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BEYOND THE PRINCIPLE OF PROPORTIONALITY

INTRODUCTION

The principle of proportionality is a doctrinal framework used in many jurisdictions to assess whether restrictions on fundamental rights imposed by public authorities are justified under the relevant constitutional charter. In its most common form, this principle consists of three tests. Each test poses a question that needs to be answered in the affirmative, before courts can conclude that the measure under review is justified. The three questions are: first, is the restriction of the right a useful means to achieve a legitimate goal? Second, is the restriction necessary? That is to say, is there not a less intrusive means to further the goal? Third, is the burden imposed on the right proportional to the benefit obtained? If the governmental measure meets these three requirements (which are usually called *suitability*, *necessity* and *proportionality in the strict sense* or *balancing*), judges must uphold it.

The principle of proportionality, conceived in this way, developed in Germany under the 1949 Basic Law. Its origins can be traced back to nineteenth-century administrative law. German administrative courts, especially the Prussian *Oberverwaltungsgericht*, had engaged in proportionality analysis to constrain the police powers of the state.[1] Other countries around the world have incorporated this tool in

[1] Moshe Cohen-Eliya and Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 Int'l J. Const L. 263, 271-76 (2010).

their constitutional adjudicative practices too.[2] There are, of course, variations in the way the principle gets applied from one jurisdiction to another.[3] But a common framework has emerged.

Interestingly, in spite of the prominence of this principle in actual practice, few constitutions explicitly embody it.[4] The German Constitution, notably, does not. The doctrine of proportionality is the jurisprudential product of judges and legal commentators. Legal philosophers, moreover, have contributed their ideas on

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[2] For a detailed description of the birth and evolution of the principle of proportionality in different regions of the world, see Aharon Barak, Proportionality. Constitutional Rights and their Limitations 175-210 (2012). The book includes a useful chart mapping the migration of the principle. *Id*. at 182. See, also, Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L. 72 (2008). For the spread of proportionality in Latin America, see Proportionality and Transformation: Theory and Practice from Latin America (Francisca Pou-Giménez, Laura Clérico, and Esteban Restrepo-Saldarriaga, eds., 2022).

[3] For the differences between Canada and Germany, for example, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. Toronto L.J. 383 (2007). As Grimm explains, the third stage of proportionality analysis (balancing) is less prominent in Canada than in Germany. Canadian courts usually address under the rubric of necessity many issues that German courts reserve for the third stage of analysis.

[4] The Constitutions of Romania (art. 53 (2)), Turkey (art. 13) and Switzerland (art. 36(3)) do, for example.

proportionality. One of the most influential works in this connection is that of Robert Alexy.[5]

Similarly, at the international and supranational levels, tribunals and other organs in charge of implementing human rights instruments commonly resort to the principle of proportionality, even if such instruments rarely mention it. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the European Convention on Human Rights, for example, do not make any express reference to the principle of proportionality. The Charter of Fundamental Rights of the European Union, in contrast, does.[6]

It is no exaggeration to say that proportionality has become part of the constitutional grammar of rights at the global level. "We now live in the age of proportionality", Aharon Barak has observed.[7] "Proportionality-based rights adjudication", Alec Stone Sweet and Jud Mathews assert, "now constitutes one of the defining features of global constitutionalism".[8]

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[5] See Robert Alexy, A Theory of Constitutional Rights (2002). For a review of this book that usefully situates Alexy's theory in the context of current discussions about rights, see Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 Int'l J. Const. L. 574 (2004).

[6] See Charter of Fundamental Rights of the European Union, 2000 O.J (C 364), art. 52, para. 1.

[7] Barak, *supra* note 2, at 457.

[8]Sweet and Mathews, *supra* note 2, at 74.

There is debate about the extent to which the United States is an exception to this trend. There are differences, indeed, between American constitutional doctrines and those developed in other countries. In particular, the third prong of the proportionality test (balancing in the strict sense) is less present in American adjudication than in other jurisdictions. The basic idea is nevertheless accepted that constitutional rights may be limited by the government, and that limitations are justified when they are tied to sufficiently important ends.[9] Actually, the rise of legal pragmatism in the 1930s opened

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[9] In the United States, rights tend to be classified in three groups, each of which triggers a different level of judicial scrutiny (strict, intermediate, minimal). The restriction of a right may or may not be justified, depending on the importance of the interest the government seeks to advance, and the kind of fit that obtains between the restriction and the goal. The higher the level of scrutiny that operates, the more compelling the governmental interest must be, and the tighter the connection between the restrictive measure and the goal being pursued. Under American law, there is normally no *ad hoc* balancing at a third stage. Rather, the weight of the right and the weight of the governmental interest are taken into account at a more abstract level, as part of the first stage of the analysis, when courts classify rights and scrutinize the legitimacy of the purposes the government seeks to advance. For an assessment of American jurisprudence from a comparative perspective, see Barak, *supra* note 2, at 509-21. For an argument that American jurisprudence is not so "exceptional" as it is commonly said to be, see Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391 (2008). The main difference, Gardbaum observes, is that rights adjudication in the United States does not normally include the third stage of proportionality analysis. *Id.*, at 416-31.

the door to constitutional balancing.[10] The reason why courts in the United States have not built a general doctrine of proportionality has to do with contingent features of the American legal system.[11]

The principle of proportionality is celebrated by many scholars and judges. Its three-step structure helps introduce some measure of intellectual discipline in judicial reasoning regarding limitations on fundamental rights. Proportionality analysis, moreover, can be viewed as an essential part of the "culture of justification" that should prevail in a democratic society. By means of the principle of proportionality, individuals whose interests are burdened by a law can turn to the courts to require the government to justify its actions in light of acceptable public reasons. This right to contest the law is facilitated by a broad conception of the scope of constitutionally guaranteed rights. The

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[10] Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L. J. 943, 948-63 (1987).

[11] See Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3094 (2015). Although many areas of United States constitutional law are governed by the idea of proportionality, no structured doctrine has emerged from the case law. Among the factors Vicki Jackson mentions to account for this result, three should be emphasized: a) unlike many European courts, American courts have been reluctant to build a theory of the Constitution that connects the various clauses of the constitutional text in a systematic manner; b) because of its age, the American Constitution contains fewer rights than more modern texts do, the consequence being that conflicts between constitutional values are perceived to arise less often; and c) the United States is relatively isolated from international sources of human rights law, which have contributed to the expansion of proportionality doctrines. *Id*., at 3121-29.

more expansive the domain of constitutional justice, the larger the possibility of challenging the actions of state authorities before courts.[12] At the same time, the principle of proportionality allows democratic institutions to restrict *prima facie* constitutional rights in the name of public interests. The legislature can thus advance goals that enjoy popular support. Courts, moreover, can conduct proportionality analysis in a deferential way, so that laws will only be invalidated if the underlying legislative judgments concerning suitability, necessity and proportionality in the strict sense are not simply "wrong", but "unreasonable". The tension between judicial review and democracy is thereby tempered.[13]

As we will see, the three questions that are at the heart of the principle of proportionality can only be posed and answered against the background of a substantive theory of justice and rights. The hard normative issues that judges must address in adjudicating cases are somehow "external" to the mechanics of the principle of proportionality.[14] In this article, I want to focus on some specific issues to illustrate the need for substantive theory.

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[12] Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 L. and Ethics of Hum. Rights 141 (2010); and Moshe Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification*, 59 Am. J. Comp. L. 463 (2011).

[13] Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 L. and Ethics Hum. Rights 78 (2010).

[14] This is recognized by champions of proportionality. Barak, *supra* note 2, at 460, for instance, writes: "Proportionality is based on the reasons underlying each constitutional right, as well as the justifications for their limitation. These reasons and

DEMARCATING ABSOLUTE RIGHTS FROM RELATIVE RIGHTS

In the first place, it needs to be emphasized that the principle of proportionality can only enter the picture when the right at stake can be restricted. Most rights are of this kind. We can call them "relative rights". Some rights are "absolute", however: no restrictions can be imposed on them. The test of proportionality is totally irrelevant when it comes to such rights.

One way of drawing the distinction is to say that absolute rights are embodied in constitutional norms that have the structure of a "rule", whereas relative rights figure in norms having the structure of a "principle".[15] A rule speaks in a categorical manner, while a principle speaks in a more flexible way. What is established in a rule is not open to implicit exceptions justified by the weight of external considerations. A principle, in contrast, is open to that sort of balancing. A principle requires that something be

those justifications in and of themselves, however, are extrinsic to the concept of proportionality. Proportionality is unable to resolve those issues". Similarly, Kai Möller, The Global Model of Constitutional Rights (2012), insists that proportionality and balancing are doctrinal tools that direct judges towards the important moral issues in the resolution of constitutional cases. "Their danger", he observes, "is that, if misunderstood, they may suggest a mistaken simplicity about reasoning with rights: the idea that the difficult questions about rights can be resolved by recourse to a largely mechanical exercise of quantification". *Id*., at 207. But see David Beatty, The Ultimate Rule of Law 166-76 (2004), who contends that the doctrine of proportionality makes it possible for judges to recast normative questions as questions about logic or facts.

[15] See Alexy, *supra* note 5, at 47-48.

realized to the greatest extent possible, taking into account the existence of opposing principles and rules.[16]

It is important to be clear that all rights, whether absolute or relative, are limited in their scope. We have a right to something (to free speech, to free association, not to be tortured, etc). This something we have a right to needs to be defined. There is, indeed, a boundary that separates what falls within, and what falls without, the area covered by the right. No matter how wide the scope of a right is taken to be, limits will always be there, beyond which the right is no longer applicable. It is the task of interpretation to fix the meaning of the constitutional clause that carries a given right. Proportionality only starts to operate once the scope of the right has been determined through interpretation.[17] Judges working with different constitutional texts, in the context of different legal traditions, will not define the constitutional rights in exactly the same manner. It is true that the highly abstract character of constitutional clauses facilitates a certain degree of convergence, but differences are inevitable.[18]

So the distinction between absolute and relative rights refers to the question whether, once the boundaries of a right have been drawn, the actions that fall within the

[16] Note that the so-called "principle" of proportionality is not really a principle, but a rule. What it orders (that limitations on rights be proportional), it orders in a categorical manner.

[17] Barak, *supra* note 2, at 45-82.

[18] As Grant Huscroft notes, "the decision to adopt a bill of rights is a decision to give heightened legal status to *particular* rights, rather than to rights in general". See *Proportionality and the Relevance of Interpretation*, in Proportionality and the Rule of Law 188 (Grant Huscroft, Bradley W.Miller, and Grégoire Webber eds., 2014).

field of the right will always be protected, no matter what, or will instead be protected only if the case for protection is not defeated by stronger considerations.

We need, of course, a theory that tells us which rights belong to each category. The principle of proportionality is silent about this issue. It only begins to speak after this important preliminary question has been answered. As we will see, however, identifying which rights are absolute is a harder enterprise than it seems.

Before we proceed, we should observe that the idea that limitations on rights may sometimes be justified assumes that conflicts do arise between rights and other values (other rights or interests). Some scholars have insisted, quite rightly, that we must interpret constitutional values in a holistic way. It would be absurd to say, for example, that if I enjoy killing people and would like to kill you, there is a conflict between my constitutional right to liberty and your right to life. The scope of the right to liberty must be read in light of the right to life. When the law prohibits me from killing you, it does not restrict my liberty, since the latter does not encompass the action to kill you.[19] This call for a harmonic interpretation of diverse values is to be applauded.

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[19] See Ronald Dworkin, *Do Liberal Values Conflict?*, in The Legacy of Isaiah Berlin 88-89 (Mark Lilla, Ronald Dworkin, and Robert B. Silvers eds., 2001). Kai Möller, however, thinks that the principle of proportionality necessitates "rights inflation": all autonomy interests should be protected as rights, including interests in engaging in trivial and even immoral activities. According to Möller, there is indeed "a right to murder". There are, of course, very good grounds to restrict this right, in order to preserve the right to life of others. But this does not mean, he maintains, that we cannot recognize the existence of such an (easy-to-defeat) right to murder. See Kai Möller, *Proportionality and Rights Inflation,* in Proportionality and the Rule of Law, *supra* note 18, at 155-72.

Indeed, many conflicts will turn out not to be real ones, if we interpret the relevant values in the right manner, making them hang together in a coherent scheme.

It would be wrong, however, to believe that no genuine conflicts will ever remain at the end of the interpretive day. We will confront situations where a right needs to be partially or totally sacrificed in order to further a sufficiently important legitimate end. Thus, it is true that my right to liberty is not "restricted" when the law prohibits my killing you, no matter how much the ban upsets my plans. On the other hand, if the law establishes a long term in prison as punishment for my killing you, a conflict does arise between my liberty and the policy or principle that the government seeks to realize. Prison *is* a deprivation of liberty, after all, even if it is a justified one. To use a more extreme example: if the death penalty were justified in some special circumstances, it would be hard to deny that the right to life of the criminal is at stake. Even if the deprivation of life were warranted, it would be a restriction of the right to life nevertheless.

Actually, we have set up a criminal justice system in order to accomplish the deterrent and retributive purposes of punishment, even if we are aware of the risk of erroneous decisions. Because of limited resources and limited time and, more importantly, because of human fallibility, we have no guarantee that no innocent person will ever be punished. We hope to reduce the risk of mistakes as much as possible, by means of the pertinent procedural safeguards, but we know that accidents are inevitable. The institutional machinery can never be perfect. We feel justified in maintaining the criminal justice system because we want to avoid the negative consequences that would follow if we eliminated it altogether. But we are aware of the tragic choice involved in this collective decision. When we discover that an innocent person was erroneously convicted of a crime, we regret it profoundly, and we often believe that the person

deserves some kind of compensation. It would be absurd to deny the existence of an underlying conflict between individual liberty and the general interest in setting up a system that assigns punishments to wrongdoers.[20]

A. **Absoluteness and importance**

So, which constitutional rights are absolute? It is tempting to say that those constitutional rights are absolute that protect the most important individual interests. In contrast, relative rights are those that protect interests of lesser weight. Some examples of absolute rights refer to vital rights indeed, such as the right not to be tortured, or the right not to be enslaved. It seems to make normative sense to believe that the more important a right is, the more difficult it is to justify restrictions on it, and that some rights are so central to human well-being that they must be regarded as absolute.

Unfortunately, things are more complicated than this. Take the Spanish Constitution, for example. It announces that everybody has "a right to life" (Article 15). It also provides that the person that is arrested by the police has the right to be brought before a judge, or must be set free, no later than 72 hours after the arrest (Article 17). There is no doubt which right is the more important of the two, and which violation is therefore regarded as the more serious. If a person is given a choice, she will reasonably prefer the government to respect her right not to be killed, over the other right. Yet, even if the right to life is more important than the other, it is a relative right. Important as it is, life may be sacrificed in certain circumstances. It is legitimate, for example, for

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[20] More generally, on the different institutions and procedures that society can use to allocate tragically scarce resources, see Guido Calabresi and Philip Bobbit, Tragic Choices (1978).

the law to authorize killing in self-defense, if certain conditions are met. In the interest of national defense, moreover, the government may be entitled to recruit soldiers in order to fight a war, thus putting their lives at risk. In general, the government allows people to use cars, which statistically cause a number of deaths every year. In contrast, under Spanish constitutional law, there is no legal justification at all for the police not to submit an arrested person to the courts when the 72-hour period has expired. This right is less important than the right to life, but it is protected under the Constitution in a categorical fashion.

B. **Absoluteness and the Intangibility clause**

The question whether a right is absolute or relative is also different from the question whether it is a right that deserves to be included in the "core of rights" that is protected against any type of constitutional amendment. As is well known, a significant number of Constitutions in the world establish substantive limits to the kinds of things that can be changed through the process of constitutional revision. Some set of institutions, norms, values, etc., are taken to be so foundational of the existing constitutional order that they are placed beyond the reach of the constitutional amendment power. Different theories have been developed to identify the fundamental rights that should be included in that core.[21] There is wide consensus, however, that

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[21] For an illuminating discussion of the doctrine of unconstitutional constitutional amendments, see Rosalind Dixon and David Landau, *Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendments*, 13 Int'l J. Const. L. 606 *(*2015); Yaniv Roznai, Unconstitutional Constitutional Amendments. The Limits

democracy and the rights of political participation that it entails belong to the untouchable core, if there is such a core. The right to vote, therefore, is generally understood to be protected against the effects of constitutional amendments.

This does not mean, however, that the right to vote is necessarily absolute. There may be good reasons to justify limitations on it. Assuming, for simplicity purposes, that the holders of the right to vote are only citizens who are of age, so that there is technically no "restriction" when the law denies the vote to foreigners and minors, there is still room for the law to exclude the exercise of this right in some cases. There is controversy, for example, as to whether persons who have committed very serious crimes may be deprived of the right to vote while serving their sentences. We need not enter into this controversy here, except to point out that it is not conceptually mistaken to assert that, even if the right to vote is part of the core that cannot be destroyed by means of a constitutional amendment, it is legitimate for the law to deny the vote to individuals who have committed grave crimes.

C. **Absoluteness and Suspension of Rights**

The issue whether a right is absolute must also be distinguished from the question whether the government is entitled to "suspend" the right, in the event of an emergency. In many jurisdictions, it is possible for certain rights to be suspended or derogated from, when extraordinary circumstances arise. Not all rights can be subject to such measures, however. Some rights are shielded against this possibility. Again, there

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of Amendment Powers (2017); and Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions (2019).

is no perfect congruence between the rights that are absolute and the rights that cannot be suspended.

The Spanish Constitution, again, provides an illustration of this. The Constitution permits the government to suspend certain rights when a state of siege or exception is decreed.[22] As we saw, the right of the arrested person to be brought to a judge before the 72-hour period has expired is an absolute right. Yet, this right can be suspended. Conversely, the right to life, which is not of an absolute nature, is nevertheless protected against suspension. So there is no perfect fit between the list of absolute rights and the list of rights that cannot be suspended when a state of siege or exception is declared.

The same lack of congruence can be observed in Canada, with regard to the use of the "notwithstanding" mechanism. Section 33 of the Canadian Charter of Rights and Freedoms empowers the legislature to expressly declare that a law "shall operate notwithstanding" the provisions of the Charter protecting rights. This declaration ceases to have effect five years after it comes into force or on an earlier date as may be specified in the declaration, although it is possible for the legislature to reenact it. The Charter specifies that this mechanism may not be employed with respect to democratic rights (to vote and to stand for election), mobility rights, and linguistic rights. In this context, it is hard to argue that the group of rights that are shielded against the operation of the notwithstanding device correspond to the group of absolute rights. On the one hand, it is reasonable to maintain that democratic rights, mobility rights, and linguistic rights, which are beyond the reach of notwithstanding clauses, may suffer restrictions. On the other hand, the right not to be subjected to cruel and unusual treatment or

[22] See Constitución Española 31 October 1978, art 55.

punishment, for example, has been held by Canadian courts to be absolute, even if a notwithstanding declaration may be issued in connection with it.[23]

D. **Identifying Absolute Rights: The Limitations of Constitutional Language**

Once we have cleared the conceptual landscape, having distinguished the absolute character of a right from other normative and institutional features of rights, the hard task needs to be carried out: we need to sort out which rights are absolute (embodied in categorical rules) and which are relative (embodied in principles that invite a balancing exercise).

The language of the Constitution is a starting point for these purposes. Suppose the framers of the Constitution were fully aware of the need to demarcate absolute rights from relative rights. If the text they wrote explicitly lists the rights that are not open to balancing, there seems to be no need to construct a substantive theory in this regard. Normally, however, no such list is contained in the text. We must then take a look at each particular clause, and try to find out whether the norm it expresses is or is not categorical.

Interestingly, the fact that a constitutional clause includes both a rule and an explicit exception may seem to indicate that the norm it embodies is indeed categorical. Precisely because an explicit exception has been established, the assumption is a strong one that the framers have thought about possible exceptions and have concluded that only the particular one they have stipulated is justified. The same is true if more than

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[23] See Grégoire Webber, *Proportionality and Absolute Rights*, in Proportionality. New Frontiers, New Challenges 77-79 (Vicki C. Jackson and Mark Tushnet eds., 2017).

one exception is expressly provided. Once the scope of the right has been determined through the rule and the pertinent exceptions, no restrictions of the right seem to be authorized. The judge, arguably, cannot employ the principle of proportionality in order to justify a further exception to the rule that contains the right.

The Spanish Constitution, for instance, establishes in Article 15 that "the death penalty is abolished, except for what military laws may establish in the event of war". The language is such that it is hard to accept the proposition that the right not to suffer the death penalty may be restricted (apart from the exception that refers to war). No matter what compelling interests the government may invoke to justify the death penalty, they are utterly irrelevant, for they cannot defeat the constitutional rule that abolishes this form of punishment, a rule whose only exception involves war.

Parenthetically, it may be contended that it does not make sense to use the term "absolute" to refer to rights that are embodied in rules that provide for exceptions. If the Constitution explicitly says that the death penalty may be imposed in case of war, for example, then the right not to suffer the death penalty is not absolute. What the Constitution says is categorical, but the right it incorporates is not absolute, since it stipulates an explicit exception to it. This is a fair point, and we may want to simply distinguish between rules and principles –that is, between categorical norms and norms that are open to balancing–, and discard the distinction between absolute and relative rights. There is no harm in using the latter distinction, however, if we are careful and take it to refer to the contrast between categorical rules and flexible principles. [24]

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[24] The concept of an absolute right is more problematic than it appears. See Alan Gewirth, *Are There Any Absolute Rights?*, 31 Phil. Q. 1 (1981). As he puts it, the problem is this: "Since an absolute right is one that is valid without any exceptions, it may be

Sometimes, however, arguments that rely on the rule/exception structure of the relevant constitutional clause to support the idea that the right is protected in a categorical manner get defeated. The Spanish Constitution offers a good example of this. Article 18.2 proclaims the right to the privacy of one's home. The article provides that "no entry or search may be made without the consent of the occupant, or without a judicial warrant, except in cases of flagrant crime". This sounds pretty categorical. Does this mean, then, that a firefighter needs to get a judicial warrant to enter a house and extinguish a fire? Obviously not. The Constitutional Court held that there is an *implicit exception* to the rule established in Article 18.2: entrance is authorized if a situation of "state of necessity" obtains.[25] Taking the right (as defined by the rule and the two explicit exceptions) to be absolute would generate results that are difficult to accept from a substantive point of view.

Note that, in practice, it does not much matter how we characterize the explicit exceptions that the constitutional text establishes when it enshrines a particular right. We may consider those exceptions as part of the definition of the right (as internal

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concluded either that no rights are absolute because all involve some specification, or that all rights are equally absolute because once their specifications are admitted they are entirely valid without any further exceptions". *Id.*, at 5. A way out of the problem is to understand that certain specifications do not debar the right from being absolute. According to Gewirth, if the right is not overloaded with exceptions, if the specifications are justifiable through a valid moral principle, and if any reference is excluded to the possibly disastrous consequences of fulfilling the right, then the right can still be absolute, in spite of those specifications.

[25] STC 22/1984, de 17 de febrero.

qualifiers of the scope of the right), or we may regard them as restrictions that the constitutional framers have imposed –or have empowered the legislature to impose– on that right. Sometimes one of these two readings is more "natural" than the other. Probably, we will say that the requirement that an assembly be "peaceful" to get constitutional protection is part of the internal definition of the right of assembly, whereas the clause that establishes that the death penalty may be imposed in circumstances of war will be understood to be an external restriction on the right not to be subject to the death penalty. For purposes of our discussion here, however, this difference can be set aside. The central question is this: once the interpreter has specified the scope of the right, taking into account whatever exceptions the constitutional text has laid down (whether these are taken to be part of the internal definition of the right, or are instead viewed as external restrictions), may the government further constrain that right on grounds that are not covered by the explicit exceptions?

When the constitutional provisions embodying rights do not mention any explicit exception, it is particularly implausible to simply refer to the language of the text to determine whether the right involved is absolute. The Constitution may proclaim that all persons have a "right to freedom of speech", for example. It may also provide that when a person is accused of a crime he or she is entitled to the "presumption of innocence" and to be judged by an "impartial tribunal". The language sounds the same in both cases. Yet it is plausible to argue that freedom of speech is not absolute –other rights or interests, such as privacy and national defense, may override it–, whereas the right to the presumption of innocence and to an impartial tribunal is absolute: no judge can convict the accused person of a crime, unless evidence has been brought that proves

guilt according to the relevant test; and no procedure can be regarded as valid if the tribunal is not impartial.[26]

It should be noticed that the definition of the right to the presumption of innocence, as well as of the right to an impartial tribunal, is connected to certain features that are a matter of degree. The evidentiary standard that must be satisfied for the presumption of innocence to be rebutted, for example, may be more or less demanding. How strongly must the evidence point to the guilt of the accused? In order to specify the evidentiary standard, the relevant lawmaker has had to balance different normative considerations. Among other things, it has assessed the relative normative importance of two different types of errors that judges (or jurors) may make: convicting the innocent, or acquitting the guilty. The more strongly the lawmaker wishes to prevent the first type of error, the stricter the standard of proof it will design. Once established, however, the standard is part of the right. Because of the absolute nature of the right, judges cannot disregard the evidentiary requirements that the right entails, in the name of competing public interests. Similarly, judicial impartiality depends on features that are a matter of degree, such as the "distance" that must exist between the judge and the parties. There is a threshold, however, that needs to be met before a judge can be regarded as impartial. Once the right to an impartial tribunal has been properly defined, the right cannot be restricted in the name of countervailing considerations.

As we have seen, the language of the constitutional text does not help us much in ascertaining whether a right is or is not open to balancing. We are forced to build a

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[26] I leave aside the question whether it is against the presumption of innocence for the law to force the criminal defendant to prove the defenses he relies on, or to rebut legal presumptions.

substantive theory for these purposes. We need to think about each right, and try to find out, under the best interpretation of the right, in light of its normative foundations, whether there is potentially any reason to restrict it in some circumstances. Some rights are such that they exclude any goal as a legitimate source of limitations. This is certainly not an easy normative endeavor. It requires the articulation of a rich substantive theory on justice and rights, as well as an institutional theory that takes into account the risks that certain governmental bodies may make mistakes or abuse their powers if balancing is permitted in certain contexts.

Incidentally, it bears insisting on the idea that balancing is out of the picture when absolute rights are at stake. Such rights generate categorical requirements of a deontological nature, which must be observed no matter the consequences. Some advocates of proportionality, however, are of the view that absolute rights are not shielded against balancing. What happens, they argue, is that absolute rights must be conferred infinite weight.[27]

This move to extend the principle of proportionality to absolute rights is not convincing. As Francisco Urbina has lucidly explained, the absolute character of a right gets distorted if it is inserted into the weight formula that structures balancing.[28] This distortion may have practical consequences. Urbina offers the example of torturing a person so as to get the location of a terrorist cell and prevent the torturing of two other persons. If the right not to be tortured establishes a deontological constraint, then it is not possible to torture a person in order to prevent two other persons from being tortured. If, instead, we accord the right not to be tortured an infinite value and turn to balancing, we then face the question whether protecting the rights of infinite value of

[27] Robert Alexy, *Thirteen Replies*, in George Pavlakos (ed.), Law, Rights and Discourse: The Legal Philosophy of Robert Alexy 344 (2007).

[28] Francisco J. Urbina, A Critique of Proportionality and Balancing 112-16 (2017).

two individuals should prevail over protecting the right of infinite value of a single individual. Whatever our moral intuitions regarding this example, the conceptual point is that absolute rights, if they are truly absolute, operate as deontological constraints that block any kind of balancing. They are not simply rights with infinite value, whatever that means.

IDENTIFYING LEGITIMATE ENDS

The implementation of the principle of proportionality requires judges to specify the ends whose achievement may justify the imposition of limitations on rights – provided that the rights we are talking about are open to balancing.

The first question that arises in this connection is whether a fundamental right guaranteed in the Constitution can only be restricted in the name of another fundamental right. The 1789 French Declaration of the Rights of Man and of the Citizen proclaimed in article 4 that "the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights". This understanding of rights, however, is nowadays widely regarded as too stringent. Public interests can also be a source of legitimate restrictions. The Universal Declaration of Human Rights of 1948 sets the general tone when it establishes in article 29 (2) that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". It is generally accepted that a fundamental right may be interfered with, not only in order to protect another right that is regarded as fundamental under the relevant charter, but also in order to protect another right that lacks that status, or in order to protect

public interests, provided that those other rights and interests are sufficiently important.[29]

Rights are thus not regarded as "trumps" that always prevail over public interests (unless a truly catastrophic situation arises). They are rather conceived as "shields", to use Frederick Schauer's metaphor. Fundamental rights, in general, protect individuals against restrictions adopted in the name of public interests, but they do not protect them against those restrictions that are necessary to preserve public interests that are sufficiently important.[30]

It is quite reasonable to maintain, for example, that freedom of speech can be limited, under the appropriate conditions, if the information would put national security in serious jeopardy. The latter is a compelling public interest that justifies restrictions on free speech, even if there is no "fundamental right to national security".

Of course, it is possible to unpack public interests (national security, public order, etc) and argue that they ultimately consist of private interests that are covered by fundamental rights. National security, for instance, is instrumentally linked to the protection of the lives of citizens against external attacks, so the right to life is at the foundation of national security. If we go down this path, however, we blur the distinction between rights and public interests, and the thesis that fundamental rights can only be restricted in the name of other fundamental rights loses its original bite.

Assuming, then, that the goals that count for purposes of grounding limitations on fundamental rights need not refer to fundamental rights, the next question is, which

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[29] For a comparative survey on this issue, see Barak, *supra* note 2, at 260-85.

[30] Frederick Schauer, *A Comment on the Structure of Rights*, 27 Ga. L. Rev. 415 (1993).

goals are legitimate? Quite often, the text of the Constitution or of the relevant international convention lists the relevant goals. Sometimes the text contains a general clause to this effect, which applies to all rights enumerated in the text.[31] More frequently, the different specific constitutional provisions mention the grounds for each right.[32]

A case can be made in favor of the more discriminating approach. A particular purpose may be legitimate in the abstract, but its legitimacy may be confined to restrictions that apply to certain rights and not others.

Take, for example, the state interest in promoting the values of liberal democracy. Suppose we accept that, unless such values are widespread in society at large, the institutions of liberal democracy cannot work properly and may actually collapse. In the abstract, instilling those values among the citizenry is a legitimate aim for the government to pursue. This does not mean, however, that all rights may be restricted in order to achieve this aim. The right of parents to educate their children in accordance with their moral and religious beliefs, for example, may be constrained by the government, in the context of the school system, in order to secure the realization of

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[31] *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, article 29 (2) (10 December 1948); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, article 1; Constitution of South Africa, article 36; and Israel, Basic Law: Human Dignity and Liberty, article 8.

[32] The European Convention on Human Rights follows this model, which is dominant at the national level. As Aharon Barak observes, "the most prevalent method of limiting constitutional rights in modern constitutions is by adopting several constitutional limitation clauses". Barak, *supra* note 2, at 141.

public values among the younger population. In contrast, freedom of speech may not be restricted on that same ground. The protection of freedom of speech, arguably extends to speech that attacks the values of liberal democracy.

It should be observed that, in order to draw this contrast, we do not need to claim that freedom of speech is *more important* than the right of parents to choose their children's education. What we need to argue is that freedom of speech excludes a particular purpose as relevant for the justification of restrictions, whereas the right of parents does not rule it out. In other words, part of what it means to be accorded a particular right is that certain potential reasons for restricting that right are excluded. Such reasons may be legitimate in the abstract, and may do normative work when other rights are at stake, but not for this one. If this idea is plausible, we are then forced to develop a theory that identifies, for each right, the types of goals that are to be ruled out at the justificatory stage.[33]

When thinking about the goals that may support limitations on rights, it is important to be sensitive to the underlying theory animating each right. We have already alluded, for instance, to the controversy over whether persons may be deprived of the right to vote as part of a penalty for having committed certain crimes. In the abstract, one can argue that being deprived of the right to vote is justified on deterrence and retribution grounds. But this is too abstract an argument. We need to think more deeply about the foundations of the right to vote, before we can assess the legitimacy of such a measure. If we believe that the right to vote is granted in order to allow each person to defend their interests in the political process, then it seems difficult to justify the

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[33] For a similar view, see Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law,* 45 Hastings L.J. 711 (1994).

restriction under examination: the individuals who are serving a criminal sentence have very important interests to protect. A change in the law may actually reduce the duration of the punishment, for example. If, instead, the right to vote is tied to a different conception of democracy, according to which the voter expresses his or her views on the common good, understood in light of the fundamental rights of all persons, there is more room for justifying restrictions on the right to vote. After all, the person that has committed a crime often exhibits a total failure to take into account the common good and the rights of others. This is a complex question, and various considerations press in opposite directions. But we need to have a certain idea about the point of the right to vote before we can decide how proportional it is for the law to deny this right to individuals who have engaged in criminal behavior.

Once we accept that a particular end is legitimate for purposes of restricting a given right, there is still significant normative work to be done to specify the contents of that end in the context of particular cases. Take, for instance, the controversies over the way we appear in public. May the government require that one's face not be concealed? May the government require that we cover part of our body, so that we don't appear naked?

The European Court of Human Rights has dealt with cases raising these questions. In the case of *S.A.S v. France*, for example, it upheld a law that banned covering one's face in public, on the grounds that the restriction was necessary to protect the rights of others. The Court accepted the French government's argument that people have a right to live in a space of socialization that makes "living together" possible.[34] In *Gough v. The United Kingdom*, the Court upheld a law that prohibited

[34] S.A.S v. France, 2014 Eur. Ct. H.R. 695.

nudity in the streets, on the grounds that others have a right not to be disturbed by antisocial, offensive conduct.[35]

These are intricate cases. They illustrate the need to dig deep into substantive normative theory in order to specify the conditions that have to be met for the "rights of others" to support limitations on one's right to choose how to appear in public. It is not plausible to make the judgment on this matter merely turn on the number of people offended and the intensity of their feelings. We would end up undermining individual rights too quickly if we claimed that the fact that the majority of the population is deeply disturbed by a particular form of appearance is a sufficient reason to allow the government to ban it. We need a more qualitative theory. But how exactly are we going to shape that theory? Which are the disturbances that the law is entitled to avoid? Should it be relevant that covering one's face (or going naked) is sometimes done as a form of protest? Questions of this sort can only be answered on the basis of a richly articulated substantive theory.

BALANCING AND THE PROBLEM OF ABSTRACT WEIGHTS

As already explained, the tripartite framework the principle of proportionality consists of instructs judges to check whether the restrictive measure under review is (i) suitable to achieve (at least in part) a legitimate goal; (ii) necessary, in that there is no alternative, more moderate way to achieve that goal; and (iii) balanced (proportional).

Note that a real conflict between the right that is being restricted, on the one hand, and the other right or interest that figures at the justification stage, on the other, only arises if the restriction is actually suitable and necessary. Obviously, if the

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[35] Gough v. United Kingdom, 2014 Eur. Ct. H.R. 1156.

limitation is not suitable and necessary, there is no need to infringe on the right. Only if the suitability and necessity tests are met do we face a situation where a conflict emerges that forces us to make a choice. It is at this point that balancing enters the picture.

In many countries, the balancing test is often the crucial one, since the other two tests tend to be applied by judges in a very deferential fashion. For a restrictive measure to be accepted as suitable, many judges do not require the government to prove with very convincing evidence that the measure will advance the aim it seeks. Some degree of likelihood is considered sufficient. The measure, moreover, will sometimes be regarded as necessary, even if there is another alternative measure that is less restrictive of the right: if the latter measure costs more money, or is less effective in advancing the aim, courts will conclude that the challenged measure is necessary.

It bears mentioning that the principle of proportionality as such does not have the resources to address questions about judicial deference. We need complex theories of institutional design to shape theories on this matter.

The third prong of proportionality analysis, balancing, raises interesting normative issues. At this stage, judges have to compare the degree to which the right is restricted by the measure under challenge, on the one hand, and the degree to which the pertinent goal is realized, on the other. The intensity of the restriction may vary from case to case, and its contribution to the satisfaction of the relevant end may also vary. As Robert Alexy puts it, judges have to apply a “law of balancing”, according to which “a limitation of a constitutional right is only permissible if principles competing with the principle underlying the right have greater weight in the circumstances of the

case".[36] So context matters: a judge reviewing a restrictive measure must check whether the costs it entails in the particular case are offset by the benefits obtained.[37]

At this stage, numbers may be relevant: in order to assess the intensity of a given limitation, courts may have to take into account how many people suffer that limitation, and how many people derive benefits from the realization of the pertinent goal.

The balancing exercise is thus contextual. Context, however, is only part of the story. Judges need to determine, in addition, how the relevant rights and interests compare in abstract weight. They do not have a machine, of course, that calculates the weight of the various rights and interests. Judges have to rely on rough intuitions here. But abstract weights matter.[38] As Aharon Barak contends, "we should distinguish

[36] Alexy, *supra* note 5, at 102.

[37] A more sophisticated balancing test is advanced by Barak, *supra* note 2, at 350-58. According to this test, the judge needs to assess the social importance of the marginal benefit gained by fulfilling the purpose by means of the law, and the social marginal importance of preventing the harm to the constitutional right caused by the law. When conducting this balancing exercise, the judge must compare the restrictive measure with the legal situation that existed before the measure was adopted. The judge must also compare the measure to alternative measures that are available.

[38] Alexy includes abstract weights in the "weight formula" that he proposes, but he thinks that abstract weights are usually equal in collisions of constitutional rights. See Robert Alexy, *Formal principles: Some replies to critics*, 12 Int'l J. Const. L. 511, 513 (2014).

between constitutional status and social weight". Rights of constitutional rank may differ in social importance. [39]

So, for example, the government may decide that a demonstration cannot be held at the place that the organizers had initially chosen, given the risk that ambulances will not be able to reach a particular hospital in time due to traffic congestion. Even if there are thousands of people whose right to assembly is being restricted, and even if there is no certainty (only a sufficiently serious risk) that a person may die if ambulances have trouble getting to the hospital in time, we can accept the restriction. We rely on the intuition that the right to life has more weight, in the abstract, than the right to assembly.

The implementation of the principle of proportionality requires a theory that articulates intuitive judgments of this kind about abstract weights. As Frederick Schauer argues, we need "rules of weight" to apply the principle of proportionality, and there might be variations in the strengths accorded to different rights.[40]

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[39] Barak, *supra* note 2, at 359. Barak proposes a two-level hierarchy of constitutional rights, to be articulated in each national legal system in accordance with particular historical experiences. *Id.*, at 531-32. This is probably too rigid. The variety of abstract weights that ought to be recognized is difficult to fit into a dualist structure.

[40] Frederick Schauer, *Proportionality and the Question of Weight*, in Proportionality and the Rule of Law, *supra* note 18, at 173-185. Similarly, Matthias Klatt and Moritz Meister, The Constitutional Structure of Proportionality 26, 29-42 (2012), argue that not all constitutional rights should be awarded the same abstract weight. Vitally important rights like the right to dignity and the right to life should be assigned relatively higher weights.

In particular, if a Constitution includes –or is interpreted to include– a general right to liberty, so that any law that imposes a burden on individuals may be challenged before courts, or a general right to equality, so that any different treatment, no matter what the grounds for the differentiation are, can be attacked, constitutional judges ought to discriminate between different dimensions of liberty and equality, and attach different weights to them. Judges should not treat all aspects of liberty or equality in the same way. True, a culture of justification may require the government to justify in court all its actions impinging on individuals, however trivial the interests at stake may be. Mattias Kumm observes with approval that in many countries around the world, "rights claims no longer concern exclusively interests plausibly deemed fundamental, but also the mundane".[41] The extraordinary breadth of the constitutional domain, however, should not exclude a more discriminating approach. Courts should be attentive to the qualitative differences between rights, as well as to the qualitative differences between various components or ingredients of rights, when they engage in balancing.

DRAWING QUALITATIVE DISTINCTIONS WITHIN THE FIELD OF OPERATION OF A RIGHT

One may contend that the complications just mentioned, concerning abstract weights, disappear in those cases where a right is restricted in order to protect that same right. In such circumstances, we do not need to compare abstract weights, since the right

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[41] Kumm, *supra* note 12, at 151. Similarly, Kai Möller, *supra* note 14, at 87, notes that constitutional practices have generally moved towards "rights inflation", which has permitted the expansion of the space where the government is faced with the constitutional burden to justify its decisions.

that appears on one pan of the scales is the same right that we encounter on the other. It would seem that judges will simply have to take into account the degree to which each right is affected and the number of persons involved on each side.

Things are more complex, however. The law permits killing a person in self-defense to save one's life, for example. In this type of situation, the life of the aggressor collides with the life of the victim, and the law empowers the latter (or other persons who can help him or her) to sacrifice the life of the former. Actually, if there are three aggressors, and the only way to save the victim's life is to kill all three, the law permits it. The law distinguishes between the different lives that are at stake. The persons who attack have created the situation that gives rise to the conflict, so their right to life yields to the right to life of the victim. The law introduces a qualitative distinction here, which trumps considerations based on numbers. The law at this point relies on a value judgment that is external to the principle of proportionality.

Furthermore, sometimes different dimensions of the same right are in conflict. Many rights are liberty rights that exhibit both a positive dimension (the right to do X) and a negative dimension (the right not to do X). The right to religious freedom, for example, encompasses the right to practice a religion as well as the right not to practice a religion. In some contexts, a clash takes place between the right of a person (or group) to exercise the liberty in the positive aspect and the right of another person (or group) to exercise the same liberty in the negative aspect. The question arises, then, whether we have any good reason to privilege one aspect of the right over the other, when the two collide.

Imagine, for instance, that a group of students in a public school wants to pray at the beginning of the class, while another group doesn't. Suppose there is a conflict, in that those who don't want to pray feel pressured to do so if prayer is allowed. An

argument could be made that the negative aspect should be given some extra weight. Being forced to pray in school, when you don't want to, is worse than not being allowed to pray, when you want to. The reason for the asymmetry may have something to do with reversibility. Arguably, the group that is forced to pray can do nothing in the future to offset the consequences of that imposition, whereas the group that is not allowed to pray can choose to do so later, outside school, thus diminishing the impact of the ban. At some point, of course, numbers matter, but there seems to be a relevant qualitative distinction here, between the positive and the negative component of freedom of religion. Is this kind of argument convincing?

Similarly, the argument has been made that prohibiting individuals to veil their faces in public is justified on the grounds that some Muslim women are coerced by their families to wear a veil. Should we distinguish here between the positive and the negative aspect of the right to religious freedom, and give more weight to the latter?

A dramatic example of this tension emerges in the context of the controversy about assisted suicide of terminally ill persons. In the case of *Pretty v. The United Kingdom*, for instance, the European Court of Human Rights examined the complaint of a woman who was suffering from an incurable, degenerative disease, who argued that fundamental rights under the European Convention had been violated in her case by the refusal of the Director of Public Prosecutions to give an undertaking not to prosecute her husband if he were to assist her to end her life.[42] The Court upheld the English law that did not permit assisted suicide. The Court accepted the argument that, even if Mrs. Pretty was not vulnerable, other terminally ill persons are. And it is the vulnerability of the class as a whole that matters, the Court asserted. So even if Mrs. Pretty had a *prima*

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[42] Pretty v. United Kingdom, 2002 Eur. Ct. H.R, 423.

facie right to decide how to end her life, this right collided with the right of others not to end their lives, and the government was entitled to make the latter prevail. Is this asymmetry justified?

These are all difficult normative questions. The principle of proportionality as such does not have the necessary resources to furnish an answer. We need a substantive theory to draw qualitative distinctions at the balancing stage, even if numbers and probabilities also matter.

PROPORTIONALITY AND THE HORIZONTAL EFFECT OF CONSTITUTIONAL RIGHTS

A final illustration of the need to elaborate substantive theories that are external to the proportionality test relates to the question whether and how fundamental rights apply in the private sphere. There is a well-known debate concerning the ability of fundamental rights to bind private parties, in addition to binding governmental institutions. Can fundamental rights display "horizontal effects", in addition to the "vertical effects" they have traditionally been conferred?

In many jurisdictions, the answer is yes. Constitutional rights are considered to govern, at least in part, the relationships between private actors. Different theories have been proposed concerning the ways in which constitutional rights can produce effects in the private domain. According to some theories, constitutional rights can be directly binding on private actors. Under other theories, in contrast, the effects of such rights are indirect: when the legislature makes laws that regulate the private sphere, and when

judges interpret such laws in the course of adjudicating cases, they must take into account constitutional rights.[43]

We need not enter this theoretical controversy here. What matters, for our purposes, is this: when a private party invokes a constitutional right against another private party, whether the horizontal effect of the right is direct or indirect, the latter party will typically rely, by way of defense, on his or her own right to liberty, or on a more specific basic right, such as freedom of association, freedom of contract, religious liberty, and the like. How are judges supposed to adjudicate conflicts between these rights?

The principle of proportionality enters the picture here: restricting one of the rights in order to serve the other is justified, if the restriction is proportional. But, again, we need to build a substantive theory at this point to provide normative guidance.

Suppose a woman complains that an employer has discriminated against her on grounds of gender – she has not been given the job because she is a woman. And suppose a woman is not allowed to enter a gastronomical club, whose members are required to be males. If we apply the test of proportionality without normative context, we are bound to limit our inquiry to things like: how important is it for the first woman to get a job, and for the other to be admitted to the club? How many other opportunities remain open, if she is rejected? That is, how many other employers can offer the woman the kind of job she is seeking, and how many other gastronomical clubs will welcome the woman that is excluded from the only-men club? These are all relevant factors to

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[43] For a comparative view of this issue, see The Constitution in Private Relations (András Sajó and Renáta Uitz eds., 2005); and Jud Mathews, Extending Rights' Reach: Constitutions, Private Law, and Judicial Power (2018).

take into account. But we need a deeper theory to shape the normative inquiry. We need, in particular, a theory of the nature of different social spheres within a liberal, democratic order. The sphere of work is different from the sphere of associations, for example. The kinds of reasons that an employer can adduce to reject someone are not identical to the kinds of reasons that an association can invoke. The role of the labor market in a liberal order is such that discrimination on grounds of gender should be excluded (barring very special circumstances). The domain of associations may be different. We may have good reason to celebrate diversity and allow for the proliferation of associations that are very different in terms of how open they are. Unless we have a background theory that helps inform our intuitions that the labor market and the associational fields are different spaces within a liberal order, we cannot justify our conclusions regarding the horizontal effect of equality rights in the particular cases.[44]

BEYOND PROPORTIONALITY: SOME INSTITUTIONAL CONSEQUENCES

I have tried to show that the principle of proportionality must be linked to a set of substantive theories about rights. Some institutional consequences follow from this. One of them concerns the role of courts when exercising constitutional review.

[44] For the notion that various principles of justice govern the distribution of goods and burdens in different spheres of life, see Michael Walzer, Spheres of Justice (1984). In the context of American constitutional law, Bruce Ackerman has argued that the civil rights movement of the 1960s led to the enactment of laws that implemented "spherical equality". Equality was shaped differently in diverse domains of social interaction. See 3 Bruce Ackerman, We the People: The Civil Rights Revolution 127-53 (2014).

If the proportionality test did not need so much help from substantive theories of the sort we have explored here, it would appear to be a relatively "mechanical" test. Of course, judges would disagree when applying the test, but those disagreements would be relatively confined. In contrast, once we realize that there is a large normative terrain to travel before the proportionality test can be fully applied, we can predict that the disagreements among judges will be deep. A progressive judge will reach different outcomes than a more conservative one. This is not news, of course. After all, we are inclined to design systems that subject constitutional judges to some democratic checks, because we are aware that controversial doctrines of political morality will inevitably animate constitutional jurisprudence.[45]

This is not to deny that the proportionality test can sometimes do lots of work, even in the absence of deep agreement among judges at the level of substantive normative theory. In some cases, governmental measures are so "irrational" that reviewing judges can easily disqualify them, even if judges disagree on more profound questions. Judges can thus follow a "Socratic method" and lay bare the contradictions in the government's positions and arguments.[46] In the case of *Christine Goodwin v. The*

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[45] Thus, democratic considerations partly explain the tendency in many European countries to place constitutional review of legislation in the hands of specialized constitutional tribunals, instead of regular courts. See Victor Ferreres Comella, Constitutional Courts and Democratic Values. A European Perspective 98-108 (2009).

[46] Mattias Kumm has made the interesting point that courts adjudicating rights claims against the government play a similar role to Socrates, who constantly tested the coherence of other people's views. A court, Kumm asserts, asks questions and assesses

United Kingdom, for example, the European Court of Human Rights examined a law that did not accord official recognition to the new sex of a transgender person.[47] Interestingly, the British government had funded the sex reassignment surgery the plaintiff had undergone. This must have struck the Court as a rather inconsistent course of action. It is not surprising that the Court was not impressed by the "general interest of the community" the British government invoked to justify the law under challenge.

So, courts can sometimes follow a minimalist strategy of this kind. It is generally a good idea for judges to explore the possibilities of a minimalist approach to potentially very hard constitutional issues.[48] In many cases, however, there is no way to avoid deeply controversial questions, as to which judges with different moral and political convictions will give different answers. The principle of proportionality offers no way out of them. We need substantive theory.

The principle of proportionality, it has also been maintained, can be employed by judges to moderate the products of the lawmaking process. Courts that engage in proportionality analysis "will tend to push policy outcomes to the partisan center".[49] This may be correct, but judges need substantive theories to assess how "extreme" a governmental measure is. If a right is believed by judges to be absolute, for example, it will be extreme for the government to establish a restriction on it. If a particular speech

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the "coherence of the answers that the parties provide it with". See *supra* note 12, at 154-55.

[47] Goodwin v. United Kingdom, 2002 Eur. Ct. H.R. 588.

[48] For a defense of judicial minimalism, see Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (2001).

[49] Sweet and Mathews, *supra* note 2, at 96.

is banned for a reason that is excluded from the list of legitimate reasons for limiting speech, the measure under review is extreme. If a law prohibits discrimination in the associational field exactly in the same manner as it prohibits discrimination in the labor market, that law may be regarded as extreme too. Of course, if we replace the substantive theories that are doing the work here with other theories that have a different content, the extreme character of the measures under examination may evaporate.

All this reinforces the proposition that, when thinking about the kinds of judges we select to perform constitutional review of legislative and governmental measures, the method of their appointment, and the mechanisms that are available to check their performance, we should be sensitive to the profound impact that background substantive theories are bound to have on constitutional jurisprudence. The centrality of the principle of proportionality should not hide this. On the contrary, when properly read, the principle constantly points beyond itself.