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What Makes an Administrative Decision Unreasonable?

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The nature of reasonableness review in administrative law has long been obscured behind vivid but uninformative descriptions. In recent years, courts and commentators have recognised that reasonableness review involves assessment of the weight and balance of reasons bearing on a decision. Yet by itself this idea is substantially incomplete, for there are many ways in which issues of weight might be relevant. Drawing on the theory of practical reason, this article offers a new account of the reasonableness standard that explains precisely how the weight of reasons matters. It shows, negatively, that several existing accounts are mistaken. Positively, it proposes that reasonableness be understood as a requirement of 'relativised justification': a decision must be justified relative to some eligible understanding of the balance of reasons. This account explains the standard's central features and yields a coherent, workable test for courts to apply.

INTRODUCTION

What is it for a public authority's decision to be unreasonable, in the sense relevant for judicial review? In *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation*[1] (*Wednesbury*) and the following decades, judicial glosses on unreasonableness accumulated: unreasonable decisions were said to be 'absurd',[2] 'perverse',[3] or especially 'outrageous in [their] defiance of logic or of accepted moral standards'.[4] Such formulations conveyed that unreasonableness was a high hurdle but did little to allay concerns that it was a fundamentally obscure concept.[5] A standard of review must, after all, have some underlying content – some conceptual structure that makes it more than just a call for deference.[6] And it has anyway long been clear that reasonableness review is not always

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1 *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223.
2 *ibid*, 229.
3 *R* v *Hillingdon LBC, ex p Puhlhofer* [1986] AC 484, 518C.
4 *Council of Civil Service Unions* v *Minister for The Civil Service* [1985] AC 374, 410G.
5 See, for example, A. Lester and J. Jowell, 'Beyond Wednesbury: Substantive Principles of Administrative Law' [1987] *Public Law* 368.
6 As Wilberg and Elliott note, reasonableness and proportionality are sometimes treated simply as proxies for less and more intrusive review respectively: H. Wilberg and M. Elliott, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing 2015) 34.

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or essentially characterised by a highly deferential approach: its intensity varies depending on the gravity of the interests at stake.[7] Acknowledging this, however, still does not tell us what unreasonableness consists in. It does not explain what the requirement of reasonableness is, such that it can be applied more or less intensively.

One approach to this question considers different ways decisions can be unreasonable, as in Paul Daly's fruitful exploration of several 'indicia' of unreasonableness, such as illogicality and differential treatment.[8] This leaves open, though, what exactly these are indicia *of*. Indicia are epiphenomena; they are symptoms. (Sneezing and a runny nose are indicia of a cold but not constitutive of one.) We should want an account of reasonableness in administrative law that exposes its deep structure and explains what, if anything, makes different varieties of unreasonableness all manifestations of the same defect.

In recent years, scholars and judges have begun to undertake this task. Paul Craig has argued persuasively that reasonableness involves 'review of the weight and balance accorded by the primary decision-maker' to relevant considerations.[9] Craig's view has been endorsed widely in terms in the Supreme Court – in *Kennedy* v *Charity Commissioners* by Lord Mance (with whom Lords Neuberger and Clarke agreed)[10] and in *Pham* v *Secretary of State for the Home Department* by Lord Carnwath (with whom Lord Neuberger, Baroness Hale, and Lord Wilson agreed)[11] and Lord Reed.[12]

This represents an important advance, but it too leaves much open. For it does not tell us *how* the weight and balance of considerations matter for reasonableness review. There are many possibilities. Reasonableness review might require that a public authority act for real, or weighty, or relatively weighty reasons; or only that sufficient reasons exist to support a decision, whether or not they were acted on; that it not err as to the weight of applicable reasons, or not err too much, or that the overall balance it strikes be justified, or not too far off being justified. These and other possibilities suggest that, to explain what the reasonableness standard consists in, it is not enough to say that it has to do with the weight or balance of reasons. We must explain how precisely it has to do with these ideas.

I offer an explanation of this kind in this paper. To do so, I bring to bear on the positive law tools from the philosophy of practical reason. Although proportionality, the main alternative to reasonableness, is well served by such theoretical work,[13] there is little concerning reasonableness review.[14] A sizeable

7 Laws LJ described this proposition as 'well established' in *R* v *Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115, 1130B-C. On the not insignificant success rate in practice of reasonableness arguments, see A. Le Sueur, 'The Rise and Ruin of Unreasonableness?' (2005) 10 *Judicial Review* 32.
8 P. Daly, 'Wednesbury's Reason and Structure' [2011] PL 238.
9 P. Craig, 'The Nature of Reasonableness Review' (2013) 66 *Current Legal Problems* 131, 132.
10 *Kennedy* v *Charity Commissioners* [2014] UKSC 20, [2015] AC 455 at [54].
11 *Pham* v *Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 at [60].
12 *ibid* at [112], [114].
13 The seminal example is R. Alexy, *A Theory of Constitutional Rights* (Oxford: OUP, 2002).
14 Notable exceptions include J. Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 *Law Quarterly Review* 563; J. Grant, 'Reason and Authority in Administrative Law' (2017) 76 *Cambridge Law Journal* 507.

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literature compares reasonableness and proportionality, but without the benefit of the kind of account of reasonableness that I develop here.[15] My direct aim here is not to offer another comparison of reasonableness and proportionality, but rather to understand the fundamentals of one half of that comparison. Nevertheless, this investigation has implications for the comparative question, and I touch on these in the concluding section.

My central argument is that the standard of reasonableness demands *relativised justification*. For a decision to be reasonable it must be justified relative to, or from the perspective of, some eligible view of the balance of reasons. A view of the balance of reasons is eligible just if it is one which the court, considering its institutional and constitutional position, properly regards as a permissible basis for the decision. A decision is justified relative to an eligible view just if it is taken for reasons which are, from the perspective of such a view, undefeated – not outweighed, excluded, and so on. That is the most precise formulation of my claim, which I will elaborate in what follows. It can also be put more simply: reasonableness review asks whether a decision is justified by the reasons for which it was taken, while deferring, as context demands, as to the weights of the reasons for and against the decision.

This position is ultimately, I believe, intuitive, but it is not uncontroversial. Establishing it will require critiquing various alternative proposals. My plan is as follows. I begin by arguing that, whatever else it requires, the reasonableness standard assesses decisions by reference to the reasons that motivated the decision-maker, so that a decision may not be defended via *ex post facto* reasoning. The next sections critique, first, the view that the standard requires justification *simpliciter* and, second, what I term simple threshold views, which take reasonableness to involve only acting for some reason or weighty reason. The justification view suggests the law is more demanding than it really is, while simple threshold views, lacking the resources to explain how reasonableness depends on the *balance* between conflicting reasons, see it as implausibly undemanding. The remainder of the paper develops the positive proposal that reasonableness requires relativised justification, showing how it underlies various facets of reasonableness review and explaining its application in practice. I also discuss how it is different from – and preferable to – views which tie unreasonableness to the misweighting of particular reasons. Erring as to the weight of a reason can make a decision unreasonable, but does not do so automatically. I conclude with brief reflections on how the analysis might bear on the reasonableness-proportionality debate (although that is not my focus in this paper).

It will help at the outset to clarify the scope of my discussion. First, I will be concerned with reasonableness review only inasmuch as it is used as a ground of judicial review of discretionary decisions, and in particular as a standard of *substantive* review, which I understand to mean review of a decision in terms of whether it is sufficiently supported by reasons.[16] Secondly, my aim is to uncover

15 See especially the 2010 special issue of the *New Zealand Law Review* and the several relevant papers collected in Wilberg and Elliott, n 6 above.

16 This intentionally leaves open whether the reasons must be the decision-maker's reasons or just any reasons the court identifies. What *sufficient* support by reasons amounts to is, of course, the

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the law's conception of reasonableness, and while that task has implications for how we might justify or critique the law, I attempt neither justification nor critique here.[17] Third, my focus is the law of England and Wales. I do not attempt to account for the law of other jurisdictions,[18] although I suspect the argument here applies to at least some other similar systems of public law. Finally, I aim to explain the general structure of reasonableness review which underlies its diverse applications. Employing the reasonableness standard in a given case requires much more than such an account.[19] It also calls for an appraisal of the facts and of the significance of the reasons relevant to the decision, along with a wider theory of judicial deference. No general account of reasonableness review can provide all that; none can provide a formula that straightforwardly determines the correct result in particular cases. A standard of review is not an algorithm. It is a structured form of judicial scrutiny, and our question is what structure reasonableness review has.

REASONABLENESS AND REASONS

Reasonableness, I have said, has somehow to do with how far a decision is supported by reasons. Talk of reasons, however, is ambiguous between *normative reasons* and *motivating reasons*. Normative reasons are good or real reasons – facts that truly count in favour of or against an action.[20] Typically these do not depend on whether one recognises or acts on them.[21] The economic potential of a development counts in its favour even if the planning officer does not realise it; the unfairness of a procedure counts against it even if the Secretary of State is unmoved by fairness. Motivating reasons, by contrast, are not objective in this way. They are simply what someone believes to be the normative reasons in favour of their action, and for which they act.[22] Context often makes technical

topic of this paper. Reasonableness is sometimes also used to assess the quality of deliberation, independent of the decision ultimately reached – as, for example, in the so-called '*Tameside* duty' on a decision-maker to inform itself sufficiently before making a decision: *Secretary of State for Education and Science* v *Tameside MBC* [1977] AC 1014 (*Tameside*). I will not be concerned with reasonableness understood in this deliberative sense.

17 This assumes, of course, that the content of the law is not determined directly by normative considerations of this kind. Dissenting interpretivists may therefore prefer to see my account as concerning only a dimension of theoretical fit with the legal materials, rather than justification of them.

18 I therefore do not discuss reasonableness as a test applicable to questions of law.

19 See M. Elliot, 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' in Wilberg and Elliot, n 6 above.

20 Here and in what follows I explain and adopt the common view in the philosophy of practical reason that a reason is a fact that counts in favour of some action, attitude, etc. For influential expositions of this view, see J. Raz, *Practical Reason and Norms* (Oxford: OUP, 2nd ed, 1999); T.M. Scanlon, *Being Realistic about Reasons* (Oxford: OUP, 2016); D. Parfit, *On What Matters: Volume One* (Oxford: OUP, 2011) section 1. The account I offer is, however, compatible with other ways of understanding reasons.

21 Only typically because one's motivations and beliefs can in certain contexts indirectly trigger normative reasons.

22 As Jonathan Dancy explains, 'motivating reasons' are not so much a further type of reason as a shorthand for putative normative reasons that are believed and acted on: J. Dancy, *Practical*

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labels unnecessary; we generally refer to motivating reasons by speaking in the possessive of someone's reasons (or rationale, or justification), as where we ask what the Secretary of State's reasons were. Someone's reasons are not always good ones, of course: their motivating reasons may not be normative reasons.

This distinction suggests two possible forms the reasonableness standard might take (postponing, for now, how it is to be specified in other respects). The reasonableness of a decision might be determined by reference either to all relevant normative reasons or, alternatively, only on the basis of the decision-maker's motivating reasons. I shall argue that, on balance, the better reading of the law is the second view – the *motivating reasons restriction*, as I will call it.[23]

The restriction does not make normative reasons irrelevant: inasmuch as the reasonableness standard assesses the adequacy (however understood) of the decision-maker's motivating reasons, it must somehow judge them against applicable normative reasons. Nor does the restriction mean that reasonableness review is limited to considering what were formally recorded or communicated as the decision-maker's reasons when the decision was made (although such records naturally provide important evidence of which considerations motivated the decision-maker). The motivating reasons restriction means simply that normative reasons for a decision[24] which did not motivate a decision-maker cannot ground a conclusion that its decision was reasonable.[25]

This is admittedly not the impression given by familiar formulations of the reasonableness standard. The test in *Wednesbury*, repeated often subsequently, was whether the decision was 'so unreasonable that *no* reasonable authority *could ever have* come to it.'[26] Even Lord Lowry's speech in *R* v *Secretary of State*

Reality (Oxford: OUP, 2000) 2-3. Motivating reasons are a subset of 'reasons why' or 'explanatory reasons', which explain attitudes, actions, and so on. Motivating reasons explain action rationally; other explanatory reasons do not. For example, 'the reason why the department rejected the application is that it was understaffed' cites an explanatory reason – here a causal explanation – but not a consideration that was taken by anyone to count in the decision's favour. See *ibid*, 5-7; M. Alvarez, *Kinds of Reasons: An Essay in the Philosophy of Action* (Oxford: OUP, 2013) 35.

23 So although reasonableness functions as a standard of substantive review, in assessing the decision reached, not just the process leading to it, it is not sealed off entirely from the decision-maker's reasoning, since the court evaluates the decision reached by reference to the reasons that motivated the decision-maker.

24 Unsurprisingly, reasons *against* a decision may show it is unreasonable, irrespective of whether or what the decision-maker thought about them. Otherwise, a decision-maker could insulate itself from a rationality challenge by refusing to consider counter-arguments.

25 Compare the US doctrine that '[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based': *SEC* v *Chenery Corp* (1943) 318 US 80, 87. The Canadian courts, by contrast, for some years endorsed David Dyzenhaus's view that the courts should attend to reasons that 'could be offered' to support a decision, in addition to those that actually were offered: D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M. Taggart (ed), *The Province of Administrative Law* (Oxford: Hart, 1997) 304. See *Alberta (Information and Privacy Commissioner)* v *Alberta Teachers' Association* 3 SCR 654 (SCC) at [52]-[55]; *Newfoundland and Labrador Nurses' Union* v *Newfoundland and Labrador (Treasury Board)* 3 SCR 708 (SCC) at [12]. In its important recent decision in *Canada (Minister of Citizenship and Immigration)* v *Vavilov* 2019 SCC 65 at [86], however, the Supreme Court of Canada held that 'it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies.'

26 *Wednesbury* n 1 above, 230 (emphasis added).

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for the Home Department, ex p Brind (*Brind*), which favoured a 'less emotive' formulation, proposed the test, '*[c]ould* a decision maker acting reasonably have reached this decision?'.[27] Taken literally, such formulations make motivating reasons irrelevant. Whether a decision *could have been* taken by a reasonable decision-maker depends on the normative reasons in favour of a decision – reasons a hypothetical decision-maker might have acted on – not on the instant decision-maker's reasons.

But such formulations are perhaps best not taken literally, as *Wednesbury* itself suggests.[28] There, Lord Greene's only apparent example of a decision that would be unreasonable in the relevant sense was that from *Short* v *Poole* of dismissing a teacher because she had red hair.[29] As the 'because' reveals, the unreasonableness here depends on – and can only be described in terms of – the decision-maker's reason. If motivating reasons were irrelevant to a conclusion of unreasonableness, it would not be possible to make the inference contemplated in the example from a decision, citing only the decision-maker's motivating reason, to a conclusion of unreasonableness.

There are in fact various contexts in which the unreasonableness of a decision turns on its lack of fit with the decision-maker's motivating reasons, such that further normative reasons are irrelevant. As *R (Association of British Civilian Internees (Far East Region))* v *Secretary of State for Defence* makes explicit, a decision is unreasonable if (as in proportionality review) it is not rationally connected to the objective it is designed to further.[30] It does not matter if it would have furthered some other possible objective that the decision-maker did not have in mind. Since objectives are just a kind of motivating reason – ends which the decision-maker takes to be valuable and served by their decision – this doctrine makes reasonableness turn on motivating reasons irrespective of other, non-motivating normative reasons. Hence self-defeating decisions are unreasonable. In *R (Law Society)* v *Legal Services Commission*, the Legal Services Commission (LSC) undertook a procurement process for family law firms to win new contracts. To obtain maximum points in the exercise, firms needed at least one caseworker accredited to a specified panel accreditation scheme and at least one accredited to another.[31] The LSC's criteria reduced by almost half the number of firms awarded contracts, especially as they were announced without

27 *R* v *Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 765 (emphasis in original).

28 A rare example of reasons that may not have been the decision-maker's (since he did not explain them) being used to uphold a decision is *Secretary of State for Employment* v *Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455. It is however an outlier, even for its time, and may reflect – beyond 1970s judicial attitudes towards unions – the unusually permissive statutory test at issue. In *Congreve* v *Home Office* [1976] QB 629, decided by the Court of Appeal a few years later (with Lord Denning MR and Roskill LJ also giving judgment), there was no hint of the same approach. The court followed the conventional structure of examining whether the decision-maker's reasons were good ones.

29 *Wednesbury* n 1 above, citing *Short* v *Poole Corp* [1926] Ch 66.

30 *R (Association of British Civilian Internees (Far East Region))* v *Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397 at [40].

31 *R (Law Society)* v *Legal Services Commission* [2010] EWHC Admin 2550 (Admin), [2011] ACD 16 (*Law Society*), helpfully discussed in R. Williams, 'Structuring Substantive Review' [2017] *Public Law* 99.

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enough notice for firms to acquire dual accreditation even if they could otherwise have done so. The LSC had expected the great majority of firms to retain their eligibility to contract. But it 'diminished the pool of those who could … have demonstrated their knowledge, commitment and experience' and thereby 'defeated its own ends', which made its decision irrational.[32] It follows that alternative but non-motivating reasons – such as, perhaps, the cost savings involved in drastically reducing the number of eligible firms – could not in principle have saved the decision.[33]

The motivating reasons restriction is also presupposed in the law's aversion to *ex post facto* rationalisations. The leading case is *R* v *Westminster City Council, ex p Ermakov* (*Ermakov*), which held that the court could cautiously admit evidence 'to elucidate or, exceptionally, correct or add to the reasons'.[34] It should do so where, for example, there had been an error in transcription or the language used to record the original decision was unclear. But the function of such evidence would generally be 'elucidation not fundamental alteration, confirmation not contradiction'.[35] *Ermakov* concerned a statutory duty to give reasons, and its *ratio* was confined to its statutory context, but even where there is no duty to provide reasons, the court will still be 'cautious' about accepting a late account of the reasons.[36] It will consider, inter alia, '[w]hether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision.'[37]

Whilst there is therefore not an absolute bar on a late statement of reasons, they are admitted only where they are not an 'ex post facto justification for the decision which in substance travels beyond, and may differ from, the actual reasons entertained by the decision-maker at the time'.[38] Thus in *R (August)* v *Criminal Injuries Compensation Appeals Panel*, the defendant's late witness statement was admitted to rebut an irrationality argument, but only on the footing that it could not be suggested to be 'unreliable or … a rationalisation.'[39] Where reasons are suspected *ex post* rationalisations, however, they may not be used to defend the reasonableness of a decision. In *R (Moore)* v *Chief Constable of Merseyside*, a police investigator's late explanation that was at least arguably inconsistent with the originally recorded reason was inadmissible.[40] On that basis, although Judge Stephen Davies was unable to conclude the decision was irrational in the sense that no reasonable decision-maker could have come to it, he quashed the

32 *ibid* at [107].
33 See also *R (Rogers)* v *Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, [2006] 1 WLR 2649 (*Rogers*) at [73]-[78], in which the Court of Appeal quashed as irrational a Primary Care Trust's refusal to provide the drug Herceptin to the claimant, but suggested it would not have been irrational if instead had been based on certain other considerations, including cost.
34 *R* v *Westminster City Council, ex p Ermakov* [1996] 2 All ER 302, 315. As the text suggests, 'reasons' here means 'recorded reasons'.
35 *ibid*, 315.
36 *R (Nash)* v *Chelsea College of Art and Design* [2001] EWHC 538 (Admin), *The Times*, 25 July 2001, *Caroopen* v *Secretary of State for the Home Department* [2016] EWCA Civ 1307, [2017] 1 WLR 2339 at [31] (*Caroopen*).
37 *Nash ibid*.
38 *R* v *Northamptonshire CC, ex p W* [1998] ELR 291 at [300] *per* Laws J.
39 *R (August)* v *Criminal Injuries Compensation Appeals Panel* [2001] QB 774.
40 *R (Moore)* v *Chief Constable of Merseyside* [2015] EWHC 1430 (Admin) at [56].

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decision, being 'satisfied that on the basis of the reasons given the decision is irrational'.[41]

In *R (Suny)* v *Secretary of State for the Home Department*, the claimant argued he was unreasonably denied a Tier 2 visa. The Secretary of State had concluded the job he had applied for was not a 'genuine vacancy' under the Immigration Rules. The decision letter cited various considerations for refusing the application, such as the claimant's purported unsuitability for the job and the possibility of hiring a resident worker – considerations which, the Court of Appeal held, were in context 'highly problematic'[42] and did not support the decision. In the proceedings, counsel for the Secretary of State suggested that these considerations could provide indirect evidence of the non-genuineness of a vacancy. Underhill LJ thought this seemed an '*ex post facto* rationalisation of a decision that was not properly thought through at the time',[43] and went on to hold the decision irrational (without regard to the *ex post facto* arguments).[44] The approach to *ex post* rationalisations assumes that non-motivating reasons cannot establish the reasonableness of a decision. If the hypothetical *Wednesbury*-style formulations were literally accurate, it would make no difference whether a reason cited by the defendant originally motivated their decision or not. The better view is that only motivating reasons may be used to support a decision under reasonableness review.[45]

A third area where the law assumes this is in the principle that a decision is unreasonable if taken for no reason. This is implicit in the doctrine associated with *Padfield* v *Minister of Agriculture, Fisheries and Food* that the court may infer that the decision-maker had no reasons if it gives none.[46] As cases such as *R* v *Secretary of State for Trade and Industry, ex p Lonrho Plc*[47] (*Lonrho*) and *R* v *Inland Revenue Commissioners, ex p TC Coombs & Co*[48] show, the inference is not automatic: failing to *give* reasons suggests, but does not equate to, not *having* any. But where the inference can be drawn – where the court concludes on the evidence that the decision-maker 'had no rational reason for his decision'[49] – then the decision may be quashed on that basis. Again, this makes little sense unless the motivating reasons restriction operates. If it did not, the lack of any motivating reasons would not be sufficient to condemn a decision, since the public

41 *ibid* at [64].
42 *R (Suny)* v *Secretary of State for the Home Department* [2019] EWCA Civ 1019 at [46].
43 *ibid* at [52].
44 *ibid* at [54]. This therefore appears at odds with Underhill LJ's sweeping and unsupported *obiter* suggestion in *Caroopen* that 'the details of how [the decision-maker] came to make [the decision] are ultimately irrelevant' to a 'perversity' challenge: *Caroopen* n 36 above at [38].
45 For the approach to Convention claims (at least under Article 14), see *In re Brewster* [2017] UKSC 8, [2017] 1WLR, where *post facto* justifications were considered, but subjected to more searching scrutiny. As the text explains, this has not so far been the approach in common law reasonableness cases. This may reflect a conceptual difference between respecting rights and making a reasonable decision, the latter having a closer connection to the decision-maker's reasons. Were the courts to disavow the motivating reasons restriction under reasonableness review, the standard would then require, not that the decision-maker's reasons pass the threshold of relativised justification, but simply that there be normative reasons in favour of the decision which pass the threshold.
46 *Padfield* v *Minister of Agriculture, Fisheries and Food* [1968] AC 997.
47 *R* v *Secretary of State for Trade and Industry, ex p Lonrho Plc* [1989] 1 WLR 525.
48 *R* v *Inland Revenue Commissioners, ex p TC Coombs & Co* [1991] 2 AC 283.
49 *Lonrho* n 47 above, 540.

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authority (or the court) could always subsequently supply non-motivating normative reasons to defend the decision. But this is not the law's approach.

REASONABLENESS AS JUSTIFICATION

The weight of authority, then, suggests that reasonableness must be evaluated by reference to the decision-maker's reasons. But what hurdle is it, exactly, that these reasons must pass? A natural view in the philosophy of practical reason identifies reasonableness with being *justified*. I shall argue that this is not the best way to see reasonableness in administrative law, but appreciating the problems it faces will be instructive.

The relevant notion of justification here is not exactly that which proponents of a 'culture of justification' apparently have in mind.[50] Justification here is not so much concerned with *explaining* reasons – with justifying oneself *to others* – but rather with simply acting in accordance with reason. Theorists of practical reason have often explained being justified in terms of having enough, or sufficient, or undefeated reasons for one's actions.[51] This depends on the common notion that reasons have a variable dimension of weight, and that when they conflict, reasons on one side can win out over the countervailing reasons by virtue of their weights. As well as being defeated by being outweighed, reasons may also be excluded or otherwise rendered inoperative.[52] Reasons are undefeated, or sufficient, if they are not defeated in any of these ways.[53] If a decision is supported by undefeated reasons, it is justified (or 'rational', where that word is used to mean 'in accordance with reason').

One can have undefeated or sufficient reasons to do more than one thing, so that there is no single thing one ought all-things-considered to do. That might in theory be because the reasons in favour of each option are evenly balanced, having precisely equal weight, though that is seldom the case.[54] More typically, where more than one option is supported by undefeated reasons, the reasons on different sides of a conflict are neither stronger than each other, nor exactly equally strong.[55] I will not here address the disagreement about how to characterise reasons (or values, or options) in these cases – whether they are incommensurable, incomparable, on a par, imprecisely equal, or something else.[56] For present purposes we can simply note that there is wide agreement

50 See E. Mureinik, 'A Bridge to Where – Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31; D. Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal on Human Rights* 11. Given my limited focus here, I do not seek to pass judgement on a 'culture of justification' either as a normative desideratum or as an explanation for judicial review's development.

51 Raz, n 20 above, 39ff; M. Schroeder, 'What Makes Reasons Sufficient?' (2015) 52 *American Philosophical Quarterly* 159.

52 Raz, *ibid*, 35 ff.

53 See for example Parfit, n 20 above, 32–3; Schroeder, n 51 above.

54 For discussion, see generally R. Chang, *Making Comparisons Count* (London: Routledge, 2002).

55 See *ibid*.

56 See for example J. Raz, *Engaging Reason: On the Theory of Value and Action* (Oxford: OUP, 1999); Chang, n 54 above, chs 2, 5; R. Chang, 'Parity, Imprecise Comparability and the Repugnant Conclusion' (2016) 82 *Theoria* 182.

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that there are situations in which reasons for more than one course of action are neither stronger nor weaker than one another, nor precisely equally strong; and that, in at least some such situations, it is justified to choose any such option. Such choices are naturally thought of as reasonable. As Joseph Raz writes, '[w]hen reasons are incommensurate, they are rendered optional … because it is reasonable to choose either option (for both are supported by an undefeated reason).'[57]

This picture has an important implication about how a choice can be justified given the alternatives. That is because the reasons for one decision constitute (or otherwise ground) the reasons against some alternative decision (including where the decision is to do nothing)[58] – a general feature of practical reason, captured by the economist's concept of 'opportunity cost'. That one could have achieved something else of value counts against what one does instead. Because reasons are comparative in this way, there cannot generally be undefeated reasons to do one thing (A) if there is more reason, all things considered, to do something else (B). For, since the reasons for B are also reasons against A, and since these are by hypothesis stronger than the reasons for A, they generally defeat the reasons for A. So A is not generally supported by undefeated reasons if there is more reason to do B.[59] In what follows, I will assume that it is justified, and hence on the view under consideration reasonable, to choose an option only if it is not worse overall than any available alternative.[60]

With this philosophical background clarified, we can ask if it is plausible to see reasonableness in administrative law as requiring justification. This was John Gardner's view – part of his attempt to give a unified account of reasonableness across many parts of the law.[61] It is also endorsed by James Grant.[62] Gardner held that to be reasonable is to be justified, and that to be justified is to act for an undefeated reason. The singular is significant: on Gardner's view, the reasons

57 Raz, *ibid*, 103.

58 For an argument that reasons generally are essentially contrastive as between alternatives, see J. Snedegar, *Contrastive Reasons* (Oxford: OUP, 2017).

59 I say 'generally' to allow for a possible exception in some circumstances. For example, a choice may be justified where the alternative is 'supererogatory' – beyond the call of duty. Arguably, there is more reason to choose a supererogatory option than not. On that view, a justified choice can sometimes not be one which there is most reason to pursue. As I explain at note 79 below, this possibility does not materially affect the analysis; for now I will drop the qualifier 'generally'. For a sceptical view of the possibility of supererogation on the part of government authorities, see J. Weinberg, 'Is Government Supererogation Possible?' (2011) 92 *Pacific Philosophical Quarterly* 263.

60 On some views, a choice is justified only if it is *at least as good as* alternatives (which excludes rational or justified choice where alternatives are genuinely incomparable). There is no scope here to enter into this debate. The 'at least as good as' formulation would make the legal standard of reasonableness more demanding than the version I consider in the text. Since I shall argue that even the 'not worse' formulation is too demanding, that conclusion applies *a fortiori* to the 'at least as good as' version. For discussion, see R. Chang, 'Comparativism: The Grounds of Rational Choice' in E. Lord and B. Maguire (eds), *Weighing Reasons* (Oxford: OUP, 2016).

61 Gardner, 'The Many Faces of the Reasonable Person' n 1 above. See also J. Gardner, 'The Mysterious Case of the Reasonable Person' (2001) 51 *University of Toronto Law Journal* 273.

62 Grant, n 14 above, 509.

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on the winning side of a conflict of reasons are '*all of them* undefeated'[63] but one is justified in 'acting on *any* of the various reasons in favour of the action.[64]

This form of latitude is doubtful.[65] It implies that a public authority can decide reasonably in acting for only a trivial reason in favour of a decision, so long as the decision happens to be supported by other good reasons which did not move the decision-maker. That is because a reason counts as undefeated in Gardner's sense if it is one member of a set of pros that are collectively undefeated. But since it is the cumulative contribution of the pros that defeats the cumulative contribution of the cons, any given pro might be only trivially important. It might be a reason whose subtraction would make no difference to whether the pros are collectively undefeated. Trivial reasons contribute little or nothing to the explanation of why some choice is eligible for justified (reasonable) choice.

The view that it is reasonable to act for any reason, however trivial, so long as it is on the winning side of a conflict of reasons, would have stark implications. It would allow public authorities to decide the weightiest matters for the most inconsequential reasons. A hospital might be closed, at extraordinary cost, merely to secure some minor bureaucratic benefit, or an enormously disruptive development might be approved simply to ease traffic on one side street – so long as sufficient other reasons happened to count in favour of the decision. These are extreme hypothetical examples, but that they would be unimaginable is nevertheless revealing. No case, to my knowledge, holds – or even contemplates – that it would be reasonable to act for inconsequential reasons in such circumstances. Moreover, the court would on this view have to decide whether trivial reasons were on the winning side of a conflict of reasons, and so consider the strength of normative reasons in favour of the decision which did not motivate the decision-maker. We have seen that courts are not in the business of considering such non-motivating reasons.

We might therefore consider an amended version of the justification view, on which acting for undefeated reasons, and hence being justified, involves acting for a *set* of reasons which is not defeated by the full set of countervailing reasons.[66] This change avoids the immediately preceding problem of allowing implausible latitude to choose among the reasons for a decision. But it nevertheless faces fundamental difficulties. Views that see reasonable decision as justified decision paint much too demanding a picture of the standard of reasonableness in administrative law. Recall that justification views allow latitude to the decision-maker as to which course to pursue, but only as to which not-worse option to pursue. Every option that *is* worse than at least one other option – less favoured by the balance of normative reasons, all things considered – is ruled out.[67] In this sense, decision-makers cannot get it wrong – as Gardner

63 J. Gardner, 'Justifications and Reasons' in his *Offences and Defences* (Oxford: OUP, 2007) 102 (emphasis in original).
64 *ibid* (emphasis added).
65 For a similar criticism in the context of criminal law see A.P. Simester, 'Wrongs and Reasons' (2009) 72 MLR 648.
66 For a similar formulation of sufficient reasons in terms of sets of reasons, see Schroeder, n 51 above, 163.
67 Subject to the caveat considered at note 59 above.

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says, '[t]he point is not to give the authority latitude to err'[68] – they can only choose between those options that would be equally right.

But the courts have repeatedly insisted that making a mistake – erring, as it were, in the court of practical reason – does not make a decision unreasonable in the relevant sense. The latitude courts give is not only as to which justified course to act for but, within boundaries, also *to make mistakes about what is justified*. As Laws J, as he then was, put it in *R* v *Somerset County Council, ex p Fewings*, the court in judicial review does not ask itself '"Is this decision right or wrong?"' or '"Which view is the better one?"'.[69] This is borne out in a range of leading cases. Consider *Tameside*, which concerned whether it was unreasonable for a newly elected Conservative council to reverse the policy of moving to comprehensive schooling pursued by its predecessor Labour authority.[70] Lord Wilberforce said the ultimate factual question in the case was 'would the only (not "the more") reasonable course have been for the authority to abandon its plans?'.[71] The parenthetical aside makes clear that the presence of a 'more reasonable' alternative would not make the chosen course unreasonable. Lord Russell agreed that wrongness not does not suffice for unreasonableness, from which it follows that some wrong decisions, decisions that can only be taken for defeated reasons, are nevertheless not unreasonable in the relevant sense.[72] Lord Salmon said it was not enough for a decision to be thought 'mistaken or wrong' by the Secretary of State for him to deem it unreasonable,[73] and cited with approval Lord Hailsham's dictum that '[n]ot every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable'[74]—a dictum elsewhere described by Sedley J as encapsulating 'precisely the logic of the public law rationality test'.[75] In *Nottinghamshire*, Lord Scarman endorsed the proposition from the judgment below that the decision-maker 'has to make a political and economic judgment. He may make a sound one or a bad one. This court might have been able to make a better one than he made,'—but this did not allow intervention on the grounds of unreasonableness.[76] In *Brind*, meanwhile, Lord Ackner said the decision was reasonable 'whether the Secretary of State was right or wrong'.[77]

In addition to leaving no space for decision-makers to make genuine but reasonable mistakes about what to do, the justification view suggests an unrealistic account of how judges must reason. This is because it presupposes that the court determines for itself which really are the undefeated reasons. Undefeated

68 Gardner, 'The Many Faces of the Reasonable Person' n 14 above, 567.
69 *R* v *Somerset County Council, ex p Fewings* [1995] 1 All ER 513, 515.
70 *Tameside* n 16 above. Although *Tameside* concerned a statutory test of unreasonableness, the House of Lords approached the case in terms of general principles of judicial review. As Lord Diplock put it at 1064E, 'unreasonable' was 'in public law … a legal term of art'.
71 *ibid*, 1052.
72 *ibid*, 1074.
73 *ibid*, 1070.
74 *In re W (An Infant)* [1971] AC 682, 700.
75 *R* v *Hampshire CC, ex p W* [1994] ELR 460, 470.
76 *R* v *Secretary of State for the Environment, Ex p Nottinghamshire CC* [1986] AC 240, 249. Lord Scarman was here discussing reasonableness in general, not the particularly deferential form of 'super-Wednesbury' review for which the case is remembered.
77 *Brind* n 27 above, 758B.

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reasons are those on the winning (or not losing) side of a conflict of reasons. To determine which reasons these are, the court would have to itself form a judgement as to the overall balance of reasons, and therefore as to the weights of individual reasons and as to how their weights compare. It would have to perform what we might call a *full balancing* of the relevant reasons. That would be necessitated even in relation to difficult choices between similarly matched alternatives. Not every difficult choice is a choice between incommensurable options or reasons: often, one option is just slightly superior to others, although that might require careful consideration to determine. Even where two or more choices (or reasons) are incomparably good, the court would still have to engage in full balancing, attempting first to ascertain the comparative weights of the relevant reasons, as best it could, before concluding that some were incomparable with others.

Such full balancing exercises are, as a rule, not conducted in reasonableness cases. Thus in *R (on the application of Mott)* v *Environment Agency*, which concerned the reasonableness of conditions on the claimant's salmon catch, Beatson LJ (with whom McFarlane LJ and Lord Dyson MR agreed) explained that it was 'not the function of the court to form its own view as between the views of different experts in a technical area … [the court is] concerned with the rationality of the decisions.'[78] Although the context here involved a scientific judgement, the contrast between the court taking its own view and merely assessing rationality is widely applicable. Moreover, if full balancing were a standard part of judicial reasoning in reasonableness cases, we would expect frequently to see judicial ranking of the alternatives which faced decision-makers, setting out whether some option is better than the others or, if not, which options are not worse than each other. After all, decisions are standardly supported by undefeated reasons (and hence justified) only if those reasons support the (jointly) best or not worse option(s).[79] There is no evidence of such a judicial practice of ranking alternatives in reasonableness review.[80]

78 *R (on the application of Mott)* v *Environment Agency* [2016] EWCA Civ 564, [2016] 1 WLR 4338 (*Mott (CA)*) at [70]; upheld by the Supreme Court (where the rationality argument was not taken) in *R (on the application of Mott)* v *Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022.

79 These problems with the justification view apply even if we recall the caveat at note 59 above that, arguably, an option may sometimes be justified even where there is more reason to choose a supererogatory alternative. On this view, the set of justified decisions includes some that are suboptimal. Yet as we saw, the weight of authority suggests that even a genuinely mistaken, wrong, and unjustified decision may still be reasonable in the relevant sense. This is much more permissive than allowing decisions that are still justified, albeit suboptimal. Moreover, even granting the possibility of justified, suboptimal decisions, the justification view still implies, incorrectly, that the court must conduct a full balancing of the relevant reasons to decide whether a decision is reasonable. For it would still have to decide which options (optimal or otherwise) are supported by undefeated reasons and which are not. In both these respects, allowing the possibility of justified, suboptimal decision does not save the justification view from giving too demanding an account of the reasonableness standard.

80 And indeed in *R (Rotherham MBC)* v *Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] 3 All ER 1 (*Rotherham*), where various alternatives had been set out, the Supreme Court declined to engage in such a ranking: at [39]–[42].

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SIMPLE THRESHOLD VIEWS

To accommodate the deferential nature of reasonableness review, we should understand it as a less-than-maximal threshold of reasons-responsiveness.[81] Here I discuss what we might call simple threshold views: those on which the reasonableness of a decision depends on either the mere existence of motivating reasons or their possessing some minimal weight. Consider, then, the idea of 'thin rationality', which Jacob Gersen and Adrian Vermeule have argued best describes the analogous 'arbitrary and capricious' standard under US administrative law.[82] A standard of thin rationality is undemanding: 'agencies are (merely) obliged to make decisions *on the basis of reasons*.'[83] Thin rationality condemns only 'genuinely ungrounded decisionmaking, in the sense that the agency cannot justify its action even as a response to the limits of reason' (such as the need to decide under conditions of radical uncertainty).[84] Gersen and Vermeule make no claims for their account's transatlantic appeal, but we may nonetheless ask if it – or something like it – can make sense of the law of England and Wales.

The most permissive possible view along these lines counts as reasonable a decision taken for any motivating reason. This is clearly too weak: any decision, no matter how absurd or outrageous, can be taken by someone who believes something counts in its favour, and it is hard to think of a single decision condemned by the courts as unreasonable that was not taken for some reason or other.[85]

A stronger version of the view holds a decision reasonable if the motivating reasons are real (ie normative) reasons, even if they are ultimately defeated ones. But the courts have long recognised that whether a decision is reasonable is always a *conflictive* question—always a question of comparing the strength of reasons for a decision with the strength of those against. The courts are prepared to quash as unreasonable decisions that were taken for *some* good reason with *some* weight where the countervailing considerations are sufficiently stronger.[86]

The thin rationality view, even in this strengthened form, thus suffers from a more acute version of the problem with Gardner's conception of the justification view, which allowed acting for trivial reasons. For it counts a decision as reasonable if the decision-maker acts for some pro, however insignificant,

81 cf Richard Arneson's somewhat different distinction between 'maximising' and 'satisficing' conceptions of reasonableness in his 'Democracy Is Not Intrinsically Just' in K. Dowding (ed), *Justice and Democracy* (Cambridge: Cambridge University Press, 2004).

82 J. Gersen and A. Vermeule, 'Thin Rationality Review' 114 *Michigan Law Review* 1355.

83 *ibid*, 1358 (emphasis in original).

84 *ibid*. The authors are clear that this is intended as a descriptive claim about the (US) positive law as well as a prescriptive one.

85 As Timothy Endicott notes, '[t]here is probably not a single case … in the law reports … in which government action was irrational in the ordinary sense [of having no intelligible purpose].' T. Endicott, *Administrative Law* (Oxford: OUP, 3rd ed, 2015) 241.

86 See for example *West Glamorgan CC* v *Rafferty* [1987] 1 WLR 457 (*Rafferty*); *Wheeler* v *Leicester CC* [1985] AC 1054; *R (A)* v *Lord Saville of Newdigate (Bloody Sunday Inquiry)* [2002] 1 WLR 1249 (*Saville*); the same point is evident in unsuccessful challenges. See for example *R* v *Ministry of Defence, ex p Smith* [1996] QB 517 (*Smith*); *R (Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453 (*Bancoult (No 2)*) (where the challenge failed 3-2 but only after detailed consideration of the balance of reasons).

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not only when that pro taken alone is defeated, but even when all the pros cumulatively are defeated, even comfortably so. If, as I claimed, reasonableness requires more than acting for a trivial reason even when that reason belongs to a set of collectively undefeated reasons, *a fortiori* it demands more than acting for a trivial reason where it may belong only to the set of collectively defeated reasons.

Gersen and Vermeule rightly note that that '[s]econd-or-higher order reasons may, in appropriate cases, satisfy' the thin rationality standard.[87] But the same difficulty applies to decisions supported by second-order reasons, such as decisions to follow a simplifying policy, or to 'satisfice' by settling on an option that is good enough, without considering further alternatives.[88] A rule, policy, or other second-order decision strategy is itself evaluable in terms of reasons for and against, and therefore by the *balance* of second-order reasons. And the problem of insufficient attention to the conflictive nature of practical reason recurs at higher orders of reasons. Consider that practically any decision to follow a simplifying policy or satisfice is supported by at least one genuine, normative reason: doing so will save time. But a decision-maker cannot defend just any decision or policy, no matter how inflexible or no matter bad its effects, as reasonable just on this (or a similar) basis.[89]

A stronger version of the view would hold that to be reasonable is to act for *weighty* reasons.[90] Weightiness can be interpreted either as an absolute or relative property. On the absolute interpretation, the reasons must be weighty considered apart from the countervailing reasons. This does not so much address as mollify the effects of the weaker version of the view. Requiring (only) absolutely weighty reasons still fails to recognise the conflictive nature of the reasonableness standard. In many cases there are absolutely weighty reasons on both sides. But it is not reasonable to act for weighty reasons if it is apparent that there are much weightier countervailing ones. For example, in *Rafferty*, it was unreasonable for a council to evict Gypsies and Travellers from its property, given it had failed to meet its statutory duty to provide suitable sites for them elsewhere.[91] Yet the council's reasons for eviction were presumably weighty: those on the site were trespassers; some had apparently caused damage to the neighbours' property; the council was part-way through redeveloping the land

87 Gersen and Vermeule, n 82 above, 1358.

88 See H.A. Simon, 'Theories of Decision-Making in Economics and Behavioral Science' (1959) 49 *The American Economic Review* 253; H.A. Simon, 'Administrative Decision Making' (1965) 25 *Public Administration Review* 31.

89 Indeed, policies are unlawful if insufficiently flexible, however strong the reasons for adopting them were. For discussion, see A. Perry, 'The Flexibility Rule in Administrative Law' (2017) 76 *Cambridge Law Journal* 375.

90 Reference is sometimes made in judicial decisions to whether reasons are 'cogent'. See for example *R (Bradley)* v *Secretary of State for Work and Pensions* [2009] QB 114 (*Bradley*) at [72]-[97]. I take it that this means either that a reason is backed up by some coherent or intelligible argument (and hence is a real, normative reason) or that it is a *weighty* reason. Both possibilities are discussed in the text.

91 *Rafferty* n 86 above. The judgment refers to those on the site as 'travelling folk or gipsies (sic)'. My preferred terminology is taken from the case's description in 'Getting off the Roundabout' *Travellers Times* 20 April 2020 at https://www.travellerstimes.org.uk/features/getting-roundabout (last accessed 26 November 2019).

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for industrial purposes, to bring employment to the area and remove the blight of the dismantled steelworks; and there had been difficulty persuading firms to acquire nearby factories.[92] The problem was not that the council lacked substantial reasons but that, given their own breach of statutory duty, these reasons were defeated. In *Saville*, similarly, there were no doubt weighty reasons in favour of the decision to lift anonymity from the soldiers who had fired live rounds on Bloody Sunday, and so make the inquiry as public as possible; these reasons were just not considered weighty enough in light of the countervailing reasons.[93] Such examples also show that it is not enough to specify the quality of the decision-maker's reasons in more detailed terms if those requirements are not themselves comparative as between pros and cons. Even a decision taken for reasons which meet Matthew Lewans' attractive list of desiderata – 'publicly accessible, intelligible, generalisable, consistent, disinterested, respon[sive] to evidence and arguments tendered by the parties … rationally connected to statutory objectives and constitutional values'[94] – is not guaranteed to be reasonable, because such reasons may still be amply outweighed.

A more promising proposal is to understand 'weighty' reasons in relative terms, so that the decision-maker's reasons must be weighty relative to the countervailing considerations. This takes us close to the true picture, but it is still unsatisfactory. One problem is just that this thesis lacks much explanatory potential: it is not clear how weighty the considerations must be to be weighty relative to the reasons against a decision. We need greater theoretical resources to flesh out an answer than the bare idea of relative weight provides. Second, this proposal yields clearly incorrect results in cases where a decision-maker faces two options, and one – obviously but narrowly – dominates another, in that it is better in at least one respect and identical or no worse in all others.[95] Suppose that the only relevant factor in some decision is cost-effectiveness, and option A is known to be slightly more cost-effective than option B, and to have no other downsides. It would seem profoundly unreasonable to choose B. These imagined facts are of course unrealistically simple, and no case directly addresses them. But such a decision would surely be irrational or 'capricious'.[96] The relatively weighty reasons view we are considering nevertheless treats it as reasonable. After all, since the gap between A and B is by hypothesis so narrow, the reasons for B are almost as weighty as those for A, so they are relatively weighty.

A third problem is that, like the justification view, this view still appears to imply that the court conducts a full balancing of the relevant reasons. To determine that the reasons for the decision are relatively weighty, it would seemingly first have to ascertain their weight, then the weight of the reasons against, and

92 *Rafferty ibid*, 467F-H; 475C-H. The point in the text holds, notwithstanding Ralph Gibson LJ's observation (476A) that these reasons were less weighty than they appeared, in comparison to the countervailing reasons.

93 *Saville* n 86 above.

94 M. Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart Publishing, 2016) 222.

95 This is roughly the notion of Pareto dominance (but without the language of preference) used by some decision theorists. See for example C. Andreou, 'Cashing out the Money-Pump Argument' (2016) 173 *Philosophical Studies* 1451, 1454. See also Alexy, n 13 above, 399.

96 *Slattery* v *Naylor* (1888) 13 App Cas 446.

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then ensure that, if the reasons against the decision defeat those for it, then at least the margin by which they do so is not too great. Yet as we saw, full balancing is not a feature, and certainly not a ubiquitous feature, of judicial decision-making in reasonableness cases.

REASONABLENESS AS RELATIVISED JUSTIFICATION

Let us take stock. Any successful account must explain, better than these alternatives, some structural features of the reasonableness standard. The standard allows decisions that are mistaken, and worse than another that might have been taken; and yet, being concerned with the balance of reasons, it does not permit all decisions taken for reasons or weighty reasons. The right account must find a path between these over- and under-demanding alternatives. And it must allow the courts to judge what is reasonable without necessarily undertaking a full balancing of the relevant reasons as the court sees them. In what follows I develop an account that explains these features. I set out its general structure before showing how it applies in practice.

First, how does the court avoid conducting a full balancing of all the relevant reasons? It proceeds by allowing a range of weightings for the reasons relevant to the decision. The decision-maker is 'entitled' to 'give appropriate weight'[97] to the relevant considerations in the sense that they have discretion to count these reasons as being more or less important within upper and lower bounds. Hence Lord Keith's statement in *Tesco Stores Ltd* v *Secretary of State for the Environment* that 'it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit' except where the decision-maker 'has acted unreasonably in the *Wednesbury* sense.'[98] The decision-maker has discretion to weight reasons – but only up to the point where their weighting causes them to act unreasonably.

The (limited) latitude given to primary decision-makers to assign weights to reasons is a function of the deference factors – concerning institutional competence and constitutional legitimacy – that permeate public law. These considerations ground more or less permissive approaches to the eligible weightings for reasons. The eligible upper and lower bounds for each individual reason together imply a range of what I will call *eligible views of the balance of reasons*.[99] Each view of the balance of reasons is a vision of that part of the factual and normative universe relevant to a decision. A weighting for a reason is eligible if the court cannot, consistent with its epistemic and constitutional position, treat it as mistaken. A view of the balance of reasons is eligible just if it is properly treated by the court as being capable of grounding the decision.

97 *Bancoult (No 2)* n 86 above, 508.
98 *Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759, 764.
99 I am understanding 'the balance of reasons' capaciously. I include all relevant normative considerations, such as permissions and duties, even if some philosophers would not understand these fundamentally in terms of reasons. I also include operators on reasons, such as enablers and disablers, which are not generally thought to be reasons themselves. See E. Lord and B. Maguire, 'An Opinionated Guide to the Weight of Reasons' in Lord and Maguire (eds), n 60 above.

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We can set this out schematically using numbers; this is a simplified representation, but a useful one.[100] Consider a decision with two pros and two cons, with eligible 'units' of weight identified in parentheses:

Pros	Cons
P1 (10-30)	C1 (10-30)
P2 (30-50)	C2 (30-50)
Total (40-80)	Total (40-80)

This gives us the eligible weights for each reason, and as the 'total' row indicates, the overall eligible weights for the pros and cons here follow additively.[101] The lower bound for the total of the pros (40) is the lowest weight the pros can cumulatively have on any eligible view. The same goes, *mutatis mutandis*, for the maximum weight the pros can be taken to have (80), and for the overall upper and lower bounds for the cons.

The notion of eligible views of the balance of reasons gives us a natural way to understand reasonableness. My suggestion is that to be reasonable, a decision must be made for reasons that would justify it *relative to*, or *from the perspective of*, some eligible view. Hence the decision-maker's reasons must be undefeated – not outweighed, excluded, etc – on some eligible view.[102] A decision is unreasonable if and only if it is not taken for such reasons, ie, if it is taken for no reason

100 Simplified because reasons do not have precise numerical weights, are not usually neatly commensurable, and are not susceptible to straightforward arithmetic operations. Nonetheless useful because reasons do have a dimension of weight, and their weights can be compared not just ordinally (A is weightier than B, which is weightier than C) but cardinally (A is much weightier than B, which is only a little weightier than C). We do this routinely using ordinary English terms, such as 'trivial', 'quite important', 'pressing', 'overriding', and so on. Numbers help make schematic illustrations crisper, but readers who prefer can mentally substitute natural language terms such as those just mentioned. On ordinal and cardinal scales of value, see for example J. Broome, *Weighing Goods: Equality, Uncertainty and Time* (Hoboken, NJ: Wiley, 1995) 70-75.

101 I say 'here' to allow that in some cases eligible views may not follow additively from the eligible weightings for reasons taken individually. Certain combinations of weightings may be incompatible. For example, it may make sense to strongly value some consideration only having discredited some piece of evidence; and if that evidence is discredited, there may then be no basis for holding some different reason to be important. Similarly, it may be impossible to combine two different reasons, even if each of them could be acted on individually, because they rest on incompatible normative foundations.

102 The requirement is simply that a decision-maker *act for reasons* which are, from the perspective of an eligible view, undefeated. There is no evidence of any further 'belief requirement' that, in addition, the decision-maker *hold a belief* about where the balance of reasons lies that is itself within the range of eligible views. So even a decision-maker whose *beliefs* about how the reasons stack up is seriously mistaken and outside the eligible range (perhaps they substantially over-estimate the pros or under-estimate the cons) could still act reasonably. For the decision-maker's reasons, while on any eligible view less overwhelming than the decision-maker believed, could nevertheless be strong enough, in that there might be an eligible weighting of all the reasons on which these reasons are undefeated. Thus in the schematic example, the decision-maker would still decide reasonably in acting on P1 and P2, even if they believed wrongly that the pros' combined weight was 100.

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at all (assuming such a reason is called for)[103] or for reasons that are defeated on all eligible views.

In our schematic example, it would be reasonable to take the decision for both pros, since the decision-maker is entitled to act on a view on which the pros cumulatively have a weight of 80 and the cons have a countervailing weight as low as 40. Likewise, a decision-maker could decide against the decision if they were motivated by both cons, since they are entitled to act on a view on which they add up to 80 and the pros come to only 40. But notice that acting on just, say, P1 is necessarily unreasonable. That is because its *maximum* eligible weight (30) is defeated by the *minimum* eligible weight of the cons (40), so on any eligible view the decision-maker's reason is defeated. As this suggests, to assess the reasonableness of a decision, the court need not somehow individually assess each eligible view. It can simply ask whether the decision-maker's reasons are defeated on the eligible view most favourable to the decision-maker. If so, it follows *a fortiori* that they are defeated on all eligible views. Otherwise they are not, and the decision is reasonable.

This proposal learns the lessons of the previous sections. It draws on the logic of justification – of acting for undefeated reasons – and hence preserves the conflictive structure of judgements of reasonableness which simple threshold views underplayed. Yet, to avoid the over-demandingness of justification *simpliciter*, the proposal relativises justification to eligible views as to the balance of reasons. It thereby incorporates the deference that is built into the idea of reasonableness.

To explore the account's explanatory power further, it will help to see how it can illuminate, in different ways, some examples in practice. Consider first *Rogers*, which concerned a Primary Care Trust's refusal of exceptional provision of Herceptin – then an experimental drug not approved by NICE – to the claimant who suffered from breast cancer. The PCT, although it did not have a blanket ban on funding Herceptin, had a policy of funding it only in exceptional cases.[104] It argued that the licencing process should not be lightly sidestepped, especially as there were concerns about the health costs and benefits of Herceptin in the medical literature, and in the claimant's case there was nothing exceptional. The Court of Appeal held that the policy, and hence the decision, was irrational because although the PCT purported to make room for exceptional cases, there were no intelligible criteria by which exceptionality could be established. The PCT had concluded that exceptionality should depend neither on a patient's particular prognosis nor on their financial circumstances. The court said the PCT could not permissibly rely on personal considerations that were not health-related either, and so, given the PCT's policy, it had to fund Herceptin for all patients within the eligible group whose doctors had properly prescribed them the drug.

103 Strictly speaking this proviso should always be included, since agencies properly omit to do countless things, for no reason, at every moment. In practice, where permission is granted, there must have been some more or less weighty reason for the agency to have done something (otherwise there would be no arguable case), and an omission will then fall to be assessed according to the relativised justification standard.

104 *Rogers* n 33 above.

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Here the unreasonableness consisted in a mismatch between the PCT's avowed goal to provide Herceptin for some patients coupled with criteria for distributing it which were in practice either arbitrary (if applied to permit some exceptions) or contradictory to that aim (if applied to permit none). This meant that even though the PCT had sound reasons for *some* exceptional provision policy, its reasons could not be good ones for *this* policy. Considered against the countervailing clinical reasons in the claimant's case, the PCT's reasons for the policy were therefore defeated (even given any appropriate deference to the PCT, and hence on any eligible view). Where a means (decision) is incompatible with the decision-maker's ends (motivating reasons), the decision-maker's reasons fail to count in favour of their decision, so are not genuine, normative reasons for it. Such a decision is, unless further reasons are relied on, unsupported by any good reason of the decision-maker. If there are plainly countervailing reasons, such a decision will be unreasonable, there being no eligible way of understanding the balance of reasons such that the decision-maker acted for undefeated reasons.[105]

In *Bradley* the Secretary of State was held to have acted unreasonably in rejecting the ombudsman's findings that government information concerning final salary pension schemes was inaccurate, potentially misleading, constituted maladministration, and had led to injustice.[106] A 20-page government leaflet had claimed that minimum funding requirements for occupational pensions were designed to 'remove any worries' people might have, and would ensure that, if a scheme had to wind up, there 'should be enough assets' for continuing payments for pensioners or a cash value of younger members' pension rights. The ombudsman found this communicated 'assurances that were never intended to be met'. The government rejected this finding, reasoning that the leaflet was only intended as brief, non-technical guidance and had warned that it was not legally authoritative. The Court of Appeal held that these reasons failed to engage with the substance of the ombudsman's finding that the government gave assurances incompatible with its intentions. The government's reasons were held independently implausible, too: the leaflet could have explained that non-pensioner members would only have an 'even chance' of receiving equivalent benefits, for example. The government also rejected the finding that its misleading statements caused injustice, since, it claimed, there was little or nothing scheme members could do to improve their position. The Court of Appeal held that rejecting the injustice finding was unreasonable because it related not just to financial loss but distress, anxiety, and so on, and the government's rejection did not respond to these points.

In a case like *Bradley* the reasons against the decision will be those explained in (for example) the ombudsman's report itself, as well as any general reasons not to reject ombudsman's reports lightly. Since such reasons were on any eligible view substantial, strong reasons were needed to reject the findings. *Bradley* also illustrates how not having any reasons that are responsive to countervailing considerations (as with the finding of injustice) will often make a decision

105 The same point applies *a fortiori* to self-defeating decisions, which not only fail to advance, but actively undermine, their objectives.

106 *Bradley* n 90 above.

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unreasonable. If (overall or for part of the decision) a decision-maker has no reasons, but there are on any view countervailing reasons, it follows that there is no eligible view of the balance of reasons on which the decision-maker has undefeated reasons.

The relativised justification account also makes sense of cases where decisions were upheld. In *R* v *Chief Constable of Sussex, ex p International Trader's Ferry Ltd*, the House of Lords held that it was reasonable for the Chief Constable of Sussex to offer reduced policing at Shoreham, where the claimant's livestock vehicles were attempting to cross the Channel amid animal rights protests.[107] Although the decision made it impossible, on many days, for the claimant to carry out lawful activity, the Chief Constable acted for the weighty reason of wishing to distribute his resources fairly and effectively over the county. Given his wide margin of discretion, this reason was enough: he had 'struck a balance fairly and reasonably open to him'.[108] The Chief Constable was entitled to weight the relevant considerations such that his reasons justified his decision.

In *Mott*, the claimant challenged a restriction placed by the Environment Agency on the number of salmon he could catch using traditional conical baskets in the Severn estuary.[109] The restriction, introduced to protect fisheries in the river Wye, reduced Mott's catch by 95 per cent, making his fishing economically unviable. He argued that the decision was unreasonable because it was based on a flawed academic study, which had concluded that most fish caught in the relevant part of the Severn estuary were from the Wye (rather than the Severn), where they would otherwise have returned to spawn. The Agency's estimates, Mott claimed, implied the Wye would be 'teeming with salmon', whereas its stocks were, as the Agency agreed, concerningly low. Beatson LJ (with whom Lord Dyson MR and McFarlane LJ agreed) stressed that this was a 'decision based in part on scientific assessments which involve a predictive element'[110] and that the court should be 'very slow' to regard such a scientific conclusion as perverse.[111] The Agency's assessment was based on a range of considerations, including the background consensus that fish return to their rivers of origin to spawn, its assessment of the statistical methods used in the academic study, and its use of a widely adopted 'de minimis catch' methodology to determine the restriction. Given the wide latitude the Agency had in weighting these various reasons (and given Mr Mott's calculations, endorsed by the first instance judge, also included some errors), it did not decide unreasonably by acting on them. That is, on a view of the relevant considerations which the Agency was entitled to act on, its reasons were undefeated.

Rotherham was a challenge by local authorities in South Yorkshire and Merseyside to the government's distribution of EU structural funds.[112] The Secretary of State had decided, first, to allocate the UK's reduced funds for 2014–2020 by reducing the available funds to each country in the UK by five

107 *R* v *Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418.
108 *ibid*, 453A *per* Lord Cooke.
109 *Mott (CA)* n 78 above.
110 *ibid* at [70].
111 *ibid* at [77].
112 *Rotherham* n 80 above.

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per cent and, second, to uplift certain English regions ('transition regions') by 15.7 per cent of 2013 levels. The claimants were unlike other transition regions in that, because of their previous classification, 2013 was the last year of five over which their funding had tapered down. Taking 2013 as the base level would therefore mean a 61 per cent reduction in funding compared to their previous average funding level. Other UK transition regions were not similarly affected: some would receive an overall increase in funding, while others faced a much lower reduction.

A majority of the Supreme Court held the decision reasonable. Although the disparities 'give one pause for thought',[113] given the Secretary of State's wide latitude in cases involving high-level economic policy,[114] his reasons were sufficient. These included not wishing to advantage the claimants on the basis of their special funding arrangements in 2007–2013 (which were expressly transitional), and a desire to maintain higher funding in the north, which had the greatest need. In our terms, the Secretary of State's reasons were undefeated, on an eligible view of the relevant considerations.

STANDALONE ERRORS OF WEIGHT

These examples give us a good overall sense of how the relativised justification account operates, but to see more clearly how the weight and balance of considerations matter on this account, we can contrast it with a superficially similar alternative. According to the authors of *De Smith*:

> [W]here undue weight is given to any particular consideration, this may result in the decision being held to be unreasonable, and therefore unlawful, because manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.[115]

On one reading, this is consistent with the relativised justification view. *De Smith* says misweighting a reason *may* make the decision unreasonable; the relativised justification view explains *under what circumstances* it does – namely, when a decision-maker's misweighting of reasons means that it acts for defeated reasons, relative to every eligible view of the reasons.

But interpreted differently, this passage suggests a competing account, which I shall call the *standalone misweighting view*.[116] It holds that it is *sufficient* for a decision to be unreasonable that the decision-maker made a (serious) error as to the weight of any relevant consideration. The relativised justification view, by contrast, insists that misweighting a reason makes a decision unreasonable only

113 *ibid* at [92] *per* Lord Neuberger.
114 *Rotherham* n 80 above at [21]-[24] *per* Lord Sumption; [61]-[65] *per* Lord Neuberger.
115 H. Woolf and others, *De Smith's Judicial Review* (London: Sweet & Maxwell, 8th ed, 2018) 603.
116 In light of the ambiguity, I do not attribute this view to *De Smith*; I only claim that it is an available reading and states a position worth considering on its merits. The standalone misweighting view does appear to be assumed in E. Lim and C. Chan, 'Problems with Wednesbury Unreasonableness in Contract Law: Lessons from Public Law' [2019] LQR 88 at, for example, 95.

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when and because its effect is that the decision-maker's motivating reasons overall are too weak, even granting appropriate latitude in their eligible weightings (ie where they are defeated on all eligible views). That, on the relativised justification picture, is the fundamental criterion for unreasonableness, to which the misweighting of particular reasons bears only a contingent connection.

Since there is no scope here to discuss all the various cases cited in *De Smith*, I shall focus on a few that apparently lend strongest support to the standalone misweighting view.[117] As I will suggest, even these are best seen as supporting the relativised justification account instead.[118]

Consider first *N (Kenya)* v *Secretary of State for the Home Department*.[119] The Court of Appeal held that an asylum adjudicator was plainly wrong to have reversed the Secretary of State's decision to deport the claimant, who had been convicted of serious offences. The adjudicator had reasoned that the main question was his risk of offending, and that since this was now low, deportation was inappropriate. According to May LJ (with whom Judge LJ agreed) the adjudicator 'was over-influenced … by his assessment of the risk of re-offending to the exclusion, or near exclusion, of the other more weighty public interest considerations.'[120] Notice that misweighting a single reason (the risk of re-offending) did not suffice for unreasonableness: rather, this reason was given too much weight *to the exclusion* of other reasons. This is a comparative judgement about the overall balance of reasons. Hence it was, May LJ said, an 'unbalanced decision' such that, had the reasons been weighted properly, it was 'plain that [the adjudicator] would not have reversed the Secretary of State's decision'. As the relativised justification view suggests – but *contra* the standalone misweighting view – the over-weighting of a reason mattered because it caused the decision-maker to err overall.[121]

In *R (Mount Cook Land Ltd)* v *Westminster CC*, the claimants argued unsuccessfully that a grant of planning permission was unreasonable, given the merits of their own competing proposals.[122] Auld LJ said that a court should, if appropriate, not be 'shy' of holding that it would have been irrational for a decision-maker 'to have given [an alternative proposal] any or any sufficient

117 Woolf and others n 115 above 602–604.

118 Several of the cases cited in *De Smith* stand only for the very general proposition that weight is a matter for the decision-maker subject to a reasonableness challenge. This is neutral between the relativised justification and standalone misweighting views. See for example *R (Sainsbury's Supermarkets Ltd)* v *Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437; *Secretary of State for the Home Department* v *AP* [2010] UKSC 24, [2011] 2 AC 1.

119 *N (Kenya)* v *Secretary of State for the Home Department* [2004] EWCA Civ 1094, [2004] INLR 612; superseded, for reasons unrelated to the present discussion, by the approach in *MK (Gambia)* v *Secretary of State for the Home Department* [2010] UKUT 281, [2011] Imm AR 60.

120 *N (Kenya)* v *Secretary of State for the Home Department ibid* at [65].

121 In other cases cited in *De Smith*, under-weighting a reason similarly caused the decision-maker's reasons to be defeated overall, on any eligible view. See for example *R (Harris)* v *Secretary of State for the Home Department* [2001] EWHC Admin 225, [2001] INLR 584 at [27]-[29] (perverse to refuse leave to re-enter the UK on the basis of the claimant's criminal offences, which could not have been a basis for removal); *R (Rahman)* v *Secretary of State for the Home Department* [2015] EWHC 1146 (Admin), [2015] ACD 107 at [31]-[32] (unreasonable for the Secretary of State to refuse to renew a passport based on a determination of fact while lacking cogent reasons for disagreeing with a tribunal's contrary reasoned decision).

122 *R (Mount Cook Land Ltd)* v *Westminster CC* [2003] EWCA Civ 1346, [2017] PTSR 1166.

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weight so as to defeat the application proposal.'[123] The words 'so as to defeat the application proposal' are crucial.[124] They demonstrate that the unreasonableness of relying on certain reasons depends on whether those reasons are sufficient, not in some absolute sense, but given the weight of the competing reasons (here, those given by the application proposal). On the facts, the alternative planning proposals, if they were material at all, were 'of such negligible weight that … the council could not reasonably have taken any notice of them': there was 'no conceivable basis' on which they could have caused the council to decide differently.[125] As we might put it, the decision-maker's reasons were undefeated on every (and *a fortiori* on some) eligible view.

Finally, in *R (Gallagher)* v *Basildon DC*, the claimants, members of a community of Travellers, had submitted personal information to the council, including about their children's medical and educational histories, which the council had published in a publicly available document.[126] The local government ombudsman concluded this was maladministration and recommended that a letter of apology and £300 compensation be sent to each claimant. The council declined to compensate, principally on the ground that compensation could not undo the distress caused. It was, the Divisional Court held, 'not rational to accord such weight to that consideration':[127] 'manifestly disproportionate weight' was accorded to it.[128]

The court's discussion was framed in terms of whether the council 'has weighed … relevant considerations in a way that a reasonable council should have done.'[129] Normally, 'weighing considerations' (plural) is weighing them *against one another* – striking a balance between them. That is a comparative question, not one of the standalone weight given to a particular reason. This reading is confirmed by context. It explains why Kenneth Parker J stressed the force of the countervailing reason which the council downplayed – that 'botheration payments' marked an affront to dignity even where there was no financial loss.[130] This consideration for compensation being weighty, the weight placed on the impossibility of undoing distress was 'manifestly disproportionate'[131] (a comparative description); and it should not have been given 'very great, if not decisive, weight'[132] (again comparative). The unreasonableness did not consist simply in valuing compensation too lightly, but in valuing it too lightly *given the undeniably powerful reasons in its favour*. The decision was unreasonable because based on what were, on any eligible view, defeated reasons.

123 *ibid* at [33].
124 *ibid* (emphasis added).
125 *ibid* at [36]-[37].
126 *R (Gallagher)* v *Basildon DC* [2010] EWHC 2824 (Admin), [2011] PTSR 731.
127 *ibid* at [38].
128 *ibid* at [41]. Note that Kenneth Parker J had already concluded that this consideration was irrelevant and only remarked *obiter* on its weight, on the counterfactual assumption that it was relevant: *ibid* at [33].
129 *R (Gallagher)* v *Basildon DC* n 126 above at [33].
130 *ibid* at [35]-[37].
131 *ibid* at [41].
132 *ibid* at [38].

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EXPLAINING REASONABLENESS REVIEW

In general

These examples show how the idea of justification from an eligible point of view underlies the way the courts understand the requirement of reasonableness. We can also now draw out the ways in which the account explains various structural features of the standard. First and foremost, the proposal specifies *how* the weight of considerations, and their overall balance, matter. It explains what grounds a 'range of responses open to a reasonable decision-maker'.[133] Multiple responses may be reasonable because there may be several ways a decision-maker is entitled to weight the *reasons* that bear on the decision. This in turn explains how a reasonable decision may be suboptimal or regrettable. Since an eligible view of the balance of reasons need not be the true view, decisions justified on a merely eligible view may not be truly justified. The view also provides a more precise, informative way of understanding the idea that a decision-maker's reasons must be 'relatively weighty', which explains how deference considerations affect this assessment. And it avoids the technical problem of allowing the choice of an option, B, where another, A, plainly but marginally dominates it. The obviousness of A's superiority will mean there is no eligible view of the balance of reasons on which the reasons for B are undefeated vis-à-vis the reasons for A.

Variable intensity and eligibility

The relativised justification account also provides a fruitful way to understand the variable intensity of review. It does so by reference to the eligibility of weightings for reasons. A weighting is eligible, recall, just if the court cannot, in light of its epistemic and constitutional position, treat it as mistaken. Variable intensity reflects variable judgements of reasons' eligible weightings. Where the range of eligible weightings for reasons is more constricted, review is more intense; where the eligible range is more relaxed, review is more deferential.

The intensity of review thus depends on what I will call *eligibility principles*. These determine which weightings of reasons are eligible under what conditions.[134] As we have seen, the content of these principles is based on deference factors concerning relative expertise, constitutional legitimacy, and so on. The proper content and scope of such deference considerations are large, complex issues, which recur across public law. I therefore do not propose to catalogue

133 *Smith* n 86 above, 554E. It is possible, however, that only one decision is reasonable. See for example *Saville* n 86 above; *R (E)* v *JFS Governing Body* [2009] UKSC 1, [2009] 1 WLR 2353; *Michalak* v *General Medical Council* [2017] UKSC 71, [2017] 1 WLR 4193 at [37] *per* Lord Mance. Where this is so, it is not because a decision must be optimal to be reasonable, but simply because the facts are such that the other options are all unreasonable.

134 Courts do not of course always explicitly set out these principles, but inasmuch as the intensity of review is not arbitrary, such principles must operate in the background, if only inchoately or by being presupposed.

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them here.[135] Instead, I want to explain how, in general, eligibility principles work.

We can distinguish between *relative* and *absolute* eligibility principles. Relative principles have the form, 'the more *x*, the wider (or narrower) is *y*', where *x* is some feature of the case and *y* is a range of eligible weightings for a reason. Many familiar discussions of deference have essentially this structure. Consider the principles elaborated by Laws LJ in *Roth*: 'greater deference will be due … where the subject-matter in hand is peculiarly within [the decision-maker's] constitutional responsibility', and so on.[136] Relative principles specify how the decision-maker's latitude in weighting reasons widens or constricts in tandem with some salient feature.

To know how much latitude is warranted in any particular circumstances, absolute principles are needed.[137] These have the simpler form, 'if *x*, then *y*', where *x* is again a feature of the case and *y* a range of eligible weights. Some absolute principles are quite general. For instance, if the nature of the challenged decision is essentially judicial, as in a public inquiry, the decision-maker may have little latitude in how reasons may be weighted.[138] By contrast, where, for example, the decision involves a polycentric, economic judgement, the eligible weight-ranges will be relaxed.[139]

Absolute eligibility principles can also determine the eligible weights of particular types of reason. Consider the principle that the weighting for a reason is eligible in so far as it is based on expert scientific opinion.[140] Here the eligible weight tracks expert opinion, whatever it is in the circumstances. In other contexts, the courts specify *ex ante* that particular types of reasons have substantial weight on any eligible view. A prime example is anxious scrutiny,

135 This is not to diminish their importance. For a leading critical discussion, see J. King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012).

136 *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 [85].

137 Relative principles are like the principle that the severer the crime, the longer the sentence should be. Although this principle tells us that a murderer should serve a longer sentence than a petty thief, it does not tell us how long either sentence should be. (This is the 'anchoring problem' discussed by criminal law theorists. See for example A. Von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993) 36ff.) Likewise, knowing that reasons which depend on scientific judgements attract a wider range of eligible weightings does not tell us how wide, as an absolute matter, a given eligible range ought to be. So a court will not be in a position to judge a weighting eligible or ineligible if proceeding from relative eligibility principles alone. Judges must presuppose absolute eligibility principles. Notice that this anchoring problem – and hence the need for absolute, not just relative, principles – affects all accounts of deference in public law. It is not peculiar to the relativised justification account of reasonableness. The relativised justification account does, however, have the resources explicitly to recognise and address the issue.

138 See for example *Saville* n 86 above; *R* v *Secretary of State for Health, ex p Wagstaff* [2001] 1 WLR 292.

139 See for example *Rotherham* n 80 above. A similar relative principle also holds: the more the decision concerns social and economic planning, the wider the range of eligible weightings. Unsurprisingly, most important deference factors yield both absolute and relative eligibility principles, so long as the relevant feature (like polycentricity) comes in degrees.

140 At least normally: the expert opinion must be 'tenable', which may exclude errors that are obvious even to non-experts: *R (British Union for the Abolition of Vivisection)* v *Secretary of State for the Home Department* [2008] EWCA Civ 417; *Mott (CA)* n 78 above.

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where substantial interferences with fundamental rights call for more 'by way of justification before [the court] is satisfied that the decision is reasonable.'[141] On any eligible view, interfering with a fundamental right or interest involves acting in the face of powerful countervailing reasons, requiring correspondingly strong justification.[142]

Because eligibility principles can operate at the level of particular reasons, intensity can be finely calibrated. This is important because the weighting of some considerations attracts more latitude than that of others. In *Rogers*, for example, the court indicated that it would have given the PCT significant latitude in determining how important the cost of Herceptin was, given its other clinical priorities. But it gave the PCT relatively little latitude in weighting the inconsistency, as the court saw it, in funding Herceptin for only some women who had been prescribed it, despite the PCT's arguments about possible differences in clinical need.[143] Rather than insisting on some 'margin of appreciation' which applies uniformly to the case as a whole, the relativised justification account accommodates different eligibility ranges for different reasons.

This focus on reasons' weights also explains why more intense review typically involves more searching review of the decision-maker's evidence. For evidence is itself just a type of reason. Evidence for a proposition constitutes reasons – epistemic reasons – for believing it.[144] Insufficient evidence may therefore be relevant in two ways. Where the decision challenged is a determination of the truth of some proposition – for example that the claimant is not a minor or that a drug is safe for market – then the evidence directly constitutes the reasons for and against making the determination.[145] Among the decision-maker's motivating reasons are the evidence they take to count in favour of their determination. Whether their reasons – the relied-on evidence – are sufficient is determined in the normal way, by allowing an eligible range of weightings.

In other cases, where a decision is an exercise of discretion other than a determination, the evidence bears indirectly on the eligible weights of the operative practical reasons. This is because the weight that ought to be ascribed to a reason depends partly on the probability that ought to be assigned to the

141 *Smith* n 86 above, 554.

142 Thus the courts can intensify review not only by constricting the *margin* of eligible weights for reasons (decreasing the difference between the lower and upper eligible bounds) but also by increasing the *absolute* eligible weights of reasons (shifting the entire range of eligible weightings up the scale). Schematically, a reason with a constricted eligibility margin and minimal absolute weight might have eligible weightings between, say, 15-20; one with substantial weight and a relaxed margin might be eligibly weighted between 60-120; one with both a substantial absolute weight and a constrained margin might have eligible weightings between 100-110.

143 *Rogers* n 33 above at [80]-[81].

144 For this view, see for example A. Reisner, 'Weighing Pragmatic and Evidential Reasons for Belief' (2008) 138 *Philosophical Studies* 17; K. Sylvan and E. Sosa, 'The Place of Reasons in Epistemology' in D. Star (ed), *The Oxford Handbook of Reasons and Normativity* (Oxford: OUP, 2018). Note the claim is that evidence constitutes reasons for belief, not the stronger evidentialist claim that all reasons for belief are evidential.

145 Such determinations may involve, as Tom Hickman explains, 'drawing an evaluative conclusion from primary factual findings based on evidence', and hence attract reasonableness review. See T. Hickman, *Public Law After the Human Rights Act* (Oxford: Hart Publishing, 2010) 285, citing *Secretary of State for Transport, Local Government and The Regions* v *Geoffrey Robert Snowdon* [2002] EWHC 2394 (Admin), [2003] RTR 15.

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underlying (putative) facts. To take a simple example, the weight that should be given to the reason 'that the decision will be efficient' depends partly on the value of efficiency and partly on, for example, probable cost savings. The state of the evidence bears on the latter, and hence on the eligible weighting for the reason.[146]

The account shows, then, why the required strength of evidence depends on the range of eligible weightings. To assess the strength of the decision-maker's reasons, the court must assess the strength of the evidence the decision-maker acts on. The more permissive the eligible weight-ranges, the more easily the decision-maker can establish its reasons are within range, the less evidence it accordingly needs, and the less searching the court's review of the evidence must be. The converse also holds, so it is no surprise, on this account, that anxious scrutiny involves particularly searching review of evidence.[147]

We can note, finally, that some eligibility principles are implied by general doctrinal rules. Under the relevant considerations doctrine, the court substitutes judgment as to which considerations must and must not be considered.[148] This eligibility principle therefore follows: all eligible views contain all (mandatory) relevant considerations and no (prohibited) irrelevant considerations. Another eligibility principle flows from the doctrine that the reasonableness of a decision is to be assessed by reference to the evidence available at the time it was made.[149] The eligible weights of reasons reflect only this evidence.

There are, then, various kinds of eligibility principle and so various determinants of the intensity of review. It is a feature of this account, though not unique to it, that reasonableness functions both as a 'standard of legality', addressed to decision-makers, and a 'standard of review', addressed to reviewing courts.[150] For whether a decision is in the relevant sense reasonable – and hence lawful – itself reflects what sort of scrutiny courts may properly undertake.

On the traditional understanding, a central feature of reasonableness review, summed up in the *Wednesbury* case, is its deferential character. The relativised justification account explains what truth there is in this view. The account shows how a reasonable decision can be wrong or mistaken, thereby vindicating reasonableness review as a manifestation of the courts' secondary, supervisory jurisdiction. It also explains what is going on when unreasonableness is taken to be a particularly high hurdle; in such cases, the court operates with a very permissive understanding of what views of the balance of reasons are eligible, and

146 A thoroughgoing externalist about reasons might insist that reasons are facts, that true propositions about the uncertain present or the future are nonetheless facts now, and hence that the weight of the efficiency reason is given by how much efficiency will actually obtain, not by how much expectably obtains *ex ante*. If so, then the actual weight of the reason does not depend on the evidence now. Nevertheless, what we should now believe about the weight of this reason – and hence its eligible weightings – would still depend on the evidence now.

147 See P. Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] PL 60.

148 On how this relevancy requirement relates to the reasonableness test, see Craig, 'The Nature of Reasonableness Review' n 9 above. For discussion of the normative question whether courts should defer as to which considerations are relevant, see H. Wilberg, 'Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide' in Wilberg and Elliot, n 6 above.

149 *Mott (CA)* n 78 above at [39].

150 For this distinction, see Hickman, n 145 above, 99ff.

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so gives the decision-maker substantial room for manoeuvre. Yet the account does not make a highly deferential understanding of reasonableness *constitutive* of the standard. That is as it should be, for a hallmark of reasonableness review is its variable intensity, which includes its intrusive application in certain areas. My account of the standard's structure leaves open how intensively it is applied, generally and in particular contexts.

Indicia of unreasonableness

A final virtue of the account is that it unites and explains various indicia of unreasonableness as manifestations of the same more general defect.[151] Such indicia are simply ways that a decision might fail to be supported by reasons that are undefeated on some eligible view. Thus a decision taken for *no reasons* – not even a second-order reason[152] – is unreasonable, if there are on any view countervailing reasons of some weight. For then on no view (and hence no eligible view) can such a decision-maker have undefeated reasons. The same is true where the decision-maker's reasons are trivial in weight and the countervailing reasons are on any view significant, and where the decision-maker's reasons are improper or irrelevant considerations (and hence excluded). And, for reasons already discussed, *instrumentally irrational* decisions – those which fail to serve, or undermine, their intended ends – are also generally unreasonable.[153]

Inconsistency or *differential treatment* tends to suggest unreasonableness (even if inconsistency is not automatically sufficient for a decision to be quashed).[154] This might be for either or both of two reasons. First, relevantly like cases are governed by like reasons. If a decision-maker has in one case regarded some reason as relevant or weighty, the court may not permit it to count it in another case as irrelevant or unimportant. The court may, that is, apply an eligibility principle on which no reason can have a relevance or weighting incompatible with the relevance or weighting the decision-maker elsewhere assumes it has. A second way inconsistent treatment may be relevant is directly as a weighty countervailing reason. It may simply be that, at least under certain conditions, differential treatment is unfair or otherwise unjust, and so counts as a compelling reason against a decision, perhaps on any eligible view. The same holds for other common law or constitutional principles, such as open justice, which may be taken to weigh heavily on any eligible view.[155] It would follow that the decision-maker's reasons must be weighty, on pain of being defeated on every eligible view.

151 See Daly, n 8 above; Woolf and other, n 115 above, 601–602.

152 As Gersen and Vermeule, n 82 above, emphasise, decision-makers may have good second-order reasons to decide one way or the other where there is nothing to choose between options on the basis of first-order considerations, or even to act contrary to the balance of first-order reasons.

153 See for example *Law Society* n 31 above; *Rogers* n 33 above.

154 *R (Gallaher Group Ltd and others)* v *The Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96.

155 See for example *Kennedy* v *Charity Commissioners* n 10 above.

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Something similar can be said of the wider class of *oppressive* or *disproportionate* decisions, which are often unreasonable.[156] These decisions impose unduly great burdens or excessive hardship on affected persons. Such hardship constitutes a powerful reason against a decision; if the hardship is *excessive* or *undue*, this reason outweighs any reasons in its favour, and often on any eligible view of the reasons. If no reasons can justify such a decision on any eligible view, it follows that no reasons of the decision-maker can.

Finally, seriously *insufficiently evidenced* decisions can be unreasonable.[157] As we saw, evidence constitutes or bears on a decision-maker's reasons, so a sufficiently poorly evidenced decision may be one taken for defeated reasons on every eligible view. Notice what follows: substantive review and review of evidence are not wholly separable even in principle. Any requirement of sufficient reasons – however sufficiency is understood – is *thereby* a requirement of sufficient evidence. Of course, that leaves open how intensively such a requirement is understood.

CONCLUSION

As I said at the outset, my focus here has been to understand the reasonableness standard on its own terms, not to provide a detailed comparison between reasonableness and proportionality. In concluding, however, I want to offer what can be no more than tentative reflections on how reasonableness, as I have been understanding it, and proportionality compare. The first reflection is that the account confirms that there are deep similarities between the two standards.[158] They both assess the weight and balance of reasons. Indeed, several stages of the proportionality test are implicit in the reasonableness analysis, since those stages simply identify different ways in which a decision can be insufficiently supported by reasons. As the discussion of types of unreasonableness showed, lacking a legitimate objective (reason), lacking a sufficient connection between one's objective and one's decision, and failing to act on a 'fair balance' of relevant considerations can all make a decision unreasonable.

The account does, however, suggest at least two potential structural differences between the two standards. The first is that proportionality, but not reasonableness, standardly requires that the decision be the least intrusive means of achieving its objective. Although in a handful of cases the courts have applied something like this 'necessity' test under the heading of reasonableness, these are

156 See for example *R (Khatun)* v *Newham LBV* [2004] EWCA Civ 55, [2005] QB 37 at [41] *per* Laws LJ. 'Often' because causing excessive hardship, relative to the true balance of reasons, is not sufficient for unreasonableness. But a significantly disproportionate decision is often one that is not justified on any eligible view.

157 See for example *R* v *Attorney General, ex p ICI Plc* [1987] 1 CMLR 72 at [64]; *R* v *Housing Benefit Review Board of the London Borough of Sutton* (1995) 27 HLR 92; *R* v *Birmingham City Council, ex parte Sheptonhurst Ltd* [1990] 1 All ER 1026. See generally Woolf and others, n 115 above, 611 ff.

158 See for example Craig, 'The Nature of Reasonableness Review' n 9 above; Williams, n 31 above.

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outliers.[159] In general, a decision need not be the least intrusive way of achieving its end to be justified, and *a fortiori* need not be the least intrusive means to be justified on some eligible view, and hence reasonable.[160] A less intrusive measure vis-à-vis the claimant's interest is usually more intrusive vis-à-vis some other interest, and there is no general requirement of practical reason, and hence none of reasonableness, that requires the claimant's interest in particular to be privileged. This is why the necessity test is suited to cases involving fundamental rights (and perhaps other similar contexts), where the law can identify *ex ante* that the claimant's interest merits special protection. But since that is not a general feature of the claimant's interests in judicial review cases, it is not a general feature of reasonableness review. It is true that the necessity test has sometimes been understood not to imply a least intrusive means requirement, or to otherwise incorporate balancing, such that the claimant's interests are not privileged at all.[161] In my view the necessity test so understood collapses into the final balancing stage of proportionality. If so, then the necessity test can be assimilated into reasonableness review only by eliminating what makes it – and so proportionality – analytically distinctive, and at the cost of undermining proportionality's much-vaunted transparency and clear structure.[162]

A second distinctive feature of reasonableness, understood as a requirement of relativised justification, is that it appears better suited to review of certain kinds of determinations than proportionality. As Tom Hickman has noted, it is not clear how to assess the proportionality of, for example, the determination that someone is a fit and proper person.[163] Hickman argues that this conceptual awkwardness arises because proportionality is concerned essentially with 'the relationship between means and ends'.[164] In my view this partly explains why

159 Some examples are cited by Williams, *ibid*. But most of these do not support the idea that necessity specifically is part of reasonableness review. *Dad* v *General Dental Council* [2000] 1 WLR 1538 was not a reasonableness case but a statutory appeal, where the relevant test was the quite different one of whether the challenged decision was 'wrong and unjustified'. *R* v *Barnsley MBC, ex p Hook* [1976] 1 WLR 1052 held a punishment clearly excessive, which paradigmatically reflects the decision-maker's strongly outweighed reasons (ie lack of 'fair balance'). Likewise in *R (Corner House Research)* v *Director of the Serious Fraud Office* [2009] 1 AC 756 the House of Lords held, as Williams puts it at 115, that 'a very significant imbalance [in the reasons] indeed would be required before the scales would tip against the Director's decision'. This is a question of overall balance, not obviously of least intrusive means.

160 That is not to say that the available alternatives are never relevant to reasonableness review. As I emphasised, the reasons against an option are given partly by the value of alternatives. So the failure to pursue a clearly better alternative can indirectly make a decision unreasonable. But it does not follow that every decision must pass the hurdle of necessity, or be the least intrusive way of achieving its end.

161 For discussion of various permissive interpretations of necessity, see Hickman, n 145 above, ch 6. An alternative, very narrow interpretation of the necessity stage holds that it condemns only decisions which are worse in at least one respect than another and better in none, ie those that are (Pareto-) dominated in the sense I considered above. See for example Alexy, n 13 above, 399–401. On this narrow reading, necessity is indeed part of reasonableness review, but I take it that, as necessity is typically understood, a decision can fail at the necessity stage even if the less intrusive means is somewhat worse in some respect. See for example *Bank Mellat* v *HM Treasury* [2013] UKSC 39, [2014] AC 700, 791.

162 See for example P. Craig, 'Proportionality, Rationality and Review' [2010] NZLR 265.

163 Hickman, n 145 above, 285; for the opposing view, see Craig, *ibid*. See further T. Hickman, 'Problems for Proportionality' [2010] NZLR 303.

164 Hickman, *ibid*, 321.

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proportionality is *not* always a suitable standard in these cases,[165] but it does not yet show why reasonableness *is* appropriate. The account here provides an answer. As we saw, such determinations are responsive to evidence, and evidence simply constitutes reasons for belief. Because reasonableness is essentially a demand for sufficiently strong reasons, in these contexts it operates as a demand for sufficiently strong evidence.

In any event, my hope is that the relativised justification account gives us a firmer understanding of the reasonableness standard, quite apart from any comparisons to proportionality. The proposal also, I believe, satisfies two other important desiderata for an account of this kind. In the first place, it provides a philosophically coherent and intelligible account of the idea of reasonableness in public law. Dimitrios Kyritsis has suggested that 'the contrast … between something being the correct course of action and being (merely) supported by reason is elusive'.[166] It need not elude us. The relativised justification account shows how some actions might be supported by reason in a sufficient – because relativised – sense, without necessarily being correct. At the same time, the account – however complex in its theoretical fundamentals – is readily applicable in practice. It ultimately suggests a simple approach. The court identifies the most favourable understanding of the relevant considerations the decision-maker is entitled to act on, and asks whether or not, relative to that understanding, its reasons were defeated by the countervailing reasons. That is the essence of the reasonableness standard.

165 Only partly because not all aspects of proportionality concern means-ends relationships: the 'legitimate aim' stage relates to the permissibility of the end, and the 'fair balance' stage concerns ends-ends trade-offs, ie balancing between various goods.

166 D. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford: OUP, 2017) 169.

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