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Total Freedom:
the Morality
of Proportionality

υπό δημοσίευση στο συλλογικό τόμο

*Proportionality
and post-nationalism constitutionalism*

1. INTRODUCTION¹

Are the doctrines we employ in human rights adjudication true to the importance of human rights norms? This question is pressed upon us by the growing popularity, in recent years, of the proportionality test in many jurisdictions. I believe that we ought to resist this trend. For, only by doing so shall we remain faithful to human rights. By contrast, although recourse to the proportionality test by judges may be an understandable tendency, it is one that distracts us from what human rights are fundamentally about.

In this chapter I aim to substantiate these claims. My argument will have the following structure. In the next two sections I shall try to connect proportionality with a conception of the value of freedom that is normatively unattractive and, at any rate incongruous with the notion of human rights, properly understood. Opposed to it, I shall sketch an alternative conception and indicate that it has a much better fit with the notion of human rights. Then in the final section I shall suggest some reasons why, despite its shortcomings, proportionality is relied upon by judges. I shall argue that proportionality performs a therapeutic role, because it helps assuage the legitimacy anxieties of judges. Even so, the risks that the proportionality discourse brings in its train are much graver than its therapeutic effect. All in all, we are better off without it.

2. AGAINST TOTAL FREEDOM

There are probably as many versions of proportionality as there are proponents of it. I do not intend to tackle them one by one. Instead, I shall try to identify some basic theoretical commitments that unite all versions, explicitly or –what’s more frequent- im-

1. I am grateful to Dimitris Kyritis for his valuable comments.

plicitly. This was also the approach I took in an earlier article, whose claims and arguments I now want to deepen and amplify.² In that article I criticized the principle of proportionality as an assault on human rights. I shall not repeat my critique here. I shall only summarize its main points as a means of introducing the themes that I shall develop in this chapter.

In a nutshell, the argument of the earlier article was that far from being inherent in the concept of human rights, as its most prominent advocate, Robert Alexy has claimed,³ proportionality is in fact incompatible with them. For, it is at odds with the view that their protection is so fundamental in a just society that it cannot be made to depend on their being balanced against other goods or on circumstances or on the will of the majority.

At the heart of the view I am asserting against proportionality is the Kant-inspired idea that persons are moral agents to whom organized society owes unconditional respect. ‘Human worth’, ‘human dignity’, ‘human inviolability’, and ‘equal concern and respect’ are just variations of the same basic idea: a just and well-ordered society is one that recognizes persons as moral agents and treats them as such. John Rawls has articulated this idea characteristically: “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override”.⁴

2. Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT’L J. CONST. L 468 (2009).

3. ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Press, 2002).

4. JOHN RAWLS, *A THEORY OF JUSTICE*, (Harvard Univ. Press, 1971) at 3. Gregoire Webber in his article *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, *The Canadian Journal of Law & Jurisprudence*, 2010, refers to Nozick, Rawls, Habermas, Waldron, Dworkin, all of whom, although from different reasoning, seem to reject the idea of balancing as inherent to human rights at 201.

The question what the inviolability of persons (or equal concern and respect) consists in is a moral question and answering it requires moral reasoning. We may disagree about the correctness of our moral judgments but we cannot hope to resolve our disputes except through moral argumentation. There is no other way.⁵ Human rights discourse is an area where morality and law are intimately connected. Thus, inevitably, moral reasoning is part of the essence of human rights' adjudication. Any attempt to obscure it misses one of its central characteristics.

The balancing approach, in the form of the principle of proportionality gets all the above points in a different and, to my mind, wrong way. First, it denies the distinctiveness of human rights by taking them to be on a par with other types of interest. Thus any human interest becomes a prima facie right.⁶ Second, it does not afford rights absolute protection. Rather, it seeks the "optimization" of such prima facie rights. To achieve this, it proceeds by balancing the competing interests by way of establishing whether a measure interfering with a prima facie right is suitable, necessary or excessively burdens the individual compared with the benefit it aims to achieve. In this process the moral inquiry that is fundamental in human rights cases takes the backseat. Indeed, we no longer ask what is right or wrong in a human right case. Instead,

5. «What makes a moral judgment true? When are we justified in thinking a moral judgment true? My answer to the first is that moral judgments are made true, when they are true, by an adequate moral argument for their truth. [...] a moral judgment is made true by an adequate case for its truth.” RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS*, Harvard University Press, 2011, p.37.

6. “[...] having a right does not confer much on the right holder; that is to say, the fact that he or she has a prima facie right does not imply a position that entitles him/her to prevail over countervailing consideration of policy”. Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, *Int’l J. Const. L.*, 2004, 574, at 579.

we are called to investigate whether something is appropriate, adequate, intensive, or far reaching.⁷ I have said that “the principle of proportionality assumes that conflicts of values can be reduced to issues of intensity or degree and, more importantly, it assumes further that intensity and degree can be measured by a common metric (something like a natural force), and that this process will reveal the solution of the conflict. Thus it pretends to be objective, neutral, and totally extraneous to any moral reasoning.”⁸

Proponents of proportionality have of course objected to my diagnosis. Thus, Alexy maintains that “the Weight Formula is not an alternative to moral argument, but a structure of legal and moral argumentation”.⁹ He says that in order to establish whether an interference with a *prima facie* right is serious, moderate or light you have to engage in moral reasoning. For instance we cannot know whether calling someone “cripple” is humiliating and shows lack of respect, unless we engage in moral reasoning (“moral arguments are indispensable for the application of the Weight Formula”¹⁰). But, even if we accept that a degree of moral reasoning is presupposed, there is no doubt that it is incorporated in a balancing exercise based on some kind of measure that purports to make the balancing objective. What that measure may be is obscure. There is an analogy here with utilitarianism. Utilitarians of

7. Tsakyrakis, *supra*, note 1, at 487 Gregoire Webber “The method of practical reasonableness promoted by proportionality and balancing brings with it a vocabulary of its own, including “interest”, “value”, “cost”, “benefit”, “weight”, “sufficient”, and “adequate”. The concepts of “good” (and “bad”), “right” (and “wrong”), “correct” (and “incorrect”) are absent, as is the conceptual clarity associated with this vocabulary.” *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, THE CANADIAN JOURNAL OF LAW & JURISPRUDENCE, 2010, 179, at 180

8. Tsakyrakis *supra*, note 1, at 474

9. Robert Alexy, *Constitutional Rights and Proportionality* p. 11

10. *Passim*.

all stripes have notoriously struggled and failed to identify a common metric into which all other evaluations could be subsumed. The analogy does not stop here, though. Utilitarianism has been criticized not only for its failure to supply a convincing understanding of a common metric, but also, more generally, for its underlying conception of persons and society. Equally, the principle of proportionality is vulnerable on account of the broader moral philosophy, on which it is based. It is to this philosophy and its consequences that I now turn.

Its basic characteristic is that it starts from what we might call a Hobbesian conception of individuals and their freedom. As in Hobbes individuals in the state of nature have total freedom, in the sense that “every man has a right to everything, even to one another’s body”,¹¹ proponents of proportionality contend that individuals have a *prima facie* right to everything. It follows from this that any interference with what someone wishes to do is a potential abridgment of his rights. However, unlike Hobbes, who did not believe that freedom in the state of nature was of any particular value and was perfectly willing to sacrifice it for the sake of security within a political order, proponents of proportionality maintain that this total freedom is of such value that it ought to be optimized along with the freedom of other individuals and other values. From the perspective of this conception, there are no specific human rights; rather individuals have a general right to this kind of total freedom, from which we can derive its more specific emanations after balancing it against competing interests and values.

Before we critically evaluate the concept of freedom that I have argued is implicit in the principle of proportionality, let us pause and consider some of its implications. The most striking is that it

11. THOMAS HOBBS, *LEVIATHAN*, (Hackett Publishing Company, Inc. ed. Edwin Curley 1994) at 80.

renders any interference with a person's total freedom a potential human rights violation or at least the starting point for a human rights inquiry. That seems to be the case law of the , which, as Mattias Kumm notes, "regards any liberty interest whatsoever as enjoying prima facie protection as a right"¹². Activities such as "falconry"¹³, or feeding pigeons on public squares,¹⁴ or spitting on the public sidewalk¹⁵ raise human rights' issues just as torture or censorship does. In other words, as Mattias Kumm acknowledges, "the recognition of a general right to liberty and a general right to equality means practically all legislation can in principle be challenged on human rights grounds, leading to an assessment of its justification in terms of public reason as prescribed by the proportionality tests."¹⁶

If in principle every piece of legislation gives rise to a human rights issue, then the judiciary must decide on virtually any question of public policy, from fines for parking violations to the fluctuation of interest rates. Furthermore, in doing so, it is bound to

12. Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification*, 4 LAW & ETHICS OF HUMAN RIGHTS, 142 at 151 (2010). "In Germany", Kumm says, "the right to the "free development of personality" is interpreted as a general right to liberty understood as the right to do or not to do whatever you please. It has been held by the Constitutional Court to include such mundane things as a right to ride horses through public woods, feeding pigeons on public squares, or the right to trade a particular breed of dogs." *Id passim*. (notes omitted).

13. Falconry is a sport of hunting with falcons. Men train the birds to do the hunting. See Frank Michelman, *Foxy Freedom?* BOSTON UNIVERSITY LAW REVIEW 949 at 965 (2010) who discusses the activity inspired by a case that was brought on German courts.

14. BVerfGE 54, 143.

15. The spitting on the public sidewalks is not an example from a case, is spirited example of Frank Michelman, *supra note 12* at 952.

16. Mattias Kumm, *supra note 11* at 164.

employ a standard that is much more intrusive than mere rational connection. As a result, the boundary between review and appeal are automatically blurred, and, with it, the basis of the courts' legitimacy. Legitimacy concerns are intensified when it is supranational courts such as the European Court of Human Rights that are tasked to protect human rights. Having to rely on an expansive understanding of the scope of human rights, they end up becoming the ultimate arbiter of the legality of every piece of national legislation.¹⁷

Independently of whether such a development would be desirable or not, there is no doubt that it dramatically alters the way we conceive of judicial review, the power of political majorities, the very concept of representative democracy and, ultimately, the role of supranational human rights courts. In reality, this shift would surreptitiously make proportionality not just the "ultimate rule of law"¹⁸ but the over-arching method for the moral assessment of any form of human conduct.

17. This is not to say that judges are eager to take up such an intrusive role or that they actually exercise it. In fact, they typically devise strategies to limit their interference with political decisions. This applies with even more force at the supranational level. The doctrine of the margin of appreciation is a characteristic example. Often those strategies bear the mark of their origin. They replicate the philosophical confusion and dead ends of the principle of proportionality. If we abandon the principle of proportionality, the usefulness and cogency of such strategies is likely to be greatly diminished. On the other hand, when, sometimes, the judges assume an expanded notion of judicial review and proceed to apply the proportionality their judgment seems totally ad hoc and arbitrary. For such a characteristic example see the case of European Court of Human Rights *Mamidakis c. Grece* (Judgment of 11 January 2007) where the amount of a fine, although found by the Greek courts to be proportionate, was held to be too much by the supranational Court without any argument other than the amount of the fine.

18. DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW*, (Oxford University Press 2004).

3. THE LIBERTY WE VALUE

But let us set aside for a moment that the concept of total freedom seriously disrupts our traditional understandings of democracy and judicial review. Let us instead consider whether it helps us grasp the concept of human rights. Take for example traffic regulations. Dworkin uses the example of prohibiting driving uptown on Lexington Avenue.¹⁹ Is it helpful to start with a *prima facie* freedom to drive however someone wishes including uptown and then to examine whether the specific prohibition infringes someone's right? The proponents of proportionality will answer "yes". They will balance the loss of freedom of driving uptown with the convenience or order in traffic produced by the existence of the traffic rule, and they will probably find that these values outweigh the loss of freedom. Even so, they will maintain that a loss of freedom has occurred, while acknowledging that it was easily exchangeable for the purpose of optimizing freedom. Suppose that new research has indicated that the restriction was misguided, and convenience and order in traffic would be better served by the opposite rule, one prohibiting driving downtown. Are we prepared to say that prohibiting driving uptown was a violation that Human Rights Watch should denounce?

What makes us think that a loss of freedom to drive as we wish, even if it is proven to be grounded on mistaken assumptions, is not particularly grave? Why can we live with it? I guess the answer is that nobody feels offended by the prohibition; nobody feels that the prohibition denies his dignity as a moral agent.²⁰ On the con-

19. RONALD DWORKIN, *A MATTER OF PRINCIPLE*, (Harvard University Press, 1985) at 189.

20. "It is not demeaning for you to accept that a majority of your fellow citizens has the right to fix traffic rules and enforce the rules they fix, provided that the rules they chose are not wicked or desperately foolish" RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS*, (Harvard Univ. Press 2011) at 367.

trary someone will feel deeply offended if he is not free to worship the God he wishes or to express his political ideas. The conclusion is that not every curtailment of freedom raises a human rights' issue but only the abridgment of certain basic liberties.

Which are these basic liberties? How are we going to distinguish which liberties are basic (or fundamental or preferred) for a society to be just and which are not? Rawls suggests two ways: a) we can use the list of the various bills of rights and declarations of the rights of man;²¹ b) we can 'consider which liberties are essential social conditions for the adequate development and full exercise of the [...] moral personality over a complete life.'²²

Ronald Dworkin goes one step further in specifying the basic liberties and thus buttressing the contrast between the idea of total freedom and the alternative conception suggested above. He understands total freedom to be the power to act as we wish unimpeded by others or by a political community. He maintains that we do not actually ascribe value to such freedom. We do not think, he says, that there is any moral loss, when the state forbids me to kill my critics. "If nothing wrong has taken place when I am pre-

21. "Throughout the history of democratic thought the focus has been on achieving certain specific liberties and constitutional guarantees, as found for example, in various bills of rights and declaration of the rights of man" JOHN RAWLS, *POLITICAL LIBERALISM* (Columbia University Press, 1993) at 292.

22. Ibid at 293. Quite instructively, Rawls himself felt compelled to utilize the notion of basic liberties in the light of HLA Hart's famous critique of the initial formulation of the liberty principle in *A Theory of Justice*. See HLA Hart, *Rawls on Liberty and Its Priority*, UNIVERSITY OF CHICAGO LAW REVIEW 40/ 3 551, 553 (1973) and J Rawls, 'The Basic Liberties and their Priority' in JOHN RAWLS, *COLLECTED PAPERS* (edited by Samuel Freeman, HARVARD UNIV. PRESS 1999). In important respects, my critique of total freedom echoes Hart's view. The failure he identified in Rawls' original proposal is the one I attribute to the principle of proportionality.

vented from killing my critics, then we have no reason for adopting a conception of liberty that describes the event as one in which liberty has been sacrificed.”²³

The liberty we value is, according to Dworkin, an interpretative concept that is not and should not be coextensive to total freedom. The liberty we should be committed to is “the area of [a person’s] freedom that a political community cannot take away without injuring him in a special way: compromising his dignity by denying him equal concern or an essential feature of responsibility for his own life’.”²⁴ This is not another formulation of the list of basic liberties. True, insofar as the traditional basic liberties (freedom of speech, freedom of religion etc) guarantee the “essential social conditions for the adequate development and full exercise of the [...] moral personality over a complete life” (Rawls), these are also included in the Dworkinian formula. Still there are substantial differences.

First, Dworkin’s formula seems broader since any interference that denies equal concern and respect qualifies as giving rise to a claim of individual right.²⁵ Second, and more important, it does not allow that “fundamental or preferred liberties” be determined by collective views. It is not that from the immense amount of freedom we pick some liberties because they seem to us more valuable than others. Doing so would be like imposing on others a certain view about what is a good and valuable way of life. But this would contradict our stated aim, because it would fail to respect everyone’s personal responsibility to make the best of their own lives.

23. RONALD DWORKIN, *JUSTICE IN ROBES*, (Harvard Univ. Press 2006) at 115.

24. RONALD DWORKIN, *supra* note 20, at 366.

25. But see Michelman and his Malthus Act hypothetical arguing that sometimes Dworkin’s formula could be narrower and not include traditional core liberties, *supra* note 12 at 968-970.

But even more fundamentally, Dworkin's formula provides a robust philosophical basis for the kind of liberty we should value. For Dworkin, it is not the role of political society to satisfy our preferences, just because they are manifestations of our freedom. In fact, political society may and does use its coercive force for all sorts of purposes and restricts freedom in all sorts of ways. There is nothing *prima facie* problematic about that. What a political society may not do is deny a liberty, when being denied that liberty would compromise our dignity. In turn, an act is an assault to dignity when it denies someone "equal respect and concern or an essential feature of responsibility for his own life". Thus, what we really value is dignity. Dignity is the central concept for human rights and all the more specific "valued liberties" are connected with it. So when, for example, we come to consider that on matters of intimacy we should be free from governmental interference, our view expresses rather the conclusion of an interpretation of the concept of dignity. One of the characteristic ways in which a political society may fail in its duty to act consistently with dignity is when it acts on discriminatory or moralistic grounds. The first type of ground compromises equal standing, whereas the latter vitiates the principle of personal responsibility for one's own life.

These observations help vindicate the view that the characteristic operation of rights is as trump cards.²⁶ It is not because rights are infinitely more important than the considerations they trump, but because a state that acted on those considerations would thereby assault dignity, and the recognition of the right serves to act as a bulwark to that assault. Consider moralistic and paternalistic laws. These are based on impermissible justifications because they do not respect the ethical responsibility of individuals and

26. See Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed. Oxford Univ. Press 1984).

thus injure their dignity. So, for example, if the justification for prohibiting bird-feeding in the park is that this kind of activity is worthless, a waste of time, this would be an insult to the ethical responsibility of the individuals. The state cannot restrict my choices on the basis that they are not worthy, because to do would be to make a judgment that the principle of personal responsibility commands that each one of us make on our own. But the state can restrict my choices when its reason for doing so does not assume any ethical evaluation. This means that there is no general or prima facie right to feed the birds, to engage in falconry or “to paint my Georgian house purple”.²⁷ A state typically prohibits or at any rate regulates those activities on the basis of considerations that do not compromise dignity (such as environmental protection, public health and urban planning). However, the very same activities raise human right issues whenever their justification is based on ethical evaluation. Again what counts is not freedom as such (the same activity can be restricted without injury) but the protection of ethical responsibility.

Now, someone could say that feeding the birds or falconry is the basic plan of his life; it is not just a preference, like drinking soda or orange juice. Does the state show lack of respect for someone’s ethical responsibility when, although it abstains from any ethical evaluation, it forbids or makes more difficult on other grounds the pursuit of a central element of my conception of the good life? What is the use of not allowing the state to make ethical judgments about my conception of the good life if it can forbid it altogether for some other reason? This is a question that again shifts our focus from dignity to total freedom. Our claim towards

27. Painting my Georgian house purple is Dworkin’s example, see JUSTICE FOR HEDGEHOGS, *supra* note 4, at 346.

society is not freedom but respect for our status as moral agents. So, if for example we had the freedom to feed the birds on the ground that time pointless activities should be given a space, this would certainly be an insult to ethical responsibility, although freedom would be intact.

If we take for granted that every society regulates most of the activities of its members, it would be a disaster to consider every individual preference as an ethical choice that raises a claim of right. We will end up “moralizing” every measure and unavoidably the majority will have to take stance on every ethical choice. The deliberation would be something as follows: Is your life’s plan feeding the birds? Then, it gives you a *prima facie* right, but so does our life’s plan, which is to play football. For us, playing football is more valuable and, since we are many, our choice must have the upper hand. Put differently, if society takes every individual preference as an ethical choice –and thus worthy of protection as a *prima facie* right, I doubt that the result will be more freedom or just a lot of frustration. Everybody, sometime, will be deeply offended because their choices will be opposed by others on the basis of their own ethical valuations.

It is true that the alternative strategy to forbid regulations that are based on ethical justifications does not guarantee or facilitate any plan of life based on any preference. But the real claim we have from society is not to provide everything we need for the success of our plan, even *prima facie*. Our, claim is not, to put it in Dworkin’s metaphor, to have all possible colors in our palette, but to be able to design our life with the colors that are available to everyone else on the basis of our own value judgments.²⁸

28. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS*, (Harvard Univ. Press 2011) at 367.

Now, if we accept that only a few basic liberties are ‘essential social conditions’ of moral personality in Rawls’ sense or are needed to protect against violations of dignity in Dworkin’s sense, it is less problematic to subscribe to a constitutional arrangement whereby courts are called to safeguard them from eventual abridgment by entrenching them against the legislative will. In other words this idea fits well with our traditional ideas of representative democracy and judicial review. More generally, this idea makes better sense of social life and the place of the individual in it. An organized society routinely constrains our freedom; it imposes limits on the ways we can use our shared social, natural and aesthetic environment. Being members of such a society, we should be more concerned that we can live our unavoidably constrained lives in dignity.

In sum, on the alternative understanding of human rights sketched above, limits to ‘total freedom’ in themselves do not constitute an ‘invasion’ of valued liberties. Rather, we have to determine which restrictions of freedom count as injuries to the dignity and autonomy of the individuals. By contrast, for a proponent of total freedom, freedom is understood in quantitative terms. Thus, this account is ill-equipped to make distinctions of kinds of invasion of freedom depending on their justification, on the basis of which the exclusionary force of rights would operate. In fact, insofar as the proportionality test is meant to be neutral and take at face value a wide range of interests, it lacks the resources to exclude any consideration whatsoever. For the same reason, it seems to presuppose a perverse conception of the relationship between the individual and society, one that builds up from a radical individualism. But this starting point is deeply misguided. For social beings like us, total freedom is not a value.

4. PROPORTIONALITY TEST: LIP SERVICE TO BALANCING?

If the connection that I drew in the previous sections between proportionality and a certain understanding of the value of freedom is valid, then a paradox emerges. How can such an unattractive moral philosophy have taken hold of human rights discourse in jurisdictions across the world, especially given the availability of the much more appealing alternative I sketched above? In this section I shall offer a tentative explanation. As a focal point of my discussion I shall use the *Smith and Grady v. UK*²⁹ case of the European Court of Human Rights. To my mind, this case captures both what's wrong with the proportionality and what's so comforting about it.

Smith and Grady v. UK related to the exclusion of gays from the military. It is considered by many as a paradigmatic case of a successful application of the proportionality test. Contrary to common wisdom, I think that the judgment was based on a piece of substantive moral reasoning, which the court's reference to balancing served to obfuscate. Let me remind you the facts of the case. The applicants, who were serving in the army, were discharged after an investigation in their private life, which found that they were homosexuals. The complaint concerned the breach of their right to privacy, yet the real issue was the legitimacy of the law that excluded gays from serving in the army.

Applying the three prong test of proportionality, the Court, first, addressed whether there was a legitimate aim for the ban of homosexuals and accepted that ensuring the operational effectiveness of the armed forces constituted in the case such a legitimate aim.

29. European Court of Human Rights *Smith and Grady v. United Kingdom* (Judgment 29 September 1999).

There was no doubt that the ban was suitable for eliminating all problems that the integration of homosexuals would cause, so the Court proceeded to examine whether the exclusion was necessary, that is, whether there were other equally effective but less restrictive means available to achieve the goal. A code of conduct with disciplinary provisions, similar to that adopted for the purpose of integrating women or members of racial minorities in the armed forces, was offered as an alternative and the Court did not preclude that it could be equally effective. The Court also considered the counter-argument –supported by a special report- which found that the integration of gays would affect the operational effectiveness of the armed forces since homosexuality raises problems and intensity that race did not³⁰. But the Court expressed its doubts as to the value of the report and rejected the claim that no worthwhile lessons could be drawn from the relatively unproblematic admission of homosexuals in the armies of other countries.

The argumentation premised upon the principle of proportionality could have ended at this point. There had been an interference with the right to privacy, while a less restrictive but equally effective means of pursuing the same legitimate aim, namely the code of conduct, was deemed to be available. What grounds of disagreement could someone have to such reasoning? Of course, one could question whether the code constituted an equally effective means or whether perhaps the special report was dismissed too hastily by the Court. Or one could also express skepticism about the lessons drawn from the experience of integration in other countries. Such challenges seem to be rather empirical. They aim to assess how different policies work in practice. In order to address them, the applicants would probably have to argue that the effectiveness of the army is in no way affected by integration and that, in any case, whatever inconvenience is caused, it would be insignificant, and would be effectively addressed by the code of conduct. In other

words, they would argue that their exclusion from the army does not serve the aim to be achieved. The success or failure of their whole contention would depend upon the evidence they could muster regarding the consequences of integration.

In turn, if the Court was interested in adjudicating such a disagreement, it would have to collect uncontested data regarding the effects of the code of conduct, or the experience of integration in other countries. Of course one wonders whether this reasoning is appropriate for a human rights inquiry or is more like the type of means-end reasoning we apply when we want, for example, to assess the economic efficiency of a subsidy.

Fortunately, the Court did not stop there. It did not confine itself to the examination of alternative, less restrictive means from the point of view of effectiveness. It proceeded to examine whether the restriction was necessary in a democratic society. It implied that the real ground behind the exclusion of gays, or in other words the real cause of any problems to the morale and effectiveness of the army, was the bias against homosexuals. It considered this an unacceptable justification. In other words the Court held that such bias constitutes an impermissible consideration in the drawing up of public policy. From the moment that bias was held not to count, the outcome of the case became evident. And this is as it should be. The real issue in that case was an issue of fundamental principle, namely whether it is right or wrong to discriminate against gays in certain sectors of society. The issue was not merely one of means-ends rationality. If it were the latter, then the Court would have to, for example, seriously consider a proposal to have separate units for gays.

Can the proportionality test do justice to the real issue in this and other human rights cases? We can start by noting that from

30. Ibid see para 102.

the perspective of the proportionality assessment homophobic feeling may well be a *prima facie* valid consideration for public policy. There may be people who claim that they cannot endure the thought that there are gays in the army; they might say that the mere idea that they could be the object of homosexual fantasies from their colleagues drives them insane, and as such it is the cause of great disturbance and suffering. Thomas Nagel has argued convincingly that such feeling cannot enter public deliberation, and I fully agree with him, but this is not the point here.³¹ The point is on what basis such an interest was dismissed in the course of the proportionality assessment, as it is clear that it did not enter the scale at all. If total freedom is our basis on what grounds were the homophobic denied their freedom not to be disturbed by the presence of gays in the army? As I said a moment ago, the Court could have discussed the possibility to optimize the conflicting interests by creating a separate unit for gays instead of a total ban from serving in the army. But there was no similar attempt of accommodating the competing interests. It was not that homophobic feeling was assigned a low value; it did not count at all.

Am I perhaps attacking a straw man? Mattias Kumm, among others,³² has suggested that, when applying the proportionality test, we ought to pay more attention to the first prong of the proportionality test, that is, the legitimate aim of the impugned measure. He argues that some reasons such as those powered by moralistic

31. “We have no right to be free of the fantasies of others, however much we may dislike them.” Thomas Nagel, *CONCEALMENT AND EXPOSURE & OTHER ESSAYS*, Oxford University Press, 2002 at 51.

32. See the exchange between Madhav Khosla, *Proportionality an Assault on Human Rights?: A Reply*, 8 INT’L J. CONST. L 298-306 (2010) and Stavros Tsakyrakis, *Proportionality an Assault on Human Rights?: A Rejoinder to Madhav Khosla*, 8 INT’L J. CONST. L 307-310 (2010).

and paternalistic attitudes are not legitimate and praises the proportionality approach because, according to his view, it “allows for the discussion and contestation of the kind of grounds that are legitimate to invoke as a restriction to the rights of others.”³³ In a similar vein, Kai Moller has argued against the supposed neutrality of the proportionality test.³⁴ These suggestions reveal a welcome sensitivity to the philosophical complexity of human rights norms. But I doubt whether the whole scheme of proportionality is of any help to or facilitates the kind of reasoning that Kumm refers to and Moller supposes is compatible with the proportionality test. To begin with, one could argue that if the assessment of a right is possible without reference to the intensity or the severity of the restriction, there is no reason whatsoever to say that the inquiry assesses the proportionality of the restriction. If our inquiry stops at the first stage, I can’t see why we have to discuss the suitability or necessity of the impugned measure only to return to examine the legitimate aim of the restriction. The more demanding the inquiry of the first stage, the less room there is for the balancing stage; that is why the European Court of Human Rights takes almost always for granted the legitimacy of the aim and proceeds to the next steps of its inquiry.

But what is more important is that *Smith and Grady* exposes the incompatibility of the principle of proportionality with the excluded reasons rationale of the Court’s decision. Above I argued that proportionality has an affinity with a conception of rights, ac-

33. Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Right-Based Proportionality Review*, LAW & ETHICS OF HUMAN RIGHTS, 159 (2010).

34. Kai Moller, *Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights*, OXFORD JOURNAL OF LEGAL STUDIES (2009) 757-786.

ording to which, to put it crudely, we have a prima facie human right to anything, anytime, anywhere, a prima facie right to total freedom, which is counterbalanced by competing rights and public policy considerations. However, this conception sits uncomfortably with the idea of rights as capable of excluding certain justifications. *Smith and Grady* provides evidence for this. If, after all, we are prepared to recognize a right to feed the birds, on what basis can we a priori exclude a right not to be disturbed by the presence of homosexuals in professional life?

But if, as I argue, the proportionality test lies in tension with the kind of moral reasoning required in human rights cases, why does it remain so popular? If it was the exclusion of certain justifications that called the shots in *Smith and Grady*, why did this exclusion stay hidden between the lines and was not explicitly embraced by the Court? The answer is most likely that, precisely because the proportionality test is *not* true to the moral discourse that is required in human rights cases, it conceals the moral reasoning that takes place behind the scene and thus makes disagreement among judges or between judges and other officials less dramatic. It is one thing to disagree about the effectiveness of a code of conduct and another thing to disagree about the moral content of a right. Equally, it is one thing to criticize the government for getting a means-ends judgment wrong, and another to criticize it for condoning bigotry and discrimination. So if society is in need of the discussion Kumm and Moller advocate, the employment of the proportionality test helps the Court avoid it rather than explicitly engage in it.

Lack of transparency is never a good idea in moral thinking – unless you are a rule-utilitarian-, but in the case of human rights convention it has a very serious consequence. A Court that has concealed the moral reasoning that determined its decision in one case will feel free to ignore it altogether in other similar instances.

Take for example the cases regarding the adoption of children by gays.³⁵ The complaint of discrimination was rejected by the Court although it was held that homosexuality was the decisive factor in denying the applicants the right to adopt.³⁶ In this case, then, a consideration tainted by bias was not excluded and the outcome was different. Now one might say that in the exclusion from the army case proportionality was properly applied while in the exclusion from adoption case it was not. But, if, as I have claimed, the reason-excluding power of rights is not embedded in the proportionality test, such failures will be endemic, and that is going to be bad both for the outcome of individual cases and for the quality of moral discourse.

35. European Court of Human Rights *Frette v. France* (Judgment of 26 February 2003).

36. The following passage of the case *Frette v. France* is characteristic of the Court's reasoning: "It must be observed that the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date. In addition, there are wide differences in national and international opinion, not to mention the fact that there are not enough children to adopt to satisfy demand." *Ibid.* para 42.

