

Why Proportionality is not a General Ground of Judicial Review

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Abstract

Proportionality is a relation between two things held, metaphorically, in either side of a balance. Proportionality is a ground of judicial review of executive decisions when and only when the law requires judges to hold the scales, and to weigh one set of interests against another. That can be a just and convenient way for the law to give special protection for interests that call for that protection (as the law of the European Convention on Human Rights and European Union law do, and the common law does in some circumstances). Proportionality should not be a ground of judicial review (1) if a claimant can assert no interest that ought to be protected by proportionality reasoning, or (2) if the weighing ought not to be done by a court. As a result, proportionality can never be a general ground of judicial review of administrative action. The grounds of judicial review are various and depend on the nature of an administrative decision. In fact, there is no *general* common law ground of judicial review of the substance of administrative decisions. Not even *Wednesbury* unreasonableness. I will explain this view by pointing out the good sense in the famous, albeit flawed, 1948 decision of the Court of Appeal in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.

I. Introduction

Proportionality is a relation between two things placed –as you might say– in either side of a balance. A lack of proportionality should be a ground of judicial review of executive action if (1) there is a balance to be struck, and (2) the judges ought to decide which way the scales come down. Those requirements do not hold generally for the vast, diverse range of conduct that administrative lawyers call ‘administrative’ –that is, roughly, for all governmental conduct outside the legislature and the courts. Strange as it may seem to say it, there is no general principle that the considerations in favour of public decisions should be balanced against the interests of persons affected by the decision. And where an administrative decision *should* be based on such a balancing, there is no general principle that judges should hold the scales.

In any good legal system, as a result, there is a presumption *against* judicial review of executive action on grounds of proportionality. The presumption can be overridden (and it may be very clearly overridden) by special reasons for judges to hold the scales. There is such a presumption in English law, and it ought to be retained.

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The argument in support of these claims must face up to a cascade of suggestions over many years from the House of Lords and the UK Supreme Court, to the effect that proportionality may someday replace the principles set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [*Wednesbury*].¹ Someday very soon, perhaps? But the idea is thirty-five years old.²

It is an idea whose time can never come. I will argue in section 1 that *Wednesbury* ought to be seen as one illustration among many of the operation of a flexible doctrine – well established long before 1948 – that is allied to the rule of law. Proportionality, by contrast, depends on special reasons for courts to protect special interests, so as to give them the force of qualified legal rights (and see section 2 below).³ In sections 3 and 4, I will identify the circumstances in which administrative action is and is not subject to review for proportionality. Section 5 makes an argument against the view defended skilfully by Paul Craig, that ‘proportionality should become a general head of review’.⁴ I will, in fact, argue that there is no *general* head of judicial review of the substance of administrative decisions. Not even *Wednesbury* unreasonableness.

II. *Wednesbury* and the anti-arbitrariness doctrine

Wednesbury was a challenge to a local council by-law.⁵ That is easy to forget. Many discussions of the case treat it as if it prescribed a code of judicial control of the substance

¹ [1948] 1 KB 223.

² In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock flagged ‘the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community’ (at 410). See also *Kennedy v Information Commissioner* [2014] UKSC 20, *Pham v Home Secretary* [2015] UKSC 19, *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3. For academic discussion of the relation between proportionality and *Wednesbury* see Anthony Lester and Jeffrey Jowell, ‘Beyond *Wednesbury*: Substantive Principles of Administrative Law’ (1987) PL 368. Cf also Jeffrey Jowell and Anthony Lester, ‘Proportionality: Neither Novel nor Dangerous’ in J Jowell and D Oliver, eds, *New Directions in Judicial Review* (Stevens London 1988). See also Grainne De Burca, ‘Proportionality and *Wednesbury* Unreasonableness – The Influence of European Legal Concepts on UK Law’ (1993) 3 *European Public Law* 561, John Laws, ‘*Wednesbury*’ in C Forsyth and I Hare eds, *The Golden Metwand and the Crooked Cord* (OUP 1998), Mark Elliott, ‘The Human Rights Act 1998 and the Standard of Substantive Review’ (2001) 60 *CLJ* 301, Paul Craig, ‘The Courts, the Human Rights Act and Judicial Review’ (2001) 117 *LQR* 589, Richard Clayton, ‘Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle’ (2001) *EHRLR* 504. On the issue of ‘the extent to which the traditional *Wednesbury* approach to judicial review must now be replaced by the proportionality test which is required under the European Convention of Human Rights, Murray Hunt wrote in 2003 that ‘there is now a palpable weariness setting in amongst the discussants’ – ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in N Bamforth and P Leyland, eds, *Public Law in a Multi-Layered Constitution* (Hart 2003) 339-70. For more recent discussions see Sir Philip Sales, ‘Rationality, Proportionality and the Development of the Law’ (2013) 129 *LQR* 223, Lord Carnwath, ‘From Rationality to Proportionality in the Modern Law’ (2014) 44 *HKLJ* 447, Paul Daly, ‘*Wednesbury* and Proportionality – Where are We Now?’ (November 28 2016) *ALM*, <<https://www.administrativelawmatters.com/blog/2016/11/28/wednesbury-and-proportionality-where-are-we-now/>>, Yossi Nehushtan, ‘The Non-Identical Twins in UK Public Law: Reasonableness and Proportionality’ (2017) 50 *Israel Law Review* 69-86.

³ This aspect of proportionality reasoning has often been pointed out, most incisively by Michael Taggart. See e.g. Michael Taggart, ‘Proportionality, Deference, *Wednesbury*’ (2008) 3 *NZ L Rev* 423.

⁴ Paul Craig, ‘The Nature of Reasonableness Review’ (2013) 66 *CLP* 131, 158. See also Paul Craig, ‘Proportionality, Rationality and Review’ (2010) *NZ L Rev* 265.

⁵ *Wednesbury* (n 1) 228-230.

of discretionary administrative decisions in general.⁶ The plaintiff cinema company sought a declaration that it was unlawful for the Wednesbury Council to require cinemas not to admit under-15-year-olds under Sunday opening legislation that empowered the council to impose conditions. The by-law was unlawful, they argued, because it was unreasonable. In rejecting that argument, Lord Greene set out to articulate the task of judges in reviewing local council by-laws, and to distinguish the judicial task from the task of the local councilors themselves in making the by-laws. He said that acting in bad faith, failing to direct oneself properly in law, and acting on irrelevant considerations (or failing to act on relevant considerations), were grounds of judicial review.⁷ While a decision with no such defect could still be quashed, it would not be enough that the judges considered the by-law to be unreasonable. The decision would have to be unreasonable in a way that calls for judicial intervention:

It must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether.⁸

This decision has often been treated as a sort of legal singularity. But it merely followed and applied an old doctrine of English law: a flexible doctrine of judicial action against arbitrary exercise of executive power. I will argue that it is a sound doctrine, and that aspects of Lord Greene's opinion articulate it very well.

Reasonableness is responsiveness to reasons. A reasonable local council by-law responds to the considerations that gave the council reason to decide one way or another. In fact, in order to be reasonable, it must respond to those considerations more or less rightly. Reasonableness is a very flexible notion, and a decision can be more or less reasonable.⁹ Proportionality is a particular aspect of reasonableness, since it is unreasonable to respond disproportionately to one consideration, or to inflict disproportionate damage on an interest that the decision maker ought to take into account. Reasonableness is not a general standard of review of local council by-laws (and, therefore, it is not a general standard of review of executive action). Neither is proportionality in particular. But if the court is in a position to say –because the by-law is oppressive or arbitrary– that the by-law exceeds the latitude that a local council ought to have to decide what considerations to act on, and how to respond to them, then there is ground for quashing the by-law.

⁶ To take one among a great many examples, Paul Craig treats 'Wednesbury review as articulated by Lord Greene and Lord Diplock' as involving a 'generally applicable standard of substantive review' that requires something 'perverse in the extreme' – 'The Nature of Reasonableness Review' (2013) 66 CLP 131, 161. Cf also Paul Craig, 'Proportionality, Rationality and Review' (2010) NZ L Rev 265, suggesting that the doctrine of the case was that 'Lord Greene MR's extreme form of irrationality... irrationality of the very extreme kind indicated by Lord Greene and Lord Diplock' was a requirement for interference with discretionary decisions in general at 274-275.

⁷ *Wednesbury* (n 1) 229.

⁸ *ibid* 230.

⁹ For further discussion of reasonableness, and of the difference between reasonableness and rationality, see Timothy Endicott, *Administrative Law* (4th edn OUP 2018) 244-246. Good by-laws are those that the council was right to make. They respond rightly to the considerations that gave the council reason to decide one way or another; good decisions are always reasonable, and there is no precise general way of demarcating the good decisions from the reasonable ones that the council ought not to have made.

Understood in that way (in accordance with the doctrine that, as we will see, was already well established in English law), *Wednesbury* was a sound decision. But there are three rather severe problems with the way in which Lord Greene presented his reasons. He stated the scope of the doctrine too broadly. He gave it a tantalising, paradoxical formulation. And he deliberately omitted to cite the cases. These problems have lent undue attraction to the idea that the decision was too anti-interventionist, and that the law should move beyond it. They lend an undue attraction to the idea that proportionality should be a general ground of judicial review.

1. *The first problem with Wednesbury: Lord Greene stated the scope of his doctrine too broadly*

Lord Greene had no authority to create a general code of judicial review of executive action. Yet, when he articulated the grounds of review in *Wednesbury*, he suggested that they were grounds for review of ‘an executive discretion’¹⁰ in general and ‘statutory discretions’¹¹ in general. He spoke too loosely. ‘Executive discretion’ is too broad a category to be covered by any single standard of substantive review. The only fair way to read the decision is on the basis that he meant to refer to discretions that are similar in relevant respects to the discretion that was actually in issue in the case he was deciding (that is, similar to the range of choice that the law allowed to a local council in making by-laws under the Sunday opening legislation). And Lord Greene did take this approach at the points in his reasons where he referred to ‘discretion of this kind... such a discretion’.¹²

The context of a decision is obviously crucial, and its importance is very often noticed,¹³ and yet it is still easy to forget that the effect of *Wednesbury* depends on the kind of decision that was being reviewed in the case. If the *Wednesbury* decision were treated as laying down a general code of judicial review of executive discretion, it would be too hands-off for some exercises of discretion. Lord Scarman made this clear in his great speech in *Khawaja v Home Secretary*:¹⁴ “the *Wednesbury* principle”¹⁵ ...is undoubtedly correct in cases where it is appropriate’, but ‘it cannot extend to interference with liberty unless Parliament has unequivocally enacted that it should’. When an immigration authority detains a person in order to exercise its statutory power to remove him from the UK as an illegal entrant, the judges must impose their own view of what is reasonable. The Court of Appeal in *Wednesbury* did not hold that the form of review they applied to local

¹⁰ *Wednesbury* (n 1) 228.

¹¹ *ibid* 229.

¹² *ibid* 228.

¹³ The best example is the hyperbole of Lord Steyn: ‘In law context is everything.’ *R v Secretary of State for the Home Department* [2001] 2 AC 532. For similar manifestoes see *R (Mahmood) v Home Secretary* [2001] 1 WLR 840, [18]- [19] (Laws J), and *R v Secretary of State for the Home Department ex p Daly* [2001] 2 AC 532. Lord Cooke admitted that the context makes a difference, but he thought that *Wednesbury* is not enough in any context: ‘The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd’ [549]. It is one of my central contentions that Lord Cooke was disregarding the importance of context, and that not all administrative decisions are subject to review even on grounds of capriciousness or absurdity.

¹⁴ [1984] AC 74.

¹⁵ *Wednesbury* (n 1). The is principle that, ‘If the authority has considered the matters which it is its duty to consider and has excluded irrelevant matters, its decision is not reviewable unless so absurd that no reasonable authority could have reached it.’ Lord Scarman at [109]-[110].

Sunday opening by-laws also applies to immigration detention; that would have been a bizarre and uncalled-for *obiter dictum*. *Wednesbury* unreasonableness is a ground of review only in cases that are relevantly similar to the *Wednesbury* case.

If *Wednesbury* were treated as laying down a general code, it would also undoubtedly involve *excessive* judicial control over some exercises of discretion. Sometimes, the courts rightly decline to use *Wednesbury* unreasonableness as a ground of review, because it would give judges an illegitimate governmental role. The classic cases are *R v Environment Secretary, ex p Nottinghamshire County Council*¹⁶ and *R v Environment Secretary, ex p Hammersmith and Fulham LBC*,¹⁷ concerning the exercise of the power that Parliament had conferred on the government under Margaret Thatcher to assess the spending of local authorities and, where it was assessed as excessive, to cap their rates and to reduce their grant from central government. In *Nottinghamshire*, Lord Scarman said that there was a risk that Lord Greene's judgment 'may be treated as a complete, exhaustive, definitive statement of the law',¹⁸ and he held that the judges could only interfere with the power at issue in the case if the minister 'had acted in bad faith, or for an improper motive, or... the consequences of his guidance were so absurd that he must have taken leave of his senses'.¹⁹ Unlike *Wednesbury* unreasonableness, that would be an irrationality standard. It is clear that Lord Scarman understood it to be more hands-off than *Wednesbury*. He concluded that 'it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had notice was perverse and must be set aside'.²⁰

In *Hammersmith and Fulham*, following Lord Scarman, Lord Bridge said that the House of Lords had adopted a more restrained role for judges in controlling discretion in *Nottinghamshire* than the Court of Appeal had adopted in *Wednesbury*, because of the nature of the power in issue in *Nottinghamshire*:

Since the statute has conferred a power on the Secretary of State which involves the formulation and the implementation of national economic policy and which can only take effect with the approval of the House of Commons, it is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity.²¹

With respect, I think he ought to have said 'unreasonableness short of the extremes...'. He concluded that a complaint that the central government's assessment was unreasonable in the *Wednesbury* sense was 'inadmissible' in judicial review.²²

Central government funding decisions of the kind at stake in those cases provide a useful paradigm of the sort of situation in which the judges should be even more restrained than when they review the substance of a local council by-law. But there are many other such situations. Imagine, for example, that Theresa May's plan in 2016 to trigger Article 50 had

¹⁶ [1986] AC 240.

¹⁷ [1991] 1 AC 521.

¹⁸ *Nottinghamshire* (n 16) 249.

¹⁹ *ibid* 247.

²⁰ *ibid* 259.

²¹ *Hammersmith and Fulham* (n 17) 597.

²² *ibid* 598.

been challenged on the ground that Brexit was *Wednesbury* unreasonable.²³ The judges would not have wanted to pass judgment on the proposition that no reasonable Prime Minister could pursue Brexit after the referendum, and when Gina Miller's lawyers challenged the use of prerogative power for the purpose, they were wise not to base their argument on the substance of the matter.²⁴ There are many other cases in which *Wednesbury* unreasonableness does not apply to an exercise of power, including *Abbasi v Secretary of State for Foreign and Commonwealth Affairs*,²⁵ in which the Court of Appeal held that the courts' role in deciding whether the Foreign Office's exercise of its power to assist British nationals was 'irrational' is limited by the fact that 'the court cannot enter the forbidden areas, including decisions affecting foreign policy'.²⁶ The court will not quash such a decision on the ground that the Foreign Secretary's judgment on the foreign policy considerations was *Wednesbury* unreasonable. Or consider what may be the simplest example of an exercise of discretionary executive power for which there is no judicial review on the ground of *Wednesbury* unreasonableness: the advice of the Prime Minister to the Queen to appoint a particular person as a minister of the Crown. It is a crucial decision for the country. Although it would be a novel case, perhaps it would be right for a court in judicial review to hold that a prime minister who acted corruptly had acted unlawfully in advising the Queen in such a way as to procure the bribe. But the law does not control the appointment of ministers by subjecting it to the judges' view of whether the substance of the decision is capricious or arbitrary.

No one is calling for replacement of *Wednesbury* with a *less* intrusive standard of review, but the grounds for doing so are as strong as the grounds for a *more* intrusive standard. In fact, we do not need to replace the doctrine in *Wednesbury*; we only need to treat the legal effect of the judgment as having a scope that is determined by the nature of the case that the Court of Appeal was deciding (like any common law decision). The doctrine has a broad range of application because there is a very broad and diverse array of discretionary administrative decision-making powers that judges should control in a restrained fashion, with roughly the same restraint Lord Greene exercised concerning local council by-laws on Sunday opening. But the case did not, could not, provide a general standard of judicial control of executive discretion. Even *Wednesbury* unreasonableness is not a general ground of judicial review of administrative discretion, and it follows *a fortiori* that proportionality is not a general ground of judicial review.

2. The second problem with Wednesbury: the formulation of the doctrine is paradoxical

Lord Greene insisted that in order for the Sunday opening by-law to be unlawful, it would have to be unreasonable 'in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable'.²⁷

²³ Professor Philip Allott suggested such an approach, in an article written just after the Brexit referendum: '...a court might take the view that it is arbitrary and unreasonable and disproportionate, in the legal sense of those words, to base the vastly important decision to withdraw from the EU on the opinion expressed by a bare majority of people taking part in a referendum....' - Philip Allott, 'Forget the politics – Brexit may be unlawful', *The Guardian* 30 June 2016.

²⁴ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

²⁵ [2002] EWCA Civ.

²⁶ *ibid* 106.

²⁷ *Wednesbury* (n 1) 230.

He reiterated: ‘the task of the court is not to decide what it thinks is reasonable’.²⁸ I think that there is something very important in this attempt to formulate the judge’s task in a way that shows comity toward the *Wednesbury* Local Council. Lord Greene wanted to focus on the decision maker responsible for the decision, and to develop a way of interfering only if the judge was in a position to say that no one in the position of the decision maker could seriously consider it appropriate to do what the council did. But if a court considers a decision unreasonable, you might well say, then it must consider that any reasonable person would take a different decision! The result seems paradoxical: if a decision is unreasonable, no reasonable body would make it; yet Lord Greene asserted that the judges would interfere if no reasonable person would make the decision, and he denied that they should decide what is unreasonable.

This paradox of the decision can be resolved in one of two ways: the first way is to turn the doctrine into review for reasonableness.²⁹ But Lord Greene explicitly held that the court does *not* have authority to quash a local council’s Sunday opening by-law simply on the ground that it was unreasonable. The reasons are as sound now as when he expressed them: the authority of the local council is not best understood as a power to pass only those by-laws that judges consider to be reasonable.

A second way to resolve the paradox would be to replace *Wednesbury* unreasonableness with irrationality. In the *GCHQ* case Lord Diplock, acting on his native impulse to offer general categories for judicial decision, used ‘irrationality’ as a term for *Wednesbury* unreasonableness,³⁰ and the inapt term has stuck.³¹ It is inapt because Lord Greene very plainly did not limit the judicial control of the substance of administrative discretion to a test of irrationality. A *Wednesbury*-unreasonable decision may be all too rational. It is not necessarily irrational to pursue a policy that any reasonable public authority would reject. Dissatisfaction with *Wednesbury* has partly arisen from the sound inclination to think that judicial control of discretion –even in making town council by-laws– should not generally be limited to the ground of irrationality.

The first resolution of the paradox is contrary to the authority of *Wednesbury* (which has still not been overruled): there is no way to be faithful to the decision, while treating it as instituting unreasonableness as a general standard of review of local council by-laws. Lord

²⁸ *ibid* 233.

²⁹ David Pannick invented this solution in argument in *R v Home Secretary, ex p Brind* [1991] 1 AC 696 at 738, suggesting that the law had moved on since 1948; see Lord Ackner at 762. Lord Ackner rightly responded that a simple reasonableness test would amount to adopting a proportionality test, which could not happen ‘Unless and until Parliament incorporates the Convention into domestic law’; 762-763. Cf Lord Lowry, 766.

³⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (*GCHQ*), 410. He explained: ‘By “irrationality” I mean what can by now be succinctly referred to as “*Wednesbury* unreasonableness”’ at [410].

³¹ In less than a month, the term ‘irrationality’ was picked up in *R v Diggines, ex p Rahmani* [1985] 2 WLR 611 (CA) and *R v Immigration Appeal Tribunal No CO/808/82* (Court of Appeal, 20 December 1984). In Westlaw the word ‘irrationality’ has appeared in 3693 cases since *GCHQ* was decided (as of 1 July 2020); among the thousands of instances, see the reference to ‘judicial review on ordinary principles of legality, rationality and procedural impropriety’ in *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35, [2016] 3 WLR 157, Lord Mance [14]. The term ‘irrationality’ never appears in Westlaw, in reference to the irrationality of administrative action, in any case decided before *GCHQ*.

Diplock's attempt to resolve the paradox in the second way, by treating *Wednesbury* as instituting review for 'irrationality', is a regrettable turn of phrase that can only serve the purpose if we treat 'irrationality' as a Diplockian jargon term for a better alternative. That better alternative was there all along, in the cases that Lord Greene decided not to cite.

3. The third problem with *Wednesbury*: Lord Greene did not refer to the cases

Lord Greene said that the *Wednesbury* doctrine 'does not really require reference to authority when once the simple and well-known principles are understood'.³² He obviously did not see himself as innovating.³³ He knew the law, but he could have assisted posterity if he had referred to the classic cases on judicial control of the exercise of discretions that are similar to the discretion that was in issue in *Wednesbury*. Those cases gave various under-theorised yet helpful articulations of the very grounds of review that he was trying to articulate. Ironically, that legal heritage has been badly obscured by arguments over *Wednesbury*, and by the place of the decision in the lore of judicial review. An explanation of the cases would have made Lord Greene's decision less paradoxical, and less tantalising.

The proximate classics included *Slattery v Naylor*³⁴ (concerning a New South Wales by-law prohibiting burials within one hundred yards of any dwelling-house) and *Kruse v Johnson*³⁵ (concerning a Kent County Council by-law prohibiting singing within fifty yards of any dwelling-house after the singer had been asked to desist). The original, archetypal classics were Sir Edward Coke's decisions in *Rooke's Case*³⁶ and *Keighley's Case*.³⁷ In *Rooke*, the Commissioners of Sewers had power to charge for the cost of flood prevention works as 'shall seme moste convenient'.³⁸ It seemed most convenient to them to charge the owner of the land along the banks of a flooding river for the full cost of works that also benefited the owners of land away from the river. Yet Coke held that they had acted unlawfully: 'Notwithstanding the words ... give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law'.³⁹

In *Keighley*, the report cited *Rooke* and said that '...these words in the said Act, sc. "according to your wisdoms and discretions," are to be intended and interpreted according

³² *Wednesbury* (n 1) 231.

³³ Sir John Laws wrote that 'Lord Greene plainly thought the case was run of the mill' – Sir John Laws, 'Wednesbury', in Christopher Forsyth and Ivan Hare eds, *The Golden Metwand and the Crooked Cord* (OUP 1998) 185.

³⁴ (1888) 13 App Cas 446 (PC).

³⁵ [1898] 2 QB 91.

³⁶ (1597) 5 Coke Reports 99b, 100a, 77 ER 209.

³⁷ (1609) 10 Coke Reports 139a, 77 ER 1136.

³⁸ 23 Hen. VIII c. 5 (1531), s. 4.

³⁹ *Rooke's Case* (n 36) 210. Coke's notes to his report of the *Case of Proclamations* (1610) 12 Coke Reports 74, 77 ER 1352 seem even to extend the same doctrine to decrees of the King: 'But we do find divers precedents of proclamations which are entirely against law and reason, and for that void; for *qua contra rationem juris introducta sunt non debent trahi in consequentiam* [measures contrary to the reason of the law are not to be given effect].'

to law and justice... Also discretion, as it is well described, is scire per legem quid sit justum...’ [to ascertain, according to law, what is just].⁴⁰

These splendid pronouncements seem to go very far beyond the rule of law, assigning to judges a responsibility for the rule of reason and the rule of justice (and perhaps the rule of wisdom). They are the closest the English common law has come to precedents for reasonableness (and, therefore, proportionality) as a general ground of judicial review. But even Coke cannot quite have meant that reason, justice, and wisdom were unrestricted grounds of judicial review. The Commissioners of Sewers were to act with reason, justice and wisdom, and the judges were to interfere with decisions that they could identify, from their distant perspective on the bench, as departures from those essentials. In *Rooke*, Coke described discretion as ‘a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections’.⁴¹ If we are to distil an actual doctrine of the grounds of judicial review of executive discretion out of Coke’s grand remarks, it ought to focus on that last idea: the will and private affection of public officials. It was not actually the job of the judges in the 17th century to decide what flood prevention works reason required, or what charges for them were just. As the notes to Coke’s report say: ‘the preponderance... must be very strong against the propriety of an order of commissioners of sewers to induce the Court of K. B. to remove it.’⁴² The judges’ job was to demand that the decision making (and the charges for the works) should be distinguishable from the mere arbitrary wills and private affections –the tyranny– of the officials. It was a doctrine of arbitrariness.

Blackstone expounded the doctrine both as scholar and as judge. In his *Commentaries*, this is how he explained the role of the King’s Bench in controlling the conduct of the Commissioners of Sewers: ‘their conduct is under the control of the court of king’s bench, which will prevent or punish any illegal or tyrannical proceedings’.⁴³ In *Leader v Moxton*,⁴⁴ the Commissioners for Paving raised Gravel Lane in London by six feet, blocking the doors and windows of the plaintiff’s houses. Justice Blackstone held that an action in trespass was available, because the Commissioners had ‘acted arbitrarily and tyrannically’.⁴⁵ The headnote in Wilson’s report reads: ‘Commissioners for paving have not an arbitrary discretion: but limited by law and reason’.⁴⁶ That phrase is drawn from a series of well-known cases holding that judges have ‘not an arbitrary discretion’ in ordering a new trial.⁴⁷

⁴⁰ *Keighley’s Case* (n 37) 1138.

⁴¹ *Rooke’s Case* (n 36) 210.

⁴² *ibid* 100a.

⁴³ Blackstone *Commentaries* Book III p 74. Cf *R v Commissioners of Sewers for the Levels of Pagham* (1828) 8 Barnewell and Cresswell 355, 108 ER 1075: ‘commissioners of sewers are subject to the inspection of this Court by writ of mandamus; and that they are to exercise a legal, not an arbitrary discretion, is laid down as an established principle of law in *Rook’s case* (n 36), and *Keighly’s case* (n 37)’. [Broderick in argument at 1076].

⁴⁴ (1773) 3 Wilson, K. B. 461, 95 ER 1157.

⁴⁵ *ibid* 1160.

⁴⁶ *ibid* 1156.

⁴⁷ *Bright v Eynon* (1757) 1 Burr. 390, 97 ER 365, *R v Bennett* (1717) 1 Str 101, 93 ER 412, *Wood v Gunston* (1655) Sty 466, 82 ER 867.

As Lord Halsbury put it in the House of Lords in *Sharp v Wakefield*:⁴⁸

When it is said that something is to be done within the discretion of the authorities... It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself...⁴⁹

This anti-arbitrariness doctrine was well expressed in *Kruse*⁵⁰ and *Slattery*.⁵¹ In *Slattery*, Lord Hobhouse said that the courts ought to quash ‘a merely fantastic and capricious bye-law, such as reasonable men could not make in good faith’,⁵² one that was ‘capricious or oppressive’.⁵³ In *Kruse*, Lord Russell gave the following account of the control of discretions of the kind involved in making town by-laws:

I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws ...as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, ‘Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires’.⁵⁴

Lord Greene in *Wednesbury* was merely paraphrasing Lord Hobhouse in *Slattery* and Lord Russell in *Kruse*. Both Lord Russell and Lord Greene refused simply to assess a by-law as reasonable or unreasonable; Lord Russell insisted on asking ‘unreasonable in what sense?’ and Lord Greene said, ‘it is true the discretion must be exercised reasonably. Now what does that mean?’ Lord Greene made it clear that the plaintiff cannot merely ask the judge to decide whether the by-law was reasonable; he *rejected* the argument of counsel for the plaintiff, that ‘whether this condition is reasonable is a matter for the court’.⁵⁵ But Lord Greene did not articulate the central notion of arbitrariness –that is, of a decision that is indistinguishable from the mere will and private affections of the officials who acted. The crucial phrases from *Slattery* –‘capricious’– and *Kruse* –‘oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men’– do not appear; arbitrariness in Lord

⁴⁸ *Sharp v Wakefield* [1891] AC 173 [179]

⁴⁹ In support of this proposition, Lord Halsbury cited Lord Kenyon in *Wilson v Rastall* (1792) 4 Term Reports 753, 100 ER 1283 on the discretion of a court in civil procedure: ‘not a wild but a sound discretion, and to be confined within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself’, at 1286. Cf Lord Selborne in the House of Lords in *MacBeth v Ashley* (1870-75) L.R. 2 Sc. 352: where magistrates were authorized to require an especially early closing time for a public house in a particular locality, ‘it is obvious that such discretion as they have is not an arbitrary discretion’ at 360.

⁵⁰ *Kruse v Johnson* [1898] 2 QB 91,

⁵¹ *Slattery v Naylor* (1885) 13 App. Cas. 446.

⁵² *ibid* 452.

⁵³ *ibid* 453. Cf *Sutton v Clarke* (1815) 6 Taunton 29, 128 ER 943: ‘If commissioners, acting within their jurisdiction, act wantonly and oppressively, they are responsible to any individual for the injury they do him’. Gibbs CJ at 948.

⁵⁴ *Kruse* (n 50) [99] - [100].

⁵⁵ *Wednesbury* (n 1) 226.

Greene's speech was wrapped up and hidden in the notion of a decision that no reasonable body could have come to. That idea –borrowed from Lord Hobhouse's phrase 'such as reasonable men could not make in good faith'– is best viewed as a figurative reminder that the court must not impose the judges' own views as to what would be a reasonable by-law. The judges should only interfere when, from their detached position on the bench, they can say that no reasonable person *in the position of the councillors* could make the decision.

4. What to make of *Wednesbury*

In spite of the three problems in Lord Greene's presentation, there is value in his attempt to articulate the court's role as standing against arbitrary use of power by town councillors, and not simply as deciding whether a town council Sunday opening by-law is reasonable.⁵⁶ The best way to understand *Wednesbury* is as giving effect to a long-standing doctrine that does not apply to all executive discretion, but only to discretions relevantly similar to the discretion that was in issue in the case. It is the same doctrine that was applied to similar sorts of discretions (and was articulated more usefully) in *Slattery* and *Kruse*. The well-established *Slattery–Kruse–Wednesbury* doctrine gave judges authority to interfere with the exercise of powers similar to the power in the *Wednesbury* case, not on the ground of unreasonableness in general, but only if a decision was capricious or oppressive. The doctrine, which is still good law, is not an inflexible standard of irrationality for all executive decision making; it is a doctrine of arbitrariness in the exercise of the sort of power that the *Wednesbury* Council was exercising. The precedential effect of the decision ought to be seen as one element in the overall judicial control of discretionary administrative power. In a landmark discussion of *Wednesbury*, Lord Justice Laws gave a very healthy reminder that that control of power needs to be flexible, although it might, with respect, have been better if he had not advocated 'the variable standard of *Wednesbury* review',⁵⁷ since *Wednesbury* review is just one element in the wider, variable range of ways of controlling administrative power that are not stated, and were not in issue, in *Wednesbury*.⁵⁸

⁵⁶ For a less positive assessment of the case, see Sir Stephen Sedley, *Lions Under the Throne* (CUP 2015), on 'the supine jurisprudence of *Wednesbury*', concluding that 'much of the development of modern public law has been a struggle to escape from Lord Greene's straitjacket' (25 n 8). He argues that *Wednesbury* was wrongly decided, and that the by-law ought to have been quashed as an attempt to thwart the statutory purpose of allowing Sunday licensing of cinemas.

⁵⁷ Sir John Laws, '*Wednesbury*', in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord* (OUP 1998) 185 at 195.

⁵⁸ And so, the phrase 'variable *Wednesbury*' has come to be popular; it suggests, regrettably, that it is a change from *Wednesbury*, and of course it suggests to some administrative scholars that it is not enough of a change. See Michael Taggart on 'Variable Intensity of *Wednesbury* Unreasonableness', in 'Proportionality, Deference, *Wednesbury*' [2008] NZ L Rev 423 at 433. On the development of the law on judicial review of administrative discretion, Mark Elliott wrote that '*Wednesbury* began to adopt a more nuanced character, with the emergence of such notions as super-*Wednesbury* and anxious-scrutiny (or sub-*Wednesbury*) review. This evidenced the beginnings of a judicial commitment to contextualism: to the notion that the standard of review should vary according to the circumstances of the case.' Mark Elliot, 'Proportionality and Contextualism in Common-law Review: The Supreme Court's Judgement on Pham' (2015) Public Law for Everyone <<https://publiclawforeveryone.com/2015/04/17/proportionality-and-contextualism-in-common-law-review-the-supreme-courts-judgment-in-pham/>>. I propose that it would be more accurate to say that *Wednesbury* always ought to have been understood as a case on the substance of Sunday opening

‘Abuse of power’ is a not a bad name for the *Slattery–Kruse–Wednesbury* ground of substantive review, as long as that evocative phrase is understood to involve arbitrariness, oppression or tyranny (i.e., abuse), and is not understood as a phrase for unreasonable decisions in general. It is not exactly a doctrine that imposes the rule of law on administrative authorities, because a court that interferes with a by-law on the ground that it is capricious or oppressive is not applying a legal rule. Instead, the court is itself exercising an open-ended, lawful discretion to prevent an abuse of power. But that judicial role is very closely allied to the rule of law because it gives the judges a way of standing against arbitrary decision making –and the rule of law, too, is opposed to arbitrary use of power. Understood in this way, the doctrine in *Wednesbury* supports the rule of law. It does so by authorising judges to stand against the arbitrary use of government power. And it does so while refusing to replace the policies of other public authorities with the policies of the judges.

Not everything should be ruled by law, and not every administrative action should be subject to the doctrine that judges can quash an arbitrary exercise of executive power. But on the other hand, some exercises of executive power should be ruled by law in a way that gives judges much more of a role in deciding what reason requires: that is the case when the law accords the force of a qualified legal right to an interest of the claimant, by requiring that a public authority cannot act in a way that is disproportionately averse to that interest.

III. Proportionality: a doctrine that protects qualified legal rights

Proportionality reasoning is not justified by the opposition to arbitrary decision making that justifies *Wednesbury* unreasonableness as a ground of judicial review. The standard form of proportionality reasoning –signified by the metaphor of a balancing exercise in which the decision-maker decides which way the scales come down– makes it a useful way of protecting qualified rights against decisions that are not necessarily arbitrary. Unqualified legal rights (like the right at common law and under Article 3 of the ECHR not to be tortured),⁵⁹ protect an interest of the right holder, regardless of other considerations. Those rights are protected *against* proportionality reasoning. Qualified rights also protect an interest of a right holder, but with the proviso that it is possible for competing considerations to justify a decision that has an adverse impact on the interest. The right to respect for private and family life in Article 8 of the ECHR,⁶⁰ was designed to protect persons against interferences with their family life that reflect a disrespect for the family. But decisions of public authorities that have an adverse impact on family life are justifiable (and may reflect no disrespect for the family) if they promote some legitimate purpose in such a way that their adverse impact on the family is not *too much*. In one side of the balance we place the interest(s) protected by the qualified right, and in the other side we place the objective that is being pursued in a way that has an impact on the protected interest. The decision maker –first an administrative authority, and then a UK court or the Strasbourg Court, if a claimant seeks judicial recourse against an

by-laws, and that judicial review has always been flexible, and has always varied by reference to the circumstances of the case.

⁵⁹ European Convention on Human Rights 1950.

⁶⁰ *Ibid*, Art 8.

administrative decision— decides whether the impact on the protected interest is *too much*, given the value of pursuing the objective.

Proportionality is a form of reasonableness and is only an appropriate ground of judicial review where the judges *should* be going beyond the prevention of arbitrary decision making, to decide what is reasonable. The presumption against proportionality reasoning is displaced when the law protects a qualified right. The Human Rights Act [HRA] introduced new forms of proportionality reasoning into UK law.⁶¹ It imported the proportionality doctrine that the Strasbourg Court had developed as a way of dealing with the articles in the Convention that allow interference with a protected interest where the interference is ‘necessary’ to protect other interests (public and private). Consider a paradigm case of proportionality reasoning, *R (Quila) v Home Secretary*.⁶² The Home Secretary decided to raise the age of eligibility for a visa to enter the UK as a spouse of a UK resident. The objective was to fight forced marriage; the decision to pursue that objective in the way the Home Secretary adopted had an adverse impact on couples who were marrying voluntarily, and wanted to settle in the UK while the person wishing to enter the UK was under the new age.

If *Quila* were decided without the HRA, it would presumably be decided on the basis of the *Slattery–Kruse–Wednesbury* doctrine (if the court decided that the discretion the Home Secretary had in making regulations for immigration was relevantly similar to the discretion that a town council has in making by-laws). In that case, the courts would interfere only if (to use the terminology of *Kruse*) the action was manifestly unjust, capricious, or oppressive.

But the *Quilas* could argue that the decision violated Art 8 of the ECHR (and was unlawful under s 6 of the HRA),⁶³ because it interfered with their private and family life in a way that was disproportionate to the value of pursuing a public objective in the way that the Home Secretary sought to do. Here is how Lord Wilson set out the steps of the resulting proportionality reasoning:

- (a) is the legislative objective sufficiently important to justify limiting a fundamental right?
- (b) are the measures which have been designed to meet it rationally connected to it?
- (c) are they no more than are necessary to accomplish it? And,
- (d) do they strike a fair balance between the rights of the individual and the interests of the community?⁶⁴

⁶¹ The Human Rights Act 1998.

⁶² *Secretary* [2011] UKSC 45, [2012] 1 A.C. 621.

⁶³ ECHR (n 59) Art 8; HRA (n 61) s 6.

⁶⁴ *Quila* (n 62). With respect, Lord Kerr’s way of phrasing step (d) reflects a way of misstating that final step that is very popular. Mark Elliott, for example, has written that proportionality ‘is obviously suited to situations in which, for instance, rights and competing public interests fall to be weighed against one another’ Mark Elliot, ‘Does the ultra vires doctrine prevent courts from replacing *Wednesbury* review with proportionality?’ (March 15 2013) Public Law for Everyone <<https://publiclawforeveryone.com/2013/03/15/does-the-ultra-vires-doctrine-prevent-courts-from->

So, in *Quila*, here is what went into each side of the balance:

In favour of the conclusion that Article 8 was infringed:		In favour of the conclusion that Article 8 was not infringed:
the impact on the couple's family life (and on the family life of other couples)		the value of fighting forced marriage by raising the visa age

The judges had to hold the scales. They had to decide whether the impact on the couples' family life would be *too much*, given the value (if any) of fighting forced marriage by raising the age for marriage visas. You see that the doctrine gives special legal protection to the *Quilas*' ability to form a family. The proximate justification for that protection is that Parliament had provided for it, by enacting in s 6 of the HRA that it is unlawful for public authorities to act contrary to rights under the ECHR.⁶⁵ That decision by Parliament was a good one if it was good to give special legal protection to family life, by authorising judges to decide whether an interference with family life goes *too far*.

Likewise, in European Union law, it is fair to describe proportionality as a general ground of judicial review. The proximate reason for the resulting role use of proportionality reasoning on matters of EU law within UK law lay in the European Communities Act 1972, and now lies in the retention of EU law in the EU withdrawal legislation; the rationale for the test within EU law relates to the distinctive interaction between EU law and actions of member states that impinge on the purposes of the EU.⁶⁶

replacing-wednesbury-review-with-proportionality/>. In step (d), the balance is not between rights and interests, but between the interests protected by the right in question, and the interests of the community (and sometimes, of other individuals). The right to respect for private and family life is not in the balance; the right is given its content by the reconciliation of competing interests. The *Quilas* won their case not because their right outweighed the promotion of the interests of the community, but because the Supreme Court concluded that the change in the age for marriage visas did not achieve enough, in the public interest, to outweigh the *interest* of the *Quilas* in settling sooner in the UK. For a discussion see Timothy Endicott, 'Proportionality and Incommensurability', in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds) *Proportionality and the Rule of Law* (CUP 2014) 311-342, and Gregoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2012), Introduction and Chapter 3.

⁶⁵ HRA (n 61) s 6; ECHR (n 59).

⁶⁶ European Union (Withdrawal) Act 2018, European Union (Withdrawal Agreement) Act 2020. The role of proportionality in EU law would take us far from the matter of this article, but it is worth emphasising that it is explained by the distinctive purpose of EU law. The EU does not exist for the general purposes of government. Its complex purpose centres on the development and operation of a single, internal economic market/community/union. The pursuit of that purpose continually raises questions as to whether actions taken by the authorities of a member state for one or another good purpose have a disproportionate impact on the interests that EU law has come to privilege. The EU pursues its purpose of integration by giving special protection to the interests of individuals and businesses in the free movement of goods, persons, services, and capital within the EU. EU law, as a result, is focused on a proportionality question. The judges of the ECJ have built up the European Union –shaping the legal framework for the complex interplay between member states and the EU– by taking it upon themselves to hold the scales in addressing that focal proportionality question. For an argument to the contrary, claiming that EU law should serve as a model for generalised proportionality review in English administrative law, see Paul Craig, 'Proportionality,

Doctrines of proportionality in judicial review of administrative action arise much more widely, and not only through EU law and the doctrine of the Strasbourg Court.

IV. When proportionality is a standard of review

Public administration is subject to a wide array of very important legal requirements of proportionality. That fact may seem to support the idea that proportionality should be a general ground of judicial review. But on the contrary, each of those legal requirements involves a rationale for special legal protection for particular interests against the pursuit of proper administrative purposes. It is the need for such a rationale that explains why proportionality is not a general ground of judicial review.

Most importantly, *due process* means proportionate process. The legal requirements as to administrative procedures in English administrative law are determined by proportionality reasoning.⁶⁷ That is, an administrative agency must give a person affected by a decision forms of procedural protection that are *enough* for the decision-making process to be legitimate, in light of the nature and purpose of the decision, the nature of the decision maker, the nature of the considerations that are relevant to the decision, and the way in which it affects the person (notice that the reason for procedural requirements is not merely that the claimant is affected by the decision). It is a matter for the courts to hold the scales, and to decide whether the procedures afforded to the claimant are enough, because of the common law's regard for fair procedures, and the limited need for judges to defer to administrative authorities on questions of process.

As for the substance of administrative decision and action, there are very many statutory duties that impose substantive requirements of proportionality. Data protection is a prime example: a public authority must hold enough data but not too much, and must not disclose personal data unless the reasons for doing so outweigh the presumption of privacy.⁶⁸ And a proportionality test determines whether the public authority can refuse disclosure on grounds of cost. The common law itself can impose substantive requirements of proportionality. Lord Justice Laws characterised the law's protection of substantive legitimate expectations as involving proportionality reasoning:

... a public body's promise or practice as to future conduct may only be denied... where to do so is the public body's legal duty, or is otherwise, to use a now familiar

Rationality and Review' [2010] NZ L Rev 265 at 267-273. Craig wrote that 'The EU courts have been applying proportionality to countless cases where rights are not in play for over fifty years' at 272. With respect, those courts over those years have been building EU law by treating more than 400 million Europeans and their business organisations as having qualified rights to freedom of movement within the EU for goods, persons, services, and capital. For further reasons why the role of proportionality in EU law does not support the case for a general doctrine of proportionality in the English law of judicial review of administrative decisions, see Sir Philip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 LQR 223, 238-240.

⁶⁷ I defend this view in Timothy Endicott, *Administrative Law* (4th ed OUP 2018), 133-135. But note that proportionality is not a ground of review for all conceivable claims that an administrative procedure was unlawful. Suppose that in *Ridge v Baldwin* [1964] AC 40, Charles Ridge had not wanted to challenge his dismissal, but some concerned citizen had demanded a hearing from the police authority that made the decision. The police authority did not owe any procedural participation in its decision to anyone other than to Ridge, and the court ought to dismiss such a claim without engaging in proportionality reasoning.

⁶⁸ See *Durant v Financial Services Authority* [2003] EWCA Civ 1746. Cf *DB v General Medical Council* [2016] EWHC 2331.

vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest.⁶⁹

That is a true proportionality doctrine: it entitles the claimant to a balancing by judges of the impact of an administrative decision on their interests (and, potentially, on other interests), against the interests that the public authority was pursuing.

The matter, it should be noted, is not perfectly clear. In the landmark case on substantive legitimate expectation, *R v North and East Devon Health Authority, ex p Coughlan*,⁷⁰ the Court of Appeal held that disappointing a legitimate expectation is unlawful if ‘to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power’.⁷¹ Abuse of power is not a proportionality test; it is the *Slattery–Kruse–Wednesbury* ground of review. In *Coughlan*, the Court strove to distinguish the test of abuse of power from *Wednesbury* unreasonableness,⁷² and the judges seem to have wanted to establish a more intrusive test for the lawfulness of disappointing a legitimate expectation. But with respect, if the Health Authority in the *Coughlan* case was abusing its power, there was no need to create a more intrusive test than *Wednesbury* unreasonableness. No reasonable public authority would abuse its power! Perhaps the reason that the Court of Appeal was seeking to craft a more intrusive test for substantive legitimate expectations than *Wednesbury* is that the judges accepted the Diplockian misinterpretation of *Wednesbury* unreasonableness as a ‘bare rationality test’ (*Coughlan*).⁷³ In any case, what the Court did *not* establish, in *Coughlan*, was a proportionality test for substantive legitimate expectations. If the proportionality test for substantive legitimate expectations is indeed the lawful test at present, that is because of Lord Justice Laws’ statement of the doctrine in *Nadarajah*.⁷⁴ The justification for a proportionality test, if it is justified, is that where an administrative authority has created a legitimate expectation, the law ought to protect the expectation (not by a conclusive requirement that the administrative authority must fulfil the expectation, but by authorising a court to hold it unlawful for the authority to frustrate the expectation if doing so would have a disproportionate impact on the claimant).

The common law also imposes proportionality requirements through the ‘principle of legality’, when judges protect an interest for which the common law has a special regard. The court does so by holding that an administrative agency’s exercise of a general power is unlawful if it interferes with the interest in question unless it advances some legitimate interest sufficiently for the exercise of power to be proportionate. The classic instance is *R (Daly) v Home Secretary*,⁷⁵ in which the House of Lords used proportionality reasoning to protect a prisoner’s interest in confidential correspondence with lawyers against the regime for searching for prohibited items in a prison cell.⁷⁶ These examples of

⁶⁹ *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [68].

⁷⁰ [2000] 3 All ER 850.

⁷¹ *ibid* 58.

⁷² *ibid* 62–67.

⁷³ *ibid* 66.

⁷⁴ *Nadarajah* (n 69); and note that Lord Justice Laws’ approach was endorsed by the Privy Council in *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1, Lord Dyson at [38].

⁷⁵ *Daly* (n 13).

⁷⁶ See also *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115.

proportionality tests in English administrative law are enough to show their diversity and importance. It would be as mistaken to say that proportionality is *not* a ground of judicial review, as it is to say that proportionality is a *general* ground of judicial review. It is a ground of review if and only if there is legal reason for the court to protect an interest of a claimant against otherwise lawful actions that have a disproportionate impact on the interest. You may be tempted to say that these instances are dots that ought to be connected into a general doctrine of proportionality, in the interests of good administration and the protection of claimants against administrative actions that disproportionately impinge on their interests. But in each of the instances above, there is special reason *for the law to protect* some interest of the claimant. That is what it takes to justify a proportionality doctrine, and that crucial element is not generally a feature of administrative action.

Consider substantive legitimate expectation. If it *is*, as Lord Justice Laws decided, a proportionality doctrine, then it is so because the common law treats the expectation as something that deserves legal protection. In the *Coughlan* case, the Court of Appeal held that it was unlawful for Miss Coughlan to be moved in order for her care home to be closed, because she had been promised a home there for life.⁷⁷ Suppose that Miss Coughlan had not been promised anything: then there would be no such expectation to protect, although her interest in staying in the home would still be a relevant consideration for the Health Authority. There would be no inherent injustice in a doctrine that the decision to close her nursing home would only be unlawful if it breached one of the requirements for lawful administrative action set out in the *Wednesbury* decision.

V. When proportionality is *not* a standard of review

Although *Wednesbury* unreasonableness is not a general ground of judicial review of the substance of discretionary administrative decisions, there is a very wide range of contexts in which the anti-arbitrariness *Slattery–Kruse–Wednesbury* doctrine is a ground of judicial review, and proportionality is not.

A month does not go by without the Administrative Court citing *Tesco Stores v Environment Secretary*⁷⁸ in support of the proposition that an exercise of a discretion by a local planning authority can only be quashed on the grounds in *Wednesbury*.⁷⁹ The court will use the anti-arbitrariness doctrine and *not* proportionality where the claimant argues that any of the following are unlawful because of the substance of the decision: an arrest by police (*Mouncher v Chief Constable of South Wales Police*),⁸⁰ arrest under statutory powers in general (*Mohammed-Holgate v Duke*),⁸¹ *R (WL) v Home Secretary*,⁸² the choice of eligibility criteria for *ex gratia* criminal injuries compensation to soldiers (*R v Ministry of Defence, ex p Walker*),⁸³ an adverse OFSTED report on a school (*R (Durand*

⁷⁷ *Coughlan* (n 70).

⁷⁸ [1995] 1 WLR 759.

⁷⁹ Lord Keith held that ‘It is for the courts ...to decide what is a relevant consideration. ...But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense.’ [1995] 1 WLR 759 at 764.

⁸⁰ [2016] EWHC 1367 (QB).

⁸¹ [1984] AC 437, [443].

⁸² [2011] UKSC 12, [73].

⁸³ [2000] 1 WLR 806.

Academy Trusts) v OFSTED),⁸⁴ a decision by the Environment Agency to impose catch limits on salmon fishing in the Severn estuary (*R (Mott) v Environment Agency*),⁸⁵ and a decision as to whether a child is in need for the purpose of the duty to provide accommodation under the Children Act 1989 (*R (A) v Croydon LBC*).⁸⁶ Very many immigration decisions also belong in this category, such as whether an asylum claim is a fresh claim (*R (Kannathasan v Home Secretary)*),⁸⁷ whether an asylum claimant is a victim of human trafficking (*R (BG) v Home Secretary*),⁸⁸ and whether to grant leave to enter the UK to someone who claims to be a refugee or a *bona fide* visitor (*Bugdaycay v Home Secretary*)⁸⁹ and *R (Giri) v Home Secretary*).⁹⁰ The category is, in fact, open-ended. In *R (Justice for Health) v Secretary of State for Health*, the Court dismissed a claim by junior doctors that the contract the Secretary of State forced on them was unlawful because it would not improve mortality rates on the weekend in the NHS. It was ‘a classic rationality challenge’.⁹¹ If the contract the Secretary of State favoured would not improve mortality rates *enough*, then it was a bad contract. But the doctors did not even try to argue that a lack of proportionality would make the adoption of the contract unlawful.

In all of these cases (thousands more could be listed), the claimant and others in the position of the claimant may have important and legitimate interests that are directly affected by the decision. That does not mean that the courts should be deciding whether the impact on those interests is more than is justified by the purposes for which the decision in question is taken.

We should note that it is possible for a public authority to act arbitrarily by imposing a disproportionate impact on such interests, where the disproportion is capricious or oppressive. And then the decision can be overruled by a court as *Wednesbury* unreasonable. *Wednesbury* unreasonableness is not in itself a proportionality doctrine, but it entails a form of proportionality: if a decision has such a disproportionate impact on interests that the decision maker ought to have in mind, that no reasonable decision maker would do such a thing, then the decision would be unlawful under Lord Greene’s doctrine. Again, it is useful to have recourse to *Slattery* and to *Kruse*, and not just to Lord Greene’s judgment. The real doctrine is that, where a local council ought to take some interest into account, even if the person affected does not have a qualified legal right to the protection of the interest, the court will interfere with a decision that is so disproportionate in its impact on that interest that it is arbitrary or capricious or manifestly unjust or oppressive.⁹² That is implicit in *Wednesbury* itself, and of course we need no change in the doctrine of the *Wednesbury* decision to secure it. The form of proportionality that is implicit in *Wednesbury* unreasonableness is the appropriate way

⁸⁴ [2017] EWHC 2097, [47].

⁸⁵ [2016] EWCA Civ 564.

⁸⁶ [2009] UKSC 8, [26].

⁸⁷ [2015] EWHC 3574

⁸⁸ [2016] EWHC 786, [53].

⁸⁹ [1987] AC 514, [522] - [523].

⁹⁰ [2015] EWCA Civ 784

⁹¹ [2016] EWHC 2338, [167].

⁹² *R v Barnsley MBC ex p Hook* (CA) [976] 1 WLR 1052 is a good example: a stallholder was deprived of the market licence that he needed for his livelihood because he was rude to a security guard who reprimanded him for urinating at night in a side street. See Lord Denning’s acute account of the facts at 1055.

for the law to protect interests of claimants and others that a public authority ought to take into account in its decision, but that do not ground qualified legal rights.

Consider the famous *International Trader's Ferry* case, in which a live animal exporter challenged the decision of a Chief Constable to restrict the protection the police provided against protesters. Lord Cooke said: 'the question here reduces, as I see it, to whether the Chief Constable has struck a balance fairly and reasonably open to him.'⁹³

Lord Cooke was trying to bury *Wednesbury*,⁹⁴ but there was no need for that. The issue for the court was not the proportionality question of whether the police provided *enough* protection (that is, whether they struck the right balance between the interests of the company in police protection, and other considerations). The issue for the court was the *Slattery–Kruse–Wednesbury* question of whether the police acted arbitrarily in deciding how much protection to provide (whether they struck a balance open to them). Lord Cooke's formula ('a balance fairly and reasonably open to him') and Lord Greene's formula ('a decision that no reasonable body could have come to') were both rather circuitous ways of stating that test.

VI. Why there is no general doctrine of proportionality

The special considerations that make it right for the judges to engage in proportionality reasoning in cases such as *Quila*,⁹⁵ *Daly*,⁹⁶ and *Nadarajah*,⁹⁷ reflect the reasons why there is no general review for proportionality.

First: although the enactment of the HRA s 6 entailed that administrative decisions would be unlawful if they have a disproportionate impact on interests protected by the Convention rights, Parliament has not decided that there should be a general legal doctrine of proportionality.⁹⁸ Secondly: the interests of persons affected by administrative decisions do not generally deserve legal protection. That is why it would be a mistake for Parliament to do such a thing, and wrong for the courts to invent such a doctrine.

Should judges generally weigh the interests of persons affected by an administrative decision against the considerations in favour of the decision? No, and this should go without saying. It would be wrong and, in fact, incoherent to weigh the interest of a person in bringing a young person into the UK for a forced marriage against the public interest that the Home Secretary was seeking to pursue in the *Quila* case. In the *Daly* case, a prisoner's interest in being able to hide contraband in his cell should not be weighed against the benefits to be attained by the prison authorities' pursuit of prison discipline.⁹⁹

⁹³ *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418, 453.

⁹⁴ See his reasons at *Wednesbury* (n 1) 452.

⁹⁵ *Quila* (n 62).

⁹⁶ *Daly* (n 13).

⁹⁷ *Nadarajah* (n 69).

⁹⁸ Sir Philip Sales discusses this aspect of the distinction between proportionality under the Human Rights Act, and as a putative general ground of judicial review: 'Rationality, Proportionality and the Development of the Law' (2013) 129 LQR 223 at 237-8: 'The enactment of the HRA gave democratic legitimacy to the judicial enforcement of the Convention rights', which would be lacking in judicial development of a generalized test of proportionality (237).

⁹⁹ *Daly* (n 13).

I hasten to add that we must not interpret the arguments that have been made in favour of a general proportionality test as an argument for weighing all of the claimant's interests against other interests. Those arguments patently presuppose that a general proportionality test would only protect legitimate interests. With that presupposition, we have already stepped away from the general weighing of private interests against the public interest. But we should take a further step: not every *legitimate* private interest ought to be protected by a proportionality test. It may sound shocking to say this. I would imagine that the popularity of proportionality arises partly from the natural inclination to think that public authorities ought generally to show respect for the legitimate interests of persons affected by their decisions. But although public authorities have a general duty to show respect for persons, they have no general duty to protect or to promote all of their legitimate interests that may be affected by a decision.

Suppose that a public authority advertises a job. There are two excellent applicants who are clearly the best of the candidates for the job. Candidate A has just been made redundant from her previous employment. Getting this job is immensely important to her. Meanwhile, candidate B holds a good position, almost as attractive as the one for which she has applied, and while she would accept the new job, she won't be very much better off in that case than if she does not get it.

These facts about the perfectly legitimate interests of persons directly affected by the decision are merely irrelevant to the public decision. Candidate A's circumstances do not even count –they ought not to be weighed– in favour of offering her the job. Or suppose that the Prime Minister advises the Queen to dismiss a minister from office and the minister claims that the impact on his interests is very serious indeed, and outweighs any public benefit that the Prime Minister can claim to be pursuing by advising the Queen to dismiss the minister. Far from weighing the impact on the minister against the public interest in the sacking, the courts should not even give permission for judicial review. Or suppose that a local authority decides to replace its petrol and diesel vehicles with electric vehicles. The interests of suppliers of petrol and diesel vehicle suppliers do not have to be outweighed; they are merely irrelevant. Not all legitimate interests that are affected by a public decision are relevant to the decision. So, proportionality between the public interest and the impact of the decision on the legitimate interests of persons affected by the decision is not generally a legitimate ground for administrative action.

You see the upshot: proportionality cannot be a general ground of judicial review, if it is understood as proportionality between the public purposes behind a decision, and the legitimate interests affected by the decision. Proponents of proportionality as a general ground of judicial review, therefore, must understand it as a requirement of proportionality between those public purposes, and interests that the public authority ought to bear in mind.¹⁰⁰ But to put proportionality reasoning in its proper place in administrative law, I propose that it is not enough that the interest in question should be relevant to the public authority's decision. There needs to be something further: a rationale for the interest to be given the special protection that the law ought to afford to a qualified right, as the House of Lords did in the *Daly* case.¹⁰¹ Even where the decision maker really ought to bear in mind the interests of a person affected by the decision, it

¹⁰⁰ I am grateful to Yossi Nehushtan for suggesting this.

¹⁰¹ *Daly* (n 13).

does not follow that a court ought to decide whether the decision has too great an adverse impact on those interests. In *Wednesbury* itself, the local councilors ought to have been thinking about the impact of their decision on the interests of persons affected by Sunday opening of cinemas, and about whether the measure they were contemplating would have a disproportionate negative impact on those interests. Proportionality was a relevant consideration for them. But Lord Greene was right not to pass judgment on the reasonableness of the by-law, because he was right not to replace the councilors' proportionality reasoning with his own proportionality reasoning. Doing so would turn every interest of a person that ought to be taken into account, into a qualified right. So, for example, in a case like *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd*,¹⁰² above, the law would be giving an artificial and unjustified protection to the livestock exporter's interest in policing. It is legitimate for a court to interfere if the public authority in such cases showed an arbitrary or oppressive disregard for the interests of the cinema goers of *Wednesbury*, or of the livestock exporters of *Sussex*. And as was mentioned above, that implies a form of proportionality: the public authority's decision will be quashed if the court decides that the disproportion between the impact on such interests and the value of the public authority's purposes makes the decision arbitrary or oppressive. But that involves no change whatsoever from the *Wednesbury* doctrine.

And because *Wednesbury* does not apply to all administrative decisions, it is not a general test of proportionality for the exercise executive discretions. As regards very many exercises of executive power, where the considerations at stake in the decision are non-justiciable, the courts should not even apply *Wednesbury* unreasonableness. The *Nottinghamshire County Council* case¹⁰³ and the *Hammersmith and Fulham* case,¹⁰⁴ discussed above, offer examples.¹⁰⁵ In such cases the public authority may need to engage in proportionality reasoning to carry out its responsibility; that gives no reason for *the Court* to engage in proportionality reasoning.

In *Regina v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement*,¹⁰⁶ the Divisional Court held that a decision to allocate more than £300 million from the overseas aid budget was unlawful, because such allocations had to be made for a 'developmental promotion purpose' within s 1 of the Overseas Development and Cooperation Act 1980, and there had been no such purpose.¹⁰⁷ It was a strikingly and, I believe, justifiably creative judicial decision to take action against an abuse of administrative power. And proportionality reasoning by judges had no legitimate role to play in that context. That is the case even though the essential question in funding overseas development is a proportionality question: whether a project will secure *enough* benefit for it to be a good use of the budget. If the court held a decision unlawful on the ground that it was not in accord with the judges' answer to that question, the statutory decision-making process would be supplanted, and the court would be acting as if it were the governing body for the overseas development programme.

¹⁰² [1999] 2 AC 418.

¹⁰³ *Nottinghamshire* (n 16).

¹⁰⁴ *Hammersmith and Fulham* (n 17).

¹⁰⁵ Section 1.

¹⁰⁶ [1995] 1 WLR 386.

¹⁰⁷ *ibid* 402G.

The economic unsoundness of the decision was relevant to the Court's decision in *World Development Movement*. But the Court did not hold the decision unlawful on the ground that the grant in question did not secure overseas aid to an extent that was proportionate to the expenditure. The Court considered the economic unsoundness of the decision as a way of reaching the conclusion that the government had merely abused the fund, using it for an ulterior purpose rather than for overseas development. Lord Justice Rose insisted that 'the *weight* of competing factors (or whatever noun is applied to them) is a matter for the Secretary of State, once there is a purpose within section 1 of the Act'.¹⁰⁸ That holding implies –quite rightly– that proportionality is not an appropriate ground of review for such a decision.

It has often been pointed out that proportionality review can be conducted with deference toward the initial decision maker, so that it does not automatically have a greater intensity than the *Slattery–Kruse–Wednesbury* doctrine. That is true.¹⁰⁹ But where the judges should not be balancing the interests at stake in a decision –as in, for example, *World Development Movement*– a doctrine that they should do so with deference has nothing in its favour except that it would not be as misguided as a doctrine that they should do so with no deference.

It has often been argued that the structure of proportionality has an organised rationality that is preferable to the unstructured *Wednesbury* doctrine. There is an apparent attraction to the idea that a form of reasoning with four (or three, or five...) steps is more structured, more rational, involving a more transparent intellectual ordering than merely asking whether a decision is extremely unreasonable. But the attraction is illusory, unless the steps are fit for the judicial purpose. There is no reason for judges to take the steps in proportionality reasoning, unless there is a legal reason for them to engage in the protection of special interests against the pursuit of proper purposes that justifies proportionality reasoning. So, proportionality reasoning does not necessarily give rational structure to judicial reasoning. When (as in cases like *World Development Movement*¹¹⁰ or *Hammersmith and Fulham*¹¹¹) there is no reason for judges to protect interests through proportionality review, the proportionality structure has no application. The rationality of adjudication has nothing to gain from an unmotivated structure.

There is no general reason for a doctrine that judges are to weigh the adverse impact of a public decision against the considerations in favour of it. So, there is no justification for a general doctrine of proportionality.

¹⁰⁸ *ibid* 401.

¹⁰⁹ *R (Begum) v Denbigh High School* [2006] UKHL 15 is a helpful paradigm case. The claimant challenged a school uniform policy as a violation of her freedom of religion. In applying the proportionality test, the House of Lords deferred to the school authorities on the question of how important and how effective the uniform policy was for the objective (providing an atmosphere in the school that would support the freedom of other students) that they were pursuing. Lord Bingham held that it would be 'irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this' [34].

¹¹⁰ *World Development Movement* (n 106).

¹¹¹ *Hammersmith and Fulham* (n 17).

VII. Conclusion

The anti-arbitrariness doctrine (illustrated, in the particular context of Sunday opening by-laws, by the decision in *Wednesbury*) is not a general ground of review of executive action. Not every exercise of an executive discretion should be ruled by the judges' opinion as to what would be arbitrary.

Proportionality is not a general ground of judicial review of executive action, *a fortiori*, because not all executive action depends on a balance that the courts can legitimately draw between the attainment of a public purpose and the impact of the action on countervailing interests. Some administrative decisions do not depend on proportionality reasoning. Appointment to and dismissal from positions in public service provide a paradigm: the impact on the perfectly legitimate interests of the persons affected by the decision tends to be irrelevant. Even where making an administrative decision well does depend on proportionality reasoning, it does not follow that there ought to be judicial review on grounds of proportionality. *World Development Movement* is a paradigm of this phenomenon: it involved a type of administrative decision that ought to be based on proportionality reasoning but should not be reviewed by judges on grounds of proportionality.

Understood as it ought to be understood, as part of the flexible *Slattery–Kruse–Wednesbury* doctrine of arbitrariness, *Wednesbury* unreasonableness cannot be consigned to history. It offers a useful way for the court to understand its role, in a wide range of circumstances, in opposing arbitrary exercises of administrative power. But not even *Wednesbury* unreasonableness is a general ground of judicial review of administrative discretion. It would be a major step forward if the Supreme Court of the United Kingdom were to clear the air –after thirty-five years of speculation and conjecture– by pointing out the obvious: that proportionality is not, and can never be, a general ground of judicial review of the substance of administrative decisions. This is true even though certain special interests of claimants have long been protected and will continue to be protected by the courts through a doctrine that an administrative measure is unlawful if it inflicts disproportionate damage on those special interests.

The proper grounds of judicial review of the substance of an exercise of executive power are diverse, because executive powers are diverse. Arbitrariness, proportionality (and other aspects of reasonableness), and correctness all have their places, and none of them is a general ground of judicial review.