

When Trumps Clash: Dworkin and the Doctrine of Proportionality

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In the decades since the Second World War, proportionality has emerged in jurisdictions around the world as the leading doctrine for the adjudication of constitutional rights.¹ The doctrine consists in a set of conditions that government must satisfy in order to justify a law that limits a constitutional right. In the Canadian formulation, to initiate the proportionality analysis, the government must demonstrate that the impugned law pursues a purpose that is pressing and substantial in a free and democratic society. To satisfy the proportionality analysis, government must demonstrate (1) that the means that the law employs are rationally connected to the relevant objective, (2) that the law pursues this objective in a manner that minimally impairs the right, and (3) that “the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values” of a free and democratic society.² At each stage of this justificatory sequence, government bears the onus of justifying the limitation of a constitutional right.³

This paper situates Ronald’s Dworkin’s theory of rights in relation to proportionality, the doctrine that structures the practice of constitutional adjudication in legal systems around the world. If there is one point on which proportionality’s defenders and its critics agree, it is that Dworkin’s *rights as trumps* model stands as a radical alternative to the doctrine. Defenders of proportionality typically interpret Dworkin as offering a rigorous theory according to which rights are not susceptible to the justified limitations that the doctrine admits.⁴ Critics of proportionality conceive of the doctrine as a dangerous confusion that dilutes the categorical protections that

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¹ Proportionality originated in the Prussian administrative courts in the late 19th century, reemerged in postwar Germany in the late 1950s in the *Lüth Case* (1958), 7 BVerfGE 198, and has since migrated to the European Court of Human Rights, Canada, South Africa, Israel, the United Kingdom, New Zealand, Australia, India, Turkey, Switzerland, Spain, Portugal, Latin America, Brazil, Hong Kong, South Korea, Hungary, and Poland. Dieter Grimm describes proportionality as Germany’s most significant constitutional export. Grimm, “The Basic Law at 60 – Identity and Change,” *German Law Journal* 11 (2010): 42. On the convergence of constitutional states on the doctrine of proportionality, see Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012), 145-210. On the historical origins of proportionality, see David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994), 307 ff. and especially Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism,” *Columbia Journal of Transnational Law* 47 (2008): 98 ff.

² *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877, para 125. See also *R v. Oakes*, [1986] 1 SCR 103; *Dasgenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835.

³ *R. v. Oakes*, 136-7; *S. v. Makwanyane and Another* (1995) 3 SA 391 (CC), para. 102; and UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, I.A.12.

⁴ See, for example, Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, 365; Kai Möller, “Balancing and the Structure of Constitutional Rights,” *International Journal of Constitutional Law* 5 (2007): 460; Mattias Kumm, “Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement,” in *Law, Rights, and Discourse: The Legal Philosophy of Robert Alexy*, ed. George Pavlakos (Oxford: Hart Publishing, 2007), 131-2;

rights afford their bearers.⁵ In failing to acknowledge that rights are trumps, proportionality collapses the distinction between rights and interest,⁶ principles and policies.⁷ This essay argues that each of these views is mistaken. Instead of standing in opposition to the doctrine of proportionality, Dworkin's model is an instance of it. Proportionality formulates conditions that specify what it means to take rights seriously when they conflict with other trumps. Further, when Dworkin engages with the moral complexities of these cases, he reaches for the very conditions that form the doctrine.

To my knowledge, Dworkin nowhere explicitly discusses the doctrine of proportionality. When he encounters limitation clauses in human rights documents, he dismisses them as the product of "political compromises" required to attract the assent of hesitant countries.⁸ Nor does he employ the distinctive terminology that typically attends the application of the doctrine.⁹ Nevertheless, I will argue that when one's focus shifts from Dworkin's words to his ideas, the antagonism between the rights as trumps model and the doctrine of proportionality dissolves.

Because my aim is to focus on the interconnection between the rights as trumps model and the doctrine of proportionality, I will largely abstract from two sets of interpretive controversies. The first concerns how best to understand the evolution and unity of Dworkin's theory (or theories) of rights.¹⁰ The second concerns how best to understand the justification of the doctrine of proportionality, the relationship between its conditions, and the significance of variations in the way that the doctrine is conceptualized and formulated in different constitutional jurisdictions.¹¹ My primary purpose in this paper is not to contribute directly to either of these debates, but to explore the ground on which they overlap.

⁵ Neomi Rao, "On the Use and Abuse of Dignity in Constitutional Law," *Columbia Journal of European Law* 14 (2008): 238; Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights," *International Journal of Constitutional Law* 7 (2009): 489; Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009), 110-14.

⁶ Alison L. Young, "Proportionality is Dead: Long Live Proportionality," in *Proportionality and the Rule of Law: Rights, Justification, and Reasoning*, ed. Grant Huscroft, Bradley W. Miller, Grégoire Webber (Cambridge: Cambridge University Press, 2014), 44 and 48.

⁷ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1999), 258-9.

⁸ Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2006), 49 [hereinafter *Is Democracy Possible Here?*].

⁹ Webber, *The Negotiable Constitution: On the Limitation of Rights*, 117.

¹⁰ For critical discussions of Dworkin's treatments of the nature and justification of rights, see, for example, Richard H. Pildes, "Dworkin's Two Conceptions of Rights," *Journal of Legal Studies* 29 (2000): 309-315 (distinguishing between rights as immunities that shield individuals from the preferences of the majority and rights as constraining the kind of reasons for which the majority may infringe individual interests); Paul Yowell, "Critical Examination of Dworkin's Theory of Rights," *American Journal of Jurisprudence* 52 (2007): 93-137 (emphasizing the incongruity between understanding rights as protecting shielded-interests and excluding external preferences); and Donald H. Regan, "Glosses on Dworkin: Rights, Principles, and Policies," *Michigan Law Review* 76 (1978): 1221 (identifying Dworkin's "essays on external preferences as interesting digressions from the main current of" his theory of rights). For an interpretation that seeks to introduce greater consistency into Dworkin's theorizing on rights by aligning it solely with the constraint against appeal to external preferences, see Jeremy Waldron, "Pildes on Dworkin's Theory of Rights," *Journal of Legal Studies* 29 (2000): 301-307.

¹¹ See, for example, Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge: Cambridge University Press, Studies in Constitutional Law Series, forthcoming), ch. 7.

I. Trumps and their Limits

Dworkin's rights as trumps model emerges from the simple idea that fundamental rights have an elevated status with respect to a range of collective goals asserted in the name of the public interest, including utility, popular preference, non-prohibitive cost, and administrative convenience. As Dworkin puts the point: "Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury on them."¹² Instead of conceiving of rights as the freedom that remains after the government has enacted collective goals, Dworkin invites his readers to understand rights as limiting their pursuit. To suppose otherwise, he insists, is to abandon the idea that the rights of individuals can constrain the conduct of their government.¹³

Once rights are understood in this way, the temptation to balance fundamental rights against collective goals must be resisted.¹⁴ For if the nature of a right is that it overrides a collective goal, then rights and goals do not compete with one another on a common plane. Instead, any instance of a fundamental right prevails over any instance of a collective goal. Even in cases in which the marginal infringement of a right would make a significant contribution to a collective goal, the enjoyment of the right may not be curtailed. Collective goals might violate rights, but there can be no conflict between them.

The claim that certain kinds of considerations are subordinate to rights does not amount to the claim that rights *as such* are absolute. Thus, Dworkin explains that limits on freedom demand "some special justification more powerful or compelling than the justification" that government must provide for "other political decisions".¹⁵ In *Taking Rights Seriously*, he delineates the grounds on which rights may be justifiably constrained:

I must not overstate the point. Someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right. He might say, for example, that although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe...What he cannot do is to say that Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed. He cannot say that the Government is entitled to act on no more than a judgment that its act is likely to produce, overall,

¹² *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), xi.

¹³ *Ibid.*, 194.

¹⁴ *Ibid.*, 197-8. See also Ronald Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990), 10 and Dworkin, *Is Democracy Possible Here?*, 27 ff.

¹⁵ *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2002), 127.

a benefit to the community. That admission would make his claim of a right pointless...¹⁶

For Dworkin, rights trump a range of subordinate considerations, but can nevertheless be constrained when a trump appears on the opposing side of the dispute. In these cases, a right might conflict with another right or with some goal of “special urgency.”¹⁷

Dworkin’s example of competing rights involves the law of defamation. In this domain, the fundamental right of free speech is limited in order to protect the “right of others not to have their reputations ruined by a careless statement.”¹⁸ Dworkin is adamant that defamation is not an isolated example: “The individual rights that our society acknowledges often conflict in this way, and when they do it is the job of government to discriminate.”¹⁹ Further, he indicates that, when considerations of this kind are in play, balancing is unobjectionable: “‘Balancing’ is appropriate when the Government must choose between competing claims of right.”²⁰

Dworkin’s also accepts that certain kinds of objectives are capable of justifying the limitation of a constitutional right. He emphasizes that the “ordinary routine goals of political administration” cannot justify limiting a right – otherwise the claim that rights are trumps would be meaningless.²¹ Dworkin characterizes an objective for which rights may be justifiably limited as a “compelling reason” that “is consistent with the suppositions on which the original right must be based.”²² He explains that these suppositions concern “the vague but powerful idea of human dignity” or “the more familiar idea of political equality.”²³ Thus, Dworkin’s claim is that the only kind of objective capable of justifying the limitation of a fundamental right is one that coheres to the general normative basis on which fundamental rights rest. His standard example of such an objective is an emergency:

A right may be regarded as a trump, moreover, even though it might not trump the general good in cases of emergency: when the competing interests are grave and urgent, as they might be when large numbers of lives or the survival of a state is in

¹⁶ *Taking Rights Seriously*, 191-2.

¹⁷ *Ibid.*, 92.

¹⁸ *Ibid.*, 193.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 199. See also Dworkin, *Is Democracy Possible Here?*, 27 (rejecting notions of balancing that subject moral principles to a cost-benefit analysis appropriate for considering questions of policy).

²¹ *Taking Rights Seriously*, 92.

²² *Ibid.*, 200. For helpful discussion of this passage, see François du Bois, “Rights Trumped? Balancing in Constitutional Adjudication,” *Acta Juridica* (2004): 160-1.

²³ *Taking Rights Seriously*, 198.

question. Then, we might say, the trump gets trumped not by an ordinary justification but by a higher trump.²⁴

From the standpoint of the rights as trumps model, rights stand in different kinds of relations towards different kinds of objectives. Rights trump any objective that is extraneous to the moral supposition on which they rest. In contrast, any objective that reflects the underlying basis of rights is itself a trump. Whereas rights limit the former kind of objective, they may be limited by the latter.

A parallel distinction emerges from the threshold condition that precedes the application of the doctrine of proportionality. Consider the approach of the Supreme Court of Canada. The limitation clause in the “*Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²⁵ Chief Justice Dickson interpreted this provision to indicate that the “underlying values of a free and democratic society”²⁶ have a “dual function”.²⁷ As he put the point in *R. v. Oakes*, the seminal Canadian case on the limitation of constitutional rights:

The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.²⁸

For Chief Justice Dickson, the underlying values and principles of a free and democratic society ground all constitutional rights and all justified limitations.²⁹ Fidelity to these constitutional values requires government to fulfill constitutional rights or to justify their limitation by appealing to their underlying values. Once a court determines that a law infringes a constitutional right, if government seeks to uphold the law’s validity, it bears the onus of justifying the infringement by demonstrating that the law furthers an objective that coheres to these values. Such objectives include, *inter alia*, “public safety, order, health, or morals or the fundamental rights and freedoms

²⁴ *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 473. See also *Sovereign Virtue: The Theory and Practice of Equality*, 127 and *Is Democracy Possible Here*, 50.

²⁵ *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 1.

²⁶ *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038, 1056.

²⁷ *R v. Keegstra*, [1990] 3 SCR 697, 736.

²⁸ *R. v. Oakes*, 136.

²⁹ *Ibid.* See also *Canada (Human Rights Commission) v. Taylor* [1990] 3 SCR 892, 916: “What is of utmost importance is a recognition that s. 1 both guarantees and limits Charter rights and freedoms by reference to principles fundamental in a free and democratic society.”

of others”.³⁰ Alternately, objectives that are “trivial or discordant with the principles of a free and democratic society” are incapable of justifying the limitation of a constitutional right.³¹ The court has held that such objectives include utility, non-prohibitive cost, and administrative convenience – the same collective goals that Dworkin’s regards as subordinate to rights.³²

The threshold condition for applying the doctrine of proportionality echoes the structure of the rights as trumps model. The shared claim is not that rights typically outweigh objectives that do not cohere to the suppositions that underlie rights, but that such objectives are incapable of justifying the infringement of a right. The doctrine of proportionality applies to cases in which a right is supposedly confronted by a competing instance of its underlying basis. To put the point in Dworkin’s terms, proportionality applies to cases in which government alleges that a right conflicts with another trump.

II. Clashing Trumps

Critics of proportionality who wish to recruit Dworkin to their cause sometimes note that he neither endorses “the principle of proportionality or balancing-talk as an inherent part of the account of rights.”³³ We saw in the prior section that Dworkin accepts that balancing is appropriate for cases involving competing trumps.³⁴ This section argues that when Dworkin engages with the moral complexities of these cases, he invokes the very conditions that comprise the doctrine.

The doctrine of proportionality consists of three conditions that government must satisfy to justify the infringement of a constitutional right. The first and second of these conditions – rational connection and minimal impairment – scrutinize the government’s claim that a right conflicts with another trump. The third – proportionality *stricto sensu* – concerns the duty of government in cases in which trumps conflict.

To satisfy the rational connection requirement, the government must establish that the rights-infringing means that the law employs advance the law’s objective. If the government fails to satisfy this condition, the impugned law cannot be justified because it limits a right for the sake of realizing an objective that the infringement does not advance. In such cases, the justification for limiting the constitutional right fails because no matter how integral the objective is to fulfilling

³⁰ R. v. *Big M Drug Mart Ltd.*, [1985] 1 SCR 295, para. 95. For a similar list of objectives, see the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.

³¹ R. v. *Oakes*, 138-9. In Germany, the threshold condition is weaker: a lawful objective can, in principle, justify the infringement of a constitutional right. This means that rights may not be limited for the sake of objectives that are *discordant* with the principles of a free and democratic society, but *trivial* objectives may advance into the proportionality analysis. From a Dworkinian standpoint, the problem with the German approach is that it does not exclude the possibility that rights will be subject to balancing against the considerations that they trump. On the German approach, see Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence,” *University of Toronto Law Journal* 57 (2007): 388-9.

³² See, for example, *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177, para. 70.

³³ Webber, *The Negotiable Constitution: On the Limitation of Rights*, 117.

³⁴ See note 17. On the compatibility of trumps and balancing, see Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012), 27.

the moral suppositions underlying rights, the objective is not advanced by the means that the law employs. Thus, to the extent that the right is infringed, the infringement is gratuitous. Dworkin does not use the term *rational connection*, but he repeatedly invokes this requirement. For example, in *Life's Dominion* he rejects the argument that the state should ban abortion on the grounds that

a society in which abortion is tolerated is one that holds human life cheap, and that in that kind of society ordinary people are more likely to be assaulted and killed. Obviously, it is a legitimate goal of society to protect people from murderous attack. But this argument is still unsatisfactory, because a state needs a *compelling* reason to justify banning abortion and therefore strong evidence that the ban is necessary. There is no evidence beyond the barest speculation that allowing the abortion of nonviable fetuses generates a culture in which people take a more callous attitude toward the slaughter of children or adults. Abortion is, in effect, freely permitted in many European countries in the first trimester of pregnancy, and these are much less violent societies than many American communities are now or were when abortion was still mostly forbidden.³⁵

Dworkin's point is that even if the state invokes an appropriate objective for limiting a right, so long as the connection between the limitation and the realization of the objective is speculative, the objective fails to justify the limitation. A right is not taken seriously if it is limited for the sake of a trump that is not advanced by the limitation. As Dworkin puts the point in *Taking Rights Seriously*, if we allow rights to be constrained on the basis of "speculation" or "vague assumptions" concerning their relation to some compelling objective, then "we have annihilated rights."³⁶

The satisfaction of the rational connection condition is not sufficient to justify the limitation of a constitutional right. Even when the rights-infringement advances the law's objective, it remains possible that the objective could be achieved through means that are less injurious of the right. The minimal impairment requires government to pursue the realization of its objective through means that infringe the right to the least extent. The failure to satisfy the minimal impairment requirement indicates that the conflict between the right and the countervailing objective has been overstated. If the objective could be achieved while infringing the right to a lesser extent, then a more severe infringement cannot be justified. In *Freedom's Law*, Dworkin invokes the minimal impairment requirement in a discussion of free speech. He suggests that if it was true that "some forms of pornography" posed a "clear and present danger" to the safety of women, censorship of those forms would be justified "unless less stringent methods of

³⁵ *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf: 1993), 115. See also *Is Democracy Possible Here?*, 50 (noting that the American "policy of imprisonment without charge or trial in Guantánamo" cannot be justified because it violates rights in a manner not "well calculated to end or even significantly reduce" the danger of terrorist attacks against the United States).

³⁶ *Taking Rights Seriously*, 195-6.

control, such as restricting pornography's audience, would be feasible, appropriate, and effective."³⁷

The satisfaction of the minimal impairment requirement establishes that a right conflicts with another trump. This means that it is not possible to fully realize one of the trumps without diminishing the other. If trumps can clash, a difficult question emerges: What is the duty of government with respect to conflicting trumps? In *Taking Rights Seriously*, Dworkin seems to reject the question when he suggests that, in cases of conflict, "Government can do nothing but estimate the merits of competing claims, and act on its estimate."³⁸ This statement might suggest that no moral standard exists for assessing government action (or inaction) in cases in which trumps conflict. In the absence of such a standard, when trumps conflict government can do no wrong. However, this cannot be Dworkin's view. For, a few pages earlier, after acknowledging that the "individual rights that our society acknowledges often conflict," Dworkin immediately suggests that when government is confronted by clashing trumps, it must make "the right choice" by upholding the "more important of the two."³⁹ Thus, Dworkin is committed to the view that there is a standard by which the rightfulness of government conduct with respect to conflicting trumps can be assessed. So, what is that standard?

Dworkin's model provides an answer to this question. Recall that, on his view, all trumps – that is, all fundamental rights and all admissible bases of limitation – are instances of the state's overarching duty to protect human dignity and political equality.⁴⁰ Thus, these principles offer a common basis for considering the extent to which a right is infringed and the significance of the opposing trump.⁴¹ Dworkin's model dovetails with proportionality *stricto sensu*, the final stage of the proportionality analysis. This term was coined by the German administrative law scholar Rupperecht von Krauss, who conceived of it in terms of "relating two or more quantities that can be set against a common yardstick".⁴² The right and the competing objective can be conceived of as quantities because each can be fulfilled to varying extents. The infringement of a right can be slight or severe, as can the extent to which a limitation furthers a countervailing objective. The yardstick against which these quantities can be set is the moral suppositions common to each.

³⁷ *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), 219. For a similar example in the free speech context, see *Taking Rights Seriously*, 204 (arguing that the government "may stop a man from exercising his right to speak when there is a clear and substantial risk that his speech will do great damage to the person or property of others, and no other means of preventing this are at hand, as in the case of the man shouting 'Fire!' in a theater.").

³⁸ *Taking Rights Seriously*, 199.

³⁹ *Ibid.*, 194.

⁴⁰ *Ibid.*, 198. On dignity and equality as unifying all political rights, see *Justice for Hedgehogs*, 330.

⁴¹ On the applicability of quantitative considerations to conflicts between trumps, see Jeremy Waldron, "Fake Incommensurability: A Response to Professor Schauer," *Hastings Law Journal* 45 (1994): 816-7: "If diamonds are trumps, even the two of diamonds wins over the ace of spades. But the trumping model does not exclude quantitative considerations altogether. It suggests... that there may be additional choices to be made, and indeed weighing and balancing to be done, among the trumps themselves: If diamonds are trumps then I can over-trump your two of diamonds with the three of diamonds."

⁴² Rupperecht von Krauss, *Der Grundsatz der Verhältnismässigkeit in seiner Bedeutung für die Notwendigkeit des Mittels in Verwaltungsrecht* (1955), 14.

Proportionality *stricto sensu* asks whether the limitation furthers the realization of the moral suppositions that underlie the competing trumps.

Dworkin seems to invoke the proportionality *stricto sensu* condition when, in a discussion of the conflict between the government's duty to protect human rights and its duty to protect inhabitants from terrorism, he adverts to the wrongfulness of supposing "that any act that improves our own security, no matter how marginally, is for that reason justified."⁴³ Dworkin responds by, on the one hand, noting how practices like torture and preventative detention constitute staggeringly severe infringements of human rights, and noting, on the other, that "the emergency is not grave enough to justify" these practices.⁴⁴ While security is the kind of objective for which rights may be justifiably infringed, the suppositions that underlie rights are not a by grievously infringing rights for modest gains in security.⁴⁵

In responding to the moral complexities of cases in which rights are alleged to conflict with other trumps, Dworkin appeals to the conditions that precede and comprise the doctrine of proportionality.⁴⁶ Further, Dworkin affirms the condition that applies to each of the others: "government should bear the onus of demonstrating that *any* interference with *any* part of the fundamental liberties is really necessary to secure some essential goal."⁴⁷ The doctrine of proportionality takes the various conditions that are scattered throughout Dworkin's corpus and consolidates them into a sequence of conditions for identifying cases of constitutional conflict and determining the duty of government with respect to them. The result is that the rights as trumps model coheres with the doctrine of proportionality, but proportionality offers doctrinal guidance that the model lacks.

⁴³ *Is Democracy Possible Here?*, 50.

⁴⁴ *Ibid.*, 26.

⁴⁵ For an illustration of Dworkin's point, see HCJ 2056/04 *Beit Sourik Village Council v. Israel* [2004] IsrSC 58(5) 807. When the Israeli government planned to build a separation fence to prevent terrorist attacks, West Bank residents brought a complaint to the Israeli Supreme Court alleging that the separation fence – much of which was built on West Bank land – posed a severe infringement of their rights, including their rights to property, freedom of movement, and freedom of occupation. Applying the proportionality doctrine, the Court determined that the government acted pursuant to an appropriate objective (security), that a rational connection obtained between the means (the building of the separation fence) and the objective, and that there were no alternative means that realized the same degree of security while impairing the rights of West Bank residents to a lesser extent. Nevertheless, the Court held that the government had not satisfied the proportionality *stricto sensu* requirement because, as Justice Barak later put it, an alternative route was available that 'provided slightly less security and much more protection of human rights.' Barak, "Proportional Effect: The Israeli Experience," *University of Toronto Law Journal* 57 (2007): 376.

⁴⁶ I do not want to push too far and say that *all* of Dworkin's discussions of rights and their limits adhere to the logic of the doctrine of proportionality. For example, as Dworkin's critics have noted, he sometimes exhibits an eagerness to avoid the complexities of constitutional conflicts by acknowledging the presence of a trump on one side of a dispute, while insisting that only considerations of popular preference lie on the other. See, for example, Rae Langton, "Whose Right? Dworkin, Women and the Pornographers," *Philosophy and Public Affairs* 19 (1990): 326-7 and Susan J. Brison, "The Autonomy Defense of Free Speech," *Ethics* 108 (1998): 325.

⁴⁷ *A Bill of Rights for Britain*, 11.

Conclusion

By considering the interconnection between Dworkin's theoretical exposition of rights and the doctrine of proportionality, two criticisms can be diffused. The first is that Dworkin's theory of rights lacks resources for thinking about cases in which rights conflict with other trumps.⁴⁸ The second is that by specifying the conditions under which rights can be justifiably infringed, the doctrine of proportionality fails to take rights seriously.⁴⁹ These criticisms are related. By working out what it means to take rights seriously, Dworkin offers a theoretical basis for the conditions that precede and comprise the doctrine of proportionality. In turn, the doctrine provides a way or ordering the piecemeal considerations to which Dworkin appeals into an ordered sequence of conditions. A government that takes rights seriously does not subordinate rights for the sake of furthering an objective that is extrinsic to their underlying suppositions. Nor does such a government limit rights gratuitously, whether by limiting rights for the sake of an objective that the limitation does not actually advance or by limiting a right to a greater extent than the objective demands. Finally, a government that takes rights seriously limits rights only in cases in which the limitation furthers the suppositions on which rights themselves rest. These conditions form an account of what it means to take rights seriously whenever their limitation is proposed.

⁴⁸ Lorenzo Zuca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007), xii: "Dworkin defines rights as trumps over utility, thereby inescapably tying together rights and utility. Such a conception, however, leaves no room for the possibility of conflicts that postulate the existence of two non-utilitarian arguments opposing each other."

⁴⁹ See, for example, Tsakyrakis, "Proportionality: An Assault on Human Rights," 489.