Introduction

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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.