biased Models

The insight into the internal symmetry of proportionality allows us to take the argument a step further. It is pretty telling that others have *criticised* proportionality for this symmetry. Fred Schauer argued that balancing's symmetry created 'a false equivalence' because it contradicted the distinction between rights and interests.[58] His argument is in line with Dworkin's statement that it was mistaken to say that 'inflating rights is as serious as invading them'; an error at the expense of the individual right was more severe than an error at the expense of society's interests.[59] I have recently labelled and discussed this view as the 'asymmetry thesis'.[60]

It strikes me that this criticism is just the opposite claim that informs Tsakyrakis' argument. This is a remarkable insight. We owe it to Tsakyrakis' chapter that we can make the picture of balancing critiques more complete. We can now see that proportionality is under attack, so to speak, from two sides. There are *two* asymmetry theses, not just one. Schauer and Dworkin blame proportionality for undervaluing individual rights in unjustified favour of social interests and public values. Their point is that balancing ignores a significant asymmetry that values rights more than social interests. Tsakyrakis claims the exact opposite. According to him, balancing undervalues social interests in unjustified favour of individual freedom. His point is that balancing ignores a significant asymmetry that values social interests more than individual freedom.

[57] I am referring here to, eg, his minimal state argument, Tsakyrakis, ch 1 of this volume, section II.

[58] F Schauer, 'Proportionality and the Question of Weight' in G Huscroft, BW Miller and GCN Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York, Cambridge University Press, 2014) 173, 174; FM Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Oxford, Oxford University, Press 2007) 253 (but compare ibid 251, where Kamm rejects specific notions of asymmetry).

[59] R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 199.

[60] Klatt (n 55) 322.

In order to picture this relationship between the two asymmetry theses more clearly, let us have a look at how Schauer phrased his asymmetry thesis through four propositions:

1. A given degree of restriction on a right is understood to be a more serious deprivation than the same degree of decrease in a public interest.[61]
2. 'Rights are worth more than non-rights-protected interests.'[62]
3. 'But when rights are on one side of the equation, there is a presumption in favour of the right, or, which is more or less the same thing, a burden of proof imposed on those who would restrict the right ….'[63]
4. Both liberty and equality rights can be restricted, but only when the reason for imposing a restriction is a 'reason of special strength'.[64]

According to Schauer, the rights-favouring variant of the asymmetry thesis, thus described, counts against balancing because the latter 'collapses' these crucial differences.[65]

We can easily reformulate these four propositions so that they depict Tsakyrakis' asymmetry thesis:

1. A given degree of restriction on a social interest is understood to be a more serious deprivation than the same degree of decrease in an individual right.
2. Social values and public interests are worth more than rights.
3. But when social values are on one side of the equation, there is a presumption in favour of the value, or, which is more or less the same thing, a burden of proof imposed on those who would restrict the value.
4. Both social values and public interests can be restricted, but only when the reason for imposing a restriction is a reason of special strength.

According to Tsakyrakis, the social-value-favouring variant of the asymmetry thesis, thus described, counts against balancing because it collapses these crucial differences.

My thesis is that both asymmetry theses are exactly what Tsakyrakis criticises: they lead to a perverse conception of the relationship between the individual and society. In Tsakyrakis' words, the first asymmetry is one that 'builds up from a radical individualism'.[66] The second, and this I add to Tsakyrakis, stems from radical communitarianism.[67] Tsakyrakis is silent about the fact that the

[61] Compare Schauer (n 58) 176.
[62] ibid 177.
[63] ibid 178.
[64] ibid 176.
[65] ibid 177, 178.
[66] Tsakyrakis, ch 1 in this volume, section V.
[67] In using the term 'communitarianism', I do not wish to refer to a particular political philosophy, as defended by specific authors or traditions of thought. Rather, I use the label here in a generic sense, denoting any theory that embraces the general position that public values are more important than individual rights.

social-value-favouring asymmetry is as prone to overemphasis as the rights-favouring asymmetry. He argues for the mistake opposite to the one he criticises: instead of too much individualism, he favours too little individualism.

I submit that both asymmetry theses are detrimental. Schauer's asymmetry is biased towards too much rights protection while failing to take public interests seriously. In Tsakyrakis' chapter, we have the opposite suggestion, that we should be biased towards too little protection of rights to protect public interests better. A blanket, outright preference for either of the competing principles will inevitably lead to a one-sided, biased situation. We are in a dilemma: we devalue individual rights (as Tsakyrakis suggests) or the public interests (as Schauer proposes). Each of these poles is equally unattractive, given that our constitutions oblige us to protect individual rights and social values. This dilemma also becomes clear from the perspective of a public official.[68]

At this point, let me stress where the disagreement lies and where it does not. I agree with Tsakyrakis' apt warning that we must not sacrifice social values to protect the unimportant behaviour of bizarre individualism. I am, like him, sceptical of overprotecting economic freedom. I am, however, likewise concerned that we should avoid the opposite mistake – overprotecting social values at the expense of cutting too deeply into freedom rights.

We may acknowledge that the deeper core of both asymmetry theses carries a kernel of truth. They can helpfully warn us not to tip the scales too much to one side. Therefore, we have to answer this: What could a less radical, smoother, flexible version of the two asymmetry theses look like? I want to submit that the golden middle lies between these extremes. The only method we have to arrive at the golden middle is balancing. Let me explain how this may work.

C. Liberalism and Communitarianism in Proportion

Regarding Schauer's asymmetry thesis, I have already established that balancing can integrate any notion of rights-favouring asymmetry that one can defend from the standpoint of morality and political philosophy. The primary mechanism for integrating that asymmetry into balancing is assigning a higher abstract weight to all rights, so that rights enter the balancing exercise with a winning margin.[69] That way, public interests will find it more challenging to justify infringements of rights. I have reconstructed this mechanism as follows:

> [A] given degree of restriction on a right taken together with a higher abstract weight of that right can attain a greater 'capacity of defence' (and in this sense can be 'more serious') than the same degree of decrease in a public interest taken together with a lower abstract weight of that public interest.[70]

[68] See my argument against Schauer's one-way balancing in Klatt (n 55) 346–47.
[69] ibid 340.
[70] ibid 339.

This mechanism follows the so-called second law of trumping: 'The higher the abstract weight of a principle, the more likely it will trump competing principles'.[71]

Using the same mechanism, I can now supplement my answer to Schauer with a new answer to Tsakyrakis. To the extent that we can justify a higher importance of social values, we can accommodate this in balancing by assigning a higher abstract weight to all social values and public interests. Consequently, all social values will enter the balancing exercise with a winning margin. Individual rights will find it more challenging to defend themselves against infringements:

> A given degree of importance of a public value taken *together with a* higher abstract weight of that value can attain a greater 'capacity of infringement'[72] (and in this sense can be more serious) than the same degree of infringement with an individual right *taken together with* a lower abstract weight of that right.

Let me stress that I do not claim that either of these two winning margins – in favour of rights or public interests – can indeed be justified. I have doubts. The texts of our constitutions usually do not indicate such differences in the abstract weights.[73] How could we justify that, for example, the constitutional principle of democracy carries a higher abstract weight than the freedom of assembly? Or does freedom of speech carry less abstract weight than the principle of social welfare? The point I want to make here is more modest: to the extent that such differentiations between abstract weights could be justified, balancing has all the technical means available to integrate them.

IV. The General Right to Freedom

The point about exaggerated Hobbesian liberalism is Tsakyrakis' main argument. He supplements it with a critique of a broad concept of the right to freedom. Let me briefly explain this supplementary relation between the critique of balancing and the critique of a broad concept of freedom with the help of two competitive schemes of rights reasoning.

A. Two Schemes of Rights Reasoning

One way to attack proportionality is to attack its background assumption that we should conceive of rights as offering broad protection to the rights holder. The need to engage in proportionality analysis only arises in a two-step reasoning scheme. Such a scheme distinguishes between prima facie protection and definite

[71] Klatt and Meister (n 1) 28; Klatt and Meister (n 2) 690.
[72] On the concept of a capacity of infringement, see Klatt and Meister (n 1) 118.
[73] I am mirroring here an argument from Klatt (n 55) 341.

protection of constitutional principles (rights and values). In the first step, we establish whether some state action infringes on the scope of a right. If so, the right prima facie protects against this state action. The state then needs to justify the infringement.

Whether a constitutional justification is available is tested in the second step, which includes proportionality analysis and balancing. Only if a justification is not available does prima facie protection turn into definite protection, and only in that case was the right violated. In this approach, there are two types of infringement: unjustified infringements, which violate the right; and justified infringements, which do not. There is a difference between infringement and violation in the two-step scheme.

The two-step reasoning scheme allows a generous definition of prima facie protection by (i) granting broad scopes of rights and (ii) classifying many actions as infringements. Lots of behaviour may count as free speech, for example, and even very indirect, unintended hindrances caused by the state may count as infringements. This generosity is then limited down in the justification stage with the help of the proportionality test. The definite protection becomes evident only after balancing the broad right with competing principles. If one is generous in the first stage and grants broad prima facie protection, then limiting this protection down in the justification stage is vital. For that purpose, we need proportionality analysis.

In contrast, a narrow protection theory limits the reasoning to a single step. If the protection of rights is specified neatly and tidyly, it is hoped that every infringement will count as a violation. The need to engage in a separate justification stage disappears. Some scholars see this as an advantage. Is it not more manageable and better to say directly which behaviour rights protect and which they do not, rather than engaging in superfluous and unnecessarily complicated two-step reasoning? What is the benefit of granting something in the first step that is taken away again in the second?

Most rights catalogues contain explicit limitation clauses, thereby prescribing the two-step reasoning.[74] Moreover, if the state did not interfere with the scope of a right (either because the scope does not protect the behaviour or because an infringement did not occur), the state can act without justifying the action. In that case, there is no need to proceed to the second step of rights reasoning, the justification stage. Tsakyrakis aptly describes the two-step scheme as 'at least the starting point of a human rights inquiry'.[75]

At this point, an essential function of definitional generosity comes to light: it helps define a threshold beyond which the state must justify its actions. The more

[74] See, eg, the second paragraphs of Arts 8–10 ECHR. On limitation clauses, see M Borowski, 'Limiting Clauses: On the Continental European Tradition of Special Limiting Clauses and the General Limiting Clause of Art 52(2) Charter of Fundamental Rights of the European Union' (2007) 1 *Legisprudence* 197.

[75] Tsakyrakis, ch 1 of this volume, section II.

narrowly we conceive scope and infringement, the less often the state will have to justify its actions. There is an argument favouring generosity, allowing for broad scopes and understanding of infringements. This argument is that it is beneficial to strengthen the necessity of justification of state actions by employing a relatively low threshold of justification.[76]

Against this background of the two schemes of rights reasoning, it becomes clear why Tsakyrakis attacked the general right to freedom. The reason is that the broadest prima facie protection of freedom is to accept a general right to freedom. Let me briefly recap his argument, then demonstrate why I think it does not hold.

B. The Objection to Overvaluation

The objection to overvaluation argues that the general right to freedom overvalues freedom. We can conceive of the general right to freedom as a prima facie right to everything. This right will include petty acts like falconry,[77] feeding pigeons in the park[78] or painting your Georgian house purple[79]. It may even include acts that are not trivial but outrageous injustice, like killing those who criticise you.[80]

Tsakyrakis discredits such a view as 'the right to total freedom'[81] and identifies it with the idea that Hobbes used to describe the state of nature, namely, that 'every man has a right to everything'.[82] According to Tsakyrakis, a right to everything automatically turns into a 'right to nothing in particular', thereby 'erod[ing] the distinctiveness of human rights as opposed to other human interests'.[83] He objects that this view 'is problematic inasmuch as it indiscriminately takes into account any human interest, even those that are worthless or ill-founded.[84]

Furthermore, the right to everything led to a minimal state that wrongly equates justice with 'individualistic liberalism'. This variant of liberalism followed the motto, 'the less freedom we give away, the more just a society is'.[85] Tsakyrakis adds that this minimal state 'makes social justice incomprehensible'.[86]

[76] On the relation between proportionality and justification, see my analysis in Klatt, 'Proportionality and Justification' (n 24).

[77] Tsakyrakis, ch 1 of this volume, section II, fn 17. The example goes back to a German case, BVerfGE 55, 159.

[78] Tsakyrakis, ch 1 of this volume, section II, fn 18. Again, this is a German case, BVerfGE 54, 143.

[79] Tsaykaris takes this example from Dworkin, see R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, Harvard University Press, 2011) 346.

[80] Again, Dworkin's example, see R Dworkin, *Justice in Robes* (Cambridge, MA, Belknap Press, 2006) 115.

[81] Tsakyrakis, ch 1 of this volume, section II.

[82] T Hobbes, *Leviathan: Reprinted from the 1651 edition*, ed Smith WG Pogson (Oxford, Clarendon Press, 1929) 99.

[83] Tsakyrakis, ch 1 of this volume, section II.

[84] ibid.

[85] ibid.

[86] ibid.

C. Three Points of Disagreement

Before I discuss Tsakyrakis' objection to overvaluation, I would like to address three points of disagreement.

First, his fear of eroding the distinctiveness of the more specialised freedom rights (eg, rights to free speech, to vote, assembly, family life, etc) seems to be unfounded. From accepting a general right to freedom, such erosion does not necessarily follow. Establishing a supplementary function of the general freedom right is possible, so courts primarily use specialised freedom rights. In the German Constitution, for example, the general freedom right is interpreted as having a subsidiary function. All rights reasoning first and foremost considers the special freedom rights, resorting to the general freedom right only if the scopes of the former are irrelevant. Hence, specialised freedom rights maintain their predominant role. There is no erosion effect.

Furthermore, on the positive side, the general freedom right *qua* subsidiary right still has an important role. It offers protection for behaviour that specialised rights do not cover. This subsidiary protection is essential, as we can witness in the European Convention on Human Rights system. The Convention does not contain a general freedom right, and in consequence, the Court has interpreted the scopes of freedom rights overly broadly in an attempt to fill the gaps of protection. I submit that a general freedom right is preferable to distorted interpretations of specialised rights.

Another meaningful function of a general freedom right is that it can provide a fundament for developing new constitutional rights in the spirit of an evolutive interpretation of the constitution. This function can be witnessed in the so-called 'in conjunction with' technique of the German Federal Constitutional Court. The Court uses the general freedom right in conjunction with specialised rights in order to establish new constitutional rights.

My second disagreement concerns the Hobbesian *argumentum ad absurdum*, claiming that a 'right to every thing' was a bizarre notion. It is vital to see that including everything in the scope of the general freedom right only establishes a *prima facie* protection.[87] So, there is still a significant difference from the Hobbesian account, which used this phrasing to describe a *definite* position.

Third, Tsakyrakis assumes an analytical priority of social values, while individual rights 'will appear further downstream'.[88] This priority is a highly contested premise that I find difficult to justify. It will bring about the opposite of what Tsakyrakis is concerned about: the danger of devaluing individual rights. Instead of an upstream/downstream relationship, it is more helpful to reconstruct individual rights and public values as two distinct constitutional rivers.

[87] Tsakyrakis acknowledges this, but he does not seem to realise that this fact takes the wind out of his sails (ibid).

[88] ibid.

D. How to Take Freedom Less Seriously

The main argument for Tsakyrakis' objection is this: Including all sorts of presumably worthless behaviour in the protection scope of a general right to freedom necessarily leads to an overvaluation of freedom. Let us note that this is an exciting objection, because the standard argument against proportionality runs precisely the other way around: the standard criticism is that proportionality *devalues*, rather than overvalues, rights because it balances rights away, giving them too little weight.[89] Tsakyrakis had argued along this standard line in his first balancing critique.[90]

In his second critique, Tsakyrakis claims the exact opposite. Rather than criticising that with balancing 'everything is … up for grabs',[91] as he had argued in his first critique, he now claims that balancing protects everything and accords useless behaviour too much weight. It is difficult to criticise both the overvaluation and devaluation of rights simultaneously.

Irrespective of this inconsistency, the reply to the objection from overvaluation seems straightforward if we adopt the two-step reasoning scheme. After all, where is the harm if the protection granted by the general right to freedom is prima facie only? If the broad scope of protection is narrowed down, the definite scope of protection does not seem to be in danger of assigning too much weight to freedom.

Tsakyrakis acknowledges this potential reply but insists that

> by placing all interests on the scales and by assigning each of those interests some weight, we have already skewed the outcome of the balancing process. … Once we start going down this road, it makes little difference to assign such interests only a slight weight. The damage will already have been done.[92]

I want to explore this thesis of 'little difference' in more detail. I will do this in four steps. Each step relates to one of the four factors in balancing.[93] I will demonstrate that the balancing model can use all four factors to prevent an overvaluation of freedom.

First, assigning minor interests only a light concrete weight is possible by using the lightest stage of the triadic scale in balancing. The intensity of infringement with the general freedom right will be evaluated as light ($I_i = l$).

Second, the abstract weight of a principle is the weight that this principle has relative to other principles but independently of any concrete case. I have recently introduced the possibility of a threefold differentiation of abstract weights within the rights class. We may have good reasons to assign a higher abstract weight to the

[89] See, eg, the sophisticated argument by Schauer (n 58).
[90] Tsakyrakis (n 2).
[91] ibid 489.
[92] Tsakyrakis, ch 1 of this volume, section II.
[93] On the four factors of the weight formula, representing the relevant considerations in balancing, see Klatt and Meister (n 1) 11.

right to dignity, a lower abstract weight to the general freedom right and a standard abstract weight to the specific freedom rights.[94] This differentiation would weaken the general freedom right, lending it a lower defence capacity vis-à-vis a public value's capacity for infringement. Even Dworkin, who opposed the general freedom right, mentions this possibility.[95]

The last two steps of my argument consider the factors relating to the epistemic reliabilities of the premises used in balancing. It is necessary to distinguish between empirical and normative premises and, thus, between the respective reliabilities. Something can be very reliable regarding empirical facts but still be highly unreliable in the normative dimension – or vice versa. To be able to register such differences, I have suggested splitting the *R*-variables into R^e, which denotes the reliability of empirical premises, and R^n, which denotes the reliability of normative premises.[96]

In the examples mentioned by Tsakyrakis (pigeon feeding, painting the house purple, killing the critic), we can safely say that the epistemic reliability on the side of the general right to freedom is usually relatively low. We may have all sorts of normative doubts about whether, for example, prohibiting killing your critics amounts even to a light interference with the killer's freedom. We may also have reservations about the factual situation, for example, the empirical consequences prohibiting painting houses purple has for the rights holder.

Taking all four steps together amounts to a situation where all four factors on the side of the general right to freedom are assigned the lowest value. This evaluation means that infringements on this right will be justified constitutionally as soon as a single factor on the other side, the side of the public value, gains the value moderate. In other words, it will be effortless for the state to justify an infringement of the general right to freedom. The general right to freedom could gain preference over the competing principle in one situation only, that is, if all factors on the other side also gain the lowest value. This situation is very rare. It is the most extreme of all 6,561 constellations.[97]

The argument gets technical here, but considering the numbers facilitates a clear and vivid insight into the substantive argument represented by the numbers. Based on the triadic scale (light, moderate, serious) and the four different factors I have just explained above, 3^4=81 constellations are possible for each of the two competing constitutional principles. The possibility of combining each of the 81 constellations on the side of the general right to freedom with the 81 constellations

[94] See my discussion in Klatt (n 55) 341–42.

[95] R Dworkin, 'What Rights Do We Have?' in R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 269. This similarity between my account and Dworkin's must not, however, be overstretched, because for Dworkin such weakness means that the general right to liberty is 'not competitive with strong rights' at all. In contrast, in my account, it can still be balanced against strong rights, albeit with a weakened capacity of defence.

[96] For details and further reference, see Klatt (n 55) 334.

[97] I mirror here an argument provided by Robert Alexy in R Alexy, 'Human Dignity and Proportionality' in *Law's Ideal Dimension* (Oxford, Oxford University Press, 2021) 205, 217–18.

on the side of the public value totals 6,561. In the extreme case that we assign the lowest values to all factors on the side of the general right to freedom, the infringement with general freedom will be unproportional in only one of 81 constellations. In all other constellations, namely the 80 constellations that remain, the interference with the general right to freedom is proportional and, therefore, constitutionally justified and allowed. It would seem difficult to describe this as an 'overvaluation' of general freedom.

My analysis so far relates only to mechanisms in the internal justification of balancing. Nevertheless, I can further strengthen my reply to the objection to overvaluation with arguments relating to the external justification. There exists a considerable number of cases in which it is clear that the general freedom right is not violated because the external justification of the values will be straightforward and uncontroversial. Examples are the obligation to fasten the seatbelt when driving a car or flying in an aeroplane, to stop your car at a red traffic light, the prohibition on buying alcohol if you are a minor, the obligation to use a lead and a muzzle for dog breeds classified as dangerous.

All these examples and many more represent conditions in which a high degree of empirical and normative reliability exists that the competing principle, the public value, will take preference over the general freedom right.[98] According to the law of competing principles,[99] this preference implies that concrete rules exist with these conditions as their *protases* and the obligation to implement the preference of the public value as their *apodoses*. We can apply these concrete rules by interpretation and subsumption. This mechanism solves many standard cases without balancing; the latter will be necessary only in complex cases.

Allowing for a right to general freedom by no means implies that everything or nearly everything becomes possible. We do not overvalue minor interests. To Tsakyrakis' claim – 'Once we start going down this road, it makes little difference to assign such interests only a slight weight.'[100] – I therefore object that, on the contrary, it makes *all* the difference.

V. Results

In my discussion of Tsakyrakis' second balancing critique, I have shared his view that moral disagreements need to be made explicit in adjudication, thus allowing for their open and transparent debate. I have also demonstrated why his view that balancing was incapable of delivering such transparency and openness rests on a misunderstanding of the role of moral argumentation in balancing.

I have then turned to his central argument, which claims that proportionality and balancing favour Hobbesian individualism at the expense of social justice and

[98] ibid 216.
[99] Alexy (n 31) 54.
[100] Tsakyrakis, ch 1 of this volume, section II.

public values. I reconstructed this claim as an asymmetry thesis that is precisely opposite to the one submitted by Schauer. Against both these theses, I have stressed proportionality's symmetry.

The theoretical structure of balancing is not biased towards either rights or interests. In that respect, both Schauer and Tsakyrakis are mistaken. However, they have a point regarding a different aspect: when we apply the theory, there is always the danger that our practice of argumentation gets biased. In that respect, precisely, their warnings are valuable. Whether this danger materialises, however, is not a theoretical problem. It will depend entirely on the quality of our external justification.

Furthermore, using the possibility to differentiate the abstract weights and drawing from my earlier answer to Schauer, I have demonstrated that balancing has means available to accommodate whatever asymmetry we can defend from the standpoint of political philosophy. Therefore, asymmetry is not a valid objection against balancing.

Lastly, I have defended the general right to freedom and reconstructed its role in balancing in a way that does not overvalue freedom at the expense of social justice.

Despite all this, my argument does not imply that Tsakyrakis' criticism lacked value. On the contrary, we owe him the earnest warning that too much individual freedom may seriously undermine the constitutional value of solidarity and social justice and, thereby, the cohesion of our political community:

> If Europe succumbs to individualism it will be exposed to a much graver risk than those associated with a free market: the risk of having the concepts of justice and solidarity seriously undermined.[101]

Indeed, an overvaluation of freedom will inevitably devalue social justice. I am perfectly in agreement with this impetus. However, I hasten to add that the opposite risk – overvaluing our community values at the expense of individual freedom – is likewise acute: if Europe succumbs to communitarianism, it will be exposed to a much graver risk than those associated with social justice; the risk of having the concept of individual freedom seriously undermined. This is why, unlike Tsakyrakis, I should stress that we have to face both risks – not just one. The best developed, most rational and transparent method to determine where the optimal combination of public values and individual rights lies is balancing.

We owe Tsakyrakis the insight that, sometimes, Hobbes seems to be in the city when we balance. Mind you, Rousseau may also be in town. Concerning both these dangerous fellows, rest assured: Hercules is in the courts.

[101] ibid, section V.

PART B

Freedom and Individualism

4

Defending the Idea of a General Right to Liberty

MARK TUSHNET

I. Introduction

Stavros Tsakyrakis' 'Disproportionate Individualism' builds a case against total freedom, alternatively described as a general right to liberty or the right to free development of the personality. The case rests on the proposition that those rights exemplify a purely individualistic freedom inconsistent with the social nature of human beings. Such a freedom, he argues, is conceptually and practically undesirable. Tsakyrakis proposes as an alternative what he calls 'liberal sociability'. Liberal sociability derives many liberal or liberal-like rights from that social nature, though of course the precise contours of those rights are likely to be somewhat different from those of rights founded on individualistic freedom. In this essay I offer a different account of liberal sociability, an account that, I argue, is compatible with the right to free development of the personality or a general right to liberty.[1]

I begin with the assumption that any liberal approach to rights will have an individualistic foundation. Liberals take the individual as the building block of society, and the (liberal) rights we have are rights as individuals rather than, for example, as members of a clan or a religious community.[2] As individuals we formulate, revise and act upon life plans for ourselves. These life plans, in turn, are made up of specific self-defined interests. Satisfying those interests, we think, will make our lives go better. I think it reasonably conventional to say that a set-back to any of those interests is something to worry about. The nature of that worry is captured by describing set-backs as *infringements* on our right to the free

[1] See Tsakyrakis, ch 1 of this volume, n 32, which describes the equivalence of the general right to liberty and the right to free development of the personality.

[2] Of course, because clans and religious communities are made up of individuals, we can have rights with respect to or flowing from membership in such entities, but the rights attach to each of us as an individual (and then might be aggregated into something that we might call, as a shortcut, rights of the clan or the religious organisation).

development of our personality, or alternatively as prima facie violations of that right. Infringements can be justified, in which case they are not *violations* of that right, or of the general right to liberty. If the justifications are inadequate, though, the infringements are rights violations.[3]

II. Individual Freedom and 'Trivial' Rights

My discussion builds upon an analysis of two problem cases to which Tsakyrakis alludes: *pigeons in the park* and *killing one's critics*. Tsakyrakis agrees that prohibiting feeding pigeons in the park or banning killing one's critics might be set-backs to the life projects of people who happen to have feeding pigeons or killing critics as parts of their life plans. But, he argues, something goes wrong when we treat those bans as infringements or prima facie rights violations. Instead, we should treat these aspects of life plans as trivial or outrageous and simply place them outside the domain of rights analysis.

Defenders of the general right to liberty acknowledge that the bans at issue are not (often) rights violations because typically they can be justified; the prima facie case for them as rights violations is easily overcome. But, Tsakyrakis argues, the usual way of refuting the prima facie case has the wrong form. Ordinarily the refutation invokes 'considerations that do not compromise dignity (such as environmental protection, public health and urban planning)',[4] which I will call mere policy reasons: the ban on feeding pigeons in the park is justified because allowing such feeding makes it easier for pigeons to breed, and larger populations of pigeons are more unsanitary and unsightly. Allowing mere policy reasons to overcome a prima facie case, though, introduces risks when more substantial interests (or less outrageous ones) are at stake. Mere policy reasons, for example, should not ever be allowed to overcome an infringement on a set-back to one's interest in expression on matters of public policy (restrictions on political speech) – or, more generally, to overcome infringements on aspects of human dignity.

Tsakyrakis' solution has several components. Only interests associated with human dignity should be admitted into the structure we use to analyse rights.[5] Such interests play two roles. They are the reasons for requiring particularly strong

[3] Proportionality analysis is one prominent way of examining whether an infringement is justified, but it is not the only such way.

[4] Tsakyrakis, ch 1 of this volume, section III.

[5] A word on the rights of non-human animals: regulations aimed at preventing (excessive) cruelty to non-human animals are straightforwardly justified by invoking those animals' rights. Tsakyrakis equates 'ethical considerations' with 'human dignity'. If we accept that equation, regulations aimed at animal cruelty are justified by a public policy reason. Proponents of the rights of such animals would reject the implications of that conclusion within Tsakyrakis' analytic structure. I believe that the simplest solution here, which I believe compatible with Tsakyrakis' overall view, is to equate 'ethical considerations' with 'the dignity of human beings and some set of non-human animals'.

justifications for infringements and as such define the realm of rights, excluding from that realm interests – parts of life projects – that are not implicated in human dignity. They are also the only permissible reasons for infringing interests within the realm of rights. Put another way, within that realm rights are absolute (Dworkinian trumps) in the sense that they can be overcome only by invocation of competing interests associated with human dignity.

Tsakyrakis' brief exposition does not spell out these components in detail, and I suggest two qualifications. I believe that the full analytic structure would have to have something like an 'emergency' exception: public authorities can ban a previously approved demonstration in a public square so that fire-fighters can transit through the square to suppress a raging and large forest fire.[6] And as a general matter we should not be allowed to trace mere policy concerns back to some source in human dignity: preserving forests might in some sense be important in ensuring the flourishing of the human species in a world threatened by climate change but we should treat the interest in fighting the fire as a mere policy concern nonetheless. Without such a restriction, the analytic structure Tsakyrakis proposes would collapse.

Tsakyrakis' analysis, then, depends centrally on the proposition that some interests are trivial or outrageous. But, he argues, we can derive principles of liberal sociability by acknowledging that humans are social beings. In what follows, I argue that we can do the same *within* an individualistic framework of total freedom. The reason is that the trivial or outrageous interests that Tsakyrakis seeks to exclude from the domain of rights can be – and in my view should be – treated as equal in importance to the interests Tsakyrakis asserts are associated with human dignity because they too are so associated. And if an infringement on one of those trivial or outrageous interests cannot be justified with reference to interests in human dignity, it *should* be treated as a rights violation.

I will elaborate on that argument in some detail, but the underlying structure is straightforward. Often, defenders of total freedom describe the interests infringed by regulations as aspects of the life plans that people just happen to have: the pigeon fancier just happens to like feeding pigeons in the park, for example, or the fox hunter just happens to like hunting foxes. That, though, is the wrong way to describe life plans. You do not just wake up one morning and say, 'Hey, I think my life would go better if I started to feed the pigeons in the park [or if I stalked and tried to kill my critics]'.[7] Rather, that specific aspect of your life plan has a history: it emerges from the way your life has gone so far, or perhaps better from the way in which you interpret the way in which your life has gone so far. Further, the social and psychological conditions in which you have found yourself

[6] That the demonstration was previously approved shows that banning it in the absence of an emergency would be a rights violation.

[7] More precisely, if you happen to wake up one morning with those thoughts, analysis will show that there were reasons of the sort I describe in the remainder of the paragraph in the text that explain why you had those thoughts.

for the life you have already led constitute that history. In this way, liberal individualism acknowledges that we are social beings – and that is enough to support the most important conclusions Tsakyrakis seeks to draw.

III. Dealing with Problem Cases

Here are the problem cases:

- *Pigeons in the park*: Ulf is a 68-year-old retired autoworker. As such he worked for decades on an assembly line. He has a rather gruff personality and developed only a few close friendships with his coworkers. Some of those friends passed away and others have moved to live with their children in other cities; Ulf hears from them occasionally. Ulf's wife of 30 years passed away several years ago. Though they wanted to have children, they never did. While his wife was alive Ulf attended church services with her but never was a religious person, and since her passing he has stopped going to church. Supported by his pension and social welfare payments, Ulf lives in a modestly furnished apartment and cooks his own meals. He spends much of his time watching sports on television. Every day he goes from his apartment to a nearby public park, carrying crumbs that he spreads out to attract pigeons. He sits on a bench for an hour or two watching the pigeons as they fly around and eat what he has set out for them.

  Ecologically minded citizens mobilised to get the local city council to prohibit feeding pigeons in the park, arguing that that activity interfered with the natural processes that should control the growth of the birds' population.
- *Killing one's critics*: Theodore has always been an academic superstar. As a child he outshone his colleagues academically, but many of them made fun of him because he was small for his age and inept at sports. As a result, he became deeply invested psychologically in his academic success. As an adult his work, while often highly praised, of course attracted some criticism. Ordinarily he could address the criticisms on their merits and show that the critics were mistaken. Criticism from Harvey, though, was different. It was wrong, as Theodore saw it, but Harvey was both a skilled rhetorician and an academic 'climber'. Harvey ignored or sneered at what Harvey treated as Theodore's feeble attempts to refute Harvey's criticisms. And, because of Harvey's expository skills, his work began to impair Theodore's academic reputation.

  Harvey's 'success' nags at Theodore, who increasingly feels that Harvey is attacking the core of Theodore's persona. Theodore becomes increasingly obsessed with Harvey. At academic conferences he refuses to appear on panels with Harvey. When Harvey presents his own work, Theodore lurks in the back of the room, compiling in his head a list of obvious errors Harvey made. When

> slightly inebriated, he fulminates against Harvey. Sometimes he trails Harvey from one venue to another, imagining that he might someday find Harvey in a dark alley and beat him up. After Harvey notices Theodore following him around, he complains to the police that Theodore is 'stalking' him. The police arrest Theodore for stalking and intruding on Harvey's right to personal privacy.

Ulf has made feeding pigeons in the park part of his life project. Tsakyrakis believes that that interest, while real, is 'worthless or ill-founded',[8] too insubstantial to be protected by a prima facie right. As noted earlier, his objection to allowing trivial interests to trigger proportionality review is that typically that review will uphold the challenged regulation by invoking mere policy reasons, and that doing so is dangerous if applied to more substantial interests. The solution is to allow only ethical considerations or (roughly equivalently) concerns implicating human dignity into proportionality review and, as a consequence, to preclude trivial interests from triggering proportionality review.

Theodore's case is somewhat different. He has made at least fantasising about killing Harvey part of his life plan, and his activity in stalking Harvey raises the possibility that some day he might actually attempt to kill Harvey. Tsakyrakis would describe Theodore's life project as 'outrageous'.[9] Of course the case is an easy one for proportionality review: the right of Theodore's target to personal security will outweigh Theodore's interest. And, note, that right is an ethical consideration, related to human dignity. The objections Tsakyrakis raises in connection with trivial interests are not relevant here. Why, then, might we think that *pigeons in the park* and *killing one's critics* are similar? Perhaps the thought here is akin to the one famously articulated by Bernard Williams: deploying proportionality analysis with respect to outrageous interests is 'one thought too many'; the outrageousness of the interest should be enough to justify its regulation.[10]

How, though, are we to identify interests that are substantial rather than trivial, well- rather than ill-founded, serious rather than outrageous? Tsakyrakis offers several candidate answers that, he argues, show the inadequacy of a purely individualistic conceptualisation of rights' realm. I argue that some of the candidate answers should be rejected as inconsistent with liberalism's commitment to the promotion of *individual* well-being or as ultimately requiring the introduction into the analytic structure of the 'mere policy considerations' that Tsakyrakis hopes to exclude (though in a different way from the one he addresses), and that the best candidate, 'liberal sociability', is consistent with a prima facie right to total freedom.

[8] Tsakyrakis, ch 1 of this volume, section II.

[9] ibid.

[10] I believe, though only tentatively, that one implication of both components of this analysis is that all regulations of trivial and outrageous interests are per se constitutionally permissible.

Tsakyrakis' references to Aristotle suggest the possibility that we might come up with objective criteria for determining what constitutes a human being entitled to human dignity. Tsakyrakis does not himself adopt this suggestion, because to do so would be inconsistent with his position that regulations cannot be justified on grounds that themselves violate human dignity. Treating a life plan that a person actually adopts as inconsistent with the objective content of human dignity would itself be an impairment of the subject's dignity.

A related approach is more promising. Features of a life plan might be 'ill-founded' if they would not be adopted by anyone fully familiar with all their aspects and fully aware as well of the psychological conditions that underlie her choices after something like a 'deep psychology' self-analysis. That might exclude from rights' domain actions taken in pursuit of sexual paraphilias such as the consensual sadomasochism at issue in *R v Brown*,[11] or the pleasure enjoyed by the men who engage in 'dwarf tossing'.[12] I doubt that it would exclude *pigeons in the park* or falconry or spitting on the streets (two of Tsakyrakis' other examples) from that domain. They seem to be, as I have put it, trivial rather than ill-founded.

Another possibility is that we can identify trivial or worthless interests by looking at the reasons we would almost certainly find sufficient to justify their infringement: if those reasons almost always sound in public policy rather than in defence of human dignity, we can treat the interests as worthless. Here the difficulty is akin to that encountered by rule utilitarians in the face of the argument that we can always reduce rule utilitarianism to act utilitarianism by specifying in more precise detail exactly what rule is said to maximise utility. As the specifications become more finely grained, the rule becomes applicable to single acts.[13] So too here: by more careful identification of the interest infringed we might find that the public-policy reasons that justify infringements on a larger class that includes this specific instance actually do not justify this one. (I return to this facet of the problem in section IV.)

I introduced the strategy of increased specification with my stories about Ulf and Theodore. I return to those stories now to support what I think to be the most promising way to deal with aspects of life plans that are or seem ill-founded, trivial or outrageous. With the stories of their lives laid out in more detail we can ask: Why did Ulf and Theodore include the questionable actions in their life plans to the point where an infringement of their interests in pursuing those actions is a

[11] *R v Brown* [1993] UKHL 19, [1994] 1 AC 212.

[12] See *Manuel Wackenheim v France*, Communication No 854/1999, UN Doc CCPR/C/75/D/854/1999 (2002), available at www1.umn.edu/humanrts/undocs/854-1999.html. I believe that most discussions of this case analyse it as an infringement of the interests of those like Wackenheim, whose livelihood depended upon the practice, rather than as implicating the interests of those who employed him. For reasons akin to those I discuss in connection with the *pigeons in the park* problem case, I believe that treating Wackenheim's interest as ill-founded is problematic.

[13] For one influential version of the argument, see D Lyons, *Forms and Limits of Utilitarianism* (Oxford, Oxford University Press, 1965).

set-back to their interests? Or, put another way, what would it take to modify the *current* conditions in which Ulf and Theodore find themselves to make the ban on feeding pigeons in the park and on stalking a matter of indifference to them, akin to a requirement that they drive on the left rather than the right side of the street?

I will sometimes refer to the steps taken to address these questions as 'remedial'. Some remedial steps operate at or near the moment of the infringement on the problematic aspects of life plans, and so might be thought of as ways to ameliorate or eliminate the set-backs to those life plans. Others operate at some temporal distance from the infringements – would have operated in the past had they been adopted – and so might be thought of as ways to forestall the development of the life plans.

I argue that there are two classes of answers to these questions. One invokes the social conditions of their lives. In addressing those social conditions we may well end up with something quite similar to Tsakyrakis' principle of liberal sociability. The other invokes their psychological states. In addressing those states we may well end up saying that infringements on interests that are not susceptible to something like psychological cleansing through self-examination can indeed be justified by mere public policies. Suppose all the remedial steps we can imagine are taken and Ulf says, 'I still want to feed the pigeons in the park' and Theodore says 'I still want to kill Harvey'; precluding them from doing so is not a violation of their rights but a justified infringement, even if we can come up with nothing other than public policy reasons for the regulation.

Ulf's case is the easier on several dimensions. He takes pleasure in feeding pigeons in the park because he is socially isolated though not materially deprived. Were he less isolated, he might find other sources of pleasure at least as good as feeding pigeons – socialising with friends at a local senior citizens' centre or going out with them to a local pub where they could watch television together. A system of 'retirement counsellors' might offer Ulf a range of options that he could explore to reduce his social isolation. This kind of intervention occurs close to the time when Ulf has to figure out what post-retirement activities give him the degree of pleasure he seeks.

Tsakyrakis' principle of liberal sociability defines '[b]asic liberties … [that] are indispensable social arrangements that enable all persons to conduct the plan of life that they deem valuable'.[14] But, as we have seen, not (for him) *all* plans of life – not the trivial, ill-founded or outrageous (hereafter 'TIO'). Social arrangements *other than* basic liberties, such as a system of social support that targets social isolation, might at least reduce the incidence of the TIO life plans. Note that these are *social* arrangements and for that reason reflect the Aristotelian view that human beings are social animals.

Ulf's social isolation, though, is not solely the result of a badly designed system of social support. Recall that his gruff personality contributed to his inability to

[14] Tsakyrakis, ch 1 of this volume, section II.

develop lasting friendships. That same personality trait might lead him to reject the efforts of the retirement counsellors. Social factors might contribute to the development of TIO life plans, but so might psychological ones.

That proposition is even clearer in Theodore's case. We might locate the source of Theodore's obsession with Harvey in his upbringing: his parents' framing of his academic accomplishment as the only thing about his life to which they attach value; the schools' failure to provide psychological support to students who are disdained (though not bullied in the traditional sense); and the like. There might be social interventions that would reduce the impact of such framings or, in the case of the schools, eliminate them. Slogans like 'Every child a winner' might be made part of public life. On a more philosophical level, strong social support might be given to entities that are guided by the principle that the equal intrinsic worth of every person is non-comparative. In temporal terms these interventions occur well before Theodore starts to stalk Harvey.

Yet we might well conclude that Ulf's gruffness and Theodore's diminished sense of self-worth have sources not only in social arrangements, either remote or proximate in time to the activities that regulation prevents, but also in their mental make-up. What, if anything, can be done to address TIO life plans rooted in psychology rather than society?

Here I adapt a suggestion from Richard Brandt. In *A Theory of the Good and the Right*, Brandt argued that rational people would adopt a utilitarian account of morality.[15] He defined rationality with reference to what he called 'cognitive psychotherapy', a process of cleansing one's thinking of false or distorted beliefs about how the world works and about how other people think (particularly about you). Brandt's version of cognitive psychotherapy is not about 'real' people like Ulf or Theodore, though; it is more a way of thinking about how we should come up with a definition of rationality.

Adapting Brandt's argument in the present context faces obvious problems. Should we say that it is enough that the government makes cognitive psychotherapy available to those who choose it? If so, what if neither Ulf nor Theodore makes that choice? Should the government be required to offer cognitive psychotherapy to them before it institutes proceedings to sanction them for feeding pigeons or stalking? Again, what if neither accepts the offer? Should we develop an analogy to civil commitment of those with mental disorders that make them threats to themselves or others, so that Ulf and Theodore would not be sanctioned (criminally) but would be *required* to undergo cognitive psychotherapy? And, finally, what if the outcome of cognitive therapy is that Ulf and Theodore now understand the psychological sources of their choice of life plan and still want to feed the pigeons or stalk Harvey?[16]

[15] R Brandt, *A Theory of the Good and the Right* (Oxford, Oxford University Press, 1979).

[16] A Freudian analogy: the defining phrase of Freudian psychoanalysis is 'Where Id was, Ego shall be.' Prior to psychoanalysis, the Id drives Ulf's choice of life plans. After psychoanalysis, the Ego makes the same choice. (To be clear, within the Freudian framework that would count as a success.)

I can offer no definitive answers here. I am comfortable with the proposition that some TIO life projects can be identified by looking solely (or perhaps primarily) to the social conditions under which they are formed. Addressing those social conditions is not inconsistent with human dignity. I am far less sure that the same can be said about remedies for the psychological conditions that lead some people to adopt TIO life plans. And yet that those plans are rooted in the psyches of real people suggests rather strongly that treating infringements on such plans as a matter of no concern at all is inconsistent with human dignity. It may be, then, that something like the Aristotelian search for objective conditions of human flourishing is the best way to deal with TIO life plans. Alternatively, of course, we could fully accept the proposition that infringements on TIO interests must indeed be justified, sometimes by ethical consideration/concerns for human dignity and sometimes by mere public policy concerns.

IV. Institutional Dimensions of Policy Choice

My argument so far has proceeded entirely on the level of moral psychology's implications for crafting public policy, with no attention to institutional issues. I conclude this chapter by turning to such issues.

Legislatures considering regulatory bans supported by mere public policy, such as the ban on feeding pigeons in the park, could seek to identify the social sources of TIO components of life projects that would be set back by enforcing the ban, and could consider whether remedies other than the ban (social supports for socially isolated people, provision of cognitive therapy) might allow the ban to take effect with minimal impact on even TIO interests.

How might courts enter the picture in an interesting way? Consider the possibility that the legislature concludes that providing social supports and cognitive therapy would be either too expensive or too likely to be unavailing and enacts the regulatory ban. Perhaps we should say that Ulf (and everyone else) has a constitutional right of a procedural sort to show that in his particular case, enforcing the ban would unjustifiably infringe (and therefore violate) his right to free development of personality or his general right to liberty.[17] We could describe this as a constitutionally grounded defence against a charge that Ulf has violated the regulatory ban.

There are, though, second-order reasons counselling against recognising such a defence (and therefore committing the analysis of TIO interests solely to the legislature). One such reason, though I think a weak one, is the possibility of

[17] Alon Harel has developed a version of this argument, arguing that everyone has a constitutional right to a hearing at which they can attempt to show that a statute unconstitutionally violates one of their substantive rights. See Y Eylon and A Harel, 'The Right to Judicial Review' (2006) 92 *Virginia Law Review* 991.

feigned social isolation (or its generalised equivalent with respect to a constitutionally grounded defence against enforcement that would violate TIO interests). The conditions for showing that a TIO interest is indeed infringed are rather stringent (Ulf has to show that he really does not like going to the local pub to watch sports), and ordinary fact-finding processes are likely to be adequate to suss out feigned social isolation.

Another reason is more substantial. It is a concern that too many people, seeing Ulf feeding the pigeons, will think that doing so is generally all right, or that the city does not take its nominal ban on feeding pigeons in the park seriously. After all, all that people see is Ulf feeding the pigeons; they have no idea that he is socially isolated. So, if him, why not me? Of course the city could in principle enforce its regulation against every violator, and only Ulf and a handful of other social isolates for whom feeding pigeons is their sole pleasurable activity will successfully assert the defence. I am not sure that would be fair to those who observed Ulf and thought that feeding pigeons was basically fine with the city.

In addition, and perhaps more weighty, universal enforcement subject to individualised defences might be too expensive. One argument against judicial balancing, even in its proportionality version, is that it cannot effectively take administrative costs into account. The starting point here is the well-known proposition that all rules are over-inclusive with respect to their purposes. In the proportionality context that implies that less restrictive alternatives always exist: carve out one, two, … of the over-inclusive applications of the rules and you have a new rule that is equally effective in accomplishing its purposes and less restrictive (because inapplicable to the carved-out 'exceptions').

Equally well-known, though, is that carving out exceptions comes at a cost – typically, literally a cost in monetary terms. My favourite example comes from Germany, which prohibited the sale of chocolate-covered rice candies as a consumer-protection measure: the legislature did not want people to buy what looked like all-chocolate Easter bunnies only to discover, once they got home, that they got a thin coating of chocolate over a crispy rice product. For present purposes we can treat the ban as infringing on the right of candy-makers to pursue their chosen profession. There is an obvious, less restrictive alternative: require clear labelling to ensure that anyone who buys a chocolate-covered Easter bunny knows that it is not an all-chocolate Easter bunny. A labelling requirement is more costly than a complete ban, though: someone has to design the label, determine how effective different forms of labelling are, and so on.[18]

So too with all carve-outs: simply doing a carve-out requires the expenditure of time and money. How can proportionality review respond to the legislature's

[18] The full-scale analysis of this case is more complicated. For a more complete discussion, see M Tushnet, 'Verhältnismäßigkeit und das Problem regulatorischer Subventionen' ['Proportionality and the Problem of Regulatory Subsidies'] in C Bäcker (ed), *Rechtsdiskurs, Rechtsprinzipien, Rechtsbegriff: Elemente einer diskursiven Theorie fundamentaler Rechte--Symposium zum 75. Geburtstag von Robert Alexy* (Tübingen, Mohr Siebeck, 2023) 371.

argument that it prefers to use that money to support some other programme (indeed, perhaps to support programmes aimed at reducing social isolation)? Several responses have been offered. The most prominent, I believe, is that proportionality review must simply ignore these costs. I confess that I do not understand the justification for that response; the costs are real, as are the effects on the legislature's ability to pursue other socially valuable programmes. Another response is that the legislature must show that these costs are more than *de minimis*. My view, for what it is worth, is that this is not intrinsically connected to proportionality review. Rather, it is a requirement of minimal rationality: if you can accomplish all you want and carve out cases where your rule is not doing anything good at essentially no cost, refraining from doing so is irrational. I believe that the best response is to take these costs fully into account. The consequence is that all legislation will satisfy the 'no less restrictive means' component of proportionality review.

The next institutional question deals with the final, proportionality-as-such component. This chapter is not the place to canvass the issues associated with judicial determination of that component. I will conclude with the flat assertion that the stronger arguments are made by those who contend that judicial determinations of proportionality-as-such are inconsistent with the commitment in a liberal democracy to legislative determination of questions of public policy *and* questions of public policy inextricably intertwined with questions about how fundamental rights should be specified.

V. Conclusion

Tsakyrakis provides an argument against recognising a general right to liberty or a right to free development of the personality. I have argued that accepting that there is such a right does not commit us to anything else that is particularly problematic. Perhaps, though, that is because I have some degree of sympathy and compassion for people like Ulf and even Theodore, who have life projects that seem – not trivial, ill-founded or outrageous but – quite eccentric.

5

Freedom and Sociability

DIMITRIOS KYRITSIS*

I. Introduction

If you want to explicate the moral force of human rights, you could do worse than to focus on the value of freedom. On the one hand, freedom does a good job of justifying human rights law; and on the other, it seems to have a good fit with its key features. For one thing, specific rights, such as the rights to religion and privacy, can be understood (at least partly) as emanations of that more general value. When these rights are guaranteed, you can exercise whichever religion you want and shape your private life however you want (within the boundaries of those rights). Plausibly, having the freedom to do so goes a long way towards accounting for the fact that we care so deeply about the relevant rights. Freedom, though, is a contested idea, and although some of our philosophical disagreements about it leave our practices largely unaffected, others might have important practical ramifications. Depending on which conception of freedom one adopts, one might evaluate differently our beliefs and actions, judging that they do or do not comply with freedom, properly understood.

As an integral element of contemporary human rights law,[1] proportionality seems to be an appropriate target of such freedom judgments. In Stavros Tsakyrakis' well-known critique of proportionality, these freedom judgments came to occupy centre stage. Tsakyrakis advances two claims about the relationship between freedom and proportionality. He contends, first, that proportionality, as commonly understood and practised, subscribes to or advances a certain understanding of freedom and, second, that this understanding is morally deficient. In this chapter, I will not engage with the first exegetical claim; it raises intricate questions about how we attribute a moral conception to legal doctrine, which I cannot address here.[2] Instead, I will focus on the second more philosophical claim. Specifically, I will explore an idea that lies at the heart of that

* I am grateful to Damian Cueni for written comments on an earlier draft.

[1] Not everywhere, of course, but in many jurisdictions.

[2] See 'Introduction' to this volume, section I.A.

claim, namely, that the problem with proportionality is that it construes freedom in unduly individualistic terms in so far as it defines the prima facie scope of rights overly generously, as the freedom to do as one pleases.

The aforementioned diagnosis connects freedom with another moral concern, also central to human rights law, that of a 'fair balance between the individual and society'. How can we best conceptualise this balance at the philosophical level? As is well known, the orthodox doctrine of proportionality tries to do so at the limitation stage, when it assesses the justifiability of rights-interfering measures advancing the public interest. Tsakyrakis, though, thinks that this comes too late. First and foremost, we ought to revise the moral account of freedom that animates the doctrine. For Tsakyrakis, the freedom to do as one pleases is not worth protecting, even prima facie. Rather, freedom must be situated from the outset within a framework of social interaction. What emerges from that is a vision of 'liberal sociability', which champions 'a notion of individuality that derives from and relates to a notion of fair sociability'.[3]

In this chapter I will defend liberal sociability. Picking up some threads from Tsakyrakis' rich and suggestive reflections, I will propose an interpretation of liberal sociability that makes it immune from two persistent objections and thereby also sharpens it as an account of the value of freedom capable of guiding human rights law. Specifically, I will argue that liberal sociability does not collapse into communitarianism because it does not presuppose an ethically thick social context or promote togetherness. Rather, its central insight is that what we do in social interaction unavoidably affects others in morally significant ways, and so it would be morally obtuse – indifferent to those morally significant effects – to insist on being free to do whatever we want, even prima facie. Hence, the claims we can properly press against others ought to be worked out from a moralised understanding of various forms of social interaction; such an understanding primarily serves to (i) identify the morally relevant interests, as these are implicated in social interaction, and (ii) in light of those interests, prescribe a system of organising social interaction that is compatible with the human dignity of all participants. I will call this interpretation of liberal sociability austere.

The argument of this chapter is divided into three main sections. Section II presents the main tenets of liberal sociability, as these emerge from Tsakyrakis' work. Section III introduces two objections: one objection states that liberal sociability privileges the gregarious over the eccentric and the recluse; while the other objection is that it holds personal life hostage to community visions of the good life. In section IV, I will claim that, once liberal sociability is construed along the lines of the austere interpretation I favour, it has the resources to address these objections. Liberal sociability is antithetical to communitarianism in so far as the latter negates human dignity, properly understood; in turn, it offers protection to the eccentric and the recluse, in so far as social interaction has limits beyond

[3] Tsakyrakis, ch 1 of this volume, section II.

which others cannot have a say in what individuals do. Based on these findings, I will then go on to draw out some practical implications of adopting the framework of liberal sociability.

II. Individuality and Sociability

A. From Social Practices to Individual Rights

It is well known that the doctrine of proportionality, as standardly understood and practised, directs us to start a human rights inquiry by asking whether a human right has been 'engaged' or 'interfered with', typically by a government action or omission. An affirmative answer to this question does not in any way foreclose the all-things-considered judgement whether the right has been violated. The government action may still be found to have been justified. However, for some proponents of proportionality, even the notion of an interference with a human right tracks an important moral concern, one that partly explains and justifies why proportionality has the structure it does. These theorists contend that this concern is underpinned by the moral value of freedom. For example, Kai Möller construes that value to encompass a prima facie moral right to everything that advances our self-conception.[4] If there is a moral 'right to everything' then, arguably, it makes moral sense to demand that interferences with it trigger a human rights inquiry and only be allowed to stand if they are suitable, necessary and proportionate. By so limiting the scope of permissible government action, the claim goes, we optimise the enjoyment of a morally valuable freedom.

Tsakyrakis criticises the conception of the moral value of freedom sketched in the previous paragraphs, which he calls 'total freedom'.[5] This conception prescribes that people in society only sacrifice the amount of freedom 'necessary to secure the mutual enjoyment of the remaining portion of their freedom under the auspices of a commonwealth'.[6] In committing to total freedom, says Tsakyrakis,

[4] K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012). I have criticised Möller's account, with special emphasis on his understanding of freedom, in D Kyritsis, 'Whatever Works: Proportionality as a Constitutional Doctrine' (2014) 34 *OJLS* 395.

[5] Tsakyrakis adapts a term used by Ronald Dworkin in *Justice for Hedgehogs.* There 'total freedom' denotes a conception of freedom which Dworkin defines as one's 'power to act in whatever way he might wish, unimpeded by constraints or threats imposed by others or by a political community': R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, Harvard University Press, 2011) 366. He then associates with Berlin the position that restrictions of total freedom, thus understood, are, as such, losses of value, even if they are, all things considered, justified by another moral value, say, the value of equality. Dworkin rejects this position. His rejection is to a great extent animated by general considerations about the nature of moral value, in particular its holistic and integrated character. See relatedly F Michelman, 'Foxy Freedom' (2010) 90(2) *Boston University Law Review* 949. In contrast, Tsakyrakis' opposition is primarily substantive: total freedom distorts a crucial dimension of moral worth.

[6] Tsakyrakis, ch 1 of this volume, section II.

proportionality reflects an 'individualistic bias'.[7] It assumes that the demands of a valuable freedom (a freedom that we are enjoined to optimise) can be worked out from the perspective of the isolated individual, attending only to her conception of the good life, independently of other people. But this, Tsakyrakis claims, gets freedom wrong.

I am not going to examine whether Tsakyrakis is right in his diagnosis of the philosophical underpinnings of proportionality.[8] Nor do I have much to say about the merits and demerits of total freedom. I want to focus on the conception of freedom that he holds up as his preferred alternative to it. In the work he published before his untimely death he presents that alternative only in outline.[9] But what he does say there is both intriguing and controversial. At the heart of his framework is the idea of sociability, which he credits to Aristotle, whereby 'practices of sharing and accomplishing things with others are prior to the individual pursuing her self-interest'.[10] To get a clearer sense of how Tsakyrakis understands the priority of such practices (henceforth also social practices), it might be helpful to take a closer look at the typology he offers. He distinguishes three types of social practices.[11] First, Tsakyrakis speaks of practices that are taking place in a context that reduces transaction costs and thus facilitates large-scale interaction.[12] These practices aim at mutual advantage, where each participating individual has her own ends but advancing them requires cooperating with other individuals seeking their own ends. Second, Tsakyrakis speaks of intimate relationships, for example between spouses. In these practices, participants also aim at their personal good, but their nature is such that they are singular or very difficult to replicate. Third, there is political society, which is constituted by individuals pursuing 'a common end, namely the collective achievement of justice'.[13]

It is noteworthy that Tsakyrakis defines all the aforementioned practices in terms of the good of individuals rather than the good of a distinct collective entity. Of course, it makes sense to say that my family had a pleasant walk or an orchestra performed well, but there is no collective that has thereby benefited over and above the members of my family and the orchestra (and possibly the people who attended the orchestra's performance). The key point, however, is that the good of one member is bound up with that of the others, which is why social practices like a family walk or an orchestra performance involve the sharing of things among

[7] ibid section I.

[8] For an argument that the legal doctrine of proportionality is not committed to total freedom, see Cueni, ch 8 of this volume.

[9] Apart from 'Disproportionate Individualism', elements of that alternative are also contained in S Tsakyrakis, 'Is There a General Right of Non-Disclosure?' in D Spielmann, M Tsirli and P Vogiatzis (eds), *The European Convention on Human Rights, a Living Instrument: Essays in Honour of Christos L Rozakis* (Brussels, Bruylant, 2011) 653.

[10] Tsakyrakis, ch 1 of this volume, section II.

[11] It is not clear whether Tsakyrakis means these three types to be exhaustive of the possibilities or he mentions them because they illustrate the features of sociability that he focuses on.

[12] Tsakyrakis, 'Is There a General right of Non-Disclosure' (n 9) 657.

[13] ibid.

those who participate in them. Note that rejecting the existence of a community good is not the same as affirming an instrumental conception of social interaction. It is perfectly compatible with Tsakyrakis' position to say that the good of individual members can include the good of being part of a community such as a family or an orchestra, or, as John Rawls puts it, that 'human beings have in fact shared final ends and they value their common institutions and activities as good in themselves'.[14]

The priority of social practices, as outlined above, has for Tsakyrakis important moral implications. Social practices typically generate benefits and burdens and, given that the benefits and burdens often fall on different individuals, raise questions of justice. Thus, it becomes imperative to regulate them so as to make the allocation of benefits and burdens among participants fair. Moral rights are downstream from this basic idea. They are rules that give effect to a fair allocation of benefits and burdens among participants. For example, it may be that, when my family goes out for a long walk in the forest, my toddler son has a moral right to be carried by his parents (perhaps after a certain point). Recognition of such a right ensures that the family outing is not unduly burdensome on him.

Notice the difference with total freedom. In the framework of total freedom, we have seen, the prima facie rights are understood expansively, based solely on what each individual wishes to do.[15] The goal is then to maximise satisfaction of these rights for everyone, resorting to balancing in order to adjudicate the inevitable conflicts among individual demands. By contrast, in Tsakyrakis' framework, '[t]he maximisation of liberty is not valuable in itself but only in so far as it is supported by this notion of fair sociability'.[16] We ought to have all and only those liberties and other rights without which it would be unfair to be expected to carry on participating in a particular social practice. In this picture, other people enter the determination of our liberties and other rights from the get-go because their reasonable interests are parameters of the requirements of fairness.[17]

Apart from its metaphysical role in grounding rights in the notion of fair social cooperation, the framework of sociability also plays a very important epistemic role. For Tsakyrakis, 'the content of [individual rights] will be determined by a notion of fairness in different social contexts'.[18] Therefore, it is likely to 'vary from one social context to the other'.[19] In order to specify what rights we have, then, we

[14] J Rawls, *A Theory of Justice* (Cambridge, MA, Belknap Press, 1971) 522.

[15] In his earlier work, Tsakyrakis refers to this feature of the proportionality assessment as its 'definitional generosity'. See S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468.

[16] Tsakyrakis, ch 1 of this volume, section II.

[17] In this sense Tsakyrakis' framework shifts away from liberty understood as a general value from which more specific rights emanate. Of course, even if the notion of total freedom is misguided, this move might still involve a conceptual loss: it could be the case that we need a general concept of liberty to perform other moral purposes. See relatedly D Cueni, 'Constructing liberty and equality – political, not juridical' *Jurisprudence* (21 February 2024) doi: 10.1080/20403313.2023.2296816.

[18] Tsakyrakis, ch 1 of this volume, section II.

[19] ibid.

ought to take into account the form of social interaction in which they are implicated and assess what distribution of burdens and benefits is required by fairness.

The way Tsakyrakis situates rights within sociability can be seen in his critique of a putative general right of non-disclosure of personal information, namely a prima facie right of the individual to resist disclosure of any personal information. For Tsakyrakis, this putative right is animated by the spirit of total freedom and reproduces the latter's distortions. By invoking it, he writes, 'state employees have claimed that their salaries should be concealed, students that grades in high school or university should not be made public, even drivers, who have infringed the traffic code, have claimed that it is forbidden to have the plates of their cars photographed'.[20] But no such right exists because '[t]he sharing of information is an inevitable and necessary feature of sociability and, indeed, a constitutive element of the collective achievement of justice and of cooperation for mutual advantage'.[21] This feature is at odds with the recognition of 'a general individual interest not to be "seen", which competes with an opposite societal interest to "see"'.[22] Tsakyrakis maintains that, rather than presuppose that the sharing of information is always morally questionable, at least prima facie, we should instead accept that the disclosure of some personal data inheres in our participation in social interaction. Starting from this premise, we should turn our attention to determining what more specific information could reasonably be withheld or required in this or that social practice and craft a more limited and tailored right to non-disclosure. Religious convictions are confidential in the context of most hiring processes, but they may not be if you are applying for a position that includes religious instruction.

B. Sociability in Politics

How can this account help us make sense of our membership in a political society and the rights that we may properly demand from our government? Recall, members of a political society have a shared end, namely, to attain justice. This is a most important aim, because 'only just public institutions allow everyone to realize his or her more particular aims'.[23] So, it would seem that the same reasons that militate against making total freedom the starting point of our interpersonal morality would also apply to the political community. As Tsakyrakis puts it, '[i]t would be rather paradoxical to think that … the less [individuals] share the better a society becomes'.[24] But despite its importance, participation in political society

[20] See Tsakyrakis, 'Is There a General Right of Non-Disclosure?' (n 9) 660.
[21] ibid 654.
[22] ibid.
[23] ibid 657. In addition, it may also be important because participating in political society is a good in itself. For an account of the good of political society that is congruous with Tsakyrakis' framework, see Rawls (n 14) 527 ff.
[24] Tsakyrakis, 'Is There a General Right of Non-Disclosure?' (n 9) 655.

is not an all-encompassing goal, subordinating all other aspects of our lives or demanding that we sacrifice our 'more particular aims' to the pursuit of the collective achievement of justice. Quite the opposite, its success is in large part measured by the room it affords for those more particular aims. Individual rights are essential to this task. For Tsakyrakis, 'they are indispensable social arrangements that enable all persons to conduct the plan of life that they deem valuable'[25] by guaranteeing for them spheres of freedom against collective demands. They thereby alleviate the burdens of social cooperation for the attainment of justice. According to Tsakyrakis, a society's yardstick for what rights to recognise and enforce is human dignity, which prescribes that we treat each individual with equal respect and concern.[26] When a political society lives up to human dignity, it realises or exhibits what he calls *liberal sociability*. Liberal sociability 'reconciles the affirmation of individual rights with the primacy of social life'.[27]

To illustrate the place of the individual and the community in liberal sociability, let me briefly contrast it to the vision of political society that underpins the so-called common good constitutionalism of Adrian Vermeule.[28] Admittedly, there are some superficial similarities between the two. Common good constitutionalists have mounted a critique of proportionality that is structurally similar to Tsakyrakis'.[29] More pertinent for present purposes, for Vermeule 'human flourishing, including the flourishing of individuals, is itself essentially, not merely contingently, dependent upon the flourishing of the political communities'.[30] This seems to come close to Tsakyrakis' claim that just political institutions are necessary for individuals to be able to pursue their aims. However, the two claims should not be confused. In fact, their philosophical starting points and understanding of the moral point of government are very different, so it is crucial to demonstrate how liberal sociability steers a middle course between total freedom and the conception of freedom espoused by common good constitutionalism.

First, as we have seen, Tsakyrakis' framework does not presuppose that communities have their own good other than in the sense that they may succeed or fail in the aim they are meant to fulfil. The same applies to political society. Recall that liberal sociability defines the purpose of a political society in terms of the attainment of justice rather than a more substantive notion of collective flourishing. The contrast becomes stark when we consider how thick Vermeule's understanding is of the flourishing of political communities. For example, he

[25] Tsakyrakis, ch 1 of this volume, section II.

[26] ibid.

[27] ibid.

[28] A Vermeule, *Common Good Constitutionalism* (Cambridge, Polity Press, 2022). My goal here is not to argue the merits of Vermeule's theory but merely to juxtapose it to liberal sociability so as to sharpen some of the latter's key features.

[29] See, for instance, C Casey and A Vermeule, 'Myths of Common Good Constitutionalism' (2022) 45 *Harvard Journal of Law and Public Policy* 103, 142 ff.

[30] Vermeule (n 28) 29.

is prepared to include in that notion a putative 'moral well-being of the political community'.[31] Whereas liberal sociability need not deny that everyone has an interest in living in a social environment congenial to her ethical outlook, which is set back by the public availability of speech and behaviour that clashes with it, or that it may be appropriate to seek to promote this interest to some extent through political action, this is a far cry from saying that the political community, over and above the individuals making it up, is made better or worse off depending on what material is publicly available. This is a proposition to which liberal sociability is not committed.

Second, and relatedly, liberal sociability rejects the general ordering between common goods and the good of individuals proposed by Vermeule. He writes that 'common goods are real as such and are themselves the highest goods for individuals'.[32] If common goods are distinct from and weightier than the particular good of individuals, then one should expect that the latter must yield whenever it clashes with the former. In light of this it may well be – though Vermeule is not explicit about this – that individuals should not have a right to promote their particular good at the expense of the common good(s). By contrast, for liberal sociability, the scope and content of our rights are delimited not by a supposed overriding fealty to the common good but by the requirements of fairness towards its other members. And fairness in the political context prescribes – consistently with human dignity – that all members are secured adequate space of freedom to pursue *their own particular life plans* rather than that they adhere to a certain vision of the good life that, say, prioritises civic participation.

III. Too Sociable, not Liberal Enough

In section II, I outlined the main tenets of liberal sociability. Liberal sociability regards our participation in various forms of social interaction as a key dimension of individual good. Rejecting the coherence and moral appeal of a 'right to everything', whose content is figured out pre-socially from the standpoint of the isolated individual, it takes liberties and other rights to flow from the requirements of fairness within social interaction. In the case of political communities, liberal sociability insists that they are organised such that they allow individuals sufficient room to pursue their particular aims in accordance with equal concern and respect. However, it resists the idea that communities have their own good, which competes with and overrides the good of individuals.

Can liberal sociability achieve its professed aim of reconciling social practices and human dignity? It is impossible to offer a comprehensive defence against all

[31] ibid 171. His example is child pornography. Needless to say, there are other bases for making child pornography impermissible apart from the protection of a supposed 'moral well-being of the political community'.

[32] ibid.

possible objections, so in this section I will focus on two that have the same thrust: liberal sociability cannot help but prioritise the community at the expense of the individual and consequently allows that the individual may have to make (what on the best understanding of freedom are) excessive sacrifices to the community. The two objections are relevant for present purposes. If sound, they demonstrate the superiority of a 'total-freedom' framework over the framework of liberal sociability. However, as I will explain in the following section, the best understanding of liberal sociability can rebut them.

A. Coercive Sociability

According to the first objection, Tsakyrakis' framework implicitly relies on a particular ordering of conceptions of the good: it expects individuals to be, well, sociable. It thus makes no room for those who insist on being 'left alone', either in the sense that they wish to minimise social interaction ('the recluse') or in the sense that they revolt against social norms ('the eccentric').[33] In so far as being left alone is an anti-social impulse, it would seem that Tsakyrakis' scheme cannot give it decisive weight. Therefore, it must consistently thwart the life plans of the recluse and the eccentric. You may not feel the force of the objection if you adopt a conception of the good that subordinates the individual to the collective. But, of course, this is not Tsakyrakis' stated conception. His aim is to give individuals leeway to pursue their own conceptions of the good. So, if this objection correctly diagnoses the implications of sociability, it is an embarrassment for him. By contrast, total freedom has a straightforwardly liberal explanation for such cases. It affords the life plans of the recluse and the eccentric the same prima facie protection as any other life plan. These life plans may have to be restricted by justified interventions in pursuit of legitimate government goals. But so may other life plans. There is nothing in the structure of total freedom that would unduly disadvantage them.

The force of this objection can be illustrated by considering the European Court of Human Rights' (ECtHR's) decision in *SAS v France*. As is well known, the case concerned the compatibility with the Convention of Law no 2010-1192, which banned the wearing of the full-face veil in public spaces. The passing of the law was preceded by a report of a parliamentary commission that had found, amongst other things, that 'the full-face veil represented a denial of fraternity,

[33] Tsakyrakis mentions a more extreme example of an anti-social life plan, that of someone who wants to kill their critics, as an illustration of the impasse of total freedom and the relative advantage of his framework. In his chapter, Mark Tushnet explores this example to argue that total freedom is not incompatible with the fundamental idea animating liberal sociability. See Tushnet, ch 4 of this volume. If total freedom can make moral sense of such an extreme example, then the force of Tsakyrakis' charge is blunted. By contrast, the less extreme examples examined here are more of a sword than a shield for proponents of total freedom. The thought is that, unless Tsakyrakis can guarantee innocuous life plans like those of the recluse and the eccentric, his framework is seriously awry.

constituting the negation of contact with others and a flagrant infringement of the French principle of living together (le "vivre ensemble")'.[34] This rationale for the ban was affirmed and further spelled out in an explanatory memorandum accompanying the Bill, which stated:

> The systematic concealment of the face in public places, contrary to the ideal of fraternity, also falls short of the minimum requirement of civility that is necessary for social interaction.
>
> Moreover, this form of public confinement, even in cases where it is voluntary or accepted, clearly contravenes the principle of respect for the dignity of the person. In addition, it is not only about the dignity of the individual who is confined in this manner, but also the dignity of others who share the same public space and who are thus treated as individuals from whom one must be protected by the refusal of any exchange, even if only visual.[35]

Arguably, this rationale, which the Grand Chamber largely relied on for deciding that the ban was compatible with the Convention, flows from Tsakyrakis' framework – or at a minimum, there is nothing in that framework to oppose it.[36] In particular, both seem to start from the premise that there is something morally problematic about an individual claiming a right to remove herself from social interaction; thus both place an extra argumentative burden on her that is not faced by other conceptions of the good life. In addition, both seem to attack the existence of such a right on the basis of the interests of others within a certain sphere of social interaction. In this way, they stack the odds against those who wish to be left alone.

B. Communitarianism in Disguise

The objection we have just considered has a rather narrow aim, to show that liberal sociability disparages people who distance themselves from joint pursuits. But the difficulty could be thought to run much deeper. It may be argued that, though avowedly liberal, Tsakyrakis' account makes a fatal concession to communitarianism. At first blush, liberal sociability includes a robust commitment to individual rights, which 'enable all persons to conduct the plan of life that they deem valuable'[37] and thus to resist the imposition of a collective conception of the

[34] *SAS v France* [2015] 60 EHRR 11, para 17. From the extensive academic commentary, see M Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*' (2015) 4 *Oxford Journal of Law and Religion* 94; I Trispiotis 'Two Interpretations of "Living Together" in European Human Rights Law' (2016) 75(3) *Cambridge Law Journal* 580.

[35] *SAS v France* (n 34) para 25.

[36] I am assuming here that a theory that endorses or allows this rationale of the full-face veil ban is for this reason problematic. But, of course, many scholars agree with this rationale. Some of the things I say below to defend liberal sociability against the first objection also hint at why I think these scholars are mistaken. However, I do not hope to fully resolve this dispute here.

[37] Tsakyrakis, ch 1 of this volume, section II.

good. Even so, the objection goes, communitarianism makes its presence felt in Tsakyrakis' scheme more insidiously. Recall that within the framework of liberal sociability individual claims are worked out from an analysis of human interaction in different social contexts. But social contexts are not ethically inert. They often – perhaps typically – embody certain assumptions about the content and worth of various social positions and their distribution among social groups. By giving epistemic value to social contexts, liberal sociability risks allowing these assumptions to contaminate our judgements about what is owed to people. For example, in an environment that rigidly defines gender roles, liberal sociability will arguably take its cues about the interests at stake and the appropriate distribution of social burdens from these rigid definitions. It might assume that assigning caring responsibilities to a woman is less of a burden than to a man, or that it distinctively promotes her well-being as opposed to a man's because this is how family is structured in that environment. As a result, it systematically puts women's rights on the back foot.[38]

This objection reinforces the previous one, too. Perhaps the reason you do not have a right to wear the full-face veil is that, once you are out in the street in France, you are participating in a social practice that involves being open to engagement with others; hence a right to wear the full-face veil contradicts the very point of the practice.[39] And the practice has this point because it is commonly accepted that it does. According to the objection we are considering, liberal sociability cannot but defer to such societal attitudes, because it takes such attitudes to determine the content of social practices. It thereby places the life plans of the eccentric and the recluse in the hands of precisely those to whom those life plans stand opposed, namely, other people.

IV. An Austere Interpretation of Liberal Sociability

In this section, I push back against the aforementioned objections by arguing for what I call an 'austere' understanding of liberal sociability. It is austere in the sense that it construes liberal sociability as not resting, implicitly or explicitly, on ideas

[38] The objection replicates the well-known feminist critique of role assignments, especially in the family. See, inter alia, C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA, Harvard University Press 1987) 36; S Okin, 'Justice and Gender' (1987) 16 *Philosophy and Public Affairs* 42, 67–68.

[39] Tellingly, the Belgian Government stated in its intervention in the *SAS* case that 'codes of clothing which prevailed in our societies were the product of societal consensus and the result of a balanced compromise between our individual freedom and our codes of interaction within society' (*SAS v France* (n 34) para 87). The Court was sympathetic to this position: it stated that '[i]t can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, *by virtue of an established consensus*, forms an indispensable element of community life within the society in question' (ibid para 122, emphasis added).

about what is good for individuals but only on ideas about what is fair or just. Contrary to the first objection, liberal sociability does not presuppose or advocate that being a recluse or an eccentric is a bad way to lead one's life. Contrary to the second objection, it maintains a sufficient critical distance from prevailing understandings of social practices and of role assignments within them. I then go on to explain that the difference between liberal sociability and total freedom is not merely theoretical but plays out in the way we decide human rights cases using the two frameworks.

A. Sociability without Communitarianism

Let me begin with the second objection. This objection misconstrues the epistemic role of sociability. It is not the case that, in figuring out the demands of fair social cooperation, we are guided by nothing other than collective judgements about the value and purpose of certain social practices. Far from it, such judgements are ultimately assessed against the backdrop of human dignity. With human dignity as its yardstick, liberal sociability does not mirror those judgements but rather seeks to scrutinise and discipline them. For example, it can assess whether the roles that are 'normally' assigned to women in childcare in a particular society or the expectation that one always show one's face in public are in line with the respect that flows from their dignity. Nor does it fall into the opposite trap, of making recourse to social context epistemically idle and getting all its answers from fleshing out the requirements of human dignity in the abstract.

To see why this is so, we need to delve deeper into the operation of Tsakyrakis' framework and outline how liberal sociability combines considerations of fact (social interaction) and value (human dignity). Specifically, appeal to considerations of fact is epistemically non-redundant in liberal sociability because it helps us map the patterns of interaction in which individuals find themselves and in which the demand of fairness arises. To return to a previous example, we may find that different forms of social interaction, say, the interaction between a service provider and a consumer, require a level of sharing of information for their success. In this respect, reliance on social context is key. Without it we do not have a clear idea of the ways in which the good of individuals is enmeshed with that of others. But the same exercise also reveals the benefits and burdens that are being generated from social interaction and the way they are currently being distributed. Thus, we may find that our information-sharing practices unduly invade the lives of consumers by requiring them to disclose sensitive personal information to service providers. It is here that human dignity gives Tsakyrakis' framework a clear normative edge. Liberal sociability will resist unfair distributions of benefits and burdens and seek to redress them by giving participants rights and liberties that block them, for example by requiring service providers to obtain the consumer's consent before obtaining and using certain sensitive information.

How do we know which distribution of benefits and burdens is unfair or which invasion of privacy is undue? In the framework of total freedom, we calculate how much of people's total freedom is restricted by a distribution of benefits and burdens and we seek to protect as much of it as possible with equal regard to all. Arguably, in this way we respect human dignity because we allow individuals to give shape to their conception of the good life. Liberal sociability takes a different tack. Being liberal, it, too, should reserve pride of place for the responsibility of each individual to lead their own life. But, of course, it rejects the baseline of total freedom as a moral non-starter. Instead, it develops an understanding of what is permissible by asking how we can preserve our human dignity in our unavoidably freedom-limiting interaction with others.

Such an understanding begins from the premise that social interaction does not exist for the good of this or that individual but of everyone involved. It engages the moral interests of many people and so its rules must be capable of reconciling those. How can we factor these different moral interests? In 'Disproportionate Individualism' and elsewhere, Tsakyrakis offers one option. He aligns himself with Dworkin's view that it is impermissible to restrict someone else's freedom on the basis of 'external' preferences, namely preferences about what is right or beneficial for her, or discriminatory preferences.[40] Clearly, this cannot be the whole story about how we ought to treat one another, even if we restrict our attention to politics.[41] Still, Dworkin's view highlights some key characteristics of moral claims in the framework of liberal sociability.[42] First, it offers a way of cashing out the liberal impulse: the reason external and discriminatory preferences are excluded is because everyone is entitled to decide what is right or beneficial for herself and to equal concern and respect. Second, it cashes out the liberal impulse without assuming that any restriction of freedom is *eo ipso* morally problematic or suspect: restrictions that are not tainted by external or discriminatory preferences are in principle permissible. Third, and importantly for our purposes, it retains liberal sociability's critical distance from collective judgements about the meaning of social practices. Even if others believe that a social practice requires that women have lesser status than men, liberal sociability will discount such beliefs as falling short of human dignity and accordingly modify the rules of the respective social practice. In this sense, the

[40] R Dworkin, 'Do We have a Right to Pornography?' in R Dworkin, *A Matter of Principle* (Cambridge, MA, Harvard University Press, 1985) 335; Tsakyrakis, ch 1 of this volume, section III.

[41] In the case of the right to non-disclosure, Tsakyrakis adds a further limitation. He says that our obligation to share certain information must be tailored to the promotion of certain purposes only, those that are related to a valuable social practice. If a certain piece of information, say about our sexual preferences, is not related to a hiring process, we should not be expected to disclose it. See Tsakyrakis, 'Is There a General Right of Non-Disclosure?' (n 9) 661. Could we perhaps generalise from this example to other rights as well? Could we say that, to the extent that a social practice has a more or less stable and widely agreed upon purpose, it would be unfair to limit individuals' restrictions other than in pursuit of that purpose? It is not possible to evaluate this suggestion here.

[42] Dworkin's view is, of course, the topic of extensive critical debate. It is not relevant for present purposes to enter this debate.

understanding of social interaction that frames our reciprocal moral claims is moralised and may look different from how interaction occurs in a particular society. We could go even further. It is possible that an actual social practice is morally beyond the pale, marred by injustice and prejudice. Again, liberal sociability does not have a default reverence for such practices. If there is no way to retain something of value by severing their morally reprehensible aspects, it will dismiss them wholesale.

With this in mind, it becomes easier to address the first objection as well. This objection mistakes the moral role of sociability in Tsakyrakis' account. Tsakyrakis is not an advocate for togetherness. He is not saying that, as a general matter, individuals are better off being open to interacting with others. Sociability in his scheme is a parameter of (much) human good, but it is not a good in itself.[43] Nor is he saying that an individual has a duty to interact with others, as the ECtHR seems to accept in *SAS*. He is merely saying that, where there is valuable social interaction, the reciprocal moral claims of participants must take a certain structure. They are not fixed solely by societal attitudes. Their determination, as previously discussed, is a moralised task. They are worked out from a scheme of rights and duties that allows that a valuable social practice thrives while preserving the human dignity of all participants.

So, in the case of the recluse and the eccentric it is an open question, one that must be resolved by moral argument about the meaning of human dignity, whether their life plan should yield to societal expectations. It may well turn out, as I suspect it will, that there is no political duty to be open to interact with others, in general or just because you are in a public space. Of course, there is value in free and civil interaction with strangers, but this value can still be realised, even if we leave the recluse alone, as long as there are plenty of opportunities for those who do want to interact with others to encounter like-minded individuals. It is even more likely that there is no general political duty to behave in a certain way, just because lots of other people in your society do so, when no valuable social interaction depends on enforcing this kind of uniformity. Note that in making this kind of assessment we do not need to pass judgement on the worth of people's life plans, by reference either to sociability or to some other thick conception of the good life.[44] It is up to each individual, including the recluse and the eccentric, to forge their life plan as they see fit, using the resources (eg liberties) that they are left with, once they have paid their fair share for the sake of sustaining valuable social interaction.

[43] That is not to deny that sociability may also be a good in this or that context, but not in the overarching sense in which Tsakyrakis employs the term.

[44] In this sense Tushnet is right to criticise Tsakyrakis for claiming that the life plan of feeding birds in the park is 'trivial'. See Tushnet, ch 4 of this volume, section II. But neither is it accurate that 'Tsakyrakis' analysis … depends centrally on the proposition that some interests are trivial or outrageous' (ibid).

B. Much Ado about Nothing?

When comparing how total freedom and liberal sociability frame the right to informational non-disclosure, Tsakyrakis warns that the two approaches might lead to the same results in practice. He writes:

> My aim is not necessarily to show that the proposal outlined here furnishes a more satisfactory response to concrete cases. In fact, it may well be that we reach the same conclusion, whether our starting point is a general right to non-disclosure subject to proportionate limitations or the idea of liberal sociability. But this overlap in outcome should not conceal the profound differences of principle.[45]

This statement could be taken to contain a major concession. If the two approaches systematically make no difference in application then their differences in principle are either insignificant or inconsequential; in both cases they can hardly be called 'profound'. At the very least, it would appear tenuous to claim that total freedom is seriously misguided.

This is a tempting position to take. After all, total freedom is only a theory of prima facie entitlements. Presumably, the same moral considerations that constrain freedom in the framework of liberal sociability can justify restrictions to those entitlements at the limitation stage of the standard proportionality analysis. Either way, all morally relevant interests are presumably taken into account. Hence, it should come as no surprise if the two approaches converge in application.[46]

Nevertheless, Tsakyrakis' apparent modesty in the aforementioned passage belies the depth of his challenge.[47] Total freedom is an account of which freedom is morally worthwhile. So, if Tsakyrakis is right that it allows items to go into the balance that lack moral worth, because they are incompatible with a fair scheme of social interaction in a given context, then it will systematically, not just occasionally, skew the proportionality analysis. Of course, as Matthias Klatt claims, when considering many manifestations of total freedom, such as killing one's critics or spitting on the sidewalk, 'a high degree of empirical and normative reliability exists that the competing principle, the public value, will take preference over the general freedom right'.[48] However, this does not suffice to drive the worry away. The bias may not make a practical difference when the moral odds are clearly stacked against the individual's claim, but this does not mean that it is not there, and it might play out in cases where the odds are more finely balanced. Tsakyrakis writes:

> Are we prepared to assign weight to outrageous interests such as [an interest in killing those who criticise me] in the first place? Once we start going down this road, it makes

[45] Tsakyrakis, 'Is There a General Right of Non-Disclosure?' (n 9) 654.
[46] For a version of this argument see Klatt, ch 3 of this volume, section IV.
[47] Kyritsis (n 4) 401.
[48] Klatt, ch 3 of this volume, section IV.D.

> little difference to assign such interests only a slight weight. The damage will already have been done.[49]

It is no good saying in response that it is open to a proponent of proportionality to assign zero weight to a prima facie entitlement.[50] Total freedom has already foreclosed this option, because it does not merely add items to be taken into account in the proportionality analysis, it also assigns them positive moral valence. As Tsakyrakis points out, 'proponents of proportionality maintain that total freedom is of such value that it ought to be optimised along with the freedom of other individuals and other values'.[51] One cannot hold that total freedom should as a moral matter be optimised and at the same time that it has zero weight.

V. Conclusion

There is undoubted simplicity in the framework of total freedom. It commits minimal moral resources to the determination of prima facie rights, which are then added to an overall balance that also includes other rights and collective goals. The framework of liberal sociability asks us to trade that simplicity with a scheme that frontloads many hard moral questions about the place of the individual in society and the claims of fairness that she can properly raise. In this chapter, I have tried to show that the shift ultimately pays off in moral insight. Individuals are situated in various patterns of social interaction. As such, they do not even have a prima facie moral right to do as they please – a moral right that human rights law ought to account for and respect. They are morally entitled to be treated in accordance with human dignity as participants of social practices whose freedom is inevitably restricted in manifold ways for the sake of sustaining those practices. In particular, they are entitled to a fair distribution of the benefits and burdens of social interaction. Many of the liberties and other rights that we cherish are meant to give effect to such a distribution. There is, as we have seen, no concession to communitarianism in this position. Liberal sociability does not take social practices at face value. Even while it treats them as a parameter of the demands of human dignity, it passes them through a moral filter. Some social practices may turn out to be too flawed to impose any restrictions on individual freedom.

Of course, this insight needs unpacking. We need to elaborate tests for specifying the demands of human dignity and fairness that will guarantee individuals' ability to lead their own lives and shape to some extent their interaction with others while at the same time allowing that valuable social interaction does not always depend on their consent. Here I have given only an outline of such tests. In

[49] Tsakyrakis, ch 1 of this volume, section II.
[50] Möller allows for this possibility in *The Global Model* (n 4) 183 ff.
[51] Tsakyrakis, ch 1 of this volume, section II.

addition, even if liberal sociability is a superior moral theory to total freedom, it does not follow without further argument that institutional actors must reason in accordance with its precepts in practice.[52] The added complexity of the framework constitutes a significant practical cost that matters a lot for human rights law and brings with it a host of pressing questions: Which institutions can reliably apply the right tests? What information will they need and how can it be made available to them? How must legal doctrine be structured to assist them in this task? Attending to these important questions must await another occasion. But we cannot hope to do so satisfactorily unless we have settled on the correct theory of rights that our tests, doctrines and institutions must track. By forcing us to confront that more foundational issue, Tsakyrakis has done human rights law a great service.

[52] I have elaborated this gap between theory and practice and the kinds of institutional and epistemic consideration that can fill it in Kyritsis (n 4) 410 ff.

PART C

Freedom and Politics

6

Proportionality for a Liberal State

MALCOLM THORBURN

I. Introduction

Since the end of the Second World War, a new model of constitutional rights has arisen, first in the jurisprudence of the Federal Constitutional Court of Germany, and then at constitutional and human rights courts around the world. It is sometimes referred to as 'the global model of constitutional rights'[1] or simply as 'the postwar paradigm'.[2] This framework is far more than just a different set of constitutional doctrines and tests; it represents a whole new way of thinking about the relationship of states to their subjects. Under the older model of rights as trumps at work in American constitutional jurisprudence and championed by Ronald Dworkin and Stavros Tsakyrakis, states have no standing duty to justify their actions to their subjects. So long as they steer clear of certain well-defined rights, they are entitled to pursue their public purposes largely as they would like. Under the new post-war paradigm, by contrast, states are regularly challenged to justify the burdens they impose upon their subjects. This has been widely hailed as a significant advance, a doctrinal recognition of the fact that states are not masters of their subjects, free to impose their will as they might like; it is a recognition that states are, instead, servants of their subjects, under a standing duty to justify their laws and actions to those who are affected by them. The rise of the post-war paradigm constitutes a turn from what Etienne Mureinik calls a 'culture of authority' to a 'culture of justification'.[3]

The culture of justification that emanates from the post-war paradigm is very welcome, but it is not clear that scholars have figured out what that culture amounts to. In broad outline, the post-war paradigm calls for a two-stage analysis of constitutional rights. At the first stage, we recognise a set of very capacious

[1] K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012).

[2] L Weinrib, 'The Postwar Paradigm and American Exceptionalism' in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge, Cambridge University Press, 2007) 84.

[3] E Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

constitutional rights and at the second stage, we recognise some sort of justification procedure by which the state may justify its infringement of constitutional rights based on some sort of proportionality test. Once we pass this level of generality, however, the scholarship starts to splinter on several important questions. According to a 'first wave'[4] of proportionality scholars, led by Robert Alexy,[5] proportionality justification is a matter of weighing the interests protected by the infringed constitutional right against those served by the state's public purpose. According to a 'second wave' of proportionality scholars led by Mattias Kumm and Kai Möller, however, proportionality justification is often a matter of deontological argument, showing that the state is morally justified in infringing individual rights in pursuit of its public purpose.[6]

Over many years, Stavros Tsakyrakis has been one of the most perceptive and persistent critics of the post-war paradigm. Although he launches several different attacks, his central worry concerns the relationship the post-war paradigm presumes to exist between state and subject. The nature of that relationship becomes clear, he argues, when we look at the way the post-war paradigm defines constitutional rights and public purposes. Constitutional rights in the post-war paradigm amount to a right to do whatever we might like – a right to 'total freedom', as he calls it. But that understanding of freedom, Tsakyrakis insists, is one that has no place in political life. It is a right that is incompatible with the equal rights of others or with the possibility of maintaining legal order. What is more, he adds, the idea of public purposes under the post-war paradigm is similarly antithetical to legal order. Just as individuals can claim a right to do whatever they please as a right under the post-war paradigm, so the state can invoke any purpose whatsoever, no matter how trivial and no matter how morally dubious, as a ground to justify infringing constitutional rights. Since both sides make unlimited claims that make no reference to the relationship of political authority that obtains between them, Tsakyrakis argues, they can only be reconciled by an ad hoc, external limitation device such as the balancing or deontological moral argument proposed by first- and second-wave proportionality theorists, respectively. Such externally imposed mechanisms can never generate a truly integrated account of the relationship of political authority that obtains between state and subject both as a bearer of individual rights and as a legal subject liable to the state's authority; they can only ever

[4] I borrow this helpful distinction between the first and second wave of proportionality theorists from K Möller, 'Beyond Reasonableness: The Dignitarian Structure of Human and Constitutional Rights' (2021) 34 *Canadian Journal of Law and Jurisprudence* 341, 343.

[5] Robert Alexy's account of proportionality is quite explicitly 'a general legal theory of the constitutional rights of the [German] Basic Law'. R Alexy, *A Theory of Constitutional Rights*, tr J Rivers (Oxford, Oxford University Press 2010) 5.

[6] 'It seems obvious that properly understood [proportionality] neither points to a mechanical exercise of quantification and comparison nor a utilitarian or consequentialist kind of reasoning; neither form of balancing would do justice to questions of rights. Rather, the starting point for any theory of balancing must be that balancing simply refers to the need to make a moral argument as to which of the two (or more) competing interests takes priority in a given case.' K Möller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2018) 12 *Law & Ethics of Human Rights* 281.

give rise to a temporary and unstable bargain between two inherently boundless and irreconcilable claims. Under the post-war paradigm, Tsakyrakis argues, any pursuit of the public interest must always be seen as a necessary evil, an unwelcome exchange of rights for benefits.

Tsakyrakis puts forward these critiques of the post-war paradigm in an effort to defend his favoured 'rights as trumps' model. However helpful and powerful his critique of the post-war paradigm is, though, it should not lead us back to the 'rights as trumps' model and the culture of authority that is at work there. We cannot be content with Dworkin's claim that states can pursue public purposes as they would like so long as 'the gain to the many will outweigh the inconvenience to the few'.[7] Nor can we be content with Tsakyrakis' invocation of Aristotle's *Politics*, arguing that all human beings are inherently political and, as a result, we must simply take it as given that political communities can legitimately impose legal demands on their subjects in pursuit of the common good. Instead, this should spur us on to consider whether there is room for yet a third 'wave' of proportionality scholarship that embraces the culture of justification but simultaneously recognises the special relationship that obtains between state and subject, and that sets out an account of justification appropriate to that relationship. In section II of this chapter, I endeavour to do just that.

The best account of the relationship between state and subject, I argue, arises from the incompleteness of individual rights claims. Within the Kantian[8] model of individual rights and legitimate public purposes espoused (in slightly different versions) by Arthur Ripstein,[9] Jacob Weinrib,[10] George Pavlakos[11] and me,[12] the most fundamental moral right of each person is to independence from the arbitrary will of others. The full realisation of this right, however, gives rise simultaneously to a set of more specific individual rights and to a set of public purposes for the state to pursue. A state is required not only to specify and enforce each person's right to bodily integrity, freedom of movement and the like. A state is also required to establish and maintain public institutions to ensure that no one falls into a state of dependence on others. The provision of public roads, markets, health care, education and housing, amongst other things, is not just a way of providing for the public good; it forms the necessary institutional framework for every person's full enjoyment of individual freedom as independence. Since both

[7] R Dworkin, 'Taking Rights Seriously' (1970) *New York Review of Books*.

[8] But see A Sangiovanni, 'Why There Cannot be a Truly Kantian Theory of Human Rights' in R Cruft, M Liao and M Renzo (eds), *The Philosophical Foundations of Human Rights* (Oxford, Oxford University Press, 2015) 671; and K Flikschuh, 'Human Rights in Kantian Mode: A Sketch' ibid, 653, on the very idea of a Kantian conception of human rights.

[9] A Ripstein, *Force and Freedom* (Cambridge, MA, Harvard University Press, 2009).

[10] J Weinrib, *Dimensions of Dignity* (Cambridge, Cambridge University Press, 2016).

[11] G Pavlakos, 'Between Reason and Strategy: Some Reflections on the Normativity of Proportionality' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justifications, Reasoning* (Cambridge, Cambridge University Press, 2014) 90.

[12] M Thorburn, 'Proportionality' in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford, Oxford University Press, 2016) 305.

individual rights claims and public purposes spring from the same source, it is no surprise that states must find some way to reconcile them with one another. States are not the bearers of rights; individual human beings are. But in so far as states are the necessary mechanism for the full realisation of individual rights, they are entitled to do what is required to satisfy that purpose. It is this model of rights and public purposes, I argue, that provides the most attractive and stable interpretation of the post-war paradigm.

II. Tsakyrakis' Two Challenges to the Post-war Paradigm

Stavros Tsakyrakis was a thoughtful and charismatic scholar of constitutional rights who contributed in important ways not only to debates in his native Greece, but also to theoretical debates in an increasingly globalised conversation about proportionality and constitutional rights. In this chapter, I focus on two of Tsakyrakis' essays ('Proportionality: An Assault on Human Rights' from 2009; 'Disproportionate Individualism' originally published in 2015), both written in English, that sharply criticise the post-war paradigm while defending a version of the Dworkinian 'rights as trumps' model.

A. 'Proportionality: An Assault on Human Rights'

The principal target of Tsakyrakis' attack in 'Proportionality: An Assault on Human Rights'[13] is the first-wave proportionality scholarship of Robert Alexy and David Beatty from the late twentieth century and the first years of the twenty-first. Perhaps the high-water mark of optimism about replacing moral reasoning in constitutional adjudication with a demoralised balancing exercise is to be found in Beatty's 2004 book, *The Ultimate Rule of Law*,[14] in which he very explicitly aims to do just that, urging a return to Herbert Wechsler's quixotic search for 'neutral principles of constitutional law'.[15] By far the most systematic and comprehensive advocate of this approach, however, remains Robert Alexy in his theory of the German Constitutional Court's proportionality jurisprudence.[16] Alexy's view has not only attracted followers within academia, but has also gained a good deal of traction with judges around the world who are drawn to its ability

[13] S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468.
[14] D Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2005).
[15] H Wechlser, 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 1.
[16] Alexy (n 5).

to guide their decision-making without needing to refer to morality or the fundamental principles of the legal system.[17]

According to Alexy, constitutional rights are not hard-and-fast limits on states' pursuit of public purposes. Instead, they are 'optimization requirements': they demand that states reconcile their pursuit of public purposes with the optimal achievement of the interests protected by constitutional rights. Proportionality reasoning, on this account, is just a way to reconcile public purposes with constitutional or human rights through a technical and quantitative exercise of weighing and balancing competing interests. This is the explicitly non-moral understanding of proportionality that, in Tsakyrakis' words, 'pretends to balance values while avoiding any moral reasoning'.[18]

In his 2009 essay, Tsakyrakis sets out several critiques of Alexy's proportionality reasoning. He argues that individual rights and public purposes cannot be balanced against one another because they are radically incommensurable; there is simply no common metric between constitutional rights and public purposes. 'Our moral universe includes ideas not amenable to quantification,'[19] he insists. 'The only way to attempt introducing a common metric,' he suggests, 'is to subscribe to some form of utilitarianism;'[20] which he takes to be radically unsuited to the framework of rights protection. He also rehearses a well-worn argument about the effect of proportionality balancing on democracy: proportionality balancing reduces constitutional rights adjudication to just another level of public policy debate in which courts do the same sort of thing that the legislature has already undertaken. In this way, the practice of proportionality encourages the judiciary to usurp the proper function of the legislature – for it is the proper role of legislatures, not courts, to balance competing interests. He also reminds us that the very idea of a legal right, set out by Wesley Hohfeld in 1913,[21] requires that rights be correlated to a corresponding duty on others. When drafters inscribe rights into a constitution, it is because they mean for them to have a stable and knowable content that imposes predictable duties on the state.[22] If individual rights are on the same level as public purposes, balanced against them in some de-moralised, technical exercise, he argues, then they are not really legal rights at all.

But of course, these arguments are not of much interest without a deeper normative foundation to show that constitutional rights actually *deserve* this sort of protection. And it is here, when considering the foundations of constitutional

[17] In support of this view, Tsakyrakis cites the noted American judge Frank Coffin. F Coffin, 'Judicial Balancing: The Protean Scales of Justice' (1988) 63 *New York University Law Review* 16.

[18] Tsakyrakis (n 13) 474.

[19] ibid 475.

[20] ibid 471. Indeed, Alexy insists that his account is purely formal one that 'essentially depends on premises provided from the outside'. See R Alexy, 'Thirteen Replies' in G Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 344.

[21] W Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 710.

[22] Tsakyrakis (n 13) 470.

rights in the relation between state and subject, that Tsakyrakis does his most interesting work. Constitutional rights, he argues, are 'those aspects of our lives most closely associated with our status as free and equal'.[23] As such, they 'are not mere quantities of freedom but protect some basic status of people as moral agents'.[24] In Alexy's framework, by contrast, human rights are nothing more than high-value interests to be entered into the balancing exercise against any number of public interests. In Tsakyrakis' favourite example,[25] the European Court of Human Rights treats one person's human right to free expression as just a high-value interest to be balanced against another's interest to be free of offence by demeaning and disparaging representations of their religion. Whoever wins in any given contest between these interests is beside the point; the problem for Tsakyrakis is the mere *possibility* of the right to free expression giving way to another's desire to avoid offence. If human rights are just some interests among others, Tsakyrakis argues, then it is appropriate to treat them as bargaining chips or weights in the balance. But if they are fundamental features of who we are as human beings, then it would be a categorical mistake to think of them as just another interest we put in the balance with others.

If first-wave proportionality scholars such as Alexy and Beatty think of proportionality reasoning as a matter of placing weights on a scale – public interests on one side and human rights on the other – then this is clearly a fundamental mistake about the very nature of human rights. Thus, Tsakyrakis is entirely right to insist that we should reject these efforts to do just that. But this sort of demoralised talk about proportionality is much less prevalent in the scholarly literature than it once was.[26] What is more, Tsakyrakis insists, many courts also now recognise that a demoralised proportionality balancing is unworkable: 'although our judges pay lip service to balancing and proportionality,' he writes, 'it is more than obvious that, most of the time, their judgment relies, in fact, on moral considerations'.[27] Tsakyrakis' fellow Dworkinian George Letsas writes:

> The Maximizing Orthodoxy is just a piece of unsophisticated doctrinal jargon about legal rights. … We shouldn't read too much into it … We should … [not] equate judicial tests courts use to decide cases (which is an epistemic or heuristic task), with a theory of what human rights we have (which is a constitutive moral question). … [W]e should be mainly concerned with what courts *do*, not with what they *say*.[28]

[23] ibid 489.

[24] ibid 490.

[25] *Otto-Preminger-Institut v Austria* [1994] 19 EHRR 34.

[26] While Kai Möller presents a devastating critique in 'Balancing and the Structure of Constitutional Rights' (2007) 5 *International Journal of Constitutional Law* 453, Alexy still has his defenders. Matthias Klatt and Moritz Meister defend a version of Alexy's model of constitutional principles and rules through their 'weak trump model', in which rights may be subject to limitations based on proportionality balancing, but only where the weights on either side scale are constitutional values. Not just any state purpose will do. See M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford, Oxford University Press, 2012).

[27] Tsakyrakis (n 13) 491.

[28] G Letsas, 'Rescuing Proportionality' in Cruft, Liao and Renzo (eds) (n 8) 324, 325.

Properly understood, Letsas argues, proportionality is a mechanism by which courts *define the scope of our rights* by reference to the moralised Dworkinian criterion of equal concern and respect.[29] Courts do not in fact weigh public purposes against rights; instead, they *consider* the effect of a particular measure on the interests of a particular individual and on society at large. But when they do so, Letsas argues, they are simply determining whether a particular measure fails to treat us with equal concern and respect. The problem with proportionality balancing, Tsakyrakis insists, is not that it actually leads to the erosion of rights directly – for courts largely ignore it and engage in moral reasoning anyway – but that 'it obscures the moral considerations that are at the heart of human rights issues, and it thus deprives society of a moral discourse that is indispensable'.[30]

B. 'Disproportionate Individualism'

i. Against 'Total Freedom'

In 'Disproportionate Individualism',[31] Tsakyrakis' argumentative strategy changes quite dramatically. In his earlier essay, he was mostly concerned with the fact that the postwar paradigm gives human rights insufficient importance. In this later essay, Tsakyrakis is concerned that individual rights are defined too *broadly* under the post-war paradigm. By insisting that almost everything the state does infringes some constitutional right, he argues that the post-war paradigm introduces an extreme form of individualism into its constitutional picture that undermines the foundations of political community.

The first thing to notice about second-wave scholars of proportionality such as Mattias Kumm and Kai Möller is that they quite unabashedly embrace the rights inflation that so worries Tsakyrakis. Kumm and Möller both recognise and endorse the massive scope of individual rights claims in recent German constitutional jurisprudence and the jurisprudence of the European Court of Human Rights: the broad right to 'total freedom' to do as we please, including quite trivial and morally neutral pursuits (such as falconry, trading in a particular breed of dog, or feeding pigeons in the park).[32] Since constitutional rights on this account

[29] This interpretation of proportionality is particularly susceptible to Grégoire Webber's critique that proportionality allows courts, rather than legislatures or constitutional drafters, to define the scope of constitutional rights. See G Webber, *The Negotiable Constitution* (Cambridge, Cambridge University Press, 2010).

[30] Tsakyrakis (n 13) 493.

[31] Tsakyrakis, ch 1 of this volume. Tsakyrakis argues that 'total freedom' has its roots in Hobbes and is a distinctly pre-political conception of freedom that has no place 'in the city'.

[32] M Kumm, 'The Idea of Socratic Contestation' (2010) 4 *Law & Ethics of Human Rights* 142, 151: 'In Germany,' Kumm writes, 'the right to the "free development of personality" is interpreted as a general right to liberty understood as the right to do or not to do whatever you please. It has been held by the Constitutional Court to include such mundane things as a right to ride horses through public woods, feeding pigeons on public squares, or the right to trade a particular breed of dogs.'

are so incredibly broad, individuals can almost always invoke them to mount a constitutional challenge to any given law or state action.[33] On Möller's telling, this rights inflation is now one of the four basic features of the 'global model' of constitutional rights, together with positive obligations and socio-economic rights; horizontal effect; and proportionality balancing.[34] Although Möller recognises that some jurisdictions still try to limit what counts as a constitutional right, he cleaves closely to the German model, insisting 'the German Constitutional Court has explicitly given up *any* threshold to distinguish a mere interest from a constitutional right'.[35]

In 'Disproportionate Individualism', Stavros Tsakyrakis takes aim at the idea of 'total freedom' at the heart of the second-wave proportionality scholarship. This notion of freedom, Tsakyrakis says, is the one Thomas Hobbes ascribed to each person in the state of nature: it is tantamount to the claim that 'every man has a right to everything, even to one another's body'.[36] It is a deeply anti-social and individualistic understanding of freedom, Tsakyrakis argues, demanding that we give as much concern for another's idiosyncratic preferences (to falconry, say) as we do to our fundamental rights to our lives, our bodies and our freedom from arbitrary detention. Of course, no system of law could recognise a right to total freedom without some sort of external limitation, for it would be impossible for one person's right to total freedom to coexist with similar rights in others. This is where the idea of proportionality limitation comes in. Because the idea of total freedom is without any internal limitation, Tsakyrakis argues, it requires an external limitation mechanism in the form of proportionality. This is why the 'right' to falconry or to trade in a certain breed of dogs is subject to limitation in the face of competing concerns.

Tsakyrakis' concern here is not that a system of constitutional rights centred on this idea of proportionality will always guarantee the right to falconry though the heavens fall. The problem with the right to 'total freedom' lies in the vision of political life to which it gives rise. Tsakyrakis puts the point thus:

> The modified Hobbesian scheme is the basis of what could be called an 'individualistic liberalism'. Its motto is the following: 'the less freedom we give away, the more just a society is'. On this view, the minimal state becomes not merely an efficient social organisation but something valuable, a realisation of justice.[37]

What is more, asserting a right to total freedom erodes the distinction between genuine individual rights that ought to give rise to constraints on the pursuit of

[33] Or even private action. Ever since the *Lüth* decision in 1958 (BVerfGE 7, 198-230), German courts have recognised that private disputes are subject to laws created by the state, and therefore they may be the objects of constitutional rights disputes as well.

[34] Möller (n 1) 3–14.

[35] ibid 4 (emphasis added).

[36] T Hobbes, *Leviathan*, ed E Curley (Indianapolis, IN, Hackett Publishing, 1994) 80.

[37] Tsakyrakis, ch 1 of this volume, section II.

collective interests on the one hand, and trivial or even valueless pursuits on the other. He puts the point in the following terms:

> Take Dworkin's example of an interest in killing those who criticise me. Are we prepared to assign weight to outrageous interests such as this one in the first place? Once we start going down this road, it makes little difference to assign such interests only a slight weight. The damage will already have been done.[38]

When we recognise a right to total freedom as even a *pro tanto* claim, we undermine the social solidarity that is so important to our political life, for it invites us to think of political life as a sort of bargain that each person makes with society by trading parts of their total freedom for the benefits of living amongst others. But that, Tsakyrakis insists, is entirely the wrong way to think about political life. Every human being is, in Aristotle's famous phrase, 'ζῷον πολιτικόν' (a political animal):[39] it makes no sense to try to conceive of ourselves outside of society, asking whether each tiny adjustment to our preferences required to ensure we may live with others is worth it, all things considered. 'Consequently,' Tsakyrakis concludes, 'we cannot start from the notion of total freedom, since social beings constitutively lack it and society is not the right place to search for it.'[40]

ii. Against the 'Right to Justification'

Tsakyrakis' argument against the right to total freedom is a powerful one, but it might seem now to be somewhat dated since the 'second wave' of proportionality scholars no longer take the language of constitutional rights very seriously. However, I will now argue that Tsakyrakis' critique is just as apt today as ever. Seeing how this is so will require an effort in translation. Let us begin with Mattias Kumm's effort to change the way in which we talk about constitutional rights in the post-war paradigm. According to Kumm, there are good moral reasons for rights inflation, but that is not because we have anything that can plausibly be called a *right* to engage in trivial or morally neutral activities. When constitutional or human rights courts use the language of rights here, Kumm argues, we should not take them at their word. Instead, we should think of constitutional rights as a triggering mechanism for a right that does have deep moral roots: the right of each person to justification from the state for all that it does. As Kumm puts the point:

> [I]t is misleading to say that Courts interpret rights. Instead of attempting to make sense of authoritative legal materials[,] the focus of courts eng aged in proportionality

[38] ibid.
[39] Aristotle, *Politics*, book I, 1253a.
[40] Tsakyrakis, ch 1 of this volume, section II.

> analysis is the assessment whether a public action can be demonstratively justified by reasons that are appropriate in a liberal democracy.[41]

The fundamental human right that lies behind specific constitutional rights, according to Kumm, is what political philosopher Rainer Forst calls 'the right to justification'.[42] On Forst's account, the right to justification is a fundamental aspect of our status as human beings. The interaction between human beings always calls for mutual justifiability if it is to be legitimate.[43] Democratic procedures usually provide a suitable justification to majorities for law and state action, but affected individuals – who might be subject to a rule even though they did not support it – require something more, which is provided by the public justification offered in proportionality analysis. 'Courts are not simply engaged in applying rules or interpreting principles. They assess justifications,' says Kumm. 'Call this the turn from interpretation to justification.'[44]

Advocates of the second wave of proportionality scholarship like Kumm recognise rights inflation, but they see it as a feature, rather than a bug in the doctrine. Talk of constitutional rights is just cover for the juridification of a general demand for public justification from the state to affected individuals for all its law and acts – and that, they say, is something to be celebrated. Kai Möller argues that the appropriate sort of justification depends on the nature of the moral conflict at stake. In core cases that are of most interest to Tsakyrakis (such as the freedom from torture), one interest will take unconditional priority over others and therefore what Möller calls 'balancing as reasoning' is appropriate. In other cases, we should consider some sorts of trade-offs and therefore what he calls 'formal balancing' – where we consider not only the weights of the two interests on the scales but also the moral significance of the means through which an end is achieved. The point here is that for Möller, even though the starting point for our moral reasoning is the claim of each person to 'total freedom', the resolution of conflicts between such claims is highly complex and morally infused. What is more, Möller adds, there are important liberal constraints against paternalism and moralism on the sort of moral justification that states can make. He writes:

> At the legitimate goal stage of the test, illegitimate goals, that is, moralistic and paternalistic goals that are incompatible with the principle of moral autonomy, are excluded in order to ensure that they play no role in the justification of the policy. The subsequent suitability, necessity, and balancing stages are concerned with fundamental equality: they ensure that a policy does not impose a burden on a person which treats their individual interests as less important than other people's.[45]

[41] M Kumm, 'The Idea of Socratic Contestation: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 142.

[42] R Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, tr J Flynn (New York, Columbia University Press, 2011).

[43] A Zysset, 'The Right to Justification in the Context of Proportionality: A Plea for Determinacy and Stability' in S Langvatn, M Kumm and W Sadurski (rds), *Public Reason and Courts* (Cambridge, Cambridge University Press, 2020) 256.

[44] Kumm (n 41) 144.

[45] Möller (n 4) 363.

How, then, does Tsakyrakis' attack on 'total freedom' apply to this new justification-focused account of the post-war paradigm? Only indirectly. Recall that at the heart of Tskayrakis' concern about total freedom was his claim that it took no account of the relationship of political authority that obtains between state and subject. His underlying concern was that the right to 'total freedom' is completely out of place when we are dealing with persons who are already embedded in a particular legal order. Indeed, he argues that to introduce a form of constitutional reasoning based on this conception of human freedom is deeply corrosive to the foundations of a shared political life. Kumm and Möller's talk of a right to justification does something similar, for although their account focuses on what connects state and citizen (ie, the process of public justification), it sets that process within a larger account of state–citizen relations that conceives of them as strangers to one another. The process of public justification Kumm and Möller embrace is just a process whereby *anyone* might try to justify imposing a burden on *anyone else*. Kumm himself heavily relies on a parallel between constitutional adjudication and Socratic contestation.[46] The relationship of Socratic contestation is one that is structured entirely on reason-demanding and reason-giving, but it is also a relationship that anyone might strike up with anyone else (just as Socrates would strike up a conversation with whomever he might find in the Agora). There is nothing built into the practice of second-wave proportionality that recognises the special relationship of authority that exists between a legitimate state and its subjects. States do indeed owe justification to their subjects for their laws and acts, but that justification must be different in kind from the sort that any stranger might give to us for doing the same thing. To think otherwise would be to give up the fundamental distinction between legitimate state action and vigilantism.[47]

In doing away with talk of constitutional rights and replacing it with talk of public justification, second-wave proportionality scholars introduce a new moral conception of the person into the picture: a person entitled to justification from all and owing justification to all. This might seem to be just what we have been looking for: an account of the human person that can account for our standing both as rights holders and as members of a political community. But, as I shall argue in section III.A, it is not. The public justification model of proportionality is just as corrosive to the foundations of political life as its rights-focused predecessor, for it, too, fails to account for the special relationship of political authority that obtains between state and citizen of which constitutional rights are a limiting feature. What we need is an account of the person that can explain *both* how the state is entitled to make and enforce laws over us for public purposes *and* how we might justify exercises of authority within that relationship.

[46] Kumm (n 41) 152 ff.

[47] I have argued frequently for giving the distinction between legitimate state action and vigilantism pride of place in our theory of state legitimacy. See M Thorburn, 'Justifications, Powers, and Authority' (2008) 117 *Yale Law Journal* 1070; and M Thorburn, 'Reinventing the Night-Watchman State?' (2010) 60 *University of Toronto Law Journal* 425.

III. A Kantian Picture of Constitutional Rights

What have we learned from the foregoing? First, we have seen that there are good reasons to applaud the move from the culture of authority toward the culture of justification. Whatever the weaknesses of first- and second-wave proportionality theories, there is something important and appealing about the notion that states are not our masters, entitled to tell us what to do as they might like; rather, they are our servants, entitled to make and enforce laws only in so far as they can justify their actions to us. Although the rights as trumps model that Tsakyrakis favours does recognise important limits to the state's power to legislate just as it might like, it does so only here and there, against a background assumption that states can act as they might like so long as they steer clear of entrenched constitutional rights.

Second, we have seen that there are good reasons to be sceptical of the accounts of constitutional rights put forward by the two 'waves' of proportionality theory. Stavros Tsakyrakis ably shows that the first wave simply fails to recognise constitutional rights as rights at all, reducing them to high-value interests to be balanced away depending on their weight in a given situation. And his critique of 'second-wave' proportionality theory, too, hits the mark. Although Mattias Kumm and Kai Möller (the leaders of the 'second-wave' movement) are uninterested in the concept of a right to total freedom, they still use it to erase the significance of the special relationship of political authority between state and subject. They demand that the state be able to justify its actions to all those affected by them – but they make that demand in precisely the same way they would do to anyone who might act in the same way. But, as Tsakyrakis so ably reminds us, the sort of demands the state is subject to, and the sort of justifications it is able to offer, are very different from those that are available to anyone else. Because the state alone has a special standing to make and enforce the law over its subjects, we would deeply mischaracterise its obligations and its available justifications if we were to disregard that special standing and call only for generic duties and justifications.

So, now that the failings of both the traditional rights as trumps model and the two current versions of the post-war paradigm are made clear, are we now without a workable theory of constitutional rights? Not a bit of it, for there is a third school of thought waiting in the wings whose account of the post-war paradigm shares the embrace of a 'culture of justification' with its predecessors, but whose account of justification is deeply embedded in the special relationship of authority that exists between state and subject. It is the broadly Kantian account of freedom, of constitutional rights and of legitimate public authority that we have not yet explored, championed in different versions by Arthur Ripstein, George Pavlakos, Jacob Weinrib and me. In this last section, I will sketch out some of its key features in a way that should give some sense of how it could overcome the troubles that have beset its predecessors.

A. Legitimate Public Authority

The moral starting point in the Kantian account of legitimate public authority is the moral necessity of living in a legal order. It is a commonplace in the social contract tradition that one has good reason to prefer living under legal order rather than in a 'state of nature', but the reasons scholars give for this vary widely. For some, the reason is simply that legal order is (for want of a better expression) a 'good deal'. Although we lose some freedom by living under law, we also rid ourselves of the very practical inconveniences of a state of nature: for Locke, this includes the uncertainty of our property rights;[48] Hobbes would add the 'continual fear, and danger of violent death';[49] John Stuart Mill focuses on the gain in utility;[50] Joseph Raz focuses on our superior ability to do what we have reason to do anyway, etc.[51] When we evaluate a particular legal arrangement according to this way of thinking, it is always a matter of comparing gains and losses in the bargain struck. This widely shared account of the terms of entry into the civil condition fits nicely with the second-wave picture of constitutional rights: we give up certain individual freedoms in exchange for security and the pursuit of certain welfare goods. If the bargain is *too* unfair – a clearly quantitative matter – then the legitimacy of the political authority is undermined. Within a functioning legal system, though, we can also put in place a set of constitutional guarantees to ensure that the terms of the bargain remain within reasonable limits.

The Kantian account, both of legitimate public authority and of constitutional rights and their limitation, starts from a very different place. Kant, like many in the republican tradition, insists that the freedom that matters in political thinking is our freedom to be our own masters – to be what the Romans called *sui juris*. At first, this account of freedom looks a lot like Isaiah Berlin's understanding of 'negative liberty', but the differences are important. Whereas negative liberty seems usually to be maximised in the total absence of coercive institutions (again, an echo of 'second-wave' proportionality thinking), freedom as independence *requires* the existence of coercive institutions. For although the state's coercive machinery can sometimes be oppressive, it is also necessary to keep others and their coercive interference in check. Without a system of coercively enforced laws, we are always at the mercy of others' interference (or, as Locke so pithily put the same point, 'wherever law ends, tyranny begins'[52]). In the absence of law and state, each person

[48] J Locke, 'Second Treatise of Government' in J Locke, *Two Treatises of Government*, ed P Laslett (Cambridge, Cambridge University Press, 1988) para 123: 'This makes him willing to leave a state in which he is very free … he can enter into a society for the mutual preservation of their lives, liberties and estates.'

[49] T Hobbes *Leviathan*, ed R Tuck (Cambridge, Cambridge University Press, 1996) 58.

[50] J Mill, *On Liberty*, ed S Collin (Cambridge, Cambridge University Press, 1989) 69: 'As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it.'

[51] J Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986) 53.

[52] Locke (n 48) para 202.

must act according to his own view of how things ought to be. And that means that however much we try to act considerately or kindly, we nevertheless cannot avoid imposing our view of how things ought to be on others. And that means that at every moment, we are subject to unilateral impositions of the views of others upon us. There is nothing – not even our own lives or bodies – over which we can say with certainty 'I am in charge of this'.

The Kantian argument for justifying public authority, then, takes a radically different structure from the arguments of many others, from Hobbes and Locke to Mill and Raz. Whereas all of these writers conceive of law and state as a *limit* on our freedom justified by the compensating benefits they bring, Kant sees the essential justification of law and state as turning on its essential role in *securing* freedom to those within its jurisdiction. All our attention on the Kantian account should focus on the question whether the legal system has secured our freedom or whether it has simply replaced a collection of small tyrants with one much bigger and more powerful tyrant. Although we need not actually have been the authors of the laws that determine our rights in order to avoid tyranny, the laws must at least be of a sort that we *could* have consented to. That is why a system that systematically excludes some people from even the most basic rights does not constitute a legal system at all.[53]

B. Constitutive and Regulative

The Kantian justification for the state's public authority is often assumed to be just another version of the same quantitative picture: are the benefits secured by the state sufficiently generous to justify the limits it imposes on our natural freedom? But since freedom of the relevant kind is a product of the state's law on the Kantian account, no such exchange is possible. But if there is no quantitative measure of this sort available to the Kantian account of state legitimacy, how are we to evaluate different legal arrangements? For those who adopt the 'bargain' picture of state legitimacy, the measure is obvious: an arrangement is better if it takes away fewer liberties and provides more compensating benefits. For the Kantian, however, a different picture emerges. The constitutive argument at the first stage ('Does this constitute a legal system at all?') gives rise to a regulative principle by which we can evaluate existing legal systems ('To what extent does this state fulfil its justifying purpose, viz, maximising each person's independence across its various dimensions?'). It is at the level of regulative principles that the Kantian account finally engages constitutional rights.

[53] Whereas the state of nature (without law at all) constitutes what Kant calls a state of barbarism, a legal system that systematically deprives certain people of any rights is a system of despotism. I Kant, *Anthropology From a Pragmatic Point of View*, ed RB Louden and M Kuehn (Cambridge, Cambridge University Press, 2012) Ak 6:256.

As we have just seen, the state's justifying purpose – the morally necessary task it and only it can perform – is to secure the freedom as independence of each person within its jurisdiction. That means, first, that it is justified in exercising coercive force in so far as this is a means to securing our freedom as independence – there is no need to have recourse to other benefits (such as wealth, utility, etc) when justifying state coercion. But it also means that state coercion must be justified in terms of its support of individual freedom of this sort: on the Kantian account, to say that the state has coerced us in order to give us greater wealth or to make us morally more upstanding is no justification at all. This is the minimalism of the Kantian conception of the state: the state is entitled to use coercive force in order to secure the conditions of individual freedom, but it is not entitled to use coercive force for any other purpose. This is because we are not entitled to impose an exchange of freedom for other goods unilaterally on another person, no matter how favourable the terms of the exchange, for it is up to them, as free persons, to decide whether or not to accept such a bargain.

C. From State Legitimacy to Constitutional Rights

The constitutive principle of the state – that it alone can secure our freedom as independence – gives rise to its regulative principle: that it should seek to secure each person's independence as fully as possible. This regulative principle, though, is not generally a justiciable demand that we can make of our state; it is, instead, a guiding purpose that states should aim for and by which we may judge them (extra-legally). Indeed, on the Kantian account, there is no need for a state to have a written constitution in which it enshrines certain basic rights. Still, the post-war paradigm of constitutional rights subject to proportionality fits neatly into its account of the state. (It is not surprising, then, that Kant is so frequently invoked by constitutional courts and constitutional scholars in the post-war period.) Whereas most other accounts of the post-war paradigm are forced into an interpretive posture, trying to find the most attractive normative account for the institutional framework they happen to find before them, the Kantian account of state legitimacy fits the post-war constitutional model from the ground up.

On the Kantian model of state legitimacy, there are certain crucial incidents of individual freedom as independence that the state should make its prime purpose to secure. On this account, the legislature is not simply a body that can enact laws to do whatever the majority votes for.[54] Instead, it is a public office that, like any public office, is a position that allows its occupant to do and to decide certain matters. The office is defined in part by the set of questions to which it is directed, in part by the set of reasons to which the occupant can attend when answering

[54] Of course, the same requirement of justification applies even more forcefully to the executive branch and its many administrative bodies and acts.

them, and in part by a series of constraints that ensure that office-holders always act according to these purposes and constraints, rather than for private or arbitrary reasons.[55] As we have just seen, this is precisely the sort of structure to which the Kantian account of legitimate public authority leads: public authority is legitimate so long as it is properly directed at the defining purposes of public office (securing freedom as independence in all its various dimensions, acting for reasons concerned with the promotion of independence in all its various guises). Once we conceive of legislation in this way then it makes good sense to think that there should be some sort of mechanism for ensuring that legislative office holders act according to the constraints of their public office. Constitutional judicial review provides a mechanism to do just that.[56]

On this understanding of constitutional rights and constitutional judicial review, it makes sense that a constitutional bill of rights would set out, at least in broad terms, the various incidents of freedom as independence that are the proper objects of public laws.[57] Individuals' rights to life and control over their own bodies are the fundamental incidents of our independence, so it stands to reason that a constitution would give them pride of place in the constitutional order. Certain other rights that are required for the functioning of a republic, where those subject to the laws can participate in the making of those laws, will also play a central role. This is why basic rights to freedom of conscience, expression, assembly and association play a central role, as well as the right to vote and other forms of democratic participation. Further, certain procedural rights (especially, but not only in the criminal process) play a crucial role in guaranteeing the conditions of our independence even when serious accusations of wrongdoing are in play. Positive rights – to a minimum basic income, to education, to health, to housing and the like – play a different but important role in the Kantian picture, too. For although the state's justifying (constitutive) purpose is to secure our independence as such, this gives rise to the regulative principle that the state should strive to maximise the independence of each consistent with the independence of others. And that means that the state should ensure that no one falls into a situation of dependence – medical, economic, or of plain ignorance.

On this account, some aspects of Robert Alexy's account of constitutional rights return in a different aspect. Since it is the state's obligation to secure the conditions of their subjects' independence as fully as possible, this means that

[55] On the idea of public office, see M Thorburn, 'Policing and Public Office' (2020) 44 *University of Toronto Law Journal* 248, 250 ff.

[56] I do not take a stance on whether constitutional judicial review is required once there is a constitutional bill of rights in place, but Alon Harel provides a plausible argument in favour of this position based on republican grounds: A Harel, *Why Law Matters* (Oxford, Oxford University Press, 2014) 147 ff.

[57] Weinrib (n 10) 219 describes the point of specific constitutional rights in the following terms: 'In a modern constitutional state, constitutional rights are concretizations of the general right that each person, by virtue of his or her dignity, has to public justice. By delineating this general right into a set of constitutional rights, the normative abstraction of inherent human dignity gains sufficient determinacy for public officials to apply it to particulars.'

(i) positive rights are an important part of the constitutional order; (ii) all rights, positive and negative (as Alexy argued), call for their maximisation within the larger constitutional framework of ordered liberty; (iii) the doctrine of horizontal effect is an important part of the constitutional order because the state's obligation is to ensure the maximisation of freedom as independence *tout court*, and not merely to get out of the way of its subjects' freedom. Where the different incidents of independence come into conflict with one another, however, the state must find some way to reconcile them all into a coherent whole. It is through the doctrine of proportionality that they will try to avoid the conflict (looking to principles of suitability and necessity to avoid conflict, and then to balancing to ensure that the conflict is managed in a way that gives due concern to each side of the conflict). I will not dwell here on the many important details of precisely how to reconcile competing claims of freedom as independence at the balancing stage, I will simply point out that the Kantian conception excludes other considerations – efficiency, utility, perfectionism, etc – from the analysis. Thus, however we structure the balancing stage of the proportionality analysis, it does not constitute 'an assault on human rights'. It is a mechanism for reconciling the competing demands of the many instantiations of the complex idea of independence.[58]

IV. Conclusion

The foregoing sketch of a Kantian theory of constitutional rights and proportionality analysis under judicial review is not meant to be exhaustive of the topic – it has not even mentioned, let alone treated fully, several crucial aspects of the doctrine. My point is simply to give some sense of an alternative account of freedom and its place in understanding legitimate public authority and how this may illuminate our thinking about constitutional rights. For present purposes, in reply to Tsakyrakis' second challenge, my central purpose has been to suggest that there is a conception of the constitutional right to freedom that need not include the constitutional protection – even *pro tanto* protection, subject to justified infringement – of pointless and even immoral individual pursuits in the name of 'total freedom'. As we saw above, Möller has been driven to embrace 'total freedom' as the relevant conception of freedom for constitutional rights purposes *faute de mieux*. If Kant's republican conception of freedom is the foundation of a plausible alternative conception of constitutional rights, however, then we no longer need to embrace Kumm and Möller's 'total freedom' conception. A broad right to freedom as independence subject to proportionality limitation does not have to lead to absurdity. Indeed, it is the best hope for a constitutional order that reconciles democratic choice with individual freedom.

[58] Several scholars before me have noted that competing rights claims (and not just rights and policy objectives) must be reconciled through proportionality reasoning. Möller (n 6) 281; Weinrib (n 10) 245–51.

7

A 'Political-Moral Approach' to Proportionality

SILJE A LANGVATN

I. Introduction

Does the doctrine of proportionality build on – or imply – a particular understanding of freedom and of rights? And, if so, is this understanding normatively justifiable? The proportionality principle and the accompanying proportionality analysis is understood in different ways across jurisdictions and domains of law, making it difficult, if not impossible, to say much about proportionality's underlying notion of freedom in general.[1] Instead of analysing specific proportionality doctrines, this chapter turns to a more general question: *Should* proportionality build on a particular moral understanding of rights and freedoms? And, more specifically, should political philosophy and legal theory justify and explain proportionality based on moral philosophy or a moral conception of fundamental rights?

I will argue that in constitutional democracies, there are good reasons for legal scholars as well as political philosophers *not* to justify a proportionality doctrine based on a moral philosophical doctrine, or a moral philosophically grounded account of human and constitutional rights. I am not arguing that we should refrain from searching for a substantive normative justification and explanation of current proportionality practices. My argument is rather that when we do, it is more proper to use a distinctly 'political-moral' approach and assess the justifiability of the proportionality doctrine in terms of what we take to be the most reasonable and coherent interpretation of the fundamental normative ideas, values, principles of the regime of which the doctrine is part. On what I take to be the most convincing version of the political-moral approach for a constitutional democracy, a proper proportionality doctrine will be one that allows a greater diversity of reasonable interpretations of our fundamental political-moral values

[1] Compare Thorburn, ch 6 of this volume.

to stand, and one in which the court is attentive to the justificatory efforts of the political decision-maker. That is, attentive when the political decision-makers can demonstrate that they have made a sincere effort to ensure the contested measure's justifiability in terms of the fundamental political-moral ideas and values of the practice.

I start by setting up a stylised distinction between three types of reasoning normatively about proportionality and other political and legal sub-practices, acts and entities within a given political-legal regime: I will refer to these as the *moral philosophical*, the *institutional-instrumentalist* and the *political-moral* type of approach. Political-moral approaches have in my view not received sufficient attention in the so-called 'normative turn' in proportionality scholarship. My main concern here is to outline what I take to be distinctive of political-moral approaches, based on what I take to be the most coherent and promising version of this type of approach.

There have been several attempts in political and legal philosophy to outline distinctly *political*, *institutional* or *practice-dependent* approaches that consider the normative significance of (existing) practices and institutions in a more fundamental way. Recent examples include the 'political realists' in political philosophy, who emphasise practice dependency when formulating first principles of political philosophy;[2] Jeremy Waldron's call for a more institution-focused 'political political theory';[3] and the literature on *political* human rights[4] that has taken John Rawls' *The Law of Peoples* as its starting point.[5] My starting point for distinguishing the political-moral approach, however, is Rawls' *late* version of political liberalism, as found in 'Introduction to the Paperback Edition'[6] and 'The Idea of Public Reason Revisited'.[7] Somewhat confusingly, perhaps, I will also make use of one of Rawls' very earliest articles, 'Two Concepts of Rules' from 1955.[8] In this early article, Rawls provides an account of the nature and logic of 'practices', which in my view is key for understanding the complex way in which Rawls conceptualises political legitimacy, public justifiability and 'public reason' in his later texts on political liberalism. Moreover, I find that the practice conception outlined in this early article also reads as a justification and explanation of the political-moral approach itself.

[2] These political realists draw on Bernhard Williams, who contends that political normativity is independent of moral normativity. For example, E Rossi and M Sleate, 'Realism in Normative Political Theory' (2014) 9 *Philosophy Compass* 689.

[3] J Waldron, *Political Political Theory – Essays on Institutions* (Cambridge, MA, Harvard University Press, 2016).

[4] eg A Etinson (ed), *Human Rights: Moral or Political?* (Oxford, Oxford University Press, 2018).

[5] J Rawls, *The Law of Peoples* (Cambridge, MA, Harvard University Press, 2001). This book was for the most part written much earlier and first appeared as an article in 1993.

[6] J Rawls, 'Introduction to the Paperback Edition' in J Rawls, *Political Liberalism – Expanded edition* (New York, Columbia University Press, 1996) xxxvi–lx.

[7] J Rawls, 'The Idea of Public Reason Revisited' (1997) 64 *The University of Chicago Law Review* 765.

[8] J Rawls, 'Two Concepts of Rules' (1955) 64 *The Philosophical Review* 3.

II. The 'Normative Turn' in Proportionality Scholarship – A Turn to which Type of Normativity and Normative Reasoning?

That intervention, or use of force, must be proportional is a normative idea that has been found in various writings on ethics throughout the ages. Examples include Maimonides' saying that 'one should only give as much medicine as needed and not more', and principles such as 'one should not shoot sparrows with cannons' or 'punishment must be proportional to the crime committed'. Ethical proportionality principles say that there must be a *proper ratio*, or a proper *relation* or *balance*, between the intervention and something else. However, they express different views on what it is that must stand in a right relation[9] and what the criterion for a right relation is.[10] Today, however, requirements of proportionality have entered into positive law in several jurisdictions and areas of law, both as a general principle of law and as requirements in specific law paragraphs. The meaning and content of the proportionality principle in these regimes are now intimately connected to how courts in these regimes use some version of structured proportionality analysis, or 'the proportionality test', when reviewing the proportionality of a contested public measure.

In its classical formulation, the proportionality test starts by determining whether a contested public measure infringes on a legally protected and fundamental constitutional or human right. If an infringement is found, the court proceeds to scrutinise whether the infringement may still be justifiable using a sequence of steps of scrutiny:

1. *Legitimate purpose*. Does the contested public measure have a legitimate purpose? If the measure is found to have a legitimate purpose, the judges proceed to the second step.
2. Suitability or the *rational connection*. Is the contested measure a suitable or rational way to pursue the legitimate purpose?
3. *Necessity*. Is the measure necessary for achieving the purpose or are less infringing measures available?
4. *Proportionality in the strict sense.* For example, is the harm to the right caused by the measure proportional to the benefits from achieving the purpose of the measure?

The proportionality test was first developed by the German Constitutional Court in the mid-1950s. Yet as proportionality has spread to other courts and domains of law, courts have adopted different varieties of the test, and they also apply it inconsistently, and this makes it difficult to say that there is one proportionality doctrine.

[9] eg 'means-end relation', or a 'cost-benefit relation'.
[10] eg 'balance', or 'more benefits than costs' or 'proper relation between purpose and means', etc.

Despite this variation, much of the normative legal scholarship on proportionality analysis is still centered on the classical version of the test as used by Germany's Federal Constitutional Court and the European Court of Human Rights.

Legal theorists who attempted to theorise and justify courts' use of proportionality analysis were initially focused on elaborating on the formal or structural features of rights, and on the epistemic, rational and deliberative qualities of the proportionality test, with Robert Alexy's work as the prime example.[11] This type of formal rationality oriented approach to proportionality justifies and evaluates proportionality as a step-wise deliberative structure that helps ensure the rationality of adjudicating contested rights-infringing public measures, or as a structure of critical scrutiny of, and deliberation over, the contested measures. On this view, the proportionality test does not build on any substantive moral doctrines; neither does it imply any moral substantive commitments or values.[12] Rather, the test is understood as a structured framework for ensuring a thorough and rational assessment of the most important aspects of the contested measure, while situating the public measure in the context of the legal system and the empirical circumstances. Scholars who defend proportionality in this way have often acknowledged that review judges who use the proportionality test do engage in substantive moral reasoning (eg, when the judges attribute value or weight to a right or interest; and when they balance different rights or interests). Yet they deny that the proportionality test is itself substantively normative or that it entails any specific view about what substantive moral reasoning must amount to.

Critics of proportionality, for their part, have largely rejected the view that the proportionality doctrine and the proportionality test are neutral with regard to substantive moral questions, and the critics have also often grounded their criticism of proportionality in some moral doctrine or view of what morality in general amounts to. With the 'normative turn' in proportionality scholarship also came several legal scholars who tried to justify and explain proportionality in a more substantive normative way. This 'second wave'[13] of theorising proportionality was more normative but focused largely on the idea of a 'culture of justification' and the related ideas of 'public reason' and 'the right to justification'. What we might call the 'third wave' of normative proportionality scholarship has sought a more direct and substantive moral justification and explication of proportionality practices. Such moral philosophical approaches have in turn been criticised from the perspective of 'institutional-instrumentalist approaches' to proportionality. What I find missing from this normative proportionality literature is a sufficient awareness of what it is that distinguishes a distinctly 'political-moral' approach to proportionality. However, before trying to characterise and defend this type of approach, I will give a brief outline of what I take to be characteristic of the moral

[11] D Kyritsis, 'Whatever Works: Proportionality as a Constitutional Doctrine' (2014) 32 *OJLS* 395.
[12] ibid 397.
[13] K Möller, 'Beyond Reasonableness: The Dignitarian Structure of Human and Constitutional Rights' (2021) 34 *Canadian Journal of Law & Jurisprudence* 341, 343.

philosophical and the institutional-instrumentalist approaches, as distinguished from the political-moral approach.

A. The Moral Philosophical Approach

To reason from a 'moral point of view' or use a 'first-order moral approach' is to reason from the perspective of what we owe each other simply *as human beings*, or by virtue of our common humanity. This involves reasoning in an impartial way that respects the intrinsic worth of all moral persons or human beings equally – by some criterion of equality or equal worth.

What I call 'moral philosophical approaches', however, are approaches that proceed on the assumption that reasoning from the moral point of view yields universal moral principles or a universal normative standard that all social, institutional, legal and political practices and institutions – *as well as* all rules, acts and policies *within* these practices and institutions – must minimally satisfy to be sufficiently justifiable to merit our support, cooperation and obedience. More precisely, a moral philosophical approach will typically (i) outline the essence of, or the deepest ground of, the foundation or the first principles of our moral duties; (ii) work out a set of moral principles or a conception of justice following from these first principles; while also (iii) claiming general or universal validity; and (iv) claiming superiority vis-à-vis other forms of normativity or 'normative oughts', such as legal, ethical, cultural, institutional, and other 'conventional' and 'socially constructed' forms of oughts. Or, put in a different way, moral philosophical approaches assume a normative 'monism' or the view that all normativity stems from conformity to the general demands of morality or reason.[14] When a normative approach has one or more of the features listed here, it amounts to a moral philosophical approach, as I understand the concept here.

Moral philosophy in this strict sense is often associated with Immanuel Kant, who reserved the term 'morality' for 'the right' and contrasted this with 'the good', 'mores', 'ethos', 'good morals', 'social ethical life' or the contingent accepted norms within a social group. For Kant, and later neo-Kantians, morality equals 'moral autonomy' or 'rational self-legislation' in the sense of 'binding one's free choice to general universalizable laws one gives oneself under the guidance of reason'.[15] On this view, moral norms of action have a rational character because they are in the interest of all affected by the action and they therefore deserve acceptance. Moral norms, on Kant's view, are thus not contingent on social practices and communities but have a rational and universal character and validity for all humans or rational beings, and they can therefore yield commands that can claim unconditional

[14] Compare HD Aiken, 'The Levels of Moral Discourse' (1952) 61 *Ethics* 235. Rawls was partly inspired by this article when writing 'Two Concepts of Rules' (n 8).

[15] J Habermas, 'Once Again: On the relationship between morality and ethical life' (2021) 29 *European Journal of Philosophy* 543, 544.

respect. Utilitarianism differs from deontological moral philosophy like Kant's in a range of different ways. Yet classical utilitarianism too attributes to morality an impartial, rational and universalistic character, and makes a similar unconditional claim of priority and respect vis-à-vis other types of normative claims.[16]

As noted above, critics of proportionality have often made an ascent to moral philosophy. Or, as we might also say, they have often made a 'descent' to deeper moral theories or foundational theories of moral rights. Many critics of proportionality have, for example, argued that proportionality implies a view of individual rights as mere 'interests' that should be optimised, as opposed to understanding rights as 'trumps' or 'shields'. This argument does not – in itself– amount to a moral philosophical approach to proportionality. Yet it becomes an example of a moral philosophical approach when the critic underpins this criticism by saying that proportionality builds on or implies an understanding of rights that 'misconstrues the special *moral* importance of rights',[17] or when arguing that fundamental legal rights cannot be balanced *because* they have *moral rights* at their core.

Another prominent criticism of proportionality has been that it entails a presumption of individuals' prima face 'right to everything' or a presumptive 'total freedom for the individual'.[18] This has been the main target of Stavros Tsakyrakis' criticism. Using proportionality analysis when reviewing infringements of legally protected fundamental rights is unacceptable, Tsakyrakis argues, because the proportionality analysis presupposes and entails an individualism that

> is a methodologically flawed abstraction that makes social justice incomprehensible … It is methodologically flawed since it ignores the fact, so well captured by Aristotle, that man is a social being and cannot be conceived of as outside society. It is society that comes first, not the individual.[19]

Tsakyrakis, as we see, does not merely argue that the proportionality practice leads to morally unacceptable outcomes. More prominently, he argues that proportionality is unacceptable *because* it distracts from 'proper moral reasoning'[20] and because proportionality builds on a wrong theory of human rights – and ultimately a wrong theory of the nature of morality as such. On Tsakyrakis' view, morality properly understood must be understood not as 'individualistic liberalism' but as 'liberal sociability',[21] and on his view, proportionality is wedded to the former and incompatible with the latter.[22] Tsakyrakis is thus basing his evaluation and criticism of proportionality on a general doctrine of what morality as such amounts

[16] At least in its classical act-utilitarian form.
[17] Kyritsis (n 11) 396 (emphasis added).
[18] Tsakyrakis, ch 1 of this volume.
[19] ibid section II.
[20] ibid.
[21] ibid.
[22] On this view, moral reasoning must proceed from and give primacy to notions of 'fair sociability', and individuals' interests and rights must be derived from such fair forms of sociability or social cooperative practices, 'where everyone has the status of free and equal' rather than giving primacy to 'the individual and her total freedom' (ibid).

to. I therefore take Tsakyrakis to be a legal theorist who uses a moral philosophical approach in his evaluation of the proportionality practice.

In recent years, moreover, we have seen several defenders of proportionality who aspire to a deep and comprehensive moral philosophical justification and explication of proportionality. Matthias Klatt, for example, states that his 'main aim is to provide a deep normative justification of proportionality as a universally valid analytical tool in rights adjudication',[23] and he attempts to do so by grounding the principle of proportionality in a basic 'moral right to justification',[24] which Klatt in turn traces back to Rainer Forst's neo-Kantian moral philosophy.

Kai Möller too has defended judicial proportionality review as a necessary part of a 'culture of justification' and as grounded in a moral 'right to justification'[25] based on 'the status of every person as a justificatory agent'.[26] The right to justification, argues Möller, expresses a moral idea: 'it insists that every citizen has a moral, and ideally, constitutional right to the kind of justification envisaged by the culture of justification',[27] that is, a culture in which every state act that infringes on an individual's freedom or subjective interests requires a justification, and where judicial proportionality review is the institutionalisation of that right. In Möller's more recent writings, moreover, he has come to think that the moral right to justification – and other related ideas such as the 'culture of justification', 'public reason' and 'public justifiability'– is stale and uninspiring, and that such ideas yield an incomplete grounding for understanding the 'moral core' of rights and proportionality. Möller now says that there is a need to provide 'a deeper and more attractive account of the culture of justification and the right to justification':[28] we must ground the nature of fundamental rights in an account of the 'grand values on which the human rights tradition is built'.[29] And, according to Möller, the moral core of human and constitutional rights consists of a 'commitment to human dignity and its three sub-principles of intrinsic value, moral autonomy, and fundamental equality'.[30] Or, as Möller also puts it, these three principles 'form the moral deep structure'[31] of human and constitutional rights.

Now, Möller's account is complex and nuanced and not simply trying to deduce the need for proportionality review from a specific moral philosophical doctrine. He refers to his methodology as a 'moral reconstruction',[32] a methodology inspired by Ronald Dworkin's interpretative theory of law. Thus, Möller

[23] M Klatt, 'Proportionality and Justification' in E Herlin-Karnell and M Klatt (eds), *Constitutionalism Justified: Rainer Forst in Discourse* (Oxford, Oxford University Press, 2019) 61.
[24] ibid 62.
[25] K Möller, 'Justifying the Culture of Justification' (2019) 17 *International Journal of Constitutional Law* 1078, 1078, 1079.
[26] ibid.
[27] ibid.
[28] Möller (n 13) 342.
[29] ibid 341.
[30] ibid.
[31] ibid 353.
[32] K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012).

evaluates the proportionality doctrine both in terms of its fit with the existing features of constitutional rights in the historical practice of the regime, and in terms of the doctrine's moral attractiveness in light of the most *convincing moral conception*, which Möller takes to be a moral conception that has human dignity at its core. This type of reconstructive methodology, Möller contends, allows for a proper *moral* vetting and *moral* criticism of existing constitutional and legal practices, while still counting as a reconstruction of the practice. Despite starting from within the regime and seeing himself as morally reconstructing the practice, I will argue that Möller is still an example of someone who uses a moral philosophical approach. For ultimately, Möller's substantive defence of the proportionality practice hinges on the extent to which the proportionality doctrine helps ensure that rights infringing measures are 'justifiable in light of the dignitarian principles of intrinsic value, moral autonomy, and fundamental equality',[33] that is, justifiable from the point of view of what Möller takes to be the most convincing moral philosophical account of human and constitutional rights in general.

B. The Institutional-Instrumentalist Approach

In 'Whatever Works: Proportionality as a Constitutional Doctrine',[34] Dimitrios Kyritsis outlines the broad features of a normative approach to proportionality that focuses on proportionality *as a constitutional doctrine* and contrasts this approach to what he calls Möller's 'substantive moral' approach to proportionality. Kyritsis' starting point is that proportionality is 'a piece of constitutional doctrine and should be justified as such'.[35] More specifically, Kyritsis does not understand constitutional doctrines as part of, or as dictated by, the constitution but rather as an institutional device that is developed to mediate between the substantive content of constitutional norms, on the one hand, and specific judicial decisions, on the other.[36] Because Kyritsis understands proportionality as essentially a tool, and not itself a constitutional norm, he thinks that a proportionality doctrine can be changed and discarded if it does not work well within the political-legal regime.

Kyritsis shares Möller's Dworkin-inspired interpretative methodology and argues that proportionality practices must be assessed both in terms of their *fit* with legal text and historical practice, on the one hand, and in terms of their *justifiability*, on the other. However, Kyritsis thinks that justifying the proportionality doctrine in the latter sense does not require a grand-scale philosophy of rights or a comprehensive account of morality. Rather, he says, some features of proportionality as the practice of constitutional rights adjudication are best

[33] Möller (n 13) 353.
[34] Kyritsis (n 11).
[35] ibid 398.
[36] ibid 411.

understood as having 'a shallow justification', that is, 'they are what they are by virtue of considerations of institutional design, not the best or a morally defensible theory of rights'.[37] A proper justification of a constitutional doctrine such as the constitutional doctrine, says Kyritsis, is 'outcome-oriented'[38] in the sense that it assesses the constitutional doctrine *in terms of how well the doctrine helps implement rights, or helps ensure compliance with constitutional norms*,[39] but also in terms of how well it performs in other 'institutional' respects, such as how well the proportionality doctrine helps uphold the political-legal regime's division of labour between the branches of government,[40] and how well it fares with regard to enhancing support and stability of the regime.[41] Therefore, Kyritsis also refers to his approach as an instrumentalist justification of proportionality, and as an intermediate constitutional doctrine.

C. The 'Political-Moral' Approach

What I call the 'political-moral approach' is a type of approach in normative political and legal theory that (i) *starts from within* a given (type of) political-legal regime that is thought to be at least minimally normatively legitimate, or morally and rationally justifiable; and (ii) is conscious of assessing political and legal acts, policies, sub-practices of the regime in light of their justifiability *within* the regime, and not in terms of these acts and policies' justifiability in light of what is thought to be the 'best' independent moral standard, or the most correct doctrine of moral philosophy in general.

On this type of normative approach there is no sharp distinction between a proportionality doctrine's 'fit' or 'coherence' with the rules, recognised traditions and the basic purposes, or defining normative ideas and values of the regime in question, on the one hand, and a proportionality doctrine's 'justification', on the other. The focus of this normative approach is on the proportionality doctrine's normative justifiability *within* the regime. And within the regime, the proportionality doctrine's justification *is* its sufficient fit or coherence with the rules, recognised procedures and conventions, but importantly also its sufficient coherence with the basic purposes or the fundamental substantive normative ideas, values and principles of the regime.

I refer to this as a *political-moral* approach because this approach emphasises that reasoning morally about what is the right thing to do in a situation becomes more complex when the situation is one in which we see ourselves as participants in a regime that we think is morally justifiable and worthy of our support, cooperation and overall obedience. In this normative situation, the justifiability of acts and

[37] ibid 410.
[38] ibid.
[39] ibid 411.
[40] ibid 412.
[41] ibid 413.

entities that fall under the practice is not a question of their first-order moral and rational justifiability but a question of their political-moral justifiability, or their justifiability in light of the basic normative ideas and values of the practice. The label 'political-moral' also seems appropriate because this approach emphasises that the normatively proper way of acting and reasoning within a morally justifiable political and legal regime requires that the participants can assure themselves and other participants that their actions cohere with, or are justifiable in terms of, the basic purposes or the basic political-moral ideas and ideals of the cooperation the practice is oriented towards achieving.

III. Rawls' Political-Moral Approach

A prominent version of a political-moral approach such as described in section II may be found in Rawls' late formulation of his political liberalism.[42] Now, Rawls did not present his late political liberalism in a systematic way, and he presents his ideas using Rawlsianisms that need extensive unpacking and explanation. Summarising Rawls' late thinking is particularly difficult also because he retains terms developed in his earlier philosophy – such as a 'well-ordered society', 'public reason' and 'overlapping consensus' – while giving them new meanings and functions. For these reasons, I think that it will be easier to present Rawls' distinctly political-moral approach through the lenses of what Rawls says about the nature and logic of rules and practices in his early article 'Two Concepts of Rules' (1955). This article, in my view, reads as a justification for the methodology of starting within a practice and normatively assess the acts and policies of this practice in terms of their justifiability within the practice. I find that the 'practice-framing' Rawls uses here brings out his later ideas in a clearer way, and will therefore use this framing throughout.

A. 'Two Concepts of Rules'

i. The Importance of Distinguishing between the Justification of a Practice and Justification within a Practice

In 'Two Concepts of Rules', Rawls aims to show the importance of the distinction between 'justifying a practice as a system of rules to be applied and enforced and justifying a particular action which falls under these rules'.[43] Or, put in slightly

[42] Rawls' earlier works – J Rawls, *A Theory of Justice* (Cambridge, MA, The Belknap Press of Harvard University Press, 1971), and even most parts of the first edition of J Rawls, *Political Liberalism* (New York, Columbia University Press, 1993) – are in my view best understood as exemplifying a moral philosophical approach. The same goes for his later books *The Law of Peoples* (n 5, first pub 1993) and J Rawls, *Justice as Fairness – A Restatement* (Cambridge, MA, Harvard University Press, 2001), which were for the most part written before 1993.

[43] Rawls (n 8) 22.

different terms, Rawls says that there is an important difference between the justification *of a practice* and the justification of an *act within a practice* – or that the reasons that can justify setting up and having a particular practice are *not* the reasons that can justify a particular act, procedure, rule or sub-practice *within* this practice.

First, what does Rawls mean when he speak of 'practices'? Practices are often characterised as a group's habits, or as a group's way of doing things based on the members' shared norms and beliefs. Yet, as we have seen, Rawls focuses on practices understood as social and political-legal *practices of applying and enforcing a system of rules*, and he uses the terms 'institution' and 'practices' interchangeably. It is crucial to recognise, Rawls argues, that rule-applying and rule-enforcing practices do not only guide, coordinate and regulate cooperation, and that their rules are not merely guiding 'rules of thumbs' that indicate the ideal rational decision on an issue,[44] guidance the participants can discard when they do not find it useful or reasonable.[45] Such practices – including games and institutions regulated by the medium of law – create or construct new types of cooperation and new types of actions that would not exist without the practice, actions such as 'scoring a goal' or 'casting a vote in a general election'.[46] Practices like games and institutions are not merely advisory and regulatory, but also constitutive; they create *new types of reasons for action for the participants*, and a *new type or level of normativity*, a normativity that is 'practice-dependent' or contingent on the existence of a practice of applying and enforcing a certain system of rules. A practice in this sense is an activity or cooperation that is specified by a *system of rules*, where the application and enforcement of these rules give the activity or cooperation its structure.[47] However, as Rawls came to emphasise more in later writings, practices such as games and institutions are also specified by their basic purposes, or the basic goods or values that the rule-regulated interaction between the participant is oriented towards achieving (eg, winning a game, punishing criminals in a criminal system or creating a fair system of cooperation in a democracy). The basic purposes – or the basic understanding of the nature of and orientation of the cooperation in the practice, and the proper relation between the participants in the cooperation – give the practice a direction and coherence, and contribute to defining the limits of what can be justifiable within the practice. For Rawls, however, it is of crucial importance to see that the basic purposes or normative orientation *within* the practice are distinct from the basic purposes one may have for setting up or supporting a rule-following practice with a particular basic purpose or internal orientation.[48]

[44] ibid 39, 28.

[45] ibid 34.

[46] Compare J Searle, 'How to Derive "Ought" From "Is"' (1964) 73 *The Philosophical Review* 43, citing Rawls' 'Two Concepts'.

[47] Rawls (n 8) 20, fn 1.

[48] As Rawls says in one of his examples, we may have utilitarian reasons for setting up a criminal law system that is essentially retributive (ie where the participants are not oriented towards utility but towards punishing criminals): ibid 7.

What, then, on Rawls' view, are proper ways of justifying a practice, on the one hand, and justifying something within a practice, on the other? We set up rule-following practices for many different reasons, but an important reason is that when everybody acts on the basis of what they think is best for themselves, or what is best for moral or religious reasons, then this creates confusion, coordination problems and conflicts.[49] Yet setting up a rule-following practice, especially an institution regulated by law and with coercive powers to enforce the rules, also involves great hazards.[50] Thus, when assessing whether it is justifiable or legitimate to set up or maintain a given practice, it is important to consider matters such as:

- Does the system of rules make up a coherent system of rules that can be public or possible to understand, apply and follow?
- Is the basic system of rules of the practice sufficiently just or morally justifiable?
- Are there checks on the officials of the practice?
- Is the system of rules and the basic institutional structure of the practice suited to achieving the goods or values or the type of cooperation that is the basic purpose (or one of the basic purposes) for having the practice?
- Are the basic purposes or basic goods to which the practice is oriented at achieving morally acceptable?
- Is the practice likely to create morally or rationally unacceptable consequences?
- Are there other feasible institutional or non-institutional alternatives to the practice that would be better in the long run, etc?

We see that proper reasoning about the justifiability of having a certain type of social or political-legal practice evaluates the practice and its different parts on its first-order moral and rational merits in the given context. Here we assess whether the practice is justifiable based on what we take to be the correct general rational and moral standards, but also considering the seriousness and urgency of the problems we try to solve with the practice, or the values of the goods and services it can yield, and in light of what we take to be its comparative advantage vis-à-vis feasible institutional and non-institutional alternatives.

However, when we assess or argue about the justifiability or legitimacy of an act, policy, sub-practice, etc *within* a practice, an entirely new type of normative consideration becomes important: the act or policy's *justifiability within the practice* itself. Here it is proper to consider aspects such as:

- Is the act or policy permitted by the rules of the practice?
- Has it been made by agents who are authorised by the rules and recognised traditions of the practice to make such acts or policies?
- Is the act in accordance with the rules and recognised procedures in the practice?

[49] ibid 24.
[50] ibid 12.

- Does it produce outcomes that are incompatible with the rules of the practice?
- But also, is the act compatible with the basic purposes the practice aims to achieve?

The last of these is an important question, because an act or a policy may be legally justifiable or legitimate in terms of the (letter of) the system of rules, yet fail to be (political-morally) justifiable or legitimate within the practice because it conflicts with or contributes to undermining the basic purposes or ideal the practice aims at achieving, or 'the point of having the practice'.[51] This is not to say that we do not assess acts or policies on their first-order moral and rational merits. But these merits are not as such what determines the act or policy's justifiability *within* the practice.

Moreover, as we have seen, the reasons we see as providing a sufficient justification for setting up and having a practice are *not* the reasons we can use to justify a specific act or policy within this practice. Rawls argues, for example, that the rule-following and rule-enforcing practice of promising may be justified on utilitarian grounds as producing the best result for society in the long run. However, he says,

> it is a mistake to think that if the practice is justified on utilitarian grounds, then the promisor must have complete liberty to use utilitarian arguments to decide on whether or not to keep his promise. The practice forbids this defense; and it is the purpose of the practice to do this.[52]

On this view, a *general discretion* on part of the participants to decide whether they should respect a rule or not is incompatible with having a practice.[53] Or, put differently, a practice necessarily involves the 'abdication of full liberty' to act in specific cases on prudential and moral grounds,[54] and it involves the abdication of full liberty to assess the justifiability of an act on its own first-order moral and rational merits (even when these merits align with the ideas and values that justified setting up the practice in the first place). If all, or most, participants were to decide on the properness of accepting a rule or decision based on its prudential or first-order moral merits then 'the point of having the practice would be lost'.[55]

ii. Different 'Offices' Allow for Different Types of Justifications and Use of Discretion

Another important feature of practices is that their rules define and create different 'offices' that have different tasks, responsibilities and different positions vis-à-vis

[51] Several of Rawls' examples in 'Two Concepts' express this view.
[52] Rawls (n 8) 19.
[53] ibid 30.
[54] ibid 24.
[55] ibid 17.

the system of rules (and the basic purposes of the practice).[56] A player's role is to participate in the activity by following its rules and aiming at its purpose (eg, winning the game). The rules of chess, for example, leave no discretion to the players as to what is a valid move or how best to understand the purpose of the game. The task of an 'arbitrator', 'judge' or 'umpire', on the other hand, is to decide whether a rule applies in a particular case and to settle conflicts over how the rules should best be interpreted. The rules of the practice will therefore typically permit an arbiter or judge a certain degree of discretion as to how the rules are best interpreted. A lawgiver, on the other hand, is authorised to change the rules, but only within certain limits and only when following the proper rules and procedures, and respecting the constraints set by the basic purposes of the practice.

The different offices are (ideally) designed to make the practice work well. That means that the offices should aim at achieving their own basic purposes but also function together as a whole to achieve the basic purpose(s) of the overall practice. The division of labour and expertise, and the delegated responsibilities and competences among different offices, mean that persons who act in the capacity of different offices must have different orientations and priorities – and importantly they must also have *different constraints* on permissible ways of reasoning, and constraints on permissible types of reasons and evidence, and different degrees of discretion with regard to different issues. And much of this will be written into the rules, or operate as recognised conventions in the public political culture. What is a proper way to justify something within a practice will thus also depend on the office or role one has within the practice.

In 'Two Concepts of Rules', Rawls argued that that there is a tendency among political philosophers to overlook, or fail to appreciate, the importance of distinguishing between justifying a practice and justifying an act within a practice. In my view, this has not changed much since 1955. Despite more awareness of the difference between political philosophy and moral philosophy, and despite a turn to political legitimacy in recent political philosophy, we find that most political philosophers understand political legitimacy (ie, having the right to rule, or being worthy of support, cooperation and obedience) primarily as a question of being 'sufficiently just' or 'morally justifiable'. And sufficient justice and sufficient moral justifiability is here understood as being in accordance with some first-order moral or rational criteria, and will vary depending on what the respective philosophers take to be the correct or most attractive and coherent doctrine of morality or rationality in general.[57] Moreover, few political philosophers and theorists of legitimacy distinguish clearly between the legitimacy of a political-legal regime and the legitimacy of an act or policy within a political-legal regime. Most acknowledge that for an act or policy within a particular regime to be legitimate, it must

[56] ibid 3, fn 1, 6 ff, 25, 28.

[57] Some also rely on an account of what rationality is and requires, or on moral theories of human rights.

cohere with (or 'fit', as Dworkin would say) the system of rules and the recognised procedures regime in question, and also be made by an agent who is authorised by the rules to do so. However, the substantive or normative justifiability (or what Dworkin would call the 'justification' part) of the legitimacy of an act or policy is typically understood in terms of some first-order moral criteria or sufficient coherence with what the political philosopher takes to be the correct account of morality, justice or rationality in general.

B. Political Legitimacy in Rawls' Late Political Liberalism

On my reading, Rawls did not draw out the full implications of the practice view he had outlined in 'Two Concepts of Rules' for his own way of doing political philosophy until his late texts 'Introduction to the Paperback Edition' and 'The Idea of Public Reason Revisited'.

In *A Theory of Justice*,[58] Rawls makes no distinction between moral and political philosophy.[59] What Rawls does here is to start by working out a conception of justice – 'Justice as Fairness' – from what he calls the 'original position': a hypothetical fair-choice situation in which Rawls thinks that it is possible to identify principles of justice that are mutually acceptable terms of cooperation for all free and equal persons by annulling power asymmetries through a 'veil of ignorance'.[60] Rawls then argues that two principles will be chosen and that these principles of Justice as Fairness 'specify the terms of social cooperation that can be entered into and the forms of government that can be established'.[61]

In the first edition of *Political Liberalism*, Rawls no longer thinks that it is realistic and reasonable to expect all citizens of a constitutional democracy to accept the same comprehensive moral doctrine of justice as the basis of their constitution and basic structure.[62] This leads Rawls to his political turn. Rawls now recasts Justice as Fairness as a conception of *political* justice that is *limited to the political* domain. As a more limited and doctrinally more shallow conception of political justice, he argues, Justice as Fairness can be reasonably acceptable to all reasonable and rational citizens of a constitutional democracy in an overlapping consensus. And since it is reasonably acceptable to all in this way, it can provide a set of reciprocally acceptable terms of cooperation for a constitutional democracy. On this account, ordinary laws, policies, and political and legal acts and decisions are sufficiently legitimate to be political-morally binding on us in so far as they are procedurally and substantively in accordance with a constitution – the essentials

[58] Rawls, *A Theory of Justice* (n 42).
[59] Rawls, *Political Liberalism* (n 42) xv.
[60] In Rawls' view, the original position '[carries] to a higher order of abstraction the traditional [moral philosophical] doctrine of the social contract': ibid.
[61] ibid 10.
[62] ibid xv.

of which in turn are sufficiently in accordance with the two principles of Justice as Fairness understood as a conception of *political* justice. Justice as Fairness also serves as the proper content of 'public reason', that is, as the substantive content of the shared political practical reason in a constitutional democracy that officials and citizens can use to justify their exercise of political power over free and equal citizens in a way that is reciprocally acceptable.

In 'Introduction to the Paperback Edition' and 'The Idea of Public Reason Revisited', however, Rawls has come to think that it is not only empirically unrealistic, but also political-morally unreasonable, within a constitutional democracy, to expect all citizens to accept the same conception of political justice as the *most* reasonable conception of political justice. When Rawls now gives up Justice as Fairness' special status and its original position as the method for arriving at reciprocally acceptable terms of cooperation, what can then be the proper substantive criteria of political legitimacy and public political justifiability in a constitutional democracy? This shift in Rawls' thinking sets off what I take to be a rather dramatic methodological shift in his political philosophy. One in which Rawls' political conception of legitimacy cuts loose from its moral philosophical grounding altogether and makes a leap into a more consistent practice view of political normativity and political legitimacy. It is this shift that in my opinion warrants the label 'Rawls' *late* political liberalism'.[63]

In his late texts on political liberalism, Rawls no longer derives the substantive standard of political legitimacy from a moral philosophically grounded conception of (political) justice. Rather, he makes a shift to political *legitimacy* itself as the more fundamental political philosophical concept. Also, he now emphasises that a proper conception of both political legitimacy and political justice *for* a '(liberal) constitutional democracy'[64] must be worked out *from within* this practice itself, and that it should be possible for the participants and their representatives to see themselves as taking part in formulating the effective conception of political justice in the regime – with Supreme Court justices, the legislature and public officials, as well as philosophers, legal theorists and others, chiming in.

Rawls himself attempts to formulate a conception of political legitimacy – or a standard of public political justifiability – for and from within a liberal constitutional democracy. In doing so, he starts from what he takes to be the fundamental ideas and conceptions of the nature of the cooperation and the participants that define this type of practice, based on ideas and values of their constitutions, preambles to the constitutions, their basic institutional set-up and bills of rights, but also recognised conventions and ideas in the public political culture of this type of regime more generally. As the very name of this practice reveals, this is a practice that seeks to combine democratic rule by the people with constitutional

[63] Some aspects of this shift are suggested in the first edition of *Political Liberalism* and in 'Reply to Habermas', but they come together and take on a new significance when Rawls in 1996 abandons the privileged status of Justice as Fairness. J Rawls 'Reply to Habermas' (1995) 92 *Journal of Philosophy* 132.

[64] Rawls (n 6) xxxix.

protections of fundamental liberties for all citizens. A defining idea of this practice, he says, is that citizens are viewed as both 'free and equal', in the sense and that each citizen has an equal right to freedom, while each citizen also shares equally in political power.[65]

A democracy is a complex, and even paradoxical, type of practice where the citizens (the 'players') who must follow the rules to make the practice function are also, as a collective, the ultimate lawgiver. In a *liberal constitutional* democracy, citizens furthermore have extensive private autonomy or constitutionally guaranteed liberty rights. So, this is a practice where citizens are the ultimate lawgiver with constitutionally guaranteed public and private liberties, where the citizens can still legitimately be coerced to obey laws with which they disagree. Already in *Political Liberalism*, Rawls had diagnosed a longstanding and deep impasse in the public political culture of liberal constitutional democracies over how institutions are to be arranged if they are to conform to the freedom and equality of citizens.[66] Rawls there exemplified the impasse with the tension between the liberal tradition, which sees liberty and autonomy as the normative foundation of this type of regime, and the civic republican tradition, which sees popular sovereignty or democratic procedures and the active participation of the citizens as more fundamental. Such long-standing and unresolved tensions in the public political culture, Rawls argued, may suggest that this type of regime cannot be 'well-ordered', or that it cannot operate in accordance with its own declared basic ideas and values – because the participants in the practice are divided over how the practice should be understood, and hence also divided over what are justifiable or legitimate acts and policies and proper ways of exercising political power within this type of practice.

Attempting to move beyond this impasse, Rawls tries to formulate a conception of the basic purposes[67] or the normative ideas and values that define and orient the practice of constitutional democracies. Many past societies have pursued final ends such as religion and empire, dominion and glory. Yet a democratic regime, Rawls argues, does not have final ends and aims,[68] and it does not have 'antecedent social ends' that justify viewing some participants of lesser worth and assigning them different rights and privileges accordingly.[69] Nor is a democratic regime a community in the sense that it is governed by a shared comprehensive religious, philosophical or moral doctrine.[70] Rather, a democracy is a more limited (but still coercive) political practice, one that has as its most fundamental underlying ideas that citizens have both equal rights to freedom and share equally in political power.[71] Trying to take both these

[65] Rawls (n 7) 765.
[66] Rawls, *Political Liberalism* (n 42) 4–5, Rawls 'Reply to Habermas' (n 63) 396 ff.
[67] Rawls, *Political Liberalism* (n 42) 232.
[68] ibid 41.
[69] ibid 41.
[70] ibid.
[71] Rawls (n 7) 765.

fundamental ideas into account, he argues that the basic purpose of this type of practice is to have a 'fair system of cooperation between free and equal citizens ["over time" or "over generations"]'.[72] Or, as he also says, this type of practice is characterised by an idea of reciprocity – or mutuality – between free and equal citizens.[73]

In his late political liberalism, Rawls abandons the idea that Justice as Fairness or any single conception of political justice can define the substantive standard of political legitimacy, public political justifiability and 'public reason'.[74] Instead, he now says:

> Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.[75]

This 'idea of political legitimacy based on the idea of reciprocity' is a highly convoluted way of formulating a conception of political legitimacy for a constitutional democracy. Yet it essentially says that a participant's exercise of political power over fundamental political issues in the practice is political-morally legitimate in so far he sincerely believes that his act is normatively justifiable *within* the practice. To check this justifiability, he must check that the action is compatible with what he sincerely believes to be the most coherent interpretation of the basic political-moral ideas and principles implicit in the constitution and familiar from the public political culture of the practice – an interpretation that he can affirm wholeheartedly[76] and also believe to be reasonably acceptable to other citizens as an interpretation of the basic political–moral ideas of the practice. Such an interpretation – one that is both worked out *for* and from *within* a constitutional democracy with a focus on making sense of its basic political-moral ideas – is what Rawls calls a '*political* conception of justice'[77] or a '*political* conception of *political* justice'.[78] The duty to be able to present a public justification of one's exercise of political and legal power in these terms is particularly stringent for Supreme Court justices, and fairly stringent for executive officers and elected representatives and candidates for office. However, it also applies to ordinary citizens when they exercise political power in fundamental political issues, that is, in

[72] ibid 765. Note that Rawls also used similar formulations in some passages of *Political Liberalism*, eg Rawls, *Political Liberalism* (n 42) 14.

[73] Rawls (n 7) 771. As we see, Rawls here recasts some of his earlier ideas in a new political-moral framing.

[74] That is, the substantive content of 'public reason' or the public political practical reason that it is proper to use when acting *as* citizens or in our 'office' in a constitutional democracy.

[75] Rawls (n 7) 771; Rawls, *Political Liberalism* (n 42) 17.

[76] That is, view as at least compatible with his 'most considered convictions'.

[77] Rawls 'Introduction' (n 6) li.

[78] ibid xxxix (emphasis added). This stands in contrast to the formulation 'conception of *justice*' in *A Theory of Justice* and 'conception of political justice' in *Political Liberalism*.

political issues that impact the constitutional essentials or the basic justice of the basic institutional structure of the practice.

To reason in 'public reason' in this way is not to deduce what is a legitimate act or stance on a fundamental political issue from what we take to be the most reasonable political conception of justice for our constitutional democracy. Rather, Rawls says, one should first get an overview of the political-moral values and considerations that pertain to the different sides of the issue and choose the side whose order of political-moral values one finds most reasonable. In addition, one must also check that this stance is compatible with what one sincerely believes to be the most reasonable political conception of justice for the practice, and sincerely believe that others can also see the stance as at least politically reasonable. Finally, one should be willing to publicly defend one's stance and decision on this basis. When reasoning in public reason in this way, the participants must be reflexive with regard to which office they occupy in the practice, and the special responsibilities, and delegated powers and forms of discretion, which the rules of the practice prescribe for this office. When both government officials and ordinary citizens use their public reason and orient and constrain their exercise of political power in the fundamental issues in this way, 'the legal enactment expressing the opinion of the majority is legitimate law'[79] and it is 'politically (morally) binding on the citizen as a citizen and is to be accepted as such'.[80]

On this approach, it is of crucial importance that public officials and citizens are able and willing to present a public justification of their political power based on – and in the terms of – political-moral ideas, values and principles. Only through such practice of political-moral justification – and responses to such justifications – is it possible to find out what is *actually* acceptable to other citizens, or what can be reciprocally acceptable terms of cooperation in the practice. And only in this way can participants in a constitutional democracy reassure each other that their actions are political-morally reasonable and in accordance with a reasonable understanding of the basic ideas of their practice. As we have seen, Rawls thinks that the basic political-moral ideas of a constitutional democracy can reasonably be interpreted in somehow different ways, and that reasonable citizens will be able to recognise a certain range of interpretations of political conceptions of political justice as reasonable. While such citizens will continue to disagree on which interpretation or conception is the *most* reasonable, they can recognise a range of conceptions as political-morally reasonable 'even if barely so'.[81] An ongoing justificatory practice oriented to – and constrained by – the basic political-moral ideas and values of a constitutional democracy is thus necessary for this practice to achieve its basic purposes, and necessary for the practice to be well-ordered according to its own basic ideas. Or, as Rawls also puts it, it is a precondition for being 'stable for the right

[79] Rawls (n 7) 770–71.
[80] ibid 770.
[81] ibid.

reasons' as opposed to stability through the governing bodies' deception or mere coercion of the citizens.

For a constitutional democracy to be worthy of its name, democratic citizens must be able to see themselves and their representatives as taking part in interpreting and defining the regime's basic political-moral ideas and values. That is, as taking part in shaping the effective or operative conception of justice that informs the interpretation of the constitutional essentials, and the incremental changes to their system of rules and their basic institutional structure. For judges to impose their private views, or a certain moral philosophically grounded conception of justice, on free and equal citizens in a constitutional democracy on the assumption of is what is acceptable or justifiable to citizens as free and equal – or what they 'would have accepted' had they been fully rational and reasonable – is not justifiable within a constitutional democracy. Doing so is not to treat citizens as free and equal and as reasonable and rational. Second, for judges to reason in this way is to use a different orientation than this office is assigned, and to go outside of the discretion allotted to judges in this practice. The final interpretation of the basic political-moral ideas and values of the regime cannot, on Rawls' view, be left to the legislature, nor to the Supreme Court, which is 'the highest judicial interpreter but *not* the final interpreter of the higher law'.[82] In Rawls' late political liberalism he says more explicitly than before that in order to function in accordance with its own basic ideas, a constitutional democracy must be a *deliberative democracy* where the citizens and the officers within the different branches of government provide reasons and justifications for their exercise of political power in public reason, and are also open to revise their interpretations and opinions in light of arguments and interpretations presented by others.[83]

i. What does it Mean to Use Such a Political-Moral Approach in Discussions about the Proportionality Doctrine?

I can here only briefly indicate what I think may be some of the characteristics, and some of the benefits, of using a political-moral approach when assessing and explaining proportionality doctrines and proportionality practices.

On a political-moral approach such as Rawls', a proportionality doctrine will be assessed in terms of its legitimacy within the political-legal regime in question. This will include an assessment of whether the proportionality doctrine in question came into being in accordance with the rules and procedures of the regime, and assessment of how well it coheres with the rest of the legal system and institutional division of labour. The political-moral approach can thus overlap with institutional-instrumentalist approaches such as Kyritsis', in the sense that it will pay attention to how well the proportionality doctrine helps ensure compliance

[82] Rawls, *Political Liberalism* (n 42) 231 (emphasis added), compare 234.
[83] Rawls (n 7) 765.

with constitutional norms, and whether the proportionality doctrine fits into, or undermines, the political-legal regime's division of labour between different offices and branches of government. Yet, importantly, a political-moral assessment will also focus on whether the proportionality practice is justifiable in light of the substantive basic political-moral ideas, values and principles of the regime of which it is part. Here, one should ask: Which political-moral ideas, values and principles of a liberal constitutional democracy speak in favour of the given proportionality doctrine? And which speak against it? Here – as in other cases involving fundamental political issues in a constitutional democracy – one should choose the side that yields the best balance of the political-moral values on the issue in the given context. However, one should also check whether the side one has chosen is justifiable in terms of what one believes to be the most coherent and convincing political-moral conception of justice for a constitutional democracy, and sincerely believe that other citizens too can recognise as a reasonable interpretation of the basic political-moral ideas and values of the practice. As Rawls' argues, the basic political-moral ideas of a constitutional democracy, and their order of priority, can be understood in somewhat different ways. There will therefore be a certain range of interpretations or political conceptions of justice that citizens can be expected to recognise as reasonable.

A political-moral approach will evaluate the justifiability of a given proportionality practice with focus on a broader set of legitimacy concerns than most authors in the current literature on proportionality are currently adopting, and I believe that it can therefore alert us to legitimacy concerns that have often gone under the radar. For instance, I think that this approach helps us see that it may be a legitimacy problem in a constitutional democracy that the spread of judicial proportionality review has largely been a court-driven process, and that proportionality doctrines have often been adopted by courts without the explicit authorisation or understanding of the lawmaker and the broader public. It is furthermore a legitimacy concern that few outside of expert legal communities pay attention to, or understand, how judicial proportionality review proceeds. Thus, many are not only unaware of the extent to which proportionality analysis involves conjectures about likely effects of a public measure and assessments of whether they are suited and necessary; they are also unaware of the extent to which proportionality analysis involves moral or political-moral reasoning, for example when assessing whether the purpose of the contested measure is legitimate and when reasoning about the importance of different rights and the significance of enhancing or limiting the rights at the final step. Characterising proportionality review as a form of Socratic contestation, Mattias Kumm has argued that 'most practicing judges would no doubt be surprised and many citizens disturbed to hear that judicial review actually proceeds along the lines described and analyzed here'.[84]

[84] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) 4 *Law & Ethics of Human Rights* 175.

And he asks whether the acceptance of judicial proportionality review is not directly connected to the proportionality test's 'technocratic camouflage' as a multi-pronged legalistic sounding test.[85] I think that Kumm himself underplays the seriousness of this as a legitimacy problem for proportionality in a constitutional democracy. On a Rawlsian political-moral approach, the lack of political and public scrutiny and the lack of understanding of judicial proportionality review will be seen as a serious legitimacy problem, because it in effect allows for unchecked judicial supremacy and for judges to effectively define the standard of what are political-legally justifiable acts in a constitutional democracy. It is also a legitimacy problem because the effective or operative standard of political justifiability in a wide range of fundamental rights issues is made in a way that is hidden and not understood by most citizens or even their elected representatives. For in this practice, citizens should be the ultimate lawgiver.

Now, the political-moral approach does not as such take sides in the debate for and against judicial review.[86] The point of this type of approach is rather that all such fundamental political questions must be assessed and justified in terms of the political-moral ideas values that are at stake, and be checked against what each sincerely believes to be the most reasonable conception of the basic political-moral ideas and values of a constitutional democracy. Yet Rawls does say that if a constitutional democracy has a Supreme Court with judicial review powers, then the proper reason for this court is public reason, or to use a political-moral approach. Indeed, protecting and upholding the basic political-moral ideas and values of the practice is the basic purpose of this office within the practice:[87] 'The justices cannot, of course, invoke their own morality, nor the ideals and virtues of morality generally,' says Rawls, but 'nor can they cite political values without restriction.'[88] Rather, the justices must develop their own views on what is the most coherent and constitutional view or the best interpretation, or the best political conception of justice, and use this as their public justifiability check.

Different offices are positioned differently vis-à-vis the system of rules, and the office of a judge is one that looks backwards to what the lawgiver has done. Thus, as Rawls said in *Political Liberalism*, 'it is the task of the justices to try to develop and express in their reasoned opinions the best interpretation of the constitution they can, using their knowledge of what the constitution and constitutional precedents require'.[89] The best interpretation for a judge must be 'the one that best fits the relevant body of those constitutional materials'.[90] However, their interpretation must also be justifiable in terms of a reasonable political conception of justice for the practice. In Rawls' late political liberalism this substantive standard is no longer derived from the original position. Rather, the substantive

[85] ibid 174.
[86] Rawls, *Political Liberalism* (n 42) 235.
[87] ibid 235, 236.
[88] ibid 236.
[89] ibid.
[90] ibid.

standard of public political justifiability within a constitutional democracy regime must be understood as the outcome of a deliberative public process where each sincerely exercises his or her political power based on what he or she takes to be the most reasonable political conception of political justice for the regime and also reasonably thinks that other citizens and branches of government can accept as a reasonable interpretation of the regime's basic political-moral ideas. Justices will be more constrained by the written text of the *constitution as it stands*, and by constitutional precedent, than are ordinary citizens and other public officials: both when the justices tally up the political-moral values on each side of a fundamental political issue, and also in the way they formulate the political conception of political justice for the regime on which they rely when acting in their office. Ordinary citizens and members of the legislature, on the other hand, will have more discretion to reason about, and act on the basis of, how they think that the constitution *should be* in light of their sincere interpretations of the basic political-moral ideas, values and principles of the regime.

In a constitutional democracy, a Supreme Court is the highest judicial interpreter of the constitution, but it is not the final interpreter of the constitution, nor the final interpreter of the basic political-moral ideas and values of the practice.[91] As Rawls puts it, ultimate power cannot be left to the legislature or even to a Supreme Court, which is only the highest *judicial* interpreter of the constitution: 'Ultimate power is held by the three branches in a duly specified relation with one another with each responsible to the people.'[92] Furthermore, to be well-ordered according to its own basic ideas, a constitutional democracy must also be a *deliberative democracy*, where citizens can see themselves and their representatives as taking part in the interpretation and determination of the operative conception of political justice in the practice.

My own understanding is that Rawls' political-moral approach will be incompatible with strong proportionality based judicial review that is based on a correctness standard and not a reasonableness standard. A constitutional democracy understood as a 'fair system of cooperation between free and equal citizens over generations', which is also a deliberative democracy, seems more compatible with a proportionality doctrine that says that judicial proportionality review should consider the justificatory efforts of the primary political decision-maker. I follow David Dyzenhaus in thinking that judges must be more attentive to the justificatory efforts of the political decision-maker, and that they must give 'due deference'[93] when the political decision-makers can demonstrate that they have made a sincere effort to ensure the contested measure's public justifiability.

When the political branches make sincere efforts to engage in some version of a proportionality analysis to ensure the public justifiability of their proposals

[91] ibid 232.

[92] ibid.

[93] D Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in G Huscroft, BM Miller and G Webber (eds), *Proportionality and the Rule of Law – Rights, Justification, Reasoning* (Cambridge, Cambridge University Press, 2014) 255.

before enacting them, and the court gives 'due deference', it becomes possible to see proportionality testing as a joint deliberative process of specifying the standard of public justifiability in a liberal democracy. This requires, as Dyzenhaus says, that 'judges will have to give up the idea that they have monopoly on right answers when it comes to questions of fundamental rights'.[94] Moreover, 'by requiring the executive to justify the exercise of its power, and by requiring the judiciary to defer to reasonable justification, the roles each branch plays are made clearer'.[95] In this way, it seems, the legislatures and public officials can be seen as contributing from different angles, and with different types of normative authorisation, focus and allotted discretion, in a joint deliberative enterprise of interpreting and defining the substantive standard of public political-moral justifiability, or the substantive standard of political legitimacy, within the regime. In a democracy, there must be an on-going, collaborative, deliberative and public practice of justification and contestation about the right interpretation among the branches of government – 'each responsible to the people'.[96] Kumm and several other defenders of proportionality in the culture of justification tradition speak of proportionality testing as a test of public reason and as a joint deliberative enterprise. However, in my view, they give courts an outsized role in defining the substantive standard of public justifiability or legitimacy in a constitutional democracy. Moreover, they typically fail to distinguish clearly between a political-moral approach and a (Kantian) moral philosophical approach to proportionality.

I believe that a distinctly political-moral approach to proportionality can also provide input to the discussion about how best to explicate – and use – the steps of the structured proportionality analysis. For instance, it seems that on this approach the legitimate purpose analysis at step 1 can best be understood as an analysis of whether the contested measure's purpose is possible to justify on the basis of a reasonable political conception of justice for the regime in question. The political-moral approach also suggests that the best way to proceed at the final balancing stage is to focus on the political-moral values at stake. Thus, we ask, which political-moral values are enhanced by the contested rights-infringing contested measure, and to what degree? And which political-moral values are harmed by the rights-infringing contested measure, and to what degree? We should then choose the side we sincerely believe to give the best balance of political-moral values on the issue – but only after checking that this balance is justifiable in terms of the political conception of justice sincerely believed to be the most reasonable political conception of justice for the regime, one that is also sincerely believed to be acceptable to other citizens and branches of government, as a coherent and reasonable interpretation of the fundamental political-moral ideas and values of the regime.

[94] ibid 255.
[95] ibid 254.
[96] cf Vicki Jackson on proportionality as a (deliberative) 'bridge between' the branches of government. VC Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 *Yale Law Journal* 3094, 3103, 3143.

From the point of view of a political-moral approach such as Rawls', it will be important that review courts provide reasoned judgments where they explain their reasoning in the different steps of the proportionality test. However, the other branches of government too must be able and willing to publicly justify their acts when their measures infringe on protected rights. Using something akin to the proportionality analysis allows both for a proper scrutiny of the justifiability of measures and for a structure of public justification of these measures that can facilitate communication and deliberation between the branches of government and the broader public. This will also make public the substantive standard of legitimacy or justifiability that is applied, so that it can be assessed and criticised. Beyond these epistemic and deliberative functions, such a public justification of infringing measures will also have an important expressive value and function: a public justification that (roughly) follows the steps of the proportionality analysis demonstrates in an accessible way to those disadvantaged by the measure that their interests have been considered, and that they, as free and equal citizens, deserve a justification they can see as political-morally reasonable when their fundamental rights and freedoms are infringed.

Finally, I believe that Rawls' political-moral approach also suggests that one must be reflexive with regard to one's office when using the proportionality test to check the legitimacy or political-moral justifiability of a rights-infringing measure. One must be conscious of the responsibilities, expertise and constraints of one's office and, when it is proper, give due deference to other offices and branches within the regime that are delegated other responsibilities and have a different authority and expertise in certain domains. A court will, for example, have a particular expertise and authority in questions about the right interpretation of the system of rules, including the constitution as it stands, and in the question of whether a protected right has been infringed and when determining whether the purpose of a rights-infringing measure is legal or not. A lawgiver, on the other hand, has a special responsibility for and authority over legislation. Public officials in offices responsible for domains such as public health, education, etc will typically be better placed to evaluate questions about the suitability and necessity of a rights-infringing measure in their area of expertise.

IV. The Political-Moral Approach – Shallow and Insufficient?

In this chapter, I have distinguished between moral philosophical, institutional-instrumental and political-moral approaches to proportionality. My main concern has been to show what distinguishes the political-moral approach from the two other types of approaches, and to outline the political-moral approach of Rawls' late political liberalism, which I take to be the most coherent and persuasive version of the political-moral approach. I have also briefly sketched how I think

that Rawls' political-moral approach yields a distinct way of normatively assessing proportionality doctrine and of explicating the first and last steps of the proportionality test.

Legal theorists like Möller, who use a moral philosophical approach, will dismiss political-moral approaches such as Rawls' as shallow and incomplete, and as failing to provide a proper moral philosophical foundation for proportionality practices. Those who use a political-moral approach, however, will think that moral foundationalists like Möller fail to acknowledge the structural complexity of moral reasoning *within* practices that are themselves (viewed as) morally justifiable. Or, as Rawls would say, they fail to grasp the importance of the distinction between justifying a practice and justifying something within a practice.

The distinction between justifying a practice and justifying something within a practice does not collapse even when the practice has been inspired by normative ideas first formulated in moral philosophy, as is the case with liberal constitutional democracies. When abstract moral political ideas and principles – such as freedom, autonomy, equality, justice or proportionality – become basic ideas of a political legal practice, or part of positive law, they become legal and political-moral ideas and principles within the practice, and the participants of the practice must interpret and refer to them as such when justifying their exercise of power vis-à-vis another. Within the public political culture of a constitutional democracy, we should not try to determine whether private autonomy, or self-legislation, self-determination and individual liberty rights, on the one hand, or public autonomy, or democratic collective self-determination and civic participation, on the other, is more fundamental.[97] In this type of practice these basic political-moral ideas are both fundamental and must be understood as co-original and of equal weight, 'with neither being prior to or imposed on the other'.[98] Within the practice of constitutional democracy, these two political-moral ideas inform and shape each other's meaning and extension, and their meaning and content is concretised in the ways in which private and public autonomy are expressed in democratic procedures, constitutionally guaranteed freedoms, in proportionality review practices, etc.

According to Jürgen Habermas, we can understand the constitutional democratic state as the 'embodiment of Kant's concept of autonomy'.[99] Yet when the

[97] This is not to say that moral philosophy, or moral philosophically grounded conceptions of rights, do not have an important role in a constitutional democracy. What I am saying is that on the political-moral approach they cannot be part of the official constitutional theory, or political-moral self-understanding of a constitutional democracy. Nevertheless, comprehensive moral theories may serve important critical functions by alerting us to different types of normative problems and injustices. They can also serve an important function by showing citizens that the constitution, and constitutional doctrines such as proportionality, can be affirmed from different moral philosophical points of view. For neither Supreme Court justices, nor citizens or their representatives – nor legal theorists or moral philosophers – agree on which is the correct moral philosophical doctrine.

[98] Rawls (n 6) 410. Compare J Habermas, *Faktizität und Geltung* (Frankfurt am Main, Suhrkamp, 1992) 135.

[99] Habermas (n 15) 547.

Kantian idea of autonomy became part of positive law, Habermas argues, it left the intelligible realm. And when fundamental rights permeate the legal system, criticism of social and political injustices within the regime can 'appeal to the untapped normative content of unsaturated basic rights and claims to justice'.[100] Or, as Rawls' might have put it, moral criticism of fundamental political and legal injustices within a constitutional democratic regime does not have to make an ascent to moral philosophy. Rather, it can proceed as a discussion about how best to understand and institutionalise positive rights. But also – and more fundamentally – normative criticism can proceed as a discussion about how best to understand and combine the basic political-moral ideas, values and principles of a liberal constitutional democracy; or as a discussion about how best to realise a 'fair system of cooperation among free and equal citizens over generations' in ever new and changing circumstances.

[100] ibid 548.

8

Proportionality and the Presumption of Liberty

DAMIAN CUENI*

I. Introduction

The idea of proportionality is widely considered to include a presumption of liberty that reveals proportionality's origins in eighteenth-century German administrative law scholarship. Yet many, most prominently the late Stavros Tsakyrakis, have claimed that such a presumption incorporates a disproportionate individualism into the legal framework of modern liberal democratic states.[1]

Taking my cue from Tsakyrakis' critique of proportionality, this chapter tries to make sense of the presumption of liberty that underlies the current legal practice of proportionality by analysing it along three dimensions: the expressive dimension concerns the degree to which the state acknowledges and respects individual costs in liberty;[2] the institutional dimension concerns a presumption in favour of granting individuals an institutional right to complain against restrictions of their liberty; and the substantive dimension concerns a presumption in favour of effectively granting individuals a greater sphere of liberty in matters such as free speech. I will suggest that modern liberal democratic states have good reason to adopt a presumption of liberty along some of these dimensions yet not others, and illustrate different ways of incorporating the presumption using the examples of Germany, Switzerland and the United Kingdom (UK).

My account in this chapter is part of a larger attempt to provide a political and legal theory of the current legal practice of proportionality. When I was invited

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[1] Tsakyrakis, ch 1 of this volume.

[2] See also D Cueni, 'Basic Rights and Costs in Political Value: The Expressive Point of the Two-Step Framework' (2025) 23(1) *International Journal of Constitutional Law* (forthcoming).

to a conference that took Tsakyrakis' work as a starting point for reconsidering the relationship between 'Freedom and Proportionality', I welcomed the opportunity to reflect on the apparent disconnect between proportionality and political theory. Given how central the idea of proportionality is to liberal democratic *legal practice*, it might come as a surprise that proportionality is largely absent from the canon of liberal *political theory*.[3] Upon closer reflection, however, it is not difficult to see why: the central idea of liberal political theory is that individual subjects are to be treated according to general laws that are applied *equally*.[4] Yet proportionality demands that the state may interfere with individual liberty only in as much as it is justified *in the concrete circumstances at hand*, even when applying laws that are in accordance with more general criteria. This idea that state action must be proportionate in concrete circumstances is absent from the work of canonical political theorists like Immanuel Kant, who tried to derive normative criteria for the universalisability of general laws but argued for enforcing these general laws with full harshness in individual cases, disregarding the concrete circumstances at hand.[5]

Tsakyrakis was one of the most famous critics of proportionality,[6] which seems to make his work an odd starting point for exploring the connection between proportionality and political theory. Yet what makes his critique so powerful is its breadth: it targets the whole way of thinking that he called 'the morality of proportionality'.[7] According to Tsakyrakis, the legal practice of proportionality is based on a misguided notion of 'total freedom' that gives rise to a 'right to everything' and thus ends up trivialising the very idea of rights.[8] Therefore, while Tsakyrakis *does* connect proportionality with political theory, he considers the political theory behind proportionality to be *utterly mistaken*. In his words, the 'basic characteristic [of this political theory] is that it starts from what we might call a Hobbesian conception of individuals and their freedom'.[9] In Hobbes' state of nature, individuals notoriously have total freedom in the sense that 'every man has a right to everything, even to one another's body'.[10] Yet when 'proponents of proportionality contend that individuals have a prima facie right to everything',[11]

[3] See also C Möllers, *Freiheitsgrade: Elemente einer liberalen politischen Mechanik* (Berlin, Suhrkamp Verlag, 2020) 25, 33 for a similar diagnosis.

[4] This ideal of rule by general and abstract laws is most clearly articulated in E Brunner, *Gerechtigkeit: Eine Lehre von den Grundgesetzen der Gesellschaftsordnung* (Zürich, Zwingli-Verlag, 1943). I thank Andreas Kley for drawing Brunner's work to my attention.

[5] On this aspect of Kant's political theory, see C Horn, *Nichtideale Normativität: Ein neuer Blick auf Kants politische Philosophie* (Berlin, Suhrkamp Verlag, 2014) 32–35, 68–73, 301–20.

[6] S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468.

[7] S Tsakyrakis, 'Total Freedom: The Morality of Proportionality' (18 February 2013), available at https://ssrn.com/abstract=2220255 (last accessed 26 April 2024).

[8] Tsakyrakis, ch 1 in this volume.

[9] Tsakyrakis (n 7) 7.

[10] T Hobbes, *Leviathan* (Cambridge, Cambridge University Press 1996 [1651]) ch XIV.

[11] Tsakyrakis (n 7) 7.

they import this notion of total freedom from the state of nature into the civil condition.[12] Such a 'right to everything' is indeed advocated by some proponents of proportionality.[13] But it is doubtful whether the expansive notions of freedom[14] that underlie this alleged right offer the best way of understanding the legal practice of proportionality.

To offer an alternative understanding of proportionality, this chapter proceeds by exploring the connection between the historical origins of proportionality, the political value of liberty and current legal practice. Proportionality and political theory were not always disconnected, and section II starts by unearthing the shared origins of proportionality and our modern understanding of liberty as a normative notion that includes a presumption of individual liberty. To better understand the notion of liberty in this presumption, section III then turns to philosophy and highlights that we can only make sense of proportionality by focusing on the real experience of being subject to a concrete exercise of state power. Finally, section IV analyses the presumption of liberty into three dimensions and illustrates different ways of incorporating these dimensions into a legal framework for thinking about restrictions of individual freedom, using the examples of Germany, Switzerland and the UK. This will allow me to conclude with some observations about what aspects of the general thinking behind proportionality are worth having in a modern liberal democratic state.

II. History: The Radicalism of Proportionality

I begin with an account of proportionality's initial introduction into eighteenth-century German[15] administrative law scholarship that preceded its role in basic rights practice. This account is necessarily stylised:[16] its main goal is to outline the continuities and discontinuities between the legal practice of proportionality and the liberal social contract tradition that inspired it. Only such a historical perspective allows us to understand proportionality in more than the narrowly legal terms of the 'proportionality test'.[17]

[12] This was not Hobbes' own view, see Hobbes (n 10) ch XIV. On the contrast between the state of nature and the civil condition, see also P Pettit, 'Statehood and Justice' (2022) 59 *Society* 140.

[13] See especially K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012) 73, 84–85.

[14] For example, in the aforementioned book, Kai Möller effectively wants to grant individuals a 'right to everything' based on an expansive understanding of autonomy that he identifies as the key value at stake in discussions of individual liberty; see ibid 33, 58.

[15] In the interest of stylistic simplicity, I will forgo historical accuracy and refer to the German states in the 18th century simply as 'German' or even 'Germany'.

[16] See T Würtenberger, 'Der Schutz von Eigentum und Freiheit im ausgehenden 18. Jahrhundert' in W Gose and T Würtenberger (eds), *Zur Ideen und Rezeptionsgeschichte des Preußischen Allgemeinen Landrechts* (Stuttgart, Friedrich Frommann Verlag, 1999) 55, for a detailed historical account.

[17] On the distinction between the 'proportionality test' and the idea of 'proportionateness', see also J Bomhoff, 'Beyond Proportionality: Thinking Comparatively about Constitutional Review and

It is difficult for us to comprehend today how radical the introduction of proportionality by political theorists and legal scholars like Carl Gottlieb Svarez (1746–98)[18] and Günther Heinrich Freiherr von Berg (1765–1843)[19] was for its time. From the perspective of a purely monarchical conception of legitimacy, the individual sphere imposes no limits on state power, and a purely monarchical conception of administrative law thus also suggests no limits within law.[20] This understanding of legitimacy was already in the course of changing within the liberal social contract tradition well before the eighteenth century,[21] and the corresponding conception of administrative law changed explicitly in eighteenth-century Germany with the emergence of proportionality in the work of scholars like Svarez and von Berg. These historical origins of proportionality in a nascent German administrative law scholarship that was inspired by the social contract tradition are often noted.[22] Yet it is not generally well understood how innovative the proposals of Svarez and von Berg were: they took the main insight of the liberal social contract tradition that all state power must be justified by reference to individual freedom; but they then went much further by connecting this insight to the need for an institutional justification of *concrete exercises* of state power that lead to an individual experience of a loss in freedom.

Svarez and von Berg were among the first to draw an explicit connection between a demand for positive justification for concrete restrictions of individual freedom, the public interest that may in principle answer this demand, and the idea of proportionality that determines how far this justification goes in concrete cases. To leave a purely monarchical conception of administrative law behind, the first step was the introduction of a public interest requirement for state action that interferes with individual freedom. Such a requirement can directly be derived from the social contract tradition. In the words of Svarez, the right to rule '*must be derived from a contract*, through which the citizens of the state have made themselves subject to the order of the ruler *for the advancement of their common happiness*'.[23] With a public interest requirement, it was no longer possible for the state to restrict individual freedom for arbitrary reasons, such as the whims of the

Punitiveness' in V Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge, Cambridge University Press, 2017) 152.

[18] CG Svarez, *Vorträge über Recht und Staat* (Köln und Opladen, Westdeutscher Verlag, 1960 [1791–92]).

[19] GH von Berg, *Handbuch des Teutschen Policeyrechts*, 1: *Teil* (Hannover, 1799).

[20] On the history of German public law in the late 18th century, see M Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Bd 1: *Reichspublizistik und Policeywissenschaft 1600–1800* (München, CH Beck, 2012) esp 372–85.

[21] See generally O Diggelmann, M Hertig Randall and B Schindler, 'Verfassung' in O Diggelmann, M Hertig Randall and B Schindler (eds), *Verfassungsrecht der Schweiz* (Zürich, Schulthess, 2020) 22–24.

[22] Compare A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72 and M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (Cambridge, Cambridge University Press 2013) 24–32, for two prominent English-language examples.

[23] Svarez (n 18) 467 (author's translation and emphasis added).

monarch. Yet even in the eighteenth century, it was relatively trivial to find a public interest that could in principle justify interferences with individual freedom.[24] This meant that there was a need for further requirements as to *how much interference with individual liberty* any given public interest could justify, and this need gave rise to the first versions of proportionality. In the words of von Berg, '[t]he police power may abridge the natural freedom of the subject, but only to such a degree as its legitimate purpose requires'.[25] This necessity requirement includes a presumption of liberty by opting against state interference with individual freedom unless the interference is necessary to pursue some legitimate purpose.

Yet to see how radical the proposals of Svarez and von Berg were, we must take a further step back and contrast them with their historical context. In general, both Svarez and von Berg relied on the intellectual background of their time, especially the liberal social contract tradition.[26] While Svarez was a political theorist in his own right,[27] von Berg developed his vision for administrative law from within the Enlightenment political theory that prevailed in Göttingen at the time based on the work of Johann Stephan Pütter[28] and Gottlieb Hufeland[29].[30] Yet with the more fine-grained lens of the legal scholar interested in the legal practice of proportionality,[31] their proposals can still be contrasted with the broader social contract tradition, and this provides the key for understanding the radicalism of proportionality. In general terms, a presumption of liberty as advocated by the broader social contract tradition refers to a need for a positive justification for state power to each individual subject who potentially has their liberty restricted by the powers of the state; but Svarez and von Berg advocated a specific version of that presumption.

The first contrast between proportionality and the broader social contract tradition concerns their *objects of justification.* On the one hand, the idea that state power finds its limits in an individual sphere of freedom may refer to the need to justify the general coercive structures of the state to each individual subject. This was the topic of the social contract theories of Hobbes,[32] Locke[33] and Kant,[34] and it would nowadays be referred to as a general theory of legitimacy. On the other

[24] On the later expansion of legitimate public interests in the welfare state, see P Lerche, *Übermass und Verfassungsrecht: Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismässigkeit und der Erforderlichkeit* (Goldbach, Keip Verlag, 1999) 46–49.

[25] Von Berg (n 19) 89 (author's translation).

[26] See generally W Kersting, *Die politische Philosophie des Gesellschaftsvertrags* (Darmstadt, Wissenschaftliche Buchgesellschaft, 2009).

[27] Svarez (n 18) esp 453–68.

[28] JS Pütter, *Beyträge zum Teutschen Staats- und Fürstenrechte*, Bd 1 (Göttingen, 1777) 354.

[29] G Hufeland, *Lehrsätze des Naturrechts und der damit verbundenen Wissenschaften* (Jena, 1790) paras 392, 557.

[30] Würtenberger (n 16) 63.

[31] See also ibid 55.

[32] Hobbes (n 10).

[33] J Locke, *Two Treatises of Government* (Cambridge, Cambridge University Press, 1988 [1689]).

[34] I Kant, *Die Metaphysik der Sitten* (Frankfurt, Suhrkamp Taschenbuch Wissenschaft, 1997 [1797]).

hand, however, the idea that state power finds its limits in an individual sphere of freedom may also refer to the need to justify concrete exercises of state power (such as discrete laws or even specific acts of law application) to the particular individuals who are relevantly affected by them. Unless one thinks that the general legitimacy of the state is enough to justify concrete exercises of state power,[35] these are separate matters, and the focus on justifying concrete exercises of state power is thus the first sense in which Svarez and von Berg went beyond the social contract tradition.

The second contrast between proportionality and the social contract tradition concerns their *levels of justification*. We must distinguish between the idea of *moral* justifiability that operates outside of concrete time and space – which is what most social contract theories focused on within their fictional state-of-nature stories – and a demand for *institutional* justification that operates in concrete time and space and needs to be answered by concrete institutional actors. Especially regarding von Berg, who is nowadays seen as one of the founding fathers of liberal administrative law,[36] it is tempting to link the previous distinction between objects of justification to these levels of justification. On such a view, what matters morally is the general justifiability of the coercive structures of the state; but the law also requires the concrete justifiability of discrete laws and acts of law application for more practical reasons.[37] Yet what in any case distinguishes Svarez and von Berg from the social contract tradition is that they demanded an institutional justification for concrete exercises of state power and thus combined a focus on concrete exercises of state power as the object of justification with a demand for justification at the institutional and not just the moral level.

The third contrast between proportionality and the social contract tradition concerns how they understand the *presumption* of liberty. Above, I referred to the presumption of liberty advocated by the social contract tradition in general terms as the need to offer a positive justification for state power to each individual subject who potentially has their liberty restricted by the powers of the state. But within the social contract tradition, a need for positive justification is often simply understood as *a condition of successful justification*, in the sense that each individual subject needs to be offered sufficient reasons to accept the power of the state *for it to be justified*.[38] The presumption of liberty behind proportionality goes further, in that it also includes *a prohibition of unjustified state interferences*. Svarez expressed this idea in strong form, arguing for a presumption in favour of liberty, 'as long as the greater weight [of countervailing considerations] is not obvious'.[39]

[35] See the dispute between D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford, Oxford University Press, 2017) 88 and K Möller, 'Justifying the Culture of Justification' (2019) 17 *International Journal of Constitutional Law* 1078, 1086.

[36] See Würtenberger (n 16) 63.

[37] D Kyritsis, 'Whatever Works: Proportionality as a Constitutional Doctrine' (2014) 34 *OJLS* 395, 412.

[38] J Rawls, *Political Liberalism* (New York, Columbia University Press, 2005) xlvi.

[39] Svarez (n 18) 39 (author's translation).

Today, the same idea is expressed when legal theorists such as Joel Feinberg maintain that 'liberty should be the norm, [and that] coercion always needs some special justification'.[40] What is clear is that proportionality did not just introduce a condition of successful justification but a genuine *presumption* of liberty that prohibits unjustified state interferences with individual freedom.[41]

The fourth contrast between proportionality and the social contract tradition concerns what the presumption *of liberty* is a presumption of. Since this question was not answered by either Svarez or von Berg, I will dedicate section III to discussing it in more philosophical terms. For now, it suffices to point out that any presumption of liberty that makes sense of the legal practice of proportionality – especially if that practice includes a proportionality requirement *stricto sensu*[42] and thus holds that even necessary interferences may still be disproportionate[43] – must be based on a normatively significant understanding of liberty. The required understanding of liberty must go beyond a mere licence to everything in the pre-political state of nature, yet it must also be more than whatever freedom the state ends up allowing its subjects once they have entered the civil condition.

Finally, we must look towards the present: in today's liberal democratic states, proportionality is inextricably linked to so-called fundamental or basic rights – in particular liberty rights like freedom of the person, freedom of speech and freedom of religion – that grant individual subjects discrete entitlements even against a legitimate government that satisfies the general conditions of the social contract.[44] Yet although these basic rights are often justified by reference to the social contract tradition,[45] the introduction of such rights into the legal order changes the role of proportionality.[46] On one prominent understanding of

[40] J Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (New York, Oxford University Press, 1984) 9.

[41] Within the law, this presumption also expresses itself in the form that the legislative and the executive branches must justify their actions to the affected individual, so that the judiciary will decide in favour of the individual if the justificatory bar has not been met. On this inter-institutional dimension of proportionality, see B Rütsche, 'Verhältnismässigkeitsprinzip' in Diggelmann, Randall and Schindler (eds) (n 21) 1049, para 41; as well as D Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York, Cambridge University Press, 2014) 255.

[42] On this terminology, see A Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge, Cambridge University Press, 2012) 340.

[43] Svarez himself already expressed the underlying idea: 'Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good.' See Svarez (n 18) 39 (author's translation).

[44] Whether Hobbes' social contract theory included such rights is controversial, see D Dyzenhaus, 'Hobbes's Constitutional Theory' in I Shapiro (ed), *Leviathan* (New Haven, CT, Yale University Press, 2010) esp 453–57. But more surprisingly, it is also controversial in the case of Kant, see Horn (n 5) 68–73.

[45] See, eg, J Rawls, *A Theory of Justice* (Cambridge, MA, Harvard University Press, 1971) 195–257.

[46] Compare R Poscher, 'Das Grundgesetz als Verfassung des verhältnismässigen Ausgleichs' in M Herdegen and others (eds), *Handbuch des Verfassungsrechts: Darstellung in transnationaler Perspektive* (Munich, CH Beck, 2021) 149, para 35.

basic rights, they establish a strong presumption of rights protection where it is normatively appropriate.[47] Far from proportionality's further strengthening this presumption of rights protection, a proportionality requirement on state action that interferes with individual freedom potentially weakens the presumption of rights protection by allowing rights to be limited whenever it is proportionate in the concrete circumstances at hand.[48]

With this ambivalent relationship between proportionality and basic rights, we have arrived at the question of the extent to which the current legal practice of proportionality still incorporates a presumption of liberty. The 'proportionality' or 'two-step framework' for thinking about restrictions of basic rights distinguishes between a first 'scope' stage that recognises a relatively broad class of discrete basic rights and a second 'justification' stage that allows these rights to be limited subject to a proportionality requirement. Much criticism has focused on the rights inflation that proportionality potentially enables at the first scope stage, which fits the charge of disproportionate individualism and suggests a strong presumption of liberty. Yet the same proportionality framework for thinking about restrictions of basic rights also potentially enables a 'disproportionate communitarianism'[49] that allows rights to be limited whenever opportune for the community at hand.[50] This ambivalence between individualism and communitarianism is central to the current legal practice of proportionality.[51] To make sense of the extent to which the current legal practice of proportionality incorporates a presumption of liberty, we must then find a way to split the difference between disproportionate individualism and disproportionate communitarianism.

III. Philosophy: A Presumption of …?

We can only make sense of the understanding of liberty that underlies the current legal practice of proportionality if we focus on the real experience of being subject to concrete forms of state power. In the introduction to this chapter, I noted that proportionality is absent from the canon of liberal political theory. I can now further clarify why this is the case: for the idea of proportionality to seem pointful, a theorist needs to engage with the real experience of individuals who are

[47] B Schlink, 'Freiheit durch Eingriffsabwehr: Rekonstruktion der klassischen Grundrechtsfunktion' (1984) *Europäische Grundrechte Zeitschrift* 457; A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press, 2009) 242.

[48] See also J Greene, 'Foreword: Rights as Trumps?' (2018) 132 *Harvard Law Review* 28, 30 (comparing the dominant approach of the US Supreme Court for thinking about restrictions of basic rights with the proportionality framework).

[49] For the use of the term 'communitarianism' in political theory, see S Mulhall and A Swift, *Liberals and Communitarians* (Oxford, Blackwell Publishing, 1996) xiii.

[50] Proportionality has been the subject of numerous doctrinal and philosophical critiques that allege that it renders basic rights adjudication too communitarian. See, eg, B Schlink, *Abwägung im Verfassungsrecht* (Berlink, Duncker & Humblot, 1976) and FJ Urbina, *A Critique of Proportionality and Balancing* (Cambridge, Cambridge University Press, 2017).

[51] See especially BVerfGE 4, 7 (1954) (*Investitionshilfegesetz*).

subject to concrete forms of state power. But whereas today's all-encompassing state simply did not exist when the great theorists of the social contract tradition, Hobbes, Locke and Kant, wrote, contemporary political theory has been notoriously uninterested in real political experience.[52] This is why the previous section relied on the historical intermediaries Svarez and von Berg – who were hybrids between political theorists and legal scholars[53] – to introduce the practical point of proportionality. Yet my interests in this chapter are ultimately not historical but philosophical and legal:[54] I want to show *why* proportionality is pointful for us now and around here. I therefore now turn to a philosophical account of the political value of liberty to elucidate the uses that proportionality might have for us today.

A. From Primitive Freedom …

My starting point is the individual experience of being subject to a concrete exercise of state power that leads to a perceived loss in freedom. For Svarez and von Berg, who focused on concrete restrictions of individual freedom in police law, this was the natural starting point. Yet although such a focus on concrete exercises of state power is largely absent from contemporary political theory, the philosopher Bernard Williams also advocated starting with real experience when trying to make sense of liberty as a political value. Williams generally thought that contemporary political theory was too abstract and 'untrue to a great deal of human experience'.[55] When offering his account of the political value of liberty, Williams thus highlighted the primordial experience that even some desirable measure may involve a cost to one's freedom. It is 'one datum of that experience,' he stressed, 'that people can even recognize a restriction as rightful under some political value such as equality or justice, and nevertheless regard it as a restriction on liberty'.[56] In a manner that dovetails with the doctrinal distinction between 'infringing' and 'violating' a basic right in the proportionality framework,[57] Williams distinguishes between *costs* in liberty as normatively significant losses that should be acknowledged and respected even when ultimately justifiable, and state actions

[52] See the prominent philosophical critiques by R Geuss, *Philosophy and Real Politics* (Princeton, NJ, Princeton University Press, 2008); and B Williams, 'Realism and Moralism in Political Theory' in G Hawthorne (ed), *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton, NJ, Princeton University Press, 2005) 1.

[53] On the important role of such 'in-between figures' in political and legal thought, see J-W Müller, 'The Triumph of What (If Anything)? Rethinking Political Ideologies and Political Institutions in Twentieth-Century Europe' (2009) 14 *Journal of Political Ideologies* 215.

[54] For how these interests may be combined, see D Cueni, 'The Idea of Humanistic Middle-Range Theory' in V Rodriguez-Blanco and D Peixoto Murata (eds), *Bernard Williams: From Responsibility to Law and Jurisprudence* (Oxford, Hart Publishing, forthcoming).

[55] B Williams, 'Pluralism, Community and Left Wittgensteinianism' in Hawthorne (ed) (n 52) 29, 32.

[56] B Williams, 'From Freedom to Liberty: The Construction of a Political Value' in Hawthorne (ed) (n 52) 75, 84.

[57] For a more detailed account of this distinction that explicitly explores this connection, see Cueni (n 2).

that *wrong* someone because they are unjustifiable and thus deny a rightful claim. He maintained that '[t]he notion of a cost in liberty is at least as well entrenched in historical and contemporary experience as that of a rightful claim in liberty',[58] and searched for a way to make sense of this notion.

In trying to make sense of the notion of a cost in liberty based on some 'widely spread human experience',[59] Williams started out with the '[t]he simple idea of being unobstructed in doing what you want by some form of humanly imposed coercion' and called it 'primitive freedom'.[60] Williams focused on primitive freedom because he thought that the *experience* of resenting the restriction of one's primitive freedom animates the use of the *concept* of liberty as a device by which to address that experience. But even though *any* restriction of primitive freedom can trigger an experience of resentment, a *general* presumption of freedom cannot find support in the bare idea of primitive freedom, because not all experiences of resentment in response to restrictions of someone's primitive freedom are *politically* significant as a cost in liberty *as a political value*.[61] Let me offer two examples before clarifying what is meant by this: during the Covid-19 pandemic, the lockdowns triggered strong resentment that was politically significant, although this resentment arguably did not give rise to a rightful claim in liberty because the lockdowns were justifiable. Yet, to adapt an example from Ronald Dworkin, while some academics may just as strongly resent the fact that they may not freely murder their critics,[62] this resentment is not even politically significant and can thus simply be ignored. To make sense of a presumption of liberty, we then need to move 'from freedom to liberty' – that is, we need a notion of freedom *as a political value* that is normatively significant enough to underwrite a presumption of liberty.

In contemporary political theory, moving from freedom as mere licence to a normatively significant understanding of liberty is typically thought to require a *moralised* or *rights-based* account of liberty.[63] A rights-based account of liberty holds that a restriction of someone's primitive freedom is not a cost in liberty if that restriction was rightful, that is, if it was in accordance with the demands of justice. Rights-based accounts of liberty have been defended by, amongst others, John Locke,[64] Immanuel Kant,[65] Nicolas de Condorcet,[66] Robert Nozick[67] and

[58] Williams (n 56) 84.
[59] ibid 76.
[60] ibid 79.
[61] ibid 83.
[62] R Dworkin, 'Do Liberal Values Conflict?' in M Lilla, R Dworkin and S Silvers (eds), *The Legacy of Isaiah Berlin* (New York, New York Review of Books, 2001) 88–89.
[63] See RM Bader, 'Moralizing Liberty' in D Sobel, P Vallentyne and S Wall (eds), *Oxford Studies in Political Philosophy*, vol 4 (Oxford, Oxford University Press, 2018) 141 for an overview.
[64] J Locke, *Two Treatises of Government* (n 33), Second Treatise, § 6.
[65] Kant (n 34) VI: 231.
[66] N de Condorcet, 'Sur les élections' in F Arago and A Condorcet-O'Connor (eds), *Oeuvres: Nouvelle impression en facsimilé de l'édition Paris, 1847–1849* (Stuttgart, Friedrich Frommann, [1789]) 100.
[67] R Nozick, *Anarchy, State, and Utopia* (Oxford, Blackwell, 1974) 262.

Ronald Dworkin.[68] Dworkin expresses the central idea most clearly when he distinguishes between a purely descriptive notion of 'total freedom' as someone's 'power to act in whatever way he might wish' and a normative notion of 'rightful freedom' as the area of someone's total freedom 'that a political community cannot take away without injuring him in a special way'.[69] Inspired by accounts such as Condorcet's, who defined liberty as 'all that is not contrary to the rights of others',[70] even The French Declaration of the Rights of Man and of the Citizen famously maintained that 'Liberty consists in being able to do anything that does not injure another.'[71] The unifying thought behind all these rights-based accounts of liberty is that a genuine cost in liberty must correspond with the conditions of rightful freedom under just institutional arrangements.[72] For these rights-based accounts, liberty does not mean more than the freedom that the state *should* end up allowing, and these accounts thus conflate the notion of a *wrong* and the notion of a normatively significant *loss* in liberty.

B. … to Liberty as a Political Value and Proportionality

To make sense of the idea of liberty as it figures 'in political argument and political conflict',[73] space needs to be found for a notion of a genuine cost in liberty that is narrower in scope than a loss in primitive freedom yet also wider in scope than the rightful freedom that cannot be taken away from someone without wronging them. As I have argued in detail elsewhere,[74] the required moderately capacious notion of a genuine cost in liberty can be derived by combining what I call the realism and the pluralism constraint on genuine costs in liberty.

On the one hand, the notion of a genuine cost in liberty must heed the realism constraint that not all experiences of a loss of one's primitive freedom give rise to a form of resentment that may count as minimally presentable in the circumstances of modern institutional politics. For example, a complaint against the power of the state as such fails to be a reasonable claim in liberty in the relevant sense,[75] as does a complaint against being prevented by the powers of state from freely

[68] R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, Harvard University Press, 2011) 366.

[69] ibid, for both quotations.

[70] Condorcet (n 66) 100 (author's translation).

[71] Translation provided in D van Kley (ed), *The French Idea of Freedom: The Old Regime and the Declaration of Rights 1789* (Stanford, CA, Stanford University Press 1994) 1.

[72] I have offered a general criticism of such juridical constructions of political values in D Cueni, 'Constructing Liberty and Equality – Political, Not Juridical' (2024) 15 *Jurisprudence* 241.

[73] Williams (n 56) 84.

[74] See Cueni (n 72), as well as Cueni (n 2).

[75] The use of 'reasonable' in Williams (n 56) 92 should not be confused with the sense of 'reasonable' in Rawls (n 38) xlv–xlix, which has been appropriated for proportionality review by M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 141, 168–70.

murdering one's critics. These are claims that simply cannot reasonably be made while also accepting the need for the state as a legitimate political and legal authority that orders the basic relations between its subjects.[76] On the other hand, the pluralism constraint highlights that there are limits as to how narrow the notion of a genuine cost in liberty may be in the circumstances of political pluralism that characterise modern liberal democratic states. These circumstances rule out fully moralised, rights-based accounts of liberty, since only an understanding of liberty that amounts to more than rightful freedom allows us to acknowledge the normatively significant costs that even rightful state action may entail and to respect the claims in liberty made by our political opponents that disagree with us about matters of justice. This combination results in a normative account of liberty (since it includes the demands of modern politics within the realism constraint) that is only weakly normative (since it stops short at including the full demands of justice because of the pluralism constraint).

Based on this moderately capacious understanding of liberty as a political value, the fundamental advantage of proportionality over alternative legal frameworks for thinking about concrete restriction of individual freedom is that proportionality directly incorporates the experience of a loss in liberty into the law. Proportionality allows a legal order to recognise experiences of loss whenever they are minimally presentable, and therefore does not hide the conflict between private and public interests that is the topic of our disputes about matters of justice. As John Skorupski has argued in his panoramic analysis of thinking about freedom in Europe from the French Revolution to the end of the nineteenth century:

> The really dangerous notion, from a liberal standpoint, is the notion that conflict between particular and general interests can be somehow abolished. It is a cornerstone of liberalism that this cannot be. There is no collective subject; there are individual subjects who have common interests but also diverging, and often competing, ones.[77]

Proportionality is uniquely suited to acknowledging this normative conflict within a legal framework for thinking about concrete restrictions of individual freedom, since it explicitly requires legal decision-makers to transparently identify, weigh and consider competing private and public interests.[78] If the experience of resenting restrictions of primitive freedom animates the use of a moderately capacious notion of liberty as a device by which to address that experience *in the*

[76] B Williams, 'Liberalism and Loss' in M Lilla, R Dworkin and S Silvers (eds), *The Legacy of Isaiah Berlin* (New York, New York Review of Books, 2001) 91, 93.

[77] J Skorupski, *Being and Freedom: On Late Modern Ethics in Europe* (Oxford, Oxford University Press, 2021) 430. Most contemporary political and legal theorists who defend a rights-based understanding of liberty do not deny that there are conflicts between individual and collective interests in the descriptive sense. What Dworkin, for example, denies is that conflicts between interests give rise to genuine normative conflicts as a matter of principle. But this dichotomy between interest and principle can be equally problematic, see also M Queloz, 'The Dworkin–Williams Debate: Liberty, Conceptual Integrity, and Tragic Conflict in Politics' (2024) 109 *Philosophy and Phenomenological Research* 3.

[78] For the various things that might be meant by the ubiquitous references to this process as 'balancing', see Möller (n 13) 134–77.

political case, then proportionality further incorporates that experience *within our legal framework* for thinking about concrete restrictions of individual freedom.[79]

This section has shown that we must distinguish between the pre-political notion of primitive freedom, costs in liberty as a political value and the idea of rightful freedom to properly understand the presumption of liberty that underlies the current legal practice of proportionality. By moving from the history of proportionality to a philosophical account of the political value of liberty, we have seen that the dichotomy between normatively *insignificant* restrictions of total freedom and normatively *significant* restrictions of rightful freedom that characterises the back and forth between proponents and critics of proportionality omits an important idea, namely, the notion of a genuine cost in liberty that is narrower in scope than total freedom but broader in scope than rightful freedom. This idea of a genuine cost in liberty is both normatively significant enough and extensionally capacious enough to make sense of the presumption of liberty that underlies the current legal practice of proportionality.

IV. Law: Three Dimensions of the Presumption

I now finally turn to the current legal practice of proportionality and analyse the presumption of liberty into three dimensions to illustrate *how* different jurisdictions incorporate the real experience of a loss in liberty into their legal framework for thinking about concrete restrictions of individual freedom: (i) the expressive dimension concerns the degree to which the state acknowledges and respects individual costs in liberty; (ii) the institutional dimension concerns a presumption in favour of granting individuals an institutional right to complain against restrictions of their liberty; and (iii) the substantive dimension concerns the extent to which the state grants individuals an effective right to pursue their freedom and thus allows for activities such as free speech. While my arguments in this section are mainly analytical and descriptive, I also suggest that liberal democratic states have good reason to adopt a presumption of liberty in their legal frameworks along some dimensions yet not others.

A. The Expressive Dimension

The expressive dimension of the presumption of liberty concerns the degree to which official state organs acknowledge and respect individual costs in liberty. Along this dimension, we ask to what extent the state acknowledges and respects an individual's claims to have been restricted in their freedom *as a cost in liberty*, and potentially also *as a basic rights infringement.*

[79] See also von Berg (n 19) 90.

To understand the expressive dimension of the proportionality framework for thinking about concrete restrictions of individual freedom, we must distinguish four categories for describing individual experiences of loss: costs in mere interests that are due to restrictions of primitive freedom; genuine costs in liberty as a political value; particularly grievous costs in liberty (ie basic rights infringements); and costs in all these senses that *wrong* someone (ie basic rights violations).[80] The leading basic rights theories collapse these four categories: they either argue that the category of basic rights infringements should even include mere restrictions of someone's primitive freedom (thus combining the first three categories into one category and contrasting it with the fourth);[81] or they argue that the category of basic rights infringements should track state actions that ultimately wrong someone (collapsing the final two categories) and fail to distinguish between mere costs in interests and costs in liberty (combining the first two categories).[82] Yet the legal frameworks for thinking about concrete restrictions of individual freedom in my three example jurisdictions of Germany, Switzerland and the UK all lie between these theoretical extremes.

No example jurisdiction recognises all costs in mere interests as a basic rights infringement. Even the general right to liberty in Article 2(1) of the German Basic Law,[83] which notoriously includes a right to feed pigeons in a public park,[84] still excludes collectively harmful activities that would be entailed by a right to everything. But a general right to liberty is in any case an exception among jurisdictions that use the proportionality framework. Both Switzerland and the UK do not recognise all costs in liberty as a basic rights infringement, since they do not recognise a general right to liberty like Article 2(1) GG. The scope of specific basic rights like freedom of religion[85] or freedom of expression[86] in these jurisdictions rather occupies the conceptual space between a narrow focus on state actions that ultimately wrong someone and a broad right to liberty. Even the right to personal freedom in Article 10 of the Swiss Federal Constitution protects only essential aspects of personal freedom and thus excludes trivial matters such as the costs in liberty that are due to restrictions on how many dogs one person may simultaneously take on a walk.[87] Yet adopting a more restrictive view of what amounts

[80] For a more detailed account, see Cueni (n 2).

[81] See, eg, Möller (n 13) 57–72.

[82] See, eg, Greene (n 48) 32, discussing Dworkin's theory of 'rights as trumps'. But Dworkin (n 68) 366, even combines the final three categories, since he only distinguishes between total freedom (the first category) and liberty as rightful freedom (the final category).

[83] Art 2(1) German Basic Law (*Grundgesetz*, GG) of 23 May 1949.

[84] BVerfGE 54, 143 (1980) (pigeon feeding).

[85] Art 15 Swiss Federal Constitution (*Bundesverfassung*, BV) of 18 April 1999; Art 9 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (European Convention on Human Rights (ECHR)).

[86] Art 16 BV; Art 10 ECHR.

[87] Urteil des Bundesgerichts 2C_856/2013 vom 10. Februar 2014 (dog walking). For a similar argument in the German context, see Judge Dieter Grimm's dissenting opinion in BVerfGE 80, 137 (1989) (riding horses in the woods).

to a basic rights infringement does not mean that mere costs in liberty are not recognised within the legal framework for thinking about concrete restrictions of individual freedom at all.

Those jurisdictions that use proportionality but take a more restrictive view of what amounts to a basic rights infringement may still recognise all costs in liberty through a *general proportionality standard*.[88] Consider a stylised contrast between the broad interpretation of the ECHR advocated by proponents of the 'right to everything' in a jurisdiction like the UK that lacks a separate domestic basic rights catalogue,[89] the general right to liberty in Germany, and the general proportionality standard in Switzerland. Proponents of the right to everything advocate an extremely broad interpretation of ECHR rights like the right to respect for private life in Article 8, so that it even covers trivial costs in liberty such as a restriction of one's ability 'to sleep well'.[90] Much better in expressive terms is the German 'hybrid' approach that recognises a *general* right to personal freedom that includes all costs in liberty – including relatively trivial matters such as costs in liberty that are due to a restriction on feeding pigeons in a public park[91] – and then also recognises *more specific* basic rights, like freedom of religion, that may be used to acknowledge and respect certain costs in liberty in a special way. Even better in expressive terms, however, is the Swiss approach that combines specific basic rights like freedom of religion with a general *constitutional* proportionality standard that is explicitly recognised in Article 5(2) BV. This approach allows the Swiss legal authorities to distinguish between infringements of specific basic rights and those restrictions of individual liberty that do not amount to a basic rights infringement but should nevertheless be acknowledged and respected as a cost in liberty at the constitutional level.[92]

B. The Institutional Dimension

T*he institutional dimension* of the presumption of liberty concerns the degree to which jurisdictions incorporate a presumption in favour of granting individuals an institutional right to complain against restrictions of their liberty. Along this

[88] Since whether the UK accepts a general proportionality standard is controversial, I will here focus on the Swiss example, notwithstanding the fact that even so-called '*Wednesbury* reasonableness' includes some recognition of costs in liberty.

[89] As a disclaimer, I do not wish to suggest that the extremely broad interpretation discussed is the correct way of interpreting the ECHR.

[90] See G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, Oxford University Press, 2007) 126, referring to *Hatton v United Kingdom* [2003] EHRR 338, para 96 (noise pollution).

[91] BVerfGE 54, 143 (1980) (pigeon feeding).

[92] To distinguish it from basic rights, the general constitutional proportionality standard in Switzerland is also referred to as a 'Grundsatz des rechtsstaatlichen Verwaltungshandelns', see U Häfelin, G Müller and F Uhlmann, *Allgemeines Verwaltungsrecht* (Zürich/St Gallen, Dike, 2020) 76.

dimension, we ask to what extent the state grants individuals an institutional right to complain against concrete restrictions of their freedom.

What makes legal orders liberal is not just the *substantive content* of their laws and policies but also that they allow for *individualised legitimation procedures* that purport to answer individualised legitimation demands. Liberal legal orders that grant their subjects *basic rights* that have an individualised legitimation procedure as their *procedural corollary* are based on the idea that the general legitimacy of the political and legal system is not enough to legitimate *concrete* exercises of state power *for the subjects* that suffer certain grievances.[93] This institutional dimension of the presumption is the main focus of a range of scholarly proposals that advocate a right to everything under the banner of a 'culture of justification'.[94] Yet the revisionary implications of an institutional 'right to justification' that effectively grants individual subjects a general right to rights-based judicial review for any law or act that relevantly affects their interests are the subject of severe criticism. For Tsakyrakis, for example, the most striking implication of a broad understanding of basic rights 'is that it renders any interference with a person's total freedom a potential human rights violation or at least the starting point for a human rights inquiry'.[95] The culture of justification advocates a strong presumption of liberty along the institutional dimension that leads to a situation where activities 'such as falconry, or feeding pigeons on public squares, or spitting on the public sidewalk raise human rights issues just as torture or censorship does'.[96]

Yet none of my three example jurisdictions recognises all costs in interests as a basic rights infringement, which means that no example jurisdiction recognises a right to rights-based judicial review for all restrictions of individual interests. Since only a basic rights infringement triggers a right to rights-based judicial review, the descriptive case against a general right to rights-based judicial review was already made above when arguing that no example jurisdiction recognises all costs in interests that are due to restrictions of someone's primitive freedom as a basic rights infringement. It is true that 'ordinary' administrative law review procedures also offer an individualised justification for concrete restrictions of individual freedom in a more inclusive sense of an individualised justification. But widening the scope of basic rights to include a right to everything blurs the important distinction between rights-based judicial review and 'ordinary' administrative law review. The culture of justification may *want* to blur this distinction. Yet the

[93] This idea is still under-theorised, but see A Harel, *Why Law Matters* (Oxford, Oxford University Press, 2014) 202–16. For doctrinal discussions, see J Dubey, 'Art. 36' in V Martenet and J Dubey (eds), *Commentaire Romand: Constitution fédérale* (Basel, Helbing Lichtenhahn, 2021) 1052, 1065–66 (for Switzerland) and Kavanagh (n 47) 343–44 (for the UK).

[94] See Möller (n 35) 1080–84 for an overview.

[95] Tsakyrakis (n 7) 7, referencing Kumm (n 75) 151.

[96] Tsakyrakis (n 7) 7.

broader the alleged basic rights become, the less plausible it is that they give rise to an institutional right to complain that amounts to anything like a right to rights-based judicial review.[97]

To recognise the pointfulness of the distinction between rights-based judicial review and ordinary administrative law review, reconsider the contrast between the broad interpretation of ECHR rights advocated by the culture of justification in a jurisdiction like the UK, the general right to personal freedom in Germany and the general constitutional proportionality standard in Switzerland. In principle, specific basic rights like Article 9 ECHR, which protects freedom of thought, conscience and religion, are meant to institute a strong presumption of liberty for certain basic liberties that increases the justificatory bar for state activities that infringe these basic liberties. But the more the meaning of basic rights provisions like 'freedom of religion' gets extended, the less the fact that a state activity infringes the right in question may determine the appropriate justificatory bar.[98] Much better also in institutional terms is the German 'hybrid' approach that distinguishes between the relatively low justificatory bar that must be cleared to justify infringements of the general right to liberty in Article 2(1) GG and the higher justificatory bar that must be cleared to justify infringements of specific basic rights like the right to freedom of expression in Article 5(1) GG.[99] Finally, Article 5(2) BV declares that all 'state action must be proportionate', which may be taken to suggest that every single state action in Switzerland must clear the same justificatory bar. Yet even Swiss legal practice continues to restrict the *judicial* proportionality review of legislative and executive acts in a variety of ways unless basic rights are concerned.[100] What these examples show is that the distinction between rights infringements and ordinary setbacks to interests does have a distinct practical point in all three jurisdictions.

C. The Substantive Dimension

Finally, *the substantive dimension* of the presumption of liberty concerns the degree to which the state ultimately allows for activities such as free speech. Along this dimension, we ask to what extent the state grants individuals an effective right

[97] This critique of a general right to rights-based judicial review is further explored in D Cueni, 'Basic Rights as Special Legitimation Demands: A Critique of the Culture of Justification' (manuscript on file with the author).

[98] As a matter of legal doctrine, in most jurisdictions the appropriate justificatory bar is *also* determined by the *severity* of the infringement in the case at hand.

[99] On this distinction, see E-W Böckenförde, 'Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik' (2003) 42 *Der Staat* 165, 188–90.

[100] BGE [Entscheidungen des Schweizerischen Bundesgerichts] 134 I 153 [Schulausschluss]. See also Rütsche (n 41) paras 34–48; and M Müller, *Verhältnismässigkeit: Gedanken zu einem Zauberwürfel* (Bern, Stämpfli Verlag, 2023) 110–21.

to pursue their freedom, that is, a definite right to certain basic liberties that ultimately enjoy legal protection.

Liberal legal orders are substantively liberal in that they grant individuals certain basic liberties that allow the exercise and enjoyment of various freedoms such as free speech.[101] This substantive dimension of the presumption will be very familiar to most readers, as substantive rights such as freedom of speech are the hallmark of any state that aspires to a liberal vision of justice.[102] In such states, speech is not just free in the sense that the state is *factually unable* to restrict it; speech is free in the sense that there is a *normative expectation* that free speech is to be the norm. What may be less familiar is the idea that a substantive presumption of free speech and the institutional enforcement of that presumption may come apart, so that there is a substantive presumption in favour of individual liberty that any given individual may not institutionally enforce upon demand. In principle, there could be a state that allows for no individualised complaints against its decisions (this imaginary state would thus be very weak on the institutional dimension of the presumption) but grants individuals considerable freedom because the state under discussion is governed by philosophical libertarians[103] who think that individuals are due such extensive liberties (this imaginary state would therefore be very strong on the substantive dimension of the presumption).

Does using a proportionality framework for thinking about concrete restrictions of individual freedom affect the degree to which states grant individuals an effective right to pursue their freedom? Looking at my example jurisdictions, the answer is 'not necessarily', since this depends both on what conception of proportionality these jurisdictions adopt at the justification stage, and on how legal decision-makers balance the considerations that are pertinent in the concrete circumstances at hand. In Germany, Switzerland and the UK, it is impossible to gauge in the abstract how much individual freedom basic rights ultimately grant in concrete circumstances without also considering the pertinent public interests as well as the basic rights of other individuals.[104] While there is a close connection between proportionality and a presumption of liberty in the expressive and institutional senses discussed, there is thus no *a priori* or general connection between proportionality and a greater or lesser degree of the substantive presumption of liberty.[105] Some scholars even claim that the proportionality framework makes it easier to limit basic rights than other legal frameworks for thinking about concrete

[101] See generally P Pettit, 'The Basic Liberties' in M Kramer et al (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (Oxford, Oxford University Press, 2008) 201.

[102] Compare Rawls (n 45) 61.

[103] See, eg, Nozick (n 67).

[104] See M Loughlin, *Foundations of Public Law* (Oxford, Oxford University Press 2010) 369–70 (focusing on the UK and Germany); and Müller (n 100) 68 (focusing on Switzerland).

[105] That a strong presumption of liberty in expressive and institutional terms must not coincide with a strong presumption of liberty in substantive terms is evidenced by the recent climate change decision of the German Constitutional Court on the need to restrict individual freedom to safeguard the future freedom protected by Art 2(1) GG. See *Neubauer et al v Germany* (1 BvR 2656/18) para 117.

restrictions of individual freedom and thus weakens the substantive presumption of rights protection.[106] But be that as it may, whether proportionality *is* 'an assault on human rights'[107] depends on many factors that are not intrinsic to proportionality as such.

V. Conclusion

The idea of proportionality only makes sense in a world where public and private interests conflict *and* where normative demands are placed on the state as to how it is to go about acting in the face of these conflicts. It is one of the ineliminable truths of political life in a modern and pluralistic society that the collective pursuit of important goals will routinely conflict with the private aims of individuals. This conflict gives rise to another indubitable truth, namely, that some individuals will experience even highly desirable measures – such as the introduction of a legal duty to replace personal heating systems in the interest of more effectively combatting climate change[108] – as involving a cost in freedom. But what normative demands are to be placed on a modern liberal democratic state that is faced with such claims to have suffered a cost in freedom? Assuming that the state was justified in acting as it did, and therefore did not wrong anyone, should it simply brush these claims aside, or should it still recognise these claims within its legal framework for thinking about concrete restrictions of individual freedom?

In this chapter, I have drawn on history, philosophy and current legal practice in order to explain that the key advantage of proportionality over alternative legal frameworks for thinking about concrete restriction of individual freedom is that it directly incorporates into the law a recognition of the costs in liberty that arise from this conflict between public and private interests. As we have seen in section II, the crucial insight that concrete exercises of state power may lead to an individual experience of a loss in freedom that even a legitimate state that acts in the public interest needs to take seriously, already animated the introduction of proportionality in eighteenth-century German administrative law scholarship. Section III then provided the philosophical foundations for distinguishing four categories for describing restrictions of individual freedom that explain why not all restrictions of individual freedom should be treated as legally significant: costs in mere interests that are due to restrictions of primitive freedom; genuine costs in liberty as a political value; particularly grievous costs in liberty (ie basic rights infringements); and costs in all these senses that *wrong* someone (ie basic rights violations). Finally, section IV focused on current legal practice and showed that

[106] Greene (n 48) 30, 58.
[107] Tsakyrakis (n 6) 468.
[108] See BGE 149 I 49 (Elektroheizung).

none of my three example jurisdictions – Germany, Switzerland and the UK – treats mere costs in interests that are due to restrictions of primitive freedom as legally significant, even though they all differ in how they treat costs in liberty that do not amount to a basic rights infringement. The result is a nuanced account of the current legal practice of proportionality that highlights the benefits of generously recognising normatively significant losses while also putting pressure on the alleged connection between proportionality and an expansive or 'total' understanding of freedom that underlies much of the debate about the merits and demerits of proportionality.

What conclusions we draw from this account of proportionality's normative significance will depend on the institutional and normative contexts we focus on. In most jurisdictions, the idea of proportionality is nowadays closely linked to the idea of justifying restrictions of basic rights. In this context, the heart of Tsakyrakis' critique is that proportionality allows for a 'definitional generosity'[109] at the first-scope stage of basic rights adjudication that trivialises the very idea of such rights and thus 'makes easy promising easier'.[110] Yet if the heart of Tsakyrakis' critique is that proportionality makes easy promising easier, then the heart of my response is that this easy promising gives effect to a presumption of liberty that is a venerable part of liberalism[111] and manifests itself within our legal frameworks for thinking about concrete restrictions of individual freedom along the three dimensions – expressive, institutional and substantive – that I have outlined in this chapter. Individuals get much more than just a disappointed promise when they come to a court with a claim to have suffered a basic rights infringement that is then deemed to be proportionate and thus justifiable. Even when the law's promise of substantive rights protection is ultimately disappointed, the affected individual got a special institutional justification that was tailored to the concrete circumstances at hand; and they also got their personal loss acknowledged and respected as a basic rights infringement by an official organ of the state.

My chapter also makes clear that proportionality must not be restricted to the idea of justifying restrictions of basic rights, yet the explicit recognition of a general constitutional proportionality standard, as in my example jurisdiction Switzerland, raises further questions that have so far not received much attention. Chief among these is the question of how the state's reactions to 'mere' restrictions of individual liberty that do not amount to a basic rights infringement should then still differ from the state's reactions to restrictions of basic rights in expressive, institutional and substantive terms.[112] For example, institutionally we might think that a general constitutional proportionality standard requires all legislative and

[109] Tsakyrakis (n 6) 480.

[110] I thank Vasiliki Christou for suggesting this phrasing.

[111] See also Williams (n 56) 95.

[112] In the Swiss doctrinal context, compare also B Weber-Dürler, 'Ablösung der Freiheitsrechte durch rechtsstaatliche Verfassungsprinzipien?' in A Auer and P Zen-Ruffinen (eds), *De la Constitution, Festschrift für Jean-François Aubert* (Basel, Helbing & Lichtenhahn, 1996) 437.

administrative acts that give rise to restrictions of individual liberty to be subject to comprehensive proportionality review, regardless of whether they infringe a discrete basic right. Yet Swiss legal practice vehemently rejects this conclusion, especially regarding the review of cantonal acts by the Swiss Federal Supreme Court.[113] If we follow the dominant understanding of a 'culture of justification' in presuming that there must be a close connection between proportionality and a right to *judicial* proportionality review, this seems to be a case of insufficient constitutional implementation. But if we are ready to move away from this presupposition, we instead might explore the idea of situating the role of judicial proportionality review within a wider sense of institutional justification.[114] After all, the analysis of the presumption of liberty in this chapter has already shown that there is much to gain from leaving some of the presuppositions that characterise the opposition between advocates and critics of proportionality behind when trying to arrive at a more nuanced understanding of proportionality's actual and potential role in modern liberal democratic states.

[113] See especially BGE 134 I 153 (Schulausschluss).
[114] For some suggestions in that direction, see Dyzenhaus (n 41) 242.

PART D

Beyond ‘Total Freedom’

9

From Rights to Policies: Facing the Giant of Proportionality

VASSILIKI CHRISTOU

I. Introduction

In his influential article of 2009, 'Proportionality: An Assault on Human Rights?', Stavros Tsakyrakis questioned proportionality and balancing as a way to argue in human rights cases.[1] Tsakyrakis explained that the proportionality test distracts from the real issues and overshadows the real moral arguments underlying each case. In the meantime, proportionality has gained ground as an overarching decision-making strategy. Expanding the scope of the principle has started with federal structures, traditional as in the United States (US) or less traditional as in the European Union (EU). Under Section 8 of the US Constitution, Congress has the power to make all laws 'necessary and proper' for carrying into execution the enumerated powers vested in it, whereas according to Article 5(4) of the Treaty on European Union (TEU), '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. Proportionality, especially in its necessity component, has functioned as a principle governing the intensity of regulatory intervention by central power in Member States.

Moreover, proportionality has quickly found its way into national legislation as a best legislative practice. In this respect, law making should follow good practice, which, amongst other things, relies on the law's being adequately justified to survive the proportionality test; a parliamentary statute can be declared unconstitutional simply because of the lack of sufficient justification, or even because of the lack of specialised scientific studies showing that the law is proportionate.[2] In other words, proportionality no longer functions merely as a means of moderating

[1] S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468.

[2] Greek Council of State Opinion nos 123/2007; 2192/2014; 2287/2015.

restrictions on fundamental rights, as the German 'Schranken-Schranken'[3] theory suggests; it has become, first, a regulator of the intensity of the exercise of state power on a vertical level and, second, an all-encompassing strategy for rationalising public policies.

Therefore, in this chapter, I will focus, first, on the question of whether proportionality, as a decision-making method that originated in the human rights field and which is now being extended to public policy making, has possibly become an inflated concept with no material coherence, given the controversial character of proportionality already in human rights adjudication. Second, I will examine whether proportionality exerts significant pressure on the principle of democracy, on the one hand, by placing too heavy a burden of justification on the legislator, and on the separation of powers, on the other hand, by disguising political issues as judicial ones, thereby allowing judicial activism on subjective and preferential grounds.

Transplanting proportionality from human rights jurisprudence to public policy decisions, that is from the constitution of liberties to the constitution of powers, is not without problems. The problems involved in this transplantation process are twofold: on the one hand, it is necessary to deal with the structural and semantic ambiguities of the principle of proportionality, which are already present when proportionality is applied in the constitution of liberties, and which, in the final analysis, are due to the fact that proportionality contradicts the nature of rights as deontic reasons that do not allow for trade-offs (section II); on the other hand, even if one clarifies the terms of the principle of proportionality when implemented in the constitution of powers, by focusing on specific aspects of the multifaceted principle of proportionality, one still encounters significant difficulties in embedding proportionality. First, the necessity test tends to undermine the role of the democratic legislator by confining Parliament within a particular economic philosophy of neo-liberalism. Second, while proportionality stricto sensu is a very useful tool for certain areas of law making, it cannot be transformed into a justiciable standard without the judge's usurpation of the power of the democratic legislator (section III).

II. A Fundamental Critic of the Contemporary Perception of Proportionality

To begin with, the principle of proportionality is as obscure as it is popular and widespread. Despite efforts, we can find ourselves in a state of 'aporia' ('απορία'). 'Aporia' ('απορία') means a question. It is the question with which Socrates would

[3] Indicatively, B Pieroth and B Schlink, *Grundrechte Staatsrecht II* (Heidelberg, CF Müller, 2002) 64–69.

begin a dialogue with his students, confessing his own lack of knowledge and his willingness to learn from others ('Socratic irony'). By the end of the dialogue, Socrates' interlocutors, although at the beginning answering the question, would find themselves in a state of 'aporia', of not knowing. At his dialogues, Socrates had posed a number of questions: 'What is piety?' (*Euthyphro*), 'What is courage?' (*Laches*), 'What is sophrosyne?' (*Charmides*). I think this is a good stage to ask 'What is proportionality?'[4]

There are several questions relating to the structure of the proportionality test. On the one hand, there is no common approach to the tiers of the proportionality review: how many they are and what they are. This means that the level of scrutiny achieved in terms of the proportionality test is not clear and not always the same. I will call this a structural 'aporia'.

On the other hand, proportionality has been, to my mind, subject to a number of misconceptions. Proportionality has been associated traditionally with balancing or, in German, '*Güterabwägung*'.[5] As a critique to a flat approach to proportionality as mere balancing, it has already been noted that only the last stage of the proportionality test, entitled proportionality stricto sensu, is concerned with balancing and weighing.[6] In what follows, however, I will argue that the third stage need not be a balancing stage either, and that the final stage can also be understood as deontic and oriented towards moral arguments; it is not even the final stage of a multi-level review but the moral point of view, a moral equilibrium, to echo Tsakyrakis' thesis. In addition, there is a semantic fallacy about proportionality. Focusing on the German notion of '*Verhältnismäßigkeit*', since the idea of proportionality originated mainly in German case law and theory, I will argue that the German idea should better be understood closer to the literal meaning of the term, that of a relational justice – '*Verhältnis*' means relationship – instead of a proportional and quantifiable conception of justice. Relational justice asks what duties we owe each other and poses deontic dilemmas about appropriate, that is, fair, relationships between means and ends, actually between arguments, as I will explain; whereas a proportional conception of justice is based on the idea of quantifying the common good, to which rights also belong without distinguishing it from other aspects of the good, and distributing it proportionally. I will call this divergence between the literal meaning and actual use of '*Verhältnismäßigkeit*' by established jurisprudence and theory a semantic 'aporia'.

[4] G Vlastos, *Socratic Studies* (Cambridge, Cambridge University Press, 1995) 32 and 39–48.

[5] BVerfG 7, 198 (220); B Schlink, *Abwägung im Verfassungsrecht* (Berlin, Duncker & Humblot, 1976) 192; R Alexy, *Theorie der Grundrechte* (Frankfurt, Suhrkamp, 1994) 79–92.

[6] G Gerapetritis, 'Proportionality and Moral Value Judgement Theory' in L Kiousopoulou, M Tsirli and P Vogiatzis (eds), *Liber Amicorum in Memoriam of Stavros Tsakyrakis, Human Rights in Times of Illiberal Democracies* (Athens, Νομική Βιβλιοθήκη, 2020) 6. Also, Jörn Ipsen uses the terms 'Verhältnismäßigkeit' and 'Proportionalität' only to describe the third prong of the review. He uses the term 'Übermaßverbot', which means the prohibition of arbitrariness, to describe the three-pronged test. See J Ipsen, *Staatsrecht II (Grundrechte)* (Luchterhand, Neuwied und Krieftel, 2000) 52–54.

A. Structural 'Aporia'

There are considerable difficulties in defining proportionality as a test for judicial review. As already noted, there is no common approach to the number and the content of the tiers of the proportionality test. Moreover, it is left to the discretion of the judiciary to decide which and how many of the tiers to go through in any given case. This leaves us in a structural 'aporia' as to what the proportionality test actually consists of. Let us approach the aspects of this structural 'aporia'.

The traditional German (and Greek) approach describes proportionality as a tripartite analysis, consisting of the suitability test, the necessity test and finally the test of proportionality stricto sensu,[7] thus leaving legitimacy review of the state objective outside the scope of proportionality. According to the German approach,[8] as well as the approach of the European Court of Human Rights (ECtHR), the examination of the legitimacy of a state objective is a preliminary step, in which the state objective is assessed in the abstract, in contrast to the proportionality test, which is tailored to the specific case.

However, some authors see the proportionality test as a four-pronged assessment, adding the legitimacy test as the first tier to the traditional three-pronged analysis;[9] other authors view the legitimacy test as the first stage of proportionality and the traditional three tiers focusing on the relationship between means and ends as the second stage.[10] Despite these differences in classification, what is important is that there are different views of what the content of the legitimacy test is. On the traditional approach, at the legitimacy stage one asks whether the state objective is a constitutionally permissible or required legislative objective in the abstract. A more recent approach, advocated by Nikos Papaspyrou, is to ask whether it is legitimate to pursue the state objective with the particular means, thereby focusing on establishing a legitimate relationship between the objective and the means in concrete terms. In this vein, Papaspyrou places emphasis on whether the means used are morally relevant to the end chosen.[11] For example, it is illegitimate to adopt a public policy that aims to increase mortality to help the pension system deposit money for future generations. Although the sustainability of the pension system is a legitimate goal, even a constitutional one in the abstract,

[7] S Vlachopoulos, 'The Procedural Aspects of the Proportionality Principle in the Greek Legal Order' in Kiousopoulou, Tsirli and Vogiatzis (eds) (n 6) 81.

[8] H Dreier, 'Vorbemerkungen vor Artikel 1-19' in H Dreier (ed), *Grundgesetz Kommentar*, Band I: *Präambel- Artikel 1* (Tübingen, Mohr Siebeck, 2004) 39, 129.

[9] A Barak, *Proportionality. Constitutional Rights and Their Limitations* (Cambridge, Cambridge University Press, 2012) 245–302; F Urbina, *A Critique of Proportionality and Balancing* (Cambridge, Cambridge University Press, 2017) 5 and 18; N Papaspyrou, 'The Proper Space of Proportionality' in Kiousopoulou, Tsirli and Vogiatzis (eds) (n 6) 17, 24–28.

[10] Gerapetritis (n 6) 6.

[11] N Papaspyrou, *Συνταγματική ελευθερία και δημόσιοι σκοποί. Σε αναζήτηση της θεμιτής πλοκής* [*Constitutional Liberty and Public Aims. An Inquiry of a Legitimate Entanglement*] (Athens-Thessaloniki, Σάκκουλας, 2019) 15–17 and 66–70.

it is disrespectful of the equality of persons to pursue sustainability in this way and by these means.

Another example is a case brought before the ECtHR concerning the ban on homosexuals' joining the army to maintain the morale of service personnel, of the fighting power and the operational effectiveness of the armed forces.[12] Although operational effectiveness is a fundamental objective of the army, it is unacceptable to try to preserve it for a morally wrong reason. Instead of deciding the case on principle, that is, on the basis of the illegitimate relationship between means and ends, the ECtHR overturned the ban, on the grounds that the reasons given for the ban on homosexuals were not convincing enough,[13] thereby entering into a morally unacceptable discussion of the possibility of banning homosexuals from the army if it proved necessary. The Court failed to see that it is unacceptable and illegitimate in principle to discriminate against people based on their sexual orientation to preserve an ideal of military order, which has in the first place been built on bias, as Tsakyrakis would have argued.

Not only is the classification and content of the legitimacy review controversial, but a close reading of the jurisprudence of the ECtHR reveals that the Court adopts a two-stages approach to proportionality, leaving proportionality stricto sensu ordinarily outside its scope. As an international court, it comes as no surprise that it avoids the most intensive type of review unless the 'margin of appreciation' of the contracting parties is narrow or minimal;[14] in this way, it respects the sovereignty of the contracting parties. As a rule, the Court only examines the suitability and rationality of a legitimate state aim and the necessity of the state measure adopted in a democratic society. In this respect, the ECtHR is the only Court to frame proportionality in terms of the democratic principle. In fact, the ECtHR uses the concept of proportionality very rarely. One such case was the recent *Vavřička* case, in which the ECtHR examined compulsory vaccination as a condition of admission to primary education and found it compatible with the Convention.[15] However, the arguments raised under the proportionality test had hardly anything to do with balancing. The Court examined whether the Czech Republic had followed an adequate procedure for justifying compulsory vaccination, like public consultation, taking expert advice, relying on data, etc.

Moreover, in some jurisdictions the concept of proportionality is not used by the courts. For example, because of the doctrine of parliamentary sovereignty[16]

[12] *Smith and Grady v UK* (1999) 29 EHRR 493, para 78.

[13] ibid paras 90–112.

[14] Critical to the ECtHR for self-restraining, J McBride, 'Proportionality and the European Convention on Human Rights' in E Ellis (ed), *The Principle of Proportionality In the Laws of Europe* (Oxford, Hart Publishing, 1999) 23.

[15] *Vavricka and others v the Czech Republic* App nos 47621/13 and 5 others (ECtHR, 8 April 2021) paras 290–309.

[16] E Ellis, 'The Legislative Supremacy of Parliament and its Limits' in D Feldman and A Burrows (eds), *English Public Law* (Oxford, Oxford University Press, 2009) 127; M Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in J Jowell, D Oliver, and C O' Cinneide (eds), *The Changing Constitution* (Oxford, Oxford University Press, 2015) 38.

and the lack of constitutional review of Acts of Parliament prior to the Human Rights Act (HRA) 1998, courts in the United Kingdom would only test the reasonableness of executive action, employing what is known as the '*Wednesbury* formula'.[17] Indeed, prior to the HRA 1998, established case law had explicitly rejected proportionality arguments in the majority of the cases and had only reluctantly accepted such arguments in others.[18]

Finally, the US courts do not use the term 'proportionality' either, but we can identify levels of judicial review of varying intensity that resemble those of the proportionality test.[19] For example, restrictions on economic freedoms imposed by market regulation are subject to a rational basis test, which can be compared to the first tier of the proportionality test. The US Supreme Court introduced this test to uphold the constitutionality of President Franklin Roosevelt's New Deal, ending the infamous *Lochner* era.[20] The rational basis test was introduced to demonstrate judicial deference to democratic policies around economic regulation. The rationale of judicial deference can be traced back to Justice Harlan's minority opinion in *Lochner*:

> A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[21]

The second level of judicial review in the US is the intermediate level of scrutiny, which is typically applied to time, manner and place regulations of speech, as these are not considered to be biased against speech content.[22] In this respect, a state measure must be necessary to serve a legitimate state interest. The third and most intense level is the strict scrutiny, which in most cases is fatal to the government action to which it is applied. To survive strict scrutiny, a government measure must be 'narrowly tailored' to serve a 'compelling' government interest, and it must be 'narrowly drawn' to achieve that end.[23] In this respect, strict

[17] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. See also P Craig, 'Unreasonableness and Proportionality in UK Law' in Ellis (ed) (n 14) 85.

[18] ibid 88–93.

[19] For a different way to compare levels of scrutiny in the US and proportionality, see P Yowell, 'Proportionality in United States Constitutional Law' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights, Comparative Judicial Engagement* (Oxford, Hart Publishing, 2019) 86.

[20] *Nebbia v New York*, 291 US 502 (1934); *West Coast Hotel v Parish Company*, 300 US 379 (1937).

[21] *Lochner v New York*, 198 US 45, 75–76 (1905).

[22] *Clark v Community for Creative Non-Violence*, 468 US 288, 293 (1984); *Ward v Rock Against Racism*, 491 US 781, 802–03 (1989). See also HJ Spaeth, 'Intermediate Scrutiny' in KL Hall (ed in chief), *The Oxford Companion to the Supreme Court of the United States* (Oxford and New York, Oxford University Press, 2005) 501.

[23] *Perry Education Assn v Perry Local Educators' Assn*, 460 US 37, 45 (1983). Compare also *Boos v Barry*, 485 US 312, 321 (1988); *Burson v Freeman*, 504 US 191, 199 (1992): 'To survive strict scrutiny, however, a State must do more than assert a compelling state interest – it must demonstrate that its law is necessary to serve the asserted interest.'

scrutiny is an enhanced necessity test, demanding quasi-absolute necessity. It is not to be equated with proportionality stricto sensu, where, unlike the necessity test, the state interest itself is weighed and put into question;[24] in proportionality stricto sensu, unlike strict scrutiny, the state interest is a negotiable, not a 'compelling', state interest. Strict scrutiny applies to content regulation of speech and to discrimination based on race and ethnicity.[25]

From the above, it can be seen that in US case law there is greater clarity as to which level of scrutiny applies each time, as there are defined categories for each level of analysis. In addition, the outcome of each level of scrutiny is more predictable. Rational basis review almost always results in the upholding of the government action, while strict scrutiny almost always results in the striking down of the government action. In contrast, intermediate scrutiny is more open-ended and dependent on the circumstances of each case and relies on ad hoc analysis and reasoning.[26] Therefore, in my view, the intermediate level of scrutiny is like the necessity test.[27] However, because of its open-endedness, it has been criticised in American theory as being unpredictable and possibly arbitrary.[28]

The above analysis shows that proportionality may not be the constitutional giant we think it is. Not all courts use the concept of proportionality. It is mainly the theoretical interpretation of judicial opinions that has brought different tests of judicial review under this common umbrella. Moreover, there is no single answer to the question of the levels of proportionality review, which amount to different levels of judicial review, and there is no common approach to the content of the different tests and when each applies. This structural 'aporia' of proportionality review stems from the fact that proportionality is an inappropriate type of review for human rights cases. It is suitable for quantifiable entities that can be weighed, measured or given a price, but not for rights as imperatives. By overlooking this, proportionality undermines the deontic and categorical nature of rights and their priority.

[24] For this observation on the difference between necessity test and proportionality stricto sensu, see V Voutsakis, 'Η αρχή της αναλογικότητας: Από την ερμηνεία στη διάπλαση του δικαίου' ['The Principle of Proportionality: From Law Interpretation to Law Making'] in *Όψεις του κράτους δικαίου* [*Aspects of the Rule of Law*] (Thessaloniki, Σάκκουλας, 1990) 207, 210–14.

[25] *Palmore v Sidoti*, 466 US 429, 432–33 (1984): 'A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. See *Strauder v West Virginia* 100 US 303, 100 US 307-8, 310 (1880). Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. See *Personnel Administrator of Mass v Feeney*, 442 US 256, 442 US 272 (1979). Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be "necessary … to the accomplishment" of their legitimate purpose, *McLaughlin v Florida*, 379 US 184, 379 US 196 (1964). See *Loving v Virginia* 388 US 1, 388 US 11 (1967).'

[26] GR Stone, 'Content Regulation and the First Amendment' (1984) 25 *William and Mary Law Review* 189, 190.

[27] Barak thinks that the intermediate level of scrutiny 'to some degree, is similar to proportionality's rational connection test, although it demands a higher level of connection'. Therefore, I think his views on this matter are not far from mine. Barak (n 9) 512.

[28] GR Stone, 'Content-neutral restrictions' (1987) 54 *University of Chicago Law Review* 46, 117.

In other words, the method of human rights adjudication is not just a method; it presupposes a theory of rights. Proportionality, as I will argue in section II.B, presupposes rights as maximisable and flexible values; on the other hand, the method of moral argumentation in the inquisition of the moral point of view is a method that allows rights to function as strong and binding reasons in the Kantian sense.[29]

B. Semantic 'Aporia'

Antisthenes, an Athenian orator, used to say that the source of wisdom is to examine names closely ('Αρχή σοφίας ή των ονομάτων επίσκεψις'). A closer look at the term 'proportionality' leaves us in a semantic 'aporia'. The word used by the German Constitutional Court is '*Verhältnismäßigkeit*': I argue that the term 'proportionality' is a poor translation of the German term. The latter refers to the relationship ('*Verhältnis*') between means and ends, between arguments, when a fundamental right seems to compete with a state objective, and not to a certain proportion ('*Anteil*') that each is entitled to. '*Verhältnismaßigkeit*' should be understood as the process of constructing a fair relationship between means and ends and morally relevant arguments.

My point is that the choice of words matters and that the literal meaning of '*Verhältnismäßigkeit*' is oriented towards quality, not quantity or weight; it is the quality of rights. I think that the literal meaning of the term shows that the concept of '*Verhältnismäßigkeit*' was not chosen at random; on the contrary, it is better suited for describing the process of constructing a just relationship between equal persons in political society, from a moral point of view. It is better suited for dealing with rights as fundamental principles or rights in the strict sense[30] rather than interests. On the other hand, the term 'proportionality' is quantitatively oriented. It reflects a proportional conception of justice, based on the idea of quantifying the common good and distributing it proportionally. The semantics of the word '*Verhältnismäßigkeit*' has been undermined by an overwhelmingly consequentialist approach based on an ad hoc balancing of interests, in which rights are accorded no different quality from, and therefore no priority over, other state objectives.

Let us explore the literal and possibly the original -before the balancing twist- meaning of the term '*Verhältnismäßigkeit*'. It originally comes from administrative law and was conceived as '*Übermaßverbot*', as a prohibition of arbitrariness, of excess of power.[31] Administrative sanctions or other burdens on the citizens could

[29] More extensively on how each method of deciding human rights cases implies a concept and a theory of rights, see V Christou, *Die Hassrede in der verfassungsrechtlichen Diskussion* (Baden Baden, Nomos, 2006) 46–74.

[30] R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 90–100.

[31] O Koch, *Der Grundsatz der Verhältnismäßigkeit in der Rechtspechung des Gerichtshofs der Europäischen Gemeinschaften* (Berlin, Duncker & Humblot, 2003) 54.

not exceed a certain limit; they had to be proportionate to the act they sought to punish or regulate. '*Verhältnismäßigkeit*' was a form of equity. It was therefore directly linked to the idea of the rule of law.[32] It should be noted that the idea of a punishment proportionate to the offence was actually one of the main pillars of the Magna Carta in 1215,[33] and in the ECtHR case law, proportionality is mainly used in the context of Article 5 of the European Convention on Human Rights (ECHR), the modern habeas corpus.[34] Later, as the principle of proportionality came to govern legislative action and to encompass the whole range of human rights, it ceased to be primarily a means of limiting excessive penalties or fines and took on a broader content.

After the Second World War, '*Verhältnismäßigkeit*' was connected to the idea of rights as values ('*Werte*'),[35] going back to Rudolf Smend's mid-war '*Integrationslehre*'.[36] Smend was the first to support the idea of balancing between values, including both rights as cultural goods and collective goals.[37] The German Constitutional Court introduced the idea of rights as values in its famous *Lüth* opinion.[38] After that, balancing became inevitable, because the Constitution did not offer a hierarchy of values.[39] Robert Alexy's theory was central to the theoretical underpinning of this value-balancing jurisprudence. Alexy also went one step further; he equated even principles in the strong sense, that is rights, with values and other state interests.[40] Rights were to be maximised in an ad hoc balancing process in a community of vaguely binding values or principles of very different kinds. In the context of this development, it has been argued that '*Verhältnismäßigkeit*' is in fact derived from the very nature of human rights.[41] Enders has defined liberty as the other side of the proportionality coin.[42] The giant had been born.

[32] Indicatively see N Emiliou, *The Principle of Proportionality in European Law. A Comparative Study* (The Hague, Kluwer Law International, 1996) 40–43.

[33] Magna Carta 1215, paras 20 and 21: '(20) For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. … (21) Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence.' See www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/.

[34] On Art 5 ECHR, see W Schabas, *The European Convention on Human Rights. A Commentary* (Oxford, Oxford University Press, 2015) 219–63.

[35] BVerfG 7, 198 (214–215).

[36] R Smend, *Verfassung und Verfassungsrecht* (Berlin, Duncker & Humblot, 1928).

[37] R Smend, 'Das Recht der freien Meinungsäußerung' (1928) 4 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 44, 50–52.

[38] ibid.

[39] F Ossenbühl, 'Grundsätze der Grundrechtsinterpretation' in D Merten and H-J Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, Band I: *Entwicklung und Grundlagen* (Heidelberg, CF Müller, 2004) 595, 611–12); M Sachs, *Verfassungsrecht II Grundrechte* (Berlin-Heidelberg, Springer, 2017) 194–95.

[40] Alexy (n 5) 94 and 120.

[41] ibid 103; St Huster, *Die ethische Neutralität des Staates* (Tübingen, Mohr Siebeck, 2002) 657.

[42] C Enders, 'Vorbemerkung vor Artikel 1' in KH Friauf and W Höfling (eds), *Berliner Kommentar zum Grundgesetz*, Band I (Berlin, Erich Schmidt, 2006), C vor Art 1, para 47: 'Die Freiheit ist insoweit -als umgekehrte Funktion der Verhältnismäßigkeit- relativ.'

By conceiving of rights as maximisable entities ('*Optimierungsgebote*')[43] Alexy inevitably deprived principles of their deontic and categorical character. As rights were values, they were downgraded from imperatives to promises; the rights were seen as providing only 'aspirational' and no longer 'deontic' reasons for action, a distinction made by Paul Sourlas in one of his essays dedicated to Tsakyrakis' work. Deontic reasons, says Sourlas, are

> in a sense peremptory, ie they prescribe well defined action-types in such a way that agents would have no discretion to ignore them, whereas aspirational reasons recommend valuable goals that can be pursued in various ways and attended in different degrees.[44]

In other words, as values, rights do not categorically prescribe action; they are not qualitatively different entities from collective goals; they do not enjoy priority and they are not fundamental. Indeed, this is the essence of the criticism to proportionality: it undermines the priority of rights, and it takes rights to be things with variable weight and in variable quantities, rather than as arguments with a strong normative claim for enforcement.

However, let us examine also the three stages of '*Verhältnismäßigkeitsprüfung*' to see whether the perception of rights as deontic reasons, although compatible with the literal meaning of the word '*Verhältnismäßigkeit*', has been completely abandoned. As already mentioned in section II.A, the first tier of the '*Verhältnismäßigkeitsprüfung*' is suitability ('*Eignung*/*Geeignetheit*'). Suitability is about whether the means are suitable to achieve the end in question. The means need not be optimal but merely conducive to achieving the end.[45] The test is not intensive, but it asks for a rational relation between means and ends. It outlines some grounds for argument. The test does not involve balancing, nor does it imply a perception of rights as quantities or as normative claims.

The second tier is necessity ('*Erforderlichkeit*'). Necessity requires that there are no less intrusive means that would be equally effective.[46] Although the necessity test accords some priority to rights, it nevertheless treats the enforcement of rights as a matter of degree and requires consequentialist compromises. In this respect, a process of trade-offs takes place at this stage, although in the end most freedom is maintained. From this point of view, the necessity test is also a form of balancing and comparing and weighing, but with a pre-defined priority for freedom. Can the necessity test escape balancing and be compatible with the idea of rights as binding and strong moral arguments? Perhaps a necessity test could focus on the relationship between means and ends: means and ends must be closely,

[43] Alexy (n 5) 101.

[44] P Sourlas, 'Proportionality and Reasons Holism' in Kiousopoulou, Tsirli and Vogiatzis (eds) (n 6) 48, 51. On deontic reasons deriving from principles in the strong sense, see also P Sourlas, *Rechtsprinzipien als Handlungsgründe. Studien zur Normativität des Rechts* (Baden Baden, Nomos, 2011) 130–37.

[45] Dreier (n 8) 130.

[46] ibid.

necessarily, unavoidably related, to ensure that a right is not sacrificed for an end that is remotely related to it.

The final stage is '*Verhältnismäßigkeit im engeren Sinne*'. This is seen as the stage where open-ended ad hoc balancing takes place. Many authors have contested this stage as, on the one hand, non-conducive to individual and collective self-determination[47] and, on the other hand, unpredictable,[48] turning judicial opinion into an act of power rather than a task of interpretation.[49] However, I will show that even this stage can be understood as devoid of balancing.

Traditionally, in German case law and theory, this level is referred to as the test of '*Angemessenheit*', which means appropriateness, and '*Zumutbarkeit*', which means reasonableness. Both these terms suggest that there is a link between the first and third tiers. Indeed, the German Constitutional Court in several cases refers to '*Verhältnismäßigkeit im engeren Sinne*' as the prohibition of arbitrariness ('*Übermaßverbot*')[50] or speaks of a reasonable relationship ('*vernünftiges Verhältnis*')[51] or a fair relationship ('*in gerechtem Verhältnis*')[52] between means and ends. In this respect, the third level of scrutiny can also be conceived of as not striking a fair balance between the gravity of the interference with fundamental rights and the importance of the public interest pursued by the measure, as the leading approach dictates,[53] but rather as an inquiry into a fair relationship.

In fact, the same emphasis on an appropriate and precise relationship between means and ends is evident when we look at the Swiss concept of '*Verhältnismäßigkeit*'. Both the first two tiers, suitability and necessity, are based on the precision of the measure (means) to achieve the specific end, as well as its intensity. The third stage is called '*Zumutbarkeit*', that is, reasonableness, and is primarily concerned with the intensity of a state measure; it is at this stage that excesses of power are to be limited, that arbitrariness is to be prohibited, and thus the third and first tiers are linked.[54]

Finally, '*Verhaltnismäßigkeit*' or relationality can be seen, unlike the leading approach, as raising the question of a fair relationship, a fair balance among narrowly related moral reasons, in which the strong force of deontic reasons can be embedded and facilitated. To relate based on moral arguments instead of weighing is compatible to the structure of a deontic reason. In this respect, balance has

[47] J von Bernstorff, 'Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-Determination' in Lazarus, McCrudden and Bowles (eds) (n 19) 63.

[48] Sachs (n 39) 195.

[49] Ossenbühl (n 39) 612.

[50] BVerfG 48, 396 (402); BVerfG 67, 157 (178); BVerfG 68, 193 (219); BVerfG 83, 1 (19); BVerfG 90, 145 (173).

[51] BVerfG 76,1 (51).

[52] BVerfG 90, 145 (173); BVerfGE 54, 100 (108); BVerfG 102, 197 (220).

[53] Dreier (n 8) 131.

[54] M Schefer, 'Beeinträchtigung von Grundrechten' in D Merten and H-J Papier (eds), *Handbuch der Grundrechte*, Band VII/2-Grundrechte in der Schweiz und in Lichtenstein (Heidelberg and St Gallen, CF Müller and Dike, 2007) 141, 178–79.

nothing to do with balancing, weighing, measuring or comparing. It is not about the gravity of interference and the importance of aim's being put on the balance. What is at stake is the interference as such and the aim as such, and whether their relationship can be justified on convincing grounds, as long as the priority of a system of liberties and the deontic character or rights are presupposed. Balance is an equilibrium; it is a moral position in which all the relevant moral arguments are fairly related to each other, given the priority of rights.[55] Finally, in the inquisition of this moral position of equilibrium, the distinction between stages is also not critical.[56]

III. From Rights to Competences and Policies

The principle of proportionality is no longer just a 'Schranken-Schranke' to be applied in the field of human rights in order to limit state power; it is also a principle that regulates the vertical exercise of competences between the EU and the Member States in order to protect national sovereignty and democracy, and, last but not least, it has begun to be applied as a general principle of good legislation at the national level. The question we need to ask is whether the principle of proportionality, in this new role it has acquired in the field of the constitution of powers, brings with it the same problems and ambiguities already discussed in section II. In addition, we should consider whether proportionality in the constitution of powers can only have a different meaning, albeit under the same name, and whether it is not too simplistic to use the term 'proportionality' for all these types of legal problems.

To address these new questions, I will first examine how proportionality, mainly as a necessity test, is understood in the context of the exercise of EU competences. Necessity, as a principle governing the vertical exercise of competences, functions as a guarantor of national sovereignty; by contrast, if the necessity test is uncritically imposed on national parliaments, it leads to a frustration of the role of the democratic legislator and of the separation of powers.

I will then turn to the ambitious invocation of proportionality stricto sensu and the cost–benefit test as parameters of good legislation at national level. I would like to note in advance, and will elaborate below, that I do not understand

[55] In this regard, I would agree with Kai Möller that proportionality consists in a 'justification stage'. A state measure is justified 'if it resolves a conflict of autonomy interests in a reasonable way' after 'balancing all the relevant moral considerations'. See K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012) 86–87 and 178; K Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' in Lazarus, McCrudden, and Bowles (eds) (n 19) 31. However, I am opposed to continuing using the term 'proportionality' for a process that is clearly not a process of 'proportionating'.

[56] My approach has possible similarities to the approaches Urbina summarises as 'proportionality as unconstrained moral reasoning'. However, my approach is not a theory about proportionality, since I dispute this term as a suitable one for human rights adjudication. See Urbina (n 9) 125–49.

proportionality stricto sensu in the field of legislation and policy making to be the same as appropriateness or '*Angemessenheit*' in the field of human rights adjudication. Appropriateness, as I have explained, is a moral standpoint, presumably the best equilibrium of liberties found by the judge in each case, whereas proportionality stricto sensu in the realm of policy indicates a rational choice by the democratic legislator among various morally and constitutionally acceptable solutions. This is the only case where proportionality is used in its literal sense, as the field of public policy may be a suitable terrain for balancing. In order to make a rational choice, it may be necessary to prioritise quantifiable entities.

In this respect, proportionality stricto sensu, as a technocratic method, can indeed help the legislator, although it is not the only decision-making method in the political field. Moral reasoning does not cease to be relevant from the legislator's point of view. But it is not exclusive, as in the field of rights. Questions of measurement and strategic prioritisation can come into play. Therefore, proportionality stricto sensu is indeed one of the methods that belong to a modern understanding of good legislation, while moral argumentation remains another. Finally, I will argue that proportionality stricto sensu can be undertaken by the legislature, but should not normally be used as an instrument of judicial review.

A. The Necessity Test for Public Action

i. Vertically

The principle of proportionality is a well-established 'Schranken-Schranke' also for the fundamental freedoms guaranteed by the European Treaties. In fact, it is one of the oldest general principles of the EU legal order.[57] The first reference to proportionality in the case law of the Court of Justice dates back to 1955 in the *Fédéchar* case.[58] The explicit reference to proportionality as a principle of the constitution of powers was added with the Maastricht Treaty in an effort to preserve national sovereignty as far as possible,[59] and as a manifestation of the presumption of power of the Member States.[60] Article 5(4) TEU establishes the principle of proportionality by stating that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. Although the TEU only refers to necessity as part of the proportionality principle in the area of the constitution of powers, the EU Court has formulated the test so

[57] R Schütz, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012) 269. On the origins of the proportionality principle, see also J Schwarze, *European Administrative Law* (London, Sweet & Maxwell, 2006) 678–79; Emiliou (n 31) 134–39.

[58] Case C-8/55 *Fédéchar* [1954-1956] ECR 292, 299.

[59] C Calliess, 'Artikel 5' in C Calliess and M Ruffert (eds), *EUV-AEUV mit Europäischer Grundrechtscharta. Kommentar* (München, Beck, 2016) 124, 142–43.

[60] A Iliadou, 'Article 5' in V Skouris (ed), *Συνθήκη της Λισσαβώνας. Ερμηνεία κατ' άρθρον* [*A Commentary on the Treaty of Lisbon*] (Athens-Thessaloniki, Σάκκουλας, 2020) 88, 90.

as to include appropriateness or '*Angemessenheit*'.[61] Nevertheless, the Court rarely goes through all three tiers of review[62] or it sometimes combines the tiers in a single analysis,[63] while the validity of the third tier is disputed in the literature.[64] In practice, the EU Court does not usually strike down EU legislation for failure to meet the proportionality requirement. In fact, the Court allows the legislature 'a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations'.[65] Therefore, to be disproportionate, a measure must be 'manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.[66]

More recently, the EU Court applied the same rational basis analysis to scrutinise initiatives taken by Eurozone Member States to tackle the debt crisis, such as the creation of the European Stability Mechanism (ESM), and by the European Central Bank (ECB) to support the monetary stability of the Eurozone during the financial crisis. In this way, it upheld the legality of both the ESM[67] and the PSPP, an ECB programme allowing the ECB to purchase government bonds in the secondary market.[68] In the latter case, the German Constitutional Court called on the ECB to properly justify the need for the PSPP in its *Weiss* opinion of the year 2020, in which it ruled that the EU Court, upholding the PSPP, had not provided sufficient reasons to show that the principle of proportionality had been respected.[69] In this case, it became clear that the principle of proportionality can act as the head of Janus. Although in theory the principle of proportionality is supposed to serve an idea of root democracy in favour of the Member States as far as it is feasible and functional, in the case of the PPSP it showed that it can work in favour of the democracy of one Member State, for example Germany, but against

[61] Case C-358/14, *Poland v EP and Council*, ECLI:EU:C:2016:323, para 78: 'When there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued …'.

[62] Koch (n 31) 579.

[63] RE Papadopoulou, 'Article 5' in V Christianos (ed), *Συνθήκη ΕΕ & ΣΛΕΕ. Κατ' άρθρο ερμηνεία* [*Commentary on the TEU and the Treaty on the Functioning of the EU*] (Athens, Νομική Βιβλιοθήκη, 2012) 25, 31.

[64] K Lenaerts and P von Nuffel, *Constitutional Law of the EU* (London, Sweet & Maxwell, 2006) 7-037.

[65] Case C-58/08 *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999, para 51; Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd, et al* [2002] ECR I-11453, para 123; Case C-233/94 *Federal Republic of Germany v European Parliament and Council of the European Union* [1997] ECR I-02405, paras 26–29; Case C-154/04 *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health* [2005] ECR I-6451, paras 104–108; Case C-426/93 *Federal Republic of Germany v Council of the European Union* [1995] ECR I-3723, para 42; Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [1996] ECR I-05755, paras 57–58.

[66] *Vodaphone* (n 65), para 58.

[67] Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:756.

[68] Case C-493/17, *Heinrich Weiss and Others v Germany*, ECLI:EU:C:2018:1000.

[69] 2 BvR 859/15, 5 May 2020.

the democratic institutions of other Member States, which would be destabilized without the ECB initiatives.[70]

It should be clarified that the principle of proportionality is not a principle for the allocation of powers between the EU institutions and the Member States, since it presupposes a conferred power; it is a principle regulating the intensity with which the conferred powers are exercised on the basis of necessity. Nevertheless, it can block the exercise of the conferred powers, even the exclusive ones,[71] as illustrated in the *Weiss* case above.[72]

In the case of concurrent competences of the EU, the principles of proportionality and subsidiarity overlap and complement each other; subsidiarity means that

> the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[73]

Furthermore, the Protocol on the principles of subsidiarity and proportionality states that

> [f]or any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators.[74]

Following this vein, a Communication from the Commission to the European Parliament, the European Council and the Council entitled 'Better Regulation: Delivering better results for a stronger Union' was published in 2016, emphasising that 'Modern, proportionate and fit-for-purpose rules are essential for the rule

[70] Compare Y Drossos, *The Flight of Icarus. European Legal Responses Resulting from the Financial Crisis* (Oxford, Hart Publishing, 2020) 217–337. In ch 4, entitled 'The Two Sides of the Coin: Constitutional Review of the Crisis Legislation', Drossos observes that the standards of judicial review were different between lending states and receiving states during Europe's financial crisis. While lending states, eg Germany, would prioritise sovereignty arguments for their nation, they would not embrace the idea of a European universe of democracy in all Member States, including states receiving the financial aid.

[71] Case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-03905, para 14; Case C-210/91 *Commission of the European Communities v Hellenic Republic* [1992] ECR I-06735, paras 19–20.

[72] In fact, the principle of proportionality applies to all types of EU action, including those of an executive nature (see Case C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR I-05949, para 36). Moreover, the principle of proportionality not only moderates the content of EU legislation; it can also dictate the type, the form of an EU action. For instance, the EU has to justify why a regulation was necessary rather than a directive, which is a tool that allows for more leniency to the Member States. However, it should be noted that no EU action has ever been annulled on this ground. See M Klamert, 'Article 5' in M Kellerbauer, M Klamert and J Tomkin, *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (Oxford, Oxford University Press, 2019) 61, 74.

[73] Art 5(3) TEU.

[74] Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2008] OJ C115/206.

of law and upholding of our common values, but also for the efficiency of public administrations and businesses.'[75]

It is clear from the above that the principles of proportionality and of subsidiarity emphasise the need to justify public action; they require the EU institutions to publicly justify their actions and, in particular, to prove themselves to be better agents than the Member States. In this respect, although proportionality has not developed into a strict legal safeguard for EU federalism, it has been successful as a political safeguard, because it has had a real impact on the functioning of the EU institutions and the way in which EU legislation is produced.[76] The long preambles found in all EU legislation are designed to convince us that there is a real need for action at the European level and that no Member State could have done the job more efficiently. The preambles are also intended to show that the need for legislation has been investigated through studies, reports or consultations with interested parties. In other words, by imposing a burden of justification on the EU institutions, the proportionality principle has increased transparency and deliberation at the EU level and improved the procedural legitimacy of EU legislation, although it has remained essentially a political safeguard.

ii. Horizontally

The experience gained at the EU level has inspired national legislators to implement the principle of proportionality, that is the necessity test, at the national level when drafting public policies. The recent Greek Law 4622/2019 embodies principles of good governance; the first item on the list is the principle of proportionality of laws and regulations, which means that a thorough justification of the suitability, necessity and proportionality stricto sensu of the legislative initiative is demanded to justify the policy chosen, even if there is no interference with human rights.[77] In other words, proportionality has emancipated itself and left home; it is making a career outside of the field of liberties.

However, the necessity test should not be transposed uncritically to the national level. Vertically, the necessity test may serve in circumstances the ideal of democratic decision-making closer to the people, as a way of empowering citizens. Horizontally, the necessity review interferes with the boundaries between the public and the private spheres, and demarcates these boundaries by expanding

[75] COM 2016(615) final – Brussels, 14/9/2016.

[76] Kumm emphasises the contribution of proportionality in enhancing public reasoning. See M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 42 *Law & Ethics of Human Rights* 142; and more recently M Kumm, 'Global Constitutionalism, Human Rights and Proportionality: Institutionalizing Socratic Contestation' (2022) 9 *Journal of Constitutional Justice* 193. In the same vein, M Cohen-Eliya and I Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) *American Journal of Comparative Law* 463.

[77] Art 58 of Law 4622/2019 published in the Official Journal of the Government no 133A/2019.

the private sphere to empower private actors rather than citizens. Placing the burden of justifying the necessity of its actions on the parliament is undemocratic and stems from a certain idea of a minimal state and from neoliberal economic policies.[78]

There is no doubt that all government action must be publicly justified on good and solid grounds. It is undeniable that legislators need to give reasons for their actions, first, to provide guidance to those who will interpret the law, whether the courts or the executive, and, second, for the sake of transparency and public accountability. This does not mean, however, that all legislative initiatives must be necessary; they must be properly reasoned and persuasive, but not necessary. Unlike the EU institutions, which have only conferred powers and no presumption of power, a parliament does not have to demonstrate the need to act, because a parliament is not meant to act only when necessary. A parliament is not a simple arbiter of social affairs, intervening only when necessary. As the representative of a nation, a parliament is there to reflect the general will in all aspects of public life, provided that it does not violate fundamental rights.

To illustrate this argument, let me use the example of a parliament that decides to grant a benefit to all school graduates to help them start their adult lives. This is not necessary for middle- and upper-class school graduates, who can afford a good start without public financial support. But such a welfare policy is not unconstitutional just because it is not necessary for some people. A democratic policy may be desirable, or it may serve the legislature's vision of a better society, or it may have been a core element of the democratic will expressed in elections. The legislator may enact any public policy she wishes, whether necessary or unnecessary, so long as she does not disregard fundamental rights or act wholly unreasonably. The application of the necessity test to public policy implies a very truncated view of the role and power of the democratic legislator, associated with a certain neoliberal understanding of the state.

In other words, the position of the national legislator is not comparable to that of the European legislator. The national legislator has power that emanates directly from the people. The same cannot be said of the European legislator as long as the EU does not rely on a constitutive will; as long as it does not have a constitution. On the contrary, in the US federal system, the central power can claim to rely on a constitutive will.[79] Thus, the necessity test established by

[78] On the impossibility of embedding the principle of the subsidiarity of the state in the context of the modern welfare state, see G Kassimatis, *Περί της αρχής της επικουρικότητας του κράτους* [*On the Principle of the Subsidiarity of the State*] (Athens, P Kleisiounis, 1974) 152–73. For a critique of subsidiarity as a constitutional principle, see J Isensee, *Subsidiaritätsprinzip und Verfassungsrecht. Eine Studie über das Regulativ des Verhältnisses von Staat und Gesellschaft* (Berlin, Duncker & Humblot, 2001).

[79] Compare *McCulloch v Maryland*, 17 US 316, 404–05 (1819), in which Justice Holmes argues that Congress has the power to establish a Central Bank by invoking the democratic legitimation of Congress upon a constitutive will: 'To the formation of a league such as was the Confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective Government, possessing great and sovereign

Section 8 of the US Constitution, mentioned at the beginning of this chapter, works in favour of extending the powers of the central Government beyond those expressly conferred. In other words, it works in the opposite direction in comparison to the necessity test in the EU legal order. It should also be noted that the German Constitutional Court, which 'invented' proportionality, has refused to apply the '*Verhätnismäßigkeit*' in the exercise of competences between '*Bund*' and '*Länder*'.[80]

Finally, the necessity test as a regulator of the intensity of the exercise of public policies, whether vertical or horizontal, has nothing in common with the necessity test applied in the constitution of liberties. They have different rationale and different objectives. Vertically the necessity test can in certain circumstances be useful as a safeguard of democracy; horizontally it is directed against the democratic legislator, who is trapped in an ideology of laissez-faire.

B. Proportionality Stricto Sensu

Proportionality stricto sensu in the field of public policy is a very different tool from appropriateness or '*Angemessenheit*' in human rights jurisprudence. The structure and nature of the test are different. Proportionality stricto sensu examines a mix of state objectives that are part of a policy programme, and not just one state objective in its competition with a right. It is a tool for the choice and design of public policy, involving a multifaceted analysis of state objectives and their preferred hierarchy and degree of realisation, when quantifiable entities come into play. Proportionality stricto sensu may simulate parliament's point of view when passing laws; it is comprehensive. As long as the rights are respected, what remains to be determined is the best combination of a policy to promote other aspects of the general interest in accordance with the public policy programme approved by the people in elections. It is a decision-making process that may be guided by a cost–benefit analysis in order to achieve an optimal result in terms of the objectives pursued by the state, when the entities involved are quantifiable.

While proportionality stricto sensu is a technocratic method of rationalising the achievement of state objectives, it is not the exclusive decision-making method of a legislator. Moral reasoning, the primacy of rights and distributive justice may indeed define the big picture, the main policies to be pursued by the legislator. Proportionality stricto sensu is then useful in determining the best way to implement these policies. Proportionality stricto sensu is instrumental. It does

powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The Government of the Union then (whatever may be the influence of this fact on the case) is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.'

[80] BVerfG 79, 311 (314); BVerfG 81, 310 (338).

not define first-level choices but it can indicate the best way to implement them by suggesting a series of second-level choices.

However, although we expect the legislator to carry out quantitative studies to ensure prudent and optimal action, the same analysis would not be acceptable to the judiciary. A judge cannot carry out a proportionality test stricto sensu without overstepping her role in the system of separation of powers.[81] Trying to assess whether the proportionality test is convincing is like taking the viewpoint of a citizen in a democratic society and evaluating public policies in order to form a voting behaviour. Not all citizens will be convinced; not all citizens will agree with the mix of policies preferred by the legislator. A pluralism of ideas about the common good and how to achieve it is inherent in a democracy. To overlook this, and to replace the pluralism of good with the process of apparently objective legal reasoning, is to miss an important aspect of democracy.

To illustrate my point, I will use the example of environmental policy making. Suppose Parliament wants to impose an environmental tax on beef as part of a package of measures to tackle climate change. This tax is obviously a reasonable choice, but it is probably not the best possible choice, because we can think of several alternative ways of achieving the same goal. For example, in order to limit the damage caused by cow emissions without directly affecting the income of all beef consumers through a tax, a legislator could impose limits on cow numbers and other organisational measures that would act as a disincentive to large-scale cow farming. It could be argued that such structural measures would also be more effective than the ecotax. Furthermore, in order to assess the benefits of the ecotax, one would have to assess its impact in combination with the whole package of environmental measures adopted and take into account the dynamics between the different measures, which could multiply or weaken the results of the ecotax. However, this type of argument is a political one, open to democratic debate and decision.

Moreover, proportionality stricto sensu is not a justiciable standard because it involves the whole range of public policy considerations that are not visible to the judge, whose jurisdiction is limited by the case before her. If a court tried to review proportionality stricto sensu, it would most likely conduct a partial analysis that would overstate the merits of the case before the court.

Moreover, even if we assume that a court could find the tools to measure the overall efficiency of an environmental policy, for example by ordering evidence, and at the same time take into account the impact on related public policies, it would be contrary to the underlying idea of democracy to do so. To say that citizens have a justiciable right to the best and most efficient environmental policy, which should then be enforced by the courts, is to assume that there is in fact one

[81] I can imagine that, in exceptional cases, a judge might be entitled to examine a cost–benefit study, the structure, methodology and content of which are laid down in the law. This is a legal review of the formal compliance of the study with the law.

best policy, rather than alternative policies for pursuing and defining the common good as reflected in the agendas of different political parties, and further to assume that a court is institutionally suited and equipped to find out what this one best policy is. This line of argument makes democratic change of government superfluous. If there is one best policy, then any government, left or right, must implement that best policy, and the courts, as the guardians of that truth, must implement it through the principle of proportionality stricto sensu. This is a distortion of the Constitution and of the separation of powers.

It might be argued that my argument above rests on a clear distinction between policies, which are to be defined exclusively by parliament exercising discretionary power, and rights, which raise justiciable and deontic claims to be categorically enforced. It is true that my argument, indeed this whole chapter, is inspired by the Dworkinian distinction between principles and policies.[82] Of course, I do not ignore the fact that in most cases legislation is based on both principle and policy considerations. However, when a judge decides a case, she must distinguish whether the issues raised are primarily a matter of principle, where arguments of liberty and equality prevail, or primarily a matter of policy, where the principle of democracy and respect for collective self-determination prevail. This distinction is also crucial in determining the nature and scope of judicial review. If it is a matter of principle then claims of principle trump and judicial review must be strict.[83] If it is a matter of policy, the judge must defer to the democratic will and choice, applying only a reasonableness test.

Nevertheless, it could be argued that the old distinction between rights and policies no longer seems to work, as constitutions have been enriched by various political ideals as a result of the establishment of the welfare state, and dictate essential aspects of public policy. Constitutionalism, internally and through its globalisation, tends to be more comprehensive than it used to be. I will therefore try to show how my argument still works in a situation where principle and policy considerations are closely intertwined.

I will take the example of the organisation of the judicial system; what the remedies will be, how many courts there will be, what the geographical distribution of the courts will be – these are all matters of policy over which Parliament has discretion, but these policies at the same time affect the exercise of a right, the right to seek redress through the courts. Courts have to consider whether there is a violation of the right of access to a court or the right to a fair trial, for example if there is no remedy for a whole category of cases, or if court fees are so high that some people are denied access to the courts, and so on. However, a judge may not consider whether the judicial system is organised in the most efficient way, all things considered. Indeed, Parliament may decide not to maximise the efficiency

[82] Dworkin (n 30) 82–130. For an accurate explanation of the Dworkinian distinction and how it is useful in moral reasoning, see Sourlas (n 44) 130–37.

[83] R Dworkin, *Rights as Trumps* in J Waldron (ed), *Theories of Rights* (Oxford, Oxford University Press, 1984) 153, 158–59.

of the justice system for a decade in order to allow more resources to flow into the education system. Maximising the common good is a process of allocating resources and setting priorities between different objectives that is not visible from the perspective of a court, and it also expresses the legislature's idea of fair distribution.

Finally, social rights are a good example of the distinction between rights and policies. Unlike fundamental freedoms, such as freedoms of speech and privacy, social rights are not deontic in nature. They are structurally dependent on the distribution of resources and allow for trade-offs. They are largely a matter of policy. However, it is possible to identify a core that may be justiciable. This is the guarantee of an existential minimum for the well-being of each person and a legitimate expectation of the acquisition of property in the form of a pension. Beyond this core, there is the question of the distribution of resources, which needs to be addressed by Parliament.

IV. Epilogue

Where does the end of this chapter leave us? What has become of our initial 'aporia'? Has it been resolved, or has it left us perplexed? Are we ready, like Socrates, to confess the disavowal of knowledge?

We may be ready to ask the right questions. Asking about proportionality in the field of rights misses a point. Since rights are not physical entities with weight, quantity, a price or physical force, the discussion of proportionality and balancing as a method of rationally deciding a human rights case distracts us from the fact that to balance what cannot be balanced is practically to decide a case by the exercise of real power and not perform a task of interpretation. In this respect, Tsakyrakis' critique of balancing was correct. To claim to resolve human rights cases by balancing is to say that epistemic knowledge ('*episteme*' in Aristotle's sense), like mathematics, can be used to resolve practical questions ('*praksis*' in Aristotle's sense); it is to let knowledge trump reason. At the same time, balancing undermines the priority of rights and underestimates their categorical nature, which does not allow for trade-offs or compromises. Rights are arguments that provide strong deontic reasons, and a fair balance must be struck between them and other closely related reasons, whether necessarily or appropriately so, to ensure that rights are not sacrificed. The task of interpretation in human rights cases is to find the equilibrium, a point of balance, which expresses the moral point of view among equal and free persons in a political society. In this respect, the term '*Verhältnismäßigkeit*' is better understood in its literal sense as relationality, reflecting a relational rather than a proportional and quantifiable conception of justice.

On the other hand, as a principle designed to quantify, measure, weigh and compare efficiency, proportionality is indeed an appropriate and useful tool in the

field of public policy; however, it may in circumstances come into tension with or violate the principle of democracy. For example, as a regulator of the intensity of the exercise of public policies, proportionality may in some cases function vertically as a safeguard of democracy; horizontally, however, it is an 'attack' on the democratic legislator, confining it to an ideology of laissez-faire. Moreover, proportionality stricto sensu, as a technocratic method, can indeed help the legislator when questions of measurement and strategic prioritisation come into play, although it is not the only decision-making method in the political field. Moral reasoning, the primacy of rights and distributive justice can indeed define the big picture, the main policies to be pursued by the legislator. Proportionality stricto sensu is then useful in determining the best way to implement these policies. Proportionality stricto sensu is instrumental. It does not define first-level choices but it can indicate the best way to implement them by suggesting a range of second-level choices. However, for a judge to test proportionality is to interfere in politics on preferential grounds, disguising political questions as questions of knowledge or truth.

In the end, what remains of the giant fruit of proportionality is a small core.

10

Two Forms of Proportionality: Substantive and Institutional

CORRADO CARUSO AND CHIARA VALENTINI*

I. Introduction

The idea of proportionality plays a central role in contemporary law as a guide for legal reasoning in applying principles. These are norms that demand the fulfilment of normative reasons in generic and indeterminate terms. On the one hand, they introduce and make institutionally enforceable a quest for realising valid reasons in a legal system. On the other hand, they do not fully specify how, by whom and to what extent those reasons should be fulfilled. Therefore, principles allow the adaptation of the contents of the law to the circumstances of application, but also raise the important challenge of specifying those contents, from time to time, in a way that is acceptable in legal terms. The liberal constitutions enacted in the twentieth century have placed principles at the centre of legal systems, as basic norms defining their substance and structure: principles express the core values of a constitutional order, guiding the action of institutions and individuals with regard to the content and form of their decisions and (inter)actions. This practical prominence is reflected in the significance that principles have gained at a theoretical level,[1] lying at the centre of a heated debate on their nature, structure and content. This debate has primarily evolved by contrasting principles with rules as different types of legal norms.[2] Anti-positivists have identified principles as

* The excerpts from the judgments quoted are all taken from the translations available on the institutional websites of the various courts.

[1] The debate on principles has involved, among many: R Dworkin, *Taking Rights Seriously* (New York, Bloomsbury, 2013 [1977]); J Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823; N MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press, 1994); R Alexy, 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294; M Atienza and J Ruiz Manero, 'Rules, Principles, and Defeasibility' in J Ferrer Beltrán and GB Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford, Oxford University Press, 2013) 238.

[2] This analysis has resulted in different views on the nature of principles in relation to rules: the 'strong distinction' view and the 'weak distinction' view; H Avila, *Theory of Legal Principles* (Dordrecht, Springer, 2007) 11 ff.

standards that express moral values in open-ended terms and that are to be applied in respect of specific application circumstances. By contrast, rules would prescribe actions in categorical terms, operating as 'all-or-nothing' norms that should be applied using subsumption.[3] Positivists contend that the difference between principles and rules is one of degree, with the former having the same type of content and structure but being more generic and indeterminate.[4]

Against this background, the idea of proportionality has gradually emerged as a dominant notion, playing a central role in legal theory and practice. It serves as the main standard orienting reasoning upon principles and the application of what they demand towards a fulfilment that is legitimate in so far as it is *proportionate* to their relevance, as pondered against the relevance of conflicting principles. In these terms, the standard of proportionality expresses the quest for a balance among legal principles, as the most appropriate way of keeping together the different demands that those principles pose in pluralist constitutional systems. In this sense, the use of this standard has been spreading in legal practice on a global scale; nevertheless, it remains very controversial.[5] There is a broad debate on the grounds for and against the use of the standard of proportionality in legal reasoning, and the type of constraints and analytical steps that this standard sets for that reasoning.

This debate has primarily evolved with respect to the use of proportionality in constitutional adjudication and, in particular, the adjudication of constitutional rights. Nonetheless, the standard of proportionality has shown the potential to operate beyond that domain, as a guide for legal reasoning upon principles that do not grant substantive protection but rather pertain to structural and formal aspects of a constitutional system.[6] Although overlooked, this latter role of proportionality is gradually taking shape. On the one hand, norms of positive law and emerging judicial doctrines point to the use of proportionality as a standard for reasoning upon the institutional structure of a constitutional system, as defined by principles concerning the distribution and exercise of competences in a regime of separation of powers. On the other hand, at a theoretical level, there is growing interest in the relationship between legal reasoning, those principles and the idea of proportionality.

Our aim in the present work is to shed light on these important developments, both practical and theoretical, and to advance the reflection on the different ways in which proportionality can provide guidance for legal reasoning.

[3] R Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16 *Ratio Juris* 433.

[4] Raz (n 1) For an extended overview of the debate on principles and rules and the use of balancing in their application, see also C Valentini, 'Principles, Balancing and Proportionality' in R Chang et al (eds), *Research Handbook on Legal Argumentation* (Cheltenham, Elgar Press, forthcoming).

[5] A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 68; K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012).

[6] B Schlink, 'Proportionality (1)' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 718.

II. Forms of Proportionality

The standard of proportionality directs the application of legal principles to ensure that their fulfilment is proportionate to their importance, taking into account the extent to which that fulfilment is factually possible and the extent to which it is legally possible, given other relevant principles that might interfere with it. In this sense, the standard of proportionality is the core element of a framework for legal reasoning – call it proportionality analysis (PA) – that currently dominates the practice of principles and, in particular, the jurisprudence of constitutional and supranational courts worldwide.[7] However, PA is not a single, unitary framework for legal reasoning; it is a family of reasoning models that share a common approach: they test whether sacrificing the fulfilment of a principle is acceptable as a proportionate means to achieving a legitimate end requiring the application of a conflicting principle. These models, then, differ in how they design the tests needed. The 'standard' model – the most influential in both theoretical and practical terms – features a four-step analytical process aimed at determining to what extent fulfilling a principle justifies interfering with the fulfilment of other relevant principles.[8] More precisely, the standard model proceeds to test whether an interference (i) has a legitimate objective and can be justified as a (ii) suitable, (iii) necessary and (iv) *stricto sensu* proportionate means to realise such objective. This last step encompasses a balancing test, which weighs the conflicting principles so as to establish a balance among them, by determining how much their fulfilment/sacrifice is narrowly proportionate to their relative weight.[9] This is the model of PA that has emerged from the case law of the German Constitutional Court, as reconstructed and theorised by Robert Alexy.[10] The underlying view of

[7] On the wide circulation of proportionality see, among many, Valentini (n 4); Stone Sweet and Mathews (n 5); V Jackson, 'Constitutional Law in an Age of Proportionality' (2015) *Yale Law Journal* 3094; D Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004).

[8] On the distinction between a standard version of PA and other versions, see also G Bongiovanni and C Valentini, 'Balancing, Proportionality and Constitutional Rights' in G Bongiovanni et al (eds), *Handbook of Legal Reasoning and Argumentation* (Dordrecht, Springer, 2018) 581; and Valentini (n 7). For an overview and analysis of the different versions of PA, see, among many others, Jackson (n 7); A Stone Sweet and J Mathews, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing' (2011) 60 *Emory Law Journal* 101; D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383.

[9] This is the *proportionality as such* (Jackson (n 7) 3094) or *proportionality stricto sensu* stage (Alexy (n 3) 436–37). According to Alexy, it is the stage that allows balancing of the interests realised by one principle against the interests realised by conflicting principle(s), and it is aimed at balancing the non-satisfaction of a principle with the importance of satisfying the other: 'The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other.' The result is a 'conditional relation of precedence' among the principles at stake.

[10] See N Pietersen, 'Alexy and the "German" Model of Proportionality: Why the Theory of Constitutional Rights Does Not Provide a Representative Reconstruction of the Proportionality Test' (2020) 21 *German Law Journal* 163, highlighting that Alexy's 'reconstruction of the jurisprudence of the German Constitutional Court is only partly accurate'.

principles is that they are optimisation requirements, that is, standards requiring the optimisation of normative reasons. Other models combine the analytical steps in a different order and/or differ in including a balancing test as a specific passage devoted to weighing the principles at stake.[11]

Still, it is the 'standard' model of PA that has become the main point of reference for courts and the ongoing theoretical debate on the questions raised by this form of reasoning. Such questions include normative ones, concerning the grounds for PA in the law, and descriptive ones, concerning what PA is and the type of structure it gives to legal reasoning. In both respects, this debate mainly revolves around the use of PA by courts in the judicial review of laws interfering with principles of constitutional rank that concern the protection of rights.

Nonetheless, PA plays an important, yet overlooked, role in other contexts and domains. It is emerging as a framework for reasoning upon – and applying – principles that concern the allocation and exercise of institutional competences under conditions in which those competences concur and potentially conflict. This development brings to light the two forms that proportionality can take as a standard for applying principles: substantive and institutional. Or so we argue.

Substantive proportionality operates as a standard for reasoning on substantive considerations, especially those that pertain to the fulfilment of substantive principles concerning the protection of rights. As such, proportionality structures the legal analysis to appreciate whether and to what extent it is legitimate to interfere with the fulfilment of a substantive principle/right to fulfil conflicting principles/rights.

Institutional proportionality operates in the dimension of institutional considerations, especially those that concern the fulfilment of principles that allocate powers and competences among institutional entities and levels of government. In this form, proportionality serves as a standard that allows us to appreciate whether and to what extent it is legitimate to interfere with an institutional principle/competence to fulfil conflicting institutional principles/competences. In this form, proportionality is a standard for reasoning upon the appropriate scope and intensity of potentially conflicting institutional competences, to realise the underlying institutional reasons in proportion to the weight they carry, one in relation to the other, in the circumstances of their application.

Indeed, the standard of proportionality gives a certain structure to legal reasoning, but it does not determine its content: PA is an *empty* framework for reasoning upon the application of legal principles. It operates by organising the legal analysis independently of the substantive or institutional principles that form its content; PA does not provide such principles itself but rather requires a substantive or institutional theory that delivers those principles.

[11] For an overview and analysis of the different versions of PA, see, among many others, G Letsas,'Rescuing Proportionality' in R Cruft and M Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford, Oxford University Press, 2015) 316; Jackson (n 7); Stone Sweet and Mathews (n 8); Grimm (n 8); Valentini, 'Principles, Balancing, and Proportionality' (n 8).

So far, the theory and practice of proportionality have primarily focused on, and developed, the substantive form of proportionality, whereas institutional proportionality has remained relatively underexplored.[12] At a theoretical level, the reflection on institutional PA has been unfolding as a sort of second-order inquiry aimed at shedding light on how institutional considerations may bear on substantive PA and the reasoning upon rights. At a practical level, there is no defined, established doctrine of institutional proportionality like those established and practised in the domain of substantive proportionality and rights adjudication. Nonetheless, there are developing ideas and legal doctrines, at a national and a supranational level, that point to the use of PA in the domain of institutional principles. Let us now shed some light on these developments.

A. From Substantive to Institutional Proportionality

The theoretical reflection on the use of proportionality in applying institutional principles has been mostly subsidiary, focusing on how those principles may be encompassed by the PA of substantive principles. This reflection has taken shape largely in light of Alexy's view of principles as optimisation requirements and his distinction between two types of principles: material and formal.[13] Material principles are those that require the optimising of specific content, mostly concerning the protection of rights – such as freedom of speech or life – given the legal and factual circumstances of their application. Formal principles are those that do not optimise specific content but instead optimise a particular way of making decisions or acting. They are concerned about how – and by whom – a substantial content is to be determined and fulfilled.

For a long time, as already mentioned, the theory of proportionality has overlooked formal principles to focus on material principles and their judicial application. Despite having this secondary role, formal principles are highly relevant for the theory and practice of proportionality: they provide institutional depth, moving PA beyond the analysis of specific rights and interests to also encompass considerations concerning the institutional setting. Formal principles design the exercise and distribution of competences among different actors and spheres of action. In doing so, they bring into PA elements of institutional differentiation that are needed to calibrate this form of reasoning in light of the substantive interests at stake as well as the institutional entities and competences involved. This institutional aspect is particularly important given the criticisms of over-constitutionalisation and over-judicialisation that have been levelled

[12] For an overview of the discussion on institutional (formal) principles and proportionality, see M Klatt, 'Judicial Review and Institutional Balance' (2019) 38 *Revus* 21.

[13] Introduced by R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002); and further refined and developed in R Alexy, 'Formal Principles: Some Replies to Critics' (2014) 12 *International Journal of Constitutional Law* 511.

against PA.[14] More precisely, the charge is that this form of reasoning ultimately centres the application of the law on constitutional principles protecting rights and, in particular, on the judicial enforcement of those rights in the exercise of the judicial review against legislatures. As argued by Tsakyrakis, amongst others, one limit of PA, in this sense, would be that it grounds and fosters a constitutional discourse centred on courts and individual liberties, giving a marginal role to other institutional actors and relevant normative issues.[15]

To address this charge, Robert Alexy, in the 'Postscript' to *A Theory of Constitutional Rights*,[16] has started developing a theory of discretion that brings formal principles, especially the principle of democracy, within the framework of PA. Nonetheless, as Alexy admits, this theory 'has generated more questions than answers',[17] many of which are still open and highly controversial. Two approaches have emerged from the ongoing debate on these questions: a combination approach and a separation approach. As we shall see, these approaches also find application in judicial practice.

B. Institutional Proportionality: The Combination Approach and the Separation Approach

The combination approach permits – or, better, requires – that proportionality reasoning integrates the optimisation of formal and substantive principles and, therefore, contemplates the direct balancing of formal and material principles in a single process. According to this approach, in the case of assisted suicide, for example, and the conflict between the substantive principles at stake – the principle that protects the right to life, on the one hand, and the principle that protects the right to self-determination, on the other – the proportionality framework also requires the weighing, and balancing against those substantive principles, of the formal principle ascribing to Parliament the competence to decide on the issue according to the principle of majority.[18]

Initially, Alexy endorsed a view akin to this, facing significant criticisms concerning the moral justification for deviating from substantive rights based solely on formal principles with the risk of undermining the authority of constitutional

[14] J Rivers, 'Proportionality, Discretion and the Second Law of Balancing' in G Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 167.

[15] S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; and Tsakyrakis, ch 1 of this volume.

[16] Alexy, *Theory of Constitutional Rights* (n 13).

[17] Alexy, 'Formal Principles' (n 13) 511.

[18] However, it should be noted that the majoritarian principle also implies values or substantive principles (such as political equality and ideological pluralism). See C Caruso, 'Majority' in R Grote, F Lachenmann and R Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford, Oxford University Press, 2022).

rights. Allan has emphasised this concern, arguing that formal principles, like democratic principles, cannot substantively justify infringing on rights.[19]

Due to these criticisms, an alternative approach has emerged: the separation approach. This approach maintains a clear distinction between the substantive level of constitutional rights and the formal level of power and authority. It ensures that the PA of principles occurs within their respective domains: formal principles are analysed and balanced against other formal principles, whereas material principles are analysed and balanced against other material principles.[20] One key advantage of the separation approach would be its logical consistency and the possibility of addressing the gap between legislative actions that set limits to rights and the judicial review of those limits. Additionally, it would prevent the conflation of competence considerations with material considerations, ensuring that state authority – whatever institutional form it takes – adheres to the substance of constitutional rights.[21] Furthermore, the separation approach has served as the basis of more elaborated accounts, providing detailed operational frameworks that favour and enhance its practical application.

As mentioned above, Alexy first endorsed the combination approach but subsequently rejected it to propose an 'epistemic model' of discretion and institutional PA.[22] According to Alexy, the combination approach risks legitimising disproportionate interferences with rights, undermining their constitutional supremacy over ordinary legislation. From this perspective, Alexy has introduced a distinction between two kinds of legislative discretion: structural and epistemic. The former covers what is neither prohibited nor commanded by the constitution, whereas the latter involves the legislature's competence to determine the constitution's boundaries amid uncertainty. Formal principles primarily influence epistemic discretion. In this sense, empirical uncertainty necessitates a second-order PA and the balancing of epistemic reliability against formal democratic principles. Indeed, constitutional rights require optimisation based on assured truth, but the absolute precedence of these rights could paralyse legislation in complex areas where such truths are unavailable. Second-order PA thus permits calibration of the balancing of substantive principles, allowing institutional considerations to mitigate the weight of uncertain empirical assumptions without overriding substantive principles. In these terms, institutional principles would allow the establishment of the appropriate degree of legislative discretion, particularly in cases in which different empirical assumptions are equally plausible. This discretion, indeed, is upheld by the institutional principle of a

[19] TRS Allan, 'Constitutional Rights and the Rule of Law' in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press, 2012) 132.

[20] See Klatt (n 12). In favour of the separation approach, see also J Waldron, 'The Circumstances of Integrity' (1997) 3 *Legal Theory* 1.

[21] M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford, Oxford University Press, 2012).

[22] Alexy, 'Formal Principles' (n 13).

democratically legitimated legislature, ensuring legislative freedom in uncertain contexts.

This 'epistemic' model has since been revised and integrated by others, such as Klatt and Meister, who have proposed a two-level model of balancing and PA.[23] On a first level, balancing is part of a PA upon substantive principles. On a second level, balancing applies to formal principles and conflicts among competences. The separation of these levels would allow for reasoning upon the fulfilment of substantive principles independently from the institutions that are competent to fulfil them. In these terms, the establishment of what substantive principles require, in terms of optimisation, is not influenced by the institutional actors involved but rather depends on their relative weight in the circumstances of application. At the same time, balancing competences would unfold separately, considering what has been established as regards the balance among substantive principles.[24]

From this perspective, Klatt has developed a theory of balancing institutional competences, centred on the legislative and judicial competences concerning social rights issues.[25] According to this theory, the solution of conflicts among constitutional competence norms – that come about at a formal level and regard the exercise of judicial review – should be based on balancing. The idea is that such norms, like constitutional norms that protect rights, are norms of principle that can come into conflict and thus need to be optimised by means of balancing. Therefore, when a conflict arises among competence norms, concerning the exercise of judicial review, this conflict should be settled by balancing those norms against one other, to this end considering the weight carried by the different institutional reasons at stake in a given case. In other words, the 'institutional problem' concerning the determination of the scope and intensity of judicial review is presented as a conflict between formal principles of competence, that is, between the political competence to decide on certain issues and the judicial competence to review those decisions.[26] In these terms, Klatt's theory makes an important contribution to the role that proportionality can play in the allocation of institutional competences and conflicts among them.

Nonetheless, this reflection remains incomplete and narrow. On the one hand, it does not fully capture the dynamic of interaction between the substantive and the institutional levels on which proportionality reasoning can unfold. On the other hand, it is mostly concerned with how institutional principles shape the relation between courts and legislatures in the domain of constitutional adjudication. Yet the relevance of those principles goes well beyond this relation, having a broader scope of application and impact. Indeed, institutional proportionality

[23] On the 'two-level model', see Klatt and Meister (n 21) 141–46.

[24] ibid.

[25] M Klatt, 'Positive Rights: Who Decides? Judicial Review in Balance' (2015) 13 *International Journal of Constitutional Law* 354.

[26] ibid; see also Klatt (n 12).

concerns many other types of relations of power and authority, based on a distribution of competences among different entities in horizontal and vertical terms. In this sense, institutional principles express institutional reasons – concerning 'who' should make certain decisions and 'how' they should do so – that apply to the different spheres of institutional action in a constitutional system, complementing the reasons expressed by substantive principles and concerning 'what' institutional actions should realise. Therefore, institutional principles have a crucial bearing on the reasoning upon substantive principles and their application. Nonetheless, as illustrated above, the terms in which those principles should interact within the proportionality framework remain highly controversial. The emerging approaches – the combination approach and the separation approach – are still being refined and are subject to ongoing discussion.[27]

Legal practice offers some important insights into this debate. Various elements – norms of positive law and emerging judicial doctrines – establish a connection between the standard of proportionality and the application of principles concerning the distribution and exercise of institutional competences. An important example, in this sense, is Article 5(4) of the Treaty on European Union (TEU), which provides that '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. Based on this norm, the standard of proportionality has become part of a broader legal framework, setting the standards that constrain the delineation of institutional competences and the exercise of powers within the system of the European Union (EU). Another element is provided by Article 118 of the Italian Constitution, as interpreted by the Italian Constitutional Court, concerning the distribution of competences, in vertical terms, among the Italian state and the regions. Furthermore, very recent developments in the case law of constitutional courts, such as the Italian Constitutional Court, point to the use of proportionality as a standard for reasoning also upon issues concerning different types of institutional competences, including the competences of constitutional courts vis-à-vis the competence(s) of the legislature.

Let us now turn to analysing the elements offered by the case law, with a focus on important rulings of the Italian Constitutional Court and the German Federal Constitutional Court, which are relevant for our purposes because they allow us to grasp essential elements of institutional proportionality. First, they show how institutional principles can conflict in different contexts – namely, with each other but also with substantive principles. Second, they provide the elements needed to reconstruct how the combination approach and the separation approach shape the reasoning of courts 'in action', guiding the adjudication of institutional principles in concrete cases. Third, these cases offer important normative insights, suggesting that the use of proportionality in the adjudication of institutional principles and competences rests on a particular conception – a 'functional' conception – of the

[27] Klatt and Meister (n 21); and Rivers (n 14).

separation of powers and, relatedly, on a connotation of those principles as standards that can be optimised and balanced, rather than categorical rules.

III. Institutional Proportionality in Action

Constitutional courts increasingly use the standard of proportionality to address the interferences that arise among institutional principles, concerning constitutional competences. This use of proportionality occurs on many fronts, shaping the relations between constitutional courts and other courts (both ordinary and supranational courts), the relations between constitutional courts and legislatures, and, furthermore, the relations between different levels of government and territorial authority. Let us now delve into the analysis of cases that show how institutional proportionality operates across this wide set of institutional settings.

We will first consider relevant cases in which the standard of proportionality has been used to apply, and balance, only institutional principles, and then we will move to the analysis of cases in which the proportionality reasoning has been used to apply, and balance, institutional principles in (direct or indirect) connection with substantive principles. In doing so, we will shed some light on how the combination approach and the separation approach can guide the adjudication of concrete cases. To this end, we will look at the case law of the Italian Constitutional Court as well as a recent and relevant development in the case law of the German Federal Constitutional Court that has occurred with the decision in the *Weiss* case.[28]

The adjudication of the Italian Constitutional Court will be the main point of reference for our analysis, as it has consistently paid close attention to the institutional dimension of substantive issues and to the institutional relevance and impact of its own decisions. Indeed, one of its notable successes is the attention devoted to institutional principles and the establishment of cooperative relations in both horizontal and vertical terms – among different constitutional branches, including the Court itself, ordinary judges, supranational courts, the legislature, the executive,[29] and among the different levels of territorial authorities within the state.

Before moving on, two caveats are in order. First, the selected cases are not mere illustrations of the use of proportionality in the application of institutional principles. They serve as case studies providing crucial insights into the practical and normative implications of that use. Second, it is hard to isolate substantive considerations from institutional considerations in the arguments of the Italian

[28] German Federal Constitutional Court, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, judgment of 5 May 2020.

[29] See V Barsotti et al, *Italian Constitutional Justice in Global Context* (Oxford, Oxford University Press, 2018) 66, 235–38.

Constitutional Court. Nonetheless, for analytical purposes, it is important to identify and set these considerations apart in order to consider their role in the Court's reasoning and the way in which this reasoning combines, or separates, them.

A. Proportionality Analysis of Institutional Competences

Let us start with the use of PA to reason only upon institutional principles, concerning the distribution of competences among constitutional actors that operate on different levels of a constitutional system. First, we will look at the reasoning of the Italian Constitutional Court on the 'vertical' allocation of competences within the state, among institutions that operate on different territorial levels of government. Second, we will inquire into a significant development in the case law of the German Federal Constitutional Court, with regard to the 'vertical' allocation of competences beyond the state, among institutions that operate at the national and supranational levels.

i. State and Regions before the Italian Constitutional Court

The Italian Constitutional Court traditionally plays a central role in defining institutional competences within the Italian constitutional system. In many cases, the idea of proportionality guides the Court's action in this respect, serving as a tool to detect illegitimate interferences with competences, particularly in the case of territorial entities. In cases concerning these interferences, the Italian Constitutional Court stands as an arbiter among institutions, and proportionality provides the standard to appreciate the weight of the competences at stake and establish a balance among them.

The basis for using the standard of proportionality, here, is provided by the constitutional principle of loyal cooperation. This principle is used in different domains, but it has proved to be especially relevant in the abstract judgement of the law's constitutionality, concerning disputes between state and regions.[30]

It is necessary to take a step back in order to understand how this principle operates. In 2001, the Italian Constitution was amended to enrich the legislative competences of regions and to further delineate the boundaries between the sphere of those competences and the competences of the state. The amended Article 117, indeed, comprises a wide set of rules on competences, providing a long list of matters on which the state has an exclusive competence[31] and matters on which there is a concurrent competence of the state and regions.[32] Then there is a

[30] See C Caruso, 'Sincere Cooperation in Times of Judicial Regionalism: From a Method of Governance to a Standard of Judgment' (2021) 4 *Quaderni costituzionali* 909–31.

[31] Art 117.2 Italian Constitution.

[32] Art 117.3 Italian Constitution.

final, residual clause that allocates the non-enumerated competences to regions.[33] Given this long list of norms specifying the competences of different territorial entities, one would expect the Italian Constitutional Court to apply Article 117 as a set of rules of competence, that is, by subsuming cases under those rules.

On the contrary, the Court has radically 'rewritten' the distribution of competences established by Article 117, interpreting the norms of competences that it brings together as principles that can be balanced one against the other, rather than as categorical rules. In fact, the Italian Constitutional Court has used the technique of weighing, and balancing, institutional interests concerning competences. When reviewing a legislative intervention, the Court considers the territorial scope of the interests involved, to determine whether they are unitary or regional interests, and then seeks to establish the appropriate degree of interference among them. If unitary interests are at stake, the state can legitimately interfere with regional competences, provided that the region's prior involvement is demonstrated, showing that regional concerns have been considered.[34] In these terms, institutional proportionality has become the analytical tool used by the Court to apply the principle of loyal cooperation, taking into account the concrete circumstances in which regions exercise their competences and interact with the state in implementing national legislation.

ii. The Weiss *Case: Institutional Proportionality at the Crossroads of Legal Orders*

As illustrated in section III.A.i, the standard of proportionality can serve as a guide to reason upon interactions, and conflicts, among the competences of different territorial entities that operate on different levels of authority within the same state. This standard, then, can offer guidance beyond the state, to address the interferences that may occur between national and supranational spheres of competence. An important instance of this use is provided by the recent decision of the German Federal Constitutional Court in the *Weiss* case. Although the decision was formally addressed to the German authorities, the Court considered *ultra vires* (ie, beyond its competences) the programme of the European Central Bank, as well as the ruling of the Court of Justice of the European Union (CJEU) upholding that programme. The German Federal Constitutional Court, in fact, has reinterpreted the principle of proportionality established by Article 5(4) TEU

[33] Art 117.4 Italian Constitution.

[34] From a formal point of view, it is Art 118 of the Italian Constitution that provides the textual foothold for such an operation. Art 118 of the Constitution provides for the principles of subsidiarity, differentiation and suitability in the allocation of administrative functions; the Constitutional Court has extended these principles to the distribution of legislative functions as well, allowing the state to take legislative functions under its control when an intervention is justified by unitary interests. See the landmark Dec 303/2003, which inaugurated the 'Subsidiarity Call' doctrine, well-known in the Italian literature and case law. See Barsotti et al (n 29) 200.

in light of the German Basic Law (*Grundgesetz* (GG)). We cannot address here the impact of the decision, and its relevance, from the point of view of the dynamics of the European integration.[35] What is relevant for our purposes is the Court's reasoning in terms of institutional proportionality.

Within the EU, a principle of institutional proportionality was introduced by the Maastricht Treaty in the face of the extension of the Union's competences, as outlined in Article 5(1) TEU. It is a legal consequence of the principle of conferral that characterises the EU as a supranational organisation with enumerated competences. As noted, Article 5(4) TEU provides that 'the content and form of Union action shall not *exceed* what is necessary to achieve the objectives of the Treaties' (emphasis added). This principle, in the EU legal system, has a (*lato sensu*) federal dimension,[36] in that it uses the idea of proportionality to shape, and reconcile, the EU's competences with those of Member States. Indeed, the idea of proportionality was introduced, in this clause, 'to protect the interests of Member States, rather than the interests of the individual' against possible excesses and legitimate interferences.[37]

Returning to the *Weiss* case, the CJEU found the ECB's Quantitative Easing programme to be legitimate under a substantive proportionality test.[38] The Court indeed found the programme to be a suitable means for the realisation of a legitimate substantive goal – keeping inflation under 2 per cent – and also a necessary means not exceeding what was required to achieve that objective.[39] In these terms, the CJEU confirmed its deferential attitude towards the ECB as a technical, independent institution: the action of such an institution is illegitimate only if manifestly inappropriate for the realisation of the objective pursued.[40]

[35] For a critical appraisal, see FC Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020' (2020) 16 *European Constitutional Law Review* 733; P Faraguna and D Messineo, 'European Central Bank, National Constitutional Adjudication and the European Court of Justice: Latest developments from the "European case-law" of the German Constitutional Court' in R d'Ambrosio and D Messineo (eds), *No 91 – The German Federal Constitutional Court and the Banking Union* (Banca d' Italia Publishing, 2021) 11, 35–38. For a different perspective, see D Grimm, 'A Long Time Coming' (2020) 21 *German Law Journal* 944. Within a couple of years, the case was closed without serious repercussions: After the decisions, additional explanations on the proportionality of the measure were made by the ECB Governing Council on 3–4 June 2020, anticipated by the disclosure of confidential ECB documents in favour of the German authorities. In June 2021, the European Commission opened an infringement procedure against Germany for depriving an ECJ decision of its effectiveness, which was later closed in December because Germany had fully recognised the legal effects of the acts of European institutions.

[36] See G de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 112, according to whom the federalism dimension of proportionality involves 'the extent to which the aim of a particular measure is one which lies primarily within the competence of the Member State, rather than the competence of the Community institutions'. See also J Steinbach, 'The Federalism Dimension of Proportionality' (2022) 28 *European Law Journal* 36, 39.

[37] Steinbach (n 36) 39.

[38] Case C-493/17 *Weiss and others*, ECLI:EU:C:2018:1000 (CJEU, 11 December 2018).

[39] The programme passed the necessity test also because it was quantitatively limited and temporary in nature.

[40] For the 'manifestly inappropriate test' on European institutions' action, see W Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 *Cambridge Yearbook of European Legal Studies* 439.

By contrast, according to the German Federal Constitutional Court,[41] the CJEU failed to grasp the grounds of legitimacy for the ECB's action: the basis of that legitimacy did not lie in a proportionate interference between substantive principles but rather pertained to a proportionate allocation of institutional competences among different institutional entities and levels of government. According to the German Federal Constitutional Court, the CJEU failed to take into account the distinction between monetary and economic policies (a competence left by the Treaties to the Member States) and, therefore, between the corresponding institutional spheres of competence. Therefore, according to the German Federal Constitutional Court, the CJEU performed a test of substantive proportionality, through the lens of monetary policy, without taking into account the dimension of economic policy, which required the exercise of other competences.[42] Indeed, the principle of allocation was illegitimately compressed and, at the same time, the (meta-)principle established by the eternity clause of the German Constitution was violated.[43] Regarding the European integration process,[44] this provision has been constantly interpreted to prevent surreptitious enlargements of powers in favour of the Union without passing through an expression of the will of the German people.[45] From this point of view, the decision of the German Federal Constitutional Court is an excellent example of institutional proportionality: the fulfilment of the substantive interest in keeping the level of inflation below two per cent and the related institutional interest in the functional independence of the ECB have disproportionately interfered with the fulfilment of two other institutional interests of constitutional rank. First, the principle of conferral and, second, the principle of democratic legitimation of choices related to European integration, both corollaries of the eternity clause enshrined by Article 79(3) GG. In this case, the principle of proportionality clearly takes an institutional form, with a degree of scrutiny that changes according to the legal context:[46] while, according to the CJEU, it poses a relative presumption of validity of the measures adopted by EU institutions, in the German Federal Constitutional Court's analysis it has

On the contrary, 'when proportionality is invoked in order to challenge the conformity of Member States' measures with EU law, the legality is typically measured against a "least-restrictive measure" benchmark' and the scrutiny is more stringent: see Steinbach (n 36) 37. One possible rationale for this variable-intensity scrutiny is the possible clash of Member States' actions with the four fundamental freedoms, which represent the bulwarks of the European legal and economic order: ibid (n 36) 37.

[41] See German Federal Constitutional Court (n 28).

[42] According to the German Federal Constitutional Court (ibid para 139), the CJEU (and the ECB before it) should have subjected monetary policy measures to an economic policy assessment, checking their impact on national 'public debt, personal savings, pension and retirement schemes, real estate prices' and – in an overall evaluation – 'weighing these effects against the monetary policy objective'.

[43] German Federal Constitutional Court, ibid paras 99–116.

[44] Since the decision on the Maastricht Treaty, so called 'Maastricht Urteil', 2 BvR 2134/92, 2 BvR 2159/92, 12 October 1993, available at https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf.

[45] Maastricht Urteil, C, para 2.

[46] See O Scarcello, 'Proportionality in the PSPP and Weiss Judgments: Comparing Two Conceptions of the Unity of Public Law' (2021) 13 *European Journal of Legal Studies* 45.

been used, thus, as a shield against the European integration process to assess compliance with the EU's principle of conferral. This strategic use becomes even more apparent when considering that the German Constitutional Tribunal never applies proportionality to assess the internal relations between the *Bund* (Federal Government) and the *Länder* (States).[47]

B. Institutional Proportionality and the Calibration of Judicial Review

In the cases illustrated in section III.A, the standard of institutional proportionality has guided constitutional courts' reasoning upon non-judicial competences and spheres of action established by norms of constitutional rank. Let us now turn to cases in which institutional proportionality applies to the reasoning on judicial competences and, in particular, serves as the yardstick to appreciate the legitimacy of the judicial review performed by a constitutional court interfering with the competence(s) of other institutions and, in particular, the legislature.

Several significant examples of such use can be drawn from the experience of the Italian Constitutional Court, where proportionality plays an important role in guiding the reasoning upon institutional principles in combination with substantive considerations. These are cases in which the Court seeks, on the one hand, to protect a substantive right or interest and, on the other hand, to calibrate its own action and avoid interferences with the competence of the legislature and legislative discretion. As pointed out by Alexy, the proportionality framework allows this to happen. Reasoning on the proportionality of interferences with substantive principles also requires a consideration of institutional principles and, in particular, the democratic principle that requires the granting of epistemic discretion to the legislature.[48] Guided by the standard of proportionality, a court can calibrate its own action so as to realise proportionate interferences with the competences of the legislature, given the weight of the substantive reasons at stake and, moreover, the extent to which there is uncertainty about the conditions of their legitimate fulfilment. The case law of the Italian Constitutional Court shows that there are (at least) two ways in which it can proceed in calibrating the scope and intensity of the review: (i) avoiding immediately declaring the unconstitutionality of a specific provision; (ii) modulating the effects of the declaration by setting, in particular, temporal limits on the efficacy of the ruling. The choice between these two options depends on the extent to which institutional proportionality ultimately demands judicial deference towards the legislature, which is greater in the first case – postponing the declaration – and smaller in the second – issuing the declaration but with temporally limited effects.

[47] J Saurer, 'Der kompetenzrechtliche Verhältnismäßigkeitsgrundsatz im Recht der Europäischen Union' (2014) 69 *Juristzeitung* 281; Steinbach (n 36) 39.

[48] Alexy, 'Formal Principles' (n 13) 519.

Two aspects, here, deserve attention. First, the Italian Constitution does not directly provide for these decisional techniques and, despite deference to the legislature, their elaboration and adoption shows a certain degree of creativity on the part of the Italian Constitutional Court. By contrast, in other systems, positive law contemplates decisional techniques for the modulation of the intensity and scope of judicial decisions.[49] Second, the standard of institutional proportionality applied to the relations between the Italian Constitutional Court and the legislature is an instance of the principle of loyal cooperation, guiding the interactions among institutions that unfold both horizontally and vertically within the Italian constitutional system.

i. Deferring Unconstitutionality

We turn now to the analysis of two important cases in which the Italian Constitutional Court has calibrated the scope and intensity of its own action, so as to fulfil the requirement of institutional proportionality posed by the principle of loyal cooperation.

The first relevant case is the *Cappato* decision.[50] Cappato, a libertarian activist, accompanied a man who had quadriplegia after a severe car accident to a Swiss clinic to assist him in the act of ending his own life. Cappato was thus charged with aiding and abetting suicide, behaviour expressly sanctioned by the Italian Criminal Code.[51] On the one hand, the Italian Constitutional Court established that the criminal provision was justified in terms of protecting vulnerable persons, by criminalising the act of providing assistance to a person in suicide; on the other hand, the Court ruled that the provision was too broad, because it was susceptible to being applied to cases in which persons affected by an incurable illness causing physical and/or psychological suffering, which they find intolerable, and who have the capacity to make free and informed decisions, are kept alive using life-support treatments.

According to the Italian Constitutional Court, in this complex case there was a conflict between two substantive principles of the same constitutional rank: the right to life; and the right to self-determination concerning treatments. For this reason, despite the over-inclusiveness of the challenged provision, the Court did not declare it unconstitutional. Indeed, according to the Court, the resolution of that conflict could not be the unconstitutionality of the challenged provision:

> [I]n the absence of specific regulations in the area … any individual – even one not working in healthcare – could legally offer, in their place or at the patient's home, as an

[49] See, eg, Art 140 of the Austrian *Bundesverfassungsgesetz*, allowing the Austrian Constitutional Court to defer *pro futuro* the effects of the decision (for up to 18 months), or to establish the general retroactivity of the decision; Art 31(2) of the German *Bundesverfassungsgerichtsgesetz*, which provides for decisions of mere incompatibility; Art 282(4) of the Portuguese Constitution, which makes it possible for the Portuguese Constitutional Court to limit the retroactivity of its decision.

[50] Italian Constitutional Court, ord 207/2018, *Cappato*.

[51] Art 580 Italian Criminal Code.

> act of charity or for a fee, suicide assistance to any patient who wished to have it, without any ex ante oversight that, for example, the individual is capable of self-determination, that the choice they have expressed is free and informed, and that the illness afflicting the patient is incurable.[52]

The Court noted that there were different possible ways of intervening and regulating these cases through the law. Therefore, the Court has called the legislature to account: since the question of constitutionality lay at the 'intersection between values of primary importance',[53] their balancing 'presupposes, in a direct and immediate way, choices that the legislator is … authorized to make'.[54] Therefore, it would be

> appropriate – in a spirit of faithful and dialogical institutional cooperation – to allow Parliament … every appropriate reflection and initiative, to avoid, on the one hand, that a provision continues to produce effects considered to be unconstitutional in the ways described, but, at the same time, to prevent potential gaps in the protection of values, which are no less relevant at the constitutional level.[55]

The Italian Constitutional Court arrived at this solution through an order of deferred unconstitutionality:[56] it suspended the pending proceedings, deferring the question and scheduling a new hearing after a one-year term. The Court warned Parliament that at the end of this term, in the event of legislative inertia, the Court would retain the power to declare the the provision unconstitutional. Indeed, after one year of inaction by the legislature, the Italian Constitutional Court declared this provision of the Criminal Code partially unconstitutional, in so far as it did not exclude the punishment of those who facilitate the fulfilment of the autonomously and freely formed intent of a person to kill themselves, when that person is fully capable of making free and informed decisions, being kept alive by life-support treatments and suffering from an incurable illness which is a source of intolerable physical or psychological suffering.[57]

The Court has used this technique in other, subsequent cases.[58] It has also been used by other courts in other constitutional systems, when they have found themselves deciding similar issues.[59] It is an example that explains how the reasoning in terms of institutional proportionality can combine with the reasoning in terms of substantive proportionality. Indeed, the Court found that the criminal provision was suitable with regard to the objective of protecting a substantive interest, such as vulnerable people's right to life. Nonetheless, the provision failed the necessity

[52] *Cappato* (n 50) 8.
[53] ibid 10.
[54] ibid.
[55] ibid.
[56] See Report of the President of the Constitutional Court, Professor Augusto Antonio Barbera, Extraordinary Meeting of the Constitutional Court, Rome – Palazzo della Consulta, Salone Belvedere, 18 March 2024, 16, available at www.cortecostituzionale.it/annuario2023/pdf/Relazione_annuale_2023_ENG.pdf.
[57] Dec 242/2019.
[58] See ord 132/2020-dec 150/2021, ord 97/2021- ord 31/2023.
[59] Supreme Court of Canada, *Carter v Canada*, 2015 SCC 5, expressly cited by ord 207/2018.

test because it was not the least intrusive means for realising that interest and, thus, disproportionately interfered with the freedom of therapeutic self-determination. The discontinuity between suitability and necessity opens the door to institutional proportionality: an immediate declaration of constitutional illegitimacy would have been a disproportionate (and unnecessary) judicial interference with legislative discretion. The case therefore required a less clear-cut and more nuanced solution, unveiling the existence of a plurality of regulatory options.

ii. Modulating the Temporal Effects of Unconstitutionality Decisions

Another important example of the adoption of the combined approach to proportionality reasoning may be found in the case law of the Italian Constitutional Court and its calibration of the temporal effects of its decisions. The Constitution establishes[60] the retroactive effect of declarations of unconstitutionality, but it makes no explicit reference to the power of the Constitutional Court to modulate the effects of its decision. The Court has explicitly addressed this problem.[61] In declaring constitutionally illegitimate a tax on extra profits coming from oil products, the Court decided to exclude retroactive effects of the provision that would have led to an onerous budgetary hole.

In this case, the Court applied proportionality as a standard that guides the exercise of judicial competences vis-à-vis other institutional competences. The Court expressly argued that the judicial choice of the decisional technique in a case, and therefore the choice regarding the scope and intensity of its own institutional action, must be guided by the standard of proportionality. Here, institutional proportionality combines with substantive proportionality:

> The institutional task vested in this Court requires the Constitution to be guaranteed as a unitary whole in such a manner as to ensure systematic and unfragmented protection for all rights and principles affected by the decision. If this were not the case, one of the rights would end up expanding and would thereby become 'dominant' over the other legal interests recognised and protected under the Constitution.[62]

Furthermore:

> The Italian Constitution, as is the case for other contemporary democratic and pluralist constitutions, requires an ongoing mutual balancing between fundamental principles and rights, none of which may claim to have absolute status. It is precisely the requirements laid down by a reasonable balancing between the rights and principles involved that condition the choice of the decision-making technique used by the Court …[63]

[60] Art 136 Italian Constitution; and Art 30 Law no 87/1953.
[61] Dec 10/2015, *Robin Hood tax*.
[62] ibid 15.
[63] ibid.

related, as in this case,

> to the temporal dimension of the contested legislation by limiting the effects of the declaration of unconstitutionality over time. … Naturally, considering the general principle of retroactivity resulting from the Constitution and Article 30 of Law no 87 of 1953, decisions taken by this Court involving the regulation of the temporal effects of the decision must be assessed in the light of the principle of proportionality. They must therefore be rigorously subject to compliance with two clear prerequisites: the compelling need to protect one or more constitutional principles, which would otherwise be irremediably compromised by a decision simply accepting the question of constitutionality and the fact that the restriction on retroactive effect must be limited to that which is strictly necessary to ensure the balancing of the interests in play.[64]

In these terms, the Italian Constitutional Court explicitly referred to the distinction between substantive proportionality – as a standard that guides the Court's application of substantive principles – and institutional proportionality – as the standard guiding the Court's reasoning upon the exercise of its own competence and the interaction with the legislature. Furthermore, the Court established a connection between these two forms of proportionality, in so far as it argued that the use of PA in assessing the legitimacy of interferences with rights allows for the fulfilment of the standard of institutional proportionality: it allows for an exercise of judicial power that is 'proportionate' to the relevance of the underlying institutional reasons vis-à-vis the reasons that justify the act under review.

In these terms, the Court's reasoning points to an understanding of proportionality as an overarching standard, guiding the action of the Court in both substantive and institutional terms: (i) it requires a systematic protection of rights through the adoption of PA in the application of substantive principles, which also (ii) allows the Court to exercise its own competence by taking proportionate institutional action. Substantive and institutional proportionality overlap. First, because what leads to the variation in decisional technique is the need to protect a principle that does not pertain to the division of powers: 'according to the Court, the retroactive application of this declaration of unconstitutionality would result first and foremost in a serious violation of the balanced budget requirement under Article 81 of the Constitution'.[65] Second, because the choice to modulate effects has an impact on the rights of the plaintiffs in the case, who, because of the Court's choice, will not see their claims met. Finally, even though the Italian Constitutional Court modulated the retroactive effects of its decisions in subsequent proceedings,[66] it added that the modulation applies under strict proportionality.

[64] ibid 16.
[65] ibid.
[66] Decs 178/2015, 246/2019, 152/2020.

C. A Separation Approach: Institutional Principles versus Substantive Principles

To sum up what has been argued so far: institutional proportionality is primarily concerned with conflicts between institutional principles; it can also involve substantive principles and lead to a modulation of the court's action to respect legislative discretion and, at the same time, enforce substantive principles.

Where this combination is lacking, the institutional principle of legislative discretion may override the substantive principles at stake. In such cases, there is no attempt to strike a reasonable accommodation between the different interests but a simple and highly deferential preference for legislative discretion. Here legislative discretion is understood in a substantive sense[67] and the Constitutional Court does not find a constitutional principle that is able to immediately bind the legislature. The outcome of these decisions is not the rejection of the question but its inadmissibility. This is not because a procedural requirement is missing but because the Court does not feel competent to enter a field deemed to be the exclusive domain of the legislature. Consider, for example, the status of children born to a female couple through medical assistance procreation (MAP),[68] or that of children of a male couple (born via surrogate motherhood).[69] In Italy, MAP is permitted only between couples of different sexes, and surrogacy is a crime in any case, with the consequence that children born through these techniques have full legal protection only against the biological parent. In these cases, the question of constitutionality concerned the extension of legal protection to the relation between the child and the intended parent. While finding a gap in legal protection, the Court believed that

> only an intervention of the legislator, regulating in a comprehensive way the condition of children born to same-sex couples through recourse to MAP, would make it possible to overcome the fragmentary and unsuitable legislative tools currently used to protect the 'best interests of the child'. It would also avoid the 'disharmony' that could arise as a result of intervention aimed only at resolving the problem specifically brought to the attention of this Court.[70]

Similarly, and with reference to surrogate births, the Italian Constitutional Court argued that

> the task of adapting existing law to the need to protect the interests of children born through surrogacy – in the context of the difficult balance between the legitimate aim of discouraging recourse to the practice and the need to ensure respect for the rights of children, in the terms set out above – can only lie, in the first instance, with the legislator, which must be granted a wide margin of appreciation for finding a solution capable

[67] Alexy, 'Formal Principles' (n 13).
[68] Dec 32/2021.
[69] Dec 33/2021.
[70] Dec 32/2021 10.

> of taking into account all the rights and principles at stake. Given the range of possible options, all of which are compatible with the Constitution and involve interventions having a potential impact on the whole family law system, the Court must now stand back, and leave it to the discretion of the legislator to provide without any delay, for appropriate remedies to the current lack of protection for the interests of the child.[71]

There are two reasons for justifying such an approach: on the one hand, the technological progress, which amplifies de facto possibilities without a social consensus having matured around them that is capable of considering them legal rights; on the other hand, the impossibility of responding with a single normative response, since the protection of the subjective situations at stake would require a systematic revision of the regulatory apparatus.[72]

IV. Institutional Proportionality: The Grounds and the Structure

Institutional proportionality, as reconstructed so far on the basis of the elements provided by the theory and practice of proportionality, points to a certain understanding of the principle of separation of powers and, relatedly, the norms that allocate and regulate institutional competences in a constitutional order. According to this understanding, the legal questions concerning the separation of powers are not so much about identifying the institution to which a specific competence should be assigned. Rather, they concern how, and the extent to which, that institution is called upon to exercise it. Let us shed light on this perspective.

A. The Grounds: Functional Understanding of the Separation of Powers

As mentioned previously, using proportionality as a standard for applying institutional principles points to a 'functional' understanding of the separation of powers in a constitutional democracy. This approach enriches the traditional, formal understanding derived from Montesquieu's ideas, which posit that the separation of powers is grounded in a set of 'bright-line rules' articulated by the constitutional text. In contrast, the functional approach views this principle as an open-ended standard that does not strictly delineate and separate spheres of institutional competence. Instead, it demands the performance of 'functional cycles',[73] where

[71] Dec 33/2021 8.

[72] Similarly, eg, Dec 240/2021 on the system of election of the mayors of metropolitan cities.

[73] G Silvestri, 'Poteri dello Stato (divisione dei)' in *Enciclopedia del Diritto*, vol XXIX (Milano, Giuffrè, 1985) 713.

different institutions may need to exercise the same competence, and the same institution may need to exercise different competences, all within a framework of 'interbranch relations' and mechanisms of checks and balances. Indeed, the principle of separation of powers is not to be understood as a rigid division of functions among constitutional bodies, instrumental, as it was in the nineteenth-century state, to the protection of negative freedoms and individual property. In contemporary constitutions, the social pluralism they recognise and activate requires to be governed through functional cycles entrusted to organs that fail to contain, in their traditional labels (executive, legislative, judicial), the richness of the tasks entrusted to them. Functional cycles reflect the differentiation of social systems: as such, not only does each power exercise one function, which may not coincide with those of other powers, but also within each power there are distinct functions that concur, as they are exercised, to determine a dynamic and reflexive balance with those exercised by other powers.

According to the functional approach, different institutions can exercise the same function as long as institutional plurality is maintained: there is no concentration of power when the same institutional body exercises several functions and different bodies can also exercise those same functions.

Thus, we can distinguish between a formal approach to the separation of powers, which assigns fundamental state functions to different organs, and the theory of checks and balances or the theory of a functional division.[74]

Based on the functional approach, the traditional functions of the state (legislative, executive, judicial) can be carried out by various intra-state organs (parliament, government, constitutional courts) and entities (regions, sub-federal States, etc). Therefore, the separation of powers has both a horizontal dimension within the organs of the state and a vertical dimension favouring the territorial entities into which a certain polity is organised. This approach to the separation of powers requires abandoning the application of competence norms as categorical rules. Instead, 'functional cycles' rely on the intertwining of competences, potentially giving rise to conflicts that necessitate balancing and proportionality reasoning.

B. The Structure

Based on the elements provided by the theory and practice of proportionality, we can outline the framework that proportionality provides for reasoning upon competences, and conflicts among them, so as to determine the legitimate scope and intensity of institutional actions. In this sense, institutional proportionality guides and structures legal reasoning so as to assess whether the exercise of

[74] P Mikuli, 'Separation of Powers' in R Grote, F Lachenmann and R Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford, Oxford University Press, 2018) 1.

a competence: (i) has a legitimate aim; (ii) is suitable, relative to that (legitimate) aim; (iii) is necessary, concerning the realisation of that aim; and (iv) is balanced – that is, the weight of the interests realised by the exercise of that competence, and the extent to which they are fulfilled, justify interfering with the interests that underlie the conflicting competences at stake. As the illustrated examples in this chapter have shown, substantive principles may bear on this reasoning, in so far as they are relevant for assessing the objective pursued by the exercise of a competence and/or they add weight to the institutional reasons at stake, or, again, they can be weighed and overcome by institutional principles.

Ultimately, proportionality serves as a framework for legal reasoning and decision making, extending beyond substantive principles to also encompass institutional principles, concerning competences or levels of government: it is a framework that can guide institutional action comprehensively. In this sense, the potential of proportionality lies not only in providing a structured decision-making process but also in fitting the 'culture of justification' that permeates contemporary liberal constitutional systems.[75] In such a culture, institutional action is legitimate if grounded in reasons that can be intersubjectively controlled and reasonably accepted by free and equal individuals.[76]

Proportionality reasoning – in the substantive and the institutional form – contributes to such justifiability in different ways. First, by identifying and subjecting to control the *full* set of reasons – substantive and institutional – underlying institutional actions. Indeed, the framework of proportionality clarifies the different deliberative stages and reasons involved in institutional decision making. The balancing stage, in particular, requires identifying all relevant reasons, weighing them against each other and determining the extent to which they should be fulfilled or sacrificed. This process highlights not only the reasons justifying institutional actions but also the remaining reasons that, though sacrificed, still merit consideration.[77] These residual reasons are legally significant, as they represent relevant considerations that persist even after a justified action is taken.[78]

Second, proportionality reasoning proceeds by scrutinising the acceptability of all the principles and reasons at stake, using criteria (suitability, necessity and *stricto sensu* proportionality) that allow for the testing of justifiability in conditions

[75] D Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Reasoning, Justification* (Cambridge, Cambridge University Press, 2014) 234.

[76] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 141–75, drawing on the ideal of public reason as introduced by J Rawls, *Political Liberalism* (New York, Columbia University Press, 1993).

[77] J Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights' (2004) 23 *Law and Philosophy* 325.

[78] By detecting this residue, the framework of proportionality allows appreciation of their legal importance and, thus, provides us with a comprehensive account of institutional action grounds as well as information that can be relevant for future cases, concerning the existence of reasons that have been previously discarded but deserve consideration.

of constitutional pluralism.[79] Indeed, these criteria emphasise how realising some reasons allows for the consideration of other, conflicting reasons, so as to ground institutional actions in a balance of reasons that is acceptable to free and equal individuals.

Yet, as mentioned previously, while proportionality can set out the deliberative steps required to achieve this balance among principles and reasons, it does not itself provide these principles and reasons.

Proportionality ultimately provides an empty analytical structure that can be used to track, scrutinise and balance the substantive and institutional reasons brought by different actors based on different accounts of the constitutional order, as demanded by a culture of justification.

Indeed, a culture of justification requires institutions to apply substantive principles and fundamental rights taking into due account, and balancing, all the different and conflicting reasons that they provide. In the same way, that culture requires institutions to fulfil formal principles and exercise institutional competences taking into due account, and balancing, the conflicting reasons that they provide.

On both fronts, the idea of proportionality provides a response to this demand. It has the potential to serve as a *general* standard for legal and political decision making, providing guidance for making, and justifying, institutional decisions as based on the transparent and balanced consideration of *all* the relevant reasons, both substantive and institutional.

[79] Kumm (n 76). On these aspects of proportionality, see also Valentini (n 7); and C Valentini, 'Proportionalism, Justification and Inclusive Adjudication' (2019) *Archiv für Rechts -und Sozialphilosophie–Beihefte (ARSP-B)* 83.

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