



Proportionality and the Rule of Law:
Rights, Justification, Reasoning
Introduction

Grant Huscroft, Bradley W. Miller, and Grégoire Webber

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Grant Huscroft, Bradley W. Miller, and Grégoire Webber *

Abstract: Proportionality has been received into the constitutional doctrine of courts in Continental Europe, the United Kingdom, Canada, New Zealand, Israel, South Africa, and the United States, as well as the jurisprudence of treaty-based legal systems such as the European Convention on Human Rights.

Proportionality provides a common analytical framework for resolving the great moral and political questions confronting political communities. But behind the singular appeal to proportionality lurks a range of different understandings. This volume brings together many of the world's leading constitutional theorists – proponents and critics of proportionality – to debate the merits of proportionality, the nature of rights, the practice of judicial review, and moral and legal reasoning. Their essays provide important new perspectives on this leading doctrine in human rights law.

This is the Introduction to *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, published by Cambridge University Press in April, 2014. In addition to the Introduction, this paper includes a list of contributors and a table of contents.

* Respectively, Professor of Law , Western University; Associate Professor of Law, Western University; Associate Professor of Law, London School of Economics and Political Science. This is the introduction to Grant Huscroft, Bradley W. Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge University Press, 2014. The paper is published with the permission of Cambridge University Press.

PROPORTIONALITY AND THE RULE OF LAW

Rights, Justification, Reasoning

To speak of human rights in the twenty-first century is to speak of proportionality. Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, South Africa, and the United States, as well as the jurisprudence of treaty-based legal systems such as the European Convention on Human Rights.

Proportionality provides a common analytical framework for resolving the great moral and political questions confronting political communities. But behind the singular appeal to proportionality lurks a range of different understandings. This volume brings together many of the world's leading constitutional theorists – proponents and critics of proportionality – to debate the merits of proportionality, the nature of rights, the practice of judicial review, and moral and legal reasoning. Their essays provide important new perspectives on this leading doctrine in human rights law.

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Proportionality and the Rule of Law

Rights, Justification, Reasoning

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Preface

This volume originates from a colloquium on proportionality hosted by the Public Law and Legal Philosophy Research Group at the Faculty of Law at the University of Western Ontario. The colloquium's participants were drawn from legal jurisdictions throughout the common law and civil law worlds, reflecting proportionality's international reach. Following the colloquium, the papers were revised for publication and additional papers were commissioned to fill in some topical and jurisdictional gaps. The resulting collection provides a comprehensive analysis and critique of proportionality from the perspectives of philosophy, constitutional theory, and law.

We are grateful to the University of Western Ontario, which provided the financial support required to stage the colloquium, and to all of the contributors. It is a privilege to work and learn together with scholars of such distinction.

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This is the third collection of essays on constitutional law and legal theory that the Public Law and Legal Philosophy group has published with Cambridge University Press, the first two being *Expounding the Constitution: Essays in Constitutional Theory* (2008) and *The Challenge of Originalism: Theories of Interpretation* (2011). We thank Adrian Pereira and his editorial team for their work on this volume, and our publisher John Berger, who has been an enthusiastic supporter of all three books.

Grant Huscroft
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1 Introduction

Grant Huscroft, Bradley W. Miller, and Grégoire Webber

I. THE RISE OF PROPORTIONALITY

To speak of human rights is to speak of proportionality. It is no exaggeration to claim that proportionality has overtaken rights as the orienting idea in contemporary human rights law and scholarship. Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights, giving rise to claims of a global model,¹ a received approach,² or simply the best-practice standard of rights adjudication.³ Even in the United States, which is widely understood to have formally rejected proportionality, some argue that the various levels of scrutiny adopted by the U.S. Supreme Court are analogous to the standard questions posed by proportionality.⁴ As proportionality scholars are well aware, some of the early literature on balancing and rights is American, with special reference to the First Amendment.⁵

¹ See Kai Möller, *The Global Model of Constitutional Rights* (2012).

² See Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (2009).

³ See Jud Mathews and Alec Stone Sweet, “All Things in Proportion? American Rights Review and the Problem of Balancing,” 60 *Emory L.J.* 797 at 808 (2011). See further Mattias Klatt and Moritz Meister *The Constitutional Structure of Proportionality* (2012) 1: “there is a firm consensus that the proportionality test plays an indispensable role in constitutional rights reasoning” (footnote omitted).

⁴ See, e.g., Paul Yowell, “Proportionality in United States Constitutional Law” in Liora Lazarus, Christopher McCrudden, and Nigel Bowles (eds.), *Reasoning Rights: Comparative Judicial Engagement* (2013).

⁵ See, e.g., Alexander Meiklejohn, “The First Amendment Is an Absolute,” [1961] *Supreme Court Rev.* 245; Laurent B. Frantz, “The First Amendment in the Balance,” 71 *Yale L.J.* 1424 (1962); and T. Alexander Aleinikoff, “Constitutional Law in the Age of Balancing,” 96 *Yale L.J.* 943 (1987) [Aleinikoff, “Age of Balancing”].

Notwithstanding proportionality's popularity, there is no consensus on its methodology. Neither does the use of a proportionality doctrine guarantee consensus on substantive rights questions. What the principle of proportionality does promise is a common analytical framework, the significance of which is not in its ubiquity, but in how its structure influences (some would say controls) how courts reason to conclusions in many of the great moral and political controversies confronting political communities. As a framework, proportionality analysis is superficially straightforward, setting out four questions in evaluating whether the limitation of a right is justifiable. A serviceable – but by no means canonical – formulation follows:

1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
2. Are the means in service of the objective rationally connected (suitable) to the objective?
3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?

There are other formulations. For example, some courts formulate the last question as a comparison of the deleterious effects on a right against the importance of the objective, rather than against the beneficial effects of the limitation.⁶ Other courts employ the proportionality framework without explicit reference to the final question.⁷ Still others insist that the question of “fair balance” is “inherent in the whole” of a bill of rights, which, on its best reading, is concerned both with “the demands of the general interest of the community and the requirements of the protection of the individual's human rights.”⁸ Although some courts insist on a systematic review of each of the

⁶ See, e.g., *R. v. Oakes*, [1986] 1 S.C.R. 103, at para. 71; cf. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 839.

⁷ See *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, [1999] 1 A.C. 6 (Judicial Committee, Privy Council), adopted by the Appellate Committee of the House of Lords in *R (Daly) v. Secretary of State for the Home Department*, [2001] UKHL 26; [2001] 2 A.C. 532 and *Huang v. Secretary of State for the Home Department*, [2007] UKHL 11; [2007] 2 A.C. 167.

⁸ *Soering v. United Kingdom*, [1989] 11 E.H.R.R. 439 at para. 89. See also *Wilson v. First County Trust Ltd*, [2003] UKHL 40; [2004] 1 A.C. 816 at para. 181 (Lord Rodger).

questions of proportionality, others maintain that the role of the judge is to “arrive at a global judgment on proportionality and not [to] adhere mechanically to a sequential check-list.”⁹ Others commit themselves to the formality of proportionality’s framework, only to entertain arguments relevant to one question in their answers to another.¹⁰

Now, these differences in formulation and practice need not detract from the claim that proportionality is the *jus cogens* of human rights law, any more than the existence of different theories of rights poses an obstacle to the ascendance of rights discourse. Despite variations in the full articulation of the proportionality doctrine, some or all of the four proportionality questions commonly feature in the assessment of rights claims. Few moral-political debates implicating rights escape proportionality analysis. Are limits on freedom of expression justified by the public interest in promoting tolerance and redressing the harms caused by racist speech? Is a prohibition on assisted suicide justified given its impact on the rights of those who wish to choose the timing and circumstances of their death? Does the provision of national security justify the establishment of limits on the due process rights of alleged terrorists? In each case, and countless others, the answer is to be determined by asking and answering some or all of the questions that are common to proportionality analysis.

That said, it would be too quick to conclude that proportionality is a uniform doctrine. Even putting aside the difference in formulations of the doctrine and the disagreement on the importance of the framework questions – differences and disagreements that obtain not only between jurisdictions but also within any one jurisdiction – it is not clear that the different uses are mere variations on a common concept.¹¹ In short, there may be different conceptions of proportionality in play.¹²

We surmise that behind the singular appeal to proportionality lurks a range of different understandings of proportionality – a range of *proportionalities*. Does this apparent diversity pose a challenge to proportionality as the global engine of human rights law? To what extent does the ascendance of

⁹ *S v. Manamela and Another (Director-General of Justice Intervening)* (CCT 25/99) 2000 (3) SA 1 at para. 32.

¹⁰ The Supreme Court of Canada sometimes reviews the “balance of interests” in its evaluation of “minimal impairment”. See, e.g., *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 at para. 93 and discussion in Webber, *Negotiable Constitution*, *supra* note 2 at 77.

¹¹ For example, consider Julian River’s thesis that there is a British “state-limiting” conception of proportionality and a European “optimizing” conception of proportionality: “Proportionality and Variable Intensity of Review,” (2006) 65 Cambridge L.J. 174.

¹² See Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism,” 47 Columbia J. Trans. L. 72 (2008).

proportionality demonstrate how, to borrow Alexander Aleinik's memorable phrase, "familiarity breeds consent"?¹³ As with Aleinikoff's pathbreaking work on the debate over balancing in U.S. constitutional law, our intention is to provoke a debate about the nature and future of the principle of proportionality more generally by inviting proponents and opponents of proportionality to engage with each other and to offer their evaluations of the impact of proportionality on the nature of rights, the practice of judicial review, and legal reasoning generally. Accordingly, this collection not only has proponents engaging with critics on the merits of proportionality, but also has proponents engaging each other on their differing conceptions of proportionality. Throughout, proportionality is challenged and defended in ways that, we hope, provide new perspectives on this leading doctrine in human rights law.

II. CONCEPTIONS OF PROPORTIONALITY

The opening chapters explore different conceptions of proportionality observable in scholarship and judicial writing. Martin Luterán (Chapter 2) advances the argument that the proliferation of proportionalities stems from confusion between two conceptions, both of which are observable within academic and judicial writing and reasoning: "proportionality as balancing" and "proportionality between means and ends." Luterán argues that present-day doctrinal confusion can be traced to a disconnect between contemporary practice and proportionality's life prior to its reception into public law. This earlier and, he argues, truer account of proportionality lies within a particular ethical tradition. Luterán argues that proportionality as balancing is such a departure from the focal meaning of proportionality that it should not be a surprise that critics complain of its rational deficiency. Proportionality between means and ends is more conducive to a principled practice of judicial review, while proportionality as balancing is an invitation to more or less arbitrary judicial decision making.

Luterán locates the "lost meaning" of the doctrine of proportionality in the philosophical principle of "double-effect" reasoning that draws a distinction between: (1) consequences that are intended and (2) consequences that are not intended, but perhaps foreseen, and nevertheless accepted as side effects. The purpose of double-effect reasoning in ethics is to identify requirements that must be cumulatively fulfilled in order for human action with both positive and negative effects (that is, *double effect*) to be morally permissible. Proportionality between ends and means was traditionally the fourth and final requirement

¹³ Aleinikoff, "Age of Balancing," *supra* note 5 at 945.

of double-effect reasoning. These requirements can be formulated as: the chosen act must not (apart from its negative side effect) be wrongful on another ground; the actor may not intend the bad effect of the chosen act as an end; the actor may not intend the bad effect as a means to a further good effect; and there must be a proportionate reason for choosing an act that has negative side effects.

Luterán proposes a reconstructed proportionality test, one that focuses on ends and means rather than balancing, and argues that it provides resources for resolving several qualitatively different kinds of constitutional conflict that are not identifiable in the standard fare of balancing conflicts of rights, interests, or values. Furthermore, where balancing ultimately leaves a court without a rational basis for choosing one option over another, the reconstructed proportionality test provides determinate rules capable of resolving at least some classes of disputes.

Alison Young in Chapter 3 shares Luterán's view that there is more than one conception of proportionality, but appeals to a different axis. Drawing on conceptions of proportionality articulated by Julian Rivers,¹⁴ Young argues that proportionality can be understood as "state-limiting" or as "optimizing" and, in her view, the two conceptions are complementary, each corresponding to a different role. The state-limiting conception attempts to determine the proper bounds of state action and is focused primarily on the question of lawfulness; in turn, the optimizing conception seeks to determine the nature and scope of the right in question. Young argues that the state-limiting conception works with a conception of rights that affords rights priority, allowing legislatures to develop policy in pursuit of the public interest while ensuring that there is a judicial check on legislative action. In contrast, the optimizing conception of proportionality, as favored by Robert Alexy and others sympathetic to his theory of constitutional rights,¹⁵ corresponds to an interest-based theory of rights: it does not automatically favor the right, but may allow public interest gains to prevail.

Young suggests that we need to assess the purpose of constitutional adjudication before we can assess proportionality. She argues that where there is a common culture defining a right, a state-limiting conception of proportionality can be adopted together with a corresponding immunity theory of rights. But in the absence of such a common culture, an optimizing theory is required to help establish a right as part of the common culture.

¹⁴ Julian Rivers, "Proportionality and Variable Intensity of Review," (2006) 65 Cambridge L.J. 174.

¹⁵ Although Mattias Kumm and Kai Möller both draw inspiration from Alexy's theory of constitutional rights, it is Matthias Klatt and Moritz Meister who have carried on Alexy's theory most faithfully: see *The Constitutional Structure of Proportionality* (2012).

Mattias Kumm and Alec Walen (Chapter 4) take up the question of whether the concept of proportionality is sufficient for the protection of human dignity or if, as some critics have argued, engaging in proportionality reasoning risks balancing away human rights. Although Kumm once conceded that there might be a class of cases in which government action violated human rights while nevertheless satisfying the proportionality test, Kumm and Walen now reject that proposition. Instead, they argue deontology is ubiquitous in proportionality analysis, in all stages, and that there is nothing in the concept of balancing that precludes taking it into account. Balancing, as conceived by Kumm and Walen, is a residual category within rights analysis that says nothing about what kinds of things are relevant to balancing or what weights to assign to them.

The mistake in the conception of proportionality that allowed for human dignity exceptionalism, they argue, was in denying that (or underappreciating how) balancing requires moral reasoning. They argue that deontology covers a range of reasons for giving some interests more or less priority over others, and that proportionality reasoning must include constraints that arise from what is required to respect human dignity. In developing an example from proportionality-based challenges to different criminal punishments and procedures, Kumm and Walen demonstrate how balancing requires attending to moral foundations; that is, attending to a morally thick account of the institutions and concepts related to the government's purpose (such as, in this example, the concept of punishment) in order to evaluate that purpose when balancing.

Like Kumm and Walen, George Pavlakos in Chapter 5 is concerned with proportionality's normativity. He argues that the current theory and practice of proportionality supports a "filter conception of proportionality." On this conception, law is primarily about means-ends or instrumental rationality and engages in categorical or absolute moral prohibitions only in exceptional cases. When such exceptional cases arise, proportionality functions like a moral filter or litmus test designed to double-check the legitimacy of authoritative law. But the moral-filter conception of proportionality gives rise to a paradox: in discharging its controlling function, proportionality drives a wedge between authoritative directives and the moral grounds that can legitimize them in the first place. Along these lines, proportionality seems to assume that authoritative legal directives obligate irrespective of their substantive legitimacy. The result is that categorical prohibitions are not internal to law but need to be imported from some other realm.

Pavlakos argues that the paradox arises from a positivist understanding of legal obligation that works in tandem with a conception of autonomy as

negative freedom. Autonomy *qua* negative freedom assumes that the function of autonomy is to create a sphere that is free of intervention with respect to very important interests of individuals. All else that remains outside this sphere is a question not of freedom but of unprincipled politics. In this picture, authoritative legal directives operate as standards of instrumental rationality, by aligning the relevant means with whatever ends legislators have put into place. When those ends appear extremely unjust, they need to be “corrected” by ad hoc appeal to categorical constraints that are external to law.

In questioning the philosophical assumptions of the filter conception of proportionality, Pavlakos advances a conception of autonomy that supports a non-positivist understanding of legal authority. On the one hand, he argues that legal obligation is grounded on deontological (moral) reasons. On the other hand, he argues that legal rights are better understood not in their traditional “defensive” role as negative constraints but as opening up spaces of freedom that need to be fleshed out by publicly authorized norms. He concludes that proportionality ought to function not as a moral filter for authoritative norms but instead as an interpretative principle that organizes a legal system as a system of publicly authorized norms, which aim at the realization of the autonomy of those living under it.

These four chapters outline some of the competing conceptions of proportionality. Significantly, these chapters rely on very different criteria to identify and assess plausible conceptions of proportionality. Luterán’s focus is both ethical and historical, whereas Young engages heavily with current legal practice. Kumm and Walen, together with Pavlakos, draw on legal theory, and Young and Pavlakos insist on a correlation between conceptions of proportionality and conceptions of rights. The relationship between proportionality and rights is also front and center in the contributions to Part II.

III. PROPORTIONALITY AND RIGHTS

The relationship between rights and proportionality analysis is examined from a variety of different perspectives in Part II. Grégoire Webber (Chapter 6) defends the view that rights are conceptually interrelated to justice and, like justice, are preemptory and directive of what is to be. His argument tracks the etymology of “rights” from the Latin *ius*, exploring the conceptual relationship of objective right (justice) and subjective right (rights). Within this framework, he argues that the received approach to human rights together with the appeal to proportionality divorces rights from what *is right* and, in so doing, fails to capture the moral priority of rights. In short, human rights law-in-action suffers from a loss of rights.

In an effort to reclaim rights from this position of inconsequence, Webber draws attention to the equivocation in the use of the term “right” in catch-phrases such as “Everyone has a right to. . . .” In reasoning toward the states of affairs and sets of interpersonal actions, forbearances, and omissions that realize rights in community, one merely begs the question, by affirming as conclusive, that one has a *right* to life, liberty, and so forth. The practical question is what, specifically, is to be established and brought into being in order to realize one’s rights. The complex process of practical reasoning required to answer that question situates the would-be right-holder in a community of other actual and potential right-holders. It is a process of reasoning undertaken by the lawmakers who bear a special responsibility for their community to settle, justly and authoritatively, right relationships between persons.

That special responsibility, argues Webber, invites a different understanding of the relationship of rights to law: rather than understanding the legislature as the author of the infringement of rights (as Möller [Chapter 7] and Schauer [Chapter 8] and many others presuppose in their accounts of rights under proportionality), the legislature sets out to realize rights in community. Albeit with many failings, many legal directives stand as true specifications of right relationships, giving proper effect to the subject matters of justice outlined in bills of rights.

Kai Möller in Chapter 7 exemplifies the conception of rights rejected by Webber. For him, proportionality implies “rights inflation,” which is to say that it implies an expansion of the range of interests protected by rights. Noting the trend toward the inclusion of a variety of interests within the scope of human rights in the jurisprudence of the European Court of Human Rights and, especially, in the jurisprudence of the German Federal Constitutional Court, Möller argues that this tendency is not only encouraged but required by the logic of proportionality analysis. Furthermore, he argues, it is the best means of ensuring that state action is justified.

Rejecting what he terms the “threshold model” of rights, Möller challenges attempts to articulate a standard according to which an interest would be of sufficient importance to qualify as a right. Arguing that any such threshold would risk arbitrariness, Möller introduces and defends a “comprehensive model” of rights according to which all autonomy interests qualify as rights. He acknowledges that such a model incorporates a range of interests, from the inconsequential (e.g., feeding pigeons in the park) to the grossly immoral (e.g., the right to murder), but argues that this does not trivialize or undermine the idea of rights.

Recognizing that the implications of the “comprehensive model” will give many reason to hesitate, Möller reiterates that recognizing an interest as a right

is not conclusive: the right to murder, for example, is justifiably infringed, and proportionality analysis would allow for this justification. This conclusion is, for him, more secure and agreeable than the conclusion, suggested by the “threshold model,” that some interests could be unjustifiably interfered with and yet, because they fail to meet a minimum threshold to qualify as rights, would not be subject to proportionality review. The lesson of Möller’s argument concludes in the affirmation that proportionality analysis invites us to revisit our assumptions that rights have special importance and special normative force. Rather, rights are better understood as endowing us with the right to be treated with a special attitude: an attitude that takes each and every individual seriously as a person with a life to live and that allows government to interfere with our activities only if there are sufficient, and proportionate, reasons to do so.

Frederick Schauer (Chapter 8) shares with Möller the premise that rights and proportionality are in a special relationship, but disagrees on the nature of that relationship. For Schauer, only when rights enter the picture does the language of proportionality come onto the scene. The language of proportionality contrasts with the language of balancing, which captures the policy-making process, according to which competing but non-rights-protected goals are weighed. The special relationship of rights to proportionality, then, is a function of the special weight of rights. Attending to the “question of weight” in proportionality analysis, Schauer reviews how the special weight of rights frames proportionality analysis.

In Schauer’s argument, all non-absolute rights are subject to limitation, and proportionality arbitrates between justified and unjustified limitations. But while non-rights-protected goals or interests can be balanced, stronger arguments are necessary to limit a right because each right is weightier than non-rights-protected interests. There is thus a presumption in favor of rights, which places the burden of proof on those who would limit the right. That burden is absent in the normal cost-benefit policy analysis.

Schauer introduces the idea of a “rule of weight” to capture proportionality analysis: a second-order rule prescribes the weight of first-order considerations about what should be done. Proportionality thus frames decision-making processes: the presumption is against limiting a right, but the presumption can be rebutted. The question put forth by proportionality analysis is whether the extent to which a limitation on a right is justified by the increase in public order or other end that the limitation on the right is expected to bring.

Grant Huscroft in Chapter 9 argues that we must be concerned with not only what it means to have a right, as Webber argues, but also with the meaning of the particular rights that we have. This, he argues, means that we must attend

to the foundational significance of the decision of a political community to enact a bill of rights. Political communities choose whether or not to enact a bill of rights and choose which rights are to receive the special protection that a bill of rights affords. In Huscroft's account, bills of rights are finite in nature; they protect some, but not all, possible rights and set out particular conceptions of some of the rights they include. In short, bills of rights reflect a "constitutional settlement" on rights questions, and this settlement must be respected before proportionality analysis can occur.

Huscroft argues that the "rights inflation" advocated by Möller is unjustified, and so too are approaches to proportionality such as Mattias Kumm's¹⁶ that render the process of rights interpretation all but irrelevant. By expanding the scope of rights and hence judicial review, some conceptions of proportionality effect radical changes to the constitutional order and should be rejected on this account, however desirable an expanded requirement of justification for state action may be.

The contributors to Part II all insist on a relationship between rights and proportionality and, despite important disagreements, there is common ground among both the proponents and critics of proportionality. All four chapters share the view that proportionality and absolute rights are difficult, if not impossible, to reconcile. For some authors, the very idea of rights presupposes that they are absolute and so not subject to proportionality (at least as conceived within the frame of "balancing"); for others, proportionality engages only with non-absolute rights. Möller and Webber share the view that proportionality and rights inflation are conceptually interrelated, but disagree on the merits of this relationship: for Möller, the gains in subjecting government authority to justification review is important; for Webber, the loss of rights and the decision to divorce rights from what is right is morally burdened. Schauer and Huscroft insist on the importance of attending to what rights mean: for Schauer, that question is related to the special role of weight in undertaking proportionality analysis; for Huscroft, that question is a precondition to justifying the decision to undertake proportionality analysis. In both cases, rights matter in a way that Möller would reject.

IV. PROPORTIONALITY AND JUSTIFICATION

The chapters in Part III of the collection explore proportionality as justification, with special reference to the "culture of justification." T.R.S. Allan

¹⁶ Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review," (2010) 4 *Law & Ethics of Human Rights* 141.

(Chapter 10) defends a common law approach to democratic constitutionalism. Legislation, he argues, is best understood as providing “influential guidance to the requirements of reason,” such that its application to particular cases requires judicial judgment and, at times, modification in order to respect rights. That common law requirement derives its authority from the concept of human dignity and not from a bill of rights. Bills of rights are important but they are, *contra* the position advocated by Huscroft, only “inessential, approximations.”

On Allan’s account, justice involves the resolution of disputes according to moral principle and this, in turn, requires proportionality. A law is proportionate whenever an alternative law, less restrictive of rights, would be significantly less effective. Allan considers the last step in proportionality analysis – the fair balance test – to be the most difficult, but even allowing for the problem of incommensurability he argues that comparability remains possible: it is rational to prefer a trivial interference with one right or interest to a greater interference with another. To the extent that a range of answers is possible, deference to the legislative choices from within that range is appropriate.

Allan outlines an approach to statutory interpretation that renders it unlikely that courts will be called upon to strike down legislation or otherwise declare it incompatible with rights. The correct construction of a statute is, in his view, the one that best reconciles general statutory aims with respect for citizens’ autonomy and dignity.

David Dyzenhaus (Chapter 11) argues that the culture of justification echoes Lon Fuller’s commitment to “reasoned argument in human affairs.” His focus is on the justifiability of the reasons for which political authority acts. Confronting the view that proportionality would invite too much judicial interference in the administrative state, Dyzenhaus argues that a focus on a decision maker’s reasons for a decision, rather than a review of the correctness of that decision, strengthens the administrative state by keeping all decisions within its province. The role of the court is to challenge the reasons why decisions are reached, not to make those decisions itself.

Proportionality is therefore at the core of the culture of justification. It asks of decision makers to take seriously the claims of rights made by individuals and acknowledge their duty to justify the exercise of authority that affects them. Like Allan, Dyzenhaus argues that this idea is not bounded to the context of constitutional rights; it is, he argues, central to public law as a whole.

In contrast to these two proponents of proportionality, Stephen Gardbaum (Chapter 12) is agnostic as to proportionality’s virtues. His purpose is to consider the normative justification for adopting proportionality by exploring an

alternative conception to the culture of justification. Proportionality is better understood, Gardbaum argues, as promoting a “culture of democracy.” In the culture of democracy, proportionality is important because it acknowledges the democratic weight that attaches to claims that compete with rights, and so establishes a middle ground between absolute rights and majoritarianism. Gardbaum argues that the culture of democracy is best reflected by Schauer’s conception of rights: rights are important, but there is a limited ability to override them in some circumstances. This ability reduces the concern that would otherwise arise from the decision of past majorities to protect rights so as to limit the law-making authority of future majorities. It also mitigates the problem of judicial supremacy in interpreting underdeterminate rights.

Gardbaum acknowledges that the culture of democracy reaches the same point as the culture of justification, but insists that it does so in a manner that emphasises the democratic function of proportionality review over its constraining and justificatory function. In order to give effect to the democratic purposes of proportionality review, Gardbaum argues that judicial review should be deferential: courts should ask whether a legislative rights judgment is reasonable.

Mark Antaki’s contribution in Chapter 13 challenges the claims – explicit and assumed – of proportionality-talk by both proponents and critics of its place in human rights law. He highlights the obviousness, inevitability, inescapability, and universality of reasoning and rights contemplated by proportionality’s culture of justification. Exploring the forms of thought that give proportionality its appeal, he argues that the culture of proportionality is rationalism, rooted in the technical and calculative and which purports to demystify the human experience.

Antaki traces the appeal to objectivity and escape from tradition contemplated by the calculation and policy assessment of balancing. In this “worldlessness,” proportionality is taken to promise unsituated reason and an Archimedean point of view. So successful is this promise that we may forget just how recent the rise of proportionality has been and how significant its lexicon has become. Drawing on Hannah Arendt, Antaki invites us to explore worldly judgment, where one’s articulation of the “facts” relevant to proportionality analysis cannot proceed without contemplating the weight one attaches to them or the interests they implicate. Antaki outlines how an understanding of judgment as worldly can lead to a rehabilitation of authority and analogy. In this way, Antaki’s chapter invites us to appreciate the connection between proportionality and analogy. Despite its claims to escape context, proportionality, like analogy, assumes a world for comparison and understanding. In this

frame, one cannot separate the aesthetic from the mathematical, perception from cognition, the poetic from the propositional, world from reason.

Although differing in many respects, the four chapters in Part III all share the view that proportionality invites a judicial role that is different than the one sometimes assumed by the rule of law's commitment to the administration of legal rules. For Allan and Dyzenhaus, the judicial role is to examine and evaluate the reasons for government action: Allan's focus on legislation and Dyzenhaus's focus on administrative action share a commitment to justification as central to the relationship of law and rights. Gardbaum shares this appeal to justification, but suggests that it empowers legislative action by denying to the court categorical conclusions: the government may act where its reasons for action are good. Allan's, Dyzenhaus's, and Gardbaum's shared commitment to justification – a commitment shared by many other authors in this collection – is critically examined by Antaki, who questions the assumptions inherent in talk of justification. In this way, the contributors to Part III provide the reader with different accounts of proportionality's relationship to justification, accounts that cannot be reduced to a simplifying assumption that proponents and critics of proportionality share one or another view.

V. PROPORTIONALITY AND REASONING

The contributions in Part IV explore the mode of reasoning presupposed and promoted by the doctrine of proportionality. If the constitutional validity of legislation turns on its proportionality, does it follow that the legislature should use the doctrine of proportionality to frame how it reasons and chooses when legislating? In answering this question, Richard Ekins cautions in Chapter 14 against an affirmative reply.

Exploring what it means to "legislate well," Ekins argues that law-making is a moral choice made in response to reasons. The legislator's reasoning is informed by moral truths and the duty to specify those truths into forms appropriate to the needs of the community. The legislator forms, refines, and scrutinizes proposals for legislation by identifying goals and means to realize those goals. Throughout this process, the legislator seeks to specify the rights of persons having in view an image of what is conducive to human well-being.

Ekins cautions that the proportionality doctrine does not do justice to the complexity of sound legislative reasoning. There are some valuable aspects of legislating that are not recognized by proportionality, and some corrupting mistakes. Such a mode of reasoning will stultify legislative reasoning, which should aim to specify that to which each is entitled, consistent with the disposition to be open to the flourishing of all persons.

Timothy Endicott explores the commensurability assumption in proportionality's claim to balance in Chapter 15. The resolution of the incommensurability problem lies in accepting that in some instances, leaving matters to the discretion of judges is less arbitrary than trying to remove that discretion through the imposition of rules that are themselves arbitrary. That resolution rests on what Endicott terms the "institutional premise"; namely, the premise that "the respect that all public authorities must have for certain human interests can best be secured by a power in an independent tribunal . . . to pass judgment on the justice of pursuing public purposes in ways that affect those interests." Proportionality reasoning is not generally pathological if the institutional premise holds. Rather, given the institutional premise, the pathologies of proportionality ("structured tendencies towards misconceived decisions") are particular and depend on judges making particular mistakes.

Those pathologies come in pairs, because they are either in favor of the claimant or in favor of the public authority. They relate to (1) spillover, such as including on the balancing scales interests that do not warrant consideration; (2) uncertainty, including uncertainties resulting from judicial consideration of complex social facts, future contingencies, and unpredictable social responses to policy choices; and (3) deference, both in respect of jeopardizing the judicial protection of human rights and in respect of failing to award public authorities their rightful place under the constitution.

These three pairs of pathologies under proportionality all relate to incommensurability. According to Endicott, incommensurability undermines attempts to achieve objectivity, transparency, and judicial legitimacy such that, even if incommensurability as a *general* pathology can be answered by the institutional premise, it resurfaces at the particular level in the form of one or more of these three more specific and contingent pairs of pathologies.

Bradley Miller in Chapter 16 follows on from Endicott's exploration of proportionality's pathologies and, developing a theme suggested in Richard Ekins' chapter, proposes one more. What Miller perceives in proportionality reasoning (particularly as conducted by judges) is a propensity to discount, or exclude a priori, many aspects of the public good that are commonly the concern of the legislator. Miller argues that proportionality reasoning, although intended to promote objectivity and transparency, serves as ready cover for the judicial adoption of undefended (and sometimes unarticulated) commitments of political philosophy. As it happens, chief among these commitments are the assumptions of political liberalism, and particularly the thesis that the political community must remain neutral about what constitutes a good life. Such an assumption has an obvious impact on the justification of legislation found to restrict autonomy interests. Miller's concern is not only – or even

primarily – with the decisions that result from such a practice. This practice of a priori exclusion ought to be judged as pathological by anyone who believes that legitimacy of judicial review requires that controversial principles of political philosophy not be pressed into law either covertly or accidentally.

Iddo Porat brings together a review of contested accounts of reasoning under proportionality with a review of institutional responsibility in Chapter 17. By tracing these debates over the U.S. Supreme Court's case law exploring the merits of balancing under the Bill of Rights, Porat argues that the American case law and literature suggests that constitutional rights lend themselves to two readings: either they are first-order considerations to be balanced against other first-order considerations, or they are second-order rights that prevent government from acting for some first-order considerations. The first reading lends itself to balancing rights, but contrary to present day assumptions, the history of U.S. Supreme Court decisions reveals that this conclusion was regularly accompanied with the assumption that the legislature, not the court, was to do the balancing. In turn, the second reading of constitutional rights, although not inviting balancing, nonetheless regularly appeals to balancing to "smoke out" whether the government, purporting to act on a permissible first-order consideration, in truth was motivated by an excluded first-order consideration. Here balancing is transparently the duty of the court, albeit for the limited purpose of identifying the motivating first-order consideration of government action.

By contrasting the different possible answers to the two separable questions, Porat identifies one strong and three weak positions on rights and balancing: the strong position reads rights as first-order considerations and assigns to courts the responsibility to balance; the weak positions trade on opposite answers to one or the other or both positions on rights and judicial review. Although the strong position dominates in much of Europe, it is not embraced in the United States, where one or the other of the three weak positions finds expression in the case law.

The question of proportionality's relationship to reasoning is examined from different angles in these four chapters, each of which challenges common assumptions in proportionality judgments and scholarship. Ekins resituates proportionality from the judicial forum to the legislative forum to test the assumption, shared by many proportionality proponents, that proportionality is the only way to reason. Endicott challenges a different assumption: namely, the commensurability thesis, and situates the institutional question at the heart of that assumption. Miller demonstrates and challenges how political liberalism is assumed, but not defended to be the default moral-political philosophy in undertaking proportionality analysis. Finally, Porat, drawing primarily on

U.S. case law, challenges both the assumption that the U.S. Supreme Court has rejected proportionality, but also the assumption that proportionality can make claim to a singular view of the place of rights and institutional responsibility.

VI. CONCLUSION

Proportionality's current status as an orthodoxy has become something of an impediment to scholarly debate. This collection's aim is to open up lines of debate beyond simplistic "for" and "against" positions, demonstrating the complexity of rival positions.

Where there is a range of proportionalities, it is important for critics to attend to relevant differences. Defenders of proportionality quite reasonably insist that critiques of one theorist's articulation of proportionality should not be understood as necessarily applying to all articulations. By supplying detailed accounts of competing proportionalities in conversation with others, this collection helps identify similarities and differences. It thus provides an important antidote to the easy rebuff that because there is no standard account of proportionality, critiques of proportionality simpliciter are off target. In turn, it enables critics to better understand their subject matter. Similarly, this collection moves some distance toward answering the criticisms that challenges to proportionality are either unpalatable¹⁷ or, alternatively, reducible to proportionality.¹⁸

The contributions to this collection instead demonstrate that debate can be more fruitfully focused elsewhere. Differing conceptions of proportionality can be drawn from the history of ideas, from different readings of judicial practice, from theoretical understandings of deontic and consequentialist reasoning, and from different conceptions of rights, law, and legislating. Does proportionality signal the special priority of rights or deny rights special importance and special normative force? Is proportionality consistent with a conception of absolute rights? Would the invitation to look to reasons as part of a culture of justification produce a different account of the judicial role, including a transformation of the relationship of judicial authority to legislative authority? What role, if any, should proportionality play as a guide to legislative

¹⁷ E.g., "not taking human rights seriously"; Barak, *Proportionality* (2011) 495, or presenting a "seriously degraded" account of rights; Tom Hickman, "Negotiable Rights, What Rights?" (2012) 75 *Modern L. Rev.* 437 at 446, 454.

¹⁸ E.g., the Judge Sir Gerald Fitzmaurice of the European Court on Human Rights in *Marckx v. Belgium* (1979), application no. 6833/74 (June 13, 1979), para. 5, insisted that proportionality includes a set of "elementary, standard propositions which should not need stating because they are such as everyone would assent to in principle."

reasoning? Is the moral reasoning that takes place within proportionality open to all sound moral theories or does it privilege some? Does the commensurability objection hold, and if so, what are the consequences for the moral choice?

The sheer ubiquity of proportionality analysis will suggest to some, perhaps to many, that the time to debate these questions is long over and it does not much matter whether proportionality is adopted for its rational appeal or for its sheer familiarity. This collection is offered, by both proponents of critics of proportionality alike, as a corrective to this complacency.