

Comment on Moshe Cohen-Eliya, and Gila Stopler, Prioritizing Rights in the Age of Balancing

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Cohen-Eliya and Stopler's paper consists of two main arguments: First, it aims at identifying two main deficiencies of what it characterizes as the existing doctrines of balancing; Second, the paper suggests that these problems can be solved, or at least mitigated, by incorporating a "probability test" into the balancing process.

The two main problems that Cohen-Eliya and Stopler identify are these: an ad-hoc balancing, of the sort of cost-benefit analysis, is "undisciplined," and thus raises concerns about the legitimacy of judicial review; and such balancing does not provide sufficient protection to human rights. I tend to agree with this criticism, as far as it is directed against the theoretical concept of an ad-hoc balancing as a method for determining the appropriate scope of protection of basic human rights. However, I do not share Cohen-Eliya and Stopler's presumption that current legal doctrines actually reflect such an ad-hoc balancing.

First, the balancing metaphor takes two distinct forms. One version of balancing is the process of placing the competing interests on a set of scales and ruling the way the scales tip (such that one interest is *outweighing* another). A different version of balancing is employed when each interest survives and is given its due. The authors refer only to the former sense, based, so it seems, on the implicit assumption that there is some well defined distinction between "basic rights" on the one hand, and "state interests," which are not basic rights, on the other hand. I'm not sure that this assumption is always self-evident. Take, for example, the recent Israeli case of Tenenbaum. Mr. Tenenbaum was hijacked by the Lebanese Terror organization Hizballa, and while he was still held there, an Israeli newspaper intended to publish an article that describes the circumstances of Mr. Tenenbaum's capture by Hizballa. The relatives of Mr. Tenenbaum filed a petition to prohibit the publication, as it might risk his life. The court applied here a balancing test, which included a probability test. It is not clear, however, whether Mr. Tenenbaum's interest in preventing the publication was or should be considered as a basic right or as a state

interest. But even when it is clear that the balance is struck against a state interest, it is not self-evident that the balance should always take the form of “to which side the scales tip,” rather than one that seeks to find a compromise between the competing interests.

A second distinction that the authors do not seem to address is the difference between *ad-hoc* balancing and a so-called “definitional” one. These forms are distinct not only according to the famous classification offered by Nimmer, i.e., the distinction between a case-by-case inquiry and a global one. The distinction mainly refers to the definition of basic liberty that is to be balanced. Some scholars, most notably legal economists, such as Richard Posner, as well as Eric Posner and Adrian Vermeule, endorse balancing that is made on an *ad-hoc* basis. It is *ad-hoc* in the sense that it balances between the relevant *interests* rather than between competing constitutional principles and values. Specifically, the infringement of a basic liberty or some other fundamental principle is not computed, as of itself, as a social “cost” in the constitutional calculus. What counts is only the policy’s adverse effect on concrete individual interests. Consequently, according to such an ad-hoc balancing approach, to justify a security measure that infringes some liberty it is not necessary to show that it would generate an exceptionally high social benefit, which outweighs the social value of the constraint. It is suffice that the benefit exceeds the cost of the policy’s direct adverse effect on relevant individual interests, disregarding the constraint violation. It seems that this is the balancing approach that the authors have in mind when they address ad-hoc balancing.

However, I don’t find it convincing that this view represents current legal doctrines. In fact, balancing often reflect the notion of civil liberties as constraints, while acknowledging that an infringement can be justified only if enough is at stake. Consider, for instance, the U.S. Supreme Court use of the terminology of balancing in analyzing the legitimacy of detaining suspected terrorists in the case of *Hamdi v. Rumsfeld*. The Court refers to “[s]triking the proper constitutional balance” between the security needs and “the values that this country holds dear...[such as the] commitment to due process.”¹ It does not balance the specific detainee’s interest that is infringed, but the social value that is at stake. Similarly, when the Court defines the scope of protection of speech, in the famous case of *Brandenburg v. Ohio*, it held that

¹ 542 U.S. 507, 532 (2004) (plurality opinion).

incitement to violence can only be punished if it is directed to producing imminent lawless action and is likely to have this effect. This is not an ad-hoc balancing, as it is based on the notion of thresholds. Only a sufficiently high risk that the speech would lead to violence can justify regulating a speech. Therefore, I'm not sure that the authors' criticism against current legal doctrines is well founded.

This leads me to Cohen-Eliya and Stopler's proposal. They suggest that the balancing should be subject to a probability test. According to this view, an infringement can be justified only if the likelihood that it would enhance the relevant state interest is sufficiently high. I think that this approach, which, as noted, is not that far from existing legal doctrines, is appropriate. It may enhance the protection of basic liberties and provide better guidelines for the process of balancing.

I think, however, that the proposal is partial. To my view, the requirement of a probability-threshold is just one type of a-priori restrictions that should be imposed in protecting basic liberties. Consider, for instance, capital punishment. Those who oppose this measure do so not because they think that the balance of interests tips in the direction of saving the lives of the murderer. Assuming that executing murderers would enhance deterrence, and would thus lead to saving the lives of additional 18 would-be victims in comparison to the sanction of life in prison, it may well be, as recently suggested by Sunstein and Vermuele, that the scales should tip in the direction of saving the 18. However, the illegitimacy of the death penalty is based on an a-priori limitation, that an infringement of the constraint against actively and intentionally taking one's life can be justified only if necessary to preempt this person, but not for the aim of deterring other potential murderers.

One can think of several others such a-priori limitations. For instance, the prohibition on intentionally and actively killing innocents, even if the aim is saving the lives of others. The probability test is similar in this respect, as the probability threshold is imposed as a pre-requisite to the balance of interests. Regulating an incitement to violence that is expected to induce violence in a probability which is lower than the threshold is illegitimate not because the expected benefit of the regulation exceeds its cost. It is illegitimate simply since it does not meet the threshold requirement, without referring at all to a detailed balance of interests, in the sense of cost-benefit analysis.

My comment here is thus that while I endorse the idea of incorporating the probability test into the analysis, I think other a-priori constraints should be included too. The probability requirement is just one of several other such constraints.

My almost final comment addresses the normative location of incorporating the probability test. The authors suggest that to put it in the last prong of the proportionality test. I disagree. To my view, the correct location is in the requirement of legitimate aim. This requirement, which normally precedes the proportionality test, refers to a-priori limitations on the legitimacy of an infringement. Incorporating the probability test, as well as other a-priori requirements, into this stage can substantially enhance the aims of providing a more disciplined doctrine, as well as a higher level of protection to basic liberties. To my view, incorporating the proportionality test into the proportionality test is an inferior option in this respect, as the proportionality measure is intuitively associated with a cost-benefit analysis. I agree that my suggestion deviates from the accepted notion of the “legitimate aim” requirement. However, the at least the authors are blocked from replying in this way, as their whole project is aimed at criticizing and shaping the currently prevailing concepts.

A final a side note: The authors argue that the second step of the proportionality requirement is defined as follows: “are there any less restrictive means for obtaining the government purpose in full.” I disagree. If one incorporates the probability test, one must also ask whether there is an alternative that does not obtain the government purpose in full but mitigates the risk to a level which is lower than the threshold. If there is, the infringement under consideration should be valid.

To conclude: I find the main proposal of the authors important and helpful. I’m not sure about its novelty, but I think that an explicit incorporation of the probability test may well contribute to achieve the aim of greater protection of basic liberties.