

# What's the Damage?

## Proportionality and the Ethics of Crisis Response

Dr Therese Feiler

Paper given at the ScanBalt Digital Forum 2020, 04 Sept 2020. For more, see: <https://scanbalt.org/scanbaltforum2020/#about>

Thank you for your kind invitation. I've been asked to comment on this conference from the perspective of ethics. But since much more is to be said than is possible here, I'm going to focus on the principle of proportionality. This principle of practical reason is a demand for lawyers and non-lawyers alike. It concerns the response to crisis or conflict: whether political, medical crisis, or indeed many judgments of daily life. Predictive technologies are part of it.

### 1. Proportionality

Now, we tend to think that a judgment on proportionality is made with reference to a particular aim. This is what the ethicist Oliver O'Donovan, drawing on the 16th century scholastic Francisco de Vitoria calls prospective proportionality. As O'Donovan expresses it: in so far as a judgment is "forward-looking, constituting a law-governed context within which future acts, private or public, are to be performed, it must be proportioned to the state of affairs which it attempts to realise."<sup>1</sup> If I want to open a locked door, the proportionate action is to get a key, unlock it, and then walk through it.

### 2. Crisis responses to Covid – a lesson in disproportionality

However, prospective proportionality alone is insufficient. Nothing tells us whether the aim itself is proportionate or not. Usually, the question is answered by reference to the law<sup>2</sup>; but the law cannot explicitly cover all possible scenarios. This is particularly evident in crises such as the present one.

If the aim of a policy or structure is too broad, we experience *mission creep*, the continuous expansion of the aims. This phenomenon will be familiar to military personnel and project managers alike. So in the response to the Covid-19 crisis, we've seen a continuous shift of goals, from "flattening the curve", to decreasing the R-value to below 1, to what seems now

---

<sup>1</sup> I'm drawing here on O'Donovan's, *Just War Revisited* (CUP, 2003), p. 48. In terms of practical reason, the analogy between politics and medicine is extremely helpful.

<sup>2</sup> Proportionality (apparently not a favourite of law students) is judged with reference to ends and means; however, the determination of the retrospective justifiability of ends seems to be a varying element of legal application in different jurisdictions: [https://www.jura.fu-berlin.de/studium/lehrplan/projekte/hauptstadtfaelle/tipps/Uebersicht\\_-Die-Verhaeltnismaessigkeitspruefung-in-der-Fallbearbeitung/index.html](https://www.jura.fu-berlin.de/studium/lehrplan/projekte/hauptstadtfaelle/tipps/Uebersicht_-Die-Verhaeltnismaessigkeitspruefung-in-der-Fallbearbeitung/index.html)

an entirely arbitrary number of daily infections. If the overall aim is to broadly protect “life and health”, governments (and the public) have nothing to *apportion* their actions to.<sup>3</sup>

Lack of an achievable, realistic aim also results in the proliferation of contradicting aims. This can even include irrational elements. A good example are many hygiene concepts. At best, they are cumbersome and ineffective to the point of being amusing.<sup>4</sup> At worst, such measures are forms of human rights abuses<sup>5</sup>, including unlawful and unwarranted detention, solitary confinement, the deprivation of the right to family life or threat thereof, even for small children<sup>6</sup>, the denial of civil rights.<sup>7</sup> Such measures create long-term physical, psychological, and economic damage. Indeed, they result in damage to the health of the very people whose health is to be protected.

Absent a defined aim of medico-political action, predictive technologies often take centre-stage *instead*. However, depending on small input variations, they can result in vastly over-dramatic doomsday scenarios, a sort of domino theory, as we saw from an early Covid-19 study at Imperial College London. Predictive technologies give us an idea of what could happen under certain conditions. They don’t tell us what we should do.

### 3. Retrospective proportionality

The question then is: How can aims be defined? The way I understand Vitoria is this: prospective proportionality needs to be balanced, and indeed guided in terms of retrospective proportionality. What is the actual harm to be responded to? What’s the damage? It is the *reactive* nature both of medicine and politics that keeps the proliferation of aims in check.

Hence, for Vitoria it was an *iniuria accepta*, a received injury, that would warrant a response. Of course, it didn’t have to be an *iniuria perfecta*. If someone runs at you swinging a cudgel, you don’t have to wait until you’ve actually been hit over the head to defend yourself.

Scholars also differ as to how certain we need to be about a threat in order to act. For Vitoria, it merely needed to be *in contineri*, an emerging threat. For Francisco Suarez (1548-1617) the

---

<sup>3</sup> A fresh example: the press conference of the Berlin police on 28 August 2020 in advance of a large demonstration against Covid-measures that was initially banned. Defending the ban, police president Barbara Slowik claimed „responsibility for the health of the people of this city, in Berlin, and beyond”, pitting the right to free association against “a right to life and physical integrity”.  
<https://www.youtube.com/watch?v=hMVEsTpojtE> [accessed 04 Sept 2020] Unsurprisingly, the administrative court declared that an “immediate threat to public safety” couldn’t be identified – the ban on the demonstration had to be lifted.

<sup>4</sup> As when books in public libraries are “quarantined” for two days after they’ve merely been touched by a librarian. The *universal* duty to wear masks (unless medically exempt or under age) also requires an urgent revision on the grounds of proportionality.

<sup>5</sup> U.K. Parliament, Joint Committee on Human Rights, ‘Human Rights and the Government’s response to COVID-19: The detention of young people who are autistic and/or have learning disabilities’, 12 June 2020, available at: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/395/39503.htm>

<sup>6</sup><https://www.faz.net/aktuell/politik/inland/was-deutsche-behoerden-familien-in-der-corona-pandemie-androhen-16913638.html#lesermeinungen>

<sup>7</sup> With a heavy emphasis on the proportionality judgment: Dietrich Murswiek, ‘Verfassungsrechtliche Probleme der Corona-Bekämpfung. Stellungnahme für die Enquete-Kommission 17/2 „Corona-Pandemie“ des Landtags Rheinland-Pfalz’, 18.8.2020, Vorlage EK 17/2-12

threat had to *in fieri* – it must be happening. Either way, for both authors, interventions cannot be based on mere speculation. Measures need to be proportionate to the harm *that has actually been done* or at least *unequivocal evidence of impending harm*. In that sense, the Kantian emphasis on empirical evidence can strengthen a particular version of practical reason.<sup>8</sup>

This also puts predictive technologies and preventive medicine *in place*. Predictions are relevant to a person or polity in so far as they refer to or extrapolate from existing injuries and indications. Prediction functions to fulfil a curative aim. Hence, the lower the risk of the possible scenario, the less invasive the defensive or preventive measures will be.

#### 4. What follows from that?

In terms of the response to Covid-19, I think the implications are evident. The problem has not been incomplete knowledge of the behaviour of the virus, but the definition of aims. And I think increasingly we're seeing political and legal pressure build up precisely because measures need to correspond both to the damage done and with a view to reliably predictable damage, if any - rather than grand aims such as "protecting life".

In so far as the biomedical industries may also be adversely affected by the Covid-crisis – I'm thinking of shrinking public purses or damaged reputation – they are not exempt from making their own judgment calls on proportionality. Needless to say, the promising tendencies inherent in their technical developments alone will not suffice.

P4-Medicine – learning from Covid-19, Covid-19 can learn from P4

Now, I think in fact, P4-medicine can, and in many versions does, heed the principle of proportionality, and I think we're trying to implement that in my consortium, DigiMed Bayern. In a project on familial hypercholesterolaemia we test for genetic diseases only when we have clinical indicators, and we test only for FH. Intervention is strictly guided by clinical responses.

At the same time, the aim is to leave judgments to patients – they are concerned with their own diseases. No preventive regime can adequately micro-manage such highly personal decisions as those on health.

Remarks on the planned input

Finally, a remark on the planned joint declaration of this event. You write, I quote: "As a result, care can be more focused on the prevention of illness instead of curing diseases." On the

---

<sup>8</sup> cp. Claudia Graband, *Klugheit Bei Kant* (Berlin [u.a.]: De Gruyter, 2015), 2. Graband's reading of prudence in Kant's work tries to bridge the gap between open-ended, non-moral empirical knowledge and practical reason in the area of freedom. She diagnoses their severance as follows: „Die bereits in GMS als eine Form der Geschicklichkeit aufgefassten Regeln der Klugheit werden nunmehr gänzlich aus dem eigentlichen Bereich des Praktischen, der Willensbestimmung durch Prinzipien, verbannt, welche ausschließlich der reinen praktischen Vernunft vorbehalten bleibt. Sind aber Geschicklichkeit und Klugheit als eine Unterform derselben aus dem Reich des Moralisch-Praktischen ausgeschlossen, so müssen sie aufgrund der strikten Dichotomie zwischen Natur und Freiheit dem Reich der Natur zugeschlagen werden. Zuständig für dieses ist der Verstand bzw. die theoretische Vernunft.“

grounds of what's just been said, I'd strongly recommend revising that. It should say: "The curing of diseases can be enhanced by prevention."

There is no meaningful prevention of disease that doesn't have a curative function and horizon. And only with this in mind can any predictive scenario be said to have any practical merit.

Thank you very much.