Constitutional Court Review 2019
Volume 9, 219–245
https://doi.org/10.2989/CCR.2019.0009

A Service Conception of the Constitution: Authority, Justification and the Rule of Law in Proportionality Jurisprudence

RICHARD STACEY

ABSTRACT: Constitutional Court judgments upholding or striking down statutory provisions that limit constitutional rights in South Africa do so on the back of an inquiry into the proportionality of the rights limitation. The Court's record suggests that proportionality analysis usually proceeds along one of two paths: an analysis that focuses on the availability of means less restrictive of rights than the impugned limitation, or an analysis that considers the strict balance between the value of the purposes sought by the limitation and the seriousness of the rights limitation. This article examines how these two paths of proportionality analysis appear at first to align with two different conceptions of the rule of law. Strict-sense proportionality analysis involves reasoning from moral first principles – or primary moral reasoning – that draws on Lon Fuller's inner morality of law, and which seeks to provide morally grounded justifications for a decision upholding or striking down a limitation. Less restrictive means analysis depends on a 'service conception' of the constitution to justify its conclusions, drawing on Raz's views about how law and legal decisions claim authority. Both Raz's service conception of authority and the service conception of the constitution that runs through less restrictive means analysis, however, depend on a view of what it means to be a legal subject that is ultimately indistinguishable from Fuller's: on either account, the rule of law demands that a legal system recognise its subjects as morally autonomous agents deserving of morally intelligible explanations for the law's operation. If less restrictive means analysis is to make a meaningful claim both to authority and to the rule of law, then it must – and indeed does – involve at least some primary moral reasoning. In turn, South Africa's culture of justification demands that courts embrace primary moral reasoning in proportionality jurisprudence.

KEYWORDS: moral reasoning, limitations, restrictive means, balancing, Fuller, Raz

AUTHOR: BA LLB (Wits) PhD (NYU). Associate Professor, University of Toronto Faculty of Law. Email: richard.stacey@utoronto.ca

ACKNOWLEDGEMENTS: An early draft of this article was presented at the *Constitutional Court Review* IX conference, 2–3 August 2018, Constitution Hill, Johannesburg. I am grateful to my fellow participants at the conference for discussion of the ideas presented here, and to the editors of this journal and its anonymous reviewers for comments on early drafts of this article.

I INTRODUCTION

South Africa's 1996 Constitution, like others in the family of post-war, dignity-protecting constitutions, entrenches a handful of liberal democratic rights that can only be limited by legislation if it is reasonable and justifiable to do so.[1] In a seminal decision under South Africa's Interim Constitution (1994–1996),[2] the Constitutional Court understood this inquiry into reasonableness and justifiability to require 'the weighing up of competing values, and ultimately an assessment based on proportionality.'[3] A few years later, the Court described the analysis as 'a balancing exercise' that must 'arrive at a global judgment on proportionality,' and which demands that 'the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be'.[4]

The principle of proportionality has become the analytical fulcrum of limitations jurisprudence in South Africa, as it has in other jurisdictions with similar constitutional limitations clauses.[5] In this article I explore two paths along which the pursuit of proportionality has proceeded in South Africa's constitutional jurisprudence since the 1990s, two paths which track a broader debate in the literature about how best to engage in proportionality analysis. Much more than this, though, I argue here that the points of intersection between these paths of proportionality allow us to make important observations about the nature of law, authority and justification in a contemporary constitutional democracy.

One of these paths involves the balancing exercise itself, or proportionality 'in the strict sense'. The inquiry on this approach goes to whether the objective a rights-limiting measure aims to achieve is important enough to justify the rights limitations that the measure imposes. On balance, limiting a right is justifiable if it can be demonstrated that the value of what is achieved by doing so outweighs the harm it causes. As I have argued elsewhere, however, the balancing metaphor is misleading: an analysis of proportionality in its strict sense should not be conceived of as the direct weighing up of the inherent value of rights and competing statutory objectives, but rather as asking whether upholding a right or allowing its limitation in

[1] Section 36(1) of the Constitution of the Republic of South Africa, 1996 (Constitution), reads: The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
For similar provisions in other countries' constitutional documents, see, eg, Germany's 1949 Basic Law art 19, Canadian Charter of Rights and Freedoms (1982) s 1, Israel's 1992 Basic Law: Human Dignity and Liberty art 8 and Israel's 1992 Basic Law: Freedom of Occupation art 4, Poland's 1997 Constitution art 31(3), Kenya's 2010 Constitution s 24, and Tunisia's 2014 Constitution art 49.

[2] Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution). The Interim Constitution has been repealed.

[3] *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 104.

[4] *S v Manamela & Another* [200] ZACC 5, 2000 (3) SA 1 (CC) at para 32. See also *S v Bhulwana; S v Gwadiso* [1995] ZACC 11, 1996 (1) SA 388 (CC) at para 18 ('The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification for the infringing legislation must be.')

[5] A Sweet & J Mathews 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72.

pursuit of competing objectives better advances a society's commitment to a set of normative principles or values.[6]

The second path of proportionality analysis asks the more fact-centred question of whether the legislature has selected means to achieve its objectives that are the least restrictive or are minimally invasive of constitutional rights. The 'least (or less) restrictive means' test understands the concept of proportionality to require statutory provisions to limit constitutional rights no more than is necessary to achieve important objectives. If there are less restrictive means available to achieve a given objective, the conclusion must be that the statutory provision is more restrictive than it needs to be, and hence is disproportionate.

The South African Constitutional Court – and many other high courts around the world – considers both the availability of less restrictive means and proportionality in the strict sense as elements of a global inquiry into proportionality. But the Court often relies more heavily on one inquiry than the other, and there are cases in which the Court relies exclusively on one or other inquiry in coming to a conclusion on the proportionality (and thus the reasonableness and justifiability) of a rights limitation.[7]

In parts II and III of this article I look at the South African Constitutional Court's decisions in *Lawyers for Human Rights v Minister of Home Affairs*[8] and *Chevron v Wilson,*[9] two recent and brief judgments emblematic of reasoning along these two paths of proportionality. The brevity of the proportionality analysis in each judgment indicates just how established each mode of reasoning has become, with the Court content to do little more than gesture at either mode of reasoning in order to bring its persuasive force to bear on the resolution of a particular dispute. However, a court's role in rights limitations cases is not only to determine whether a particular rights limitation is justifiable or not, but also to explain why that limitation is justifiable or not. A commitment to the rule of law requires that the reasons for law's application, for court judgments just as for any other legal rule, be intelligible to the people bound to obey it. And in turn, a judgment's claim to authority – that is, its claim to stand as an authoritative statement of law that makes a demand on legal subjects' obedience – depends on whether its reasoning is intelligible to legal subjects.

I argue in part IV, then, that these two modes of reasoning about proportionality correspond to two apparently quite different conceptions of law in general, and of the rule of law in particular. An approach that foregrounds proportionality in the strict sense aligns closely with Lon Fuller's account of the rule of law and the idea that law as such has an 'inner morality'.[10] Law's authority on this Fullerian approach depends on its justifiability against the normative principles or values to which a political community happens to commit. Demonstrating the justifiability of a rights-limiting statutory provision – or its absence – is the job of courts of review, and a court's conclusion on this issue will itself be authoritative to the extent that it

[6] R Stacey 'The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication (2019) 67(2) *American Journal of Comparative Law* – (forthcoming).

[7] N Petersen *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (2017) and S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

[8] *Lawyers for Human Rights v Minister of Home Affairs & Others* [2017] ZACC 22, 2017 (5) SA 480 (CC)('*Lawyers for Human Rights*').

[9] *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* [2015] ZACC 15, 2015 (10) BCLR 1158 (CC)('*Chevron v Wilson*').

[10] L Fuller *The Morality of Law* (Revised Ed, 1969).

intelligibly demonstrates that either upholding or striking down the limitation is consistent with the legal system's normative foundations.

On the other hand, judicial reliance on less restrictive means analysis presents what I call a 'service conception of the constitution', adapting Joseph Raz's service conception of authority.[11] Judgments that rely on the ostensibly objective, fact-based heuristic of the less restrictive means analysis make a claim to authority, on this Razian view, because they produce decisions about the validity or invalidity or rights limitations that are more intelligibly related to our most basic normative commitments than when judges engage in unavoidably subjective and impressionistic moral reasoning about what those commitments require. On this view, the moral reasoning that strict-sense proportionality analysis is abhorrent to the rule of law, and should be avoided, because it is unintelligible to legal subjects (or at least, less intelligible than less restrictive means analysis).

It is interesting on its own to identify the different conceptions of law and of the rule of law at work in each of these modes of proportionality analysis. But the more interesting claim I make is that Raz's service conception of authority, and with it the service conception of the constitution that runs through less restrictive means analysis, depends on a view of what it means to be a legal subject that is ultimately not all that different from Fuller's.[12] Legal subjects, I argue along with Fuller, demand justification for the operation of the legal system that goes beyond purely factual reasoning of the kind that less restrictive means analysis purports to deliver, and this is no less the case with respect to rights limitations. This follows from the law as such, for Fuller, while for Raz it follows from a merely contingent commitment to the rule of law.

The implications for these two paths of proportionality are significant. Critics of strict-sense proportionality analysis prefer less restrictive means analysis for the reason that it provides more intelligible reasons for law's operation, and thus better upholds the rule of law. But if a commitment to the rule of law demands that the legal system recognise its subjects as morally autonomous agents deserving of morally intelligible reasons explaining why the law operates as it does – as I argue it does for Raz as much as for Fuller – then less restrictive means analysis cannot both uphold the rule of law and avoid moral reasoning. It follows, as I argue in part V, that if less restrictive means analysis is to make a meaningful claim both to authority (ie, to producing legal judgments that we should respect and obey) and to the rule of law, then it must – and indeed does – involve at least some reasoning from moral first principles (what I refer to here as 'primary moral reasoning').[13] For South Africa's legal system to continue to be a 'culture of justification,'[14] we must acknowledge that both paths of proportionality analysis depend on and demand the kind of justification that only moral reasoning can deliver, and which proportionality in the strict sense unashamedly involves.

[11] J Raz 'Authority and Justification' (1985) 14 *Philosophy and Public Affairs* 3, 15.

[12] K Rundle 'Form and Agency in Raz's Legal Positivism' (2013) 32 *Law and Philosophy* 767 and K Rundle *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (2012).

[13] R Stacey 'The Magnetism of Moral Reasoning' (note 6 above). See also T Hickman 'Proportionality: Comparative Law Lessons' (2007) 12 *Judicial Review* 31, 47; M Zion 'Effecting Balance: Oakes Analysis Restaged' (2013) 43 *Ottawa Law Review* 431.

[14] E Mureinik '"A Bridge to Where?" Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32. See also M Cohen-Eliya & Iddo Porat 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463.

II LAWYERS FOR HUMAN RIGHTS V MINISTER OF HOME AFFAIRS

A The normativity of 'global' proportionality analysis

Section 36's proportionality inquiry instructs courts to consider not only whether the limitation of a right is 'reasonable and justifiable in an open and democratic society based on dignity, equality and freedom', but also whether it satisfies five other distinct desiderata. These narrower and more formal criteria embrace the nature of the right (section 36(1)(a)), the importance of the purpose of the limitation (section 36(1)(b)), the nature and extent of the limitation (section 36(1)(c)), the relation between the limitation and its purpose (section 36(1)(d)), and less restrictive means to achieve the purpose (section 36(1)(e)).

The inquiries in this analysis largely correspond to what has become a standard judicial approach to limitations analysis in jurisdictions with similar constitutional limitations clauses. In Canada and Germany, for example, the high courts have set out a rubric for proportionality analysis that includes an initial inquiry into whether a rights-limiting measure pursues an important objective (respectively described in those countries as a 'pressing and substantial' objective' and a 'legitimate purpose'), two more factual inquiries into whether the limitation is rationally connected to that objective and whether there are less restrictive means to achieve that purpose, and finally the more evaluative question of whether the extent of the rights limitation is proportional to the benefits it produces.[15]

The text of s 36 of the South African Constitution reflects all four elements of this model of proportionality analysis, but the Court frequently recites the incantation that s 36 requires a global or holistic assessment of proportionality driven by the values at the heart of the Constitution. Consider, for example, Sachs J, writing in a separate concurring judgment:

> The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct. If I may be forgiven the excursion, it seems to me that it also follows from the principles laid down in *Makwanyane* that we should not engage in purely formal or academic analyses, nor simply restrict ourselves to ad hoc technicism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case.[16]

Perhaps more forcefully, a unanimous Court had this to say in *Manamela* in 2000:

> It should be noted that the five factors expressly itemised in s 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the

[15] In Canada, the leading cases that emphasise this approach are: *R v Oakes* [1986] 1 SCR 103 at paras 69–70; *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at para 139; and *Canada (Attorney General) v JTI-Macdonald Corp* [2007] 2 SCR 610 at para 36. In Germany, the proportionality test was developed in *Nudism Education*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958 7 Entscheidungen Des Bundesverfassungsgericht [Bverfge] 320; *Pharmacy* BVerfG 1958 7 BVerfGE 377; *Own Account Transport Tax* BVerfG 1963 16 BVerfGE 147; and *Shop Closing Act II* BVerfG 1961 13 BVerfGE 237.

[16] *Coetzee v Government of the Republic of South Africa, Matiso & Others v Commanding Officer Port Elizabeth Prison & Others* [1995] ZACC 7, 1995 (4) SA 631 (CC) at para 46 (footnotes omitted).

> concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.[17]

These passages suggest that the Court is committed to a mode of reasoning about proportionality that draws connections between right and limitations on one hand and the fundamental normative commitments the Constitution makes on the other hand. 'Purely formal' analysis, 'technicism', or adhering 'mechanically to a sequential check-list' should support but not replace this primary inquiry into whether rights limitations can be persuasively justified against the Constitution's most basic values. In practical terms, the Court's decision-making proceeds on the principle that more serious infringements of rights, where 'seriousness' is understood in light of constitutional values, must be justified by more compelling reasons – where the force of those reasons is again assessed in light of basic values. On the face of these statements and the Court's frequent reference to or recitation of them, it would seem that proportionality in the strict sense is the touchstone of South Africa's limitations jurisprudence.

At most, though, proportionality in the strict sense is solely determinative in only some of the Court's decisions. Niels Petersen takes the view that proportionality in the strict sense plays almost no role in the Constitutional Court's record of limitations decisions, finding only four cases in a sample of 44 to rely on a finding that the limitation was strictly disproportional to strike it down.[18] My view is that proportionality in the strict sense plays a role in somewhat more than just four of the Constitutional Court's rights cases, but the trifling difference between my reading of the cases and Petersen's is of no concern here.[19] Rather, the point is that there is a handful of cases, however large that handful actually is, in which the Court's determination of a rights limitation's justifiability depends on proportionality in the strict sense rather than on the formal and factual inquiries into rational connection and less restrictive means.

B Strict proportionality in *Lawyers for Human Rights*

Lawyers for Human Rights v Minister of Home Affairs did not involve a particularly challenging set of facts, and the judgment does not abound with ground-breaking judicial reasoning. It was on the contrary a quite straightforward case, involving a challenge to the constitutionality of sections of the Immigration Act 13 of 2002 on the grounds that they unjustifiably infringed

[17] *Manamela* (note 4 above) at para 32.

[18] Petersen (note 7 above) at 86, 208–209. The cases that Petersen understands as relying on proportionality in the strict sense are: *Makwanyane* (note 3 above); *S v Niemand* [2001] ZACC 11, 2002 (1) SA 21 (CC); *Ex parte Minister of Safety and Security: In re S v Walters* [2002] ZACC 6, 2002 (4) SA 613 (CC); and *De Vos NO & Others v Minister of Justice and Constitutional Development & Others* [2015] ZACC 21, 2015 (2) SACR 217 (CC). See also N Petersen, 'Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court' (2014) 30 *South African Journal on Human Rights* 405; S Woolman and H Botha 'Limitations' in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, 2008) Chapter 34 at 69–100 (On proportionality analysis).

[19] R Stacey 'The Application of Proportionality in the Case Law of the South African Constitutional Court' in M Kremnitzer & T Steiner (eds) *Proportionality in Action: Comparative and Empirical Perspectives on Judicial Practice* (2019)(forthcoming).

constitutional protections against detention without trial and arbitrary deprivation of freedom.[20] The Constitutional Court agreed with the Pretoria High Court that the impugned sections did indeed limit these rights and that these limitations were not reasonable and justifiable, grounding its decision in a broad application of strict-sense proportionality reasoning.

The Court began by noting that the objective of the Immigration Act is to regulate the admission to and departure of foreigners from South Africa. Its preamble declares that the detection, reduction and deterrence of illegal immigration are objectives of the Act, while also acknowledging that the contributions of migrants to South Africa are valuable and that it is important to promote human rights and minimise xenophobia. Much of the scheme of the Act, however, is geared towards finding and deporting illegal migrants. Section 2(1)(c), for example, provides that one of the primary objectives of the Department of Home Affairs is 'detecting and deporting illegal foreigners'. Section 1 then defines an 'illegal foreigner' as a person who is neither a citizen nor a permanent resident and is in contravention of the Act or is a 'prohibited person', and s 29 in turn defines prohibited persons broadly, to include people sick with infectious diseases, people with criminal convictions, and people who have previously been deported.[21]

To reduce and deter illegal migration, the Act includes provisions that grant wide-ranging powers to authorities to detain migrants for the purposes of deporting them. Section 34 of the Act, the provision at the heart of the case, empowers immigration officers to arrest 'illegal foreigners' without a warrant and detain them 'at a place determined by the Director-General' of the Department of Home Affairs until they are deported. Section 34(1)(d) provides that such persons may be detained for up to 30 days without a warrant of court, and for up to 90 days thereafter with a warrant of court. As the Constitutional Court put it, the section 'grants drastic power to an administrative official'.

The applicants' primary complaint against the provision was that it imposed neither constraints nor guidelines on officials' exercise of this drastic administrative power, nor provided an opportunity for judicial scrutiny until after 30 days of detention. And even for detention beyond 30 days, section 34(1)(d) did not require the court considering the Department's application for a warrant to hear the detainee in person. Quoting from its 1998 discussion of the prohibition on detention without trial in *De Lange v Smuts*, the Court noted:

---

[20] Constitution, s 12(1)(a) and (b) reads, in relevant part:
Everyone has the right to freedom and security of the person, which includes the right–
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial …

[21] Section 29(1)(Prohibited Persons)(The following foreigners do not qualify for a temporary or a permanent residence permit:
(a) those infected with infectious diseases as prescribed from time to time;
(b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country with which the Republic has regular diplomatic relations in respect of genocide. terrorism, murder, torture, drug trafficking, money laundering or kidnapping;
(c) anyone previously deported and not rehabilitated by the Department in the prescribed manner;
(d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence; and
(e) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends.)

> History nevertheless emphasises how important the right not to be detained without trial is and how important proper judicial control is in order to prevent the abuses which must almost inevitably flow from such judicially uncontrolled detention.[22]

Having decided that the impugned provisions limited constitutional rights,[23] the Court spent a few short paragraphs determining that the limitations were not reasonable or justifiable and could not therefore be saved by s 36 of the Constitution. The state sought to justify the right's limitation on the basis that it would prove costly and judicially onerous to bring every detained migrant before a court. The objective served by limiting illegal migrants' fair trial and freedom rights, the state argued, was avoiding the costs that would be incurred by respecting those rights.[24]

In responding to this argument, the Court did not bother with a sequential procession through the inquiries into whether saving costs is an important or legitimate objective by itself,[25] if the rights-limiting measure was rationally connected to that objective or whether there were less restrictive means available to achieve it. Rather, the Court satisfied itself with what seems to be an uncomplicated conclusion that the cost-saving benefits of limited judicial oversight of immigration detention do not justify the harms that flow from limiting rights to fair trial and personal freedom. The Court found the state's arguments in this respect 'woefully short of justifying the limitations'.[26]

This is an example of proportionality analysis in its strict sense, with no reliance at all on whether less restrictive means to deter illegal migration were available. Even though the Court could have considered whether it would be less invasive of rights to fair trial to require a warrant for any detention beyond, say, 48 hours or 72 hours rather than 30 days, it did not do so. An inquiry into less restrictive alternatives was not necessary to the Court's conclusion that the measure was disproportionate. Rather, the Court's decision relies on the assessment that it is more important, as a matter of constitutional principle, for the law to prohibit the limitation of rights to fair trial and personal freedom than it is for the legal system to save the costs of additional court hearings.

Lawyers for Human Rights lies along a path of jurisprudence in which strict-sense proportionality analysis figures large in the resolution of limitations inquiries. This jurisprudence has established strict-sense proportionality analysis as a recognised form of reasoning in constitutional litigation, and perhaps as a result, the reasoning in *Lawyers for Human Rights* is

[22] *Lawyers for Human Rights* (note 8 above) at para 39, quoting *De Lange v Smuts NO* [1998] ZACC 6, 1998 (3) SA 785 (CC) at para 27.

[23] Ibid at paras 52–58.

[24] Ibid at para 59.

[25] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* [2004] ZACC 10, 2005 (3) SA 280 (CC) at paras 47–50 (Court accepted that avoiding administrative burdens could be a legitimate objective for the state to pursue.) See also *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1, 2002 (2) SA 794 (CC)(Court held that a religious exemption to the criminal prohibition on cannabis use, while a less restrictive alternative than a blanket prohibition, would impose additional costs and administrative burdens on the police that would undermine their ability to achieve the main objectives of reducing the harmful effects of narcotic drug use.) But see *Minister of Justice and Constitutional Development & Others v Prince* [2018] ZACC 30; 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC)(Court holds that the blanket prohibition on dagga use violates the right to privacy in a manner that could not be justified by the law's objective of reducing its allegedly harmful effects or complying with international treaties regarding drug trafficking.)

[26] *Lawyers for Human Rights* (note 8 above) at paras 61 and 63.

not as full or as explicit as in some of those earlier cases. I refer to *Lawyers for Human Rights* here, not because it is an exemplar of clear and thorough strict-sense proportionality reasoning but precisely because it is not. The Court's argument is merely emblematic of proportionality in the strict sense as a form of argument on which the Court can rely when appropriate. And because that form of argument is established and recognisable, the Court need do little more to justify its conclusion than to say that the reason for the limitation – saving costs – is not compelling or persuasive enough to warrant a serious limitation of rights to fair trial and personal freedom.

This path of reasoning has become so embedded in South African constitutional jurisprudence, such that the Court could follow it in somewhat pedestrian fashion in *Lawyers for Human Rights*, only because several judgments before now have already laid out in a deeper way how to think through questions justifiability in light of constitutional values. In the reference regarding *S v Walters,* for example, the Court concluded that shooting dead a person suspected of having committed a crime as petty as stealing an apple from a fruit-stand is a manifestly disproportionate way to pursue the objective of apprehending people suspected of having committed crimes.[27] The Court's analysis begins by noting that s 36 'requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment'.[28] Framing the inquiry explicitly in light of constitutional values, the Court went on:

> What looms large … in the present case, is that the right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of any of these rights, would for its justification demand a very compelling countervailing public interest.[29]

The flaw in the statutory scheme that authorised the use of deadly force, the Court said, was that it drew no distinction between the use of such force in different situations. If a fugitive poses no threat to other people, it went on, there is no justification for the use of deadly force.[30] Only the pursuit of objectives as compelling as the need to protect rights to life, dignity and bodily integrity more broadly – that is, objectives closely tied to the Constitution's value system – could justify the use of deadly force.

Following similar logic, in *S v Niemand* the Court struck down statutory provisions requiring seven-year minimum prison sentences for 'habitual criminals', even for the commission of crimes 'which do not constitute violence or a danger to society'. The Court held that the provisions limited the right not to be arbitrarily deprived of freedom, and further that the limitation was 'grossly disproportionate' to the value of separating non-violent criminals from society.[31]

More recently, the Court was asked to decide whether a common-law action in tort should continue to lie to a non-adulterous spouse against a third person with whom an adulterous spouse had engaged in an affair.[32] The common-law wrong of *contumelia*, the Court noted, exists because it is a 'blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent'.[33] The common-law action serves a

[27] *Walters* (note 18 above) at paras 41–46.
[28] Ibid at para 27.
[29] Ibid at para 28.
[30] Ibid at para 46.
[31] *Niemand* (note 18 above) at paras 19 and 25.
[32] *DE v RH* [2015] ZACC 18, 2015 (5) SA 83 (CC).
[33] Ibid at para 60, quoting *Mayelane v Ngwenyama & Another* [2013] ZACC 14, 2013 (4) SA 415 (CC) at para 74.

cuckolded partner's dignity by allowing them to recover damages from third persons, and protects the dignity of spouses more generally to the extent that it may deter adultery and preserve the sanctity of marriage.[34] The crisp question before the Court was whether these objectives justified intrusions into both the adulterous spouse's and the third person's rights to privacy, 'to have a sexual relationship with whomever he or she chooses', and to personal freedom and security.[35]

The Court decided that the action for *contumelia* will no longer be part of South African common law because it cannot be considered wrongful, in light of the 'community's general sense of justice', the 'legal convictions of the community' or 'public policy', for one person to engage in a sexual relationship with another person who happens to be married. The Court made it clear that the determination of wrongfulness depended on the 'balance' to be struck between the potential infringement of non-adulterous spouses' dignity on one hand, and the actual infringement of adulterous spouses' and third parties' rights on the other hand.[36] Moreover that balance – and thus wrongfulness in this case – is 'informed by our constitutional values'.[37] The judgment is thus a morally rich assessment of whether protecting a non-adulterous spouse's dignity and the sanctity of marriage on one hand, or people's freedom to choose whom to have sex with on the other hand, is more closely aligned with constitutional values.

A further case, *Gaertner v Minister of Finance,* illustrates more sharply the interplay between strict-sense proportionality analysis and the inquiry into less restrictive alternatives.[38] The case concerned provisions in the Customs and Excise Act 91 of 1964 allowing customs inspectors to enter a wide range of premises without a warrant of court. Key to the Court's finding that these provisions imposed an unjustifiable limitation of the right to privacy was the conclusion that requiring a warrant for entry into premises where the expectation of privacy is high, such as a person's home, would be a less restrictive means to enforcing customs and duties than searches without a warrant.[39]

This finding does not stand on its own, however. Some searches, the Court remarked, 'are generally more invasive and involve a greater limitation of the right to privacy'.[40] The warrantless search of a person's home is a more serious infringement than the warrantless search of a person's place of business or warehouse.[41] These more invasive searches in turn require more compelling justifications: while the objectives of the Customs and Excise Act are important enough to justify the less extensive privacy violation of a warrantless search of a business, they are not important enough to justify the warrantless search of a person's home.

The availability of a less restrictive way of enforcing customs and duties – ie, search on warrant of a person's home – is not, however, the reason for the Court's conclusion that the limitation was unjustifiable. Rather, it is a solution to the underlying disproportionality between the serious limitation imposed by warrantless home searches and the importance of enforcing customs and duties. Regardless of whether or not less restrictive alternatives are available, warrantless home searches cannot be justified by the objectives of the Customs

[34] *DE v RH* (note 32 above) at para 26.
[35] Ibid at paras 54–58.
[36] Ibid at paras 62–63.
[37] Ibid at para 51.
[38] *Gaertner & Others v Minister of Finance & Others* [2013] ZACC 38, 2014 (1) SA 442 (CC).
[39] Ibid at paras 68–73.
[40] Ibid at para 65.
[41] Ibid at paras 62–63.

and Excise Act. It is not the factual availability of less restrictive alternatives that renders the impugned provisions unjustifiable, but the conclusion that constitutional values in this case are better served by prohibiting warrantless searches of homes than allowing them. The Court's determination that there are less restrictive means to achieve the Act's objectives is consistent with and supportive of the primary conclusion that the rights limitation is disproportionate, but is not necessary to that primary conclusion.

C The rule-of-law objection to moral reasoning

The cases I identify in the previous section are examples of a kind of moral reasoning in the Court's limitations jurisprudence. In these cases, the decision whether to uphold rights or allow their limitation depends on the persuasiveness of arguments that one course of action produces results that are more consistent with the values on which the constitutional order depends and which section 36(1) explicitly articulates.[42] In balancing rights and their limitations, section 36(1) instructs judges to consider which option more faithfully advances the Constitution's commitment to openness, democracy, equality, freedom and dignity.[43]

But this form of reasoning faces the criticism that it is unintelligible to anyone but the judge, undermines the certainty of law, and in turn dulls law's efficacy as a tool for ordering the behaviour of its subjects.[44] The premise of this criticism is that if the law is to guide social

[42] J Raz 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in his *Between Authority and Interpretation* (2009) 323, 325 and 328. Joseph Raz takes it as a defining feature of constitutionalism that any given constitution reflects 'principles of government … that are generally held to express the common beliefs of the population about the way their society should be governed'. He argues further, in a passage that evokes some of what I argue is going in the Constitutional Court's strict-sense proportionality analyses, that constitutional theory purports to explain 'under what conditions the constitution of a country is legitimate, thus fixing the condition under which citizens have a duty to obey it. In doing that, it provides an account of the principles of political morality that underpin the constitution, in that they justify and legitimize its enforcement. This affinity between moral reasoning and constitutional adjudication in Raz's theory is the core of the argument I set out in part V, that even less restrictive means analysis depends on moral reasoning.

[43] HCJ 14/86 *Laor v Israel Film and Theatre Council* [1987] IsrSC 41(1) 421 (The Supreme Court of Israel has described the proportionality analysis involved in the justification of rights limitations as an inquiry into whether upholding a right or allowing its limitation is more 'socially important'.) See also A Barak *Proportionality: Constitutional Rights and Their Limitation* (2012). Former Chief Justice of Israel Aharon Barak notes in his extra-curial writing that what is socially important, in turn, depends on 'political and economic ideologies, from the unique history of each country, from the structure of the political system and from different social values'. Ibid at 349. The social importance of protecting a right against limitation or allowing the limitation of a right in a particular case, Barak goes on, is derived from the constitution's purposes and the degree to which upholding either option 'advance[s] the legal system's most fundamental values.' Ibid at 361.

[44] For a handful of critics of strict-sense proportionality analysis on this rule-of-law basis, see S Takyrakis 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; G Webber 'Proportionality, Balancing and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179; F Urbina 'Is it Really that Easy? A Critique of Proportionality and "Balancing and Reasoning"' (2014) 27 *Canadian Journal of Law and Jurisprudence* 167 and F Urbina *A Critique of Proportionality and Balancing* (2018). For a handful of critics of moral forms of legal analysis more broadly, on rule-of-law grounds, see R Epstein *Design for Liberty: Private Property, Pubic Administration and the Rule of Law* (2011); R Epstein 'Why the Modern Administrative State is Inconsistent with the Rule of Law' (2008) 3 *NYU Journal of Law and Liberty* 491 and FA Hayek *The Road to Serfdom* (1944). See also accounts of this tension between the rule of law and moral reasoning in B Tamanaha 'The Tension between Legal Instrumentalism and the Rule of Law' (2005) 33 *Syracuse Journal of International Law and Commerce* 131 and J Waldron *The Rule of Law and the Measure of Property: The Hamlyn Lecture Series* (2012).

conduct and provide a framework of rules within which people can act, then those rules need to have certain characteristics. Lon Fuller offers one laundry list of these characteristics, which he famously called the principles of legality: laws must be clear, public, applicable to everyone generally, consistent with one another, non-retroactive, stable over time, and they cannot command the impossible. In addition, public officials' conduct must be congruent with previously declared rules.[45]

One of the most basic commitments of the rule of law is that authority over people be exercised only through law, and in accordance with law's previously promulgated rules. It is the law that should instruct people how to behave, rather than princes, dukes, or highwaymen with guns. And when public officials instruct members of society what and what not to do, those instructions must themselves remain within the limits of the law. If the bureaucratic or judicial administration of a legal system is not sufficiently consistent with Fuller's principles of legality, the argument goes, it sacrifices this most basic value of the rule of law. Laws that are not clear or public, for example, make it difficult for people to know how they are supposed to behave and makes official enforcement of those laws against them arbitrary and unpredictable. Even if laws meet the first seven of Fuller's principles of legality, the rule of law will be replaced by the rule of persons if officials' conduct is incongruent with previously declared rules.

These rule-of-law commitments are just as much an issue in the courtroom as in law-making or the bureaucratic functions of the administrative state. As legal officials, judges are just as much constrained by previously declared rules as any other official. But just about every legal dispute between private parties involves a disagreement about what the law actually allows or requires. In the hard cases where the law has no answer as to how to resolve a dispute, judges must exercise a degree of discretion to decide what the law does mean.[46] Although there is an area of indeterminacy at the penumbra of law's settled core,[47] judging in this marginal penumbra can remain consistent with the rule of law if, in Blackstonian fashion, judges make new rules that both settle the dispute before them and apply generally and clearly to similar disputes in the future.[48]

Judicial decisions that rely on proportionality in the strict sense, however, appear to the critics to evade formulation as general rules applicable to future cases. There is no clear, public, or intelligible standard or metric by which judges determine the moral weight of rights and the

[45] L Fuller *The Morality of Law* (note 10 above). For other laundry lists of principles of legality, with minor variations T Bingham *The Rule of Law* (2010); J Raz 'The Rule of Law and its Virtue' in *The Authority of Law* (1979) 211, 214–218 and L Solum 'Equity and the Rule of Law' in *The Rule of Law – Nomos* XXXVI (1994).

[46] H Hart *The Concept of Law* (1961) and R Dworkin 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14 (reprinted as 'The Model of Rules I' in R Dworkin *Taking Rights Seriously* (1978) (just how much discretion judges have is the subject of the dispute between HLA Hart and Ronald Dworkin).

[47] H Hart 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 607–615.

[48] For William Blackstone, the slow, evolutionary, case-by-case development of the common law ensures systemic justice in the law, allowing judges to fine-tune the rules of law by their application in the penumbra of legal uncertainty, as law works itself pure (*Commentaries on the Laws of England* (19 Edition, 1867). For Jeremy Bentham, however, the common law is confusing, conflicting, mystifying and unintelligible to everyone bar an elite and educated few. J Bentham *A Fragment on Government* in J Burns & H Hart (eds) *A Comment on the Commentaries and a Fragment on Government* (1977) 410–412). On the requirement that judges aim to fashion clear rules that can be applied in future cases see A Scalia 'The Rule of Law as the Law of Rules' (1989) 56 *University of Chicago Law Review* 1175.

competing objectives that rights limitations serve.[49] On the contrary, this rule-of-law objection continues, the weights that judges attach to these competing interests are products of nothing other than the subjective moral intuitions of each judge.[50] The balancing inquiry, as the Canadian constitutional scholar David Beatty puts it,[51] is a 'freewheeling' and 'unprincipled' moral frolic that neither relies on nor generates clear, stable, predictable, or publicly knowable rules of conduct, and is for that reason incompatible with a commitment to the rule of law.

Although it is not my main concern here, I believe much of this criticism can be allayed by conceiving of strict-sense proportionality analysis not as the direct weighing up or balancing of the value of rights and the value of competing objectives, but as the assessment of each against the constitutional values each system happens to commit to.[52] In any case, the point for present purposes is that these critics of strict-sense proportionality analysis prefer less restrictive means analysis because, on their view, it is more intelligible and better upholds a commitment to the rule of law. It is to this mode of proportionality reasoning that I now turn.

III *CHEVRON V WILSON*

A The path of least restriction

Not unlike *Lawyers for Human Rights*, the Court's reasoning in *Chevron v Wilson* is not likely to make it into a handbook of constitutional law. This is not because it is faulty or suspect, but rather that the judgment does not add much to the existing jurisprudence. As in *Lawyers for Human Rights,* the Court mostly treads a path of reasoning already laid down. Unlike *Lawyers for Human Rights,* however, the conclusion in *Chevron* rests most apparently on the factual finding that there are means less restrictive than those chosen by the government to achieve the objectives it set out to achieve.

The case involved an arrangement between the operator of a transport company (Wilson) and the supplier of petroleum products to Caltex petrol stations (Chevron) in terms of which the transport company filled its vehicles with petrol at Caltex stations on credit and paid in bulk at the end of each month. At some point a dispute arose as to the accuracy of Chevron's billing, and after Wilson refused to pay the amounts that Chevron claimed was owing to it, Chevron brought suit in the magistrate's court. During proceedings it became clear that Chevron was

[49] The complaint that strict-sense proportionality analysis involves the comparison or weighing up of incommensurable goods – the 'incommensurability objection' – is just one element of the broader concern that strict-sense proportionality analysis, at least when conceived of as balancing, is either inconsistent with the rule of law or simply incoherent. *Bendix Autolite Corp v Midwesco Enter Inc* 486 US 888, 897 (1988)(Scalia J); N Petersen 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2013) 14 *German Law Journal* 1387; S Woolman & H Botha 'Limitation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, 2008) Chapter 34, at 69–100 (On balancing as an inapt metaphor and the inevitability of incommensurability given the goods and values that must be squared).

[50] In addition to the critics listed in note 44 above, a summary of this line of criticism can be found in N Carmi 'The Nationality and Entry into Israel Case before the Supreme Court of Israel' (2007) 22 *Israel Studies Forum* 26, 33; K Möller 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 727–730. Similarly, Ronald Dworkin characterises the objection to discretionary judicial reasoning in hard cases as rooted in the sense that it 'seems unfair, contrary to democracy, and offensive to the rule of law'. Dworkin *Taking Rights Seriously* (note 46 above) at 123.

[51] D Beatty *The Ultimate Rule of Law* (2004) 171.

[52] R Stacey 'The Magnetism of Moral Reasoning' (note 6 above).

not a registered credit provider in terms of s 40 of the National Credit Act 34 of 2005. The Act provides that credit arrangements made by unregistered credit providers are unlawful from the moment they are concluded, and that any amounts paid to the credit provider under the terms of the agreement must be paid back to the consumer (s 89(5)(a) and (b)). Applying these provisions, the magistrate's court found itself obliged to order Chevron to pay back to Wilson all the money already paid to it – some R33 million (about US $2.5 million).

Chevron approached the Cape Town High Court and in turn the Constitutional Court for an order declaring that s 89(5) of the National Credit Act amounts to an unjustifiable limitation of the right not to be arbitrarily deprived of property (s 25(1) of the Constitution). Both courts agreed that requiring the refund of monies already paid by a credit consumer by an unregistered credit provider amounts to a deprivation of property, and further that in leaving courts no discretion to make an order that is just and equitable in the circumstances, the deprivation was arbitrary.[53]

Turning to whether the limitation of the right could be justified, the Constitutional Court began with a statement that genuflects at the altar of proportionality in the strict sense: 'To determine whether there is sufficient reason for a deprivation' the Court said, 'it is necessary to evaluate the relationship between the purpose of the law and the deprivation caused by that law.'[54] In the very next paragraph, however, after noting that the purpose of s 89(5) of the National Credit Act is to protect consumers from predatory lenders, the Court fell back on the inquiry into whether there were less restrictive means to achieve that purpose.[55] Recognising that a judicial discretion to make an order that is just and equitable in the circumstances is less restrictive than the peremptory injunction to order the full refund of all monies paid, the Court concluded that the limitation of property rights was not justifiable.

The judgment in *Chevron v Wilson* does not engage in any outright reasoning about or balancing of the moral value of protecting consumers from predatory lenders on one hand, and the moral value of preserving property from arbitrary deprivation on the other. As I argue in part V, I think there is necessarily some moral reasoning at work in cases like this, first of all in concluding that the impugned limitation is disproportionate whether or not there are less restrictive alternatives, and second in assessing whether the less restrictive alternative – in this case a judicial discretion to craft an appropriate remedy – is itself a justifiable limitation of property rights and thus actually a meaningful alternative. But the point for present purposes is that whether or not the less restrictive alternative imposed a justifiable limitation, the Court held that because in fact there was a less restrictive alternative available, s 89(5)(b) imposed a necessarily disproportionate limitation.

Unlike *Lawyers for Human Rights* where the inquiry into strict proportionality did all the work in finding the limitation unjustifiable, or *Gaertner* where the inquiry into less restrictive means was tied up with an inquiry into proportionality in the strict sense, the Court here does not even reach the stage of strict proportionality balancing. There are other examples where the Court relies on similar reasoning, but I mention only one here by way of example – the earliest I could find in the Court's record. In 1995, the Court considered in *S v Ntuli* whether statutory restrictions on self-represented appeals against criminal convictions by persons already serving prison sentences for those convictions unjustifiably limited rights to fair trial and

[53] *Chevron v Wilson* (note 9 above) at paras 17–24.

[54] Ibid at para 32.

[55] Ibid at para 33.

equality before the law.[56] Section 305 of the Criminal Procedure Act 51 of 1977 provided that self-represented appeals could proceed only if a high court judge certified that there were reasonable grounds for appeal.[57]

Having found that the provisions did indeed limit fair trial and equality rights, the Court then considered if the limitations were justifiable. Identifying the purpose of the provisions as avoiding the crowding of courts rolls with frivolous appeals at the expense of meritorious ones, the Court concluded that the requirement for a judge's certificate was more restrictive than it needed to be because it presumes, without evidence, that only the frivolous appeals will get stopped. Since a variety of alternative mechanisms existed for controlling frivolous appeals,[58] the Court found that the mere possibility that the need for a judge's certificate would stop meritorious appeals was enough for it to conclude that 'the means used to achieve the end therefore go beyond it' and were disproportionate.[59]

At no point, however, did the Court consider whether the objective of reducing the number of frivolous applications for appeal was proportional, in the strict sense, to the limitation on rights that the requirement for a judge's certificate imposed. That is, the Court did not ask whether the extent of the limitation on the right to appeal imposed by the requirement of a judge's certificate was justified by the benefits of a less crowded court roll.

B De-moralising proportionality analysis

One way of looking at cases like *Ntuli* and *Chevron v Wilson* is that, sometimes, a court need not reach the morally rich inquiry into proportionality in the strict sense in order to find that the limitation is unjustifiable. If a rights-limiting measure is unlikely even to achieve its purpose, then surely there can be no justification at all for the limitation. Similarly, if the same objectives that a rights-limiting measure aims at can be achieved in a manner that is less restrictive of rights, then surely the less restrictive approach is preferable and the more extensive limitation is not justified.

Fact-centred reasoning of this kind eliminates – or purports to eliminate – the moral reasoning that strict-sense proportionality analysis involves. To the extent that less restrictive means analysis involves no moral judgments, it is able to sidestep the rule-of-law objection levelled against strict-sense proportionality analysis. The core of this rule-of-law objection is that judges' subjective moral reasoning suffers from the same unintelligibility that for Jeremy Bentham runs through the common law as a whole.[60] The moral intuitions of judges are not accessible to or intelligible to the subjects of judicial decisions, and in many cases not necessarily reflective of or shared by the members of the society subject to those decisions. Allowing judges to make decisions on the basis of these inaccessible intuitions, so the objection goes, undermines the authority of law because those decisions are not persuasive to those who do not share the same moral intuitions.

If hard cases about rights limitations can be solved without the impressionistic, subjective, ad hoc and unprincipled moral reasoning that strict-sense proportionality analysis requires judges to engage in, and rather according to rules that are more transparent and intelligible

[56] *S v Ntuli* [1995] ZACC 14, 1996 (1) SA 1207 (CC).
[57] Ibid at para 4.
[58] Ibid at para 28.
[59] Ibid at para 24.
[60] See J Bentham *A Fragment on Government* (note 49 above).

than judges' moral intuitions, then the commitment to the rule of law and the principles of legality will be better upheld.[61] Judicial decisions can be more easily justified to those they affect, the argument goes, if their conclusions depend on objectively verifiable evidence and facts about the world.[62]

At the same time, the fact-focused decision rules of the less restrictive means inquiry constrain whatever discretion judges do have to make new law in the penumbra of legal uncertainty. Judicial decisions about limitations, guided by what the evidence suggests is the least restrictive approach to achieving some set of objectives, are less influenced by whatever moral commitments a judge happens to have. And precisely because less restrictive means analysis decentres moral reasoning from limitations analysis, the argument goes that court judgments are more intelligible and more easily justified to legal subjects when they rely on less restrictive means analysis to the exclusion of strict-sense proportionality analysis. It is precisely this de-moralising exercise – the removal of moral reasoning from proportionality analysis – that purports to inoculate it against the rule-of-law objection. On this argument, a judgment like *Chevron v Wilson* is more intelligible, more easily justified to legal subjects, and thus more consistent with the rule of law than a judgment like *Lawyers for Human Rights.*

IV PROPORTIONALITY ANALYSIS AND THE CONCEPTION OF LAW

The South African Constitutional Court's record reflects how it has relied on both less restrictive means analysis and strict-sense proportionality analysis in considering the constitutionality of rights limitations.[63] A court's reliance on less restrictive means analysis in some cases and strict-sense proportionality analysis in others can be explained, I think, by the court's view as to which mode of reasoning is more intelligible to legal subjects in each case, and thus which produces the more persuasive judgment.

If we accept the idea that a judicial decision must be intelligible to legal subjects if it is to be an authoritative statement of law, then this debate about the relative intelligibility of modes of proportionality analysis is important. The fact that there is an ongoing debate about whether one mode of reasoning is more intelligible, more predictable, more consistent with the rule of law and so on, suggests that we are indeed committed to the idea that judicial decisions must be intelligibly justified.[64]

[61] D Beatty *The Ultimate Rule of Law* (note 51 above) at 74.

[62] M Cohen-Eliya 'The Formal and Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence' (2005) 38 *Israel Law Review* 262, 263.

[63] N Petersen notes that the Court has tended to favour a more fact-based reasoning of less restrictive means analysis in order to strike down rights limitations contained in legislation. *Proportionality and Judicial Activism* (note 7 above) at 109–110. In contrast, the Court has been more willing to rely on strict-sense proportionality analysis to strike down provisions in the common law and to uphold as justifiable statutory rights limitations.

[64] The works listed above (note 44 above) provide critical commentary on strict-sense proportionality analysis and favour a more objective test like the less restrictive means test. For authors supportive of proportionality in the strict sense, and who engage with its detractors, see R Alexy *A Theory of Constitutional Rights* (2002), 402–411; A Barak *Proportionality* (note 43 above); K Möller 'Proportionality: Challenging the Critics' (note 50 above); M Khosla 'Proportionality: An Assault on Human Rights? A Reply' (2010) 8 *International Journal of Constitutional Law* 298 (Replying to Tsakyrakis); S Tsakyrakis 'Proportionality' (note 44 above). But see Tsakyrakis's rejoinder in S Tsakyrakis 'Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla' (2010) 8 *International Journal of Constitutional Law* 307 and M Klatt & M Meister 'Proportionality: A Benefit to Human Rights? Remarks on the ICON Controversy' (2012) 10 *International Journal of Constitutional Law* 687.

I am not interested at this point, however, in which form of reasoning is in fact more intelligible, or even if measuring such a thing is possible at all. Rather, I consider in this part of the article how each of these paths of proportionality analysis makes a claim to intelligibility, and in turn to authority, and how those claims connect each path of proportionality analysis to different conceptions of law and of the rule of law. In part V which follows, I argue that the differences between these conceptions are actually not all that stark, and that less restrictive means analysis ultimately relies on much the same kind of moral reasoning as proportionality in the strict sense. For both modes of reasoning, intelligibility and authority depend on making arguments that are morally persuasive, rather than merely factual persuasive.

A Raz's positivism: a service conception of the constitution

Consider again how less restrictive means analysis claims to meet the rule-of-law objection by replacing substantive moral reasoning about the value of rights and competing limitations with a factual calculus about which course of action impairs rights less. In doing so, less restrictive means analysis fits the mould of what Joseph Raz calls the 'service conception of authority'. Raz sees the service function of the law as providing rules for conduct which are binding on us, or authoritative, because they claim to align our conduct more closely to the legal system's basic normative commitments than do our own judgments about how we ought to behave. We defer to legal authorities for guidance on how we should behave – courts in cases of disputes, legislatures in the case of our everyday behaviour – in order to avoid having to engage for ourselves in complicated moral reasoning about how we ought to act. 'The whole point and purpose of authorities', Raz says, 'is to preempt individual judgment on the merits, and this will not be achieved if in order to establish whether the authoritative determination is binding individuals have to rely on their own judgment of the merits.'[65] Raz calls this the 'pre-emption thesis'.

Along with the pre-emption thesis, Raz's service conception of authority combines two other ideas: the 'dependence thesis' and the 'normal justification thesis'. The dependence thesis captures the idea that there are already reasons for people to act in particular ways, and on which law's normative force depends. These reasons for action would apply to people in the absence of the law, and legal directives or rules should therefore summarise and reflect these already existing reasons. The 'normal justification thesis' maintains that law is justified, and thereby claims authority, because people are likely to better comply with these already existing reasons for action if we follow the law's directives than if we try to work out for ourselves what those reasons or norms require us to do. The law generally and legal rules and judgments specifically are meant to replace or pre-empt the reasons on which they depend, giving the subjects of the law a new reason for acting in one way or another.[66]

In Raz's view it is easier, for example, to pay the taxes that the tax agency tells us to pay than to try and work out for ourselves what percentage of our earnings would be just or reasonable to redistribute or to give to the civic institutions that provide services like sewerage, waste removal, health care and social security. The service of law is that it absolves ordinary people from having to deduce from first principles how we should behave. Instead of engaging in primary moral reasoning ourselves, we can rely on legal authorities to tell us what to do because

[65] J Raz 'Authority and Justification' (note 11 above) at 15.

[66] J Raz 'Authority, Law and Morality' (1985) 68 *The Monist* 295, 297–299 (reprinted in J Raz *Ethics in the Public Domain* (1994) 210.)

all the moral calculations have already been done, by the legislature in formulating the law or by the courts in applying the law.

It is important to note that for Raz, however, the point is not that law must in fact do a better job than we could do ourselves of aligning our conduct with norms, but that a legal system must necessarily make the claim that it does so. Moreover, a legal system must display the qualities that make such a claim possible. 'To claim authority', Raz argues, a legal system 'must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority.'[67] A central feature of such a legal system, he goes on, is an identifiable and intelligible set of legal rules. Law is normally justified – that is, acquires 'legitimate' rather than merely 'de facto' authority[68] – by its capacity to intelligibly convey to us how already existing norms require us to behave, and to pre-empt those norms as reasons for action. To this end, law must in the first place be identifiable.[69] Of course, lawyers, judges and legal subjects will continue to engage in some degree of argument about out how the law applies to particular disputes and how the law might require us to act in particular circumstances, but the answers to those inquiries no longer depend, for Raz, on moral reasoning about the normative commitments that happen to underlie the law.

This leads Raz to a defence of the 'sources thesis', a central theme in the tradition of modern legal positivism. The sources thesis posits that the only determinant of a legal rule's validity is its source. Legal validity is on this view a matter entirely separate from the question of law's moral virtue, and the latter simply plays no role in determining if law is valid or not.[70] By looking only to a purported legal rule's provenance, we can more certainly identify what is properly considered law that we have reason to obey, than if we were to engage in arguments from first principles about the moral virtues of purported legal rules. As subjects of the law, Raz insists, we need do no more than follow the rules promulgated by recognised sources of law, and we have no business calling into question on moral grounds the authority of laws promulgated by recognised sources. Legal positivism strives for a legal system that is a 'settled, public and dependable set of standards for private and official conduct'.[71] By eliminating moral reasoning from the assessment of a rule's legal validity, the legal system gains the certainty and clarity Raz says it needs to make the claim to authority.

For a court judgment about the constitutionality of a rights limitation to claim authority, on this Razian view, it must provide an intelligible reason for its conclusion that pre-empts any reasoning from moral first principles. Questions about the constitutionality of rights limitations thus elevate the consideration of authority to the constitutional level: while Raz is concerned with how ordinary statutes and court decisions authoritatively mediate between

[67] Ibid at 300.

[68] Ibid at 296–297.

[69] Ibid at 304–306.

[70] H Hart 'Positivism and the Separation of Law and Morals' (note 47 above) at 596 (The 'separation thesis' can be said to be subsumed by the source thesis, to the extent that locating law's validity entirely in its sources necessarily separates its validity from moral considerations). See also R Stacey 'Democratic Jurisprudence and Judicial Review: Waldron's Contribution to Political Positivism' (2010) 30 *Oxford Journal of Legal Studies* 749, 755 and J Gardner 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199.

[71] R Dworkin *Taking Rights Seriously* (note 46 above) at 347. It might look like something of a scarecrow argument to rely on one of legal positivism's greatest critics for a description of it, but Raz himself admits that Dworkin's description of this central element of legal positivism is exactly the account that he wants to defend. J Raz 'Authority, Law and Morality' (note 66 above) at 320.

people and reasons for action, a challenge to the constitutionality of a statute concerns how the constitution and constitutional adjudication authoritatively mediate between the legislature and fundamental constitutional principles. In the same way that normally justified law purports to provide pre-emptive answers to questions about how we ought to behave, replacing any primary moral reasoning we might do in working out what the law actually is, a proportionality analysis that asks only whether there are in fact less restrictive means to achieve an important objective purports to provide pre-emptive answers about the justifiability of rights limitations, absolving courts from having to do any moral reasoning as to whether upholding a right or allowing its limitation better advances the constitution's normative commitments.

Instead of wading into moral debates about the relative value of rights and the policy objectives a limitation aims to achieve, or about the relative harm of limiting a right or choosing not to pursue an incidentally rights-limiting policy objective, courts need only apply a mechanical-decision rule to the facts of the case and report the results. Less restrictive means analysis claims authority for constitutional adjudication to the extent that it produces comprehensible and intelligible reasons for its conclusions. It is the best kind of sausage-making: judges simply feed the factual ingredients into a machine and collect the decisional sausage at the other end, without ever having to think about how sausages are actually made inside the machine or get their hands dirty with whatever sausages are made of. In this service conception of the constitution, the outcomes of fact-based reasoning pre-empt consideration of moral first principles, which judges would otherwise have to try to make sense of in order to decide whether to uphold a right or allow its limitation. And given enduring and reasonable disagreement about the content of our moral commitments, Raz sees this pre-emption of primary moral reasoning as a service indeed.[72]

For Raz, law claims authority because it guides us both to do the things we have reasons to do anyway, and to comply more fully with those reasons than if we were left to work it out for ourselves. The law, in other words, is more intelligible to us as a reason for action than its underlying moral imperatives. Judgments based on less restrictive means analysis, for their part, claim authority to the extent that they uphold underlying constitutional commitments more intelligibly than decisions purporting to explain in moral terms what those constitutional commitments require. The service conception of the constitution thus maps onto Raz's more general conception of the law as a set of authoritative rules that require no moral reasoning to identify.

The Razian flavour to a court's preference for less restrictive means analysis, then, is that the subjective, impressionistic and allegedly less intelligible moral reasoning inherent in strict-sense proportionality analysis undermines the conditions necessary for judgments on rights limitations to claim authority. While fact-centred decision rules allow judges and legal subjects alike to readily identify what the constitution requires, pre-empting moral arguments about what our basic constitutional commitments mean, strict-sense proportionality analysis seems to require exactly these moral arguments. The pre-emptive force of strict-sense proportionality analysis is low, for its part, because it turns on precisely those fundamental questions of morality that Raz's service conception aims to pre-empt. A legal system full of strict-sense proportionality analysis thus risks sacrificing the conditions necessary to make a claim to authority. On this Razian conception of law, rights adjudication can make a claim to authority only by minimising the room for moral reasoning.

[72] Raz 'On the Authority and Interpretation of Constitutions' (note 42 above) at 369–370.

B Fuller's morality: justifying limitations against constitutional commitments

It is the moral reasoning inherent in strict-sense proportionality analysis that makes it a target of the rule-of-law objection. But this objection, I think, rests on an impoverished conception of the rule of law that does not recognise that legal subjects' moral agency is at the very foundation of the commitment to the rule of law.[73] Strict-sense proportionality analysis aligns with a conception of law that is closely connected to Fuller's ideas about the rule of law, rather than the positivist conception of law with which less restrictive means analysis aligns. The key to distinguishing between these different conceptions of law is the way that each understands the rule of law. The problem for proponents of less restrictive means analysis, however, is that Raz endorses a conception of the rule of law that is ultimately impossible to separate from Fuller's. As I argue further, this affinity between Raz and Fuller supports a further affinity between the two paths of proportionality analysis, in that both ultimately involve unavoidably moral reasoning.

I start with the question of why we care about the rule of law in the first place. As subjects of the law, we value clarity and intelligibility in the operation of law not simply because these are good things in themselves for a legal system to have, but because a clear system of rules allows us to make meaningful decisions about our lives. An unintelligible legal system negates the value of people's choices because it makes it more likely that our choices will be frustrated by some legal rule or decision we did not understand or whose implications we could not have anticipated. The instrumental value of a clear and intelligible legal system is that it guarantees that the law respects our choices.

Raz's conception of the rule of law follows this instrumental account. The rule of law is not something that a system of rules must possess in order to qualify as a legal system. On the contrary, Raz sees the rule of law as just one of the stars in the constellation of legal ideals.[74] It is a valuable quality for a legal system to have, in part, because it makes law more effective as a technology of government. Just as sharpness is the 'specific excellence' of knives, the rule of law is the specific excellence of law because the more a legal system sticks to rule-of-law requirements like clarity and intelligibility, the more effective it will be in communicating to us what is allowed and what is proscribed.[75]

Raz also agrees with Fuller that adherence to the rule of law curbs arbitrary power. Raz describes the rule of law as a negative virtue because it limits the danger of arbitrary power that the law enables in the first place,[76] while Fuller contends that adherence to the rule of law limits opportunities for public evil because a conscientiously constructed and administered legal system 'exposes to public scrutiny the rules by which it acts.'[77] Raz accepts, then, that the rule of law is valuable because it constrains the operation of law to stable and predictable channels, minimising unexpected exercises of power and creating room for the meaningful and

[73] R Stacey 'The Rule of Law Sold Short: *A Critique of Proportionality and Balancing* by F Urbina' (2018) 1 *Constitutional Commentary* 129.

[74] Raz 'The Rule of Law and its Virtue' (note 45 above) at 211; J Waldron 'The Classical Lockean Picture and its Difficulties' Lecture 1 in *The Rule of Law and the Measure of Property* (note 44 above) at 1, 12.

[75] Raz 'The Rule of Law and its Virtue' (note 45 above) at 225.

[76] Ibid at 219–220.

[77] Fuller *The Morality of Law* (note 10 above) at 158. See also L Fuller 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 636.

productive exercise of individual agency.[78] The rule of law has value, even for Raz, because it affirms a view of human beings as morally autonomous agents capable of rational action. He warns in this light that to depart from the rule of law is to undermine human dignity by disrespecting legal subjects' moral autonomy.[79]

The difference between Fuller and Raz is that Fuller sees the rule of law not as a virtue to be sought pragmatically, but a quality without which a legal system cannot operate at all. Law as such is internally moral, in Fuller's most famous contribution to legal theory, because it is 'constitutively dependent'[80] on the view of legal subjects as morally autonomous agents. While for Raz it is a contingent good for a legal system to affirm this view of humanity, for Fuller the law can fulfil its function – that is, it can succeed in shaping social behaviour – only if it presupposes that as legal subjects we have the capacity to understand rules and conform our behaviour to them. Law, as such, affirms individual moral autonomy, conceiving of every legal subject as 'a responsible agent capable of understanding and following rules.'[81] As Kristen Rundle puts Fuller's position:

> For Fuller there can be no meaningful concept of law that does not include a meaningful limitation of the lawgiver's power in favour of the agency of the legal subject. This is not a moral objective that is imposed in the enterprise of lawgiving from without it. It is, rather, simply something that follows from the formal distinctiveness of law as the enterprise of subjecting human conduct to the governance of general rules.[82]

From the perspective of constitutional adjudication, the implications of this view of legal subjects are far-reaching. If we find predictability and intelligibility in the legal system valuable because of its service to moral autonomy and the capacity for reason in which individual choice is rooted, then it must be the case that autonomy and the capacity to reason are the primary goods to which predictability and intelligibility are secondary. An intelligible legal system, and in turn intelligible legal reasoning, is valuable only to the extent that it tends to facilitate the exercise of moral autonomy.

Accordingly, law must meet the demands that morally autonomous, rational, and free-thinking people put on it. For Fuller, this requires that legal rules display the characteristics he articulates in his eight principles of legality. Our capacity to act as morally autonomous agents who formulate and pursue life plans just as Raz thinks we do, is seriously undermined when the law changes from day to day, is impossible to understand or to comply with, applies retroactively or is kept secret, or if official behaviour is incongruent with previously declared rules.

But Fuller's principle of congruence encompasses both the highly specific and formal rules of law that make up statutes and regulations, and the fundamental normative commitments on which a legal system rests. Where a constitution happens to make a commitment to a set of fundamental normative values (openness, democracy, dignity, equality and freedom, for example), the principle of congruence demands that official conduct remain congruent with these values as well as with formal rules. Every failure of congruence, whether a departure

[78] Raz 'The Rule of Law and its Virtue' (note 45 above) at 220–222. See also K Rundle 'Form and Agency' (note 12 above) at 776.

[79] Raz 'The Rule of Law and its Virtue' (note 45 above) at 222.

[80] Rundle 'Form and Agency' (note 12 above) at 771.

[81] Fuller *The Morality of Law* (note 10 above) at 162; R Stacey 'Popular Sovereignty and Revolutionary Constitution-Making' in D Dyzenhaus & M Thorburn (eds) *Philosophical Foundations of Constitutional Law* (2016) 161, 171–172.

[82] K Rundle 'Form and Agency' (note 12 above) at 772.

from the formalities of duly promulgated statutes and regulations or from fundamental constitutional values, is for Fuller and for Raz an affront to legal subjects' moral autonomy because it undermines the settled order within which we make decisions about what to make of our lives.

To meet the rule-of-law demand for normative congruence, a government must, in the first place, act in ways that tend to uphold the values to which the constitution happens to commit a political community. But more than this, the commitment to the view of legal subjects as morally autonomous agents requires the government to demonstrate to us, through a process of persuasion and argumentation, that its actions – rights-limiting legislation, for example – are congruent with constitutional values. For government to act only in ways that are demonstrably congruent with underlying values and previously declared rules supplies normative reasons for legal subjects to accept the authority of the law, in turn generating a 'bond of reciprocity' between lawgivers and legal subjects.[83] Strict-sense proportionality analysis is a mode of argumentation tailored to demonstrating whether limiting a right in pursuit of some objective or striking down the limitation and upholding the right better advances the values set out in the constitution.

The value of the rule of law is not only the clear, intelligible and predictable legal system it may generate, as a matter of fact. We value the rule of law and demand normative congruence because, beyond these qualities, it requires the legal system's authorities to demonstrate to us on the basis of rational explanation and argument that laws are oriented toward the fulfilment of the most basic normative commitments of the political community of which we form part. The view of human beings as morally autonomous rational agents who demand justification for the rules that bind us informs a conception of law which, unlike the service conception of the constitution and the legal positivist tradition in which it is steeped, emphasises its moral and normative content.

Strict-sense proportionality analysis responds to the rule-of-law demand that power be exercised according to law, where 'law' as such is understood as having to be justifiable against a legal community's most deeply held moral convictions. 'Legality can produce legitimacy', Habermas suggests, 'only to the extent that the legal order reflexively responds to the need for justification that originates from the positivization of law and responds in such a manner that legal discourses are institutionalized in ways made pervious to moral argumentation.'[84] Strict-sense proportionality analysis is a tool that allows courts and policy makers to make deeply moral arguments explaining decisions with reference to the values that a constitution entrenches at the foundation of the legal order, and thereby to claim authority for their decisions.

V THE MORALITY OF LESS RESTRICTIVE MEANS ANALYSIS

I argued in part IV above that each of the two paths of proportionality analysis that the South African Constitutional Court has travelled since 1994 corresponds to a particular understanding of how law in general, and legal judgments in particular, make a claim to authority. Both modes of reasoning purport to make limitations analysis intelligible to the

[83] L Fuller *Morality of Law* (note 10 above) at 39–41 and J Waldron 'Why Law – Efficacy, Freedom, or Fidelity?' (1994) 13 *Law and Philosophy* 259, 275–280 (Jeremy Waldron describes the valuable core of the rule of law as the 'fidelity to law' that it generates.)

[84] J Habermas *Law and Morality* in S McMurrin (ed) *The Tanner Lectures on Human Values, Volume VIII* (1990) 217, 243–244.

subjects of the law: less restrictive means analysis in Razian fashion by replacing primary moral reasoning with factual analysis, and strict-sense proportionality analysis in Fullerian fashion by arguing that either upholding or striking down a rights limitation is more congruent with basic constitutional values.

Despite these different approaches to law's authority, Raz nevertheless understands the rule of law, as Fuller does, to presuppose and affirm legal subjects as morally autonomous agents capable of rational thought and conduct. This calls into doubt the extent to which less restrictive means analysis, aligned as it is with Raz's service conception of authority, is ultimately capable of pre-empting judges' moral reasoning in limitations cases.

The core of the case I make here is that while less restrictive means analysis may operate on facially factual grounds, it can do so only because the moral reasoning has already been done outside the purview of the less restrictive means inquiry. Less restrictive means analysis does not pre-empt moral reasoning after all, so much as proceed as if the moral conclusions are foregone. Upholding a rights limitation because it has adopted the least restrictive means presupposes that the objective the limitation purports to achieve is important or valuable enough to justify limiting a right (or at least, to justify limiting it minimally). But the less restrictive means analysis does not by itself help us to understand why limiting a right even to that minimal extent is justified by the objective the limitation hopes to achieve: the moral conclusion that the minimally restrictive limitation is justified – i.e. that it is proportionate to the harms it causes – must have already been reached by analytical means other than the less restrictive means inquiry itself.[85]

Indeed, in order to conclude that the government's chosen means of achieving some objective is disproportionate because there is some less restrictive alternative available, it must be the case that that less restrictive alternative is itself proportionate. If it were not, it would not be an alternative open to the government. The difficulty for less restrictive means analysis, however, is that this conclusion about the proportionality of the less restrictive alternative cannot depend on less restrictive means analysis. That would be terribly question-begging. Even where less restrictive means analysis seems to do all the work, in indicating as a matter of fact that there are other ways to achieve an objective that do less damage to rights, the foundations of that analysis are laid by a different mode of reasoning – namely, strict-sense proportionality analysis.

A similar gap in the logic of less restrictive means analysis appears in cases where the adoption of the least restrictive means fails to resolve moral disagreement, or at least fails to persuade legal subjects to put aside whatever moral objections they may have and accept the authority of the decision. Former Israeli Supreme Court Justice Aharon Barak provides an example which corresponds roughly to the situation the South African Constitutional Court confronted in the *S v Walters* reference. If shooting dead a fleeing criminal is indeed the only, and thus least restrictive way to apprehend a criminal, then the reliance on the less restrictive means test alone compels us to accept it as a justifiable rights limitation.[86]

[85] Hickman 'Proportionality' (note 13 above) at 47 (Argues that 'it is artificial in practice to divorce the question of overall proportionality from the potential availability of less-intrusive means'). See also M Zion 'Effecting Balance' (note 13 above); D Réaume 'Limitations on Constitutional Rights: The Logic of Proportionality' (2009) *University of Oxford Legal Research Paper Series, Paper No. 26/2009*, available at http://ssrn.com/abstract=1463853 at 8.

[86] A Barak 'Proportional Effect: The Israeli Experience' (2007) 57 *University of Toronto Law Journal* 369, 373;Barak *Proportionality* (note 43 above) at 342–343.

Whether using deadly force to stop a fleeing criminal is justified or justifiable in certain cases is a serious question, however, about which people may reasonably disagree. To the extent that a limitations inquiry ends with the purely factual conclusion that there are no less restrictive means available, it leaves no room for discussion of these moral disagreements. All this indicates, a proponent of less restrictive means analysis might say, is that a court should not *uphold* a rights limitations unless it has found that it is both minimally impairing and proportionate in the strict sense: it remains open to a court to *strike down* a limitation only because it does not adopt the least restrictive means. But the argument cannot go both ways. There is something self-defeating, or at least internally inconsistent, in asserting on the one hand that a court must avoid moral reasoning in concluding that a less restrictive route to achieving a government objective is a proportionate and thus acceptable alternative to the government's chosen means, and yet demanding on the other hand that a court engage in moral reasoning when an imitation is minimally impairing.

Raz for his part acknowledges that 'legal authority is itself a form of claimed moral authority',[87] to the extent that it relies on already established moral principles. A great deal of legal argument is consequently 'technical' rather than moral, and involves merely explaining what the position in the law actually is. Once the moral justification of a system's ultimate legal rules is established or assumed, Raz goes on, 'the moral justification of the rest of the law is – up to a point – established by technical legal argumentation.'[88] Less restrictive means analysis is persuasive as a form of technical legal argumentation, and makes a meaningful claim to authority, only because moral justifications of the principles on which a particular less restrictive means analysis depends have already been provided elsewhere.

Raz admits that sometimes we do appeal to moral reasons to justify a claim to legal authority, even if we mostly rely on technical argument. Constitutional adjudication presents a special case for Raz, however. Constitutions are morally and legally under-determinative and vague on many issues.[89] In many cases a constitution will provide no clear answers, in the face of people's inevitable disagreement on questions of morality and the indeterminacy of claims to moral truth.[90] In these situations, Raz concludes, formal legal doctrine that is 'detached from moral considerations' should emerge to serve as a 'distancing device' between moral disagreement and the intelligible resolution of legal disputes.[91] It seems to me that less restrictive means analysis is one of these distancing devices which for Raz circumvents any need to morally justify a legal decision. But it is difficult to understand how the non-moral and purely technical justification of a decision that engages precisely those moral matters about which people deeply disagree could be shown to be justifiable to them without any moral argumentation at all. On the contrary, the fact of moral disagreement demands moral argumentation rather than its avoidance.

Recall that in *Gaertner*, a case I discuss above alongside *Lawyers for Human Rights,* the Court found that warrantless home searches in the enforcement of customs and excise legislation unjustifiably infringed the constitutional right to privacy. Its conclusion was supported by its finding that a rule requiring home searches be conducted only with a warrant of court would be less restrictive of privacy. But finding that there are, in fact, less restrictive alternatives carries

[87] Raz 'The Authority of Constitutions' (note 42 above) at 331.
[88] Ibid.
[89] Ibid at 365.
[90] Ibid at 346.
[91] Ibid at 369–370.

the necessary conclusion that the harm flowing from less restrictive, on-warrant home searches of a person's home is proportionate to the value of enforcing customs and excise legislation. Proportionality in the strict sense does all of the argumentative work here, even though the Court relies on less restrictive means analysis.

The Constitutional Court's own record indicates that the inquiries into less restrictive means and strict-sense proportionality are conceptually distinct, and that less restrictive means analysis by itself will sometimes deliver no answer or the wrong answer. The Court has found, for example, that limitations can be disproportionate in the strict sense regardless of whether they are minimally impairing,[92] and perhaps more pertinently has upheld a rights-limiting measure as proportionate in the strict sense even though less restrictive alternatives were available.[93]

The point is not just that less restrictive means analysis and strict-sense proportionality analysis are distinct inquiries and may on occasion support different results. Rather, the important observation is that a conclusion about a rights limitation's constitutionality cannot be grounded entirely in less restrictive means analysis, because there are important questions about the moral relationship between rights and limitations that the less restrictive means analysis leaves unanswered.

And if we understand the rule of law and the notion of law's authority as both Fuller and Raz do, then the reason that judgments need moral justification beyond merely factual justification becomes apparent. It is only by making arguments that appeal directly to legal subjects' capacity as autonomous moral agents that judgments can be justified against, and claim authority in light of, a society's normative commitments. Deploying Raz's service conception of authority in the context of rights adjudication – what I have called the service conception of the constitution – flies in the face of Raz's own conception of legal subjects as moral agents who demand the moral justification of law.

This is not to say that the factual conclusions that less restrictive means analysis generates are never persuasive or authoritative, but rather to emphasise that the persuasive force of those factual conclusions presupposes that any deep-seated moral disagreements about a rights limitation – that is, disagreements about its strict-sense proportionality – have already been addressed. For a judgment about a rights limitation to claim authority, then, it must be possible to explain why the outcome is congruent with constitutional values. Strict-sense proportionality analysis provides a mechanism to provide this explanation in unashamedly moral terms. Of course, a court's account of a limitation's strict-sense proportionality or disproportionality may not resolve these moral disagreements, but the argument in support of that conclusion gives people a reason to accept it as authoritative even if they disagree with it. Less restrictive means analysis, understood as an exercise in pure facts, is not able to provide these moral justifications. Its claim to authority can only be supported alongside the morally rich mode of reasoning that strict-sense proportionality analysis provides.

[92] *DE v RH* (note 32 above); *S v Niemand* (note 18 above); *In re: S v Walters* (note 18 above).

[93] *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* [1999] ZACC 8, 1999 (4) SA 623 (CC)(With respect to limitations on due process rights in order to provide magistrates with information on which to determine bail conditions, the Court looked to foreign jurisdictions for examples of similar provisions that restrict due process rights less, but nevertheless concluded that limitations in question were proportionate in South Africa).

VI CONCLUSION

The rule-of-law objection to strict-sense proportionality analysis is rooted in claims that the subjective moral reasoning it involves is unintelligible. Less restrictive means analysis, the other path of proportionality reasoning that the Constitutional Court has walked since 1994, promises to avoid this objection because it purports to be a factual and value-free heuristic for adjudicating rights limitations cases. In pre-empting primary moral reasons for upholding or striking down rights limitations, less restrictive means analysis presents a Razian view of the authority of legal judgments. What I call the service conception of the constitution separates legal reasoning from questions of morality, and locates legal judgments' authority in the factual reasoning that pre-empts judges' moral reasoning.

But the conception of the rule of law at the heart of this attack on strict-sense proportionality analysis is not the only game in town. Lon Fuller offers a normatively rich account of the rule of law which requires just as much congruence between official conduct and the basic normative commitments a legal system happens to make, as it does between official conduct and previously declared rules. Moreover, law's authority depends on the justifiability of its operation against these basic normative commitments.

I am not concerned here to defend Fuller's conception of the rule of law against all comers. Rather, I want to point out that the conception of the rule of law that underlies Fuller's concept of law, and which in turn aligns with strict-sense proportionality analysis, bears a striking resemblance to the conception of the rule of law that Raz presents. Both Raz and Fuller see the value of the rule of law in the service it does individual moral autonomy. Both Raz and Fuller take legal subjects to be undeniably rational agents, suffused with a capacity to think and reason for themselves. For both Raz and Fuller departing from the requirements of the rule of law undermines human agency, which for Raz is merely unfortunate and undesirable but which for Fuller makes impossible the entire project of governing by law.

On the view of the rule of law that Raz and Fuller share, then, the authority of court judgments about rights limitations depends on morally rich reasoning that speaks to and affirms the capacity of legal subjects to reason about the law, understand it and conform their behaviour to its commands. Constitutional rights are inherently moral legal artifices, closely tied to the values and norms that a constitution happens to articulate and to which it commits the legal system. A court is better placed likely to succeed in justifying a decision that upholding a right or allowing its limitation is more closely aligned with these constitutional commitments, and thereby to make a claim to authority, if it can explain why those values pull in one direction rather than another.

Less restrictive means analysis, at least as its proponents describe it, tries to eliminate precisely these morally rich explanations. The difficulty that it has in doing so, I argue, is that the Razian service conception of the constitution it adopts is inconsistent with Raz's own view about the rule of law and the morally autonomous nature of legal subjects. I do not want to make a broad attack on Raz's service conception of authority here,[94] but I do want to suggest that it breaks down at the point where it applies to the justification of rights limitations. The breakdown occurs because relying on the factual inquiries of the less restrictive means analysis alone leaves unexplained why less restrictive approaches are themselves justifiable rights limitations. People want to know why the sausage machine spits out each particular

[94] For a somewhat broader attack than mine, see Rundle 'Form and Agency' (note 12 above).

sausage: we want to be convinced that the decisional sausage is composed of ingredients that are normatively palatable to us. Less restrictive means analysis, and the service conception of the constitution on which it depends, does not clear a path for judgments on rights limitations to make a meaningful claim to authority.

I end by noting that moral reasoning remains important to many of the jurisdictions where the constitution provides explicitly for the limitation of constitutional rights. Even where courts rely formally on the less restrictive means analysis and make no overt attempt to balance the value of rights and the objectives of rights-limiting measures, the reasoning is difficult to make sense of without tracing the implicit moral evaluation going on behind the scenes of less restrictive means analysis.[95] Ultimately, it may not even be possible for a method of rights adjudication to fully reflect the Razian version of legal positivism. But if South Africa's legal system is to continue to promote a culture of justification and to move away from a culture of authority, it seems that an approach to proportionality analysis that emphasises the justification of legal decisions and the operation of legal rules against the fundamental values the Constitution articulates is better than one that relies on factual, evidence-based and value-neutral reasoning.

[95] Stacey 'The Magnetism of Moral Reasoning' (note 6 above).