Proportionality and the Rule of Law

Rights, Justification, Reasoning

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

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PROPORTIONALITY AND THE RULE OF LAW

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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.

Grant Huscroft is Professor in the Faculty of Law at Western University in London, Canada, where he is a founding member of the Public Law and Legal Philosophy Research Group. His research focuses on constitutional rights and judicial review and has been published in Canada, the United States, the United Kingdom, New Zealand, and Australia. He is a coauthor of the treatise *The New Zealand Bill of Rights* (2003) and has edited and coedited seven collections of essays.

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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
Bradley W. Miller
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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 peremptory 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