Balancing as a Legal Method: What it is and how (not) to do it

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I. The Scales of Justice

One of the few things that almost everyone knows about justice under law, is that it is commonly depicted as a blindfolded goddess holding a sword and a balance (or beam) scale. Lady Justice's blindfold stands as a symbol of law's impartiality, whereas her sword is meant to remind everyone that law's demands are not mere advice or polite requests; they are imposed by coercive force if need be. But what about the balance scale? The scale, as a mechanical device, has been used since ancient times to determine the weight of an object, mainly for trading purposes. In its earliest form, it consisted in a beam with a fulcrum at its centre, and two plates suspended at equal length from the fulcrum. The scale utilizes a simple law of physics that anyone who has carried home heavy bags from the supermarket knows: if objects of equal weight are suspended symmetrically from a beam, it will sit horizontally, achieving balance, or equilibrium. Using this simple law, scales were used to determine the relative weight of two objects. Later, with the introduction of standardized measures, they were used to determine the absolute weight of an object, by adding weights on the opposite plate until an equilibrium is reached. The equilibrium provides an accurate measurement of the object's weight.

One analysis of the symbolism of the scale, most commonly accepted, is that the judge will assess the arguments for and against the plaintiff's case, or in criminal law, the case of the prosecution. The party whose case is weightier, whose plate so to speak tilts *down*, will win.[1] The party whose plate tilts *up*, will lose. Part of the symbolism is to project the values of objectivity and determinacy. The thought is that, just like the weight of objects, the merits of one's case in court can be objectively determined. The symbolism seeks to import into law the type of confidence we have in the objectivity of physics. Not only is it a fact of the matter that

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[1] Wendy Sutherland-Smith, 'Justice Unmasked: A Semiotic Analysis of Justitia', *Semiotica* (2011), 213-222; Judith Resnik, Dennis Edward Curtis, *Representing Justice* (Yale University Press), 2011.

some objects weigh more heavily than others, but also it can be shown to everyone's satisfaction that this is the case. By analogising itself to a mechanical device, law aims to project the kind of objectivity and determinacy that physics has.

Lawyers know of course that the analogy with physics is in a crucial sense inapt. The truth of legal claims cannot be judged in the same way we judge the weight of objects. It is an interpretive process that seeks to assign meaning to legal materials and to offer a justification for why the judge should side with one party against the other. The law does not side with the litigant whose case is weightier in the same way that the laws of physics side with the heavier object in the scale. Lawyers and judges disagree about which party should win and the methods they employ are those of argumentation and persuasion, not of empirical demonstration. Yet the metaphor of balancing permeates legal thought and talk. The standard of proof in civil cases is that of the *balance* of probabilities. Rights in constitutional law must be *balanced* against public interest, or other rights. Almost every area of law can be described as a balancing act between various goals, values, aims or policies. And the scales of justice continue to decorate court rooms and law textbooks.

With few exceptions,[2] the balancing metaphor is rarely challenged in legal theory, and it is my aim here to make some trouble for it, at least in the way it is understood by most lawyers and judges. We know for sure that litigants' arguments are not *literally* weighed in court. So, there must be something else that is going on when the balancing metaphor is used. One question is whether there is any distinct idea that the metaphor picks out, or whether there is a diverse set of phenomena for which it stands as a proxy. But my real concern in this paper will be not with whether the metaphor is vacuous, but whether it is pernicious. I think that it is, and I am going to try to explain why. I shall, however, stop short of recommending that we abandon it altogether. My sense through talking to lawyers and judges for several years is that the balancing metaphor is too embedded in legal thought and talk to be debunked. There are too many scales hanging in courtrooms and printed in textbooks to be phased out. Instead, I want to propose an alternative understanding of the symbolism of the scales of justice, one that better fits the nature of legal rights.

More specifically, I shall present two different ways in which the balancing metaphor can be explicated. The first model is what I shall call the *physi*cs model. It assumes that the function of balancing is analogous to the function of measurement in physics, namely to quantify a property of an object, or an entity. The idea is that just like we can quantify mass, length, time or temperature, likewise we can quantify an aspect of the litigants' circumstances, such as the merits of their case, or the significance of their interests. The point of this quantification is comparative, to decide which of two measurements is better - longer, stronger, weightier in the case of physics, and something equivalent in the case of law.

[2] See Jurgen Habermas, *Between Facts and Norms* (Polity Press, 1996), p. 253-261; Charles Fried, 'Two Concepts of Interests, Some Reflections on the Supreme Court's Balancing Test', *Harvard Law Review* 755 (1963).

Someone's plate must tilt *down*, so to speak, and the point of balancing under the physics model is to decide which.

The second model, which I shall call, the *equilibrium* model is, by contrast, not about quantifying anything. It stands as a metaphor for the requirement to treat people as equals and avoid showing prejudice, bias or contempt to any litigant party. It is, in essence, an extension of Lady Justice's blindfold. This second model reverses the logic of the symbolism: the point is not to make the scale tip in favour of the more deserving party, but the opposite: to make sure it stands level, with the plates symmetrically suspended from the beam, showing equal regard to both sides. To balance, after all, means to assign *equal* weight to two entities. I am going to argue that the *physics* model offers a misleading account of legal rights, and that the *equilibrium* model offers an attractive alternative.[3]

II. The Physics Model

The physics model is predicated on some notion of quantification, on the need to compare quantifiable properties. At first glance, there are several cases in which the judge is required to quantify. Damages, for instance, is an obvious category. A court may have to measure how much of the plaintiff's property, or bodily integrity was affected by the defendant's actions. The size of the plaintiff's fence, or the range of motion of their arms, may be smaller than it was before the defendant's actions. This quantification takes the form of tracking qualities (such as length, or mass) of the damaged entity, measuring them, and then converting the measurement to monetary units for purposes of compensation. The physics model suggests, however, something stronger. It claims that quantifiable properties are constitutive of one's legal rights, that they necessarily determine the content of the litigant's right. The thought here is that legal reasoning must proceed directly *from* an assessment of quantifiable properties *to* a determination of rights and duties. It is analogous to the claim that the weight of the heavier object on the scale *makes it the case* that the balance tips. If the litigant is to be awarded X amount of damages, this is in virtue of a process of quantification that took place at an earlier stage.

The problem, however, is that even in the law of damages there is no direct inference from measurable harm to harm for which the defendant is legally responsible. The judge must also determine whether the defendant has caused the harm, whether there was fault, or whether a given harm (such as the so-called 'pure economic loss') is the type of harm that the law deems non-compensable. None of these determinations are the result of quantification. It is, of course, an empirical question how much damage my car has suffered in a collision that

[3] The Equilibrium Model can very easily be presented as an independent model, rather than an alternative conception of balancing. My point is that, since the very use of balancing in law is metaphorical, the metaphor can easily be deployed in favour of a model that rejects any form of quantification.

involved many cars, including yours. But the questions surrounding the quantification of damage are evaluative: whether for instance your actions were too remote from the damage to my car to count as having *caused* it, whether you showed *due* care while driving, whether my own negligence contributed to the collision, and so on and so forth. And with respect to these normative questions, it is inapposite to suggest that the answer lies in some process of quantification. We must take a stand, for instance, on whether – for the purposes of the law – the test of causation requires foreseeability as well as whether foreseeability should be understood in subjective terms (i.e., of the particular defendant), or in objective terms (i.e., of the average or reasonable person in the circumstances).

To be sure, at the end of this normative analysis the judge may quantify and decide that the defendant is only liable for 80% of the damage, say on the basis of the claimant's contributory negligence. But this percentage does not correspond to some quality (say mass, or length) whose quantity was determined at an earlier stage. It is not as if 80% of the damaged car had the defendant's DNA on it, and 20% had the plaintiff's DNA, so to speak. These percentages relate to apportioning legal responsibility for the damage between the parties. Though there is quantification in the *output* of the normative judgment about responsibility, there is no quantification in the *input*. It is not the case that the judge assumed the defendant to be 100% responsible, and then reduced that percentage, having measured the degree of the claimant's contributory negligence. The defendant may have issued the claimant a valid disclaimer, in which case their responsibility would have been set at 0%. Percentage setting, as a conclusory statement about legal responsibility, is the result of normative judgment.

The way we usually explain such statements is by employing the principle of *fairness*. It would be unfair if the culpable defendant was liable for the whole damage, given that the plaintiff was also in the wrong (say, by not wearing a seatbelt). But it would also be unfair if they were to split the cost of the damage, given that it was the plaintiff's culpable wrongdoing that initiated the harmful set of events. A 80%-20% split counts as a fair allocation of legal responsibility, particularly if it accords with past precedent. To be sure, the 80% is a percentage of a quantified damage, and in that sense, quantification does figure among the determinants of the claimant's rights. But the reduced percentage is the result, not of quantification, but of the application of the principle of fairness.

One might be tempted here to present the above line of reasoning as the outcome of balancing: given that both parties were at fault, but the defendant was more so than the plaintiff, the 80-20 split strikes a good balance between the two parties. But this gets the matter backwards: it is a good balance because it is fair; it is not fair because it is a good balance. Lawyers use routinely the term '*fair* balance' and this is no accident. It's fairness that calls the shots, not some quantified notion of balancing. The general point I think is this: quantifiable properties matter in law only derivatively from moral principles (such as fairness) that are applicable between the parties. Sometimes these principles tell us to ignore

whatever quantifiable properties were established by one of the parties. This is the case for instance with valid disclaimers of responsibility in tort law (e.g., "items left here at owner's risk'). Sometimes they tell us to take them into account, but to reduce *how* they matter, as in the case of contributory negligence. There is, in other words, no necessary co-relation between quantifiable properties and judgments about legal responsibility.

Now, there is one domain where the physics model might get more traction, and this is in matters of fact, as opposed to law. It is the role of trial courts to establish the facts of the case, and these are typically disputed between the parties. Perhaps this is all that the symbolism of the scales of justice aims to capture: the party whose story about the pertinent facts of the case is more plausible than the other side, should win. Consider the test of the balance of probabilities in civil law disputes. The claimant has the burden of proof, required to show that the facts or events upon which they rely are more likely than not (i.e., more than 50% probability) to have occurred. In a dispute about facts, one party's claim must prevail over the other, and the judge or jury must assess whether the burden of proof has been successfully carried out. In a criminal trial, the prosecution carries the burden to prove its case beyond reasonable doubt, usually taken notionally to be a probability greater than 90%, or 95%. Probabilities, one might say, are both quantifiable mathematically and determinative of the litigants' rights: they determine whether someone should be liable or whether someone should be found guilty.

The physics model, however, faces serious problems even in the domain of evidence. The first thing to observe is that the idea of a burden of proof is, at its core, a normative idea. The claimant decides to use collective resources (courts and bailiffs) in an attempt to have their demand enforced by state actors who serve in the public interest. It is only fair that the person who opts to use these collective resources should have the burden of showing that they do not do so capriciously but have a valid basis. Moreover, it is unfair to expect of the defendant to prove a negative, say that they did *not* lend the claimant any money, in so far as proving a negative is much more difficult than proving an affirmative. In general, the judicial process is not premised on an unqualified quest for truth and knowledge, but on the idea that courts must treat litigant parties fairly and use the collective resources that they command justly. No litigant has the moral right that no expenses be spared until all the factual truths about their claim comes to light.[4] Evidence rules, such as the burden of proof, are applications of the principle of fairness, which controls how mathematical probabilities are to be used within the judicial process.

The primacy of normative principles is further noticeable in the objections made against purely mathematical models of probability and the use of statistical evidence in court. If all that mattered for judgments of legal responsibility was the probability that a given fact

[4] If an unqualified search for truth was the aim of judicial fact-finding, then courts would fail badly at it. For such a criticism see Frederic Schauer, 'Our Informationally Disabled Courts', *Daedalus* Vol. 143, No. 3, The Invention of Courts (Summer 2014), pp. 105-114. We do better not to assign such an unqualified aim to the judicial process.

has occurred, then we would be unable to explain why statistical evidence about the defendant is deemed inadmissible, even when it carries the same, or higher degree of probability than individualized forms of evidence. In the example that has become central in the literature, we need to explain why the fact that a company owns 70% of the buses in a region is not an acceptable basis for finding it liable when we do not know which company owns the bus that injured the claimant. By contrast, we do accept the testimony of an eyewitness whose claim to have seen the company's bus is 70% reliable. Similarly, in criminal law we would not accept that someone be found guilty because they belong to a group of 100, 99 of whom we know were involved in criminal wrongdoing (though we don't know who). It is true, in this case, that for any given person in the group, there is a 99% probability that they are guilty. Yet this is deemed insufficient to pass the legal test of beyond reasonable doubt.

There is a wealth of literature seeking to defend the distinction between individualized and statistical forms of evidence and justify why it matters to law. [5] Most accounts seek to tease out the immorality in accepting statistical evidence about the defendant, though they vary significantly in how they unpack it. Some claim that the defendant ought not to be punished merely for being a member of a reference class.[6] Others put the complaint in terms of the autonomy[7] or individuality[8] of the defendant, arguing that it is a moral imperative to judge individuals only on the basis of their own conduct, not that of others. Other worries are put in terms of how statistical evidence increases the likelihood of punishing an innocent person, hence violating a central tenet of fair trial, the presumption of innocence. I mention only some of the ways that these concerns are expressed, simply to highlight the fact that the way in which probabilities, *qua* quantifiable properties, play out in the law of evidence is sensitive to the application of moral principles.[9] We see that even in the law of evidence, the idea that quantifiable properties (in this case mathematical probabilities) should determine directly judicial outcomes is far from true. When we say that the court ought to decide a civil dispute on the balance on probabilities, what we really mean is that the court ought to strike a *fair* balance regarding probabilities.

One might object at this stage that the difference between balancing and fair balancing is a mere difference in terminology. But this is far from the case. Striking a fair balance means that some probabilities (e.g., those based on statistical inferences) may have

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[5] For helpful overview see Mike Redmayne, "Exploring the Proof Paradoxes", *Legal Theory* (2008) 14: 281–309; Hock Lai Ho, *A Philosophy of Evidence Law: Justice in the Search of Truth*, Oxford University Press (2008), pp.135-43; David Enoch and Talia Fisher, "Sense and 'Sensitivity': Epistemic and Instrumental Approaches to Statistical Evidence", *Stanford Law Review*, (2015) 67:

[6] Colyvan, M., H. Regan, and S. Ferson, 2001, "Is it a Crime to Belong to a Reference Class?", *Journal of Political Philosophy*, 9: 168–181; *P. Tillers, If Wishes Were Horses: Discursive Comments on Attempts to Prevent Individuals from Being Unfairly Burdened by Their Reference Classes,4 LAW, PROBABILITY & RISK 33 (2005).*

[7] David T. Wasserman, The Morality of Statistical Proof and the Risk of Mistaken Liability, 13 CARDOZO L. REV. 935, 942-43 (1991); Amit Pundik, Statistical Evidence and Individual Litigants: A Reconsideration of Wasserman's Argument from Autonomy, 12 INT'L J. EVIDENCE & PROOF 303 (2008).

[8] Lea Brilmayer & Lewis Kornhauser, Review: Quantitative Methods and Legal Decisions, 46 U. CHI. L. REV. 116, 149 (1978)

[9] For a stronger argument that knowledge itself is qualified by moral requirements see Sarah Moss, Probabilistic Knowledge (OUP, 2018).

to be ignored altogether. On the physics model, by contrast they are factored in at the start. More specifically, the picture I think we should resist here, is the following two-stage approach: we begin, first, with quantification and, at a second stage, we cut and chop whatever measurement we have established, to achieve a fair outcome. This picture is misleading because often fairness requires that we do not take *any* measurement. The size of the claimant's loss is irrelevant if the defendant has issued a valid disclaimer of responsibility. On the two-stage approach, by contrast, we would begin with a quantification of the claimant's loss and then ask whether we should balance this against the fact that the defendant issued a valid disclaimer. At this stage, we either have to allow the quantification to bear on the outcome (say by deciding that responsibility be shared), or to discount it altogether. If we do the former, we would be committing a moral mistake, since it is unfair to let the defendant bear *any* of the cost given the valid disclaimer of responsibility. If we do the latter, we do not actually take quantification to be relevant at all to the determination of legal rights and duties. This is because the size of the claimant's loss is legally irrelevant if the defendant validly shifted responsibility onto the claimant. The physics model is either mistaken (risking wrong outcomes), or an inaccurate description of legal reasoning.

I have so far explored the physics model of balancing with respect to damages and probabilities, but there is a different area on which a lot of the literature focuses and this the balancing of *interests*. Human beings have a diverse set of interests of wellbeing, ways in which their life can go better or worse. We have interests in bodily integrity, health, shelter, food, family life, socialising and many others. The idea that some of these interests are more significant than others makes intuitive sense. It is evident in our day-to-day life, when we must make choices about which interests to prioritize. We may pass on a job opportunity in another city, judging that the interest in advancing one's career is not as significant as the interest in avoiding commuting. From an individual perspective, we rank some interests higher than others all the time, in part because time and other resources are finite, and we cannot pursue all of them.

It is this individual perspective that the physics model extends to law. Often, people pursue conflicting interests. My interest in expressing blasphemous statements to humorous effect may conflict with your interest in not being offended in your religious belief. The law inevitably takes sides by choosing who prevails in a lawsuit. Sometimes, it does so at legislative level, by making blasphemy or disparaging a religion an offence. Legislators in these cases deem that the interest in religion ranks higher than the interest in expression. In countries where abstract individual rights are protected in a constitution, or in a binding international human rights treaty, and where courts have the power of judicial review, the question of how to rank interests is posed at the adjudicative level.

This notion of balancing is an inherently normative idea, since it begins with what is of value ethically speaking. And, just like the physics model, it assumes that there is a way to quantify the significance of the competing interests, and to allow minor or moderate

restrictions on one's legal rights, when gains to the wellbeing of others are substantial enough. This does not necessarily mean that the numbers of those whose interests are affected matter, as consequentialism holds. Let us suppose that encountering blasphemous speech has a mild impact on the interest one has in practicing their religion. Criminal prohibition of blasphemy, on the other hand, is a severe restriction of freedom of expression. If numbers count, one would find the prohibition proportionate when the blasphemers are few and the offended believers are millions. But if numbers do not count, one might find that the interest in avoiding blasphemous speech is not as significant as the interest in expressing religious satire without being imprisoned.

Assuming this welfarist account of rights, we might think of the wording of constitutional rights as a preliminary ordering of interests. With respect to so-called absolute constitutional rights, such as the right not to be tortured or enslaved, drafters did not consider that the interest in avoiding torture or slavery could ever be outweighed by other interests. But with respect to so-called *qualified* rights, they thought that the interest in free expression or privacy may well give way to more weighty interests, justifying restrictions to the corresponding constitutional right. And they delegated the task of weighing up competing interests to courts.

This is a familiar picture within constitutional theory with respect to rights whose limitations are subject to the principle of proportionality. In German law doctrine, the test of proportionality is said to have three prongs:

> (i) Is the impugned measure rationally connected to the pursuit of a legitimate aim (the '*suitability'* test)?
>
> (ii) Is the measure necessary for the pursuit of that aim (the '*necessity'* test)?
>
> (iii) Is the seriousness of the interference with the applicant's right proportionate to the benefits gained in pursuit of the legitimate aim in question ('proportionality in the *narrow sense'*, or '*balancing*')?

The balancing prong is supposed to capture the core of the constitutional function of proportionality. Here is how judge Barak, a former judge of the Israeli Supreme Court, describes this part of the test:

> The last test of proportionality is the "proportional result" or "proportionality *stricto sensu*" (*Verhaltnismassigkeit im engeren Sinne*)... [A]ccording to proportionality stricto sensu, in order to justify a limitation on a constitutional right, a proper relation ("proportional in the narrow sense of the term"), should exist between the benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose. This test requires a balancing of the benefits gained by the public and the harm caused to the constitutional right

> through the use of the means selected by law to obtain the proper purpose. Accordingly, this is a test balancing benefits and harm.[10]

Here, balancing is defined as a cost-benefit analysis, comparing the cost of infringing the claimant's right with the benefit gained for the public interest. Several objections have been raised against the suggestion that the adjudicative stage involves this balancing of interests of wellbeing. Some oppose the idea that balancing is rationally possible,[11] or at the very least that it is *always* possible, given that interests of wellbeing might be incommensurable.[12] Perhaps, for instance, there is no way to judge whether the interest in avoiding religious offence ranks higher than the interest in expressing satirical speech. Others worry that balancing is incompatible with the thesis that rights are deontological norms, which are defined in terms of resisting trade-offs with the common good.[13] On this deontological view, to have a right means to be able to exercise it even if the majority would be better off if one didn't.[14] The idea is that when we balance free speech against public interest, and allow the latter to restrict the former when it is significant enough, we simply seize to treat free speech as a right.

What are we to make of these familiar concerns? There is one assumption in these debates which strikes me as problematic, and which is often made even by those who oppose balancing. The assumption is that rights must have something to do with people's interests, with what is *good* about their life. It is informed by a teleological ethical outlook according to which the point of protecting these interests against harm is ultimately to allow individuals to lead a flourishing life. Particularly since the emergence of the human rights movement, the interest-based theory of rights has become dominant. Rights are said to correspond to interests of well-being, and this – in turn – has sparked an explosion of rights declarations, from the human right to health and education, to the human right to benefit from scientific progress. We have become uncritically accustomed to equating rights with interests of wellbeing, leaving aside what these interests entail for how we collectively should act, given that they compete for scarce resources and their pursuit imposes conflicting demands. The equation obscures a fundamental distinction between X being good for a person and a person having a right to X. It is good for my wellbeing that my business goes well, but I have no right that you do not open a competitive business next door and drive me bankrupt. Likewise, it is good for my wellbeing that I spend time in your beautiful garden, which you never use, but I have no right to trespass on your land.

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[10] Barak, A., (2012). *Proportionality,* Cambridge: Cambridge University Press, p. 340.
[11] Habermas, Ibid, p. 259.
[12] Endicott, T., (2014). Proportionality and Incommensurability. In: G. Huscroft, B. Miller, G. Webber, eds., *Proportionality and the Rule of Law*. Cambridge: Cambridge University Press.
[13] Letsas, 'Rescuing Proportionality', in Renzo et als (eds), Philosophical Foundations of Human Rights (OUP).
[14] Ronald Dworkin, 'Is there a Right to Pornography?'

These examples can be taken to illustrate that having an interest to X is not sufficient to guarantee a right to X, because it can be outweighed by other interests. It might be suggested, for instance, that there is a public interest in having a competitive market and it outweighs any given individual's interest in avoiding competition harm. Similarly, it might be suggested that there is a public interest in having a property system whereby people control the use of their belongings, which outweighs any given individual's interest in trespassing. These suggestions are often cast it terms of balancing: one's right to liberty or economic activity must be balanced against the economic wellbeing of the country and the rights of others to property. What then is wrong with this, interest-based, conception of balancing?

The problem I think is of the same nature as the one we identified earlier with respect to damages, and probabilities. The explanation for why you have a right to open a business next to mine and drive me to bankruptcy is not that the interest in having a competitive economy is more important than the interest in avoiding economic harm. Competition harm is morally benign because it is the result of a *fair* competition and the point of anti-trust legislation is precisely to ensure fairness. If competition is unfair, then any loss would be wrongful. In general, the extent to which people may pursue their own plans, and exclude from their consideration the cost in imposes on others, depends on a complex account of the domains in which it is permissible to have competition, and what a *just* and *fair* allocation of resources within these domains requires. The moral principles of equality and fairness control both which interests matter and how they matter. Justice condemns, for example, instituting an exclusive system of competition for healthcare resources, leaving those who lose out without any healthcare provision.

We must, once more, resist as misleading a two-stage approach, whereby we begin with an assessment of human interests and then, when they conflict, we adjust them accordingly, based on comparative weight. Often, very weighty interests are morally irrelevant because it would be unjust or unfair to take them into account. A person may be devastated when their religious or political ideas are ridiculed by others, or are marginalized. Yet they have no right to get the government to control, in their favour, which ideas gain currency in society. Such control would be unfair and in breach of the government's duty to treat people as equal agents, bearing individual responsibility to decide with ideas to endorse. The correct normative explanation for why there is no such right consists in invoking moral notions such as fairness, equality and justice rather than notions of wellbeing. The explanation is not, in other words, that my interest in ridiculing a person's religion is more weighty than their interest in being religious. By locating the illegitimacy of an interference with individual liberty on the impact it has on the right-holder's interests, interest-based theories face the same problem as the physics model. They are either pernicious, allowing interests to count when they shouldn't, or they are inaccurate, providing the wrong explanation for why a right must prevail.

The main objection I am raising here against the idea of balancing of interests is not that assessment of their comparative significance is not subject to any rational standards, or that it does not possess as much justificatory force as appeals to deontological notions such as justice and fairness.[15] From an individual perspective, it is perfectly rational to weigh up competing interests and to justify one's actions accordingly. The objection is that this perspective does not apply when we seek to justify legal rights and political actions. There, the normative significance of interests is wholly derivative from the applications of moral principles such as justice, fairness and equality. The application of these principles does not track any prior quantification, or ranking of these interests in terms of their significance or their contribution to wellbeing.

In sum, the physics model of balancing fails to deliver what it promises. By taking quantification as the baseline for determining legal rights and duties, it puts the cart before the horse. Balancing, understood as quantifying properties (be they damages, probabilities or welfare) is either pernicious, leading to the wrong legal outcome, or it is inaccurate, failing to capture the proper normative explanation for the outcome.

III. The Equilibrium Model

Why has the balancing metaphor captivated the minds of lawyers and judges? It might be no accident that Lady Justice's scales are sometimes portrayed level and sometimes tipped.[16] The physics model, according to which the function of the scale is to determine rights through quantification, represents a powerful tradition in moral philosophy, according to which the point of morality is either to promote the good (teleology), or to maximize it (utilitarianism). The scales will tip if either the significance, or the numbers of the affected interest (or both) are high enough. But a different tradition, associated with Kantian philosophy, takes moral notions such as right, justice and wrong to be defined independently of what is good about people's lives. Government behaves morally when it treats people as free and equal moral agents, respecting their personal responsibility for choosing their own plan of life, their own projects, relationships, hobbies, occupation and so on. It behaves immorally when it denies or unduly interfere with this responsibility. In short, a state violation of individual rights is always an affront to the principle of equal respect, and the function of adjudication is to restore the appropriate balance, or equilibrium in the relation between the individual and the political community.

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[15] This is Habermas's concern, ibid, p. 259: "Because norms and principles, in virtue of their deontological character, can claim to be universally binding and not just specially preferred, they possess a greater justificatory force than values. Values must be brought into a transitive order with other values from case to case. Because there are no rational standards for this, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies."

[16] See Resnik and Curtis, ibid, p. 203.

A paradigm case of a state breaching its duty of equal respect is censorship. By banning a form of expression for the reason that the ideas it expresses are offensive or dangerous, the government treats both the speaker and potential listeners with contempt. It also treats them as less than equals because it sides with those who agree that the ideas are offensive or dangerous and against those who disagree. Crucially, the explanation here is not that, by not being censored, the good of one's life is increased. If that were the explanation, then censorship would be justified when it serves the interests of the speaker. In a close-knit religious community, for example, an atheist would have no interest in expressing blasphemous remarks: doing so would gratuitously offend others, rupture social bonds and lead to alienation. According to the Kantian tradition, the wrong of censorship is not explained in terms of the interests of wellbeing that it harms, but in terms of the duty to treat others as free and equal moral agents. The emphasis on the duty to treat others as equals is how we can understand the symbolism of a perfectly balanced scale: by respecting free expression, the law sides neither with the blasphemer, nor with the religious believer. It avoids taking sides on what ideas of the good life people should hold, and it respects equally the responsibility of both parties to decide this for themselves.

The equilibrium model of balancing underpins a family of non-teleological theories about moral rights that are sometimes referred to as 'status-based' theories and sometimes as 'reason-blocking' theories.[17] Perhaps the best examples are T. M. Scanlon's early defense of free speech and Ronald Dworkin's idea of rights as trumps.

In his early view on free speech T.M. Scanlon drew a distinction between two different ways of explaining violations of the right to freedom of expression (Scanlon 1972). The distinction is between theories that assess the illegitimacy of a restriction and theories that assess the illegitimacy of the *reason* or *justification* for a restriction. The former theories look at the character of the acts which are restricted and whether the restriction harms important interests of wellbeing. The latter theories, by contrast, look at what a given restriction is trying to achieve. Consider bans on blasphemy. We can look at the harm done to the interest in blaspheming and then balance it against the harm blasphemous speech causes to the interests of those who practice the dominant religion. Alternatively, we can look at what the rationale or reason for such a ban might be. Suppose the reason is best understood as a way to curb the spread of heretical views. Such reason is illegitimate because it is premised on the idea that people should be prevented from having false beliefs about religion. As Scanlon explains, the government cannot act on this reason compatibly with treating individuals as free and autonomous agents. The justification imputed to the ban violates the liberal principle that government has a duty to treat individuals as having a particular *status*, namely being autonomous agents who are responsible to form their own beliefs about religious matters.

[17] Thomas Nagel, 'Personal Rights and Public Space';

The view that we should look at the legitimacy of the *reasons* for restricting liberty, rather than the legitimacy of the restriction itself, also underpins the very influential theory of constitutional rights put forward by Ronald Dworkin. In Dworkin's famous metaphor, rights are 'trump' cards held by individuals against the government, when its action is based on a category of reasons, particularly reasons that offend its duty of equal respect and concern. The point of constitutional rights is to block or exclude such reasons, in the way certain cards trump all others in familiar card games. His theory, initially developed in the context of the US Constitution, assigns to constitutional rights a robust role, and rules out the possibility of any balancing. The government's duty to treat individual with equal respect and concern is not to be balanced against other considerations. It is a necessary condition for the legitimacy of state coercion. What is absolute is not the significance of individual interests protected by rights, but the blocking of reasons or justifications that are incompatible with the coercive role of government.

The best illustration of Dworkin's reason-based approach is his account of abortion and euthanasia.[18] The traditional way to tackle these thorny moral issues is through the balancing of the interests involved: the interest of women in controlling their body, the interests of the unborn fetus, the interests of terminally-ill patients not to suffer, or the interests of vulnerable patients not to be put under pressure to end their lives. This interest-based analysis leads to intractable questions about whether fetuses have an interest in life and, if so, whether it can be balanced against the interest of women to control their own body. Similarly, it is not clear how to balance the interest of terminally ill patients not to suffer a terrible death against the risk that legalization of euthanasia poses to vulnerable patients (Dorf 2008). Dworkin's approach, by contrast, is radically different, eschewing discussion of interests. His starting point is that the value of human life is not derivative from the interest of a person to be alive but is instead detached, having intrinsic value, or sanctity. We can understand for instance the statement that something of value is lost, even when it is in the best interest of a person in a permanent vegetative state to have their life ended; the value of life is not derivative from the interest in being alive. Building on this premise, Dworkin argues that decisions about when life begins and ends involve deeply ethical questions about the sanctity of life, similar to questions raised by religion. It is therefore impermissible for the government to coerce individuals, through a legal ban, into accepting its own view about truth and falsity with respect to such ethical decsision. His defense of the right to abortion and euthanasia is premised, not on the interests of women and terminally ill patients, but on what counts as an illegitimate justification on the part of the government when regulating coercively individual choices. The defense of these constitutional rights does not presuppose, nor depends on, the balancing of any interests of well-being.

[18] (Dworkin 1994).

Many, no doubt, will be unconvinced by the suggestion that the function of courts is not to take sides between competing claims, but to restore a position of moral equality. The law, they might object, does take sides. It sides with the blasphemer if the religious believer loses the case in court, and it sides with the religious believer in the opposite case. It is true that court cases often are presented as a conflict between two competing rights. In the context of the European Convention on Human Rights (ECHR), for example, the Strasbourg Court constructs cases of blasphemy or speech that disparages religion as a conflict between freedom of expression under article 10 ECHR, and freedom of religion under article 9 ECHR.[19] This judicial construction presupposes the physics model of balancing: it equates rights with interests and assumes that the judicial outcome is determined by *ad hoc* balancing: is the interest in expressing a blasphemous statement in the circumstances more important than the interest not to be offended in one's religious beliefs?

How problematic this judicial construction is, however, shows in the results it produces. In the much-criticised *I. A. v Turkey*, the Strasbourg Court held that a small monetary fine was a proportionate restriction to freedom of expression given the significant amount of religious offence that it causes. The Court was indeed correct that, in the circumstances, the setback to interests imposed by a £10 fine pales in comparison with the harm caused by religious offence. Perhaps in a different case, where the sanction was imprisonment and the blasphemous expression caused mild offence, the result would have been different. But is *ad hoc* balancing of interests the right way to determine what the law is on this case? The Court bypassed the prior normative issue of asking whether it is permissible for the government to restrict speech on the basis that some listeners deem it offensive. This is not a question about the interests of the affected parties, but about the kinds of reasons that government may rely upon when deploying coercive force. If censorship on the basis of content interferes with the government's duty to treat people as free and equals, then it is wrongful for *that* reason, not for the impact it has on the interests of the speakers.

I do not think, however, that cases like *I. A. v Turkey* are the norm. Consider for instance the case of *Modinos v Cyprus* (1993), which concerned whether keeping on the statute books a criminal ban on homosexual acts was a violation of the right to private life. Since the Court's finding in *Dudgeon* (1981) and *Norris* (1988) that such bans violate the ECHR, the official policy of the Attorney-General of Cyprus was not to prosecute, and the ban had effectively become a dead letter. Still, the applicant claimed that the very existence of the criminal provision amounted to a violation of human rights. Here, the Court could have adopted the physics model, by balancing *ad hoc* how much of the applicant's interests were affected by the unenforced provision, compared to the effect that the provision had on the public morals of the country. The Strasbourg Court's reasoning could have proceeded in a

[19] See for instance *Otto-Preminger Institute v. Austria* (1995) 19 EHRR 34; *I.A. v. Turkey* (2007) 45 EHRR 967; E.S. v Austria (2019).

similar fashion to that in *I. A. v Turkey*. It could have found that the public morals of the majority were served significantly by a symbolic condemnation of homosexual behaviour, even if it is not criminally enforced, whereas the interference with the applicant's interest in sexual orientation was minor, given the very low probability of criminal enforcement. Instead, however, the Court was quick to find a violation of the applicant's right to private life, stressing that "the existence of the prohibition continuously and directly affects the applicant's private life".[20] A state that, in the name of public morals, keeps a criminal ban on homosexual acts on the book treats the people who have this sexual orientation or identity with contempt, even when the ban is not enforced. The *Modinos* judgement restored the normative balance between the applicant and the public authorities; the scales of justice stood level again.

So my sense is that we cannot go very far trying to use particular cases as argumentative support for or against the physics model. Judicial dicta can be found either way and the main question is which model provides the best explanation for what we take to be a justified judicial outcome. The physics model, which is based on interest balancing, either produces the wrong result, favouring the result in *I. A. v Turkey*, or fails to explain normatively why the applicant in *Modinos* had the right to win.

In his influential defense of balancing as a constitutional method, Robert Alexy insists that interference with fundamental rights comes in degrees and that the point of balancing is to optimize, not the serving of interests, but the applicable legal principles.[21] He assumes that principles compete with one another, and that the court must assess, in a given case, how to optimize their application. He gives the example of tobacco health warnings and notes that we can quantify both the degree of interference with the tobacco industry, and the degree of the harm smoking causes to one's health. Health warnings on cigarette packs constitute only a minor interference with the smoker's and tobacco company's liberty, compared to an outright ban, whereas the risk smoking poses to health is severe. By upholding the health warning, the court optimizes the applicable legal principles. Following a related judgment of the German Constitutional Court, Alexy finds this judicial outcome 'obvious'.

Alexy's approach displays all the problematic features of the physics model. It begins with quantifying goods and harms and moves on to compare the measurements. At no point does it inquire into whether the reason for which the government seeks to impose advertising restrictions is permissible. Suppose, for example, that the government imposed mental health warnings on promotional materials of a political party, based on solid research showing that those who join the party are twice as likely to develop depression compared the rest of the population. Alexy's balancing method would here uphold the restriction. But such result would not only be far from obvious but also deeply problematic. Sending the message to

[20] Ibid., para 24

[21] Robert Alexy, 'Constitutional Rights, Balancing and Rationality', Ratio Juris (2003), p. 131; Alexy, 'Balancing, Constitutional Review and Representation', *International Journal of Constitutional Law* (2005), 582-591.

members of a political party that their ideas lead to depression is not something that the government may permissibly do. And it seems irrelevant that the interference with the freedom of the political party to promote their materials is minor.

Alexy might respond that he is not committed to this problematic outcome and seek to distinguish this case from the tobacco case. He might argue, for instance, that the difference lies in the fact that freedom of political speech is more weighty than freedom to engage in economic activity, and hence a higher threshold of harm is required in order to interfere with it. The right to political participation, as a legal principle, must also be optimized. But this response will not do. Government interference with freedom of political speech for other reasons, even less pressing ones, is perfectly legitimate. The government, for example, may impose a limit to how many promotional materials political parties print, for environmental reasons. The main point is this: we cannot assign any weight to specific interferences with liberty unless we ask whether the reason for which it is undertaken complies with the government's duty to treat people as equals.

Contrast how the equilibrium model would explain the outcome. The imposition of health warnings on cigarettes is legitimate in so far as it is informed by an egalitarian justification. The explanation here would be normatively rich, looking at a number of pertinent considerations. Smoking causes serious harm for which people require extensive and costly medical care, typically provided by the state. It is true that no-one has the right to impose on other the cost of their lifestyle choices. But it would be inhumane to let seriously ill people without medical care, even if they are responsible for their ill-health. It is therefore *fair* that the government should seek to minimize the cost on public health services, by warning people of the effects of smoking and, consequently the cost they impose on others. This is only a brief attempt at justifying the restriction under a reason-blocking theory, but the core idea is that the rationale for the health warning can be shown to be non-paternalistic. It can be grounded on assumptions about what a fair allocation of healthcare resources requires.

But perhaps Alexy might not disagree with any of the above reasoning. He might simply insist that the function of all of this is to optimize the relevant legal principles. I find, however, that we must not try to describe the egalitarian dimension of rights in terms of balancing and optimization of principles. It will never fit and it will only create confusion. All the normative work is done by asking what kinds of reasons are permissible grounds for the government to act, in the light of its fundamental duty to treat people as free and equal moral agents. It is done by elaborate conceptions of what fairness, justice and equality require, not by grading interferences into 'light', 'moderate' and 'serious'. In so far as such grading takes place, it is the conclusion, not the premise, of the process of legal argumentation.

IV. Conclusion

The further away the fulcrum is from one side of the beam, the less weight it needs to counterbalance the other side. The law of the lever, as it is called, offers us a phenomenal mechanical advantage, allowing us to lift heavy loads with minimal human effort. But the law as a political institution cannot allow any advantages to be given within the judicial process. The fulcrum must be right in the middle, equidistant between the two plates, and the scale must stand level. I have sought to argue here that the point of balancing as a legal method is not to quantify anything, as the physics model suggests. Quantification is never the normative basis for a legal conclusion about which party has the right to win. We do better to think of the legal metaphor of balancing as the quest for an equilibrium. The government often acts on reasons that violate its duties of fairness and equality. Courts must examine the considerations that might be adduced to justify a given restriction and judge whether they are compatible with these duties. When they are not, they must find for the victim and restore a relation of moral equality, or balance, between the litigant parties.