Rights in the Balance

*Jud Mathews**

Review of Francisco J. Urbina, *A Critique of Proportionality and Balancing* (Cambridge, 2017), 267 pp.

Proportionality analysis — the *Oakes* test to Canadians[1] — is the dominant approach globally for adjudicating human rights claims today, and currently a subject of intense interest to legal academics. The sheer volume of books on the subject published in the last several years is enough to threaten the structural integrity of the stoutest bookshelf.[2] Most of the books are broadly approving of proportionality's use by courts, but some have taken a more critical view.[3] Notable among the latter is Francisco J. Urbina's recent *Critique of Proportionality and Balancing*, which promises "a comprehensive critique of the proportionality test."[4] Distinguished by its ambition and the sophistication of

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1 *R v Oakes*, [1986] 1 SCR 103.

2 Important recent titles include Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) [Barak]; Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge: Cambridge University Press, 2013); Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013) [Porat]; Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2016); Vicki C Jackson & Mark Tushnet, eds, *Proportionality: New Frontiers, New Challenges (Comparative Constitutional Law and Policy)* (Cambridge: Cambridge University Press, 2017); Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012); Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012) [Möller]; Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press, 2017); Liora Lazarus, Christopher McCrudden & Nigel Bowles, eds, *Reasoning Rights: Comparative Judicial Engagement* (Sussex, England: Hart Publishing, 2016); Alexander Tischbirek, *Die Verhältnismäßigkeitsprüfung: Methodenmigration zwischen öffentlichem Recht und Privatrecht* (Germany: Mohr Siebeck, 2017); Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, Cambridge University Press, 2009); Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, 2016). Proportionality is the subject of a huge number of articles as well.

3 *See, e.g.*, Webber, *supra* note 2.

4 Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 2 [Urbina].

its arguments, Urbina's book is essential reading for those engaged in the debates over proportionality.

The structure of Urbina's argument is elegant, revolving around a pair of binaries. Urbina argues that there are two main accounts of proportionality: maximization and proportionality as unconstrained moral reasoning. On the maximization account, the object of the proportionality test is to maximize the interests, values, or principles at stake. Under "proportionality as unconstrained moral reasoning," proportionality is an invitation for judges to engage in "open-ended moral reasoning, unconstrained by legal sources."[5] Urbina also argues that one can evaluate legal categories — including the doctrines used to adjudicate rights claims — from two perspectives: moral and technical. The moral perspective asks whether the doctrine captures the moral considerations that properly bear on a matter. The technical perspective asks how well it can translate the demands of morality into the real world: can courts reliably apply the doctrine to reach appropriate results?

Urbina's argument lines up the two binaries. The chief problem with the maximization account, he claims, is that it fails to capture what is morally relevant about rights. The defects of proportionality as unconstrained moral reasoning, for its part, are principally technical: proportionality as moral reasoning is incapable of providing the kind of legal direction that courts require. What is more, Urbina contends, since the flaws he flags are deeply rooted in these two dominant conceptions, no amount of tinkering can save proportionality. Ultimately, he argues, "there can be no understanding of proportionality that escapes objections of the kind offered here," and "there can be no single method for deciding whether an interference with a human right … is substantively justified."[6]

The book develops this argument, engaging more with academic treatments of proportionality than judicial decisions. In the end, Urbina argues for an alternative approach to rights adjudication, which he calls simply "legal human rights," that favors categorical reasoning. Is Urbina's case against proportionality convincing? For reasons I give below, I conclude that it is not.[7] But I will argue that his book helps to uncover what is at stake in the proportionality wars: to show where the core disagreements between proportionality

5 *Ibid* at 9.

6 *Ibid* at 2.

7 I do not come to this issue with a blank slate. For my own views on proportionality, see Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford: Oxford University Press, 2019).

proponents and skeptics lie. And, I will argue, his critique of proportionality highlights some peculiarities of his rival conception of legal human rights.

Before going further, it is worth reviewing what the proportionality test is. The core idea of proportionality is that measures limiting a fundamental right are invalid if they go too far. Courts determine whether a challenged measure is excessive by subjecting it to a battery of tests, administered in a predefined sequence. First, the court asks what the objective of the challenged measure is, and whether it is legitimate. Next, the court considers whether the measure is a suitable means for achieving that objective. Courts typically require only a rational relation between means and ends at this stage. Then, the court performs a least restrictive means test, asking whether the objective identified in the first step could be achieved using a measure that limited rights less. Finally, if the measure survives these tests, the court moves to "proportionality in the strict sense," a balancing test that asks whether the measure's impact on rights is excessive in relation to the contribution it makes towards its objective. There is substantial variation in how courts in different jurisdictions actually conduct proportionality review,[8] but this is the canonical version of the test.

The two accounts of proportionality that Urbina describes differ in what happens in the fourth and final stage of the test. On the maximization account, which is the subject of the four chapters following the introduction, the court engages in a balancing exercise, choosing to uphold or strike down the challenged measure depending on which outcome strikes the better balance between the interests at stake. Urbina's "maximization" is essentially what Robert Alexy terms "optimization" in his landmark *Theory of Constitutional Rights*, and Urbina uses Alexy's work, along with Aharon Barak's and David Beatty's, to illustrate maximization.[9]

Urbina has two lines of attack against maximization. The first is an incommensurability argument. To determine whether a limitation on a right is justifiable, proportionality requires that courts weigh the positive and negative impacts on the values at stake.[10] But different values are incommensurable. For Urbina:

8 *See ibid* ch 3.

9 Robert Alexy & Julian Rivers, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010); Barak, *supra* note 2; David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

10 On different versions of proportionality, it may be values, interests, or principles that are weighed. The purported problem is the same in any case.

> two things are incommensurable with respect to X when X is not a property by which they can be compared quantitatively, that is, X is not a property by which it can be judged that one of the things is (overall, net) more or less X than, or just as X as, the other — whether or not there is a unit of measurement that can express X.[11]

Suppose the government prevents the publication of sensitive military documents on national security grounds. This action could ground a rights claim sounding in freedom of expression or freedom of the press. Depending on how the court rules, it will sacrifice some amount of national security for some freedom of communication, or vice versa. Even if, as Alexy proposes, the court grades the importance of the two values in the abstract, and assesses how severely each stands to be affected, the problem remains: there is no common currency for comparing the values at stake. Nor does it avail the court to assess the stakes with reference to some broader property, such as importance for the Constitution (as in Alexy's theory) or marginal social importance (as in Barak's). If these portmanteau properties depend on component properties that are themselves incommensurable, the incommensurability objection applies with undiminished force.

But even setting aside the problem of incommensurability, Urbina maintains that proportionality is still not equal to the task of deciding rights claims. We want judicial review to capture what is morally relevant about the rights claims at issue, and there is no reason to suppose that a balancing test does. Indeed, Urbina argues, "rights are about justice," and "[j]ustice is not about aggregating or maximising preferences or interests effectively or efficiently, but about distribution, that is, about who is entitled to what."[12] What distinguishes rights from other norms is their special priority, their claim to "pre-eminence,"[13] and a balancing framework, where the right is simply placed on one side of the scale, necessarily shortchanges this.

One way out of these difficulties, for proponents of proportionality, is to conceptualize the final stage of proportionality review as something other than a balancing test. Some scholars, including Moshe Cohen-Eliya and Iddo Porat, Mattias Kumm, and Kai Möller, consider the last stage to be more of an open-ended assessment of a challenged measure's justification.[14] The limitation of a right is permissible if the reasons for it are strong enough.

11 Urbina, *supra* note 4 at 40.

12 Urbina, *supra* note 4 at 81-82.

13 *Ibid* at 95.

14 See Porat, *supra* note 2, Mattias Kumm, "The Idea of Socratic Contestation and the Rights to Justification: the Point of Rights-Based Proportionality Review" (2010) 4 *Law & Ethics Hum Rts* 142, Möller, *supra* note 2.

But according to Urbina, this approach, which he calls "proportionality as unconstrained moral reasoning," creates its own problems. To illustrate them, Urbina imagines a community of shipwrecked survivors who choose one of their number to be their judge. The judge is untrained in law, but she seeks to resolve disputes justly. Urbina catalogues the problems that will arise as she decides cases, including confusion over what count as relevant considerations, the possibility of improper influence, excessive discretion, questions of legitimacy, and the unpredictability of outcomes. These, he argues, are the practical problems that result when cases are decided by means of unconstrained moral reasoning.

The solution lies in legal direction, and legal direction comes from authoritative legal categories. Legal categories supply direction because they "make a claim to control the behaviour, reasoning, and decision of whoever is applying them, or is ruled by them."[15] Legally directed adjudication not only serves rule of law values by constraining judges, but is more likely to achieve just outcomes than unconstrained moral reasoning, because the different legal categories can be tailored to the specific moral issues of the areas of law where they are employed.

The final chapter sketches an alternate vision for a human rights regime, with custom doctrinal tests for different areas of law, widespread use of categorical reasoning, and strict priority for rights, effectively eliminating the need for limitations analysis. As Urbina acknowledges, his idealized rights regime bears more than a passing resemblance to the constitutional jurisprudence of the United States.[16] At least in certain areas of U.S. constitutional law, how a claim is handled depends substantially on which doctrinal box it is slotted into. In First Amendment law, for instance, rights adjudication revolves around the application of categories such as "limited public forum," "expressive conduct," "viewpoint discrimination," and "fighting words," each of which is associated with a different test or outcome.

The critique of proportionality offered in this important book is thoughtful and wide-ranging. Certainly it won't settle the debates over proportionality, but by making his case in detail, Urbina throws into relief some core differences that underlie the disagreements between proportionality fans and critics. Ultimately, in my view, proportionality comes out looking better than the alternative. Urbina's critique ends up highlighting features of his own con-

15 Urbina, *supra* note 4 at 150.
16 *Ibid* at 247-48.

ception of rights and rights review that I anticipate many readers will reject as unreasonable.

The most controversial aspect of proportionality is that it requires courts to engage in some form of balancing analysis. Those lined up on opposite sides of the proportionality debate differ so sharply on the appropriateness of balancing in part because they tend to disagree, if only implicitly, over what level of rational justifiability it is fair to expect from judicial decision-makers. More than two decades ago, Jürgen Habermas charged that there are no rational standards for balancing,[17] and Robert Alexy countered that there are: judgments about proportionality are grounded in reasoned judgments about the relative stakes of completing interests.[18] Disputes over incommensurability are manifestations of a similar divide. Virgílio Afonso da Silva has argued that incommensurability does not mean incomparability — even if the values at stake in a rights case can't be reduced to a common metric, a judge can still meaningfully compare the concrete alternatives in front of her, and the trade-offs they entail.[19] This is not good enough for Urbina, because "whatever is good in realising one of the values at stake is different from whatever is good in realising the other value."[20] This deep incommensurability thwarts judgments about trade-offs: "that one value could be realised to a great degree and another to a reasonably small degree is no conclusive reason for choosing any of the alternatives."[21]

The key phrase here, the one that expresses the standard of reasoned decision-making to which Urbina holds courts, is "conclusive reason." For Urbina, a decision-maker facing a choice between incommensurables has a reason to pick either option: each realizes something of value. But a comparison of the options cannot yield a *conclusive* reason for either, because the options cannot be commensurated. Urbina gives the example of a prospective homeowner who is looking for two things in a house: size and beauty. Suppose she must choose between a smaller, prettier house and a larger, uglier one. She could make the choice based on some external reason — say, a promise to her mother that she buy one of them — or based on a feeling or other subrational motive, or by flipping a coin. But, according to Urbina's conception of decision-making, she could not rationally choose one house over the other on the basis of a judgment

17 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (New Baskerville: MIT Press, 1996) [translated by William Rehg].

18 Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16:2 *Ratio Juris* 131.

19 Virgílio Afonso da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision" (2011) 31:2 *Oxford J of Leg Stud* 273.

20 Urbina, *supra* note 4 at 63.

21 *Ibid.*

that it was the best house overall, taking into account its size and beauty, because size and beauty are incommensurable.

It is worth noting that Urbina is not making the more modest point that courts as institutions are not well-positioned to judge these kinds of trade-offs. Urbina's critique implies that *no actor* can make a reasoned choice between alternatives with incommensurable features, on the basis of a comparative judgment about those features. Suppose the prospective homebuyer concludes, "I think House A is a better choice overall, because it's only slightly less attractive than House B but has twice the number of bedrooms." Urbina's conception of decision-making, built around conclusive reasons for action, gives him no way to credit that statement.[22] He concedes that readers will have a "common sense intuition … that we decide by commensurating what incommensurability theorists would consider incommensurable values or principles."[23] His response is that "[i]ntuitions can be wrong," and he suggests that something else, besides a comparative judgment, must be doing the work in such cases. This formalistic conception of decision-making is one that I suspect most readers will find unrealistic and irreconcilable with their own experiences. We make reasoned judgments all the time based on comparative assessments of different states of affairs that are not formally commensurable. Courts can too.

Urbina's critique of proportionality as unconstrained moral reasoning also reveals some curious features of his own view. It is worth noting, first, that his characterization of "proportionality as unconstrained moral reasoning" is tendentious: few would argue that proportionality reduces to an open-ended instruction to courts to do justice.[24] In fact, the moral reasoning involved in proportionality is constrained by several sources, starting with the constitutional provision at issue. Precedent also provides guidance, even in systems where it is not formally binding.[25] But perhaps most significantly, in the versions of

22 It is worth noting in passing that, by Urbina's logic, we should be unable to make comparative judgments even about the beauty of homes, if beauty depends on subsidiary, incommensurable properties. Suppose one house has better proportioned rooms, and another is painted a nicer color. Or that the dining room is more attractive in one house, and the living room in another. Which is the prettier house? Many of the properties relevant to legal decision making may plausibly be composite properties in the way that beauty is — consider desert, fault, or even justice itself — which by Urbina's reasoning would defeat the possibility of a decision maker advancing a reasoned argument that one state of affairs is better than the other when one or more is at play.

23 Urbina, *supra* note 4 at 64.

24 *Ibid* at 125-31. The scholars Urbina discusses with the broadest conceptions of the proportionality test, Kai Möller and Mattias Kumm, do not go that far.

25 *Ibid* at 130. Citing Kumm, Urbina notes that text and precedent provide only weak constraints in proportionality, but there is a difference between weakly constrained reasoning and unconstrained reasoning.

proportionality actually practiced by many courts, moral reasoning is squarely directed towards the question at hand: whether the infringement of a right is justified by the countervailing values or interests at stake. Courts need a theory of the right at stake to give content to the analysis: to inform their judgments about what reasons count in favor of the parties' claims, and how much. Urbina is clear at the outset that his critique engages with accounts of proportionality put forth by legal scholars. But the dichotomy around which he builds his critique, between maximization and unconstrained moral reasoning, fails to capture plausible ways in which courts in fact incorporate moral reasoning into a balancing analysis.

In truth, the problem with proportionality, for many critics, is not that the moral reasoning it invites is *un*constrained, but that it is not constrained *enough*. One of the chief selling points for Urbina's preferred categorical approach to adjudicating rights, in his view, is that it confines judicial discretion more than proportionality, with its reliance on balancing.[26] His position is emblematic of another broad difference between the pro- and anti-proportionality factions: constraining judges tends to be more important, relative to other goals, for proportionality's critics than for its proponents. The questions of how and how much constitutional judges should be constrained are important and enduring ones. But some features of Urbina's case for constraint are questionable, and worth examining more closely.

Urbina writes mainly about the value of constraint in law in general, and not in the context of constitutional rights adjudication. No one would dispute the value of constraint in many legal contexts. No one would suggest, for instance, that we would be better off if courts would develop income tax law themselves through case-by-case rulings. One reason the question never comes up is that the legislature has drafted a detailed tax code which the court applies. But constitutional rights norms are different. They are different, not least, in that they are typically framed quite broadly. For example, Canada's *Charter of Rights and Freedoms* guarantees, among other things, "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

Two things follow from the generality of rights as they are framed in charters. The first is that, if constitutional rights decisions are going to be made according to legal categories, it will be the courts that come up with them. As new

26 Debates over the use of categorical and balancing approaches in rights review have obvious affinities to the broader scholarly discussion about rules and standards in the law.

cases arise, presenting new legal questions or factual situations, courts will create new categories, or craft exceptions to existing ones. Urbina seems satisfied that it is the categories that are doing the work, as his choice of the term "*legally directed* adjudication" suggests.[27] But is adjudication really "directed" by categories whose creators and custodians are courts? While deciding cases with reference to legal categories offers the appearance of constraint, I question whether it provides meaningfully more constraint than proportionality as a practical matter.

Second, the use of open-ended rights provisions is part of a set of design choices that characterize most modern constitutions. Another, related feature shared by many modern constitutions is a limitations clause, laying out conditions under which rights can be limited. Together with the commitment of judicial review to a court, these provisions express a particular approach to rights adjudication: courts are to give rights a broad scope, and to determine when limitations on those broad rights are justified. Many courts choose proportionality because it is well suited to performing the kind of rights adjudication the constitutional design envisions.

Urbina argues instead that the scope of rights should be narrowly defined, and that rights should have conclusive force within that scope. At several points in the book, he suggests that the categorical nature of rights and their special priority derive from the nature of rights themselves, or the rule of law: that this is just what rights are, and how they work.[28] How convincing readers find this claim will likely depend on how well it fits with their prior assumptions about what rights are, because Urbina offers little in the way of argument to support it. But however well Urbina's view comports with the best conception of rights as a theoretical matter, it is plainly out of step with the choices made by the drafters and ratifiers of many constitutions in effect today. This is simply not what rights are, or how rights work, in contemporary systems of constitutional justice around the world.

These criticisms should not detract from the bottom line, which is that this is a challenging, important book, elegantly structured and rigorously argued. Urbina's case against proportionality, if unlikely to win over every reader, demands to be taken seriously. It deserves a place on many groaning bookshelves.

27 Urbina, *supra* note 4 at 160 [emphasis added].

28 See, for instance, Urbina, *supra* note 4 at 95, 97, 149. This characterization of rights undergirds Urbina's second objection to maximization, that it fails to capture what is morally relevant about rights, as well as his claim that categorical rights can yield morally better outcomes than unconstrained moral reasoning.