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Making Legal Knowledge Work: Practising Proportionality in the German *Repetitorium*

Jacco Bomhoff*

Abstract: This article presents a cultural and critical study of 'proportionality review' as a legal knowledge format and practice. The setting for this study is German public law, and in particular a domain of German legal education that is rarely analyzed even in Germany: the classes and materials offered by *Repetitoren*. These are commercial providers that aim to prepare students for the all-important 'First Juridical Examination'. In this setting, proportionality is presented as a principle that matters, a doctrine that works, and a technique that jurists – lawyers, judges, but especially also law students – can learn to perform. Sustaining the sense that proportionality 'works', however, itself requires work, in particular in the form of largely invisible background constraints on what can count as suitable problems and appropriate solutions. In these processes of making proportionality into a 'doable' technical instrument, the German legal-constitutional order as a whole is presented as a feasible, achievable project. The article looks at how proportionality's success is produced and experienced, and at what its status as a foundational, near-ideal legal instrument means for the character of the German constitutional and legal imagination.

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1. INTRODUCTION

'Proportionality' has captured the modern liberal legal imagination. The term commonly stands for, either or both, a general constitutional or human rights law principle, and a practical, multi-step doctrinal framework for the judicial scrutiny of legislative or executive action allegedly infringing upon fundamental rights guarantees (Jackson 2015; Jackson & Tushnet 2017; Stone Sweet & Mathews 2019). Proportionality review in public law asks courts to assess whether rights-limiting measures are suitable, necessary, and proportionate in relation to achieving a legitimate aim. As both principle and judicial framework, proportionality is generally understood to have originated in Germany, and to have 'migrated' to a broad range of jurisdictions, including Canada, South-Africa and Israel, as well as to the practice of some influential trans- or supra-national legal orders. German legal scholars write of proportionality – '*Verhältnismäßigkeit*', or the '*Übermaßverbot*' – as 'probably the Federal Constitutional Court's greatest juristic achievement; one incidentally, it shares with German constitutional scholarship' (Lepsius 2020: 95; Lepsius 2015: 2). 'The justices refined the proportionality test into a work of art', says the introduction to a recently translated appraisal of the Court's work. In doing so, they created 'a methodological masterpiece that became their most successful export' (Collings 2020: xix).

This article presents a cultural and critical study of proportionality review as an artifact of legal knowledge: a routinized, distinctively formatted, technical practice to be performed, embedded in a broader 'way of doing legal knowledge' (Riles 2004; Riles 2005: 976; Riles 2006; Valverde 2003). While its near global spread means that proportionality review today also has features of a 'modality of globalized legal knowledge' (Riles 2011: 186), the focus here will be on proportionality's character as a component and emanation specifically of legal consciousness in the field of German public law, even if the article also aims to make a contribution to our understanding of the workings of legal doctrine more generally. The article engages with the setting in which aspiring German lawyers practice 'doing proportionality' most intensively: the *Repetitorium*. These are preparatory courses, offered by commercial providers, that the great majority of law students take alongside their – free – university studies, to get ready for the all-important, state organized, 'First Juridical Exam'. For this setting of exam-oriented instruction, and drawing on published teaching materials and classroom observations with two large providers in three towns in Nordrhein-Westfalen, the article examines proportionality as a legal knowledge format in action, notably in the context of 'solving' set problem-cases under exam – or exam-preparatory – conditions. From this angle, as part of the practical activities of '*Falllösung*', proportionality manifests itself as problem-solving technique. Capturing proportionality in this guise will require taking in, not just its features as a formal template, but also the material this technique is meant to work on – the factual and legal constellations of typical problem-cases (*klausurtypische Problemkonstellationen*) – as well as the technical instructions for its proper performance and the formal, disciplinary, and aesthetic standards on which such performance is assessed (a sample question and answer appear at the end of this article).

The overall heading for this analysis is the idea of proportionality's *success* as a legal knowledge instrument. Doctrinal success, for the purposes of this study, is a formal and

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phenomenological notion concerned with the experiences and commitments of local actors working with the relevant legal materials (Kennedy 2006: xvii-xxxiv; Balkin 1993). It refers in particular to shared perceptions of *centrality* and *feasibility*: understandings that proportionality is a principle that matters, a doctrine that works, and a technique that jurists – lawyers, judges, but especially also law students – can learn to perform.[1] A preliminary idea of this sense of relevance and success can be gathered from these two statements from leading German commentators. One is the idea that '[w]ithout the principle of proportionality *we would have an entirely different theory of constitutional rights*'; the other the suggestion that 'the dogmatic figures that guide constitutional interpretation' in German law today, including principally proportionality, '*could hardly be better devised*' (Lepsius 2015: 4; Jestaedt 2020: 66, emphases added). The article is interested primarily in the ways in which this sense of success is produced and experienced, and in what such overwhelming prominence for this one particular instrument means for the broader constitutional-legal order of which it is a constituent part. In a way, as will be seen, commitment to core elements in the foundational post-War constitutional rights case law of the German Federal Constitutional Court creates problems for which proportionality review presents itself as the ideal, or even only, solution. At the same time, commitment to proportionality as a technology of constitutional rights reasoning imposes demands on the framing of problem-cases, so as to make them suitable to resolution by way of proportionality analysis. Proportionality analysis plays a central role in making the legal and social order amenable to rights review, but it also pushes towards presentations of legal and social materials in ways that makes them amenable to proportionality review. To a significant degree, then, proportionality sets up the problems to which it itself proposes the solutions, in this way performing its own success.

Making these dynamics visible requires approaching proportionality not just as language, concept or doctrine, but as a practical, teachable and examinable template and activity. In Sections 2 and 3, the article first sets the stage for this investigation by presenting the context of *Repetitorium* exam-prep teaching. It argues that this setting favours both the standardization of legal doctrine, and its presentation in a particularly sincere or transparent form. In the course of these teaching practices the German constitutional-legal order is in an important sense homogenized, facilitating the socialization of students into a role of junior partner in the project of its realization. In Section 4, the article then further explores the specifically performative dimension of proportionality as a legal knowledge format in practice. Here, the focus will be on the exigencies of performance, in particular under exam conditions, and on what they mean, not just for candidates' experience of proportionality as a legal instrument, but also for their view of the broader social and political world on which this instrument is meant to

[1] 'Success' for a legal doctrine is used here not in material terms (*e.g.* effectiveness in achieving predetermined ends), institutional terms (*e.g.* effectiveness in securing compliance), or political terms (*e.g.* a sociological sense of legitimacy as acceptance). It also is not a normative badge of endorsement. It is concerned rather with doctrinal architecture or form (proportionality as a hinge on which the constitutional-legal order turns), and with the commitments and beliefs of relevant actors (proportionality as an instrument that works). Relevant literatures for this approach include work on legal consciousness (including from within Critical Legal Studies), on the legal and political imagination, and on legal knowledge formats and practices, as discussed further below, in Section 2. See *e.g.* Kennedy 2006; Kennedy 1982; Riles 2004; Riles 2005; Cornut-St. Pierre 2019.

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operate. This world, as presented over and over again to aspiring German lawyers, is one in which proportionality *works*. Making proportionality work, however, itself requires work. These efforts, which remain largely invisible, set limits on what can count as suitable 'problems' and as appropriate 'solutions'. In problem-case after problem-case, candidates thus encounter a world seemingly devoid of tragic trade-offs, and full of apparent conflicts that turn out to be 'solvable' through the careful calibration and 'mutual optimization' of proportionality reasoning. These repeated experiences of success, by way of a practice that is simultaneously formally intricate and substantively pragmatic, fit neatly with proportionality's broader reputation as a flexible, progressive, and even potentially transformative legal doctrine (e.g. Hailbronner 2014: 645). But, this article suggests, there is also much that proportionality's gaze cannot easily see. Relations of power, for example. Or the outsized, unacknowledged roles of a form of liberal common sense, and of baselines unreflectively patterned on the status quo. Taken together, these limitations not only suggest that proportionality review may well be a much more conservative doctrine than commonly thought, but also that its success risks coming at the price of a narrowing of the legal and constitutional imagination.

These aspects of proportionality's character are significant. The 'constitutional culture ... anchored by the post-World War II German constitution' has been referred to as 'the most influential in the world' (Scheppele 2013: 23). This influence is made up largely of the migration of a small set of ideas and practices, among which 'proportionality' figures most prominently (other important elements would be 'purposive interpretation' and 'horizontal effect'). As an uprooted, abstracted, distilled, format and technique, proportionality review has become a prominent global technology for governing through law (Stone Sweet & Mathews 2019). The main proposition supporting the approach taken in this article is the suggestion that, if, in so many different settings, legal actors are taught to think of and use proportionality review as an instrument, then the form and experience of that instrument, and the way it makes the world appear to those wielding it, matter (Riles 2005: 986). After all, as the saying goes, 'if all you have is a hammer, …'.

2. TEACHERS AND TOOLS: PROPORTIONALITY, THE *REPETITORIUM* AND THE *SCHEMA*

In the world of German public law, the term 'proportionality' typically refers to both a general principle of constitutional or fundamental rights law (*Grundsatz der Verhältnismäßigkeit*), and to a specific, multi-step legal doctrine or test (*Verhältnismäßigkeitskontrolle*). In both guises, it is a prominent feature of legal reasoning, visible in particular in the professional registers of legal scholarship, judicial decisions, and law teaching. Across these two guises, proportionality is thus, at the same time, a mundane practical technique – part of the way German lawyers 'do' public law – and an instrument of worldmaking – part of the way German lawyers talk about their constitutional order and about themselves, to themselves. These latter, meaning- and world-making dimensions of proportionality certainly deserve further investigation – not least because

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they may well be connected to broader salient trends, such as the spread of audit cultures, or of modes of 'techno-moral governance' (Strathern 2000; Fassin 2012; Bornstein & Sharma 2016; Merry 2016). But even if ultimately, hammer-and-nails-like, we will want to know more about what the world looks like to lawyers wielding proportionality review as one of their main tools, the approach taken in this article is to suspend such interrogations of meaning, and to start by looking closely at the characteristics of the tool itself – at what proportionality review, as a technical instrument, is asked to, thought to, and made to *do* in German public law (*cf.* Valverde 2003; Riles 2005: 982, 1029ff). The setting for this investigation is a sub-field of German legal education that is typically only discussed in anecdotal terms even in German legal circles. Its participants meet not in university lecture halls, but in rented conference rooms; and the teachers are not university professors, but *Repetitoren*.

Even if in practice very few law graduates become judges, university legal studies in Germany have, since the middle of the 18th century, been framed as the first stage specifically of *judicial* training. One corollary of this designation is that the exams concluding these studies are 'State-', rather than mere 'university', or even 'bar', exams, organized by public authorities in the different German *Länder*. In fact, until 2002, grades obtained at university law faculties were entirely irrelevant to the final grade obtained in the so-called 'First State Exam' (since then called the 'First Juridical Exam') (Böning 2013; van de Loo & Stehmeier 2013). Alongside their law faculty studies, which in Germany are tuition-free, the vast majority of law students – by common estimates around 80% to 90% - also enroll with commercial providers, or '*Repetitoren*' to prepare for their State Exam (Kilian 2016; FAZ 2011; Die Zeit 1994). The '*Repetitorium*' is an institution with a long history: Goethe famously studied law with a *Repetitor*. Today, while there are many smaller players, the national market for this form of tutoring is dominated by a small group of major providers. Among these *Hemmer* and *Alpmann Schmidt*, founded in 1976 and 1956 respectively, are by some margin the largest, offering courses in dozens of locations across Germany.[2] The enduring appeal of the *Repetitorium* can be explained mostly through the distinctive character of the State Exam – a rite of passage that looms large even in popular consciousness (Kaulbach & Riecke 2017). These exams require highly specific problem-solving and answer-writing techniques that tend not to be the focus of university legal education. *Repetitorium* classes offer a highly structured environment of text-focused teacher-student exchanges, centered on problem-cases (*Fälle*), which students need to learn to 'solve' (*lösen*). In administrative and constitutional law these problems typically, though certainly not always, demand some form of proportionality or proportionality-like review (HW 2014: 50). This technique of problem solving ('*Falllösungstechnik*', see e.g. Wolff 2003; Hyland 1990: 1598) will be the focus of discussion later.

Repetitoren occupy an ambivalent position, both within the world of legal education, and in the broader popular imagination. The larger *Repetitoria* are highly lucrative course providers and publishing houses, with students paying for a wide range of courses and

[2] There are also numerous smaller players. Some universities have started offering their own versions of exam-prep courses, called '*UniRep*'. Students also practice working through set problem questions in university law school study groups (*Arbeitsgemeinschaften*).

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materials – from weekly practice and rehearsal sessions to pre-exam weekend crash courses ('All of Public Law, in 3½ days!'). Their business, though, is one acknowledged to be one partly 'built on fear' (Die Zeit 1994; Der Spiegel 2001; Böning 2013: 164). There are essentially no hard data to support their claims of reduced fail-rates and improved marks. *Repetitoren* are also commonly criticized by university professors for 'dumbing down' the law (Pieroth 2014: 11), and they have been banned from advertising on some university campuses. Unlike judges and university professors, finally, *Repetitoren* are unable to participate in the marking of official exams. *Repetitoren* are thus under pressure to affirm their own position, which they do, for example, through ostentatious displays of commercial success – arriving to classes in expensive cars – or allusions to own past spectacular exam performance. Much is also made of the suggestion that students are learning something special – something they will not be taught in university law classes, or with any rival provider. Law Faculties teach 'Moon Law'; you will be given '25 opinions on a problem that does not exist', one founder of a leading provider says in an interview (Der Spiegel 2001). *Repetitorium* teaching materials, on the other hand, promise 'application-oriented' and 'exam-focused' learning, 'exam tips' and 'strategic knowledge'. 'Most students will get this point right on the exam', one manual explains, before promising: 'this is how you distinguish yourself' (HW 2014: no. 30).

In *Repetitorium* classes and teaching materials the object at the center of all attention is the 'Schema'. '*Schema*', in this context, means broadly chart or template. It is an organized, structured presentation of legal doctrine, most commonly represented diagrammatically. It is in this form that law students will typically encounter elements of legal doctrine, such as the proportionality test. Three synonyms are in common use, each conveying a different emphasis: '*Prüfungsschema*', '*Aufbauschema*', and '*Loesungsschema*'. '*Prüfen*', a verb at the heart of German legal technique, means 'ascertaining', 'testing', 'examining', or 'verifying'. A '*Prüfungsschema*', according to a rare explicit definition, is 'an ordered presentation of all conditions required for one or more specific legal consequences' (Rosenkranz 2016: 294). The basic process of verifying whether the conditions of any *Schema* are met – '*prüfen*' – requires '*Subsumption*'. This is understood to be the syllogistic process of relating minor premises to major ones. The imperative '*Subsumieren Sie!*', and the admonition '*Sie sollten genau subsumieren!*' – 'You should be precise with your syllogisms!' – are among the most frequently heard instructions in *Repetitorium* classes. Solving a problem-case, in turn, requires candidates to construe a longer argument chain (*Argumentationsketten*), by piecing together a series of '*Schemata*'. The term '*Aufbauschema*' ('construction template') conveys this architectural sense of order and the activity of building, not just with regard to the reasoning required in an individual case, but also for the legal order, or any subfield thereof, more generally. The last alternative, '*Lösungsschema*' ('solution template'), indicates the role these diagrams are to play in the 'solution' of problem-cases ('*Falllösung*'). One *Repetitor* whose classes I attended likened the activity of working with these diagrams to building with Lego blocks: 'Nothing intellectual about it'. But, he also told the students: 'A *Schema* is like money; only once you have it, can you safely ignore it'.

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The common view is that, as mere 'ordered presentations', *Schemata* add – or detract – nothing of importance to the law. A *Schema* is a mere 'image' or a 'model' of already existing law ('*Abbild*'; '*Modell*') (Rosenkranz 2016: 295ff). It is 'not invented' by judges or professors, but is rather thought to emerge from an integrated logical and practical reading of constitutional or legislative provisions, through a process of reasoning and construction that is not further specified or explored (Rosenkranz 2016: 294ff). *Schemata* are not constructed or elaborated in class. To the observer, they simply appear: on slides, in handbooks, or in the printed collections of study materials published by the *Repetitoria*. A good *Schema* is one that 'closely matches' or 'does justice to' the 'system' of a particular area of law, or to the 'structure' of constitutional rights provisions, for example (HWCh 2016: no. 101). Once elaborated and disseminated, in handbooks and teaching materials, they are 'presumed to be' useful and meaningful (Großfeld 1992: 25). There is, consequently, only minimal discussion in German literature of what *Schemata* are thought to *do* (but see Möllers & Birkenkötter 2014: 612ff). Their benefits are thought to be entirely pedagogical in nature: they force candidates to 'slow down' *and* enable them to 'save time', and they help make sure that *all* conditions for the application of *any* possibly relevant legal norm are verified, in the right order (Rosenkranz 2016: 296).

Schemata, which have their origins in private law, were popularized in constitutional rights law mainly through the publication of the immensely successful study book '*Grundrechte. Staatsrecht II*' by Bodo Pieroth and Bernhard Schlink, in 1985.[3] Pieroth/Schlink, as it is universally known, was at once one of the very first public law study books devoted entirely to constitutional rights, and one of the first to systematically employ problem-cases and diagrams for their resolution (Pieroth 2014: 4-6). This was the textbook that, for the first time, offered a clear conceptual and practical 'grid' for proportionality review 'that could be canonized and universalized as a scheme' (Lepsius 2015: 17). In a later retrospective, Bodo Pieroth recalled the authors' decision to treat each specific constitutional right set out in the Basic Law in the same way throughout their book, on the basis of a problem-scenario that would be solved systematically 'by the book' ('*schulmäßig*'), using the same basic conceptual scheme of 'scope of protection / interference / constitutional justification' in each case (Pieroth 2014: 6, 9). The justification stage in this scheme turned on a review of means/ends relationships, under the heading of 'the principle of proportionality', and was given shape through another three-step structure, of 'suitability', 'necessity', and 'proportionality in a narrow sense' (Pieroth/Schlink 2005: no. 269-291). Given, as Pieroth also recalled later, that 'the reasoning of Federal Constitutional Court decisions at the time was not at all constructed in such a replicable, and thus learnable way ('*nachvollziehbar*', '*erlernbar*')', the authors' form of presentation actively contributed to the homogenization and universalization of proportionality as a teachable and usable tool (Pieroth 2014: 6-7).

[3] Now in its 36th edition (2020), and translated into Japanese and Portuguese, to serve markets where German constitutional legal theory is highly influential (Japan, Brazil). The model for their approach was an extremely influential study book for private law (Medicus 1968).

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3. HOMOGENIZATION THROUGH TECHNIQUE

Proportionality review, then, as a *Schema*, is a legal knowledge instrument, and the *Repetitorium* is one key setting where novice German lawyers learn to wield it. Studies of legal education elsewhere have shown how context and styles of instruction may affect the images of law and legal technique transmitted to students. For the context of US law schools, for example, Elizabeth Mertz has observed how the well-known 'Socratic dialogue' model of law teaching 'both indexes and mirrors a core legal model not only of how knowledge or truth is obtained but also of how justice is achieved', by way of dialogue and rhetorical contest (Mertz 2007: 59). Mertz's observations can serve as jump-off point for reflection on the latent images of law and legal technique that German students are presented with in *Repetitorium* teaching. Particularly significant in shaping this context are constraints stemming from the *Repetitorium* business model and from characteristics of the exams candidates are prepping for. These pressures, I argue, line up with core tenets of German constitutional theory and contribute to an overall homogenization of the German constitutional legal order. That homogenized order, in turn, affords an environment in which proportionality review, as a transparent, highly standardized, and – with the right instruction – *feasible* legal technique, is able to emerge as a particularly successful legal doctrine.

Repetitorium teaching materials promise to help students acquire two main competencies familiar also to legal education elsewhere. These are '*Einordnung*', meaning the formal organization of legal knowledge and the ability to fit specific problems within larger wholes; and '*Falllösung*', which designates the activity of 'solving' problem-cases on the exam. In this specific context, however, these competencies come with two more particular constraints. First, there is the immense volume of the material German law students are expected to master for their First Juridical Exam (Großfeld 1992: 27; Böning 2013: 169; Llewellyn 1932: 556-557). In public law in particular, candidates will often be asked in the exam to work with legislation that they will not have studied in any detail before (Rosenkranz 2016: 296). This constellation puts a heavy premium on mastery of standardized techniques that can be applied across large swathes of material (*e.g.* HW 2014: no. 2). Proportionality review responds to the demand for such a universally applicable tool. Second, the commercial pressures and ambivalent status of the *Repetitorium* business model means that, for any knowledge practices to be transmitted, the 'pay-off' has to be particularly immediate and clearly sensed. There is, after all, little else, in terms of school prestige, networking opportunities, or intellectual curiosity, to sustain the continued commitment of students as paying customers. In such a setting, legal knowledge has to be presented as simply, transparently – and, by implication, as *sincerely* – as possible, without provocative complication, irony, or sense of ambiguity as to applicable principles or outcomes.[4] There will be a high premium, too, on stimulating perceptions of feasibility,

[4] This sincere expressive posture is crucial to an understanding of German legal discourse, and by extension, German legal consciousness, see *e.g.* Bomhoff 2013. The contrast with the 'sophisticated scepticism' and 'irony' of the international human rights law discourse centered in US elite law schools and analysed in Riles 2006 is striking. See further Keane 2002: 76, on sincerity as a 'semiotic and pragmatic form'.

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obviousness, and conformity to 'common sense' in the application of the newly acquired techniques.

This sincere and transparent mode of knowledge presentation fits well with the role and perspective candidates are asked to adopt in the exam, which is that of a reporting judge, writing an expert-memorandum (*Gutachten*) for a court, rather than that of an advocate for a party, or of a scholarly critic of the law. Judges, in particular, are heavily involved in the marking of State Exam answers. *Repetitoren* often remind students that the kinds of answers that will get high marks, are those of which these judges might say 'this looks like the work of someone who could be a colleague [on the bench]'. This outlook and expressive mode correspond to a basic stance that candidates are expected to assume throughout their answers, as junior partners enlisted in an ongoing project of 'realizing' and 'concretizing' – both terms of art – the constitutional-legal order of the German 1949 Basic Law (*cf.* Brugger 1994: 398; Müller, 1999: 275). This project, in which the Federal Constitutional Court is a leading actor, but which the German Basic Law itself orders and the court presumes to be shared by others, including state ministries and local authorities (Basic Law, articles 1(3) and 20(3)), *homogenizes* the modes of legal argument all throughout the legal order (Baer 2014: 121; Jestaedt 2020: 66). In this homogenized field, Federal Constitutional Court judgments read like textbooks; theoretical constructs – such as the proportionality principle – often seem as if 'made for' teaching; and doctrinal tools – like the proportionality test – can form the jump-off point for extremely elaborate works of theorization (Möllers 2020: 194; Hailbronner 2015: 92; Alexy 2002). Parallels within the vocabulary used across the different discursive levels of this order, from exam-prep brochures to constitutional court judgments, are indicative of the homogenized character of the project German jurists see themselves as participating in. Through repeated invocations of terms such as 'realization', 'calibration', and 'optimization', the language of the Federal Constitutional Court and of leading scholars marks itself as belonging to the same discursive genre of 'problem solving' as the teaching materials and interactions of the *Repetitorium*. Judicial, scholarly, and didactic discourse all present legal analysis as a matter of 'problem solving', and ask students to assume the position of the solver. This genre, in turn, naturalizes a worldview in which these problems not only 'exist', in certain obvious and easily definable ways, but are also *solvable* – of course precisely through the forms of legal analysis that set them up in the first place, in ways to be discussed in what follows (Riles 2004: 785; Coe & Nastasi 2006: 187).

What emerges from this amalgam of commercial and examination pressures, legal technique, and constitutional theory is a kind of self-validating feedback loop (Bourdieu 1977: 167). The legal techniques on offer in class and in printed materials, the problems presented for examinations, and the solutions set out in teaching materials and marking criteria, all speak to each other, so that that the application of technical mastery, conformity to presumed shared notions of common sense, and validation in terms of high constitutional principle, all become mutually reinforcing. This is the broader context in which constitutional *value* and legal *technique*, but also constitutional *theory* and legal *practice*, become intertwined (Hailbronner 2014: Bomhoff 2013). Proportionality review is both a central instrument for, and a prime beneficiary of, this kind of feedback loop.

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4. PROPORTIONALITY AS A KNOWLEDGE PRACTICE: *FALLLÖSUNG* AND THE DEMANDS OF A 'CLEAN JURISTIC BALANCING'

Proportionality review, in *Repetitorium* classes and materials and on the exams for which they prepare, is a knowledge format *in action*: a template performed together with – 'applied to', as those involved in the practice would have it – the hypothetical fact situations candidates are presented with (the so called '*Sachverhalt*') (Riles 2005: 783; Valverde 2003: 24). Approached in this way, the artifact of proportionality *as practice* indicates not just a set of technical competencies and teaching materials, but also a range of typical problems – '*klausurtypische Konstellationen*' – and approved solution models. This Section looks at these materials and at the processes by which proportionality is made into a teachable, doable, and examinable activity. The argument to be advanced is that these uses made of proportionality, in this highly formative context, form part of its character as a legal instrument, just as its features as an instrument will shape the uses to which it can be put, and in this way the character of the constitutional-legal world of which it is part. This investigation will take several steps. It begins by looking at the general, locally held, standards for a properly 'juristic' deployment of proportionality analysis. It then turns to the implications of the fact that problem-questions need to be structured in such a way as to allow candidates to at least *reach* the proportionality-stage in their longer argument chains. Finally, it shows how in the instructions for how to carry out proportionality review, once this stage has been reached, *Repetitorium* teaching materials reinforce basic ideals of the German constitutional-legal order, in particular the injunction that no one value should ever 'lose out completely'.

As legal doctrines and constitutional principle, proportionality is in many ways central to the practice and theory of German public law. The same goes for proportionality-related forms of calibration, notably '*Güterabwägung*' or balancing of values, and '*praktische Konkordanz*' – proportionality's analogue for constitutional rights guarantees without any limitation clause in the German Basic Law. These are all also, in the narrower context under consideration here, the acknowledged centerpiece for many problem-questions on the First Juridical Exam (*e.g.* HWCh 2016: no. 131). At first sight at least, this central role would seem to be good news for candidates. In proportionality, it would appear, they would have a clear template to follow; an efficient ordering of steps to take; easy to memorize under exam conditions, and standardized in its application throughout, in principle, the entirety of their public law examination subject matter (Jestaedt & Lepsius 2015: vii). From the students' perspective, however, proportionality and other forms of calibration also come with special challenges. For one, these doctrines' apparent informality and common-sense-like qualities are a strange fit with the highly formalized, technical demands of the problem-cases, for which the intricate private law problem based on the German Civil Code remains the archetypical example. As is the case for law students in other jurisdictions, German law students too are largely taught *not* to speak in overtly substantive terms, like 'fairness' or 'justice' (Bourdieu 1992: 828). In addition, the reasoning operations required, in particular the 'balancing' prescribed by proportionality's last step will seem, again at least at first sight, rather different from the syllogistic '*Subsumption*' that students will have encountered as the main reasoning tool throughout

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their studies. Candidates, then, face the daunting task of having to write about highly abstract and openly value-laden notions, such as the 'proportionate' character of governmental action, or the 'calibration' between constitutional rights in conflict, on a five-hour exam, on the basis of only limited information available from the question-prompt, without descending into what one course manual calls 'fabulation' (HW 2014: no. 144).

Repetitorium classes and teaching materials both stoke these concerns and promise help. They reinforce the sense that this is a technique that presents special challenges – in particular: the dreaded '*Subjektivität*' – but that is ultimately also like any other, in that it *can* be mastered and performed to conventional standards. A certain degree of 'subjectivity' will remain, students are told, but this is fine, so long as it is managed through a degree of '*geschulte Judiz*', or trained juridical sensibility, to be acquired through problem-solving exercises in the *Repetitorium* (HWCh 2016: no. 135). Supporting this craft-like view of legal doctrine are the numerous references to 'strategy' and 'tactics' that dot teaching materials (*strategisches Wissen*, *Klausurtechnik und -taktik*), as well as proprietary-sounding invocations of a 'method' unique to a specific provider (such as the '*hemmer-Methode*', named after one leading provider). Students thus receive a double message with regard to proportionality and related forms of calibration. On the one hand, there is a clear acknowledgement of the idea that these are operations that *are* somewhat different from other juridical techniques, and that they are to be treated with some caution (Pieroth/Schlink 2005: no. 293). So, for example, one *Repetitor* whose classes I attended would announce 'Colleagues, this is where we leave the realm of mathematics', when a problem-question required some form of explicit calibration of rights, values, or interests. Teaching materials make reference to the unavoidable influence of the 'subjective valuations of the person working on the problem-case' (in the original German: the 'editor' of the answer; *e.g.* HWCh 2016: no. 95). And candidates are comforted with the suggestion that, when it comes to proportionality review, 'the actual outcome will be of less importance' for their mark than their reasoning in getting there (HW 2104: no. 139). In parallel, however, teachers and materials stress a second message. This is the suggestion that proportionality review, *if* deployed in the right way and at the correct stage, is an entirely appropriate instrument, and is, as a juridical technique, ultimately not all that different from other techniques used in the solution of problem-questions. This dual character is visible, for example, when a manual explains the notion of proportionality to students through the saying that one should not use guns to shoot at mosquitos, but then immediately reminds them that they should not write this sort of thing in their exam answers (HW 2014: no. 130). These contrasting messages are on particularly clear display in this extract from a *Repetitorium* manual from Hemmer, a leading provider, which is a rare example of a text directly addressing the question of how to 'do' proportionality review:

> '**hemmer-Methode**: This is an area where, on the *Klausur*, many points are up for grabs! So make sure your reasoning can be followed by the examiner and try to work in a juristically pure way. That way you can distinguish your answer from a generalized weighing-up merely in terms of advantages / disadvantages / outcome, at the level of a simple secondary school essay assignment. What is important here, alongside a degree of trained legal sensibility, is a careful analysis

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> of all the elements given in the problem-question (…). It is argued by some that such balancing and weighing lacks any kind of rational or binding criteria. This is accurate, to the extent that there will always be some remainder of subjectivity, which for you, on the exam, means that, typically at least, the actual outcome reached will not matter all that much. This is why, in the exam, it is a good idea to also take the elements of "suitability" and "necessity" [earlier components of the proportionality *Schema*] seriously, and not to jump too quickly into a discussion of proportionality "in a narrow sense" [the final "balancing" stage of the *Schema*], and to end up waffling away. At the same time, the examiners will expect some kind of discussion from you on this last point, not least because this is where a differentiation in grades can take place – more so than, for example, in the area of admissibility review, where many students will write more or less the same thing' (HWCh 2016: no. 135).

Some of the criteria set out here are applicable to 'good' legal reasoning more generally, in particular the demand of '*Nachvollziehbarkeit*', indicating reasoning that is comprehensible, open to scrutiny, even 'replicable' (as with scientific experiments), and the instruction to work in a juristically 'clean' or 'pure' way. These notions would deserve extended cultural examination in their own right. Here, though, I focus on two related elements that are more specific to proportionality analysis *per se*. These concern, first, the important objective of affording candidates the opportunity to at least engage in proportionality analysis (under the heading of 'reaching' proportionality), and second, the instructions given for how to carry out this analysis once they get there ('doing' proportionality). The emphasis will be on the images of 'good' problem-questions and 'good' proportionality-based answers that emerge from *Repetitorium* teaching materials, and on what they tell students about what German constitutional law and practice look like.

4.1. *REACHING* PROPORTIONALITY: LATENT IMAGES OF GOVERNMENT AND RIGHTS

Proportionality review figures only at a very late stage in longer reasoning chains. A simple standard answer in a constitutional rights case would in any event also include a review of the admissibility of the claim, and a determination of whether any right was infringed. This, before a review of proportionality, or a related form of calibration for rights guaranteed without reservation clauses, can even become relevant, at the so-called 'justification' stage. Administrative law answers are likely to be longer still. This justification-stage, in turn, will in many cases involve assessments of, first, any impugned legal basis as such, and second, of its application in the specific circumstances of the given case. Both these latter steps are essentially made up of a review of proportionality (See *e.g.* HW 2014: no. 141).[5] Within these two steps, the individualized assessment of

[5] Doctrinal note: This double assessment, finally, will sometimes be followed still by a review of the so called '*Wesensgehaltgarantie*' under Art. 19II Basic Law (the 'essential minimum' doctrine), which, on the predominant 'relative' view, again, and as presented in teaching materials, 'amounts to nothing more than a (repeated) proportionality review' (HW 2014: no. 144b)

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'proportionality-in-a-narrow-sense' of the measure as applied again comes at the very end. And it is for this very last step that most points can be earned on the exam (HW 2014: no. 139) Typical exam problem-questions should therefore afford candidates the opportunity to *reach* as deeply as possible into these later, calibration-focused, reasoning stages in their answers. It is important to recall here that exam answers take the format of a memorandum written for a judge. Crucially, this format does not typically allow for candidates to pursue subsidiary arguments at any length. Where there are choices to be made, candidates are rather encouraged to deal first with any options they are going to reject, and then to reject these firmly. As one *Repetitor* told students: counterarguments not decisively rebutted do not merely render an answer unconvincing but rather, simply, 'logically wrong'. Within these constraints, examiners and candidates share the same goal of ensuring that answers can reach the points-rich stages of proportionality review. And this comes with implications for the kinds of questions candidates can typically be presented with, and for the approach they will be encouraged to take in their reasoning.

First, to allow candidates to get past the 'interference-' and into the 'justification-' stage of the answer-model, problem-questions must be set in such a way that the exercise of any constitutional rights implicated will in fact have been affected (through legislative or executive action) in some non-frivolous way. Second, the same general aim – to afford candidates the opportunity to at least get to a full proportionality review – suggests that exam-typical constellations should not feature governmental measures pursuing some plainly illegitimate purpose – or at least: not exclusively so – nor measures that are clearly not suitable to their stated end (*e.g.* HWCh 2016: no. 132). And third, while the governmental measure involved should constitute *some* serious interference with the relevant rights, this interference should, at the same time, not be *too* grave, since in that scenario, again, no full-fledged, individualized proportionality assessment would be possible.[6] Candidates, for their part, will be under pressure to avoid 'prematurely arguing themselves out of the examination' (HW 2014: no. 210). This is a powerful incentive for students to adopt a maximizing approach to the scope of constitutional rights and to their salience in individual cases. And this exam-strategic consideration, it turns out, lines up precisely with the general approach to rights interpretation adopted by the Federal Constitutional Court:

> 'In general, when it comes to determining the substantive scope of rights, it should be noted that the Federal Constitutional Court, in cases of doubt, favours an extensive interpretation, notably: that understanding "which develops the juridical force of the Basic rights-norm to the fullest extent" (…). **hemmer-Methode**: This is of course helpful to you from an exam-tactical perspective! Only in this way can further problem areas be opened-up, in particular those of the justification-stage

[6] Doctrinal note: This is slightly more complicated. In such a case, the model-answer would likely only involve the first level of proportionality review (comparable to 'on its face' review in other jurisdictions). An ideal question would rather involve a statute that does infringe a right, but can be 'saved' through 'interpretation in conformity with the constitution', thus opening up space for an individualized assessment of the proportionate character of its application in the case at hand. See *e.g.* Altevers 2017: 29; HWCh 2016: no. 136.

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> …, for which you can set out your reasoning and thus gather points'. (HWCh 2016: no. 103; also HW 2014: no. 97)

Similarly, students are encouraged in their teaching materials to opt for finding that a constitutional right, once defined broadly, *has* been infringed in the case at hand – again to ensure that the *Klausur* does not end prematurely (*e.g.* HWCh 2016: no. 112).

Within these parameters, a picture emerges of a '*klausurtypische Problemkonstellation*'. And this 'typical' constellation, repeated over and over in classes and teaching materials, presents budding lawyers with powerful latent images, first, of what government and governing in Germany supposedly look like in actuality; and second, of the character of the rights order of the Basic Law. To briefly take the second point first: these constellations cement a particular background image of the constitutional rights order of the Basic Law, within which constitutional and administrative law claims play out. This order, typical problem-cases affirm, is an overarching, integrated whole, devoid of either significant gaps – 'constitutional black holes' – or, as will be discussed further below, tragic conflicts (*cf.* Brugger 1994: 398). In relation to the first point: A typical problem is likely to involve a government authority pursuing legitimate objectives, by way of more or less suitable means, but ending up going 'somewhat too far' – either by having included some illegitimate policy among the range of legitimate aims pursued, or by limiting the exercise of rights too stringently, for some individuals and in some instances. Public authorities in these typical problem-cases, whether legislative or executive, are portrayed as *basically benevolent*, but somewhat overzealous. What these cases tend not to involve, by contrast, is either 'bad faith' government and 'illicit motives', or catastrophic rights infringements. The assumption that this scenario in fact corresponds to realistic assumptions about the character of German government is shared at the highest levels of the federal judiciary. As one sitting Justice of the Federal Constitutional Court (and former law professor) puts it: in proportionality review, in the great majority of cases, there will be a 'legitimate aim', in particular because 'in Germany we are dealing with actors who understand themselves to be bound by the constitution' (Baer 2014: 121). It is not just the case, therefore, that law students, as candidates for their 'State' examination, are enlisted as junior partners in the constitutional project of the Basic Law, as described earlier. They are also, in that capacity, repeatedly presented with scenarios involving government authorities to whom that very same attitude is ascribed.

4.2. *Doing* Proportionality: Mutual Optimization

Examination-setting authorities not only have to enable candidates to reach the proportionality stage; they also have to give them sufficient material to work with for once they get there. In addition, candidates, teachers, and examiners must be clear on the standards for what constitutes a properly 'juristic' deployment of proportionality analysis. To begin exploring this last point in more detail, here is what one *Repetitorium* handbook tells candidates about how to 'do' proportionality analysis, with a focus on proportionality's last 'balancing-'oriented step:

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> 'In order to answer the question of proportionality *stricto sensu*, a precise balancing between the relevant interests at play has to be undertaken, for which the following procedure is recommended: (…) First, a basic requirement for any weighing worthy of the name – that is: for a fair calibration – is that none of the competing positions will be fully extinguished. (…) It is necessary to verify, therefore, whether the interference with a constitutional right makes the exercise of that right virtually impossible, or whether it merely limits one particular mode of the exercise of that right, where this could be replaced by other, functionally equivalent modes of exercise' (HW 52 2014: no. 131-132; HWCh 2016: no. 135).

This ideal, of ensuring that no claim, whether voiced by individuals or in name of the public, is ever 'fully extinguished' or pushed aside ('*völlig verdrängt*'), is central to the image of a proper deployment of proportionality as a 'clean juristic balancing'. Strikingly, statements to this effect can be found at very different levels of German public law reasoning, from *Repetitorium* teaching materials, to the case law of the Federal Constitutional Court, and in academic writing on constitutional theory. In class, one teacher used the example of a contrast between what he called 'Western' and romantic, or 'feel good', movies to make this point. In terms of the precision and force of their legal arguments, he said, students should aim for a shoot-out: 'Behind you there should be only dead bodies'. But in terms of the substance of the positions involved, students should strive for happy endings: *something* had to remain for every legitimate interest involved. 'We have to ensure that the different rights in the Basic Law can live alongside each other', another teacher would say (see also Pieroth/Schlink 2005: no. 301). These didactic instructions, even when voiced in colloquial terms, show a striking resemblance to vocabulary used in judicial and scholarly writing. One key notion found on all these levels is the idea of *mutual optimization*. At the level of constitutional rights theory this term is associated principally with professor Robert Alexy's book, '*Theorie der Grundrechte*', first published in 1985, and since widely translated. In this book, Alexy developed a theoretical reconstruction, explication, and defense of the Federal Constitutional Court's basic approach to constitutional rights as 'principles'. As principles, Alexy argued, rights are '*optimization requirements*', to be adjusted and calibrated by way of proportionality review, and in particular through what he called 'the weight formula', depicted in mathematical notation in many of his writings (Alexy 2002: 52-53; Alexy 2017: 18). As optimization requirements, constitutional rights are norms 'which require that something be realized to the greatest extent possible *given the legal and factual possibilities*' (Alexy 2002: 47, emphasis added). In Alexy's theory, the earlier steps of proportionality review – necessity and suitability – demand optimization relative to 'the factual possibilities', and the later stage, of proportionality *stricto sensu*, relative to 'the legal possibilities'. These 'legal possibilities' are set by competing principles within the constitutional order (Alexy 2002; Alexy 2014; Klatt & Meister 2012: 10).

It is important to emphasize that 'optimization' here refers to a relational ideal, rather than one-sided maximization. This is especially visible in another key term often seen in teaching materials, judicial decisions, and scholarly writing namely that of a '*schonender Ausgleich*'. '*Schonend*' means conciliatory, gentle, considerate, protective, or –

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especially revealing – going easy on scarce resources; and '*Ausgleich*' has meanings ranging from equilibration and evening out, to compromise. This language is associated in particular with the proportionality-equivalent doctrine of '*praktische Konkordanz*', developed originally in the writings of professor – and later Federal Constitutional Court Justice – Konrad Hesse, and used today typically to deal with constitutional rights that do not feature an explicit limitation clause (Pieroth/Schlink 2005: no. 296).[7] According to settled case law, a conflict involving such a right 'is to be solved on the basis of the principle of *praktische Konkordanz*, which demands, not that one of the conflicting positions is preferred and maximally protected, but rather that all positions are brought into an equilibrium that is as conciliatory as possible' (Schladebach 2014: 266). Model-answers for problem-questions of this type commonly invoke this language. This, for example, is what students on one *Repetitorium* course are given as a sample answer in response to a case concerning exceptions to physical education classes for Muslim girls in secondary school – a case presented as turning on a conflict between the freedom of religion (Art. 4 Basic Law) and the state's responsibility to educate (Art. 7(1) Basic Law):

> 'This conflict can be brought to a conciliatory, practical equilibrium (*praktische Konkordanz*), having regard to all relevant interests, if the applicant's claim to be entirely exempt from sports classes is only allowed to the extent that these classes are exclusively offered on a co-educational basis for girls of her age. The state's responsibility to educate is not undermined if it is possible to take the applicant's concerns into account through the organizational means available (…). This is possible if, instead of exclusively co-educational sports classes, separate classes for boys and girls would be offered. This would not seriously undermine the state's educational responsibilities; neither in general, nor in relation to the organization of physical education specifically' (Altevers 2017: 11; see also at 22: '*dass beide zu optimaler Wirksamkeit gelangen*').

4.3. A 'Doable' Doctrine, a Feasible Constitution

The technique of proportionality review, then, figures as the central 'means of *calibrating* effective fundamental rights protection both in the legal order at large and (especially) in the individual case' (Jestaedt 2020: 66, emphasis added). Doing proportionality properly, students are told, means reconciling, 'optimizing' in relation to 'the possible', and avoiding any kind of 'total-loss' for any constitutionally protected interest. This drive to optimize relationally, to view constitutionally protected interests as akin to scarce resources to be preserved and allocated, imbues the technique of proportionality review with at least some of the characteristics of a cost-benefit audit, and more generally, of *accounting* as a 'modality of argument' (Maurer 2002: 662; Riles 2005:

[7] For Hesse's broader influence, as reported in general news media, see *e.g.* Badische Zeitung 2019 ('Hesse was even more influential as professor. He developed the concept of "*praktische Konkordanz*" which every law student knows. This concept holds that in a conflict between two constitutional values neither should recede completely, but both should rather be brought to an optimal equilibration').

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986; Loughlin 2015: 218). This parallel has implications for the presentation of both proportionality itself as a form of argument, and of the social world that this argument is meant to engage with and work upon. On the first point, accounting, as Bill Maurer has observed, is a very specific form of rhetoric in that it 'occludes its own rhetoricity' (Maurer 2002: 662). This quality is of great value to actors under pressure to demonstrate the kind of 'objectivity' that is demanded of jurists engaging in proportionality review in German public law. In its discursive practices, Maurer argues, accounting 'renders itself a transparent practice of recording facts already there in the world and in the process denies its own status as a modality of argumentation' (Maurer 2002: 662). Proportionality analysis shares these characteristics of transparent recording. Its transparency – notably by way of the explicit exhibition of its own internal analytical structure – has already been discussed. Proportionality's passivity is visible in the way it presents outcomes as always already inherent in input and process. At the level of constitutional theory, the most striking illustration of this characteristic is probably Alexy's use of diagrammatic depictions of 'indifference curves,' to illustrate the 'law of balancing' he deems integral to proportionality review (Alexy 2002: 103-104). In terms of constitutional rhetoric, proportionality, like accounting, performatively 'constitutes what it names', in the sense that the outcome of the proportionality test (as questions and process) is an assessment of the 'proportionateness' (as some inchoate substantive measure) of governmental or legislative measures (Maurer 2002: 646, citing Bruce Carruthers). In this way, proportionality always provides the answer to its own question.

In practical terms, however, the most important parallel, for the *Repetitorium* context, between the two techniques is the way proportionality analysis arrives at its outcomes by way of what could be called a 'read-off' from the materials students are provided with – the factual and legal constellation of the problem-case. Even when the formal framing discourse is that of relative weights and conditional precedence, the model answers provided to exam-type problem-questions in fact typically depend much more on a combination of a fairly traditional brand of careful reading and filtering of the given facts, together with a major – if entirely unacknowledged – role for 'common sense' (*cf.* Mertz 2007: 105). These readings typically reveal a 'solution' to already be present in the given problem itself, which is exposed as having been merely an *apparent* conflict all along. As Riles has noted for a different context, the sense of technical mastery that can accompany finding such 'solutions' for – or rather: in – 'false' conflicts can be powerful (Riles 2005: 1025). This tendency fits very closely with the harmonizing drive discussed above. Apparent conflicts – over physical education classes, musicians practising loud instruments in their homes, museum displays of human bodies – begin in elaborate discussions of constitutional rights – freedom of religion; the *Berufsfreiheit*; human dignity – before disappearing in practical accommodations: separate instruction for girls and boys; reasonable limits on practice times; freely given prior consent by the deceased (Altevers 2017; HWCh 2016: no. 95. *Cf.* also Marzal 2017). At other times, careful reading of the problem-case reveals that either some essential precondition for the imposition of a rights-limiting measure simply has not been met, or that compliance with some legal requirement in a rights-limiting measure is simply practically impossible. In such cases, these measures cannot be applied to their fullest extent, but rather have to be calibrated in their scope,

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often using the technique of interpretation in conformity with the constitution ('*verfassungskonforme Ausglegung*'). So, for example, if the proposed text for a statute on online surveillance omits a requirement that there needs to be evidence of a 'concrete and imminent danger', then such a condition has to be 'read-in' to the statute, to ensure its constitutionality (Altevers 2017). On the other hand, in a case involving students wishing to stage an impromptu demonstration against a last-minute campus visit by a politician, a mandatory notification period has to be partially 'read-out' of the relevant statute, since demanding compliance with an impossible condition would not be proportionate. In another problem-case – this one based on a famous court decision - an individual has been criminally convicted and ordered to pay a fine based on the fact that they had distributed a flyer with the slogan 'Soldiers Are Potential Murderers – Worldwide, also in the German *Bundeswehr*!' (Altevers 2017: 16-17). Here again, the resolution of the case, coming at the very end of the long argument chain in the model answer provided, does not turn on any explicit assessment of the relative 'weight' of a right of freedom of expression, but rather on the fact that because the statement included the term 'worldwide', the legal conditions for finding an 'insult', of the *Bundeswehr* generally or of individual German soldiers specifically, were simply not met (Altevers 2017: 17).

This repeated practice of finding solutions, not just for problems, but *in* problems, when read through a calibrating proportionality lens, inculcates perceptions of feasibility and of success, in three specific senses. First, in a narrow exam-focused sense, proportionality emerges as *a doable doctrine*: a technique that students will be able to master, simply by carefully following the steps of its *Schema*, and by reading the given problems carefully. As Annelise Riles has noted, this sense of technical mastery can provide a powerful source for users' attachment to, and investment in, their tools, including legal doctrinal ones (Riles 2005). Secondly, in the course of this practice, proportionality becomes *a doctrine that works*. Time and again, application of this technique reveals apparently difficult clashes and trade-offs to be resolvable, in some 'mutually optimizing' manner. The didactic instruction for students, that they should make sure that no one value, interest, or 'position' is every fully extinguished, finds confirmation in model answers in which nothing *is in fact* ever fully lost. These apparent successes will likely appear to candidates to flow from the application of proportionality as a technique, thus again increasing its use value. Thirdly, these typical problems and their model solutions reinforce a much broader image of *an achievable constitutional rights order* – an order whose promises can in fact be realized, through law, using these particular doctrines of legal calibration. This last point, in turn, has three closely related dimensions. First: the suggestion that the Basic Law does not, for all its gaps and internal tensions, make impossible promises. Second: the notion that social and political life in modern Germany is in fact amenable to being brought into correspondence with the promises of the Basic Law. And third, crucially: that proportionality review and related techniques of calibration are a suitable, necessary, and effective way of achieving this correspondence.

Inculcating a sense of mastery, an appreciation for technical aesthetics, and emphasis on 'doability', will be widespread features of training and assessment more generally, not just in law, and not just in Germany. What is striking about these common features in this particular context, however, is how these dimensions of juridical practice

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line up with, and reinforce, the ideology of constitutional rights propagated by the Federal Constitutional Court in its jurisprudence under the 1949 Basic Law. From early on, the Court, leading commentators, and individual justices in extra-judicial writings, have emphasized the 'feasibility' of the constitutional rights order under construction, in particular by downplaying the risks of unavoidable tension, unbridgeable conflicts, or tragic choices. Constitutional values and social reality; general rules and specific outcomes; individual rights and collective interests; the Liberal State and the Social State – for each of these pairings, German postwar constitutional jurisprudence emphasizes synthesis over conflict, and hopefulness over skepticism (Bomhoff 2013; Hailbronner 2014; Müller 1999). 'Competing constitutional values', one of the most influential early scholarly commentators on the Basic Law argued in a representative statement, 'are not related in terms of superiority and inferiority, in the sense that they might be "played out" against each other. They are, rather, matched, so that each influences the other' (Häberle, 1962: 161, 164). With proportionality in hand as their instrument of choice, German law students encounter, in their exam-typical problem-questions, a world in which these ideals turn out to be practically achievable again and again – even for novice lawyers like themselves.

4.4. Good Problems, Good Solutions, Hidden Costs?

Proportionality, previous Sections have tried to demonstrate, is in many ways a successful legal knowledge instrument, certainly in the context of German public law. But the sense that proportionality works, depends on background conditions that remain largely hidden from view. Proportionality's success is produced in part by way of invisible constraints. And these include, in particular, limitations on suitable problems and on appropriate answers. While a fully developed critique of proportionality falls outside the scope of the more interpretive project of this article, this final subsection does offer a starting point for such critique, by suggesting that these constraints come with costs, in terms of a restricted, and ultimately more conservative, legal and constitutional imagination.

Proportionality's successful deployment in the context of solving exam-type problem questions requires that candidates be presented with problems that have been made solvable. Rather than any simple 'application' of 'law' to 'the facts', the practice of *Falllösung* consists rather of a complex interaction of a rationalized, *schematized*, and idealized model of law, and a similarly rationalized and schematized model of social situations (Geertz 1983: 172ff). The 'cartoonlike' description of social situations that characterizes such hypothetical fact statements offers a particular kind of flattened description of reality: one that presents a 'good' problem – a difficult, but ultimately also doable series of questions on the legal materials under examination. As Elizabeth Mertz and Annelise Riles have observed in the US context, this means that the given facts are, from the outset, 'carefully tailored to present an analytical puzzle … *already prefigured by the doctrine itself*' (Riles 2005: 783, emphasis added). 'Social context is unmoored and thinned' leaving only those selected 'bits and pieces of information needed' for the operation of the relevant technical legal operations (Mertz 2007: 205-206). In common law systems, for example, 'good' problems might be those that enable students to 'create analogies' as

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Mertz indicates. In the German context, 'good' problems are those that allow for *Subsumption* within a *Schema*, for example, and, in the context of this article, for calibration by way of proportionality review, *praktische Konkordanz*, or related doctrines. The social and political world assumed and sketched in exam-typical problem-questions and, more broadly, in didactic instructions on how to 'do' proportionality review, is a world in which such calibration is, at least typically, possible (*e.g.* HW 2014: no. 132). Hard choices, tragic conflicts, and impossible trade-offs, more generally speaking, are virtually absent from *Repetitorium* teaching materials. This absence can sometimes be quite striking. In one manual, for instance, the examples used to illustrate rights doctrines, quite clearly fall into one of two very distinct categories. A small handful of them are absurd and shocking: graphic descriptions of children left to bleed to death on public squares (right to life), or of extremely painful medical procedures imposed as part of evidence gathering for minor offences in criminal law (HW 2014: no. 113a, 140). The others are entirely mundane: think of the practising musicians mentioned earlier. Neither of these two categories present any actually difficult trade-offs for students to grapple with. And it is not just the *Repetitorium* that shuns tragic conflict. One early reviewer of the Pieroth/Schlink textbook mentioned earlier, wrote that the authors 'shy away from going there where it hurts' (cited in Pieroth 2004: 8). These restrictions on the presentation of 'typical' problems come with side-effects that would merit further investigation. There is only relatively little by way of local critical or socio-legal analyses of the legal examinations process in Germany. But earlier studies have emphasized, in particular, the problematic associative implications of problem-cases populated entirely by gendered stereotypes (Pabst & Slupik 1977). The point suggested here is related. If there is justified concern over private law problem-case scenarios in which all the working professionals are male and all the care-givers are female, how are we to think about public law problem-questions that relentlessly present social and political conflicts as always, juridically, solvable? (*cf.* Großfeld 1992: 25).

These problems, moreover, are presented as solvable in a specific way, namely through pragmatic, managerial, and especially *incremental*, adjustments and compromises, all under the general heading of mutual optimization ('*Optimierung*', also called '*allseitige Abwägung*'). Here, proportionality reasoning shows perhaps its clearest parallel to cost-benefit analysis and value-for-money accounting techniques; heretic though that association would be to many German lawyers. Constitutional rights adjudication under proportionality review takes on features of a process of incremental adjustments to unexamined baselines. Douglas Kysar has made this point in relation to cost-benefit analysis in environmental law, in language that fits proportionality review neatly. He writes: '[a]s generally practised, cost-benefit analysis offers a semblance of comprehensiveness and evenhandedness by arbitrarily normalizing the status quo distribution of rights and resources'. *Optimization* – Kysar uses this specific term – then 'comes to mean ever more refined tinkering within a given … system, the unexamined rules of which help to form the set of constraints under which optimization occurs. The transformative potential of law is thus curtailed' (Kysar 2012: 83, 7). This characteristic was strikingly visible in Alexy's presentation of proportionality review as a matter of optimization, demanding rights realization 'to the greatest extent possible *given* the legal and factual possibilities'. This injunction at the level of constitutional rights theory, as we have seen, closely matches the

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practical instructions given to *Repetitorium* students. But in neither context are the limits set by these 'possibilities' analysed in any depth. They tend to stem, in particular from the kind of notions of 'common sense' that students can safely expect to share with their teachers and examiners (Mertz 2007: 78). In this sense at least, German public law legal reasoning in the *Repetitorium* setting is strikingly similar to the description Elizabeth Mertz gives for the language of US law school teaching: it all adds up to an 'oddly abstract-contextual whole'; a combination of 'blurred and precise boundaries, of obsessive attention to detail and yet also a permission to generalize freely without any substantiation about some matters' (Mertz 2007: 105, 130). It is this kind of common sense-style reasoning – sometimes couched in legal garb, such as the distinction between 'core' and 'peripheral' domains of rights protection that often plays a role in problem-questions – that typically offers candidates a 'way out' from any apparent conflict that remains once all the proper links of the required reasoning chains have been laid out.

Even if the focus in most of this article has been on 'translating' what German practice means to those involved in it, this project is closely connected to that of attempting to 'unveil' what this practice may hide from those committed to it (Fassin 2012: 245). And from this perspective, the incrementalism and the role for 'common sense' that this section has discussed, suggest that, for all the tributes to proportionality as a doctrine that is dynamic and 'open-ended', perhaps even 'transformational' (Jestaedt 2020: 66; Stone Sweet & Mathews 2019: 50; Hailbronner 2015), it may well in fact be a much more conservative practice than is commonly thought. And it is at this point that a final return to proportionality as discourse, as well as a practice, can be revealing. Proportionality reasoning, alongside all its – ascribed or contested – juridical qualities, is also very much a language that makes appeals to neutrality, universality, common sense, science, and natural order. In fact, the legal language of proportions and balancing may be unique in the way it synthesizes appeals to all of these values in one place. But as Pierre Bourdieu has noted in a passage that fits proportionality reasoning remarkably well, these attributes are often those of the language of conservatism and nostalgia. In such discourse 'the simplicity and transparency of common sense' merges with a 'rhetoric of scientificity' into a 'depoliticized political discourse'. This, then, is 'the language of nature … characterized by a rhetoric of impartiality, marked by the effects of symmetry, balance, the golden mean' (Bourdieu 1992: 131-132). It would be difficult to give a more apt description of the work proportionality does in German public law.

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5. CONCLUSION

Learning how to 'do' public law, for German law students, requires getting to grips with a technique that has become central to the postwar constitutional-legal order: proportionality review. This article has studied proportionality, not as concept or symbol, but as a legal knowledge instrument in action. More specifically, it has studied the processes by which aspiring German lawyers become committed to this particular instrument, and the ways in which they come to experience it as an instrument that 'works'. And it has looked at some of the broader implications of this perception of success. These processes take place largely under the radar, as it were, in the context of exam-prep teaching in the *Repetitorium*. Here, legal doctrine more generally, and proportionality in particular, is presented in an especially teachable, 'doable', and examinable form. In the process, German public law is homogenized. Not just in the 'horizontal' sense that large swathes of law will be covered by the same doctrinal apparatus, but also in a less easily visible, more 'vertical' sense. Law students, as candidates for a state-organized exam, are enlisted as junior partners in a much broader project of constitutional realization, concretization, or actualization – to once more use terms familiar in German legal discourse – of the constitutional-legal order of the Basic Law. But if in pursuing that task proportionality seems so central, and appears to work so very well, this has to be in part because German jurists operate within a world that proportionality itself has helped constitute. And while this is true, to a large extent, for German lawyers and judges more generally, it is especially true for students in the *Repetitorium*, as candidates for the First Juridical Exam. Exam-typical problem-questions are set in ways precisely to be 'solvable' by way of proportionality review. Those 'solutions', moreover, take a very specific form, of calibration and 'optimization' relative to unexamined, pre-existing baselines. This world, in which both the relevant questions and their answers make obvious sense to the initiated, is proportionality's world: a self-contained, self-reinforcing realm in which everything is proportionality, and proportionality is everything (*cf.* Maurer 2002: 647).

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Appendix:
Repetitorium problem case and model answer

Fall 11 in the *Alpmann Schmidt* Public Law collection (Altevers 2017) concerns an improvised, entirely peaceful, student demonstration against a university visit by a higher education minister. Police break up this demonstration, on the ground that the organizers did not formally notify their intention to demonstrate with the relevant authorities, as required by statute at the '*Land*' level. One organizer, 'S', claims his right to freedom of assembly – Art. of the 8 Basic Law, or *Grundgesetz* – has been violated. Is he right? The printed model solution looks like this:[8]

> **I.** For this to be the case, first, **the scope of protection of the freedom of assembly** would have to be engaged. An assembly is present whenever multiple persons gather in a place in order to form and exchange opinions. (…) A coincidental meeting of individuals is not sufficient. (…) The ca. 100 students present in this case intended to demonstrate to make clear their criticism of higher education policies. The conceptual requirements for an assembly are therefore fulfilled.
>
> **II.** Next, there would have to be an **interference** with the scope of protection. By breaking up the assembly, the authorities have directly, by way of a legal act imposing obligations, interfered with the exercise of the right, so that an interference in the classical sense is present.
>
> **III.** This interference could be **constitutionally justified**.
> **1.** Art. 8 *Grundgesetz* contains **a limitation clause** for **open-air assemblies** by way of an ordinary statute. (…)
> **2.** It is to be verified whether the interference in this case, based on the relevant statute, forms a **constitution-conform concretization** of this limitation clause. (…)'.
>
> **a)** For this to be the case, first, the statutory basis for the dissolution of the assembly would have to be constitution-conform.
>
>> **aa)** The statute is **formally constitution-conform**.[9]
>> **bb)** The statute would also have to be **materially constitution-conform**. In particular, the relevant provisions would, in order to be materially constitution-conform, have to be **proportionate**.

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[8] Reproduced with permission. Own translation. Omitted passages indicated. The formatting reproduces the original (indentation and bold highlights).
[9] This was given.

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(1) For that to be the case, the legislator would, first, have to pursue a **legitimate aim**. The notification requirement and the power to dissolve serve to defend against dangers. This constitutes a legitimate aim'.
(2) [Paragraph on '**suitability**', omitted]
(3) [Paragraph on '**necessity**', omitted]
(4) Next, the means used would also have to be **appropriate**. This means that the disadvantages to the bearer of the constitutional right should not be out of proportion to the aims pursued. In this regard, the significance of Art. 8 *Grundgesetz* as a democracy-constituting fundamental right is to be kept in view.
S only heard about the minister's visit the morning before the assembly. Compliance with the 48-hour deadline required by the statute was, therefore, entirely impossible. Insisting on the 48-hour deadline in such a situation would mean that any urgent or spontaneous assembly would be impossible. This would not be compatible with the elevated significance of Art. 8 *Grundgesetz* in a democracy.
This incompatibility, however, can be remedied by way of a **constitution-conform interpretation** of the statutory provisions. In light of Art. 8 *Grundgesetz*, the statute is to be interpreted in such a way that the notification requirement is dropped entirely for spontaneous assemblies, and to be shortened for urgent assemblies.[10]
In light of this possibility to interpret the statute in a constitution-conform way, the statutory provisions are appropriate, and therefore proportionate. Consequently, they are also materially constitution-conform.

b) Besides this, a **constitution-conform application of the statute in this specific case** would be required. Based on the relevant statute, the competent authority can dissolve any non-notified assembly. However, here, again, and this time in the specific case, the **principle of proportionality** is to be observed. Due to the importance of the freedom of assembly, the case law of the *Bundesverfassungsgericht* holds that a mere failure to notify cannot be sufficient ground to dissolve an urgent assembly.[11] Rather, in case of peaceful demonstrations, the authorities should always proceed in a way that is assembly-friendly. Dissolution requires that the assembly poses an immediate danger. In this case, however, the participants conducted themselves entirely peacefully, so that a

[10] Margin note states this distinction.
[11] No authority is cited for this in the model answer. But in the headnote students are reminded that the problem is based on a well-known decision of the *Bundesverfassungsgericht* concerning an anti-nuclear demonstration in the 1980s: BVerfGE 69, 315 (*Brokdorf*) (1985).

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dissolution is disproportionate and thus materially unconstitutional. S has been injured in his right under Art. 8 para. 1 *Grundgesetz*.

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