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# Proportionality: Challenging the critics

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*While the principle of proportionality has been the most important doctrinal tool in constitutional rights law around the world for decades, constitutional theorists have only recently begun to develop theoretical accounts of it. Even more recently, a few scholars have come forward with critiques of the doctrine's usefulness, in particular with regard to its assumed failure to adequately address the moral issues and the assumed impossibility or impressionistic nature of balancing. This paper examines the arguments of the critics and concludes that they have failed to make a convincing case against proportionality.*

## 1. Introduction

The principle of proportionality started its triumphal march through human and constitutional rights law roughly a half century ago.<sup>1</sup> Surprisingly, however, it was only relatively recently that it began to attract the attention of constitutional rights theorists;<sup>2</sup> and even more recently, some opposition to the principle has begun to form.<sup>3</sup> So there are now a number of theories trying to demonstrate that proportionality is a valuable doctrine, and there are a few attempts to show the opposite. This

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<sup>1</sup> The German Federal Constitutional Court's *Pharmacy Judgment* ("Apothekenurteil"; BVerfGE 7, 377 [1958]) is generally considered to be its hour of birth in constitutional rights law.

<sup>2</sup> ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (2002) (first published in German in 1986); DAVID BEATTY, *THE ULTIMATE RULE OF LAW* (2004); Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in *LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY* 131 (George Pavlakos ed., 2007); Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 *LAW & ETHICS HUM. RTS.* 141 (2010). For a critique of Alexy's theory, see my *Balancing and the structure of constitutional rights*, 5 *INT'L J. CONST. L. (I-CON)* 453 (2007). There is now also an increasing interest in the historical development of the principle of proportionality; see Moshe Cohen-Eliya & Iddo Porat, *American balancing and German proportionality: The historical origins*, 8 *INT'L J. CONST. L. (I-CON)* 263 (2010); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSNAT'L L.* 72 (2008-9).

<sup>3</sup> Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, 7 *INT'L J. CONST. L. (I-CON)* 468 (2009); GRÉGOIRE WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* (2009).

paper does not directly contribute to this debate but rather hopes to open up a new field of discussion by directly engaging with the critics of proportionality. Rather than making a positive case for proportionality or a negative case against it, it examines the arguments of the critics of proportionality and asks whether they make a coherent case for rejecting it.

Proportionality is a doctrinal tool for the resolution of conflicts between a right and a competing right or interest, at the core of which is the balancing stage which requires the right to be balanced against the competing right or interest. Thus, there are two distinct ways to criticize proportionality. The first argues that the special normative force which rights hold lends them an absolute or near-absolute priority over competing considerations, which is such that it makes any talk of balancing, at the very least, misleading. Such an approach is defended, in particular, by scholars broadly following Ronald Dworkin's theory of rights as trumps: according to that theory, rights are not, as proportionality would seem to have it, balanced against conflicting interests; rather, they (normally) trump them; or so the proponents of that theory see it. I am deliberately vague here because I believe that balancing and proportionality properly understood must also feature in Dworkinian theories of rights; however, I will not push the point in this paper.<sup>4</sup> The second line of criticism of proportionality leaves open the question of whether rights have an absolute or near-absolute priority over conflicting considerations but argues that the principle has other deficits which make it unsuitable for the resolution of rights issues. It is this latter strategy which this paper addresses and explores.

The paper will proceed as follows. The next section will provide an account of the doctrine which at least intends to be relatively uncontroversial. Even though this account will present some of the features of proportionality in a way which may not be the standard textbook approach, it does so in the hope of clarifying the respective points rather than bringing in controversial claims through the back door. The subsequent section will then present and assess the objections raised against proportionality.

If there is one theme running through this essay, it is this: the risk in criticizing proportionality is that a critic confuses author A's theory or court C's approach (or worse, court C's one decision D) with the principle of proportionality itself. The fact that A's theory, C's doctrine, or decision D are wrong shows only this—that a mistake happened. It does not show that proportionality itself is an unattractive doctrine. It would never occur to anyone to argue that because Robert Nozick's theory of justice is unconvincing, we should abandon the concept of justice; rather, in order to recommend abandoning the whole concept of justice, one would have to show that even the *best* theory or conception of justice is less than worthwhile. So in order for an argument rejecting proportionality to be successful it would have to first make the strongest possible case *in favor* of proportionality, only in order to show in a second step that even this strongest possible case is too unattractive to be maintained. When a critic of proportionality directs his criticisms at some unattractive feature of a specific conception

<sup>4</sup> See my *Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights*, 29 OXFORD J. LEGAL STUD. 757 (2009).

of proportionality in the hope of targeting the concept of proportionality itself, he risks fighting against a straw man.<sup>5</sup>

## 2. The principle of proportionality

Proportionality is a test to determine whether an interference with a *prima facie* right is justified. There are several slightly different formulations of the principle.<sup>6</sup> I will, in line with most theorists of proportionality, take proportionality to imply the following test.<sup>7</sup> First, the policy interfering with the right must pursue a legitimate goal (legitimate goal stage). Second, there must be a rational connection between the policy and the achievement of the goal; in other words, the law must be a suitable means of achieving the goal at least to a small extent (rational connection or suitability stage). Third, the law must be necessary in that there is no less intrusive but equally effective alternative (necessity stage). Fourth and finally, the law must not impose a disproportionate burden on the right-holder (balancing stage; proportionality in the strict sense). At its core, the proportionality test is about the resolution of a conflict between the right and a competing right or interest, and this conflict is ultimately resolved at the balancing stage.<sup>8</sup> However, before engaging in the balancing exercise it is important to establish that there exists a genuine conflict (suitability) between the right and a relevant (legitimate) competing interest (legitimate goal) which cannot be resolved in a less restrictive way (necessity).

### 2.1. The first stage: Legitimate goal

The legitimate goal stage raises two questions: first, what does it mean to speak of the “goal” of a policy; and second, which goals are and which are not legitimate. I will deal with each issue in turn.

Speaking of the goals or aims of policies is slightly misleading. Having a goal or an aim is a state of mind; therefore, policies cannot have goals or aims. One might think that what counts are the goals or aims of the relevant decision-makers, for example parliamentarians or civil servants. But that, too, would be misleading: courts

<sup>5</sup> Cf. Madhav Khosla, *Proportionality: An assault on human rights?: A reply*, 8 INT'L J. CONST. L. (I-CON) 298, 302, 306 (2010).

<sup>6</sup> For an illuminating comparison of the Canadian and German understandings, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007).

<sup>7</sup> Cf. ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS, *supra* note 2, at 66; Kumm, *Political Liberalism and the Structure of Rights*, *supra* note 2, at 157.

<sup>8</sup> This is controversial. In particular, the Canadian version of the proportionality test tends to read the balancing exercise into the earlier stages, which is criticized by Denise Réaume who argues that “this question [the question of which of the values is more important], which has so often been disguised and hidden elsewhere in the steps of the *Oakes* test, or simply not been addressed, properly belongs at the end of the process, with the other steps serving simply to disqualify bad justificatory arguments and refine the ultimate contest.” See Denise Réaume, *Limitations on Constitutional Rights: The Logic of Proportionality*, University of Oxford Legal Research Paper Series, Paper No. 26/2009, 26 (2009). Dieter Grimm makes essentially the same point; see Grimm, *supra* note 6, at 383.

do not normally inquire into the states of minds of the relevant decision-makers, and rightly so. What matters is whether the policy or decision is objectively justifiable, not whether the persons who made it had the right considerations on their minds. Thus, it may have been the case—indeed, it is quite plausible to assume—that in the scenario leading up to *Smith and Grady v. U.K.*<sup>9</sup> the subjective goal of the policy makers deciding that homosexuals should be banned from serving in the army was simply to give expression to their homophobia. But that psychological fact was irrelevant for the question of whether the policy violated the right to private life under article 8 of the European Convention on Human Rights (ECHR).

Rather than relying on psychological facts, the idea of the goal of a policy should be understood in the following way. The first question to answer when assessing the legitimacy of a policy that interferes with a right is whether there are any interests that are *candidates* for justifying the interference in the sense that it is not entirely implausible that they will at least be rationally connected to the policy. Take the case of a prohibition of a demonstration on the ground that it might attract counter-demonstrations which could lead to violence. An interest that would be a candidate for justifying the prohibition is the need to protect the rights to physical integrity of those who might be harmed by the violence; therefore, the protection of their rights qualifies as a goal (which would obviously also be legitimate). As a matter of principle, nothing speaks against counting the protection of some completely unrelated interest—say, an interest of the citizens in good schools for their children—as a (legitimate) goal; it clearly is a goal that the state may and should pursue. But the reason that we do not seriously consider it as a goal in this particular case is that it is blatantly obvious that this interest cannot justify the ban of the demonstration—it simply has nothing to do with it, and it would therefore not pass the suitability test at the next stage. Thus, it is just a matter of intellectual efficiency not even to consider it as a goal pursued by the ban.

Regarding the legitimacy of a goal, most goals pursued by policies are obviously legitimate; in particular, the goals of protecting a person's physical or psychological integrity, his property, liberty, or other autonomy interests. However, some are not: for example, Mattias Kumm has argued, correctly to my mind, that moralistic and (impermissibly)<sup>10</sup> paternalistic goals should be excluded and, thus, not count as legitimate.<sup>11</sup> His example is that in *Smith and Grady v. U.K.*, any goals connected with the disapproval of homosexuality should be discounted (and as a matter of fact, such goals were not considered by the European Court of Human Rights [ECtHR]). I will not offer a theory of the legitimacy of goals here but merely state that at this stage of the proportionality test it is necessary to decide for each goal whether or not it is legitimate, and this will require a moral argument.

<sup>9</sup> *Smith and Grady v. United Kingdom*, (2000) 29 EHRR 493.

<sup>10</sup> Various distinctions between permissible and impermissible paternalism have been proposed in the literature; reviewing this, however, is beyond the scope of this essay. But to give two examples, quite plausibly, paternalism is justified in the case of seat-belt requirements but unjustified in the case of sexual practices between adults.

<sup>11</sup> Kumm, *Political Liberalism and the Structure of Rights*, *supra* note 2, at 142.

## 2.2. The second stage: Suitability

The point of the suitability stage is to establish the extent to which the protection of the right and the legitimate goal (established at the first stage) actually clash. Put negatively: the point of the principle of suitability is to sort out those cases where, upon a closer look, there does not exist any conflict. The principle of suitability holds that there must be a rational connection between the interference and the legitimate goal: the interference must be a suitable means of achieving the goal at least to a small extent. If it does not contribute to the achievement of the legitimate goal at all, then there is no conflict: a conflict means that one can realize one value only at the cost of the other; however, here the right is limited with no corresponding gain for the legitimate goal. Conversely, if the interference contributes to the achievement of the goal to some extent, however small, then the suitability test is satisfied because it has been established that there is indeed a clash of the two values.

## 2.3. The third stage: Necessity

The principle of necessity holds that there must be no other, less restrictive policy that achieves the legitimate goal equally well. There are two basic situations where a policy is unnecessary. In the first, the state does all that is necessary, *and more*. To the extent that the state goes beyond what is necessary, there is again no clash of interests. It would therefore also be possible to resolve such a case under the suitability principle by arguing that to the extent that the measure goes beyond what is necessary, it is not a suitable means of achieving the goal (because the goal has already been achieved). For example, if, similar to the case of *Handyside v. U.K.*,<sup>12</sup> a book is banned in order to remove it from circulation (and let us assume that this happens for a legitimate reason, such as the protection of minors), then, depending on the circumstances, it may not be necessary to seize, forfeit, and destroy all existing copies of the book or to punish the publisher, because the goal may already have been achieved by the ban itself, unaided by seizure, forfeiture, and destruction.

The second situation is where the state has a choice between two or more different ways of achieving the goal, and one of them is less restrictive of the right. Take again the case of *Smith and Grady v. U.K.*: the legitimate goal pursued by the U.K. policy of dismissing homosexual soldiers from its army was the avoidance of tensions between heterosexual and homosexual soldiers, which would lead to a decline in morale and fighting power. The alternative policy considered by the ECtHR was a code of conduct. Assuming that the code-of-conduct policy would have avoided any tensions between homosexual and heterosexual soldiers just as well as the dismissal policy, the dismissal policy would not have been necessary because the same result could have been achieved by a less restrictive means. Contrary to the first situation discussed in the previous paragraph, there *does* exist a genuine conflict of interests here between the national security interest and the interest of the homosexual soldiers in remaining in

<sup>12</sup> *Handyside v. United Kingdom*, (1979–1980) 1 EHRR 737. Note that the facts in this case were slightly different; the example serves only to illustrate the argument.

the army. However, the point is that the alternative measure (the code of conduct) would have achieved the goal at a lesser cost for the homosexual soldiers.

The traditional formulation of the necessity test, which asks whether there is a less restrictive but equally effective means, is in some ways simplistic. The problem is that often there exists an alternative policy which is indeed less restrictive but has some disadvantage. One can distinguish three scenarios. First, the alternative policy is less restrictive but not equally effective. For example, the code-of-conduct policy in *Smith and Grady* probably would not have been equally effective: surely dismissing all gay soldiers resolves the problem of possible tensions between gay and straight soldiers very effectively because there will simply not be any openly gay soldiers left. It is therefore doubtful that the code-of-conduct policy would have achieved the goal just as well.

Second, an alternative policy is less restrictive but requires additional resources. For example, in *Pretty v. U.K.*,<sup>13</sup> which dealt with the right to assisted suicide, the Court could, and indeed should, have considered not only the alternatives of permitting or prohibiting assisted suicide but also the possibility of making assisted suicide permissible within a regulatory framework designed to minimize the danger of abuse, for example by requiring certain procedures to be followed, such as the involvement of a physician. But such a scheme would require a certain amount of resources to be spent; so while the alternative is less restrictive of the right, it involves an extra cost to be borne by the public. Another example is that of counterdemonstrations that are likely to lead to violence. One way to avoid the violence is to ban the original demonstration; another is for the state to provide the necessary police forces to protect the demonstrators from the violence of the counterdemonstrators; but, again, this involves the spending of resources.

Third, there may be a less restrictive policy option which however requires imposing a burden on a third party. Rather than prohibiting the activity of person A, the state imposes a lesser burden on person B in order to enable A to follow his project. Cases involving accommodation often fall into this category: rather than requiring a religious believer to act against his religious duty, a relatively light burden is imposed on others to accommodate him.

Structurally, there are two ways to deal with such cases: they can either be resolved at the necessity stage or the balancing stage. The necessity stage may be considered the proper place because the question is whether, in light of a less restrictive alternative, the more restrictive policy is really necessary. This seems to be the way favored in Canada.<sup>14</sup> Alternatively, one could conclude at the necessity stage that the more restrictive policy is indeed necessary because the alternative involves an extra cost and therefore cannot be considered equally effective; then the problem has to be resolved at the balancing stage. This is the solution favored in Germany.<sup>15</sup> But while I believe that the German approach is preferable for reasons of structural clarity, the important

<sup>13</sup> *Pretty v. United Kingdom*, (2002) 35 EHRR 1.

<sup>14</sup> Grimm, *supra* note 6, at 393.

<sup>15</sup> *Id.*

point is not whether to deal with the problem of a range of policy options at this or that stage of the test but, rather, to adequately address the substantive problem at issue. This problem is that the original proportionality test is simplistic in suggesting that all one need do is to look for a less restrictive alternative that achieves the legitimate goal just as well. There will often be a range of responses to a social problem; some will be more restrictive; some will be more effective; some will burden one group; others another group. The proper way to handle such cases must be to assess all possible policies relative to each other.<sup>16</sup> For example, in *Smith and Grady*, the question would be whether the dismissal policy is proportionate in light of the fact that a code-of-conduct policy would partly fix the problem.

#### 2.4. The fourth stage: Balancing

When reaching the balancing stage, it has already been established that there is a genuine conflict between the right and another right or interest, which cannot be resolved in any less restrictive way. The point of the balancing stage is to determine which of the two (or more) values at stake takes priority in the concrete circumstances of the case. In other words, the question is whether the interference with the right is justified in light of the gain in the protection for the competing right or interest. To this end, the two values have to be “balanced” against each other.

It is not obvious what this reference to “balancing” means, and this vagueness is indeed part of the challenge posed by the critics of proportionality, which is why I will postpone most of this discussion to the next section. Suffice it to say, there are at least two senses of balancing. The first we might call “interest balancing.” It operates according to a cost-benefit analysis: the respective rights or interests are “measured,” placed on a set of scales, and their weight is compared. The second kind of balancing we might call “balancing as reasoning.” We sometimes say in everyday language that we have to balance all relevant considerations against each other. This is just a way of saying that we have to make a moral argument as to which of the competing interests takes priority in the case at hand, and this moral argument may or may not proceed by way of interest balancing (interest balancing is one kind of moral reasoning but not the only one).

Thus, it is important to understand that balancing in constitutional rights law does not *necessarily* refer to interest balancing. This can sometimes lead to results that may seem paradoxical at first glance. For example, it is uncontroversial that it would be impermissible for the state to set up a policy which requires a randomly chosen person to be killed in order to use his organs to save five other persons.<sup>17</sup> Thus, killing the one would be disproportionate to the goal of saving the five. This may sound paradoxical because, on balance, five lives seem to outweigh one life. However, the paradox disappears

<sup>16</sup> A similar approach has been proposed by Tom Hickman, *The substance and structure of proportionality*, PUB. L. 694, 711 (2008).

<sup>17</sup> This is a variation of the famous “Transplant Case,” widely considered in discussions about consequentialism and deontology. It was first introduced by Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 395, 396 (1984-5).

when we realize that, contrary to some common usage, balancing in constitutional rights law is not necessarily about interest balancing. Rather it can also mean “balancing all the relevant considerations,” and the outcome of this exercise of practical reasoning is that it is impermissible to kill the one. Another way to make the same point is to say that balancing is about the sacrifice that can legitimately be demanded from one person for the benefit of another person or the public. In the Transplant Case, the right to life of the one prevails because it cannot be demanded of a person to sacrifice his life to enable others to be saved through the use of his body parts.

### 3. Challenging the critics

#### 3.1. “Proportionality, by purporting to be morally neutral, avoids the moral issues”

It is sometimes argued that proportionality analysis is, or claims to be, morally neutral. Thus, Stavros Tsakyrakis writes: “[The principle of proportionality] pretends to be objective, neutral, and totally extraneous to any moral reasoning.”<sup>18</sup> In a similar spirit, Grégoire Webber states:

The structure of proportionality analysis itself does not purport (at least explicitly) to struggle with the *moral* correctness, goodness or rightness of a claim but only with its *technical* weight, cost or benefit. The principle of proportionality—being formal or empty—itself makes no claim to correctness in any morally significant way.<sup>19</sup>

It is important to distinguish between two claims that could be made with regard to the assumed moral neutrality of proportionality: first, one could argue that the principle of proportionality *itself* is morally neutral; second, one could say that proportionality *analysis*, that is, the application of the principle to a given case, proceeds in a morally neutral way. I agree with the criticisms presented above only insofar as there would be a serious flaw in the doctrine if it were really true that the principle of proportionality or its application were morally neutral. However, I fail to see why an attractive conception of proportionality should endorse this neutrality.

The principle of proportionality itself operates at a high level of abstraction; but this must not be confused with moral neutrality. It states, for example, that only legitimate (as opposed to illegitimate) goals can be used to justify an interference with the right; this is a moral statement. Similarly, the claims that an interference must be suitable, necessary, and not disproportionate are obviously moral statements about the conditions under which an interference with a right is justified. For example, someone could claim that even when an interference with a right goes further than what is necessary, this would be justified; and we could then have an argument with her, trying to convince her that her view was mistaken and that it was important—morally

<sup>18</sup> Tsakyrakis, *supra* note 3, at 474.

<sup>19</sup> WEBBER, *supra* note 3, at 90.



important—to confine the acceptable limitation of rights to what is necessary. So we would launch a defense of the principle of proportionality on moral grounds, and the reason the defense would be on moral grounds must be precisely because proportionality is a moral concept.

The application of the proportionality principle must also be moral reasoning. It seems obvious to me that human rights are creatures of morality, and that therefore reasoning with them is moral reasoning. Imagine you are a judge on the ECtHR, and you have to decide the *Odievre* case, which involves an adopted woman who wants the French authorities to release to her the identity of her natural parents.<sup>20</sup> So you have to decide whether the denial to do so, which interferes with Ms. Odievre's right to private life under article 8 of the ECHR, is proportionate. To assess the proportionality you have to collect the reasons that support the French policy—protecting the private life of the natural mother and the natural father, protecting the adoptive family, preventing the chance that without the possibility of staying anonymous, women might choose abortion or choose improper procedures in abandoning their children, and so on<sup>21</sup>—and decide whether these reasons are so strong that they outweigh Odievre's right. Could you strike this balance in a “morally neutral way”? One might say that your job as a judge is to apply the Convention, not to develop free-standing moral arguments. There is some truth in this argument: judges are bound in some way by the respective constitution they are interpreting. If you are a judge in Ireland who believes that women have a right to abortion, you are nevertheless in some way bound by the Irish Constitution,<sup>22</sup> which acknowledges a right to life of the fetus.<sup>23</sup> But it is one of the crucial features of the proportionality test that it simply directs judges to assess the weights of the respective rights and interests without giving them further instructions. By stipulating that an interference with a right is justified if it is, for example, “necessary in a democratic society,” constitutions deliberately release judges from interpretative constraints and direct them to the development of a *moral* argument about the acceptable balance of reasons.<sup>24</sup> Thus, if you are a judge deciding *Odievre*, then once you have established that the French policy interferes with Odievre's right to private life under article 8(1), article 8(2) directs you examine whether this policy is “necessary in a democratic society” (in the interests of one or several of

<sup>20</sup> *Odievre v. France*, (2004) 38 EHRR 43.

<sup>21</sup> *Id.* at paras. 44, 45.

<sup>22</sup> Article 40(3)(3) of the Irish Constitution states: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right. . . .”

<sup>23</sup> This is deliberately vague. It seems mistaken to me to split up the issue of the correct approach to, for example, the Irish Constitution into two distinct questions: first, is the Constitution binding; second, how do we interpret it. Rather, I believe that the question of the bindingness of the Constitution is a moral one which will affect its interpretation.

<sup>24</sup> This point is overlooked by Jeremy Waldron who argues that when human rights are made justiciable, as a result they become entangled with all sorts of legalistic baggage which detracts the judges' attention from the moral issues; see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1381 (2006). This criticism does not have much bite with regard to systems of judicial review that use proportionality; see Kumm, *The Idea of Socratic Contestation*, *supra* note 2, at 157–158.

the values listed in article 8[2]), and this can only mean that you must ask yourself whether the reasons the French authorities cite are weighty enough to justify denying the claimant her right. That assessment must, of course, be a moral one, and any interpretation of the proportionality principle which denies this is plainly mistaken. Thus, the only charge that one can launch is that a specific author, in developing his conception of proportionality, has made a mistake. It is not “the” principle of proportionality but an unattractive interpretation of the principle which makes the assumption of moral neutrality.

### 3.2. “Proportionality necessarily gets the moral questions wrong.”

Tsakyrakis accuses proportionality not only of avoiding the moral questions but, worse, of necessarily getting them wrong. The charge is that it is indiscriminate as to the interests which it balances against the right.

One particularly striking way in which the principle of definitional generosity fails to capture the importance of the items it places on the scales is by not weeding out, at the first stage, interests and preferences powered by what I would characterize as illicit justifications. There are some types of justification that are not just less weighty than the right with which they conflict. Rather, their invocation is incompatible with the recognition of that right.<sup>25</sup>

Tsakyrakis has in mind cases such as *Otto Preminger Institut*,<sup>26</sup> dealing with the ban on a movie which was shown in a private cinema and which was perceived to be blasphemous. In that case, the ECtHR balanced the right to freedom of expression against an assumed right of the majority in Austria not to be insulted in their religious feelings. Tsakyrakis would prefer this latter “right” to be accorded “zero” weight in the balancing exercise, which means that there would not be anything to balance freedom of expression against, and thus freedom of expression would prevail. One can criticize the ECtHR of having got this case wrong. But one cannot, as Tsakyrakis does, blame the principle of proportionality for this. When he claims that some interests should be characterized as “illicit justifications” and that this should be done “at the first stage,” then this is precisely what the proportionality test provides for at its first stage when it asks whether a goal is legitimate. It would have been possible, indeed probably correct, to characterize as illegitimate Austria’s goal of protecting Catholics who are offended by the mere existence and showing of a blasphemous movie to an audience of persons freely choosing to watch such a movie. A properly conducted proportionality analysis would have discussed this point in quite some depth at the first stage, which pushes the judge to exactly the question that Tsakyrakis thinks proportionality has no potential to address. So again, Tsakyrakis attacks, at best, an unfortunate interpretation of the proportionality principle or an unfortunate judgment of the ECtHR but not the idea of proportionality itself.

<sup>25</sup> Tsakyrakis, *supra* note 3, at 488.

<sup>26</sup> *Otto Preminger Institut v. Austria*, (1995) 19 EHRR 34.

### 3.3. “Proportionality requires balancing incommensurables.”

At the core of the proportionality test is the balancing stage, where the right is balanced against a competing right or public interest. “Balancing” suggests the image of scales, however, and scales serve their purpose only when the two things to be compared can be measured with the same unit (for example, grams). In the domain of constitutional rights, the question thus arises whether it is really possible to “balance,” for example, the right to freedom of the press against a person’s interest in privacy. It seems that unless there is a common scale on which the two conflicting goods, values, or interests can be compared, such balancing is impossible. In that case, one might have to conclude that the two are incommensurable.

As a preliminary point, it is not clear that even in cases where there is indeed a common scale, balancing the conflicting goods on that scale is appropriate. Take again the hypothetical Transplant Case, introduced above.<sup>27</sup> If the state required a person to sacrifice his life in order to use his organs to save the lives of five others, then the values on both sides of the balance are commensurable (lives).<sup>28</sup> But it would still not follow that we should resolve the case by counting numbers and concluding that five lives outweigh one. Rather, intuitively, it seems that requiring the one to sacrifice his life would mean to impose a disproportionate burden on him, in spite of the fact that, by doing so, a greater number of lives can be saved. I believe that there are many cases where balancing on a common scale, while possible, would be inappropriate; but I cannot prove this point here because that would require a comprehensive theory of balancing, the development of which is beyond the scope of this essay.

#### 3.3.1. *Strong and weak incommensurability*

Before examining the question of whether it truly can be maintained that the goods which constitutional rights law recommends for balancing are incommensurable, let us briefly examine what would follow if the charge were true. Let us assume that, in a given case, a balance has to be struck between freedom of the press and privacy in order to assess the constitutionality of a statute which prohibits the press from intruding on the privacy of a person, and let us further assume that the two values at stake are incommensurable. Already we are faced with a difficulty: as Jeremy Waldron has pointed out, there are at least two meaningful ways to speak of incommensurability, and we must decide which of the two we are invoking. The first kind Waldron calls “strong incommensurability.” When two values A and B are strongly incommensurable, then “it is not the case that A carries more weight than B, and it is not the case that

<sup>27</sup> See *supra* note 17 and accompanying text.

<sup>28</sup> This is controversial because the lives at stake are the lives of *different* persons. For example, take a case where someone could either save five persons A to E or one person F. Most would argue that he would make a moral mistake by saving F and letting A to E die, precisely because numbers do matter and lives are commensurable. But some philosophers disagree with this. See FRANCES KAMM, *MORALITY, MORTALITY. VOLUME I: DEATH AND WHOM TO SAVE FROM IT* chaps. 5 and 6 (1998), for a comprehensive discussion of this issue.

B carries more weight than A, and it is not the case that they are of equal weight.”<sup>29</sup> This sort of incommensurability leaves us “paralysed, not knowing what to choose” and, thus, potentially “leads to agony.”<sup>30</sup> It implies that “there is no basis in our knowledge of value to say that one decision rather than the other one was correct.”<sup>31</sup>

Applied to the example, if it were true that the two values at stake—freedom of the press and privacy—were strongly incommensurable, then it would follow that there was no basis in morality to say that one or the other should be preferred, and all one can do is simply make a choice. In the example, the legislature made a choice by giving preference to privacy, and, in choosing one of the values at stake, the legislature did exactly the right thing (of course, it would also have done the right thing had it chosen freedom of the press). Now, if the legislature does the right thing, then the principle of democracy demands that its decision should be allowed to stand. Therefore, the correct decision of a constitutional court in this situation would be to accept the legislature’s choice of giving preference to privacy. We can generalize from the example and hold that where two (or more) values are strongly incommensurable and the elected branches give preference to one of them, their decision is constitutionally legitimate. From this, it follows that the more pervasive strong incommensurability is, the smaller becomes the role of judicial review. Let us assume that it were the case that all policy decisions came down to choices between strongly incommensurable values. We would have to conclude that the elected branches never made—never could make!—a mistake by giving preference to one of the strongly incommensurable values and that therefore judicial review would be superfluous.

The second kind of incommensurability is “weak incommensurability.” It holds that where the two values are weakly incommensurable, it is possible to bring the two values into a relation with one another. Waldron argues that this relation will often be such that one value trumps other considerations, acts as a side constraint, or takes lexical priority; generally speaking, “we are to immediately prefer even the slightest showing on the A side to anything, no matter what its weight, on the B side.”<sup>32</sup> For the purposes of this paper, I am not interested in those particular relations because they point to theories of rights which, as a matter of substance, reject balancing and therefore proportionality as well. However, weak incommensurability should not be seen as limited to situations where one value takes (almost) unlimited precedence over the other. It may also apply in situations where the two values can, in some way, be brought into a relation with each other which does not give that degree of precedence to one. For example, it may be possible to deny that freedom of the press and privacy are strongly incommensurable (which would imply that any choice of the legislature would be acceptable) and also to deny that one should engage in balancing of a cost-benefit kind—essentially along utilitarian or consequentialist lines—to resolve the conflict. Rather, the truth might be that a moral argument has to be made about the proper relation between the

<sup>29</sup> Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813, 815 (1993-4).

<sup>30</sup> *Id.* at 816.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

two, and that this moral argument, properly conducted, leads to the correct answer about which value takes priority while not relying (exclusively) on cost-benefit analysis. Cost-benefit balancing can thus be contrasted with the wider “practical reasoning” which provides us with an answer as to which of the two values takes priority in spite of the absence of a common measurement. Applied to the example, if the right to freedom of the press and privacy were weakly incommensurable, it would follow that while cost-benefit analysis would be inappropriate to resolve the conflict, practical reasoning would guide the court toward the conclusion regarding which of the two should take precedence. Thus, in contrast to the case of strong incommensurability, there may indeed be one right answer as to which of the two values takes priority.

Does it follow from this that the concept of balancing is inappropriate for the resolution of conflicts between weakly incommensurable values? Not at all. Waldron usefully points out that, as used in ordinary language, “balancing” refers not only to quantification and cost-benefit analysis but also to “any reasoning or argumentation about the two values in question.”<sup>33</sup> This is the point I made in the first section, where I argued that balancing can be understood in the sense of “balancing all the relevant considerations.” As an illustration, take the famous *Hatton* case, which concerns the right of residents near Heathrow airport not to be exposed to noise pollution at night and in the early morning hours (what George Letsas dismissively calls “the right to sleep well”),<sup>34</sup> which conflicts with a public (economic) interest in allowing night flights. The Grand Chamber of the ECtHR,<sup>35</sup> which finally decided in favor of the U.K. government, overturned the judgment of the Chamber<sup>36</sup> which had decided in favor of the claimants. This disagreement indicates that the case was a hard case, that is, one in which we would expect reasonable people to disagree. But if balancing in the sense of cost-benefit analysis had been appropriate, then the outcome of the case would have been crystal-clear: the considerable economic advantages of allowing night flights must, on a cost-benefit analysis, take precedence over the interests of a relatively small number of residents who find their sleep disturbed but who could move, with relative ease, to another part of London if they found their situation unbearable. So the balance that the ECtHR struck between the right and the competing public interest was surely not a cost-benefit analysis (then the case would have been an extremely easy one). Rather, the Court balanced the two values against each other in the sense of practical reasoning, determining how much noise pollution one can legitimately impose on the residents in the interest of a specific economic advantage. So while the Court did not engage in balancing of a cost-benefit kind, it still makes sense to call its reasoning a “balancing” exercise.

### 3.3.2 *Consequences for balancing and proportionality*

Having clarified the two distinct meanings of incommensurability, let us now examine whether either kind of incommensurability poses a threat to the principle of proportionality.

<sup>33</sup> *Id.* at 819.

<sup>34</sup> GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 126, 129 (2007).

<sup>35</sup> *Hatton v. United Kingdom*, (2003) 37 EHRR 28 (Grand Chamber).

<sup>36</sup> *Hatton v. United Kingdom*, (2002) 34 EHRR 1.

Let me start with weak incommensurability. Here the criticism must be the following. Balancing suggests that whenever two values are “balanced,” there exists a common scale on which to compare the two. But such a common scale may not exist. Rather, it may be necessary to “balance” the two values in the sense of reasoning about which of them ought to take precedence in the case at hand.<sup>37</sup> Thus, a court faced with the *Hatton* case cannot “balance” the right to private life against the economic interest of the country in a cost-benefit fashion, but it must develop a moral argument about the relation between the two values and then decide which one takes precedence.

It is important to see that the charge which this criticism launches against proportionality is very limited. All it says is that proportionality has the potential to be misunderstood; that it may suggest a false simplicity of cost-benefit analysis, where balancing in the sense of moral reasoning is appropriate. Now, I am not sure whether there is any concept of a certain level of abstraction in the world of political morality that does not have the potential to be misunderstood. If it were true (as I agree it is) that balancing in the sense of cost-benefit analysis is often inappropriate and balancing as reasoning is required, then this is captured by even the most basic formulation of the proportionality test which simply argues that the two values have to be “balanced,” keeping in mind, as Waldron points out, that balancing is actually used in the sense of “balancing as reasoning” by most people. To further avoid any risk of misunderstanding on this point, one could simply add “in the sense of balancing all the relevant considerations.” It is therefore unfortunate when Tsakyrakis states that “[t]he principle of proportionality assumes that conflicts of values can be reduced to issues of intensity or degree and, more importantly, it assumes further that intensity and degree can be measured with a common metric, . . . and that this process will reveal the solution to the conflict.”<sup>38</sup> How does he know that this is what “the” principle of proportionality assumes? Again, it is not “the” principle of proportionality but, at best, an unattractive interpretation of the principle that makes this assumption.

What about strong incommensurability? As I have argued above, to the extent that the values that go into the balance at the fourth stage of the proportionality test are strongly incommensurable, it is not possible to rely on reason to direct us to the right answer. In the context of constitutional rights law, this means that the policy should be allowed to stand because the elected branches did the right thing by simply choosing between them. Thus, whenever a court overturns a choice between two strongly incommensurable values by the elected branches it illegitimately interferes with democratic decisions. Therefore, everything turns on the question whether such strong incommensurability really exists, or how often choices between different policies rely on strongly incommensurable values.

<sup>37</sup> Tsakyrakis, *supra* note 3, at 472.

<sup>38</sup> *Id.* at 474.

One idea about the pervasiveness of strong incommensurability could be that it obtains very often, namely whenever there is more than one value stake. For example, Webber writes:

[W]here legislative scheme S1 has all the benefits of legislative scheme S2 but the former interferes less with valid interests, the two schemes are commensurable and reason dictates that legislative scheme S1 be preferred. But *reason cannot determine the choice* between different schemes where there are *multiple criteria* for evaluation: for example, where legislative scheme S1, whilst interfering less with valid interests, has some but not all of the benefits of legislative scheme S2.<sup>39</sup>

This is a sweeping statement. Let us unpack it, using an example. For an illustration of the first sentence of Webber's statement, one could think of *Smith and Grady v. U.K.*,<sup>40</sup> which decided that the United Kingdom's policy of dismissing homosexuals from its armed forces violated the right to private life of the affected soldiers. The main reason for the dismissal policy was that many of the heterosexual soldiers disapproved of homosexual colleagues, and that, therefore, the presence of homosexuals affected unit cohesion and posed a risk to national security. One of the questions raised was whether a policy introducing a code of conduct could resolve this problem as effectively as dismissing the gay soldiers. Let us stipulate that this would indeed be the case, and let us further stipulate that the code-of-conduct policy does not have any other disadvantage. Then the first sentence of Webber's statement would apply: the code-of-conduct policy scheme S1 and the dismissal policy scheme S2 have the same benefits (they avoid harms to national security), but S1 interferes less with a "valid interest" (the rights of the homosexual soldiers). Here, Webber would argue, the two policies are indeed commensurable, and S1 is to be preferred. In substance, this is just an application of the necessity principle (the third stage of the proportionality test): in light of the fact that the code-of-conduct policy interferes less with the rights of the homosexual soldiers yet achieves the legitimate goal just as well, the dismissal policy is not necessary.

However, such situations where policies are commensurable will be extraordinarily rare for Webber because, as his second sentence makes clear, whenever there are "multiple criteria" for evaluation, we are faced with incommensurability. So if the code-of-conduct policy had some other disadvantage (it would require a modest amount of resources, or it would also impose a modest burden on the heterosexual soldiers), then the two policy schemes would be incommensurable, and, as Webber argues, "reason cannot determine the choice" between them. At another place he writes: "Without an identified common measure, the principle of proportionality cannot *direct* reason to an answer. It can merely *assist* reason in identifying the incommensurable choice that one must make."<sup>41</sup> So all one can do, for Webber, is to make a choice. He argues, following John Finnis, that once one has made a choice one may become psychologically attached to one's choice, so that one convinces oneself that the choice was determined by reason. But this is an illusion, because in the moment of choosing reason does not provide an answer.<sup>42</sup>

<sup>39</sup> WEBBER, *supra* note 3, at chapter 3 (emphasis added).

<sup>40</sup> *Smith and Grady v. United Kingdom*, (2000) 29 EHRR 493.

<sup>41</sup> WEBBER, *supra* note 3, at chapter 3.

<sup>42</sup> *Id.*

Taken literally, this endorses strong incommensurability. Webber stresses at several points that reason cannot determine the answer to the conflict; whereas in conditions of weak incommensurability, as discussed above, reason *can* determine the right answer. But let us pause for a moment and wonder what this implies. As Webber explains, whenever there are “multiple criteria” involved, this kind of strong incommensurability obtains. However, we have established that multiple criteria are involved in almost every single policy decision, and therefore it would follow that there is (almost) never a right answer: virtually *every* policy decision would become a matter of mere choice, unguided by reason. But that must be, at the very least, an overstatement. If true, it would imply that *anything goes* (except when the conditions of the first sentence of Webber’s statement apply): *any* policy involving multiple criteria would be legitimate.

This points to a fault in Webber’s approach. While the way he characterizes incommensurability indicates that he is talking about strong incommensurability, what he has in mind actually must be weak incommensurability. This is supported by the following statement: “The incommensurability challenge here formulated identifies as its target the widespread assumption that balancing and proportionality proceed mathematically and technically.”<sup>43</sup> So Webber’s real target seems to be the idea that balancing in terms of cost-benefit analysis is possible. All he would need to demonstrate this claim is to prove the existence of weak incommensurability. But the characterization of incommensurability which he provides supports strong incommensurability and, taken literally, would lead to results that are highly implausible.

The foregoing discussion has not attempted to show that strong incommensurability does not obtain. But it has identified a burden which anyone who wants to criticize proportionality on the ground of strong incommensurability would have to meet: a critic would have to provide an account of the conditions under which strong incommensurability obtains. If he just claims that it exists whenever there are “multiple criteria,” then he overreaches and is driven to the implausible conclusion that almost all political decisions involve incommensurables and thus become a matter of mere choice, unguided by reason. Thus, to the limited extent to which it may exist, strong incommensurability would have to be demonstrated rather than asserted.

### 3.4. “One should address the moral questions squarely, rather than use proportionality”

One of the conclusions of the previous section was that one should understand “balancing” in the sense of “balancing all the relevant considerations,” and that this implies making a moral argument as to which of the two (or more) values in conflict ought to prevail in a given context. This leads straight to the next criticism of proportionality: if proportionality itself does not provide the moral argument but merely directs the judge toward developing one on her own, then why use proportionality at all, and why not just let judges focus on the important moral questions squarely?<sup>44</sup>

<sup>43</sup> *Id.* at 100.

<sup>44</sup> *Cf.* Tsakyrakis, *supra* note 3, at 493.



To assess this criticism, let us examine what such a moral argument would look like, using the *Pretty* case<sup>45</sup> as an example. Ms. Pretty suffered from motor neurone disease and wanted her husband, who was supportive of the plan, to help her commit suicide once her condition became unbearable. However, as assisted suicide was a crime in the U.K., she claimed that its prohibition violated her rights. It is reasonably clear that the prohibition interferes with Ms. Pretty's right to private life under article 8 ECHR, which includes a right to "die in dignity." So the question is whether this interference is justified.

Let us give the critics of proportionality a fair chance and not address this problem with the traditional doctrinal arsenal (including proportionality) but rather in a straightforwardly moral way. Presumably, we would start by collecting arguments that are candidates for justifying the interference with Ms. Pretty's right. The relevant arguments here might be: it is against the will of God to kill or to assist someone in killing herself; the state has an unqualified interest in the preservation of life; if assisted suicide were to be allowed then this rule would be abused, leading to the killings of old relatives or patients. Of course, this list could be longer; my discussion here is only for purposes of illustration and not meant to be a comprehensive discussion of the complexities of *Pretty*. The next step would be to examine each of these arguments in turn. We might dismiss the first one by saying that arguments based on a particular religious doctrine should not be permissible in the realm of public reason. The second argument (the interest in the preservation of life) is more complex; let us say that upon closer inspection we conclude that it is unconvincing because it is not clear what exactly the basis of that interest should be. So all turns on the third argument. It rests on certain empirical assumptions which are hard to prove or disprove, such as whether the supposed abuse would really take place and how widespread it would be. We might ask whether, if the risk was real, it could be avoided by introducing a special procedure that persons willing to assist someone's suicide have to follow, such as the involvement of a physician. And finally, we must decide whether, assuming that the special procedure is not workable, we think that the right of the claimant to commit suicide is more important in the circumstances than the rights to life of those who might be abused if assisted suicide became legal.

I suspect that the reader will have realized the direction of my argument by now: proportionality analysis would address exactly the same questions. At the legitimate goal stage, the question would be whether considerations as to what is or is not God's will are legitimate, and the correct answer would be that they are not; they would thus be excluded from the further proportionality assessment.<sup>46</sup> The idea of an unqualified interest in the preservation of life<sup>47</sup> would be examined and would either have to be made more precise or be dismissed. The argument relating to the risk of abuse, of course, would qualify as legitimate. The suitability stage would examine

<sup>45</sup> *Pretty v. United Kingdom*, (2002) 35 EHHR 1.

<sup>46</sup> Cf. Kumm, *Political Liberalism and the Structure of Rights*, *supra* note 2, at 142.

<sup>47</sup> For a critique of the idea of an unqualified interest in the preservation of human life, see RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* chap. 5 (1996).

whether there is an empirical connection between allowing assisted suicide and abuse (further doctrines to deal with empirical uncertainty might be needed at this point).<sup>48</sup> The necessity stage would ask whether in order to protect vulnerable people it might be sufficient to introduce a safety procedure, and it might also address the question of the practicability of such a procedure (including the issue of its cost, and so forth).<sup>49</sup> Assuming that the special procedure is not an attractive alternative, the balancing stage would determine whose rights or interests should take priority. Thus, in this case, proportionality analysis would address the very same questions as straightforward moral analysis. This is not a coincidence. *Proportionality is simply a structure that guides judges through the reasoning process as to whether a policy does or does not respect rights.*<sup>50</sup>

Thus, it is a misunderstanding to draw a contrast or opposition between straightforward moral reasoning about what rights require and proportionality analysis. This connects to the point discussed above under (1), where I argued that proportionality analysis is moral analysis. And furthermore, it is not only “some kind of” moral analysis; it is, if conducted competently, exactly the *right* kind of moral analysis because the proportionality structure pushes judges toward the important issues: it forces them, first, to collect possible reasons for the interference with the right and to assess their legitimacy; it then asks them to assess, for each of these goals, whether the interference is rationally connected to the respective goal; it further requires them to consider possible alternatives; and, finally, to address the question of whether the right or the competing rights or interests take priority. This is exactly the structure that a well-designed moral argument should also take; however, by accepting the test of proportionality as a doctrinal tool, the judges are assisted in their moral reasoning in that they do not have to reinvent the wheel (that is, the adequate structure of the moral argument) in each case.

Now, it is true that the proportionality structure is more helpful in some cases than in others. Again, Tsakyrakis places proportionality in the worst possible light when he argues:

Since it is only rarely that measures are completely irrational, and it is always possible to argue that they are suitable and necessary to accomplish a legitimate aim, a measure fails only very occasionally on the first two counts. Essentially, the proportionality test is reduced, more often than not, to [balancing].<sup>51</sup>

<sup>48</sup> See, as an example of such a doctrine, Robert Alexy’s “Second Law of Balancing,” which holds that “[t]he more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises”; *supra* note 2, at 418.

<sup>49</sup> Alternatively, the assessment of the possible alternatives that involve extra costs would be carried out at the balancing stage. For the question of which stage is appropriate, see above, text accompanying notes 14, 15.

<sup>50</sup> Cf. Kumm, *The Idea of Socratic Contestation and the Right to Justification*, *supra* note 2, at 144: “[The proportionality test] provides little more than a check-list of individually necessary and collectively sufficient criteria that need to be met for behaviour by public authorities to be justified in terms of reasons that are appropriate in a liberal democracy. In that sense it provides a structure for the assessment of public reasons.”

<sup>51</sup> Tsakyrakis, *supra* note 3, at 474.

It is true that there are cases which boil down to a straightforward balancing exercise between the right and the importance of one obviously legitimate goal that is being pursued, to which the policy is rationally connected, and which cannot be achieved by any less restrictive means. It is also true that sometimes proportionality analysis boils down to not much more than the determination of whether the goal of the policy is legitimate, and then proportionality is of limited help. For example, if the state prohibits homosexual sex, and the only plausible goal pursued by the prohibition is to discourage homosexual lifestyles, then the only question in a properly conducted proportionality analysis is whether the moralistic goal of the state is legitimate. Having concluded that it is not, the proportionality assessment is complete.

But again, nothing follows from these examples. We should assess the value of proportionality not by asking whether there are cases where it does *not* add much, but by asking whether there are cases where it does. In many cases, important moral work has already been done when reaching the balancing stage. Legitimate goals have been separated from illegitimate ones and the—often difficult—empirical questions of suitability and necessity have been assessed. So it would not be an alternative to proportionality to start directly with the balancing exercise. Proportionality analysis, properly conducted, has its strongest moments when there are a variety of goals pursued by a policy, some of which are legitimate and some of which are not; where the policy is rationally connected to some of the legitimate goals but not others; and where, in light of the existence of alternative policies, there are special problems regarding the necessity of the measure. In such cases, proportionality is a particularly valuable tool because it helps judges be *analytical*, that is, breaking one complex question (“Is the interference with the right justified?”) into several subquestions that can be examined separately.

### 3.5. “Balancing is impressionistic”

The outcome of a case often turns on the result of the final stage of the proportionality test, the balancing stage. By merely stating that, at this stage, all the reasons for and against the interference have to be balanced, the principle of proportionality does not provide a substantive test as to how to conduct the balancing; rather, it directs judges to “balance” all the relevant considerations in order to decide whether the policy in question is proportionate or not. The criticism against proportionality to be explored here argues that this balancing exercise will often, usually, or necessarily be *ad hoc*, impressionistic, and unprincipled. This criticism was first voiced by Jürgen Habermas in his critique of the German Federal Constitutional Court’s approach to rights: “Because there are no rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies.”<sup>52</sup> More recently, Tsakyrakis and Webber have made related claims. Thus, Tsakyrakis writes:

What we find . . . is a characteristically impressionistic assessment of the relative weights of competing considerations, which does not lend itself to a rational reconstruction of the argumentative

<sup>52</sup> JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 259 (1998).

path that has led to a particular decision. The reasoning is terse and fails to identify the contribution that different considerations make to the outcome.<sup>53</sup>

Webber's critique reads as follows:

Indeed, the way in which the principle of proportionality generates particular conclusions is difficult to discern: concluding whether legislation "strikes the right balance" or is "proportionate" in relation to constitutional rights is, in many instances, asserted rather than demonstrated.<sup>54</sup>

We have to analyze these criticisms in some detail to assess their potential. They might mean that the balancing process must *necessarily* have an impressionistic flavor; this would imply that it is not possible to engage in balancing that can be rationally reconstructed. However, if the outcome of a balancing exercise cannot be rationally reconstructed, then this implies that the two values are strongly incommensurable (because if they were only weakly incommensurable or commensurable, they could be brought into a relation with each other); and I have already shown that it has not been demonstrated that strong incommensurability will very often obtain. So the criticisms must be interpreted to mean that, while it would be possible to strike the balance properly (that is, in a way which could convince someone not already convinced of the outcome), judges fail to do so and simply conduct the balancing in an impressionistic fashion.

There is a short and a long answer to this criticism. The short answer is that it merely brings us back to the point made before, namely that this is not an argument against the idea of proportionality itself but only an argument which might at best show that some judges sometimes fail to conduct the balancing inquiry properly. Given that the two values are not strongly incommensurable, it follows that it is possible to bring them into a relation with each other, and we should require our judges to develop arguments that "lend themselves to rational reconstruction." If they fail to live up to this standard, then this is the judges' fault, not proportionality's.

But there is a deeper puzzle in this objection, and it leads me to the long answer. As a matter of moral reasoning, it is often not evident why the balance between two values in a given case ought to go one way or the other. A comprehensive argument about this would require a general, substantive moral theory of balancing that provides guidance about how to conduct a balancing operation correctly; however, such a theory does not, to my knowledge, exist yet. As long as this remains the case, all of us, including judges, have no choice but to rely to some extent on our intuitions when striking a balance between a right and a competing value. Take again the *Hatton* case, discussed above.<sup>55</sup> The balance to be struck in that case was between the rights to private life of the residents near Heathrow airport and the public interest in economic progress. As I have argued above, balancing in the sense of cost-benefit analysis must be inadequate for the resolution of this conflict (because if it were adequate, the case would be entirely unproblematic and the residents would lose; this could not explain

<sup>53</sup> Tsakyrakis, *supra* note 3, at 482.

<sup>54</sup> WEBBER, *supra* note 3, at 89.

<sup>55</sup> See *supra* note 35 and accompanying text.

why the case was a hard case at all). But the view that cost-benefit analysis would be inappropriate for this case is only based on an intuition which most of us presumably share. It is extremely difficult to make a moral argument as to *why* one ought not to engage in a cost-benefit analysis in this case. Let us modify it and stipulate that the night flights can only be conducted in a way that would lead to the early deaths of the residents (from diseases related to sleep deprivation). Presumably, almost everyone would agree that in this scenario, the night flights would certainly be impermissible. However, while we may be in agreement here, again, making a moral argument to prove this uncontroversial point turns out to be extremely difficult. Why not sacrifice the lives of a few residents in order to achieve economic benefits that could, for example, be used to build more hospitals and save even more people? What is it that makes this wrong? I believe that this case is fairly typical in that it is an example where we speak loosely of the need to strike a balance and might even agree on how the balance is to be struck while, nevertheless, finding it extremely difficult to articulate the underlying moral considerations.

Now, assume that we just had to give the best possible justification for why we conclude in the original *Hatton* case that the economic interest of the nation outweighs the rights to private life of the residents. In the absence of being able to provide a tightly reasoned moral argument, we would presumably go for the second-best solution and articulate our reasons as well as we can, maybe along the following lines. At the first step, we would give an account of the seriousness of the interference with the rights of the residents; thus, we would say something about the quantity and quality of the disturbance, the different ways in which the residents might be able to avoid it (including selling their houses and moving to another part of London), and so on. At the second step, we would develop an account of the importance of the public interest; for example, we would ask how much extra revenue can be generated and what other benefits there are. And in a third step, we would try to explain, as well as we can, why we think that in light of the seriousness of the interference with the applicants' rights and the importance of the public interest at stake, we believe that the public interest outweighs the rights to private life of the residents.

While this reasoning would be incomplete because it would fail, at the third step, to provide a complete moral argument with regard to the *relation* between the two values at stake, this would be the best we could do. And, to repeat, this is not because it is impossible to develop a convincing moral argument (then strong incommensurability would obtain). Rather, it is for the simple reason that the issues are complex, in fact too complex to be resolved in a theoretically satisfactory way at the moment when we have to decide the case. Fortunately, however, in many cases we have moral intuitions to which we are sufficiently strongly committed to feel confident in saying that the balance between the two values should go one way or the other. In relying, to an extent, on our intuitions in making such judgments, we do not, of course, have to abandon reason entirely: we can still scrutinize our intuitions for certain faults (for example, biases). So my claim is not that intuition, unrestricted by any checks firmly grounded in reason, should prevail. Rather, it is that intuition will feature as part of the decision-making process, especially where no theoretically satisfactory account of the relevant issues exists.

Judges face exactly the dilemma described in the last paragraphs. And, therefore, it is not surprising that, being judges and not moral philosophers (and it is unclear that moral philosophers could do the moral argument any better) and operating under time constraints, they approach the issue in much the same way that I have just described: they look at each side of the balance, trying to be as precise as possible about giving an account of the interests at stake, and they then decide, relying partly on their intuition, which way the balance goes.<sup>56</sup> This is surely somewhat unsatisfactory; and it would be worthwhile if philosophers and constitutional theorists turned their attention to the issue of balancing much more than, to my knowledge, they have done hitherto. Then it might be possible to develop the specific intuitions we hold with regard to certain cases into a workable, general theory of balancing;<sup>57</sup> and that would be an important step forward for the theory of constitutional rights law. However, as long as such a theory does not exist, all of us have to continue to reason about rights relying, to a certain extent, on intuitions.

In this light, the criticism that balancing is “impressionistic” strikes me as true in a way, but it also misses the point. It would be hubris to believe that we are justified in rejecting as insufficient someone’s moral judgments simply because they rely, to a certain extent, on intuition. It is idle to claim that it would be much more adequate to come up with a tightly reasoned, comprehensive, and complete moral argument in every case. The moral questions are just too complex for that.

#### 4. Conclusion

My conclusion for this essay is that the principle of proportionality has survived the recent assaults on it alive and kicking. Nevertheless, its critics have made important and worthwhile contributions to the debate. First, they correctly identify problems with some conceptions of proportionality that claim, for example, that proportionality analysis is morally neutral or that balancing can or should always be conducted in a cost-benefit fashion. But those criticisms should be directed at their proper target, namely those particular conceptions of proportionality that make the respective implausible claims, not against the idea of proportionality itself. Second, their criticisms relating to the impressionistic nature of balancing point to an aspect in which the existing theories of proportionality are incomplete; yet again, what follows from this is not

<sup>56</sup> Dieter Grimm (a former constitutional judge) responds to the objection that balancing is merely a political decision that this “can be avoided by a careful determination of what is put into each side of the scales when it comes to balancing. . . . If this is done accurately, the balancing process remains sufficiently linked to law and leaves enough room for legislative choice”; see Grimm, *supra* note 6, at 396. While, for the reasons given in the main text, I believe that a careful determination of the weights of both interests at stake will not be sufficient (because the question remains of how to relate the two interests), Grimm’s remarks nicely show how, in the absence of the ability to make an argument about the relation of the two values, the emphasis of the analysis of a conscientious judge eager to develop an argument as comprehensive as possible will inevitably shift to the determination of the importance of the conflicting interests.

<sup>57</sup> I will make a proposal for such a theory in a forthcoming book on THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS.

that proportionality should be abandoned but that further theoretical work should be done to gain a better understanding of, in particular, the still undertheorized doctrine of balancing. Finally, the critics deserve merit for being among the first to challenge the near-consensus in legal practice as to the desirability of proportionality analysis by providing critical perspectives and thus enriching scholarly discussion. In light of the spectacular success of the principle of proportionality in constitutional rights adjudication around the world, it is crucial to continue the debate about its value and, inseparable from this, its proper content and meaning; and for this debate critical voices are not only welcome but, indeed, indispensable even if, as I have argued in this essay, at least for the time being they fail to convince.