

Reclaiming Proportionality: A Response to Professor Ripstein

George Letsas*

Introduction

Arthur Ripstein's splendid lecture seeks to reclaim proportionality within a rights-based moral outlook. Anyone who takes rights seriously should appreciate the challenge posed by the ubiquitous presence of proportionality in our ordinary moral landscape. If rights give way whenever some appropriate proportion of harm and good obtains, then the worry is that our commitment to the primacy of rights is a sham; for it may turn out that what we really care about is not rights, but some form of minimizing harm and maximizing good. It is this worry that has recently led several rights enthusiasts to reject proportionality as an 'assault on human rights',¹ as a principle that is rooted in the morality of utilitarianism or other forms of consequentialism.²

Like many of us, Ripstein believes that this outright rejection of proportionality as a moral principle is a mistake. He seeks to show how, properly understood, proportionality is compatible with an account of interpersonal rights. But he wants to resist the route most philosophers have taken to reconcile proportionality with rights. This is the familiar camp of moderate deontologists, who pay attention to good and bad consequences while restricting which consequences should matter, and how much.³ On this view, proportionality is a determinant of rights but not all the way down. Instead, Ripstein wants to reclaim proportionality by situating the principle at a different level of moral concern than the

* Professor of the Philosophy of Law, University College London. I am grateful to the editor of the *Journal of Applied Philosophy* for his extremely useful comments and suggestions.

¹ See Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?', 7 (3) *International Journal of Constitutional Law* (2009), pp. 468-493.

² See Heidi Hurd, 'Stand your ground' in Christian Coons and Michael Weber (eds), *The Ethics of Self-Defense* (2016), Oxford University Press, chapter 13.

³ For example, an act of self-defence against a mobster will not become disproportionate just because it will trigger retaliation and more grave wrongdoing on the part of the mafia; such bad consequences are irrelevant in assessing whether the act was proportionate, whereas they would not be under unrestricted forms of consequentialism.

question of what rights we have against one another. Focusing on the case of self-defence, he aims to show that proportionality is part of an answer to a different moral question: which means of enforcement should be available to individuals when their rights have been violated?

Ripstein's approach is a novel and promising one. It chimes with a central feature of anti-consequentialist views, namely that morality is not monistic, governed by a single moral principle, such as maximization of utility. Rather, it is multi-layered and each level of moral concern is governed by separate principles.⁴ Hence the discovery that proportionality has a place in one level of morality (enforcement) need not contaminate the whole of morality with consequentialism, especially that level of morality which is concerned with what rights individuals have. Moreover, thinking about proportionality in the context of enforcement allows us to import distinctive moral and conceptual constraints into proportionality from an idealised account of enforcement. Ripstein rightly emphasises that enforcement of rights should ideally be a public enterprise in which self-help and vigilantism are off the table.

Whilst I am most sympathetic to Ripstein's starting-point as well as the general cause of rescuing proportionality from consequentialism,⁵ I am somewhat sceptical that an idealised account of enforcement can provide the resources for an adequate account of the principle of proportionality, even in the isolated case of self-defence. I am also sceptical of the discontinuity Ripstein finds between the morality of rights and the morality of rights enforcement, particularly the claim that the former is a proportionality-free zone.

The (Not So) Simple Picture of Rights

Rights set normative constraints on the means others may use in pursuing their ends: we may not use others as a mere means to our ends. "I cannot", Ripstein writes, "run my fingers through your hair, in order to satisfy my curiosity". Building on this familiar Kantian idea, Ripstein moves on to paint what he calls a 'simple picture of rights'. He argues that within this picture, people's ends play no role in determining the content of the rights we

⁴ In John Rawls's famous formulation: "the correct regulative principles for a thing depends on the nature of that thing", in John Rawls, *A Theory of Justice* (1971), p. 25. See also the discussion of monistic and non-monistic accounts of morality in Thomas Nagel, 'The problem of Global Justice', 33 (2) *Philosophy and Public Affairs* (2005), at 122.

⁵ For a critique of consequentialist readings of proportionality see George Letsas, 'Rescuing Proportionality' in Cruft, Liao and Renzo (eds), *Philosophical Foundations of Human Rights* (2015), Oxford University Press, chapter 17.

have against one another. It is not my curiosity that is the problem, he notes, but the fact that your hair is not a permissible means of satisfying my curiosity: only you get to decide what use your hair is put to. And if people's ends do not play a role in determining what rights people have, then neither does the significance of their ends. It may be my life's only goal to run my fingers through your hair and you may be indifferent to non-consensual touching of your hair. But an assessment of the good and harm done to each other's goals does not even enter the picture, precisely because rights are about means, not ends. And since proportionality is about weighing up the interests of the wrongdoer against those of the victim – Ripstein concludes - it falls outside the domain of rights. No proportion of good and harm could make it permissible for me to touch your hair without your consent.

Ripstein wants to challenge, not this simple picture of rights, but the inference people draw with respect to the enforcement of rights, namely that 'right should never yield to wrong'. Popularised by the morally problematic US laws of 'stand your ground', this is the idea that proportionality should have no place in the morality of self-defence: in defending the right to your body or your property, one should have the right to stand one's ground, including the right to use lethal force if necessary, even if it is in order to protect a minor infringement, like the touching of one's hair or the stealing of one's apples. It is this inference that Ripstein finds unwarranted, because it treats the domain of rights and the domain of enforcement as continuous: it insists that proportionality has no place in the latter because it has no place in the former.

I want to suggest, however, that the simple picture is not quite as simple as Ripstein makes out, and that an element of proportionality is already embedded within it. Consider the case of touching and pushing each other on a crowded bus. Why is this not an impermissible use of other people's bodies? One explanation, and the one Ripstein seems to espouse, is that these are authorised uses of one's body: one consents to be touched by deciding to use public means of transport in the knowledge that this mild intrusion on one's body is very likely. But this explanation seems to me to invoke consent as a proxy for a different sort of judgment. Without means of public transport, mass movement of people would be impossible. If everyone were to use private transportation, traffic would come to a standstill and nobody would be able to pursue *any* end that depends on transport (and most people's ends in modern life do). Most people would rather be squeezed on public transport for a short while than not having the option to commute at all. It is reasonable and fair for people to put up with a mild intrusion on their bodily integrity for the sake of a major benefit in their ability to pursue their ends. So when I elbow you aside at the back of a crowded bus in order to make my stop, I am

– in a trivial sense – using your body as a means to my end: my not being late for work is more significant than your not being gently pushed. Yet this does not amount to a rights-violation, partly because of reciprocity and fairness (*everyone's* ends are better served by this minor intrusion) and partly because of the proportionality between the liberties we lose and the liberties we gain.

To be sure, we might cast the above explanation in terms of hypothetical consent: we would all agree to an arrangement whereby we gain a substantial benefit for a minor inconvenience. But hypothetical agreement is not really a basis for justifying anything. As Ronald Dworkin puts it, “[we] use the device of a hypothetical agreement to make a point that might have been made without that device, which is that the solution is so obviously fair and sensible... the fact that I would have chosen it myself adds nothing of substance to that argument”.⁶ In other words, it is fairness or some other dimension of morality that explains why we have *reason* to consent, even if we actually haven't. Nor is actual consent what explains why it is justified to touch and elbow each other on public transport. Few commuters give consent in the robust sense of the term (i.e. informed, considered and explicit) and explicit lack of consent would not make touching impermissible. Holding a sign “I do not consent to being touched” on a crowded bus will hardly gain sympathy with other commuters, and for good reason: fairness requires that each one of us shares the inconveniences of mass transport and not just its benefits.

Ripstein remarks that the constraints rights impose are formal; they “set out the issue of who gets to decide about the purposes for which a particular body will be used”. While he is right that people have authority to decide what purposes their body will be put to, the example above suggests that the contours of that authority are hardly formal; they relate to human ends and their ethical significance. Pushing each other on public transport would be impermissible if humans had eggshell bodies or were able to teletransport. Similarly, touching others on the bus would be impermissible if one's reason for doing so is sexual gratification, rather than to get on and off the bus. It's not that human ends do not matter; it's that *improper* ends don't and proper ends (such as serving universal interests of well-being) *might*, if they meet certain moral conditions.⁷

⁶ Ronald Dworkin, *Taking Rights Seriously* (1977), at 151.

⁷ We can describe this as a middle position between Ripstein's formal deontological theory on one hand and a perfectionist theory of rights on the other hand, such as Joseph Raz's interest-based theory (in his *Morality of Freedom*, 1986). The former has difficulty accounting for how abstract moral maxims can determine the content of rights and dictate practical outcomes in different cases. The latter, by contrast, has difficulty explaining the conditions under which aspects of a person's

So in order to individuate interpersonal rights properly, we need an account of the significance of human interests, as well as the reasons for which one interferes with someone else's interests. Without such an account we would be unable to explain why I am justified (and not just excused) in breaking an unconscious person's ribs while performing CPR in order to save her life. The fact that I acted on a noble end (to save a life), and the fact that a broken rib is objectively far less significant than death, is a necessary component of the normative explanation for why I did not violate her rights, even though I put her body to an unauthorized use. Breaking one's ribs is a proportionate reaction to the risk of death and proportionality in part explains why there has been no rights violation.

We must, of course, take seriously the worry behind the idea that rights set formal constraints: if we were to qualify rights in the light of human ends and their objective significance, wouldn't we then have to accept that it is permissible to take someone's kidney against their will in order to save the lives of others or the life of the person who might cure cancer? Wouldn't we gradually descend to a form of consequentialist balancing of interests in which rights evaporate?

Ripstein's account is no doubt motivated by this worry but it seems to me that so long as our account of rights is very different to that of an unrestricted form of consequentialism, this worry is exaggerated. Our ability to distinguish between different cases is crucial. In some cases, the significance of human ends speaks to the content of interpersonal rights (as in the public transport example); in other cases, it speaks to when a right may be overridden: I still wrong you when I break into your cabin to save myself from starvation, but I am *all things considered* justified in doing so, given how insignificant your property interest is compared to my life. Finally, there are cases where neither the significance, nor the number of people affected speaks to permissibility. I have no right to your kidney, even if by taking it I can save the life of the person who might cure cancer; nothing could override that right of yours (except perhaps when the number of lives I will save has seven figures or some such high threshold). The consequentialist cannot distinguish between these three types of cases, but neither can *we* without taking into account the significance of human ends and the reason for which our actions impact on the interests of others in given contexts.

wellbeing can generate duties on others, given that interests lack the inherent normative force of moral maxims. Contemporary rights-theorists seek to combine both elements in their theory of rights, see for instance Ronald Dworkin, *Justice for Hedgehogs* (2013).

So it seems to me a mistake to exclude human ends and their significance from the simple picture of rights, as Ripstein's account suggests. What we need is a suitably impartial standpoint from which to judge whether some proportion of harm and good meets requirements of fairness, reciprocity, or some other standard of morality that is applicable within the relevant context. These standards will govern the application of the proportionality principle and restrict which human ends matter in each context, and how much.⁸ It is then no mystery why the same standpoint is also present when we ask what is permissible in self-defence. I will say more about how this plays out in the last section, but I would like to emphasize this point here because Ripstein looks to enforcement for precisely this standpoint: enforcement of rights should ideally be done by officials, who need to take up a public and impartial standpoint, taking everyone's interests into account. Yet it seems to me that this standpoint, and the resulting constraints on the proportionality principle, is already there in the domain of rights. It enables us to put flesh in the bones of the formal maxim that others are not to be used as a mere means to our ends.

Necessity and Proportionality

Ripstein notes that although the simple picture of rights has no conceptual resources to account for proportionality in self-defence, it does impose a requirement of *necessity*: it only authorises the use of defensive force when it is necessary to prevent a wrong. I find this puzzling, given that the requirement of necessity in self-defence includes an assessment of the significance of human ends. Necessity is said to require a comparison between different means of defending one's rights, whereas proportionality is said to require a comparison between an act of defending one's rights and doing nothing.⁹ If I can punch you to prevent you from stealing my apples, then my paralyzing your legs with a shotgun flouts the requirement of necessity, because it inflicts more harm than other available alternatives with similar probability of success. And if I kill you to prevent you from stealing my apples, then my action flouts the requirement of proportionality, even if there was no alternative way to

⁸ It is worth emphasizing that in morality there is no such thing as a proportionality principle *simpliciter*. It is always specific acts (e.g. punishment) that must be proportionate to specific factors (e.g. the gravity of the wrong committed). The fact that the relevant acts and factors vary from context to context readily suggests that proportionality is not a proxy for an all-things-considered aggregative calculation of costs and benefits. If it were, then the severity of punishment would have to be proportionate to *all* possible costs and benefits, and not just to the gravity of the committed wrong.

⁹ See Jeff McMahan, 'Proportionate Self-Defense' (unpublished manuscript, on file with author).

stop you. This is because the harm I inflict is disproportionate to the one I would suffer by doing nothing.

Though there is a logical distinction between necessity and proportionality, both involve comparisons between different possible worlds in one of which at least some harm occurs. The difference is that necessity involves a comparison between alternative means of self-defence, each of which suffices to prevent the wrong; proportionality by contrast, involves a comparison between a world in which the attacker (or third parties) suffers some harm as a result of an act of self-defence, and a world in which the attacked does not defend herself and is wronged. Typically, necessity compares different possible outcomes for the *attacker*, whereas proportionality compares an outcome to the attacker with an outcome to the defender.

Yet this difference is hardly one that can be drawn within the resources of the simple picture of rights, as Ripstein paints it. Why, under that picture, would the defender have a duty to inflict as little harm as possible on the attacker, and be required to weigh up (correctly) the harm that alternative forms of self-defence will cause to him? In other words, why would the defender have the burden to respect the fact that the attacker's interest in avoiding death is greater than his interest in avoiding injury?

Just like proportionality, necessity in self-defence requires us to take into account the interests of the wrongdoer, and to assess their weight and significance; it requires a degree of impartiality, of putting oneself in the shoes of the attacker and recognizing him as member of the moral community, *despite* his wrongdoing. I see no way that this requirement can be derived from the formal idea that my body is not a means to the attacker's ends and be made compatible with the constraint that an assessment of the significance of (the wrongdoer's) ends is irrelevant to what interpersonal rights we have. If Ripstein's simple picture of rights has no place for proportionality, then it should have no place for necessity either. At best, the simple picture would only contain a requirement of *sufficiency*: defenders would be justified to take any suitable means of self-defence that (it is reasonably to assume) suffices to stop the attacker and to prevent him from using me as a means to his ends.¹⁰ No comparison between possible worlds would be required under the simple picture. So it seems to me arbitrary that one would go further and incorporate a requirement of necessity, as Ripstein does, but

¹⁰ Assuming of course that it does not wrong third parties. Constitutional lawyers sometimes refer to this as a test of 'suitability' or 'rational connection' between some measure and the intended aim, a test that is taken to be less stringent than necessity and proportionality.

exclude a requirement of proportionality.¹¹ Requirements of necessity and proportionality go together and our picture of interpersonal rights must contain elements of both.¹²

Proportionality and Public Enforcement

Ripstein argues that private enforcement of rights is morally problematic and that enforcement requires a public authority. He deploys two separate ideas to support this argument. The first is to do with *motivation*: agents who single-handedly go around enforcing their rights (or the rights of others) are likely to overdo it and breach the requirement of proportionality, partly because their motives are hostile to the interests of wrongdoers. Ripstein's discussion of the pathology of vigilantism, with its characteristic elements of excess and vengeance, is here particularly illuminating.

The second idea however is different and is to do with *epistemic* access to the standards governing enforcement. He remarks, rightly, that one's right to self-defence does not tell one when or whether to defend oneself. But he also adds that "[t]he abstract ideas contained in the simple picture are at least partially indeterminate", leaving the issue of what to do in self-defence to one's best judgment. By doing so, Ripstein argues, enforcement becomes arbitrary because people's judgment of what is required, even if made in good faith, will differ. By contrast, public enforcement makes the standard determinate, and hence non-arbitrary, by specifying through positive law the precise limits of self-defence. Since these standards are public (i.e. set from an impartial standpoint), they must take into account the interests of both the wrongdoer and the defender; they must include the principle of proportionality.

I think Ripstein is right about the first point: private individuals are less likely than public officials to be motivated to take into account the interests of wrongdoers, when it comes to enforcing rights. The despicable practice of lynching is a good reminder of this. But I think Ripstein is wrong to argue that the standards governing self-defence are

¹¹ Seth Lazar has suggested that an element of proportionality is part of the test of necessity in his 'Necessity in Self-Defense and War' 40 (1) *Philosophy and Public Affairs* (2012), pp. 3-44.

¹² Jeff McMahan (ibid, footnote 8) criticizes international lawyers for conflating the distinction between necessity and proportionality in discussions of *jus in bello*. I believe that this conflation is not accidental but is indicative of the common roots of the two standards in requiring a degree of moral regard for the wrongdoer.

indeterminate, making private enforcement arbitrary. We need to distinguish here between uncertainty and indeterminacy. I may be uncertain as to whether I have the moral right to shoot at a burglar or whether I should retreat. Reasonable people may take a different view and different cultures may stand at the polar opposites of this question. But that does not mean that there is no moral fact of the matter as to whether it is permissible to kill someone in order to prevent him from stealing your TV set; of course it is not. We do not need positive law in order to make this determination.¹³ In fact, any public standard of self-defence set by the law will be subject to *external* standards of necessity and proportionality. This is exactly why many of us criticize the ‘stand your ground’ laws in the US, which do not include this standard.

Ripstein remarks in this respect that he does not advocate that there are no right answers here, just that the concepts relevant to self-defence (such as “aggression” or “dangerous”) are very abstract and do not dictate their own application. But abstractness is an inherent feature of all moral concepts, including those of interpersonal rights, and it is not unique to the morality of enforcement. Besides, if the need for public enforcement is triggered by moral abstractness, then it would be trivially true that public officials are needed for *everything* that morality requires.¹⁴

There is another way however to understand Ripstein’s emphasis on public enforcement, which is to view it as a heuristic device. He notes that unlike private individuals, a public official cannot treat wrongdoers as outlaws; they are citizens and they have ‘a claim on the state’s moral attention’. I have already suggested that our picture of interpersonal rights already includes moral regard for the interests of others, subject to conditions of fairness and reciprocity. That is why, for instance, you do not violate my rights when you push me aside on the bus to make your stop so that you are not late for work. It is that same standpoint that triggers requirements of necessity and proportionality. Few of us are moral saints and most of us commit several wrongs in the course of lives, most of which are insignificant and some of which are very serious. But in general, we will occupy the positions of both victim and wrongdoer throughout our lives and we share the same important

¹³ We should note here the difference between moral questions (such as what rights we have) and co-ordination problems. Prior to the law, it is indeterminate which side of the road I should drive so that I do not injure others. Drivers have to co-ordinate in order to comply with their moral duty and the law facilitates this co-ordination. But I do not have to co-ordinate with anyone in order to respect the right of the attacker not to be subjected to disproportionate force.

¹⁴ I should note here there is respectable philosophical pedigree to the idea that there can be no justice outside the state and the law. Even if that idea has merits however, it would still fail to tell us anything specific about proportionality and how it differs from other moral requirements.

interests in life, bodily integrity and property. Reciprocity requires showing the attacker the same regard for his interests that we would like our victims to show us when we commit a wrong. As promisors for example, we do not want promisees to sit back and let losses accumulate when we have breached a promise; instead we want them to mitigate their losses subject to conditions of proportionality.¹⁵ By recognizing that proportionality restricts the enforcement of our primary rights, requiring some regard for the interests of wrongdoers, we meet standards of fairness and reciprocity that should govern our interaction as moral equals.

The problem however, as I see it, is that few of us are motivated to take this standpoint at the moment when our rights are being violated. We tend to see the attacker as an outlaw, as someone who does not deserve any regard for his interests. If criminal laws were drafted solely from the victim's perspective, they would be morally problematic. It is here that Ripstein's emphasis on public enforcement can provide useful guidance: in judging what rights the attacker has, we must put ourselves, not in the position of the victim, but in the position of the public official, with his duties of equality and impartiality.

Ultimately however, the emphasis on public enforcement is no more than a heuristic device. The role of the public official is a metaphor for a particular moral standpoint and that standpoint governs our relations, not only as citizens, but also as members of the moral community. Just as the police officer cannot treat anyone like an outlaw, likewise, private individuals cannot treat anyone, including attackers, as an outcast from the moral community. This is why proportionality has a role not only in law, but also in what we owe one another in the context of interpersonal relations, such as friendship or family, with which the law has no business interfering.¹⁶ Public enforcement cannot trigger moral requirements out of thin air and proportionality is part of what it is to live together, both within and outside the law. _

¹⁵ The mitigation doctrine in contract law works in a similar way to the doctrine of self-defence in criminal law: the promisee is required not to enforce fully her primary right against the promisor, but instead to assist him by mitigating the losses caused by the promisor's wrongdoing. For a fairness-based explanation of this core feature of contract law see George Letsas and Prince Saprai, 'Mitigation, Fairness and Contract Law' in G Klass, G Letsas and P Saprai (eds) *The Philosophical Foundations of Contract Law* (2015), Oxford University Press. For a rights-based critique of the mitigation doctrine, similar to the one mounted against proportionality is self-defence, see Seana Shiffrin, 'The Divergence of Contract and Promise', 120 *Harvard Law review* 708 (2007).

¹⁶ It is important to note here that not all cases of self-defence are about enforcement, understood as the use (or threat of using) physical force to prevent wrongdoing. Suppose that my partner threatens to pinch my cheeks softly, against my will. I can prevent her from doing so by threatening to break up with her. We can still ask whether this means of defending my right to bodily integrity is proportionate, even though the defensive act falls outside the means public officials may use in coercively enforcing our rights. I explore this aspect of proportionality, as a general ethical requirement, in 'The Moral Dimension of Proportionality' forthcoming in *Current Legal Problems* (2017).