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Proportionality, Rationality and Review

PAUL CRAIG*

This article responds to Mike Taggart’s bifurcation thesis and his argument that proportionality should be reserved for rights-based cases, with low intensity rationality review being used for other types of case. I argue to the contrary that proportionality should be a general principle of judicial review that can be used both in cases concerned with rights and in non-rights based cases, albeit with varying intensity of review. The article begins by addressing the advantages of proportionality as a head of review. The argument then shifts to consideration of Mike Taggart’s preferred position of proportionality for rights-based cases combined with low intensity review for other administrative law challenges. It is argued that this position does not cohere with positive law, and that it is not desirable in normative terms. The remainder of the article is premised on the assumption that rationality is accorded a broader meaning. I address various objections to proportionality becoming a general head of review, and contend that these arguments are mistaken or misplaced.

I Introduction

The debate concerning rationality and proportionality as tests for judicial review has taken on new vigour.¹ Mike Taggart has argued in favour of the retention of rationality review alongside proportionality.² So too have Tom Hickman and Jeff King, as evidenced by their contributions to this

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volume\textsuperscript{3} and by earlier work,\textsuperscript{4} while Dean Knight has expressed scepticism about proportionality.\textsuperscript{5} They have joined others such as Philip Sales\textsuperscript{6} and Mark Elliott\textsuperscript{7} who have advanced a similar argument, although there are differences of view among those who subscribe to this general line of thought. David Mullan argues, however, that proportionality should inform rationality review.\textsuperscript{8} There are others, such as Murray Hunt and Philip Joseph, who contend that "bifurcation" should be resisted.\textsuperscript{9} I fall into this camp. This article will therefore defend the view that proportionality should become a general head of judicial review. The structure of the argument is as follows.

It will be argued in part II that proportionality can readily apply as a standard of review to all types of case, irrespective of whether they are concerned with rights or not. This will be exemplified by reference to European Union (EU) law, in which proportionality has fulfilled this role for nearly forty years. There will be a brief analysis of the positive law, followed by consideration of the normative foundation for proportionality review.

The focus in part III shifts to analysis of Mike Taggart’s preferred position of bifurcation. His position is premised on the application of proportionality to rights-based cases, with traditional Wednesbury rationality review\textsuperscript{10} applying outside this sphere, to what he classifies as cases concerned with “public wrongs”. It will be argued that this intellectual position is open to practical objection, and does not cohere with what the courts have actually been doing. It will also be contended that this view is undesirable in normative terms.

The remainder of the article addresses a different version of the bifurcation argument. This version is based on the assumption that proportionality review should be applicable in rights-based cases, with a broader form of


\textsuperscript{5} Dean Knight “Mapping the Rainbow of Review: Recognising Variable Intensity” [2010] NZ L Rev 393.


\textsuperscript{10} Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (CA).
rationality review applying outside this terrain. Advocates of this position maintain that even if rationality is accorded this broader meaning, it is nonetheless preferable to preserve bifurcation, because of what they perceive to be disadvantages attendant upon the application of proportionality in cases that are not concerned with rights. These arguments will be critically analysed in part IV of this article.

II Proportionality as a General Head of Review

There are varying dimensions to the debate concerning proportionality as a general head of review. It is therefore helpful to begin by recognising that proportionality can as a matter of positive law fulfil this function. This is best approached not in the abstract, but rather by consideration of a legal system such as EU law in which proportionality fulfils this role as a general head of review. There will be a brief overview of the positive law, followed by consideration of the normative foundation for proportionality operating as a general head of judicial review.

A Positive law

The Treaty establishing the European Community (the EC Treaty) did not contain an explicit, detailed set of principles against which to test the legality of Community or state action. It therefore largely fell to the European Court of Justice (ECJ) and the Court of First Instance (CFI) to fashion principles of administrative legality. In undertaking this task they reasoned partly from specific Treaty provisions which justified Community action only where it was “necessary” or “required” in order to reach a certain end. They also drew upon principles from national legal systems and fashioned them to suit the needs of the Community itself. The concept of proportionality was most fully developed within German law, in which it appeared initially to challenge policing measures that were excessive or unnecessary in relation to the objective being pursued.

Proportionality is now established as a general principle of Community law.¹¹ There was early reference to proportionality in the case law concerning

the European Coal and Steel Community (ECSC). The principle was, however, developed more fully after the decision in Internationale Handelsgesellschaft, where proportionality was used to challenge the system of deposits for import and export licences. While the action failed on the facts, the judgment nonetheless established proportionality as a ground of review. A version of the principle was also enshrined in art 5 of the EC Treaty as part of subsidiarity, and is now after ratification of the Lisbon Treaty to be found in art 5 of the Treaty on the Functioning of the European Union (TFEU).

The EU courts have been primarily responsible for determining the meaning of proportionality. The proportionality inquiry requires the relevant interests to be identified, with some ascription of value to those interests, since this is a condition precedent to any balancing operation. The courts will inquire whether the measure was suitable or appropriate to achieve the desired end. They will also examine whether it was necessary to achieve that objective, or whether this could have been attained by a less onerous method. There has been some uncertainty as to whether the third element, often referred to as proportionality stricto sensu, is also part of the Community test. The reality is that although the EU courts do not always make reference to this aspect of the proportionality inquiry, they will do so when the applicant presents arguments directed specifically to it.

It is moreover clear that proportionality is applied with varying degrees of intensity, ranging from a deferential approach to rigorous and searching examination of the justification for a measure which has been challenged.

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15 Craig EU Administrative Law, above n 11, at 670–672.
16 De Bürca, above n 11, at 111; Craig EU Administrative Law, above n 11, at 657.
Proportionality, Rationality and Review

Three broad types of case where challenges are made on grounds of proportionality can be distinguished: cases involving discretionary policy choices, rights, and penalties. The intensity of review differs in these types of case.

The most common case is where proportionality is used to challenge a discretionary policy choice made by the administration. The judiciary is cautious in this type of case. The administrative/political arm of government makes policy choices, and it is generally recognised that the courts should not overturn these merely because they believe that a different way of doing things would have been better. They should not substitute their judgment for that of the administration. It means that the courts apply the concept less intensively than in the other two categories of case, and will only overturn the policy choice if it is clearly or manifestly disproportionate. This is more especially so where the policy choice required the weighing of complex variables. The guiding principle is that this measure of review will be appropriate whenever the EU legislature exercises a broad discretion involving political, economic or social choices requiring it to make complex assessments.17 Since many Treaty articles will be of this nature, relatively low intensity review will be the norm.

A second category of case is concerned with rights, enshrined in the Treaties or EU legislation. The ECJ will construe limits to such rights strictly, with the consequence that there will be a searching inquiry into the suitability and necessity elements of proportionality.18 There are, however, also rights-based claims that feature as one ground of challenge to a measure passed pursuant to an EU regulatory policy. The judicial approach is rather more complex in such cases. The very denomination of certain interests as EU rights means that interference with those interests should be kept to a minimum; but the reality is that rights-based challenges often arise as part of a proportionality action directed against a measure where the EU is exercising discretionary power. In such cases the EU courts will apply


the test of manifest disproportionality to non-rights-based claims that the
discretionary policy measure was unsuited or unnecessary to achieve the
desired aim. The most common rights-based claim in such cases is that
property rights or the right to pursue a profession, trade or occupation has
been infringed. The EU courts have acknowledged such rights within the
legal order, but have made it clear that they are not absolute and should
be viewed in relation to their social function. The ECJ and CFI therefore
consider in such cases whether the restrictions imposed by the measure
correspond to objectives of general interest pursued by the Community and
whether they constitute a disproportionate and intolerable interference which
impairs the very substance of the rights guaranteed.19

The third broad category of case is where proportionality has been used
by applicants claiming that a penalty or other financial burden is excessive.
The EU courts have less reason for reticence in this type of case, primarily
because a penalty20 or financial burden21 can be struck down without thereby
undermining the entirety of the underlying policy. While the EU courts
review the proportionality of penalties with some rigour, they also apply
the principle so as to effectuate the aims of the relevant Treaty provisions
or legislation.22

Proportionality is therefore a general head of judicial review in EU law
that is applicable to test the legality of EU action, and of Member State
action when the latter falls within the remit of the Treaty. It is important
to stress that proportionality is not the sole or dominant precept of judicial

19 Case 265/87 Hermann Schräd er HS Krafftfutter GmbH & Co KG v Hau ptzollamt Gronau
Case C-200/96 Metronome Musik GmbH v Music Point Hokamp GmbH [1998] ECR
ECR II-125 at [74]-[75]; Case C-293/97 R v Secretary of State for the Environment,
Minister of Agriculture, Fisheries and Food, ex p Standley [1999] ECR I-2603 at [54];
Cases C-20/00 and 64/00 Booker Aquaculture Ltd v Scottish Ministers [2003] ECR
I-7411 at [68].

20 Case 181/84 R, ex p E D & F Man (Sugar) Ltd v Intervention Board for Agricultural
Produce [1985] ECR 2889; Case 240/78 Atalanta Amsterdam BV v Produktfirma voor
Vee en Vlees [1979] ECR 2137; Case 21/85 A Maas & Co NV v Bundesanstalt für

21 Case 114/76 Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & Co KG [1977] ECR
1211; Case 116/76 Granaria BV v Hoofdproduktfirma voor Akkerbouwprodukteten [1977]
ECR 1247; Cases 119/76 and 120/76 Ölmühle Hamburg AG v Hauptzollamt Hamburg
Waltershof [1977] ECR 1269; Case C-295/94 Hupeden & Co KG v Hauptzollamt
Hamburg-Jonas [1996] ECR I-3375; Case C-296/94 Pietsch v Hauptzollamt Hamburg-
I-5645.

review within EU law. It takes its place alongside other well-established heads of review that are concerned with error of law, error of fact, review for impropriety of purpose, legitimate expectations, equality and the like. This may be obvious and so indeed it is for those familiar with EU law.

The point has nonetheless been emphasised at this juncture because critics often assume that if proportionality were to become a general head of judicial review, this would somehow mean that it would become the sole or dominant tool in the judicial armoury. There is no warrant for such a conclusion, judged in terms of the positive law, since many EU cases are decided on another ground of review without any mention of proportionality. Nor is there any warrant for such an assumption in conceptual terms. It is simply a non-sequitur to reason from the proposition that proportionality should be a head of review that can in principle apply to any form of administrative action, to the conclusion that it becomes the sole or dominant doctrine of judicial review within a legal system.

B Normative foundation

It is worthy of note that there has been no normative debate in the EU as to whether proportionality should be used in non-rights-based cases. It has been applied as a general test of judicial review from the time in which it was initially recognised as a principle of administrative legality in the 1970s. There has been no suggestion that the principle is ill-suited or ill-adapted to cases that lack what Mike Taggart refers to as the anchor of rights. It is therefore important to understand the normative foundations that underlie its place as a general test for judicial review within EU law. There are three linked strands to this argument, which concern substantive reasons for its use, the advantages of its structure, and simplicity. They will be considered in turn.

(1) Substance

The substantive component of the normative argument rests ultimately on the belief that exercise of power requires reasoned justification of the kind provided for by the proportionality inquiry, irrespective of whether the case is concerned with rights or not. A public body is accorded power to achieve certain ends. The courts will maintain control through the plethora

23 See further below, part IV B.
24 Taggart, above n 2, at 477.
of doctrinal tools mentioned above. They will, inter alia, review to ensure that the public body has exercised the power for purposes that are broadly in accord with the statutory purposes. They will also exercise control over discretionary power broadly conceived even when the power falls within the purposes allowed by the legislation, and will do so via rationality or proportionality review. Proportionality is premised on the assumption that this inquiry demands reasoned justification from the public body for the choices it has made. This reasoned justification is cast in terms of a means-ends inquiry. It is for the public body to demonstrate that its contested action was necessary and suitable to achieve the end in view, and that it did not impose excessive burdens on the individual.  

This rationale for legal intervention applies just as readily in cases where rights are not in issue as in those where rights are infringed, although this factor may well affect the intensity of review. There is no warrant for the suggestion that the idea of reasoned justification, viewed in terms of the means-ends proportionality inquiry, is more difficult to apply to non-rights-based cases. The EU courts have been applying proportionality to countless cases where rights are not in play for over fifty years. Nor is there any substance to the suggestion that the kind of reasoned justification demanded by the proportionality inquiry, suitably modulated through variation of intensity of review, is conceptually ill-suited outside the rights-based arena. The arguments to this effect will be critically analysed in the subsequent analysis.

(2) Structure

The structural component of the normative argument rests on the benefits that flow from the three-part proportionality inquiry, which focuses the attention of the agency being reviewed and of the court undertaking the review. The agency has to explain why it thought that the challenged action really was necessary and suitable to reach the desired end, and why it felt that the action

did not impose an excessive burden on the applicant. If the reviewing court is minded to overturn the agency choice it must do so in a manner consonant with the proportionality inquiry. It will be for the court to explain why it felt that the action was not necessary, et cetera, in the circumstances. It is precisely this more structured analysis which has often been lacking when the "monolithic" Wednesbury test has been applied.

EU law reveals the benefits of proportionality review, even in those instances where it is applied with low intensity. Thus, the structured form of the proportionality inquiry will normally lead the ECJ to examine the arguments of the parties in a degree of detail that is rarely found in cases employing the Wednesbury test. The ECJ and CFI will check in detail, within the proportionality inquiry, to see whether the foundations for the challenged decision are sound. They will look hard at the facts and arguments adduced by the parties in order to determine whether the measure should be regarded as manifestly disproportionate.

(3) Simplicity

The argument from simplicity does not mean that proportionality review will always be straightforward or uncontentious in its application, but such a claim would be equally untenable in relation to rationality review. It does mean that it would be advantageous for the same type of test to be used to deal with all claims, irrespective of whether they involve non-rights-based claims under EU law, rights under EU law or the Human Rights Act 1998 (UK) (the HRA), or other non-HRA domestic law challenges. This is particularly so because it will be common to find at least two such claims in an application for judicial review, and it will not be uncommon to find cases where all three may be of relevance. It should, moreover, be recognised that there will be difficult borderline cases as to whether a right is implicated in a particular case or not.

III Proportionality Plus Narrow Rationality Review

Mike Taggart's preferred solution is, however, that proportionality should be the test only in relation to rights-based cases (broadly understood as including fundamental common law rights), with narrow rationality review remaining the test for what he describes as "public wrongs". He explicitly limits rationality review to the narrow form of Wednesbury unreasonableness. He thereby rejects both proportionality as a general head of review, and the

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27 See Craig EU Administrative Law, above n 11, chapter 17.
28 Taggart, above n 2, at 471–472 and 477–480.
broader form of rationality review articulated by some courts that will be considered below. The “rainbow of judicial review” will therefore be starkly divided, with rights-based cases subject to proportionality, while “public wrongs” will only be overturned if Lord Greene MR’s extreme form of irrationality can be established (or, of course, if some other ground of review can be made out29). This is a possible approach, but there are two problems with it, the first being practical, the second being normative. These will be examined in turn.

A Practical objections

The practical consequence is that rationality review cast in these terms would almost never avail claimants. We live in the real world, and the consequences of any test must be evaluated with respect to real-world situations, not hypothetical examples, however famous they might be. The classic example of the decision that is so unreasonable that no reasonable public authority would have made it is the dismissal of the teacher because of the colour of her hair. Lord Diplock spoke in similarly extreme terms, limiting rationality review to a “decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it”.30 Mike Taggart’s solution is therefore dependent on the claimant in a case concerning “public wrongs” being able to prove irrationality of this magnitude.

The problem is, however, that this test, if taken seriously, constitutes an almost insurmountable hurdle for claimants. The nature of this point should be clarified to avoid misunderstanding. I accept that decisions of such extremity might in principle occur. This should not mask the reality, which is that it is very difficult, if not impossible, to come up with real-world cases in which such extreme irrationality has been present.

A second objection is that the courts have in fact applied rationality review more broadly than the extremity demanded by Lord Greene and Lord Diplock.31 They hear argument in cases that have nothing to do with rights

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29 He set significant store by the advancements that have been made in expanding and refining specific substantive grounds of review: ibid, at 479.
31 The following is simply a selection of the many cases that could be cited. The number could easily be doubled or tripled. Exigencies of space mean that the following examples will suffice: Hall & Co Ltd v Shoreham-by-Sea Urban District Council [1964] 1 WLR 240 (CA); R v Hillingdon London Borough Council, ex p Royco Homes Ltd [1974] QB 720; United Kingdom Association of Professional Engineers v Advisory, Conciliation, and Arbitration Service [1981] AC 424; R v Boundary Commission for England, ex p
where the impugned decisions could by no stretch of the imagination be regarded as irrational in the sense articulated by Lord Greene or Lord Diplock. The applicant does not always win in such cases, and it is still difficult to convince the court to overturn a decision on *Wednesbury* irrationality, but success is not commonly predicated on showing irrationality of the very extreme kind indicated by Lord Greene and Lord Diplock.

It was precisely this that led some judges to be more explicit about the nature of rationality review in such cases. Lord Woolf MR opined that the label of irrationality often did not do justice to the decision-maker, who would often be the most rational of persons. Sedley J acknowledged that it would suffice to show some error of reasoning which robbed the decision of its logical integrity, and that the applicant did not need to go

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32 Knight v Secretary of State for Communities and Local Government [2009] EWHC 3808 (Admin); EM (Zimbabwe) v Secretary of State for the Home Department [2009] EWCA Civ 1294.

further and prove that the decision-maker was "temporarily unhinged".\textsuperscript{34} The Court of Appeal likewise held that it would suffice to show some flaw in the reasoning, not a decision that defied comprehension.\textsuperscript{35} It was such developments that prompted Lord Cooke to question Lord Greene's test in \textit{R v Chief Constable of Sussex, ex p International Trader's Ferry},\textsuperscript{36} a decision which will be considered more fully below.

The normative foundation for this more liberal construction of rationality review will be considered below. The salient point for present purposes is that this jurisprudence leaves Mike Taggart's approach between a rock and a hard place. An exponent of such an approach might simply conclude that all such cases applying this broader form of rationality review that do not fit with the Lord Greene/Lord Diplock extreme version were wrong, thereby accepting that only rarely if ever will a claimant in the real world be able to use rationality review in the case of public wrongs. The alternative is for an exponent of the Mike Taggart view to accept the correctness of the broader version of rationality review, the corollary being rejection of narrow rationality review as articulated by Lord Greene and Lord Diplock.

What is clear is that you cannot have it both ways. It is not coherent to argue for the traditional conception of rationality review as a residual longstop, while at the same time supporting the case law set out above that is premised on a broader reading of rationality. It is likewise not coherent to maintain that rationality review should be confined to its traditional narrow meaning, and pretend that it is any form of meaningful control over administrative decision-making that will avail claimants.

B Normative objections

The view proposed by Mike Taggart is also problematic from a normative perspective. Those who are opposed to proportionality as a general test for review question its normative foundations. The same onus is incumbent on those who argue for any species of review, be it broad or narrow.

There is, however, little in the way of detailed normative justification given for rationality review cast in the form used by Lord Greene and Lord Diplock. The explanations proffered tend to rest content with some generalities couched in terms of the courts not substituting judgment on

\textsuperscript{34} \textit{R v Parliamentary Commissioner for Administration, ex p Balchin (No 1)} [1997] COD 146 (QB) at [27].
\textsuperscript{35} \textit{R v North and East Devon Health Authority, ex p Coughlan} [2001] QB 213 at [65].
\textsuperscript{36} \textit{R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd} [1999] 2 AC 418 at 452.
the merits of discretionary determinations, coupled with reference to the
significance of this injunction to preserve the separation of powers. These
claims must however be substantiated, not merely asserted. There are two
difficulties with this normative defence of narrow rationality review.

It can be accepted, firstly, that the courts should not substitute judgment
on the merits of discretionary determinations. There are indeed good
reasons for this, grounded in the separation of powers. It does not, however,
provide the requisite normative justification for the narrowness of traditional
rationality review. All tests for substantive review place some constraints on
the decision that can be reached by the administrator, and that is true also
for narrow rationality review. It is the extent and nature of the constraint
that is in issue. There are various other judicial options in terms of tests for
review, which do not entail judicial substitution of judgment on the merits,
but which nonetheless do entail more searching scrutiny of the challenged
decision. It is therefore insufficient to invoke some mantra as to separation
of powers and the avoidance of merits review as if this provided a complete
argument in favour of narrow rationality review.

This was recognised most explicitly in the judicial arena by Lord Cooke. He
accepted the separation of powers rationale for the courts not substituting
judgment on the merits, but denied that this should lead to a very narrow
form of rationality review of the kind espoused by Lord Greene and Lord
Diplock. It was, said Lord Cooke,37 not necessary to have such an extreme
formulation in order to ensure that the courts remained within their proper
bounds as required by the separation of powers. He advocated a simpler and
less extreme test: was the decision one that a reasonable authority could
have reached? Lord Cooke returned to the topic in more forthright terms in
R (Daly) v Secretary of State for the Home Department:38

[1] I think that the day will come when it will be more widely recognised
that ... Wednesbury ... was an unfortunately retrogressive decision in
English administrative law, in so far as it suggested that there are degrees
of unreasonableness and that only a very extreme degree can bring an
administrative decision within the legitimate scope of judicial invalidation.
The depth of judicial review and the deference due to administrative
discretion vary with the subject matter. It may well be, however, that the
law can never be satisfied in any administrative field by a finding that the
decision under review is not capricious or absurd.

37 Ibid.
There is a second normative difficulty with narrow rationality review, which is that it may paradoxically lead to the very infirmity that its proponents seek to avoid, viz increased substitution of judgment. It is axiomatic that narrow rationality review as articulated by Lord Greene operates after the public body has successfully negotiated the hurdles of purpose/relevancy, which are intended to delineate the "four corners" within which the public authority is allowed to act. This inquiry is regarded as one of statutory interpretation, and the courts substitute judgment on issues of purpose and relevancy. It is indeed part of the rationale for very limited rationality review that the public body has surmounted such hurdles and is hence within the permissible terrain accorded to it by the statute.

The conceptual divide between purpose/relevancy and rationality is, however, inherently uncertain. This is generally recognised by administrative lawyers, who note the latitude that the dichotomy affords to the courts as to whether to characterise a case as falling within purpose/relevancy, or whether to consider it via rationality review.\(^{39}\) The conceptual reason for this latitude has rarely been explored, but is not hard to divine. Whether executive action is adjudged under the former or the latter will inevitably depend on the degree of abstraction or specificity with which we frame the purpose/relevancy inquiry. The broader or more abstract the inquiry at the level of purpose/relevancy, the more likely that the challenged action will satisfy those precepts, the corollary being that the case will be decided through rationality. By way of contrast, the narrower the initial inquiry at the level of purpose/relevancy, the more likely that the case will be resolved at that level, the corollary being that less remains to be done through rationality review.

This is apparent by reflecting on the classic example from the *Wednesbury* case, dismissal of a teacher for the colour of her hair. This hypothetical was tested for conformity with rationality review, the assumption being that dismissal on such grounds satisfied tests cast in terms of purpose/relevancy. That assumption could be accurate only if the issue was posed in relatively broad terms, viz that "physical characteristics could be relevant in hiring or dismissing a teacher". If, however, the issue was framed in more specific terms, viz that "the natural colour of a person's hair could never be a relevant consideration in hiring or firing a teacher", then the case would have been resolved without recourse to rationality review.

We can now begin to appreciate the paradox adverted to above. Courts operating within the *Wednesbury* framework had the following choice in a particular case where they felt that legal intervention was warranted. They

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39 See, for example, Knight's contribution to this volume: above, n 5, part III A.
could broaden the ambit of rationality review by applying it to the case even though the challenged action could not realistically be regarded as irrational in the sense articulated by Lord Greene and Lord Diplock, in acknowledgement that such a high standard of irrationality would only rarely if ever be met. They could alternatively characterise the dispute as one going to purpose/relevancy, thereby obviating the need to broaden rationality review, and substitute judgment on the issue of purpose or relevancy presented to them. The courts used both strategies. The salient point for present purposes is that the latter strategy, insofar as it entailed substitution of judgment, was even more intrusive than the former.

We live now in a world where rights-based judicial review has assumed more prominence. This is reflected in the greater intensity of substantive review used in such cases. There is good reason for differential intensity of review in cases that do not have a rights component. The thesis propounded by Mike Taggart may well be depicted as part of the “rainbow of review”, but the difference for claimants who fall within the respective parts of the rainbow is stark indeed. The limit of rationality review for those who fall within the “public wrongs” part of this spectrum means that such claimants will rarely if ever satisfy the test for such review advanced by Mike Taggart. We should not live in a world where “public wrongs” are subject to no meaningful judicial scrutiny. This does not fit the reality of the positive law, nor is it desirable in normative terms.

IV Proportionality and Broader Rationality Review

The focus now shifts to the divide between proportionality and broader rationality review. The argument is that proportionality should be used for rights-based cases, but that rationality in the sense argued for by Lord Cooke or something analogous thereto should be retained for other cases, and that the approach should therefore remain bifurcated. The proponents of this view have advanced a series of arguments against proportionality becoming a general head of review. It is clearly right that the matter should be carefully debated. It is equally important that these arguments are carefully scrutinised, which is the focus of the remainder of this article.

40 It is not always entirely clear whether a commentator supports broader or narrower rationality review in non-rights-based cases. If I have misinterpreted any particular author by considering them within this category then I apologise. It also follows that if such an author really subscribes to the thesis advanced by Mike Taggart then the preceding critique is equally applicable.
A Proportionality, rights and non-rights-based cases

It is important at the outset to clear the ground. The argument is as to whether proportionality should become a general head of review, which is applicable to cases that do not concern rights or EU law. It is not an argument for proportionality to bear the same meaning in rights-based cases and non-rights-based cases. I make the point at this juncture because the structure and content of the argument used by some who are opposed to proportionality becoming a general head of review, such as in Jeff King’s contribution to this volume, could indicate the contrary — viz, that if proportionality were to become a general head of review it would apply in an equivalent, or almost equivalent manner, to rights and non-rights-based cases. This has not been advocated by any commentator; it is not demanded by the concept of proportionality, nor is it required by judicial doctrine.

Those who advocate proportionality as a general head of review regard varying intensity of review as integral to the enterprise, in the manner explicated above and examined further below. If such a step were taken by the courts, they would then have to elaborate the relative intensity of proportionality review that should apply in non-rights-based cases, in the same way as has been done in the EU, and indeed in the same way that was done when the courts distinguished between the intensity of rationality review that applied to rights and non-rights-based cases prior to the HRA.

B General, not sole, head of review

It is also important to clear the ground in a second respect. The argument is as to whether proportionality should be a general head of review, and replace rationality review. Tom Hickman maintains that this means that proportionality should be “the only substantive ground of review”,41 and that the whole doctrinal ensemble of judicial review would be controlled by proportionality.42 Two points should be made in this regard.

First, the argument for proportionality being a general head of judicial review means that it should be capable of being used to test all forms of administrative action, irrespective of whether the case is concerned with rights or not. It is an argument against the retention of separate terrains for rationality and proportionality respectively. It does not mean that proportionality is the “only ground of substantive review”, as Tom Hickman claims. There are other grounds of substantive judicial review such as review

41 Hickman “Proportionality”, above n 3, in part I.
42 Hickman Public Law, above n 4, at 272–273; Hickman “Proportionality”, above n 3, in part I.
for error of law, error of fact, propriety of purpose, relevancy, legitimate expectations and equality. It is no part of the argument that proportionality should encompass the terrain occupied by these other doctrinal tools. The argument against bifurcation is not therefore an argument for proportionality to take over the world of judicial review.

Secondly, proportionality may feature as part of the doctrinal inquiry in cases concerned with, for example, equality and legitimate expectations, because the courts have decided for good reason that it should play a role when adjudicating on these concepts. This is, however, already so under the existing law. It is not dependent in any way on proportionality becoming a general tool of judicial review. Nor does proportionality control the whole doctrinal ensemble in cases dealing with topics such as legitimate expectations or equality. Its role in the legitimate expectations jurisprudence is confined to cases where the public body seeks to resile from a prima facie legitimate expectation. The great majority of such cases are not decided on this ground, the determining factor being whether the claimant is able to establish that a prima facie legitimate expectation exists. This would not change if proportionality were to be recognised as a general head of review. It would not mean, as Tom Hickman argues, that a claimant would not need to have an expectation of any particular character, or that some light or trivial form of expectation would suffice to gain the court’s attention. EU law shows forcefully that this argument is unfounded.

The same is true for equality cases. Proportionality may be relevant in such cases, when determining whether prima facie indirect discrimination can be justified, since the courts have rightly decided that the proportionality of any such differential treatment will be relevant in deciding whether it is justified. This does not, however, mean that the whole doctrinal ensemble of equality law turns on proportionality. Nor does it mean that the role of proportionality in equality cases would alter if it were acknowledged as a general head of review, as is readily apparent from EU law.

C Cost and ossification

Jeff King’s principal, albeit not sole, objection to proportionality becoming a general head of review in administrative law is couched in terms of cost, ossification and abuse. He argues that any benefits to be gained from proportionality as a general head of review are outweighed by the “serious
negative consequences that we have good reason to fear”. This is the “main crux” of his argument against proportionality. Practical concerns of this nature are important, and Jeff King is quite right to raise them. It is equally important for such empirical considerations to be carefully evaluated. I do not believe that he has sustained the argument. Let us consider the arguments about cost and ossification in turn.

Jeff King maintains that “[a] more searching standard would increase the costs of preparing for and fighting cases in court, as well as of negotiations and settlement for those cases that do not reach court”. This is far from self-evident. The pertinent empirical inquiry as to the cost of proportionality becoming a general head of review would be as follows.

We would begin by estimating the marginal extra cost entailed in cases being litigated on grounds of proportionality rather than rationality. It is not at all self-evident that there would be any such marginal increase. The fact that proportionality entails more searching scrutiny than traditional rationality review does not mean that cases would necessarily be prolonged. Indeed, the converse might well be true, since it might rapidly become apparent that the public body could not show that its action was proportionate. If there were any such increase we would then have to estimate the percentage in relation to the overall cost of litigation, in order to have some perspective on the scale of any cost problem.

We would then have to discount or reduce this figure, whatsoever it might be. This would be in part because more cases might not be contested or might settle if the public body felt that it was less likely to win on proportionality review as opposed to scrutiny via rationality. These cases would, therefore, not be fought or not be fully litigated with a net saving in cost. A further reason to discount or reduce any possible increase in litigation costs is the positive impact of “signalling”. Jeff King rightly notes that legal norms, including those of judicial review, can perform a signalling function that impacts on the behaviour of those affected. If proportionality were to become a general head of review it might well, consistently with the signalling thesis, cause some alteration in the behaviour of public officials, whereby they took it into account when making their decisions, with the consequence that fewer decisions were challenged.

46 King, above n 3, in part I; and for the supporting argument, see ibid, part V C.
47 Ibid, in part V C.
48 Ibid.
49 I do not believe that anything is to be learned from the Greater London Authority (GLA)/Porsche litigation, which never reached court, and where the rationale for the GLA paying the costs of the other side was far from self-evident.
50 King, above n 3, in parts III, IV B and VI B.
Jeff King’s thesis based on ossification is, with respect, equally questionable. He maintains that “[a] more searching standard could increase litigation and legal uncertainty, and thus interfere with the capacity of an authority to carry out its mandate effectively”. We should undoubtedly be wary of the dangers of legal rules ossifying administration. We must be equally cautious about the evidence and causes of ossification, its meaning, and the impact, if any, that proportionality might have in this regard. Space precludes detailed examination of these three issues, but the following points can be made briefly here.

In terms of the evidence for and causes of ossification, Jeff King cites literature from the United States (US) to sustain his argument. It is, however, questionable how far this literature is relevant to the United Kingdom (UK) or the EU. Insofar as there is an ossification problem in the US, it flows from a conjunction of procedures over and beyond the notice and comment procedure for rulemaking, combined with intensive judicial review of the scientific evidence. We do not have notice and comment rulemaking in the UK or in the EU, and no one is advocating the kind of intensive judicial review that has proven problematic in the US. It should also be noted that insofar as there is a problem with ossification in the US, this has nothing to do with proportionality, since that is not the doctrinal tool used in such judicial review actions. There is, moreover, no evidence of regulatory ossification in the EU, where proportionality is a general head of judicial review and is applied with varying intensity of review.

In terms of the meaning of ossification, if we interpret this term too broadly it leads to reductionism. The debate about ossification in the US is premised on the fact that agencies may spend years crafting a draft rule on a complex issue, which is then overturned because some element of, for example, the scientific evidence is contestable — even though the reality is that the evidence, by its very nature, is open to varying interpretations. The term ossification is not generally used to disparage any aspect of judicial review that renders it more likely that agency action will be struck down. If it is used in this manner then it would be an argument against any expansion of judicial doctrine, whether that be in relation to process or any aspect of substantive judicial review that forms part of the judicial armoury.

In terms of the impact that proportionality might have on the potential for ossification, there is no reason to believe that it will lead to increased litigation or legal uncertainty, thereby interfering with the public body’s ability to carry out its mandate. There is, as seen in the preceding discussion of cost, no reason to believe that proportionality review will necessarily lead to an increase in cases litigated before the courts. The evidence cited by Jeff

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51 Ibid, in part V C.
King for ossification in the UK context is derived from the planning context. This evidence is, however, premised on the fact that the very possibility of engaging in judicial review at all can delay planning decisions. This is inevitable and could only be obviated if we denied the existence of any judicial oversight. It does not tell us anything about the likely impact, if any, of a shift from rationality to proportionality review; and there is, as noted above, no evidence that low intensity proportionality review in the EU has led to regulatory ossification.

D Legal certainty

The ills laid at the door of proportionality by its opponents include detrimental impact on legal certainty. They criticise proportionality on the ground that its mere invocation tells one little as to the standard of review, or the intensity with which it is applied.

The criticism of proportionality as a general head of review on these grounds is striking, given the uncertainty that besets the meaning of irrationality. UK law, both before and since the HRA, is premised on a sliding scale insofar as this connotes varying intensity of review both as between and within different categories of case. We know, to be sure, that there are different standards of review that apply in rights and non-rights-based cases respectively. We know that rationality review in the latter category is less far-reaching.

It is over 60 years since Wednesbury, and over 250 hundred years since the advent of some form of rationality review in the UK. The bottom line remains that we cannot produce a modern definition of rationality review which is legally authoritative and where the mode of application coheres with the legal test. This is reflected in the contributions to this volume by those opposed to proportionality, where the definitions of rationality, insofar as they are proffered, vary significantly both within and as between the various articles.

What we have is a legal test, Wednesbury, which cannot, for reasons given above, explain the current case law. This is coupled with various ad hoc modifications of the legal test by dicta of judges in individual cases. I looked at a sample of 200 recent rationality cases that did not involve rights for the purposes of this article. It revealed the following. Some courts continue to cite Lord Greene and/or Lord Diplock, while at the same time adjudicating on cases which would have been stopped in limine if the criteria of rationality review from their respective Lordships had been taken seriously, since the

52 Hickman "Proportionality", above n 3, part III C.
Proportionality, Rationality and Review

alleged error came nowhere close to the kind of irrationality demanded by them. Some cases simply conclude that the Wednesbury test has not been met on the facts, without any further indication as to how demanding the court perceives the test to be. In other cases the precise language of rationality review is modified so as to countenance more searching scrutiny, although there is no consistency in the actual wording used. In yet other cases, the courts have deployed the term “anxious scrutiny”, the precise import of which has itself varied within this sub-part of the jurisprudence.

The reality is therefore that in some cases the courts have been applying some sense of rationality review that was broader than that articulated by Lord Greene and Lord Diplock, albeit still not easy to satisfy. The problem is that we were never told definitively what that is, and indeed it is still not clear. Lord Cooke was exceptional and notable for his willingness to question openly the traditional orthodoxy, and to suggest a reformulated rationality test that better reflected the practice of what at least some of the courts had been doing, as well as being preferable in normative terms. The idea that there would be some net detriment in terms of legal certainty if proportionality were to be available as a general head of review is therefore predicated on a picture of the status quo that does not cohere with legal or practical reality.

Tom Hickman nonetheless maintains that the situation would be worse if a proportionality test were to be used. The meaning and intensity of review would have to be worked out for different types of case, with the consequence

53 For examples, see above n 31.
54 For examples, see above n 31.
55 I am grateful to Jeff King for discussion on this point. The expression derived from Bugdaycay v Secretary of State for the Home Department [1987] AC 514 at 531, where it was used to capture the idea that cases involving human rights warranted anxious scrutiny. It has since been deployed most commonly in relation to immigration, where it has been held to require such scrutiny by all those involved in the decision-making process, including the primary decision-maker, the Secretary of State and the court: WM (DRC) v The Secretary of State for the Home Department [2006] EWCA Civ 1495 at [7]. This can then entail heightened rationality review: ibid at [10]. The term has also been used to denote close attention to the facts: ibid at [11]; and the need for close consideration of all factors that might avail the claimant’s case: R (YH) v Secretary of State for the Home Department [2010] EWCA Civ 116, [2010] 4 All ER 448 at [24]. There are, however, other cases that use the phrase in the context of applying proportionality within the Human Rights Act 1998 (UK): Brookes v Secretary of State for Work and Pensions and the Child Maintenance and Enforcement Commission [2010] EWCA Civ 420 at [41]; or to betoken careful review because human rights are involved: R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 [2004] 2 AC 368 at [16] and ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6, [2009] All ER (D) 38 at [50].
that it would be “even more flexible and even less prescriptive than the reasonableness test”,\textsuperscript{56} such that the mere invocation of proportionality would have no predictive value.

To be sure, the intensity of review would have to be worked out. This would not, however, involve the difficulty depicted in Tom Hickman’s critique. It would require the Supreme Court to take a considered view of the appropriate intensity of proportionality review to be applied in non-rights-based cases, in just the same way that it made that decision in relation to rights-based cases in \textit{Daly}. The test would then be applied and elaborated in later jurisprudence, in just the same way as with the \textit{Daly} test. This is exactly what the EU courts have done. The basic proportionality test to be applied in non-rights-based cases has been clearly stated by the EU courts for over thirty years. It has been applied in an extensive subsequent jurisprudence, but the core essence of the test has not changed.

Indeed, if proportionality were to become a general head of review, the very judicial elaboration of the appropriate intensity of such review in non-rights-based cases would provide a welcome clarification as compared to the present law. It has taken us a couple of hundred years of rationality review to arrive at a situation in which we still do not have a clear test that coheres with what the courts have been doing. The idea that legal certainty would suffer with the shift to proportionality review and the clarification of intensity attendant thereon is unconvincing.

\section*{E \textit{Proportionality, levelling out and sliding scales: the general argument}}

Tom Hickman repeatedly adverts to the danger that if proportionality were to become a general head of review it would “flatten out” or result in “levelling of” the existing regime.\textsuperscript{57} He contends that we do not yet have a sliding scale of judicial review in the case law,\textsuperscript{58} and that such an approach to judicial review cannot be justified.\textsuperscript{59} This is because the “recognition of a normative hierarchy in public law has been a great step forward in the protection of rights", and “levelling out the law again would … be a step back, rather than another step forward”.\textsuperscript{60} Hickman maintains that legal certainty would be jeopardised by the “adoption of a single, entirely flexible, meta-principle of substantive review",\textsuperscript{61} which would obscure the range of standards that

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{56} Hickman “Proportionality”, above n 3, in part III C.
\item \textsuperscript{57} Ibid, in parts I and II.
\item \textsuperscript{58} Hickman \textit{Public Law}, above n 4, at 258.
\item \textsuperscript{59} Ibid, at 261.
\item \textsuperscript{60} Ibid.
\item \textsuperscript{61} Ibid, at 275.
\end{enumerate}
\end{footnotesize}
are present in the normative building blocks of public law. A generalised proportionality test would tell the public body nothing about the standard or intensity of review that the court would adopt when reaching its decision. These fears are misplaced. The reality is that the current law operates with varying intensities of review, and in that sense embodies a sliding scale; and that this would not change if proportionality were to become a principle of review applicable to all kinds of administrative action. These points will be considered in turn.

(1) Current law: intensity of review

It is clear that the law before the Human Rights Act 1998 (UK) (the HRA) was based on varying intensities of review and that this remains true for the legal position post the HRA. In that sense we have had and continue to have a sliding scale of review.

Prior to the HRA it was judicially acknowledged that rationality review applied more intensively in rights-based cases. It was in that sense not monolithic. Moreover, as seen above, even in non-rights-based cases the courts in reality routinely applied rationality review where the challenged action could not be regarded as falling within the description of irrationality formulated by Lord Greene and Lord Diplock. Indeed, more detailed inquiry as to the application of irrationality within both the rights-based and the non-rights-based category revealed even greater variation of intensity of review, depending, for example, in the former category on the nature of the right broken and the nature of the justificatory argument advanced by the government.

62 Ibid.
66 See above n 32.
The case law post the HRA reflects continuity with the past, insofar as there are varying intensities of review. The variation of intensity operates at two levels, both between broad categories of case and within those categories. The former is readily apparent in the fact that proportionality operates within the terrain of the HRA, in EU law and in relation to cases where the government seeks to resile from a prima facie legitimate expectation, while some form of rationality review applies for the generality of administrative law cases.

The latter, variation of intensity of review within the categories, is also evident, although less explored. It can be briefly exemplified in relation to the HRA. It is for the reviewing court to decide objectively the proportionality analysis demanded under the HRA. The court inquires whether the limitation placed on the right is really necessary. Often, but not always, this demands that the limitation be the least restrictive in all the circumstances, and if it is not then it is deemed to be disproportionate. Review according to this standard is searching and intensive, but it does not preclude the court from taking account of the views of the initial decision-maker when deciding whether this version of the proportionality test is met or not. The fact that the ultimate decision as to compliance with proportionality resides with the court does not tell us how much weight will be accorded to the view of the initial decision-maker when the court is making its ultimate decision. This issue is itself one for the ordinary courts to decide. It is properly for the ordinary courts to determine how far the views of the initial decision-maker should be taken into account in this respect.

The reason for the variation in the intensity of review even within the overall category of rights-based cases is not hard to divine. The rights contained in the HRA are not all of equal importance, and this is a fortiori true of rights-based documents that contain a broader list of rights than the HRA. Less obvious, but equally important, is the fact that even if a particular right, such as free speech, is acknowledged to be of real importance in the hierarchy of rights, it may be invoked in widely differing circumstances, ranging from political speech during electoral contests to the opening of a sex shop in a particular neighbourhood. The courts will duly apply the HRA including proportionality to all such cases; but the way in which the test is applied, and the degree of weight accorded to the views of the initial decision-maker, will perforce differ depending, inter alia, on the importance of the right, the circumstances in which it is invoked, the nature of the justificatory arguments advanced by the defendant and the extent to which

it has democratic credentials. This is readily apparent from a number of high-profile cases.\(^6\) The point is succinctly captured by Baroness Hale.\(^7\)

The concept of what may be “necessary in a democratic society” has to take into account the comparative importance of the right infringed in the scale of rights protected. What may be a proportionate interference with a less important right might be a disproportionate interference with a more important right. The concept of what is “necessary in a democratic society” also has to accommodate the differing importance attached to certain values in different member states.

(2) Proportionality as a general head of review: intensity of review

The discussion thus far has shown the variation in the intensity of review in the present system, both as between categories of case and within a particular category of case.

Tom Hickman’s critique of proportionality as a general head of review is predicated on it operating as an entirely flexible sliding scale of review, which would thereby lead to uncertainty and would jeopardise the level of substantive protection for rights enshrined in the current law. His argument is therefore premised on the assumption that the recognition of proportionality as a general head of judicial review that could apply to all types of administrative action broadly conceived would have this deleterious consequence.

There is, however, no warrant for equating recognition of proportionality as a general head of judicial review within administrative law with the kind of freewheeling application of the concept on which his argument is predicated. There is no warrant for this equation in relation to the concept itself, or the way in which it has been applied in systems that recognise proportionality as a general head of review. There is indeed no more or less reason why proportionality as a generalised tool of judicial review should have this consequence, than there is in relation to rationality as a generalised head of judicial review. This is readily apparent if we reflect briefly on how the concept is applied in systems that recognise proportionality as a general


\(^7\) Countryside Alliance, above n 69, at [124].
head of review, and by considering how it would be deployed in the UK if it were to be so recognised.

EU law provides a fitting example of a legal system that regards proportionality as a general head of judicial review. The ECJ and CFI, as we have seen, developed the concept through an extensive jurisprudence that related to review both of EU action and of actions of Member States. The EU courts have fashioned a sophisticated case law in which they elaborated the meaning of proportionality and the way in which it applied to different types of administrative action. It quickly became clear that proportionality would apply with varying degrees of intensity in different types of case. The categories of case elaborated by the ECJ are no less certain than those developed by the UK courts either before or after the HRA. To the contrary, the ECJ fashioned differential standards of review in, for example, rights cases and non-rights-based cases before their UK counterparts had done so, and they have continued to fine-tune the application of proportionality within those categories.

It is certainly true that there is room for normative argument concerning the nature of the categories of proportionality review sketched out by the courts, but that is inevitably so in any legal system, and the task is not rendered more or less difficult by the standard of review being cast in terms of proportionality rather than rationality. Commentators may well disagree with particular judicial decisions in this area, but that is also self-evidently true for academic commentary on judicial review in any legal system. It does not alter the fact that there is nothing within the EU experience of proportionality that lends credence to Tom Hickman’s argument as to how proportionality operates.

The preceding argument is equally applicable to the application of proportionality within the UK if it were to be recognised as a general head of judicial review applicable to all types of administrative action. Tom Hickman’s argument is premised on the assumption that if this were to occur then the courts would operate as if from a tabula rasa, applying proportionality as some freewheeling meta-principle, an unfettered sliding scale, without any attention being given to existing case law or the categories that they have fashioned thus far. This is not demanded in any way by recognition of proportionality as a general head of review, nor does it accord with practical reality.

If the courts were to follow Lord Slynn’s suggestion\(^{71}\) and recognise proportionality as a general head of review it would surely be engrafted onto the existing framework of review as developed by the UK courts.

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There would continue to be categories of case as there have been hitherto. The courts would continue to treat rights-based cases as warranting stricter proportionality scrutiny, as demanded under the HRA. They would still use proportionality in cases with an EU law component, applying it in such instances in accord with the ECJ's case law. They would in addition apply proportionality to non-rights-based cases, and fashion lower intensity proportionality review. There will, to be sure, be room for debate as to how searching scrutiny within this category should be. That can be accepted and indeed welcomed. There is, however, no reason to believe that public bodies will be less certain of the standard of review in such cases as compared with the status quo. This is especially so given the point made above: the continuing uncertainty as to what rationality review truly demands in this area, notwithstanding the fact that the courts have deployed this concept for a very considerable period of time.

There is, moreover, no reason to believe, as Tom Hickman argues, that the level of substantive protection for rights would be undermined by the recognition of proportionality as a general head of review. He argues that the robustness of the proportionality test as it applies in rights-based cases might be undermined by a less intensive form of proportionality review being applied in the context of non-rights-based cases. However, the courts prior to the HRA maintained a distinction between rationality review in rights-based cases and those not involving rights, and there is no reason to think that this would not be equally true if proportionality were applied with differential standards of review.

Conversely, there is also no reason to believe that the level of substantive protection would be pitched at too high a level, simply because the test is cast in terms of necessity. This is a concern voiced by Jeff King. He argues that rationality admits of more than one solution, and hence is capable of embracing the disagreement that characterises plural societies. He maintains that necessity is an absolute and precludes taking account of such differences of view. This does not, with respect, cohere with the application of the necessity test by courts in the UK, in the EU or under the European Convention of Human Rights (Convention). The very fact that some measure of deference/respect/weight is accorded to the primary decision-maker even in rights-based cases serves to leaven the application of necessity, thereby enabling the views of the executive or legislature to be taken into account when deciding whether the action was indeed necessary. This is reflective of the fact that reasonable people can disagree as to whether action is indeed necessary, and that the views of the legislature or executive

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72 Hickman "Proportionality", above n 3, in part III E.
73 King, above n 3, in part V A.
may be deserving of some respect/weight in that regard. This is of course a fortiori so in relation to the application of proportionality in non-rights-based cases.

**F  Proportionality, levelling out and sliding scales: the particular argument**

Tom Hickman’s critique of proportionality also contains a more particular exemplification of the general critique adverted to above. The argument appears to be as follows. He points quite correctly to the fact that the definition of various Convention rights differs, with the consequence that different demands are thereby placed on the public authority. The nature of the right might require that the governmental action should be reasonable, as in the case of duties to take positive action; or it might require that the government not derogate from the Convention unless it can show that such derogation is strictly necessary. Tom Hickman then asks how such different standards of legality could be reconciled with a general test of proportionality. He fears that a proportionality test would either subsume such standards, or live uncomfortably alongside tests of reasonableness that condition the power of public authorities. He concludes by saying that “the range of standards of legality in modern public law should be patent in its architecture and not be obscured beneath a general façade of proportionality”.

This argument is, with respect, unconvincing. It elides the very distinction between standards of legality and standards of review that Tom Hickman has rightly insisted on as central to clarity in public law thought. The recognition of proportionality as a general head of review would not entail the excision of rationality from the terrain of public law. The courts or legislature might well decide that reasonableness should be a constituent element in the definition of a wrong, or in the determination of the ambit of a right. Thus, the European Court of Human Rights has held that where there is an obligation to take positive action, the public authority must take “reasonable” steps to protect an individual from harm. There is no reason why this should alter if proportionality were to become a general head of judicial review. To suggest that this is so is to confuse the definition of a right with the test for judicial review as to whether that right has been breached in a particular case. Tom Hickman is, therefore, clearly right to stress the distinction between what he terms standards of legality and tests

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74 Hickman “Proportionality”, above n 3, in part III D; see also part II.
75 Ibid, in part III D.
76 Ibid.
for judicial review.\textsuperscript{78} He is equally correct to note that the definition of a right will vary.

The test for judicial review under the HRA for breach of Convention rights is, however, already proportionality. The way in which this test is used takes account of the nature and importance of the right. It has not led to the excision of rationality from the definition of a right where its inclusion has been felt warranted. The interplay between standards of legality and standards of judicial review is therefore firmly part of the present law. It is not something that is in any way created by proportionality becoming a general head of review. Thus, what we are asked to believe is that the advent of proportionality as a general test for review, which would be of novelty in non-rights cases where such a test has not hitherto applied, would somehow cause the differential standards of legality as they pertain to different Convention rights to be obscured, even though proportionality already applies within the HRA and has not had this consequence. There is no reason to think that this should occur at all.

G \textit{Proportionality, procedural legitimacy and burden of proof}

Those opposed to proportionality question its legitimacy. There are two dimensions to this argument, procedural and substantive. The procedural argument has been advanced by Mike Taggart\textsuperscript{79} and Tom Hickman.\textsuperscript{80} They claim that if proportionality were a general head of review it would mean that the burden of proof would lie with the public body, as it does under the HRA, and this would impose an unjustified burden on the public body. This argument is misplaced.

The burden of proof under the HRA lies with the claimant. It is for the claimant to show that there has been a breach of a legally protected right. If the claimant does so the government may seek to rely on a defence that the limitation of the right was necessary to safeguard, for example, public security. The government then has the burden of proving the defence, including proportionality. The fact that the burden of proof lies with the government in such cases is therefore simply the consequence of the government seeking to rely on a defence to an invasion of a legally protected right. It has nothing to do with proportionality being the test used in HRA cases; the position concerning the burden would be the same if the test in

\textsuperscript{78} Hickman \textit{Public Law}, above n 4, chapters 4 and 5; also Hickman “Proportionality”, above n 3, in part II.

\textsuperscript{79} Taggart, above n 2, at 439–440, 465, 477.

\textsuperscript{80} Hickman “Proportionality”, above n 3, in part III B.
HRA cases were cast in terms of rationality, not proportionality. Thus, if proportionality were to be a general head of review, the claimant would have the burden of proof in non-HRA cases in precisely the same way as when challenging on any other ground of review, as is also the case under EU law.

H Proportionality, substantive legitimacy and intensity of review

The issue of substantive legitimacy is important and must be addressed. The precise nature of the argument varies, but its most common format is that proportionality as a general head of review would infringe the separation of powers by constituting too great a constraint on the exercise of public power. The normative foundations for proportionality review were set out above. The following discussion builds on that analysis, and the assumption is that proportionality would operate with varying intensities of review developed in the manner discussed earlier.

The separation of powers tells us that it is not for the courts to substitute judgment for that of the public body where discretionary power has been assigned to the latter. The doctrine provides little by way of definitive guidance as to the permissible degree of judicial oversight falling short of substitution of judgment, irrespective of whether review is expressed in terms of rationality or proportionality. There is therefore a spectrum of possibilities, with substitution of judgment at one end, very low intensity rationality review of the kind extolled by Lord Greene/Lord Diplock at the other, and various intermediate options in between.

I do not believe that adherence to very low intensity rationality review cast in terms of the Lord Greene/Diplock test is desirable, nor do I believe that it is demanded by the separation of powers. In practical terms, litigants would never get beyond the court door if the strictures of this version of the rationality test were taken seriously. In normative terms, it has never been apparent precisely why the separation of powers is thought to demand this exiguous form of judicial oversight. Nor is it self-evident why the divide between rights cases and non-rights-based cases is felt to warrant this chasm in the test for judicial review. This is more especially so given that the far more demanding test used in relation to rights is premised on the assertion that a right might have been infringed, not that it necessarily has been. There are many interests falling short of rights that are of real importance for individuals, which warrant meaningful judicial oversight even if this is not as intensive as that which pertains in rights-based cases.

81 See above, part II B.
82 See also to similar effect Mullan, above n 8, and Hunt, above n 9.
I am therefore firmly with Lord Cooke in believing that separation of powers does not demand rationality review cast in the traditional minimalist form. His preferred option was to recast rationality review to render it more demanding. I have always felt that Lord Cooke was right to take this step. I have, however, also felt that in doing so the broadened version of rationality review shaded into proportionality. The investigation into whether a public body's action was reasonable would invite inquiry as to whether the action was necessary to achieve the aim and whether it was suitable to attain the desired end. I do not, moreover, believe that heightened rationality review of the kind advocated by Lord Cooke can meaningfully be undertaken without implicitly paying attention to the relative weight accorded to the relevant interests, and the balance struck by the decision-maker, in a manner analogous to that undertaken within a proportionality analysis.

Those who are minded to challenge the substantive legitimacy of proportionality as a general head of review therefore have a choice. They might contend that Lord Greene and Lord Diplock had it right all along, and that the practical and normative arguments to the contrary set out above are misplaced. Such arguments must however be sustained, not just asserted.

They might accept that a shift to more intensive rationality review of the kind advocated by Lord Cooke, or something related thereto, would be akin to proportionality review. This was acknowledged by Mike Taggart, and caused him to retreat to the more limited form of rationality review — which solution is, however, subject to the problems adumbrated above. It was acknowledged also by Jeff King, albeit with different consequences, leading him to advocate extension of proportionality to a further category of case where he felt that it was warranted, with more limited rationality review being applicable for the remainder of cases. The precise nature of the rationality review that should apply in this remainder of cases is, however, not entirely clear. It appears to be more intensive than the Greene/Diplock view, but less intensive than that advocated by Lord Cooke. I accept that this is a possible approach, but it is not one that I favour. I do not believe that a test lower than that advocated by Lord Cooke is acceptable for any sphere of administrative action, and that is so even though its precise application may depend on context. It should not be necessary for an applicant to show something akin to capriciousness or perversity before the courts will intervene.

There is a third option open to those opposed to proportionality as a general head of review. This is to accept that rationality review of the kind advocated by Lord Cooke, or something akin thereto, is correct in normative terms and consonant with the separation of powers, but to deny that this

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83 Taggart, above n 2.
84 King, above n 3.
collapses into proportionality review. This argument would have to be sustained, not just asserted, and it would have to be shown to be preferable in terms of substantive legitimacy, which is the object of the inquiry. It would therefore have to be shown that the kinds of inquiry explicitly undertaken via proportionality analysis (necessity, suitability et cetera) would not implicitly occur when resolving the rationality of the challenged action. It would have to be shown why, insofar as these inquiries entail some assessment of the relative weight of the respective interests and the balance between them, this is not substantively legitimate outside of the sphere of rights (more especially because they would be undertaken via varying intensity of review). It would also have to be shown that more intensive rationality review could be undertaken without explicitly or implicitly assessing the relative weight of the respective interests and the balance between them.

I. The types of case for which proportionality is suited

A further critique of proportionality is that it is not suited to all spheres of administrative action. There are two variants of this argument in the literature.

(1) Rights and non-rights cases

It is contended that proportionality cannot readily be applied in cases that do not concern rights, because it is difficult or impossible to decide on the interests to be balanced and the weight to be ascribed to such interests. This argument can be seen in Mike Taggart's thesis when he maintains that "without the anchor of ‘rights’ as a starting point the proportionality methodology loses many of its touted advantages as a transparent and visible tool for ensuring reasonable or proportionate decision-making", with the result that "[i]t has a ‘determinate-looking’ structure without the reality of determinacy". 85 This objection to proportionality review is, with respect, misconceived for three reasons.

First, the argument is premised on certain assumptions as to the application of proportionality review in rights-based cases which are not fully revealed, nor are they properly assessed. The assumption is that the constitution, the legislature or case law has stated that certain rights are deserving of judicial protection and that this serves to “anchor” proportionality in a way that is not possible in non-rights-based cases. This premise conceals as much as it reveals. The constitution, the legislature or case law may well indicate that certain interests are worthy of special protection. This does not,

85 Taggart, above n 2, at 477 (footnote omitted).
however, render the balancing process in such cases straightforward, or less problematic than if proportionality were to be applied in non-rights-based cases. The reason is not hard to divine, and was touched on in the preceding analysis.

Recognition of certain interests as rights still leaves open all the difficult issues that are routinely addressed in the case law, both in the UK and elsewhere. These include the relative importance of the rights, the range of justificatory responses open to the government or legislature, and the fact that the same right, even if prima facie high on the list of protected rights, can be deployed in very different circumstances, as instanced by the free speech example given earlier. These issues are played out in the case law on proportionality in rights-based cases and in the related jurisprudence on the extent to which the courts should accord the initial decision-maker some deference/respect/weight when making the proportionality calculus. The reality is therefore that the identification of a right affected by the challenged governmental action constitutes merely the starting point for the proportionality analysis, and does not in itself resolve the issues identified above.

Secondly, the identification of the respective interests that are to be considered within the proportionality calculus in non-rights-based cases is readily apparent from systems, such as the EU, that use this test of review. The nature of the proportionality analysis in such cases is naturally framed by the arguments advanced by the parties. The claimant will contend that, for example, a certain regulatory measure is disproportionate in its impact on his trade interests. The defendant will then adduce arguments as to why the measure was necessary and suitable. Its argument will perform be grounded on the legislative schema in question. It will argue that the contested measure was necessary or suitable in the light of the statutory objectives that underlie the legislation, and if the case reaches this point it will also contend that the challenged measure does not violate the third limb of the proportionality test. It will be for the court to evaluate the contending arguments. It is therefore the purposes underlying the legislation that form the natural focus for the proportionality analysis, coupled with the impact that exercise of the regulatory power has had on the claimant. This is exactly what one would expect, and the EU courts undertake the requisite inquiry day in day out.

It can be readily accepted that the judicial inquiry is evaluative in terms of its identification of the statutory objectives, the application of the different limbs of the proportionality test, and the weight accorded to the claimant’s interest. No one has seriously contended to the contrary. There is, however, no warrant for saying that the proportionality inquiry requires greater normative evaluation in cases where rights are not present than in those where they are, more especially because the former category of case will normally entail low intensity proportionality review. Nor is there any warrant
for the view expressed by Mike Taggart that proportionality loses many of its
touted advantages when applied in non-rights-based cases. To the contrary,
it continues to provide a structured framework for inquiry through which to
decide whether the contested action should survive judicial scrutiny.86

Thirdly, it is no answer to the preceding point to contend that in non-
rights-based cases the courts should not be making such evaluative judgments
concerning the importance of the claimant’s interest and the purposes that
the legislative scheme is designed to serve. Recourse to such normative
evaluation equally cannot be avoided in undertaking rationality review of
the kind articulated by Lord Cooke or anything akin thereto. It could indeed
be said with justification that to attempt such rationality scrutiny without
addressing such issues would itself be irrational. We have already seen that
the original conception of rationality articulated by Lord Greene and Lord
Diplock is not reflected in the courts’ jurisprudence. Cases do not “fit the
bill” of manifest irrationality cast in terms of the red-haired school teacher,
or the decision that is so outrageous in its defiance of logic or of accepted
moral standards that no sensible person who had applied his mind to the
question could have arrived at it. If this sense of irrationality had truly guided
the courts then cases would never have progressed beyond the courts’ door.
Some courts have therefore been applying a test more akin to that openly
espoused by Lord Cooke, even if they have not been willing to admit this.
Rationality review of this nature cannot be applied without implicitly or
explicitly according some weight to the claimant’s interest. It cannot be
undertaken without assessment of the objectives underlying the statutory
scheme. The judgement as to whether the decision is rational will, as argued
above, require the courts to undertake much the same inquiry as that done
explicitly via proportionality, albeit not so overtly or clearly.

(2) Non-rights cases

The second variant of the argument considered in this section has been
advanced by Tom Hickman, who argues that there are many decisions that
can only be sensibly analysed in terms of rationality. These decisions may,
says Hickman, be bizarre or unreasonable, but they cannot sensibly be said
to be disproportionate.87 Tom Hickman provides a number of examples that
he believes substantiate this analysis. There are four difficulties with this
argument.

First, the argument for proportionality as a general head of judicial
review is, as made clear above, not an argument for it to be the sole head of
review. There will be many cases where the most appropriate ground of

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86 Craig EU Administrative Law, above n 11, chapter 17.
87 Hickman Public Law, above n 4, at 285–288.
challenge is based on propriety of purpose, relevancy, error of fact or one of the plethora of other grounds of review that exist within administrative law. This will not alter if proportionality takes over from rationality review. Thus, in EU law proportionality as a general head of review subsists alongside the other grounds of review and it will be for the EU courts to decide, in the light of the way in which the case is argued, which is the most appropriate head of review to apply to the instant case. It is clear that a number of the examples proffered by Hickman as to the unsuitability of proportionality are in reality primarily concerned with review of fact and evidence. The principles of judicial review concerned with factual error should therefore be applied to such cases, and the courts should develop an appropriate standard of review in such cases, akin to the sufficient evidence test as used in the US. It is equally clear that other examples offered by Tom Hickman would be most naturally considered via propriety of purpose or relevancy. Cases of this kind do not therefore sustain the argument that he advances.

Secondly, it is not at all clear from the examples proffered by Tom Hickman that proportionality is inappropriate in cases that might presently be decided by rationality review. He maintains, for example, that a decision to close a waste disposal facility could be subjected to rationality review, but could not sensibly be analysed in terms of proportionality. To the contrary, the decision seems entirely suited to proportionality analysis. We would wish to know whether the closure was necessary and suitable to attain the statutory objectives, and we would apply the third limb of the proportionality test if the case reached that stage. The overall analysis would be conducted in accord with the relatively low intensity proportionality review that is appropriate to this kind of case, and would not therefore impinge too greatly on the public body’s discretion. Nor would it be in any way “ridiculous” to apply proportionality to cases of this or related kinds.

Thirdly, Tom Hickman’s argument is predicated on rationality review being preferable in such instances and it raises once again the very meaning of such review. Tom Hickman does not tell us what sense of rationality review he thinks should apply in such instances. The facts in the preceding example, and the others given by Tom Hickman, cannot be regarded as coming close to irrationality review as depicted by Lord Greene or Lord Diplock. If Tom Hickman believes that this form of rationality review is indeed appropriate then the arguments against this view set out above would be applicable. Assuming that he does not take this stance, then rationality review in such cases must perforce be closer to that articulated by Lord Cooke, or something akin thereto, since they would otherwise not get beyond the court door. In reaching any conclusion as to whether the decision was irrational in that

88 Hickman “Proportionality”, above n 3, in part III F.
sense, the court will often take account of the same types of considerations as would be done via proportionality analysis, albeit less explicitly and in a less structured manner. The court will in reality often also accord relative weight to the respective interests in the case in deciding whether the decision was irrational, and balance them, although once again this will commonly be done implicitly rather than explicitly. Given that this is so, I fail to see how this is preferable in terms of legitimacy, whether procedural or substantive, or why it is any less intrusive on the autonomy of the public body.

Finally, the EU has power over a very broad range of subject matter, as a mere glance at the chapters of the Lisbon Treaty will attest. Proportionality as a general head of judicial review is deployed in all such contexts as a test of legality of EU and Member State action.

J The critique of the EU model

It is fitting to conclude this part of the article by adverting to Tom Hickman’s argument disparaging the ECJ’s proportionality jurisprudence, which is depicted as perfunctory and lacking in detailed analysis. This is not the place for comparative analysis of styles of judicial discourse in different legal systems. Suffice it to say the following. I have read hundreds of EU cases on proportionality, and I have read hundreds of UK cases on rationality review. I am perfectly happy for any 20, 30 or 50 to be chosen at random from each system, and for the reasoning and results to be compared in terms of clarity, structure of reasoning or any related metric. The reality is that, contrary to Tom Hickman’s assertion, the proportionality analyses undertaken by the CFI and the ECJ will normally be considerably more detailed in non-rights cases than the rationality analyses of their UK counterparts. This is so even though the EU courts are deploying low intensity proportionality review. The arguments of the parties will be set out fully and addressed in a structured manner by the EU courts under the part of the proportionality analysis to which they relate.

V Conclusion

The debate concerning the respective merits of proportionality and rationality as tests for judicial review will doubtless continue. Indeed, the very pages of this special issue are testimony to the continuance of this discourse. It will in

90 Hickman “Proportionality”, above n 3, in part III H.
terms of positive law only be settled in the UK by the Supreme Court, which will at some stage have to decide whether to pick up the marker laid down by Lord Slynn a decade ago. I respect the arguments of those opposed to proportionality becoming a general head of review, but do not, as is apparent from the preceding analysis, agree with them. I am in any event grateful to have had the opportunity to contribute to this issue, the catalyst for which was Mike Taggart’s last major article on this topic. He would have enjoyed the academic debate that his contribution generated. We shall all miss him greatly as a friend and academic colleague.