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Driving Up Lexington Avenue (Again)

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I. Introduction

There are controversies about rights that simply will not go away. I do *not* have in mind the well-known disputes about specific rights issues, such as abortion, hate speech or religious symbols in public spaces. Rather, I mean controversies about the theory of rights. One of the questions that has kept rights theorists busy is about the nature of rights: are they trumps (as argued by Ronald Dworkin),[1] or are they principles (as held by Robert Alexy)?[2] Another question, and the one that is the topic of this chapter, concerns the scope of rights: do rights protect *any* liberty interest, such that any limitation of a person's freedom to do as he or she pleases constitutes a limitation of a right and requires a justification? Or is the scope of rights narrower, with the consequence that many activities that people routinely engage in are not protected by rights and their limitation is accordingly simply a matter of policy?

Early in his career, Ronald Dworkin forcefully took a stance on this question. In *Taking Rights Seriously*, he argued against a right to liber*ty* and instead defended a right to (distinct) liber*ties*. The example that he used to illustrate his argument concerned Lexington Avenue in New York City:

> I have no political right to drive up Lexington Avenue. If the government chooses to make Lexington Avenue one-way down town, it is a sufficient justification that this would be in the general interest, and it would be ridiculous for me to argue that for some reason it would nevertheless be wrong.[3]

[1] See, eg, R Dworkin, 'Rights as Trumps' in J Waldron (ed), *Theories of Rights* (Oxford, Oxford University Press,1984) 153.

[2] R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) ch 3.

[3] R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 269.

'Driving up Lexington Avenue' has captured the imagination of rights theorists.[4] Stavros Tsakyrakis, too, invokes it in 'Disproportionate Individualism',[5] his final essay on the theory of rights, in order to make his case against a right to liberty or, as he calls it, 'total freedom'. His work is particularly relevant because, unlike Dworkin's, it is well-informed of and engages with contemporary scholarship on proportionality-based rights adjudication and presents its criticisms of a right to liberty as part of an assault on this way of conceptualising rights.

This chapter returns the favour and engages directly with Tsakyrakis' challenge. I have not been able to withstand the pull of the Lexington Avenue example, and accordingly, I will use it to build my case against Dworkin's and Tsakyrakis' views. I will first give an overview of the case in favour of a general right to liberty as proposed by the literature on the culture of justification and the right to justification (section II). This will be followed by a summary of Tsakyrakis' challenge (section III) and my case for why I believe this challenge to be unsuccessful (section IV).

II. The Case for a General Right to Liberty

As a matter of the history of ideas, the case for a general right to liberty was developed *not* as a free-standing argument about rights but as an attempt to make sense of a globally successful *practice* of rights adjudication. This practice, which in previous writings I have labelled 'the global model of constitutional rights',[6] prominently displays two features. The first is *rights inflation*,[7] which means that in the practice of rights adjudication the scope of rights has become very broad. The best-known and most extreme example is the German Federal Constitutional Court's interpretation of the German Basic Law as protecting a right to freedom of action. This is, of course, precisely the 'right to liberty' that Dworkin and Tsakyrakis reject. Article 2(1) of the German Basic Law provides 'Everyone has the right to freely develop his personality.' As early as 1957, the Court decided to interpret this right as a right to freedom of action, arguing that an earlier draft of the provision had stated 'Everyone can do as he pleases'.[8] The Court repeatedly affirmed this ruling and famously declared that Article 2(1) included the rights to feed pigeons in a park[9] (an example that Tsakyrakis picks up in his essay) and to go riding in the woods.[10] The second feature is the use of the doctrines of *balancing* and

[4] See, eg, DN Husak, 'Ronald Dworkin and the Right to Liberty' (1979) 90 *Ethics* 121, 128–29; DH Regan, 'Glosses on Dworkin: Rights, Principles, and Policies' (1978) 76 *Michigan Law Review* 1213, 1216–17.

[5] Tsakyrakis, 'Disproportionate Individualism', ch 1 of this volume.

[6] K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012) ch 1.

[7] ibid 3–5.

[8] BVerfGE 6, 32 (36–37) (*Elfes*).

[9] BVerfGE 54, 143 (*Pigeon-Feeding*).

[10] BVerfGE 80, 137 (*Riding in the Woods*).

proportionality in order to determine the permissible limitations of rights.[11] The limitation of a right is justified if it is proportionate, that is, if it serves a legitimate goal (legitimate goal stage), is a suitable means of achieving the goal (suitability stage), is necessary to achieve the goal (necessity stage) and if the importance of the goal outweighs the severity of the limitation (balancing stage; sometimes called proportionality in the strict sense).

The emerging structure of rights (wide scope of rights plus use of balancing and proportionality) sits in some tension with most, if not all, philosophical theories of rights, including Dworkin's: where contemporary rights adjudication endorses a general right to liberty, Dworking rejects this and prefers more narrowly defined rights to liberties; and where contemporary rights adjudication wants to balance rights against competing interests, Dworkin rejects balancing[12] and argues that rights operate as trumps.[13] The debate about proportionality, in which comparative constitutional lawyers and constitutional theorists have engaged since roughly the beginning of this century,[14] can be seen as an attempt to come to terms with the success of the global model and either make a coherent case for it, thus defending a globally successful practice, or show its theoretical deficiencies, thus adhering to conventional philosophical wisdom about rights.

The case for rights inflation can be made, and has been made in the literature, in more than one way, just as one can climb to the peak of a mountain from more than one direction. One route adopts a negative strategy and demonstrates the incoherence of any attempt to limit the scope of rights to a set of especially important interests.[15] If there is no right to liberty but only a right to (distinct) liberties, then we need a test that tells us which liberty interests are protected by rights and which are not. This points to the necessity of a 'threshold' that delineates rights from mere interests. It turns out that it is at least very difficult and perhaps impossible to develop a coherent threshold: all existing attempts have failed, and fairly obviously so. Best known is James Griffin's theory of rights as protecting

[11] Möller (n 6) 13–15.

[12] R Dworkin, 'It is absurd to calculate human rights according to a cost-benefit analysis' *The Guardian* (24 May 2006) at www.theguardian.com/commentisfree/2006/may/24/comment.politics.

[13] See Dworkin (n 1).

[14] Representative publications include Alexy (n 2); A Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge, Cambridge University Press, 2012); D Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004); M Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in G Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 131; K Möller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709; A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008-9) 47 *Columbia Journal of Transnational Law* 72. See also the following edited collections: G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge, Cambridge University Press, 2014); VC Jackson and M Tushnet (eds), Proportionality: *New Frontiers, New Challenges* (Cambridge, Cambridge University Press, 2017).

[15] Möller (n 6) 74–77.

personhood.[16] Griffin argues that human rights protect personhood, which in turn requires liberty. Which liberty interests? Griffin's answer: those liberty interests that are important for personhood. This reasoning is obviously circular, and Griffin offers no principled way of distinguishing liberty interests that are required for the protection of personhood from interests that are not.[17] Of course, the failure of Griffin's theory in this regard does not demonstrate that there could not be some other, more convincing theory or threshold. But as long as no convincing threshold is put forward, it is perhaps permissible to embrace rights inflation and work on the assumption that there is, indeed, a general right to liberty.

The second, and more positive, case in favour of a general right to liberty flows from the twin ideas of the culture of justification and the right to justification. This theory was first proposed by Mattias Kumm as an attempt to make sense of the practice of human and constitutional rights adjudication with its focus on a broad scope of rights and the use of balancing and proportionality.[18] Kumm argues, drawing on the work of the German philosopher Rainer Forst, that every person's foundational right is the right to justification. This means that whenever the state places a burden on a person, it owes him or her a substantive justification, and it is the role of the courts, and ultimately the constitutional or supreme court, to assess the reasons put forward by the state and to strike down any unjustifiable laws.

Take as an example the famous and above-mentioned German case about the right to feed birds in a public park. Assume that you would like to feed birds in your local park and that a public authority has prohibited this activity. It seems clear that bird feeding is not the kind of activity that would ordinarily attract the protection of rights *if* we understand rights as protecting a set of narrowly defined, especially important interests. But the right to justification does not subscribe to this starting point. Rather, it argues that *any* limitation of your ability to do as you please requires justification. Intuitively this is surely plausible: as a would-be bird feeder, you might ask 'How dare they prohibit me from feeding the birds? They better have a good justification!' And you would be entirely right to demand a good justification, because if no such justification exists, the legitimacy of the state's act would at least be questionable. Under the right to justification, you could take your case to court, and the court's role would be to uphold your right to justification, that is, to strike down a law that unjustifiably burdens you.

To this one might object that the justification that you are entitled to is that the law that limits your ability to feed the birds has democratic pedigree.[19] Put bluntly, the justification is that a democratic majority voted for this law.

[16] J Griffin, *On Human Rights* (Oxford, Oxford University Press, 2008) 32–37.

[17] J Raz, 'Human Rights Without Foundations' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010) 321, 326–27; R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, Harvard University Press, 2011) 474, fn 5; Möller (n 6) 74–77.

[18] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 141.

[19] For a discussion of this issue, see K Möller, 'Justifying the Culture of Justification' (2019) 17 *International Journal of Constitutional Law* 1078, 1088–92.

The response that proponents of the right to justification and the culture of justification give to this point is that democratic pedigree is a necessary but not sufficient condition. In addition to democratic (majoritarian) decision-making processes, the law must be reasonably justifiable. This, too, makes intuitive sense if you place yourself in the shoes of the bird feeder: if there was simply no substantive reason for the prohibition on bird feeding, you would not consider the law justified and you would consider the prohibition as illegitimate. By way of contrast, you would regard the law as legitimate if there was a good enough reason justifying it, even if you disagree with the policy and would have voted against it. This is because you understand that there is *reasonable disagreement* about what justice requires and that your personally favoured views will not always prevail.

The right to justification can explain and make sense of the practice of human and constitutional rights law with its endorsement of a right to liberty and the doctrines of balancing and proportionality. It requires a general right to liberty because this ensures that *any* limitation of a person's freedom will trigger the duty of justification. And the proper application of the principle of proportionality ensures that disproportionate laws, that is, laws that are not reasonably justifiable, are struck down.

III. Tsakyrakis' Challenge

In this section I will present Tsakyrakis' two central objections to rights inflation. I will briefly respond to the first, relating to the relationship between the individual and the community, at the end of the following subsection. However, the main focus of the remainder of this chapter will be on his second criticism, which relates to the relationship between rights, freedom and dignity; this will be discussed in section IV.

A. Rights, the Individual and the Community

Tsakyrakis argues that 'total freedom' and proportionality underestimate the value of community. He invokes an analogy that I find useful and productive: he compares a political community with intimate relationships. While couples are supposed to be as close to each other as possible, the partners nevertheless remain 'distinct and independent even in intimate relationships'.[20] For example, it would be inappropriate for the partners to spy on each other or to read each other's private correspondence.[21] A parallel point, Tsakyrakis argues, applies for

[20] Tsakyrakis, ch 1 of this volume, section II.
[21] ibid.

a community-based conception of political justice, and he uses the term 'liberal sociability'[22] for this. A fair society aims for the greatest possible integration of its members while simultaneously insisting that each member remain distinct and independent. To this end, 'basic liberties' are indispensable: they 'enable all persons to conduct the plan of life that they deem valuable'.[23]

Even though Tsakyrakis does not cite Dworkin here, his idea appears to be influenced by Dworkin's work. In the famous 'Introduction' to his book *Freedom's Law*,[24] Dworkin provides a defence of judicial review that focuses on the value of political community. The question he addresses is the old question of the tension between the judicial protection of rights and democracy. Dworkin reconciles the two by arguing that the value underlying democracy must be community, and that a genuine community must be one of moral members. Moral membership, in turn, requires upholding three principles. The first is the principle of participation: no one can be a moral member of a community unless he has the 'opportunity to make a difference in the collective decisions'.[25] The second is the principle of stake. This is what in his earlier writing was the right to equal concern and what in his later work became the dignitarian principle of intrinsic (and equal) value: it holds that 'collective decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all'.[26] The third is the principle of independence. This principle is identical to the right to equal respect in his earlier writings and the principle of personal responsibility in his later work. It holds that a genuine political community must be 'a community of independent moral agents';[27] this prohibits moralism and (some forms of) paternalism. Accordingly, the judicial protection of rights should be geared towards protecting the conditions of moral membership. If it does this successfully, it does not undermine but rather strengthens democracy.

The question that Tsakyrakis can be seen as raising here is whether proportionality-based rights adjudication or the right to justification have a 'story' about community, too. In his view, the philosophy underlying proportionality-based judicial review is one of 'the minimal state' or 'individualistic liberalism'. But that strikes me as incorrect, even from an empirical perspective. The country that subscribes more than any other to those values is the United States, which at the same time follows a theory of rights that is much closer to Tsakyrakis' preferred theory. And conversely, the country best known for proportionality-based judicial review, Germany, has never adopted any philosophy resembling the 'minimal state' or 'individualistic liberalism'. From a normative perspective, too, Tsakyrakis' claim is unconvincing. As pointed out above, the first theory of proportionality-based

[22] ibid.
[23] ibid.
[24] R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA, Harvard University Press, 1996), 'Introduction'.
[25] ibid 24.
[26] ibid 25.
[27] ibid 26.

judicial review and the right to justification was put forward by Mattias Kumm.[28] He makes this case by invoking the value of democracy, which, Kumm argues, starts with the idea of consent: the consent of the people. However, because insisting on everyone's consent is impractical and unrealistic, the requirement of everyone's consent must be replaced by two conditions, one procedural and one substantive, which have to be cumulatively fulfilled. Procedurally, a law must have been passed by a majority; and substantively, the law must be such that those most burdened by it could reasonably have consented to it.[29] Kumm then shows that this requires proportionality-based judicial review. So while his theory is presented as concerned with democracy and not community, it can easily be rephrased in the language of community: to be a true community, the laws that we give ourselves must be justifiable to everyone, in particular to those who object to them and/or voted against them. If we enforce unjustifiable laws against those who object to those laws, we do not treat them as equal members of our political community.

B. Freedom, Dignity and Rights

Tsakyrakis makes the following, Dworkin-inspired case against 'total freedom'. Imagine the government makes Lexington Avenue a one-way street. Proportionality and the culture of justification would consider this a limitation of the general right to 'total freedom' and ask whether this limitation is proportionate. But there seems something wrong with this logic, according to Tsakyrakis. Even if the government made the wrong call here as a matter of policy, this mistake would not appear to be violation of rights. He asks the rhetorical question 'Are we prepared to say that prohibiting driving uptown was a violation that Human Rights Watch should denounce?'[30] The answer is 'no' because 'nobody feels offended by the prohibition; nobody feels that the prohibition denies her dignity as a moral agent'.[31] From this he infers 'The conclusion is that not every curtailment of freedom raises a human rights issue but only the abridgement of certain basic liberties.'[32]

This conclusion appears at first sight to be the conventional endorsement of a set of narrowly defined basic liberties, such as freedom of religion, freedom of association, freedom of speech and so on. However, as Tsakyrakis makes clear later in the same section, this is not what he and Dworkin have in mind. He rejects lists of basic liberties: 'Dworkin's formula seems broader since any interference that denies equal concern and respect qualifies as giving rise to a claim of human right.'[33] This is correct and important. What matters for Dworkin (and Tsakyrakis) is not whether an act by the state restricts a narrowly defined right. Rather, what

[28] Kumm (n 18).
[29] ibid 168–70.
[30] Tsakyrakis, ch 1 of this volume, section III.
[31] ibid.
[32] ibid.
[33] ibid.

matters is whether the act by the state is consistent with equal concern and respect. Accordingly, lists of liberties do not help us, or in any case are not determinative.

Instead, we have to look at the meaning of 'equal concern' and 'equal respect', which together sum up the requirements of human dignity. (Here Tsakyrakis pulls together elements of Dworkin's early theory of rights, where Dworkin spoke of equal concern and respect (without invoking dignity) and his later work, which introduced human dignity with its two prongs, first, equal and intrinsic value (which was equal concern in Dworkin's earlier work), and second, personal responsibility (which was equal respect in Dworkin's earlier work).)

A law violates equal *concern* (equal and intrinsic value) if it is discriminatory. Since there is nothing to indicate that the prohibition on driving up Lexington Avenue is discriminatory, equal concern is not violated.[34] Equal *respect* is violated in the case of a law that is moralistic or paternalistic. Here we can see the appeal of Tsakyrakis' claim that for there to be a rights violation, the law in question must be offensive to the dignity of the right-holder and an affront to his or her moral agency: moralistic and (inappropriately) paternalistic laws certainly have that quality. In the Lexington Avenue example: since making Lexington Avenue a one-way street would not be motivated by moralism or paternalism, there is no violation of equal respect. Accordingly, there is no right to liberty, and there is no violation of rights in the Lexington Avenue example.

IV. The Right to Drive Up Lexington Avenue

My argument in this section will proceed in two steps. First, I will show that the gap between the culture of justification and Tsakyrakis/Dworkin is considerably narrower than Tsakyrakis makes it seem. Second, I will show that to the extent that there remains a difference, Tsakyrakis' (as well as Dworkin's own) interpretation of Dworkin's principle of personal responsibility is too narrow.

A. Narrowing the Gap

i. Equal Concern and Respect

Tsakyrakis' claim that there is no right to drive up Lexington Avenue needs to be qualified, on the basis of his own theory. Remember that he correctly rejects the

[34] For the record, I have argued in earlier writings that Dworkin's first principle of human dignity (the principle of intrinsic value) should be interpreted as requiring that laws be proportionate: any law that is disproportionate in the strict sense (ie, which fails at the final stage of the proportionality test) attaches too little weight to the interests of the right-holder and accordingly treats his interests as less important than those of others; this constitutes a violation of his status as an equal. See K Möller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2018) 12 *Law & Ethics of Human Rights* 281, 292–96.

conventional philosophical view that rights protect only certain narrowly defined activities or liberties, such as speech, religion, association, privacy and so on. Under that view, it would certainly be correct to state that there is no right to drive up Lexington Avenue: this activity would simply not be among the range of activities protected by rights, and therefore any argument that the government violated rights when it made Lexington Avenue a one-way street would be a non-starter.

But, to repeat, this is not how Dworkin and Tsakyrakis see it. They do not believe in lists of liberties, despite Dworkin's occasional references to them. Rather, they believe that what matters is whether the governmental policy violates equal concern and respect. This implies that under certain conditions, making Lexington Avenue a one-way street could indeed violate rights. If the NYC government argued that driving up Lexington Avenue had been prohibited because it hates drivers (say, because drivers vote disproportionately Republican) and it wants to make their lives more difficult, then this would be discriminatory and would accordingly have failed to show equal concern for drivers. Or if the government had argued that the reason for its policy was that it thought driving was a bad lifestyle and people should cycle instead, then this moralistic or paternalistic motivation could (arguably) have violated equal respect.

What this shows is that for Tsakyrakis and Dworkin, we cannot exclude in advance the possibility that making Lexington Avenue one-way violates rights. It all depends on the reasons for the restriction. How come, then, that Tsakyrakis is so confident that making Lexington Avenue a one-way street does not violate rights? The answer is that we frequently make assumptions about what the government's motives typically are in enacting a law. On the basis of those assumptions, we are confident that we want the government's motives or reasons closely scrutinised when it censors speech, regulates religious practice or bans certain forms of consensual sexual conduct. But we remain largely unsuspicious about the government's motives with regard to planning decisions. Tsakyrakis states:

> So, for example, if the justification for prohibiting bird feeding in the park is that this kind of activity is worthless or a waste of time, this would be an insult to the ethical responsibility of the individuals. The state cannot restrict my choices on the basis that they are not worthy. … But the state can restrict my choices when its reason for doing so does not assume any ethical evaluation. This means that there is no general or prima facie right to feed the birds, to engage in falconry or 'to paint my Georgian house purple'. A state *typically* prohibits … those activities on the basis of considerations that do not compromise dignity … However, the very same activities raise human rights issues whenever their justification is based on ethical evaluations.[35]

This is somewhat puzzling and appears contradictory: on the one hand, there is no prima facie right to feed the birds, but on the other hand, prohibiting bird feeding can in certain circumstances violate rights. How can this be? How should a Dworkinian-Tsakyrakisian judge who has to assess whether a prohibition on

[35] Tsakyrakis, ch 1 in this volume, section III (emphasis added, footnotes omitted).

bird feeding violates rights structure her inquiry? The judge has to work with a bill of rights that presumably includes a right to 'liberty' (as in the Due Process Clause of the Fourteenth Amendment to the US Constitution) or 'private life' (as in Article 8(1) of the European Convention on Human Rights) or 'the right to develop one's personality' (as in Article 2(1) of Germany's Basic Law). She now has two options. The first is that she states that 'there is no prima facie right to feed the birds', in which case none of the rights that she is tasked to protect is applicable and the case is over. The problem with this is that she never gets to the crucial question of whether the prohibition violates equal concern and respect; and accordingly this route is not acceptable. She therefore has to choose the other route, which is to accept that one of the rights in the bill of rights is engaged, in order then to proceed to ask whether the law in question respects equal concern and respect. My point is: we can obsess as long as we wish over the moral coherence of claims such as 'there is/isn't a prima facie right to feed the birds', but given how bills of rights are drafted, this will not be helpful to judges. The positive law obligates them to determine in a first step whether a right is engaged, and in a second step whether it has been violated. And their (stipulated) Dworkinian-Tsakyrakisian commitment obligates them to determine whether the law violates equal concern and respect. I see no alternative to their acknowledging in a first step that any limitation on 'total freedom' (doing as one pleases) engages rights, and then examining in a second step whether the limitation respects equal concern and respect.

What follows is that the gap between proportionality-based judicial review and Tsakyrakis/Dworkin is smaller than it initially seemed. Both approaches acknowledge that a limitation on feeding the birds or making a street one-way could potentially violate rights: it all depends on the kind and strength of the reasons on which the government relies. Proportionality-based judicial review would engage in an all-things-considered assessment of whether the reasons that the government relies on justify the policy under consideration, whereas Tsakyrakis and Dworkin would engage in a narrower inquiry as to whether the reasons are consistent with equal concern and respect.

The problem deepens. Tsakyrakis and Dworkin want to exclude moralistic and paternalistic reasons. But how can a court determine whether a given law is motivated by moralism or paternalism? Granted, if the court is lucky, the government will admit its own moralism. In practice, this is very unlikely and happens almost never. As Mattias Kumm has pointed out in the context of the 'gays in the army' case of *Smith and Grady v United Kingdom*,[36] it seems likely that the relevant political discussions in the United Kingdom in the 1980s were influenced by homophobia, dislike of homosexuality, and moralism. But of course these 'reasons' do not appear in the United Kingdom's submission to the European

[36] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

Court of Human Rights. Kumm observes, 'Once forced into the game of having to justify a practice in terms of public reason, participants are forced to refocus their arguments, and what comes to the foreground are sanitized arguments relating to "operational effectiveness and morale".[37]

I find the controversy about assisted suicide instructive in this regard. Let us assume that a law that prohibits assisted suicide is motivated in part by moralism (for example, a religious view that it is wrong to commit suicide or assist with it) and in part by a concern about protecting vulnerable people from abuse (under the logic that if assisted suicide were to be legalised, this could be abused by carers or family members). Under Tsakyrakis' and Dworkin's framework, the law violates rights if it violates equal respect, that is, if it is moralistic. But how should this be determined? It seems to me that there is no alternative to go beyond the subjective motivations of the decision-makers and engage in an assessment of whether the concern about protecting vulnerable people from abuse is substantively convincing enough to justify the policy. This, however, is precisely what proportionality-based judicial review and the culture of justification would do: in a first step (at the legitimate goal stage), any moralistic or paternalistic reasons would be declared illegitimate and would be excluded from the further proportionality assessment, and at the three following stages (suitability, necessity, and balancing/proportionality in the strict sense) the court would examine whether the legitimate reason (protecting people from abuse) justifies the policy. The general point towards which I am steering is: sometimes, assessing whether a law is moralistic and/or paternalistic requires engagement with the strength of the other, non-moralistic and non-paternalistic reasons as well. This further narrows the gap between Tsakyrakis/Dworkin and proportionality-based rights adjudication, especially in cases that potentially involve moralism or paternalism.

ii. Proportionality

The previous subsection showed that the application of Tsakyrakis' and Dworkin's theories, on a closer look, shares some of the features of proportionality-based judicial review. This subsection narrows the gap between the two theories further by focusing on proportionality and the culture of justification. In his example regarding Lexington Avenue, Tsakyrakis correctly states that for proponents of the culture of justification, making Lexington Avenue one-way is a limitation of freedom and accordingly requires proportionality analysis to establish whether it is justifiable. He helpfully points out that in most scenarios, there will be a good reason for making a street one-way, and therefore, for the example to 'work', we need to stipulate further that 'new research has indicated that the restriction was misguided'.[38]

[37] Kumm (n 18) 160.
[38] Tsakyrakis, ch 1 in this volume, section III.

In fact, we will have to go even further. Because planning decisions are complex and require considerable expertise, courts will generally be slow to interfere with such decisions and will defer to a considerable extent to the relevant decision-maker. A court could not just replace the government's assessment of this empirically (as well as, to some extent, normatively) complex question with its own. First, the court is not the primary decision-maker but only engaged in a review of the primary decision-maker's decision. In the culture of justification, this implies that the court asks *not* if the primary decision-maker made the 'correct' or 'best possible' decision but only if its decision was reasonable, that is, one of (usually) a range of reasonable decisions.[39] Second, where the original decision-maker has considerable expertise, the court will be even slower to interfere. Tsakyrakis mentions 'new research', and this points in the right direction. But bearing in mind the complexity of these decisions and knowing that often even 'new research' will be controversial and/or not necessarily provide the final word on an issue, it is more likely that a court would interfere only where the mistake of the planning authority is obvious and indisputable. To make the example work, let us say that making Lexington Avenue a one-way street causes traffic pollution on parallel streets during rush hour that leads to severe delays for drivers driving uptown; that this could have been avoided at a marginal cost by keeping Lexington Avenue a two-way street; and that there are no other relevant considerations. In such a scenario, under proportionality-based rights adjudication, a court would come to the conclusion that making Lexington Avenue a one-way street did indeed violate rights because, even taking into account the court's institutional limitations in terms of expertise and the corresponding deference that should be given to the original decision-maker, the court could confidently conclude that the policy was not justifiable. In reality, such cases are rare, and it is important to make this clarification in order to avoid the misleading impression that under the culture of justification, courts would routinely replace the relevant government agency's assessment with their own. This further narrows the gap between proportionality-based judicial review and Tsakyrakis' and Dworkin's conception of rights.

iii. Conclusion

This section has shown that the distance between Tsakyrakis and the culture of justification is smaller than he makes it seem. However, there is still a difference between them. In the Lexington Avenue example, it is imaginable that in certain cases, a court following Tsakyrakis' preferred view would reach the opposite conclusion of a court endorsing proportionality-based judicial review. The next section will therefore take a closer look at Tsakyrakis' and Dworkin's conception of rights and point out why I believe it to be flawed.

[39] Möller (n 19).

B. Personal Responsibility

Both the culture of justification and Tsakyrakis take the view that rights protect the status of every person as free and equal. But the two theories give different interpretations to what this means. For the culture of justification, protecting each person's status as free and equal means that every act that limits that person's freedom must be reasonably justifiable to him or her. For Tsakyrakis, the protection of a person's status as free requires something else. He interprets Dworkin's right to equal respect as requiring respect for the ethical responsibility of each person for his or her own life. This is consistent with Dworkin's own writings, including his later work, where he replaces the right to equal respect with the second principle of human dignity, the principle of personal responsibility. Personal responsibility holds, for Dworkin, 'that each person has a special responsibility for realising the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him'.[40] Most people will agree with this principle in this abstract formulation, but it is very difficult to establish how to apply it to specific policies in order to establish whether they respect or violate personal responsibility. In this context, we have to consider Dworkin's idiosyncratic distinction between ethics and morality. Morality is concerned with the duties we have towards others, whereas ethics is about the duties we have to ourselves.[41] For example, if I kill or injure you, I have violated an obligation towards you, that is, a moral obligation. But if I decide to go to church and pray to God, then this concerns a duty I have to myself. For Dworkin, the state can in principle enforce moral obligations (for example, by prohibiting murder) but it has to abstain from enforcing ethical ones.

From this starting point it follows, as Dworkin and Tsakyrakis correctly point out, that moralism and (at least some forms of) paternalism are impermissible. To use that somewhat dated example: if the state prohibits homosexual sex because it considers it to be against God's will, then it violates the principle of personal responsibility because it is each individual's personal responsibility to figure out whether or not homosexual sex is ethically valuable for him or her. So far, so good. The argument I want to develop in this section is that the principle of personal responsibility is not necessarily exhausted by the prohibition of moralism and paternalism.

Tsakyrakis foresees this challenge and provides two reasons why it fails. I have difficulty fully understanding the first, and accordingly I will quote his argument in full:

> [I]t would be disaster to consider every individual preference as an ethical choice that raises a claim of right. We will end up 'moralising' every measure and unavoidably the

[40] R Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton, NJ, Princeton University Press, 2008) 10.

[41] ibid 20–21.

> majority will have to take a stance on every ethical choice. The deliberation would be something as follows: Is your life's plan feeding the birds? Then it gives you a prima facie right, but so does our life's plan, which is to play football. For us, playing football is more valuable and, since we are many, our choice must have the upper hand. Put differently, if society takes every individual preference as an ethical choice – and thus worthy of protection as a prima facie right – I doubt that the result will be more freedom. Everybody, sometimes, will be deeply offended because others will oppose their choices on the basis of their own ethical valuations. The right to nothing in particular will then morph into a right to nothing *tout court*.[42]

Tsakyrakis' starting point is correct: any claim that there is a right to trivial activities such as feeding birds or driving up Lexington Avenue must proceed on the assumption that there is ethical value in this activity, from the perspective of the right holder. It would indeed be strange to protect something as a right which the right holder does not regard as relevant for the purpose of creating value and meaning in his life. What the culture of justification denies is that only ethically important activities (such as those relating to religion, speech, privacy, etc) 'count' or matter in this regard. But it is certainly true that people feed birds because they regard that activity as something of ethical importance (otherwise they would not engage in it), and people try to get home after work in a timely manner (wishing they could drive up Lexington Avenue) because they regard that activity or what it enables (say, spending more time in the evening with their families) as ethically valuable.

I understand Tsakyrakis' next point as acknowledging that if we are so generous as to include ethical choices as rights, then there will often be conflicts of rights. So, to use his example, if there is a green pitch and it could be used either as a park where people can feed birds or as a football pitch, then there is a conflict. He is also right in so far as numbers matter in this regard: if there is only one would-be bird feeder but 100 people want to use the pitch for football, this is a strong argument to designate it as a football pitch. So it is true that if rights are defined as broadly as the culture of justification would have it, everybody would frequently lose out because other people's rights would frequently outweigh his or her rights. This could not be otherwise – the only scenario where I would not frequently or at least occasionally lose out in this way is where I am the dictator. What the culture of justification adds to this is the insistence that courts should review the policy choices that the majority makes, in order to ensure that everyone's interests have been adequately taken into account. If there are already nine football pitches and the last green spot is about to be converted into the tenth, removing the last remaining spot where animal lovers can feed birds, then perhaps this would be a situation where the courts should step in to protect the ability of animal lovers to give their lives meaning by feeding birds. I fail to see how this leads to a 'right to nothing'.

[42] Tsakyrakis, ch 1 in this volume, section III.

Tsakyrakis' second argument is this:

> It is true that the alternative strategy to forbid regulations that are based on ethical justifications does not guarantee or facilitate any plan of life based on any preference. But the real claim we have from society is not to provide everything we need for the success of our plan, even prima facie. Our claim is not, to use Dworkin's metaphor, to have all possible colours in our palette but to be able to design our life on the basis of our own value judgements with the colours that are available to all.[43]

I agree that 'regulations that are based on ethical justifications' should be impermissible. States should be neutral in questions of the good life. But this does not mean that states cannot, or need not, take into account people's ethical preferences when making policies. In the above example, where 100 people want to play football and 1 person wants to feed the birds, the question for the state is not whether football playing or bird feeding is ethically better. Rather, the state has to decide which designation of the pitch of land is best, given the ethical preferences that people in the community have. Without taking sides in the ethical question, the state can decide that the just solution in this scenario is to designate the pitch for football.

Not only is there no contradiction; there are good reasons to be open to considering the importance of people's ethical convictions in political decision-making as well as judicial review. Let us return to the Lexington Avenue example. If just one person wants to drive uptown in order to get home, it may seem far-fetched to claim that the impossibility of doing so has anything to do with his status as free and equal. Tsakyrakis and Dworkin would say you do not have a right to that 'colour in our palette'. Now assume that the person needs to get home to spend time with his wife. Make the wife about to seek divorce because she never sees her husband because of the traffic jams in NYC. Add needy children and sick parents. An under-stimulated dog. Now assume it is not just one person but everyone working in lower Manhattan: NYC designed a traffic policy that makes everyone's marriage fall apart, ruins their relationships with their children and leads to old people dying neglected as well as animal cruelty. And NYC did this without any discernible benefit – it is simply its 'policy'. I do not find it absurd to think that such a policy might violate Dworkin's and Tsakyrakis' principle of personal responsibility, according to which the state has to respect every person's personal responsibility to create meaning in their own lives. If the state creates conditions where it is exceedingly (disproportionately) difficult to create meaning in one's life, what stops us from saying that the state failed to protect this principle? After all, states design traffic policies precisely in order to enable people to get to work and to get home after work (and a number of other reasons). So the point of traffic policies, in the final analysis, is to facilitate people's living their lives: to enable them to create value and meaning in their lives. Accordingly, if the state

[43] ibid.

designs a traffic policy that does not facilitate the living of one's life but makes it harder – in other words, which torpedoes people's ability to take responsibility for their lives – then it appears to me that the principle of personal responsibility would condemn this state of affairs.

V. Conclusion

I conclude that 'total freedom' and the general right to liberty have survived Dworkin's and Tsakyrakis' assaults unscathed. My first, and more preliminary, point is that the gap between their preferred theory of rights and the right to justification with its endorsement of a general right to liberty and proportionality turns out to be smaller than it may initially seem. Second, I have suggested that the conventional interpretation of Dworkin's principle of personal responsibility as requiring the exclusion of moralism and paternalism is too narrow and that a state that enacts disproportionate policies fails to live up to its obligation to create conditions where people can accept personal responsibility for their lives.

But be that as it may. It is a great loss for proponents of the culture of justification, the right to liberty and the principle of proportionality that we will not be challenged by Stavros Tsakyrakis any longer. By making his insightful and powerful case against proportionality and 'total freedom', he has left his mark in the field. His work will continue to be grappled with, as will the intriguing problem of the right to drive up Lexington Avenue.