A Sense of Proportion: some thoughts on equality, security and justice

Annabelle Lever

▶ **To cite this version:**

Annabelle Lever. A Sense of Proportion: some thoughts on equality, security and justice. Res Publica, 2020, 26 (3), pp.357-371. 10.1007/s11158-020-09450-8 . hal-02893977

HAL Id: hal-02893977

https://sciencespo.hal.science/hal-02893977

Submitted on 21 Jul 2023

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

A Sense of Proportion: some thoughts on equality, security and justice.

Annabelle Lever

Institut des Etudes Politiques, Paris (Sciences Po, Paris) and

Cevipof, Paris

98 rue de L'université, Paris 75007

Annabelle.lever@sciencespo.fr

in

Res Publica

online 29 January 2020

DOI

10.1007/s11158-020-09450-8

Many thanks to Kira Vrist Rønn, who invited me to participate at a conference on proportionality in Copenhagen, in September 2016, and whose invitation to take part in a special issue for *Res Publica* motivated this paper. Many thanks too to the reviewer/s at *Res Publica* for their helpful comments, and to the editors of this journal for letting me publish with them even though our special issue fell through.

'Proportionality' is a bit of a black box, whether or not it figures in discussions of security, of bioethics or of taxation. However, its function in philosophical argument is reasonably clear, in that talk of 'proportionality', like standards of 'reasonableness' or 'fairness', indicate that we are concerned to evaluate a range of alternatives which cannot be accurately specified in advance. In such cases we are normally concerned to specify what range of ways of treating people will count as treating them as equals, on the assumption that treating people equally may not require, or permit, us to treat them the same. (Walzer 1983, pp.3-26; MacKinnon, 1988). There are a variety of ways in which to treat people as equals, and a variety of criteria, such as need, desert, wellbeing, non-domination, non-marginalisation and the like, which affect our views of what equality requires. (Young 1990, pp. 39-65) Hence it is often difficult to specify in advance of a very detailed and context-dependent inquiry what equality requires of us. If, therefore, we are to present and justify a principle about how people should be treated, for example in matters of taxation, bioethics or security, there are good reasons to use place-holders like 'proportional' or 'reasonable' to put on hold, at least for the moment, matters that are sufficiently complicated, contentious and distracting as to prevent us from thinking about anything else.

This intuitive picture of proportionality – as a proxy for people's claims to equal treatment, where identical treatment is not appropriate or possible – contrasts with the picture of proportionality recently articulated by Arthur Ripstein in 'Reclaiming Proportionality', the 2016 Lecture to the Society of Applied Philosophy, and published in the *Journal of Applied Philosophy.* (Ripstein, 2017, 1-18). (All references to Ripstein will be to this article.) While there is much that I agree with in this article, and much that I would want to think about more deeply, what is striking about the picture of proportionality that Ripstein provides is that it makes no mention of equality at all, although it is centrally concerned with the conflicting claims of individuals. Indeed, proportionality as Ripstein understands it, derives its force exclusively from the demands that competing regulative ideals make on those who would adopt, or must fulfil, the demands of public law. Proportionality, so understood, is concerned with the conflicting demands generated by principles of regulation. Hence, Ripstein implies, our primary concern, even when we are concerned with conflicts amongst individuals, are the claims of *principles* upon our thought and behaviour, rather than the claims of *people,* themselves.

Perhaps it is helpful to see the principles behind the people, as Ripstein assumes, just as it can be helpful to see the principles behind the facts figuring in normative analysis, as G.A. Cohen has argued. (G. A. Cohen 2008, pp. 229-273). However, I question whether we are *required* to abstract from people and their conflicts in the way that Ripstein supposes. I will therefore cast doubt on his reasons for thinking that a suitably public approach to security requires us to use the language of proportionality, rather than of equality, fairness or reasonableness in making, testing and justifying normative arguments.

The paper will develop as follows. First, I will sketch my view of proportionality as a placeholder for some substantive conception of equality, before turning to Ripstein's account of proportionality. I will then use a discussion of racial profiling to illustrate my arguments. As Risse and Zeckhauser have claimed, if racial profiling is justified, it

is justified only if minorities do not suffer 'disproportionate' police stops, compared to more favoured social groups. (Risse and Zeckhauser 2004, pp. 131-70) They concede that what it means to police in a proportionate manner is far from clear, whatever one's views about the justification for racial profiling. (140-42). Hence, racial profiling provides a helpful way to consider the strengths and weaknesses of Ripstein's analysis. The brief conclusion spells out my concern that talk of 'proportionality', though often helpful, and sometimes necessary for moral reasoning, can end up concealing, rather than illuminating, people's claims to be treated as equals.

Proportionality, Rights and Principles.

Why talk about proportionality, if we are interested in protecting people's rights, rather than trying to understand the nature of aesthetic judgements? The answer, I believe, is that references to proportionality, like references to reasonableness, are place holders for complexities in the treatment of each other as equals that we want to set aside, at least for the moment. Thus, people often claim that a given act, or class of acts, are justified so long as they are 'proportionate', without spelling out what this might mean, or why proportion is relevant to the problem at issue. Similarly, people often use the language of reasonableness in moral or legal settings to single out a broad category of considerations relevant to the topic in question, but without having to specifying straight away what these are, and why they are relevant.

Of course, it is sometimes assumed that what a reasonable person believes is obvious, just as it is obvious what a reasonable person would do. In those cases, talk of reasonableness isn't really a place holder for further analysis, but is meant to trigger paradigmatic cases or examples in a reader/listener's mind. To some extent that is how talk of reasonableness used to be used – a more abstract version of Patrick Devlin's famous 'man on the Clapham Omnibus', whose sentiments were meant to determine whether legalising consensual adult homosexual intercourse

would threaten that society's survival. (Devlin, 1968) But, over half a century later, in which critical moral, political and legal philosophy have thrived, it is generally clear that talk of 'reasonableness' needs unpacking, because it is not obvious that there is one uniquely reasonable thing to do, to believe, to want or to feel in many cases. (Joshua Cohen 2009). Moreover, given the epistemic dimensions of the social cleavages that make up our societies, what seems reasonable to us may have little basis in the experiences, feelings and beliefs of other people.

By contrast with this analysis of proportionality as a 'place holder' and invitation to further reflection, Arthur Ripstein argues that we should think of proportionality as a deontological constraint on the means we may use to pursue our legitimate ends, as opposed to a consequentialist injunction to balance the costs and benefits of different ways of acting. (p.1). The goodness of our ends, Ripstein supposes, does not make up morally for badness in our means of pursuing them – as though there were some cosmic abacus on which we could tot up moral gains and losses over a day or a lifetime. Hence, he argues, we must distinguish between two sets of principles- those that determine what rights people have against each other, and those that determine what a public authority may do in order to protect those rights. (p.2) These are principles operating on two different levels, so that the limits on what public authorities may do to protect rights has no bearing on how we should think of the content, justification, or the stringency of the rights themselves. The implication of this argument is that rights can be absolute, given the constitutive principles that justify them, even though the principles governing their enforcement may tightly constrain what public authorities may do to protect them.

However, Ripstein is not interested in the place of proportionality in determining when individuals are morally justified in exercising, or seeking to enforce, their rights against each other *as private individuals*. These are questions of virtuous conduct which assume that we know what our rights are, so all that is at issue is whether or not we should insist, or 'stand upon' them, as Ripstein puts it. (p.8) Readers of Judith

Thomson will be familiar with this line of thought already although Thomson, unlike Ripstein, appears to be uninterested in proportionality. Instead, Ripstein wants to look at cases that, he believes, are 'internal to right', or a question of the logic of rights, rather than of virtue or goodness. As he explains, you may be callous or cruel for exercising your rights. However, if you use excessive force in defending your rights - even your right to life – you can become a murderer. It is the latter case that interests Ripstein and that, he believes, illuminates the reasons why judgements of proportion are necessary to rights.

According to Ripstein, once we accept that the proper basis for enforcing rights is *public* not private, we must attend to proportionality between the means used to protect rights, and the ends (ie rights protection) that are sought. A public perspective is necessary, Ripstein believes, in order to ensure that the enforcement of each person's rights is consistent with the enforcement of everyone else's; and that public perspective consists in determining who is entitled to enforce rights, in what circumstances, and using what means, so that right is distinct from might, even when right requires force in its defence. (pp. 8, 10) Such a public perspective requires a legal system governed by two regulative principles; (1) that everyone should enjoy their rights – whether they are good or bad, law abiding or not; and that (2) 'all uses of force be authorised by law, where law is something that can be understood to be done on behalf of everyone'. (pp. 12, 13). Thus, there are no outlaws, and people's rights can be protected in a way that reflects each person's rights. (p. 12)

It follows, for Ripstein, that 'sometimes force cannot be used, even if it is necessary to prevent a wrong' (p.13), because lethal force can be disproportionate as a means to protect rights – a point that, we might add, is likely to be true for non-lethal uses of force as well. The disproportion arises because the means used to protect rights privileged the defence of rights over the equally important ideal that force should be authorised by law. However, disproportion can occur in another way too, according to Ripstein, such that rights are under protected because too much weight was

attached to the regulative principle that force be legally authorised.[1] Ripstein offers no example of this form of disproportion, but we could imagine it as arising from an excessive formalism, or the insistence by an official on written permissions and orders before acting to protect rights – even when these are not legally required and will predictably impede the fulfilment of the relevant public duties.

Ripstein concedes, of course, that we will not know what counts as the proportionate enforcement of rights before considering the particulars of a given case. However, the demand to protect the two principles of legal enforcement, 'tells us the form of thought that is relevant and why it would be incumbent on public officials to engage in it'. (p.13). All enforcement is subject to public law and, therefore, all enforcement is subject to the demands of proportionality. (p. 14) Drawing out the implications of this position for 'Stand Your Ground' laws in the United States, he notes that self-help is subject to the demands of proportionality, because self-help is legal only where it fills a gap in the public enforcement of law, and is therefore taken up from a suitably public perspective.

The problem with 'stand your ground' laws – or at least one of them, because Ripstein accepts that there may be many others -is that they inevitably violate the demands of proportionality, because while private persons may sometimes be authorised to use force in order to defend their rights, they have no *duty* to defend their own rights, whether by force or not. (p. 14) In stand your ground cases, however, force is made legal in circumstances where people can evade threats to their lives, bodies and liberty by not standing on their rights, by running away. To make it legal to kill others in those circumstances, he believes is disproportionate,

[1] For doubts about whether these should be understood as instances of the *disproportionate* use of force, rather than as deviations from *necessary* force, see Uniacke 2017, p.42. For the suggestion, with which I'm in agreement, that Ripstein treats as 'disproportionate' force cases where force may not have been justified to begin with, see Quong 2017. p. 36. The difficulty, however, is that Ripstein appears to endorse a conception of rights such that all rights are infinitely stringent morally, although their enforcement may legitimately entail differences of degree. So, it is unclear that he can make the distinctions in stringency between rights to one's apples and rights to one's life that Quong assumes.

because it fails to take sufficiently seriously the duty of the law to protect the life and rights even of wrongdoers. Hence, Ripstein concludes, the demands of proportionality 'should not be seen as a feature of the first-order rights that individual human beings have as against each other, but rather as a feature of public enforcement' of those first order rights. (p.15) As Ripstein helpfully puts it;

> It is no mere coincidence that vigilantes tend to give disproportionate punishments or use disproportionate force, because they suppose that they are above the law. They take up a standpoint on the enforcement of rights – even if these are genuine rights – that imagines away the role of the public standpoint in authorizing such enforcement. Defenders of stand your ground laws assume that the vigilante is the ideal case of enforcement. I have tried to argue that proportionality figures in enforcement because of the distinctive role of a public authority in authorizing any enforcement whatsoever, and the distinctive task of a public authority in providing a rightful condition for everyone. That is just what it is to live together under laws. (p.15)

Proportionality, Joint Fulfillment and Satisficing: the limits of Ripstein's Analysis

There is much to like in this perspective on proportionality, particularly for those who are concerned with the tendency of public officials, as well as some philosophers or jurists, to treat competing duties, generated by individuals' claims to privacy and security, as a reason to sacrifice one of the conflicting pairs to the other, or to establish some permanent hierarchy between them.[2] However, it is hard not to notice that it is respect for *principles* rather than *people* that appears to motivate the demand for proportionality, according to Ripstein, and that people's claims to

[2] Compare Himma 2015, pp. 145-170, and Adam D. Moore 2015, pp. 171 -182 on the relative importance of rights to privacy and security. Or consider Omand's assumption that privacy must always bow to security, whenever the two conflict (Omand, 2011 pp. 285-7, 324-5. I contrast Omand's perspective with that of the US Supreme Court in *NAACP v. Alabama* in Lever, 2015, pp. … (all except Omand in ed: Moore….).

equality play no obvious role in clarifying the nature and stringency of those demands.

Indeed, it is conflicts of regulative principles, rather than of individual (or group) rights, with which we are concerned, when we are concerned with proportionality, according to Ripstein. This appears to be a reflection of Ripstein's Kantian framework, in which private rights protect the freedom of individuals, understood as their ability to make decisions without having to consult or consider the claims of others. (p.5) These rights, as Ripstein sees it, generate only negative duties, rather than duties to aid, and the duties to which they give rise are therefore absolute and jointly compossible. So understood, 'conflicts of right' are conflicts within the *public enforcement of rights*, rather than conflicts between the competing duties to which rights give rise since, as Nozick famously insisted, if the duties associated with rights are always negative, there is, in principle, no limit to our ability to respect the rights of others. (For a discussion and critique of Nozick's views see Waldron 1993, 1-34)

According to Ripstein, rights can be violated because people act in excess of their authority -whether in public or in private matters. Law governs coercion to the extent that it prohibits such unauthorised conduct, and specifies who can respond to such unauthorised conduct, and in what way. Specifically, law, for Ripstein, creates what we might call 'the circumstances of proportionality', because of the two duties that legal coercion places on public agents: to protect the rights of everyone and to prevent the violation of rights. These duties can come apart when one of the people whose rights must be protected is also violating, or trying to violate, the rights of another. In those circumstances, as Ripstein sees it, public agents can no more deny that they have a duty to protect everyone (including the aggressor) than they can deny that they have a duty to prevent the violation of rights. They must therefore seek a *proportionate* response to these potentially conflicting demands, and this means that they may sometimes be morally forbidden from preventing a violation of rights, especially when this would require them to use lethal force in order to do so.

These claims by Ripstein, however, are quite puzzling, and the lack of any examples to clarify his ideas does not make life easier. Why, after all, does the fact that we face conflicting demands of duty imply that the language of *proportionality* is a necessary part of the theory and practice of rights? We might suppose that public officials should *only* act in ways that *simultaneously* prevent rights violations *and* protect everyone – what we might call 'joint fulfillment' of ethical demands -and that where they cannot do both, they therefore lack authority to act. This set might be quite narrow and would, therefore, mean that public authorities would be unable to prevent at least some violations of rights, and unable to protect everyone – but that will not surprise anyone who is inclined to take a deontological perspective on the duties of public officials, or predisposed to suppose that the demands of proportionality, such as they are, must be internal to rights.

At the level of logical possibilities, this 'joint fulfilment only' option would seem to be one way of thinking about what morality requires of public officials – a perspective that might give greater weight to the role of the state in the *post hoc* identification, punishment and reform of rights-violators, and the compensation and support of victims, than to what we might call 'first-order prevention of crime'. But as deontologists are unlikely to be surprised that rights mark sharp limits on the prevention of crime, and as second-order prevention may have much to recommend it, there is no reason to dismiss out of hand this way of thinking about security and rights. Hence, the fact that there are two compelling duties that public agents have to respect does not mandate *proportionality* as the standard for evaluating their claims on us.

Likewise, there would be no need to talk of proportionality on a less demanding view of what public agents must do. The language of 'proportionality' appears to suggest that, faced with two (or more) duties that pull in different directions, we must do more than *satisfice* their fulfilment. Instead, so it seems, we must seek some *comparable* degree of fulfilment for each, instead. Whereas

satisficing would imply that the minimal requirement of our duties to prevent rights violations can be specified *independently of each other,* or in some non-comparative way, the language of proportionality necessarily implies that we are concerned with their *comparative fulfilment/non-fulfilment.*

Perhaps within Ripstein's Kantian framework there is a reason for this – tied to the idea of morality and legality as systematic wholes. But it would still need to be explained why the demands of system could not be met by treating the minimal requirements of public morality as specified independent of which duties come into conflict with each other, while allowing that the contingencies of circumstance (or of who *is* actually threatening whose rights) determine what, above that minimum, a virtuous public agent would seek to do. Such a perspective would seem a better fit with the demands for clarity and determinateness that Ripstein identifies as amongst the regulatory principles of a legal system. Indeed, the difficulty with his understanding of proportionality would seem to be that what the enforcement of rights requires is extremely open-ended and, unfortunately, wholly dependent on apparently contingent matters of fact, such as who is attempting to violate whose rights, and in what circumstances.

It is unclear, then, that Ripstein has shown us that proportionality is a necessary feature of rights protection or, indeed, that it is compatible with the protection of rights at all. Perhaps, as he believes, there is something in a Kantian approach to rights which will explain the need for proportionality analysis or its advantage, even when not necessary. But - or so I would suggest -the difficulty with Ripstein's argument can be traced to the two distinctive features of his article which we noticed earlier: the absence of any discussion of equality, and the formulation of the need for proportionality in terms of the conflicting demands of principles of

regulation, rather than the conflicting demands made by, or on behalf of, actual people.[3]

Seeing the people behind the conflicting principles/subprinciples, for example, helps to explain why it would be morally wrong to suppose that state agents may only act when they can jointly fulfil the demand to protect everyone, while preventing violations of right. Even if there is something to be said for the idea that much of the prevention of crime will and should be *indirect* or *second-order*, the first alternative to proportionality analysis is morally problematic once one envisages the people behind the demands of principle.

Faced with public officials struggling to decide what your claims to privacy imply for my claims to security, the joint protection view implies that the answer is to protect your privacy only where it is also possible to protect my security. But that seems wrong. Granted that you have rights to keep some matters to yourself, and to isolate yourself from other people in various ways, it does not follow that everything which those rights entitle you to do are of equal importance from the perspective of the reasons that privacy is a right. (Lever 2015, 162-180.) The same is true of my rights to be secure from threats to life and limb, and to my liberties and public standing. (Waldron 1993, 1-34.) So why should protection for an important form of privacy – say, the ability to exclude unwanted people or eyes from your bedroom- depend on the state's ability to protect a relatively minor, though still duty-conferring, interest of mine in security? Even if the two were to generate incompatible duties for some contingent reason, it would be surprising to conclude that the state's duty to protect the former was in any way dependent on its ability to protect the latter.

[3] My argument here has evident affinities both to George Letsas' reservations about Ripstein's arguments in (Letsas, 2017 24-31), especially his concern about 'the discontinuity …between the morality of rights and the morality of rights enforcement' (25); but also with his arguments about equality and 'fittingness' underpinning uses of proportionality in constitutional law. (Letsas 2018, 53 - 86). However, unlike Letsas, I do not think that the equality dimensions of proportionality analysis can be reduced to 'fittingness', helpful though his analysis is in constitutional contexts where role responsibilities are particularly evident.

If that is so, and if proportionality is a feature of rights protection this is, in part, because rights are not equally important, objectively. Independent of people's particular attachments, interests and resources, there are some features of their wellbeing that are more important than others, even when we cross the threshold of 'duty-conferring interests' that marks out the differences between those things that are properly thought of as 'rights', (on an interest theory of rights), and those which are not. (Wenar 2015, available at https://plato.stanford.edu/entries/rights/) Couched in the language of liberal rights, as Waldron would put it, we may say that the circumstances of proportionality arise because the rights which both express and protect people's equality and intrinsic worth are not, themselves, of equal importance. Hence, we do not treat people as equals when we refuse to protect their most important interests because we are unable ALSO to protect the less important interests of others. Indeed, that seems to be at least one of the core problems with which the simpler, more Benthamite, forms of utilitarianism are faced.

If considerations of proportionality are to have a role in the enforcement of rights, we need reasons to reject the *satisficing* option, too. What we have learned of the difficulties of the *joint fulfilment* option can help us here. If our standard for satisficing is high, it will approximate joint fulfilment and will therefore suffer from the same problems as the latter. On the other hand, if the standard is placed too low, it will fail to require public agents adequately to protect people's most important interests.

It is a structural feature of satisficing, understood as a norm of conduct and standard for ethical evaluation, that once the level deemed satisfactory is reached, there is nothing further to be said. (Phillips 2000, pp. 279-293) But this leaves open the possibility that public agents will be entitled to leave unprotected interests that are, indeed, important to people's security, freedom and equality, simply because they are not quite as important as those that are deemed necessary to satisfice the protection of people and their rights. Likewise, satisficing standards leave open the

path for *arbitrariness* and, indeed, prejudice, indifference, laziness in the protection of people and their rights once the requirements for satisficing have been met. Indeed, even if it were possible to decide what would be a satisfactory level of protection for people and their rights, (given the tensions that wrongdoers create amongst these), the problem of arbitrariness in the protection of people and their rights above that threshold would be seriously problematic. After all, security is a fundamental personal and public good, not just a right – and to have one's access to it depend on the whim of public agents would be deeply offensive to people's self-respect, even if what is at issue are forms of security that are of secondary rather than primary importance.

What, then, of the positive case for thinking that a concern for proportionality is a part of reasoning about rights? The first thing to note, I think, is that once we put people back into our picture of proportionality, it becomes clear that what we are principally concerned with is proportionality of *sacrifice*, rather than proportionality of *benefit* or some other form of proportionality. If it is not possible for public officials to fulfil all their duties to us, it is important not only that the reasons why not are consistent with the rationale for their duties, but that the sacrifices themselves are fairly shared amongst citizens.

Seeing themselves as equals, in a democratic context, means that people must be able to see each other as equally entitled to participate in the making of the laws that bind them all; and not merely as objects of concern and duty, however equal. Protections of people and rights which are stigmatising – perhaps paternalistic or moralistic in their form and/or content -will therefore be objectionable on moral and political grounds, even if people's person and rights are otherwise satisfactorily protected. Unfortunately, this aspect of rights protection has no place in Ripstein's account of proportionality, which shows no interest in people other than as objects of official duties and as potential criminals and victims of crime.

With these considerations in mind, what, then can be said in favour of *proportionality* as opposed to *joint fulfilment*, *satisficing* or any other way of handling the moral tensions and conflicting demands engendered by people's claims to security? A focus on proportionality means that we do not have to decide what is a satisfactory level of rights protection in particular, or in general – a question to which there is likely to be no uncontroversial answer. As compared to 'joint fulfillment', an analysis of what we should do in terms of proportionality avoids an 'all or nothing' approach to the problem of reconciling competing, but pressing, ethical demands. In so far as joint fulfilment of ethical requirements is possible, that is welcome, but the standard of proportionality does not require us to settle for a lower level of rights-protection, or lower levels of fairness in the public distribution of protection, in order to ensure that some level of joint protection is possible. This, too, is appealing. Thus, the appeal of proportionality, as a way of thinking about our duties to others, is that it takes seriously the importance of protecting rights, while requiring attention to the distributional and comparative demands of rights protection. Highlighting the connections between the morality of proportionality and the moral demands of equality, then, enables us to see the reasons to prefer proportionate solutions to some of our moral problems to the alternatives that Ripstein has ignored.[4]

Equality, Proportionality and Police Searches

If we turn to racial profiling, we can see the advantages of interpreting proportionality in terms of equality, though also the difficulties of determining what proportionality requires. We can also see how the interpretation of proportionality as equality illuminates the choice between alternative ways of protecting rights or

[4] These alternatives do not figure in the critical evaluations of Ripstein by Letsas, Uniacke and Quong, who suppose that the alternative to standards of proportionality – at least in the cases under discussion – must be standards of 'necessity'. But that would seem to imply a *private* approach to problems that, Ripstein suggests, are about *public* law enforcement, even when carried out by civilians rather than uniformed agents – hence, it seems, Ripstein's suggestion that 'stand your ground' laws violate proportionality rather than necessity. (15). The assumption that necessity is the sole alternative to proportionality as a standard for evaluating recourse to force (in war or peace) therefore merits further attention.

security, such as universal searches, random searches and racial profiling – or the uses of CCTV, policemen and laypeople as agents of security. (Lever 2013, 99-105). As we will see, the language of proportionality highlights the demands that equality places on the ways we seek to assure rights and to protect people. However, there may be other, better, ways of thinking about those demands, and the solutions to them by public agents and citizens.

Proportionality and Racial Profiling.

In 'Racial Profiling', Risse and Zeckahauser seek to show that the racial profiling of racial minorities might be justified, even in a society that is racially unjust, provided that 'proportionate' searches of racial minorities are also used. (2004, pp.131-170) The idea, of course, is that if 'race ' is to be used as a factor in warrantless searches by police, this has to apply as much to cases where being 'white ' counts as a significant predictor of crime as when being 'black' or 'nonwhite' does. However, as the profiling of white people is hard to detect and, to the extent that it occurs, is less obviously problematic[5] the philosophical, legal and empirical literature is mainly concerned with police searches of minorities and whether they are 'proportional', on the assumption that if they are not, minorities are being targeted by the police simply because they are minorities, rather than for some reason connected to the demands of protecting everyone.

Thus, debates about police searches, and their results, on the New Jersey Turnpike turn on whether the reason minorities are stopped so often, as compared to their numbers in the population or on the highway, is a reflection of the way they drive – too fast, without wearing seatbelts, in cars that are unsafe or that lack lights, indicators and the like – in order to determine whether this disproportion is ethically warranted. [6] The assumption behind the debate is that *if* the disproportion is not

[5] For reasons to think that ethnic/racial majority searches might be problematic, nonetheless, and in ways that reflect the problems with minority profiling, see Lever 2016, 425-435.

[6] For a helpful guide to the issues surrounding racial profiling see Steve Holbert and Lisa Rose, *The Color of Guilt and Innocence: Racial profiling and Police Practices in America, (*Page Marque Press,

warranted, it would be evidence that the police are behaving in a racially discriminatory manner and therefore violating the rights of minorities, because such differences in stop and search rates are unlikely to have occurred by chance.

Debates about 'proportionality' in the context of police stops and searches, then, are clearly about the extent to which people are being treated as equals by the police, in the first instance, but by voters and their representatives beyond that. In these debates the end is taken for granted, and the only question is whether the police *are* in fact targeting people for stops *simply because* of their skin colour or apparent race or ethnicity, independent of their conduct. In the American context there was also a legal debate about whether race or ethnicity could be permitted as *additional* factors in police stops and searches for illegal immigrants, illegal weapons and illegal drugs, or whether doing so violated constitutional guarantees of equality before the law. The assumption framing the debate is that these security objectives are legitimate and important -the proper basis for police action – and, therefore, the only question is whether these legitimate purposes might justify the use of factors that would otherwise be prohibited in police conduct. It is also assumed that *other means* exist which would be morally acceptable, even though these alternatives might have their own disadvantages and might, perhaps, be less 'efficient' than searches that used race/ethnicity *as well as other factors* in determining who the police stop.

Ripstein is therefore right to suppose that the debate, at least in such cases, concerns the choice of means to be used to ends that are already deemed acceptable, and not the question of how to evaluate competing sets of means and ends. Hence, the debate about *proportionality* in racial profiling does not ask us to try to estimate the harms that profiling prevents, compared to the harms that it creates – a comparison that would be particularly difficult given the amorphous nature of the crimes that

---

California, 2004) especially pp. 1-14, 185-212. Relevant Supreme Court decisions on what is a legitimate police search include *Terry v. Ohio,* 392 U.S. 1 (1968); *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *United States v. Brignoni-Ponce,* 422 U.S. 873, (1975); *United States v. Ortiz,* 422 U.S. 891 (1975); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Brown v. Texas,* 443 U.S. 47 (1979).

profiling might prevent and the difficulty of determining how effective profiling is in preventing them. (Applbaum, 2014; Harcourt, 2004; Lever, 2017).[7] Thus, Ripstein's interpretation of the demands of proportionality applies well beyond the 'stand your ground laws' that he seeks to evaluate. However, interpreting these debates in terms of the proportionate fulfilment of two competing demands – the protection of rights and the protection of people, (who may be rights-violators)-does not seem to capture what is at issue here. Rights-violators, by implication, can be found amongst all racial and ethnic groups and, importantly, amongst those who are and are not members of the police, and therefore charged with a special responsibility for ensuring the rights of others. So, what is at issue in these different debates on profiling are two different comparisons between two different groups of people.

The first comparison concerns the group of rights violators who are members of racial minorities, as compared to the group of rights violators who are not – on the assumption that NO morally acceptable search will catch all rights violators or will treat minority v majority status as a sufficient reason for a police stop. The second comparison concerns the group of non-violators who are members of racial minorities, compared to non-violators who are not, on the assumption that the innocent have to pay the costs of security as well as the guilty, but that these costs need to be shared in ways that do not stigmatise or unduly burden innocent minorities as opposed to innocent majorities.

Random and universal searches treat racial majorities and minorities the same. Hence, there is no particular reason why they should stigmatise and unfairly burden the innocent, or unfairly treat some guilty people as compared to others. Indeed, because these forms of search mean that the police do not need to decide who to search at all, they *protect the police* from stigma and hostility, and give them the

[7] The comparisons of harm and benefit in both a deontological and consequentialist account of profliling are essential to Risse and Zeckhauser's case for profiling, and their reasons to think that Randall Kennedy has overstated the former. However, the argument there – as in the literature on racial profiling more generally – is distinct from questions about whether racial profiling does, or could, be applied fairly to white and non-white people.

means to identify and correct their own prejudices without implying that they are more prejudiced or racist that the general population. (Lever, forthcoming 2020). This is generally overlooked in the debate on profiling. On the other hand, racial profiling clearly risks exacerbating existing difficulties in interpreting police behaviour and thereby stigmatising unfairly both those police officers who are conscientious protectors of everyone's rights *and* the great majority of racial minorities who, whatever their profession, do not violate people's rights either. Hence, the burden of proof in arguments over police searches is on those who would justify, rather than those who would oppose, racial profiling and why, thus far, that burden of proof is unlikely to be met. (Kennedy, 1998, 136-167; Lever, 2016, 425-435; 2005 pp. 94-110; Reiman, 2011, pp.3-19).

We have seen, then, that talk of proportionality in disputes about police searches involves comparisons *within* not *between* the guilty and the innocent. Although references to 'hit rates' and to the relative frequency with which stops produce evidence of wrong doing necessarily figures in arguments over security, this is not because there is some level of 'success per stop' that would automatically justify police searches, or show that one police tactic should be preferred to another, even if we put aside concerns over equality. Ignorance of the total criminal population, (or of the numbers who aspire to join it), means that the significance of different hit rates, real or hypothetical, is largely speculative, even before we consider the ways in which racial bias may affect hit rates. (Zack 2015, 31-62). Although it is hard to know how far bias affects hit rates themselves and their interpretation, it is reasonable to suppose that it has *some* effect, and potentially quite a significant and self-reinforcing one, given that the more guilty people one finds the more one will be inclined to think one's tactics effective and justified, even when they are not. As racial minorities are a disadvantaged social group, even before one considers the choice amongst police tactics, the risk of disadvantaging them further, in ways that are likely to become progressively worse over time, clearly tells against racial profiling as compared to at least two of the policing alternatives. (Lever, 2016, pp.

425-435). Hence, while it is hard to make the notion of a proportionate search very determinate - even when one breaks down the different comparison groups relevant to the reconciliation of equality and security- we are nonetheless capable of reasoning about the relative merits and demerits of different ways of pursuing security, and of drawing fairly robust ethical conclusions from them.

Conclusion

We have seen that the black box of proportionality can be illuminated by focussing on the implications for equality of the different means we may take, as a society, to achieve legitimate collective ends. So understood, judgements of proportionality concern the relative strengths and weaknesses of different ways of pursuing legitimate ends, given the importance of treating people as equals, despite their evident differences. We have seen why this is a more natural interpretation of concerns with proportionality than that suggested by Ripstein, although his attention to the moral claims of rights-violators is particularly welcome given a tendency to idealise those who are law-abiding, and to essentialise those who are not. We have also seen that this interpretation of proportionality illuminates actual debates over security not just in the sense that we can offer an *additional* reason to reject 'stand your ground laws' to the many that are already available, but because it illuminates actual debates over the ethics of police stop and search procedures, and enables us to integrate the interests of rights-protecting police into the arguments in favour of automatic and random searches – especially as compared to racial profiling.

However, if we can make sense of 'proportionality' as a component in the ethical analysis of security policy – as of public policy more generally- I see no particular reason to favour the language of proportionality over other ways that we might formulate our interests in equality. If it is possible to use 'proportionality', like 'reasonableness' as a promissory note about an analysis to come, or as a way of describing issues that will have to be temporarily set aside, there is nothing which precludes using the language of equality in these ways, or substituting the words

'fair' or 'reasonable' for 'proportionality' in most contexts. Indeed, I tend to prefer the alternatives because they avoid the false sense of precision which talk of proportionality can generate, and because talk of fairness, equality and reasonableness do not lend themselves to quantification in the way that proportionality does. We are therefore much less likely to suppose that we are talking about quantities of security, or quantities of rights violations or protections if we use these other ways of talking, and are therefore less likely both to misunderstand what the ethics of security requires, or which comparisons we are ethically required to assess.

Replacing talk of proportionality with talk of equality, fairness or reasonableness may discourage us from trying to quantify the number of guilty, as opposed to innocent, people caught by different police tactics, as though that would magically resolve ethical debate about what we should do, or descriptive and interpretative disagreements about what the police are doing. Instead, we could focus attention on how different security strategies treat people, whether or not we classify them as members of the police, as victims of crime, as criminals, as members of a racial minority, or as some, even all, of these. [8] Given the fragility of our analytic categories, the difficulty of interpreting relevant evidence, and the inability to obtain relevant evidence for moral, scientific and practical reasons, we need ways of assessing what is ethical that do not demand greater precision or certainty than we have. If talk of

[8] I am not yet able to discuss how my analysis of 'proportionality' apples to discussions of just punishment. However, I suspect that concerns with 'disproportionate punishment' – for example, killing those who steal bubblegum, to use an example suggested by a *Res Publica* reviewer – will be found to combine concerns with the *purposes* of punishment (rehabilitation and prevention as opposed to retribution), with those about the treatment of different *types of offence* (eg. petty theft as compared to bank fraud; or property-offences as compared to those against the person), and different *types of offenders* (first time offenders, say, versus repeat offenders).

'proportionality', like talk of 'reasonableness', can be an invitation to ethical reflection, we have seen that it lends itself to abstractions and false forms of precision which may obscure, rather than illuminate, the gravity of that challenge, and what is at stake when we fail to meet it. I therefore conclude that we should be wary of treating the language of proportionality as a natural or inevitable part of our reasoning about rights, whether or not we are concerned with the ethics of security, or predisposed to seek deontological, rather than consequentialist, approaches to morality.

References

Applbaum, A. I. 2014 'Bayesian inference and contractualist ustification on interstate 95'. In *Contemporary Debates in Applied Ethics*, 2nd ed., Chichester, UK: John Wiley and Sons. 219–32.

Cohen. G. A. 2008. *Rescuing Justice and Equality.* Cambridge, MA: Harvard University Press.

Devlin, P. 1968. *The Enforcement of Morals* . Oxford: Oxford University Press

Harcourt, B. 2004. 'Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally'. *University of Chicago Law Review* 71 (4): 1275–1381.

Himma, K.E. 2016. 'Why security trumps privacy' in *Privacy, Security and Accountability: Ethics, Law and Policy* ed. A. D. Moore. London: Rowman, Littlefield Intl., 145 - 170.

Holbert S. and Lisa Rose. 2004. *The Color of Guilt and Innocence: Racial Profiling and Police Practices in America.* California: Page Marque Press.

Kennedy, R. 1998 *Race, Crime, and the Law*. New York: Vintage Books.

Letsas, G. 2017. 'Reclaiming Proportionality: A Reply to Ripstein', *Journal of Applied Philosophy* , 34.1. 24-31

Letsas, G, 2018, 'Proportionality as Fittingness: The Moral Dimension of Proportionality", *Current Legal Problems* 71.1. 53-86.

Lever, A. 2019. 'Racial Profiling' *forthcoming* in ed. Bob Fischer, *Ethics, Left and Right: The Moral Issues That Divide Us.* Oxford: Oxford University Press, December 2019) ch. 18; ('Against Racial Profiling' 571 -5; and 'Reply to Hillman', 585 -6).

Lever, 2017. 'Race and Racial Profiling', in ed. Naomi Zack, *The Oxford Handbook of Philosophy and Race*, Oxford: Oxford University Press, 2017. 425-435

Lever, A. 2016, 'Democracy, privacy and security', in *Accountability: Ethics, Law and Policy* ed. A.D; Moore. London: Rowman, Littlefield Intl., 105 -124

Lever 2015, 'Privacy, Democracy and Freedom of Expression', in *Social Dimensions of Privacy* eds. B. Roessler and D. Mokrosinska, Cambridge: Cambridge University Press, 162-180.)

Lever, A. 2005, 'Why Racial Profiling is Hard to Justify: A Response to Risse and Zeckhauser', *Philosophy and Public Affairs,* 33.1, (January 2005), 94-110

MacKinnon, C.A; 1988. *Feminism Unmodified: Discourses on Life and Law.* Cambridge, MA: Harvard University Press.

Moore A.D. 2016, 'Why privacy and accountability trump security' in *Accountability: Ethics, Law and Policy* ed. A. D. Moore. London: Rowman, Littlefield Intl., 171 -182

Omand, D. 2011. *Securing the State* . *Oxford: Oxford University Press.*

Phillips, A. 2000. 'Feminism and Republicanism: Is this a Plausible Alliance?', in *Journal of Political Philosophy;* 8.2, 279 -293.

Qong, J. 2017. 'A Comment on Ripstein's Reclamation', *Journal of Applied Philosophy* 34.1, 32-37.

Reiman, J. 2011, 'Is Racial Profiling Just? Making Criminal Justice Policy in the Original Position.' *Journal of Ethics* 15 (3): 3–19.

Ripstein, A. 2017. 'Reclaiming proportionality'. *Journal of Applied Philosophy* 34.1, 1 – 18

Risse, M. and R. Zeckauser, 2004. 'Race and Racial Profiling', *Philosophy and Public Affairs.* 32.2. 131 -170.

Uniacke, S. 2017. 'The Proportionality Constraint'. *Journal of Applied Philosophy* 34.1, 38-42

Waldron, J. 1993. *Liberal Rights: Collected Papers 1981 – 1991.* Cambridge: Cambridge University Press.

Walzer. M. 1983. *Spheres of Justice*: A Defence of Pluralism and Equality. NY: Basic Books.

Wenar, L., 2015. 'Rights' *Stanford Encyclopedia of Philosophy*

Young, I.M. 1990, *Justice and the Politics of Difference*. Princeton, New Jersey: Princeton University Press

Zack, N. (2015). *White Privilege and Black Rights: The Injustice of U.S. Police Racial Profiling and Homicide*. New York, NY: Rowman and Littlefield.