Giorgio Bongiovanni
Giovanni Sartor
Chiara Valentini
Editors

Law and Philosophy Library 86

Reasonableness and Law

Springer

legislature has to take into account. With this proviso, legislative decision-making can be assimilated to the model of individual rationality I described above, which integrates epistemic and practical rationality (the role for epistemic rationality in legislation is stressed by the idea of evidence-based legislation, on which see, among others, Seidman and Seidman 2001). This assimilation has to be integrated, as I shall argue in what follows, by taking into account the plurality of institutional agents involved in the public decision-making process.

Legislators (supported by their staff, communicating with their constituencies, participating in political debate inside and outside the legislative body) need to first detect a problem-situation, namely, a social arrangement that appears to be unsatisfactory, expressing an unsatisfied social need that they think should be addressed. On the basis of an empirical analysis, they should identify more precisely the issue characterising that problem-situation and the social behaviour from which it emerges. This will enable them to establish what goal (values) should be pursued through legislation in that situation. For instance, let us consider a problem now being discussed by the Italian legislature: a very high number of private telephone communications are wiretapped under police investigations, and the content of such communications often winds up being published in the media, with serious prejudice to its author. A new law designed to deal with this problem-situation should aim to better protect individual privacy, a goal achieving which would in turn also be a way of protecting individual liberty.

Putting such a goal on the legislative agenda would start teleological reasoning, in order to draft a legislative measure protecting privacy with regard to private communications wiretapped under crime investigations. For this purpose, an empirical analysis is required aimed at understanding how possible measures (plans) will impact on the values at stake: not only privacy, but also freedom of speech, freedom of the press, publicity (and the consequent public control) of judicial activities, repression and hence prevention of crimes, and limitation of the costs of judicial inquiries (by reducing wiretapping costs). For instance, an absolute and unconditional prohibition against wiretapping in crime investigations would increase privacy protection, and would leave freedom of speech untouched, but would seriously limit the possibility of identifying the authors of many crimes, especially those carried out by organised crime rings. It would reduce to 0 the costs of wiretapping, though this may require different kinds of investigations, possibly more expensive ones. By contrast, an unconditional wiretapping authority conferred on every prosecutor in investigations concerning any kind of crime, coupled with an unlimited authority to distribute and publish the wiretapped conversations, would increase the likelihood of preventing crimes (assuming that prosecutors were able to devote their resources to the most effective investigations, on the basis of a correct cost-benefit analysis) and would emphasise freedom of the press.

Such considerations need to be based on empirical analyses that will take into account the complex social connections at issue. It is not sufficient to consider only law in the books; analysis has to extend to law in action. Legislators need to evaluate the probability that legal provisions are not followed, since penalties are nor enforced or fail to deter unwanted behaviour: will a fine imposed on officers and journalists succeed in deterring them from communicating and publishing

wiretapped conversations? They must also consider the chance that the legal process is used for deterring legitimate actions: will journalists be deterred from publishing legitimate information concerning legal proceedings of powerful people, fearing the costs and uncertainties of judicial proceedings? Moreover, they need to extend the analysis from the immediate social effects of the intended legislation to its indirect effects: what consequences would the increased impunity, consequent upon the impossibility of using wiretapping in investigations, have on certain kinds of criminality, such as political corruption, extortion and racketeering, or drug trafficking? It may also happen, as when economic policy is involved, that the empirical predictions required to establish the likely outcome of certain measures are very difficult and questionable, being dependent on much-debated theories: will a tax cut boost investment? Will it improve or worsen the condition of the poor?

After considering some alternative measures aimed at solving the problem (not *all* possible measures, since this would exceed human capacities), legislators will need to compare such measures and write into law the measures having the best combined impact on all the values at stake. The analysis of the impacts of a new law on all relevant values can be very difficult. Difficulties may pertain to different aspects: predicting the empirical effects of alternative choices, spelling out the values to be achieved, specifying their content, and establishing their relative importance.

Finally, rational legislators should monitor the outcome of the law, to check whether it achieves the intended objective, or whether it has unwanted consequences, or whether a better solution to the problem can be found, a solution not considered when the legislative choice was made (possibly because certain knowledge became available only later, through advances in the natural sciences or in technology or economics).

Legislative rationality also includes the reflective element I described above, at least to a certain extent: legislators need to represent the interest of the their constituencies, or rather the view that their constituency has of the common good, but they should also subject such views to critical examination, taking into account empirical knowledge, correcting biases, etc.

We can distinguish the substantive and the procedural rationality of legislative procedure, where substantive rationality relates to a decision's effective capacity to achieve the goals that legislators aimed at, and procedural rationality has to do with following a procedure that reliably tends to provide substantially rational decisions. Such procedural features include the ability to consider different normative and factual opinions, to collect evidence for and against a policy, to carry out empirical inquiries, to stimulate public debate and take its outcome duly into account, etc.

14 Constitutional Commitments and Legislative Rationality

Rationality requires taking duly into account previously adopted epistemic and practical determinations: it requires that these determinations guide subsequent reasoning until they are withdrawn. While individual reasoners can memorise past

determinations as intentions (or duty-beliefs), where a collective agency is concerned, past determinations can be stored in normative sources (official documents, but also shared customs or doctrines) which are publicly accessible and embed norms to be followed and applied by officials, and which are to be modified according to established procedures. There may be different kinds of norms:

- norms establishing general or specific duties or permissions to carry out or not carry out certain acts;
- norms establishing a duty to aim at certain goals (values) or to not prejudice them;
- norms conferring a legal status; and
- norms indicating what factors support certain normative conclusions

All such norms—if they are part of a constitution—should constrain and guide the legislature's deliberative process. It would be irrational for individual reasoners not to act on the basis of a commitment they continue to accept, unless they believe they are in a situation where the commitment is inapplicable or is overridden by a prevailing reason to the contrary (I stand by my commitment to work out every evening, though this evening this commitment is made inapplicable or overridden by my commitment to give a lecture). Similarly, legislative determinations departing from constitutional norms could in a sense be viewed as irrational, i.e., as disregarding some commitments that govern legislative decision-making: for legislators who continue to uphold their commitment to a constitution (as they should when reasoning and acting in the name of the community governed by that constitution, i.e., a community that has undertaken such a commitment), it would be irrational not to respect a constitutional norm, unless they believe they are in a situation where the norm is inapplicable or is overridden by prevailing communal reasons to the contrary. Note that this irrationality only exists when legislators are viewed as members of a legislature acting in name and on account of the community committed to the constitution: violating the constitution to install a permanent dictatorship or to gain immunity from prosecution may be perfectly rational from the perspective of individual self-interest.

How to go about respecting a constitutional norm, however, depends on the content of that norm:

- a constitutional norm establishing duties or permissions to carry out or not carry out certain action is violated when a new legislative determination either directly instantiates a prohibited action or makes permissible what was prohibited or prohibits what was permissible;
- a constitutional norm establishing a duty for the legislature to realise a value (aim at a goal) is violated when the value does not enter in an appropriate way, according to its importance, into the teleological reasoning of legislators, namely, when it is not appropriately taken into account in legislative choice-making;
- a constitutional norm conferring a legal status is violated when a legislative determination denies such a status (similarly, a norm denying certain persons a legal status is violated when a legislative determination confers such a status on them);

- a constitutional norm indicating that a factor supports a certain normative conclusion is violated when the factor is not considered in a legal determination where it was relevant.

According to this broad characterisation of the notion of a constitutional norm (which seems to me to tally with the common usage of the term *norm*), it also includes constitutional prescriptions requiring the pursuit of certain values (goods). If legislators have to take into account all constitutional norms, then these norms too will have to direct in legislative decision-making, along with the norms specifying that certain actions be to be taken or omitted.

In order to analyse how a legislature should comply with constitutional commitments, we need to focus specifically on norms establishing rights. On the traditional view that a right protects an individual interest or opportunity (the so-called benefit theory of rights, advanced by authors such as Jeremy Bentham and Rudolf Jhering: see, for a logical analysis and for references to the literature, Sartor 2006), two components are entailed by the statement that "j has a right to A toward k", *where j is the beneficiary of the rights and* k is the counterparty: on the one hand, the situation where j enjoys A is viewed as valuable and, on the other, it is assumed that there exist guarantees aimed at facilitating this enjoyment, which bear upon k (these guarantees can be specified in other norms or may have to be argued from general principles).

Thus a right-conferring norm includes in the first place a value component: the norm stating that "j has a right to A toward k" entails that the legal system values j's having A, or views it as an objective to be pursued through the law. More precisely, a right-conferring norm protects an individualised value, namely, a set of valuable situations pertaining to particular individuals separately considered (my freedom to speak, your freedom to speak, etc.). Consequently, the interest (value, good) protected by a right is essentially non-aggregative: the fact that someone's right is satisfied to an optimal extent does not make up for the fact that someone else enjoys the right to an insufficient extent.

Secondly, there is a guarantee component: j's having a right to A toward k entails that the law provides some normative guarantees that facilitate j's having A and bear upon k. For one thing, this right entails that j is permitted to have A as far as k is concerned (i.e., it is not the case that protecting k's interests requires prohibiting j from having A).[8] The protection provided by a mere (or unprotected) permission to have A (see Hart 1982) can be strengthened by what might be called, in Hohfeldian terms, a disability or incapacity, namely, by k's inability to change j's legal standing with regard to A, namely, of turning j's permission to have A into a prohibition (as would happen if j's right was established under a constitutional norm, one that legislature k could not make any exception to). And, for another thing, j's right to A

[8] For instance, if the legal system L prohibits j from having an opportunity to express his or her opinion in the interest of the state, we should conclude that j has no right under L to express his or her opinion about the state.

toward k may include further legal guarantees, consisting in obligations incumbent upon k to facilitate j's pursuit of A:

- k's goal-duty (an imperfect duty, in Kant's terminology: see Kant 1996, Chapter 2; Sen 2004a) to consider in k's deliberative process the goal that j should have A, recognizing for this goal an appropriate relevance (e.g., the duty to consider freedom of speech when introducing a regulation aimed at protecting privacy);
- k's negative action-duty not to prevent j from having A (e.g., a duty to not prevent a person—as through imprisonment—from expressing his or her opinion);
- k's positive-action duty to ensure that others do not interfere with j's having A (e.g., a duty to protect a person against attempts to prevent him or her from expressing an opinion);
- a positive-action duty to ensure that j has the means to enjoy A (e.g., a duty to provide access to the media)

Moreover, these duties are often accompanied by the right-holder's power to activate judicial enforcement when some of these obligations are not complied with (a power included in the restrictive notion of a legal right in Kelsen 1967).

In order for a right to exist, it is not necessary that full protection be provided (as would result from the combination of all the duties I have introduced, plus the corresponding powers of enforcement). The protection of certain rights (e.g., some social rights, such as the right to work or to housing) may consist in only a goal-duty, often not judicially enforceable though the right-holder's autonomous action. This would provide a lesser, but not irrelevant, protection of the corresponding individualised values (on how certain rights may consist in only an obligation to take them into account in deliberation, see Sen 2004a). Some rights may operate in different ways with regard to different counterparts (e.g., the right to privacy may be protected by a negative action-duty with regard to administrative authorities, who are prohibited from using personal data unless specifically allowed by the law, but only as goal-duty with regard to the legislature, who can limit the protection of privacy though legislation taking competing interests into account). Certain rights (such as social rights) may be protected only by a goal-duty at a constitutional level, and by action-duties at the legislative level. The view that rights are values also protected (and sometimes only protected) by goal-duties does not mean that all rights are equal. This view is consistent with the assumption that certain individualised values (the enjoyment of civil and political liberties) may carry more weight than other values, and hence have priority over them, and in particular over collective values. This is also consistent with the view that some rights also include protection through defeasible or even indefeasible action-norms. However, outside the domain where an action-norm is to be applied (e.g., the prohibition against torture), goal-norms (norms that deal with values such as individual self-determination and integrity) would still operate.

To understand the distinction between action- and goal-duties, we should go back to our analogy between individual and collective decision-making: just as an individual determination (intention) to perform an action is adopted by a person

because he or she considers that action to be an appropriate way to achieve certain goals, so a norm establishing an action-duty is adopted by a certain authority (or collectivity) because that authority (collectivity) considered the norm to be the appropriate way to achieve certain public values. Respecting the authoritative determination that has lead to the adoption of an action-norm requires us to not disregard that norm on the basis of a different comparative assessment of the values considered in that determination. Thus, if a constitution requires that nobody can be detained for more than 48 hours without a judicial warrant, interpreters (legislators and judges in particular) should not disregard this rule on the basis of the value of security (even when they believe that the constitution is wrong, e.g., that it should have established for detention a longer term based on a better balance of the values at issue): the constitution made its evaluation concerning the way to balance security and freedom, and respecting the constitution means respecting this evaluation (this corresponds to Raz's 1978 view of rules as exclusionary reasons).

In other cases, however, the situation is different. A particular constitutional norm obligating the legislature to uphold a certain value, even when the value is individualised and non-aggregative, may only require that the value be taken into account in legislative decision-making according to its constitutional importance. Consequently, this norm does not uniquely determine a legislative decision, which will instead result from a teleological evaluation aimed at achieving not only this value but also the other constitutional values at stake, and to do so in keeping with these values' relative importance. Thus, legislators are obliged to take into account and evaluate all relevant constitutional values: when aiming to guarantee security, for instance, they should also take into account privacy and freedom of speech. Sometimes a constitutional norm will guide such an evaluation by indicating what values should be relevant to this decision (thus excluding that other values may interfere with the outcome, or that they may interfere beyond the limit of evaluation accorded to the decision-maker). Thus, it may be possible to limit freedom of speech only for reasons pertaining to public order and morality, and not, say, for reasons pertaining to scientific progress (which consequently could not be used to justify a ban on advocacy for creationism or homeopathy).

The distinction between action-duties and goal-duties overlaps with another significant distinction, namely, the distinction between a yes/no state of affairs and a scalable state of affairs. A yes/no state of affairs either obtains or does not obtains, while a scalable state of affairs may hold to different extents. For instance, while being a citizen is a yes/no state, being free or unfree is a scalable state of affair (since this is a function of the number and quality of the options within one's reach). When two duties concern the realisation of a yes/no state of affairs, preference should be given to one duty to the exclusion of the other, so that at least one of the two is satisfied (this is the domain of defeasible reasoning). By contrast, when two duties concerning scalable goals have to be satisfied, the best compromise usually requires that neither of them be completely neglected or completely satisfied. A scalable duty (the duty not to make people suffer when questioned or detained) can become an action-duty with regard to a particular threshold (the duty not to torture people).

Action duties concern the realisation of yes/no states of affairs, while goal duties usually concern the realisation of scalable states of affairs.

Given the premises of legislative reasoning—constitutional goals, further legislative goals, preferences for such goals, and constitutional constraints on the pursuit of such goals—legislators should make a teleologically appropriate determination. From the legislators' perspective, this means that after an adequate inquiry, the chosen determination should appear better than inactivity and it should not appear to be worse than any particular alternative determination the legislators have so far identified. The legislative choice would fail to reach *teleological appropriateness* if the legislators made a choice they believed to be worse than another possible choice they were aware of in achieving the public good (even though the choice may be better suited to advancing the legislators' private interests). Similarly, the legislative choice would fail to reach teleological appropriateness if it were adopted impulsively, without an appropriate inquiry (which would have led to discover a recognisably better option). It would fail as well if it were vitiated by previous epistemic mistakes—in evaluating the evidence, identifying causal connections, examining evidence to the contrary, etc.—when such mistakes would not have been committed through an appropriate cognitive effort.

Figure 6 shows the connection between the satisfaction of a scalable value and the benefit it provides: a decrease in the satisfaction of the value determines an increasingly significant loss in the benefit deriving from it. We reach a point, the *core threshold*, such that any further decrease in the satisfaction of the value determines a loss of benefit that is unlikely to be compensated by gains in the benefit provided by the greater achievement of other values. The portion of the value line to the left of the core threshold is what may be called the value's core or nucleus. On the other hand, when the level of achievement increases, we come to a point such that any further increase will have little importance. The portion of the value line to the right of this point represents situations where the value is achieved at a fully satisfactory level, so that any further increase, though still positive, may not come within the scope of a legal obligation to advance that value.

If scalable values have the structure just indicated, then decisions affecting competing values (e.g., privacy and security) take place in a decisional context of the kind represented in Fig. 7.

The continuous lines indicate indifference curves, namely, combinations of levels of satisfaction of two competing values giving the same compound benefit. For instance, the most external indifference curve shows that achieving level 22 (measured by counting the number of small squares from the origin of the quadrant) with regard to both values A and B is equivalent to achieving level 40 with regard to A and 10 with regard to B (both points, [22, 22] and [40, 10], are situated on the same indifference curve). This curve expresses the idea that B (e.g., privacy) is less important than A (e.g., security): for most curves, a higher quantity of B is required to make up for the loss of one unit of A. However, when the quantity of B decreases, having one additional unit of A becomes more and more important, up to the point where any further increase in B will no longer make up for a further equal loss in A. Let us assume that the decision-maker has choices 1, 2, 3, and 4

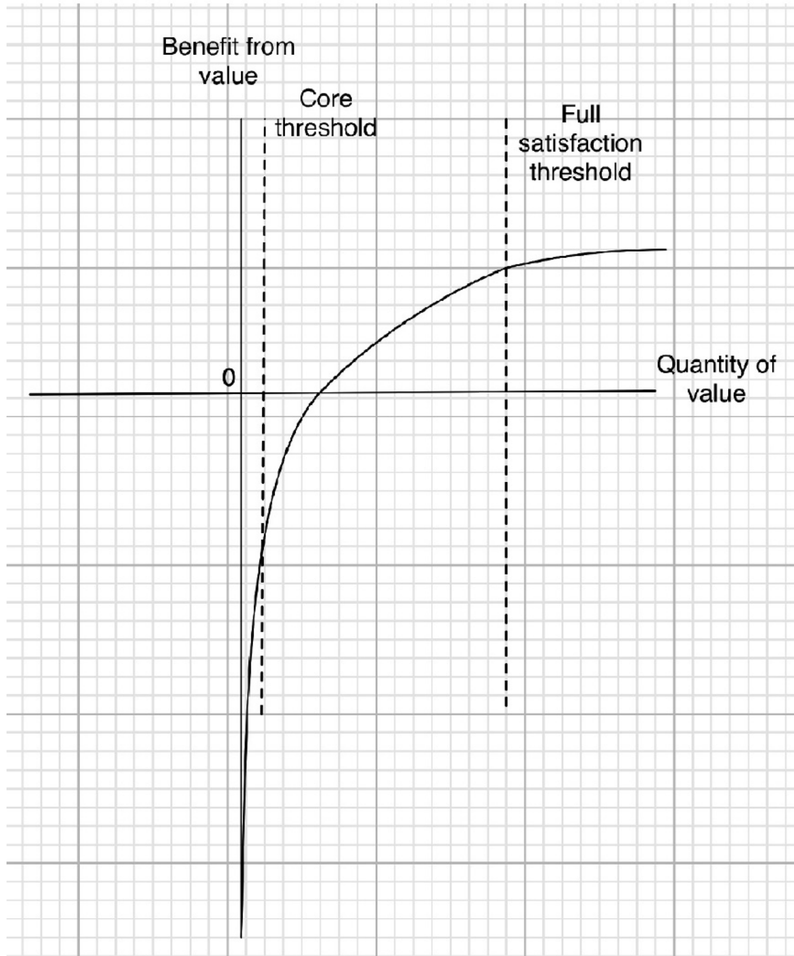

Fig. 6 Core and satisfaction threshold for a value

available (represented in the figure by way of the numbered circles). Choice 1 is Pareto-superior to choice 3, since it provides not only a higher compound benefit, but also a higher level of satisfaction with regard to both values. Choice 4 is not Pareto-inferior to 1, since it indicates a level of satisfaction for value *B* which is higher than that provided by 1. However, this is obtained at the cost of a very low level of satisfaction for value *A*, a loss which is not made up for by the benefit provided, consisting in an increase in security. Thus choice 4, while ensuring the highest level with respect to *B* obtains the lowest compound score. The conclusion that choice 4 is inferior to 1 thus presupposes a "comparative value judgement," namely, a judgement about the comparative importance of values *A* and *B*. On the basis of this judgement, the loss with regard to *A* in choice 4 is not offset by the

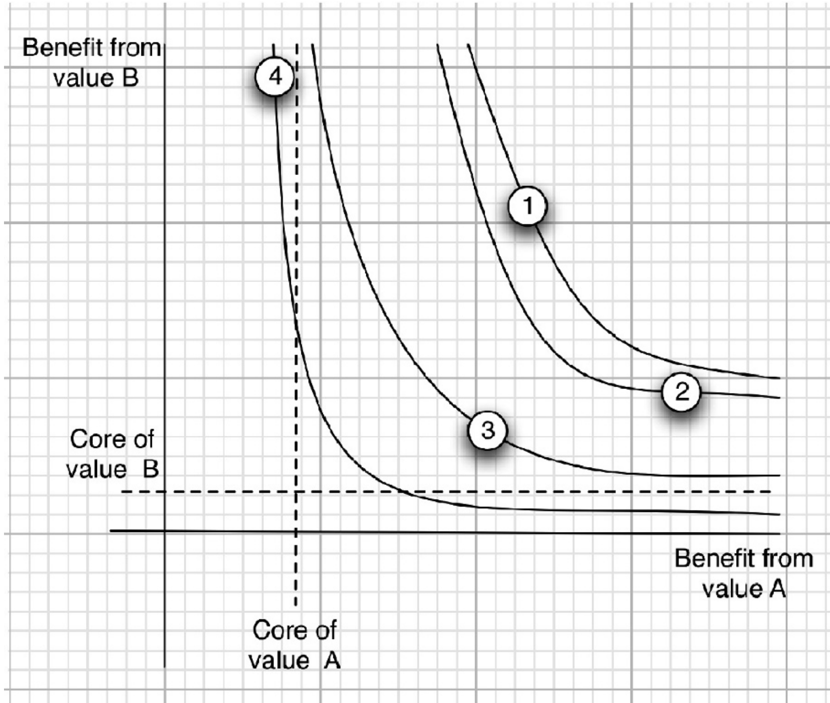

Fig. 7 The balancing of competing values

corresponding gain in B. Even 2 is not Pareto-superior to 1, but this happens for the opposite reason, which is that 2 achieves A to a higher degree than 1 but at a cost that is not offset by the loss with regard to B.

This quantitative characterisation of the notion of a right's core needs to be integrated by qualitative considerations by taking into account the diversity of the interests protected by a right. A single constitutional right can be analysed into different components, concerning different individual interests, but unified within the same framework (under the same overarching value). For instance, the right to private and family life recognised by the European Convention on Human Rights includes related, but different, components such as protection of the domicile, freedom to establish a family, freedom of sexual orientation, and information privacy (data protection). Interference with each such component takes the nonlinear shape I described above: as the level of satisfaction of a particular component of the right decreases, the negative impact on the corresponding interest becomes more and more important, in an accelerated way. Thus, each right includes a family of cores pertaining to different individual values (interests): for each of the specific constitutional values falling under a single right, there is a point when further losses are unlikely to be matched by gains with regard to other constitutional values pertaining to the same or to other rights. For instance, the fact that a legal system provides

full protection of the domicile, along with full data protection, cannot make up for the fact that homosexuality is criminalized: a core of the right to private and family life would still be violated. The same would also happen if freedom in sexual orientation were protected but no data protection were provided. Similarly, a core of the right of freedom of speech would be violated if freedom of speech were fully protected in all respects save for a prohibition against criticising the current government.

15 The Constitutional Evaluation of Legislative Choices: Reasonableness and Deference

When we examined legislative decision-making from the perspective of the decision-makers themselves, we focused on bounded rationality. If sufficientist reasonableness is equated with bounded rationality, then a choice will be reasonable when it remains in the region between bounded rationality and optimal rationality. A reasonable but non-rational choice would be a non-optimal determination, such that no criticism of cognitive ineptitude can be directed at the decision-makers: they appropriately used their cognitive powers (in developing an economic policy, or in designing privacy regulations), only they failed to achieve the best possible result and caused negative outcomes (growing unemployment, citizens' privacy unduly restrained) because of the unfortunate cognitive circumstances in which they were acting (new unexpected social or technological developments, unavailability of good predictive models, etc.). Correspondingly, any departure from bounded rationality (any mistake in acquiring and processing the available legal or factual information) would count as unreasonable.

This does not seem to correspond to the way in which reasonableness (and unreasonableness) is understood in judicial review, with regard to both legislative and administrative choices, where a broader notion of reasonableness is generally preferred, according to which a determination remains reasonable even though it is affected by cognitive faults, according to the reviewer.

With regard to judicial review the analogy we used between individual decision-making and the institutional decisional process of a legal community breaks down: while in case of individual decision-making the same agent is involved in the entire process (agents can consequently review any outcome of their previous reasoning which appears faulty to them), the decisional process of a legal community involves different bodies and institutions, each having its own functions and capacities. It is unlikely that the best integration between a decision-maker and a judicial reviewer will be one where the reviewer can strike down the decision maker's choice whenever the reviewer sees it as failing to achieve complete rationality (this would empower the reviewer to strike down all decisions she views as suboptimal, namely, all decisions she would not have taken had she been in the decision-maker's place, but with the hindsight of someone having all knowledge available the time of the review), even with regard to the achievement of constitutional values (this would

empower the reviewer to strike all decisions she views as failing to maximise the total outcome with regard to all the constitutional values at stake). Nor is the best integration likely to be one in which the reviewer can strike every decision she views as failing to achieve bounded rationality (this would empower the reviewer to replace with her own decisions all the decisions she would have taken differently had she been reasoning with the information the decision-maker had at the time the decision was made).

We must therefore define a different notion of reasonableness, a notion tailored to the institutional role and competence of decision-makers and of their reviewers, and in particular a notion that takes into account the reviewer's deference space, namely, the area within which the reviewer should not attack the measure under review even though she believes a different measure should have been taken (on deference, see Soper 2002). If unreasonableness (where constitutional values are concerned) is understood as providing a sufficient ground for review, then the notion of reasonableness is not independent of deference but is rather delimited by institutionally due deference. In other terms, considerations of institutional deference enable us to identify a sufficientist reasonableness threshold, encompassing not only the decision the reviewer would have taken but also other choices which he or she considers to be faulty but not yet unreasonable (insufficiently faulty to be unreasonable). However, this means that we cannot provide a universal characterisation of deference-based reasonableness, precisely because such a characterisation will depend on institutional deference.

Figure 8 illustrates how a determination (1) that does not coincide with what the reviewer would choose (5) may still fall within the margins of the decision-maker's appreciation (as indicated by the dotted lines) and may thus escape review: though the reviewer views the decision-maker choice as imperfect (it is based on an indifference curve that in the reviewer's opinion accords too much importance to value A), she does not consider it to be attackable, being within the margin of reasonable appreciation.

The idea of a sufficiency threshold applies as well to a legislature's epistemic judgements, which too can determine a failure to appropriately balance the values at stake. For instance, given the factual premise that a terrible terrorist attack is imminent, and the premise that scouring all Internet traffic with data-mining techniques will probably foil the attack, a legislator may be justified in adopting such measures to the detriment of privacy. However, if there are no grounds for accepting either of those premises (no convincing evidence that an attack is underway, and little evidence that unrestricted data-mining will be able to prevent it), then sacrificing privacy may be considered unreasonable. But substituting the court's epistemic assessment for the legislature's seems to require something more than a mere mistake of the latter: it should require a mistake consisting in epistemic unreasonableness, namely, a serious and indisputably ascertainable fault. Thus, this should not be done when the legislature's fault, according to the court, only depends on the adoption of a particular economic or social theory which the court favours (viewing it as more reliable, better supported by the facts), but which other reasonable people reject (as Judge Holmes famously argued in the Lochner case).