The magnetism of moral reasoning and the principle of proportionality in comparative constitutional adjudication

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ABSTRACT

In the family of constitutional democracies born in the latter twentieth century, constitutional limitations clauses have emerged to manage the conflict between individual rights and the legislative pursuit of broader social objectives. In six paradigm post-war constitutional democracies – Canada, Germany, Israel, India, Poland and South Africa – the principle of proportionality has become the analytical fulcrum of the inquiry into the constitutionality of rights limitations. Criticism of the principle of proportionality as a heuristic for limitations analysis has crystallized into three main objections: proportionality analysis devalues rights by exposing them to the ordinary processes of political bargaining; it offends the rule of law because it involves unpredictable moral reasoning; and it involves the unintelligible balancing of incommensurable goods. This article considers, first, whether limitations jurisprudence in the paradigm countries contains responses to these objections. It argues that there are ways of meeting the devaluation and incommensurability objections, but suggests that models of analysis that purport to meet the unpredictability objection by minimizing the role of moral reasoning are undermined by the continued judicial reliance on moral reasoning in the paradigm countries. The article argues, second, that moral reasoning maintains this magnetic attraction over judges because the conception of the rule of law at work in the paradigm countries, and which judges and other legal officials are committed to upholding, compels judges and legislators to engage

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directly and fully with the normative commitments a political community makes and which inform its constitution. Because people reasonably disagree over the content and contours of these normative commitments, judges cannot rely on de-moralized analysis but must make arguments intended to persuade rational, morally autonomous members of a political community how our most fundamental normative commitments should be understood by the legal system.

INTRODUCTION

For many of the democratic states that emerged in the second half of the twentieth century, a new constitution or the revision of an old one marks the break from a history of injustice and authoritarianism and the embrace of human rights and democracy.[1] This constitutional commitment to a set of fundamental human rights enjoins the government to respect and protect these rights whenever it exercises public powers and functions; but constituting a democratic order on the ruins of a defunct political system – national socialism, colonialism, apartheid, or a former soviet republic, for example – may require 'large-scale, egalitarian social transformation'[2] which at times conflicts with individual rights. Constitutional 'limitations clauses' emerged to manage this conflict, setting out the circumstances in which and the rules and principles according to which a government may justifiably limit rights in pursuit of transformative social objectives.[3]

Six countries – Canada, Germany, India, Israel, Poland and South Africa – are paradigm examples of modern constitutional systems where rights may be limited through the application of a constitutional limitations clause. In each jurisdiction, the constitutionality of a rights limitation has come to rely on the principle of proportionality, and the key exercise in judicially reviewing a rights limitation is the proportionality analysis. The principle of proportionality,

[1] SAMUEL P HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991); GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE (1999); Jon Elster, *Constitutionalism in Eastern Europe,* 58 U. CHICAGO LAW REV. 447 (1991); HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (2000); Sujit Choudhry, *After the Rights Revolution: Bills of Rights in the Postconflict State,* 6 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 301 (2010); WERNER HEUN, THE CONSTITUTION OF GERMANY: A CONTEXTUAL ANALYSIS (2011).

[2] Karl Klare, *Legal Culture and Transformative Constitutionalism* 14 S. AFR. J. HUM. RTS. 146, 150-51 (1998).

[3] The pre-Arab Spring constitutions of Egypt (1971) and Tunisia (1959), by contrast, did not contain limitations clauses controlling the limitation of rights. Instead, they provided that rights to freedom of expression, privacy and fair trial would be exercised 'in accordance with' or 'as regulated by' the ordinary law, effectively leaving it to a simple majority of the legislature to decide when rights should yield to broader objectives.

however, is the focal point of a vibrant debate and has been the target of much criticism.[4] Three major objections to proportionality analysis have emerged from this debate: the devaluation of rights objection argues that allowing rights limitation undermines the value rights have as constraints on state power; the objection from predictability complains that the moral reasoning involved in comparing the value of rights and competing social objectives is inconsistent with rule-of-law demands for predictability in the operation of legal rules; and the incommensurability thesis claims that the value of rights and the value of the interests pursued by limiting them are not commensurable, and cannot be meaningfully balanced or weighed up in an attempt to work out which a society should prefer.

I set this article against the background of these objections. First, I consider whether the models of proportionality analysis developed by courts in the six paradigm countries contain responses to each of these objections. In Part I of the article I describe how limitations jurisprudence has solidified into a standard model of proportionality analysis. In Parts II to IV, I describe the three major objections to proportionality analysis in more depth, alongside the possible responses the jurisprudence of the paradigm countries reveals. The devaluation of rights objection can be met by a model of analysis that protects core elements of each right against limitation, but remains open to the other two objections where limitation occurs outside this protected core. I consider whether the objection from predictability can be met if courts eliminate the unpredictable and morally controversial balancing of rights and competing social objectives from the analysis and rely more on empirical inquiries into which of the available policy options will achieve stated objectives with the minimum infringement of rights. I argue, however, that even courts that purport to limit the analysis to these policy questions nevertheless rely on moral reasoning. Finally, defending this ubiquitous judicial reliance on moral reasoning, I argue that the incommensurability objection can be met with an avowedly moral model of proportionality analysis – 'balancing as reasoning' – that does not weigh the value of rights directly against the

[4] For criticism of proportionality as a principle of rights adjudication, *see, e.g.,* Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?,* 7 INT'L J. CON. L. 468 (2009); Grégoire N Webber, *Proportionality, Balancing and the Cult of Constitutional Rights Scholarship,* 23 CAN. J.L. & JUR. 179 (2010); and Francisco J Urbina, *Is it Really that Easy? A Critique of Proportionality and "Balancing and Reasoning",* 27 CAN. J.L. & JUR. 167 (2014). For an equally rich literature supporting proportionality analysis and responding to this criticism, *see, e.g.,* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2002); DAVID BEATTY, THE ULTIMATE RULE OF LAW (2004); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATION (2012); Kai Möller, *Proportionality: Challenging the Critics,* 10 INT'L J. CON. L. 709 (2012); Madhav Khosla, *Proportionality: An Assault on Human Rights? A Reply,* 8 INT'L J. CON. L. 298 (2010); and Matthias Klatt & Moritz Meister, *Proportionality: A Benefit to Human Rights? Remarks on the I*CON Controversy,* 10 INT'L J. CON. L. 687 (2012).

value of competing objectives, but inquires which policy option is more consistent with fundamental constitutional values.

The second element of my argument, and the main contribution I make here, explains the prevalence of moral reasoning in all these models of proportionality analysis as an outcome of a normatively rich conception of the rule of law. I argue that judges rely on moral reasoning not because they have failed to confine themselves to policy questions or to guard vigilantly against the creep of moral considerations into judicial reasoning, but because they understand the commitment to the rule of law, including the rule-of-law concern for predictability, to demand that all exercises of public power must be congruent with and justifiable against the moral principles that a political community holds dear, and which inform its constitution.[5]

At the same time, I argue that both the objection from predictability and the suggestion that it can be met with a 'de-moralized' model of proportionality analysis rest on a particularly formalistic and impoverished understanding of the rule of law. The magnetic attraction that moral reasoning holds for courts in the paradigm countries is an indication that a normatively rich conception of the rule of law lies at the foundation of these legal systems, and I explain in Part V why this is so. Ultimately, balancing as reasoning offers a solution to the incommensurability objection but also affirms the currency of a normatively rich conception of the rule of law and responds to the demand for predictability in a way that moves us beyond the formalistic concerns on which the objection from predictability rests.

I. RIGHTS LIMITATION IN THE 'NEW' CONSTITUTIONALISM

The constitutions of the six countries examined here, or at least their rights-protecting provisions, have all been enacted since the Second World War. The express textual recognition that rights are subject to and capable of limitation distinguishes these and other post-war constitutions from constitutional commitments of older origin, such as the US Constitution (1787) and the French Declaration of the Rights of Man and of the Citizen (1789).[6] The limitations clauses that appear in these new constitutions have no correlate in older constitutions, and although the strict

[5] In contrast to the way I make the argument here, some proponents of proportionality have sought to separate the principle of proportionality from its flawed application by courts, arguing that the fact of judicial misunderstanding of the principle and misapplication of its doctrine is not a reason to criticize proportionality as a method of legal reasoning. See Möller, *supra* note 4.

[6] *See, e.g.,* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. OF TRANSNAT'L L. 72 (2008).

scrutiny with which US courts examine legislation sometimes follows a path similar to these limitations inquiries,[7] it is only this 'new' constitutionalism that expressly contemplates the limitation of individual rights in pursuit of broader social objectives.

A. Early limitations clauses: proportionality in Germany and India

The early examples of this new, post-war constitutionalism, Germany's 1949 Basic Law and India's 1950 Constitution, allow the limitation of rights through a series of 'internal' limitations that apply to specific rights. In the German Basic Law, these internal limitations clauses provide that rights can be interfered with only by a statute duly passed by the legislature.[8] They say nothing about the principles or rules with which limitations must comply, and do not mention the principle of proportionality at all. Indeed, even where the Basic Law speaks in general terms about the limitation of rights in article 19, it says only that limitations must be imposed by generally applicable laws and that 'in no case may the essence of a basic right be affected'.

The internal limitations clauses in the Indian Constitution allow rights to be limited only for specific purposes and in terms of general legislation, but provide in addition that only 'reasonable restrictions' on rights are acceptable.[9] Although the protection of the right to life in article 21 appears to depart from the requirement of reasonableness, providing only that 'No person shall be deprived of his life or personal liberty except according to procedure established by law', the Indian Supreme Court has nevertheless held that 'the concept of reasonableness must be projected into the procedure contemplated by article 21'.[10] In articulating what 'reasonable restrictions' might be, the Indian Supreme Court has indicated in express language that proportionality is required. It has held that the inquiry into reasonableness must consider the

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[7] Vicki C Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 2680 (2015); Niels Petersen, *Legislative Inconsistency and the "Smoking Out" of Illicit Motives*, 64 AM. J. COMP. L. 121 (2016).

[8] The Basic Law's internal limitations take a form exemplified by the right to personal freedoms in article 2 (emphasis added):

> '(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
> (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. *These rights may be interfered with only pursuant to a law.*'

Internal limitations appear also in the rights to freedom of expression, arts and sciences (article 5(2)), marriage, family and children (article 6(3)), assembly (article 8(2)), privacy (article 10(2), 13(2) and 13(4)-(7), and 17A(2)), movement (article 11(2) and 17A(2)), occupational freedom (article 12(1)), property (article 14(1) and 14(3)), and citizenship (article 16(1)).

[9] The rights to freedom of speech, freedom of assembly, association, movement, residence, and profession and occupation in article 19(1)(a)-(e) and (g) of the Indian Constitution are subject to limitation in terms of article 19(2)-(6), respectively.

[10] Maneka Gandhi v. Union of India, (1978) AIR 597.

'disproportion' of an impugned limitation,[11] and understands reasonableness to prohibit the 'arbitrary' or 'excessive' limitation of rights.[12]

In Germany too, it has fallen to the Federal Constitutional Court (FCC) to inject the principle of proportionality into the adjudication of rights limitations. In the 1958 *Nudism Education*[13] and *Pharmacy*[14] cases, the FCC articulated three inquiries by which to assess the proportionality of a rights limitation. These inquiries go to (i) whether the public purpose pursued by the rights-limiting measure is a legitimate one for the state to pursue (the legitimate goal test); (ii) whether the measures chosen to achieve that purpose are rationally connected to it (the suitability or rational connection test); and (iii) whether the measures chosen impair or restrict rights as little as possible, and are therefore necessary to achieving the legitimate goal (the necessity test, the least restrictive means (LRM) test, or the inquiry into minimal impairment). These early cases turned on the third of these inquiries, indicating that the FCC understood proportionality to mean primarily that whenever government pursues specific social objectives, it must always choose the policy that is least invasive of constitutional rights.

During the 1960s the FCC added a fourth inquiry to the test, noting that the reasonableness of a rights limitation is not established merely by the fact that it is the least restrictive means to achieve a legitimate purpose.[15] The FCC began to inquire whether rights limitations were 'disproportionate and unreasonable', by scrutinizing the balance between the advantages and disadvantages of limiting a right.[16] This inquiry into 'proportionality in the strict sense' weighs the value of protecting a right against limitation, on one hand, against the value of the broader objectives achieved by allowing the rights limitation on the other hand. The terms 'balancing' and 'proportionality in the strict sense' are frequently used interchangeably in referring to this element of the proportionality analysis.

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[11] VG Row v. State of Madras, (1952) AIR 192.

[12] Chintaman Rao v. State of Madya Pradesh, (1951) AIR 118.

[13] *Nudism Education,* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 320.

[14] *Pharmacy,* BVerfG 1958, 7 BVERFGE 377.

[15] *Own Account Transport Tax,* BVerfG 1963, 16 BVERFGE 147.

[16] *Shop Closing Act II,* BVerfG 1961, 13 BVERFGE 237. For academic commentary describing and advocating the use of proportionality in rights adjudication during this era, *see* RUPPRECHT KRAUSS, DER GRUNDSATZ DER VERHÄLTNISMÄSSIGKEIT IN SEINER BEDEUTUNG FÜR DIE NOTWENDIGKEIT DES MITTLES IN VERWALTUNGSRECHT (Ger. 1955) and PETER LERCHE, ÜBERMASS UND VERFASSUNGSRECHT: ZUR BINDUNG DES GESETZGEBERS AN DIE GRUNDSÄTZE DER VERHÄLTNISMÄSSIGKEIT UND DER ERFORDERLICHKEIT (Ger. 1961). *See also,* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence* 57 U. OF TORONTO L.J. 383, 384-87 (2007).

B. General limitations: the proportionality test solidifies

The German jurisprudence has provided the template for proportionality analysis in other parts of the world,[17] and the four inquiries the FCC identified now constitute the standard model of proportionality analysis in the other paradigm countries. The rights-protecting constitutional documents of Canada, Israel, Poland and South Africa each contain a stand-alone clause governing the limitation of the rights they guarantee. The very first provision of Canada's Charter of Rights and Freedoms applies to all the rights set out in the remainder of that document:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court of Canada has read this provision to mean that rights-limiting measures must meet a standard of proportionality. In *R v Oakes*, influenced by the German jurisprudence, the Court adopted the four-part standard model as the means of testing whether this standard is met.[18]

The limitations clause in South Africa's 1996 Constitution (section 36) is textually similar to section 1 of the Charter, allowing limitations only if they are expressed in general legislation and if they meet standards of reasonableness and justifiability as informed by the commitment to openness, democracy, dignity, equality and freedom. Section 36 goes on to list factors that must go into the consideration of whether these standards are met. It provides in full:

> 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;

[17] Stone Sweet & Mathews, *supra* note 6, at 97-111; and BARAK, *supra* note 4, 178ff (2012).

[18] R v. Oakes, [1986] 1 S.C.R. 103, at paras. 69-70. See also R v. Big M Drug Mart Ltd, [1985] 1 S.C.R. 295 at para. 139; and Canada (Attorney General) v. JTI-Macdonald Corp. [2007] 2 S.C.R. 610, at para. 36. The Supreme Court idiosyncratically describes the proportionality analysis as consisting of only the rationality, necessity and strict proportionality tests, with the inquiry into the legitimacy of the goal a preliminary inquiry that does not form part of the proportionality test. I say more about the way the Court understands the relationship between the legitimate goal test and proportionality in section III.C.

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

While the factors listed in paragraphs (a)-(e) codify at least the first three inquiries of the standard model of proportionality analysis, the South African Constitutional Court has confirmed that the limitations clause calls for 'a global judgment on proportionality' centered on balancing.[19] 'The more substantial the inroad into fundamental rights,' the Court has said, 'the more persuasive the grounds of justification for the infringing legislation must be.'[20] The factors enumerated in paragraphs (a)-(e) are not separate elements or steps in the proportionality analysis, so much as considerations to be weighed in coming to this global judgment on proportionality in the strict sense.

While both the Canadian and South African limitations clauses hitch the acceptability of rights limitations to their justifiability against the standard of reasonableness, the limitations clauses of neither the Polish Constitution (1997) nor Israel's two rights-protecting instruments (the Basic Law: Human Dignity and Liberty (1992) and the Basic Law: Freedom of Occupation (1992)) mention any such standard. The clauses are, however, unambiguous in directing officials to consider the purposes and necessity of limitations. Article 31(3) of the Polish Constitution allows rights limitation 'only when necessary' for the achievement of certain specified objectives, and article 8 of Israel's Basic Law: Human Dignity and Liberty allows rights limitation 'to an extent no greater than is required' for the fulfillment of a proper purpose (article 4 of the Basic Law: Freedom of Occupation is substantially similar).

Yet even without the textual levers of reasonableness or justifiability, the Polish Constitutional Tribunal has read the limitations clause to demand that rights limitations must be 'in adequate proportion to the burden imposed',[21] and the Israeli Supreme Court has held that 'the fulfillment of a proper purpose – by rational means that are least restrictive in achieving the purpose – cannot lead to a disproportional limitation of human rights'.[22] Courts in all six of the paradigm countries have thus understood limitations clauses in their respective constitutional

[19] *S v. Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at para. 32; *S v. Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para. 104.

[20] *S v. Bhulwana; S v. Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para. 18. *See also S v. Manamela, supra* note 19, at para. 69.

[21] *Authorized driving instructors,* CT judgment in case no K 30/07 (20 February 2008) (Poland).

[22] H.C.J. 7052/03 Adalah – The Legal Center for the Rights of the Arab Minority v. Minister of Interior [2006], at para. 75.

documents to require rights limitations to be assessed under the rubric of proportionality. If the principle of proportionality is somehow flawed, however, we must question whether proportionality analysis should play this determinative role in limitations disputes. The objections catalogued below raise this question squarely. I consider in turn whether the jurisprudence of the six paradigm courts contains the raw material for building responses to these objections, how effective these responses are, and what we can learn about the principle of proportionality from the efficacy of these responses.

II. RIGHTS AS SOFT TRUMPS: MITIGATING THE DEVALUATION OF RIGHTS OBJECTION

The devaluation of rights objection to proportionality analysis is rooted in the principle of constitutionalism, which holds among other things that an ordinary legislative majority cannot change the constitution. The only way to reduce the level of protection afforded by the rights entrenched in a constitution is to amend the constitution.[23] In India, both Jawaharlal Nehru's and Indira Gandhi's governments pursued land reform programs over the constitutional objections of landed aristocrats by amending constitutional property rights,[24] emphasizing that the battle for the constitutional protection of property was fought at the level of the text of the Constitution itself.

The principle of constitutionalism is undermined, the objection goes, when a government can reduce the protections afforded by constitutional rights simply by striking a balance in ordinary legislation between the seriousness of a rights infringement and the ends the infringement serves.[25] In these circumstances, rights have no special constitutional position as trumps[26] or side constraints,[27] and can be traded in the hurly-burly of ordinary legislative politics along with any other policy goals a government or a society may set.[28]

If we insist on finding a proportional balance between rights and the interests that rights limitations serve, must we relinquish any commitment to the idea that rights are trumps that

[23] *See* the Canadian Supreme Court's discussions of the principle of constitutionalism in Reference re Secession of Quebec [1998] 2 S.C.R. 217, at paras. 70-78; and Reference re *Supreme Court Act, ss 5 and 6* [2014] 1 S.C.R. 433, at paras. 89-95.

[24] Shankari Prasad Deo v. Union of India 1951 (3) S.C.C. 106 and Sajjan Singh v. State of Rajasthan 1965 (1) S.C.C. 933.

[25] Webber, *supra* note 4, at 198.

[26] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 193 (1978).

[27] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 28ff (1974).

[28] Tsakyrakis, *supra* note 4, at 471; Mattias Kumm, *Political Liberalism and the Structure of Rights, in* LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 142 (George Pavlakos ed., 2007).

defeat ordinary, non-constitutional political bargaining? Proponents of the principle of proportionality candidly accept this implication. For David Beatty, rights not only 'have no special force as trumps', but actually 'disappear' in the proportionality analysis.[29] For Robert Alexy rights go no further than establishing 'prima facie requirements'[30] that can be ignored as long as they are ignored proportionately.

Accepting that the principle of proportionality devalues rights, however, does not demand a choice between absolute, inviolable rights on one hand and the abandonment of the principle of constitutionalism on the other. There is an intermediate position: a softened model of rights as trumps narrows the work for the principle of proportionality to do by allowing rights limitation only once it has been established that the core or fundamental content of the right at stake has not been infringed. This approach countenances the limitation of only the peripheral or non-core content of constitutional rights, imposing an absolute barrier to infringing the core of a right no matter how compelling the reasons for doing so might be. Restricting rights limitation to the peripheral content of rights significantly reduces what is at stake in limitations analysis, precisely because the most valuable aspects of rights are never left open to limitation.

The German Basic Law adopts a model of rights as soft trumps. Article 19(2) provides that 'In no case may the essence of a basic right be affected'. In early judgments the FCC rejected the categorically exclusionary approach that article 19(2) seems to require, holding that the 'essence of a basic right' cannot by itself be an adequate standard of review and that 'the proportionality principle must be respected whenever a fundamental right is infringed.'[31] In judgments since then, however, the FCC has been more prepared to define core areas within specific rights that do enjoy absolute protection against infringement. This jurisprudence depends less on article 19(2) of the Basic Law than on article 1(1), which provides that 'human dignity shall be inviolable.' The elements of rights that are closely connected to human dignity are therefore absolutely protected, and no social or political interests are important enough to justify the violation of these dignity-protecting elements of basic rights.

The FCC has identified the inviolable core of several distinct rights. The right to personality in article 2(1), for example, protects three different 'spheres' of personality: the social sphere and the private sphere are subject to proportional limitation, but the intimacy sphere, extending to

[29] BEATTY, *supra* note 4, at 171.
[30] ALEXY, *supra* note 4, at 57.
[31] *Pharmacy,* BVerfG 1958, 7 BVERFGE 377; *Handicraft Admission,* BVerfG 1961, 13 BVERFGE 97.

matters of personal sexuality, illness and physical condition, is closely connected to human dignity and is inviolable.[32] Similarly, the FCC has held that editorial confidentiality lies at the core of the article 5(1) right to freedom of the press;[33] that the production of artwork is a core element of the right to artistic freedom under article 5(3) while the presentation or dissemination of the artwork is not;[34] and that in the context of the article 13(1) guarantee that the home is inviolable, not 'even the overwhelming interests of the general public would justify an invasion of the absolutely protected core of the human personality'.[35]

The FCC's refusal to countenance balancing when the impugned conduct violates dignity was emphatically affirmed in the *Aviation Security* decision in 2006, when it struck down provisions of the Aviation Security Act authorizing the German Air Force to shoot down hijacked airliners. The FCC held that no utilitarian calculation of the numbers of lives saved and lost justifies the deprivation of dignity involved in the intentional killing of a smaller number of people.[36]

The Polish Constitution includes analogues to both articles 19(2) and 1(1) of the German Basic Law. The final sentence of article 31(3) of the Polish Constitution provides that 'limitations shall not violate the essence of the freedoms and rights', while article 30 provides that 'The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens [and] shall be inviolable'. The Polish Constitutional Tribunal has emphasized that the Constitution's protection of human dignity is absolute and is not susceptible to proportionality review[37] and that dignity is the foundation of many other rights.[38] In addition

[32] *Microcensus* BVerfG 1969, 27 BVERFGE 1; *Book 'Esra'* BVerfG 2007, 119 BVERFGE 1.
[33] *Wallraff/Bild,* BVerfG 1984, 66 BVERFGE 116.
[34] *Herrnburger Report*, BVerfG 1987, 77 BVERFGE 240.
[35] *Acoustical Surveillance,* BVerfG 2004, 109 BVERFGE 279. See also *Tape Recording II,* BVerfG 1973, 34 BVERFGE 238. The FCC's decision here of course leaves open the possibility that certain forms of surveillance or search will not intrude on this core personality interest. Amendments to the Basic Law in 1998 reflect this position: article 13(3) was amended to allow acoustical surveillance of a person's home if 'particular facts justify the suspicion that any person has committed an especially serous crime defined by a law' and if authorized by at least one judge. See also Dominik Hanf, *Constitutional Court Reaffirms Privacy of the Home in Search and Seizure Decision*, 2 GERMAN L. J. 11 (2001), noting that the requirements for judicial authorization of search set out in article 13(2) will be strictly adhered to and the exception for emergency situations narrowly construed.
[36] *Aviation Security Act,* BVerfG 2006, 115 BVERFGE 118. Aharon Barak uses the example of this case, and other cases involving torture or deliberate harm to a few in order to prevent harm to many, to point out that the notion of absolute rights is a controversial one: BARAK, *supra* note 4, at 27-30; see also ALEXY, *supra* note 4, at 195-96.
[37] *Lustration,* CT judgment in case no K 7/01 (Mar. 5, 2003) (Poland).
[38] *Civil service,* CT judgment in case no SK 6/02 (Oct. 15, 2002) (Poland); *Eviction without temporary accommodation,* CT judgment in case no K 11/00 (Apr. 4, 2000) (Poland).

to identifying elements of the essential core of rights to education,[39] property,[40] and social insurance,[41] the Tribunal has also constructed a hierarchy of rights based on how closely each right is connected to dignity. The right to honor, good name and privacy is directly related to human dignity,[42] for example, but the right of access to court is not.[43]

While Polish and German jurisprudence precludes any limitation of the essential or dignitarian core of rights, soft trumping operates only at the stage of analysis at which the extent of a rights limitation is determined. If a court concludes that a limitation does not strike at the dignitarian core of a right, the limitation must still be assessed for proportionality. Indeed, courts in both countries proceed with the standard model of proportionality analysis once satisfied that the dignitarian core of a right has not been infringed. As a result, proportionality analysis in these countries remains susceptible to the objections from both predictability and the incommensurability thesis.

III. THE OBJECTION FROM PREDICTABILITY, AND DE-MORALIZING RESPONSES

A. The subjectivity of balancing

The objection from predictability complains that the inquiry into proportionality in the strict sense tends to undermine the predictable operation of the legal system. Since predictability is an important element of the commitment to the rule of law, the objection goes on, unpredictability is a threat to the rule of law and is to be avoided. Making sense of the objection from predictability requires understanding both how predictability is connected to the principles of the rule of law, and why we value and should strive to uphold the rule of law in the first place.

The rule of law protects a society against the arbitrary rule of officials – the rule of men, in the classical literature – because it demands that those who govern do so only through the mechanism of law and within the limits the law imposes.[44] The rule of law is sometimes

[39] *University fees,* CT judgment in case no SK 18/99 (Nov. 8, 2000) (Poland).
[40] *Eviction without temporary accommodation, supra* note 38; *Demolition order*, CT judgment in case no P 8/99 (Oct. 10, 1999) (Poland); *Regulated rent,* CT judgment in case no P 11/98 (Jan. 12, 2000) (Poland).
[41] *Pension benefits*, CT judgment in case no SK 16/01 (Oct. 22, 2001) (Poland).
[42] *Criminal Libel,* CT judgment in case no P 10/06 (Oct. 30, 2006) (Poland).
[43] *Access to Court for Aliens,* CT judgment in case no P12/99 (Nov. 15, 2000) (Poland).
[44] Classical statements of this idea appear, for example, in ARISTOTLE, THE POLITICS, Book 3 Chapter 16 (Carnes Lord trans., University of Chicago Press, 1984); JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 8 (1992); and AV DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188-95 (8 ed. 1915).

described as some or other 'laundry list'[45] of the qualities or desiderata a legal system must have if it is to succeed in limiting arbitrary power and creating an ordered society.[46] Lon Fuller's eight principles of legality provide one model for these lists, holding that laws must be (1) general and generally applicable to everyone, (2) clearly promulgated and publicly knowable, (3) clear and understandable to their subjects, and (4) capable of being obeyed. Further, laws must not (5) act retroactively (except where necessary to correct defects in the legal system), (6) conflict or contradict one another, or (7) change too frequently or without sufficient warning. Finally, once laws are in place, (8) the administration and application of the laws by officials must be congruent with the laws announced beforehand.

Implicit in the rule of law is a conception of human beings as rational and autonomous agents capable of understanding rules and conforming their behavior to them.[47] We value the rule of law and demand that political systems uphold it because it leads to a set of stable and predictable background rules for conduct that apply to everyone and within which everyone can formulate and pursue their own conceptions of the good life. Moreover, the rule of law requires that official conduct remain congruent with previously declared rules, protecting people's pursuit of their conceptions of the good from unexpected official interference or disruption.[48] This capacity for formulating and pursuing one's own conception of the good is sometimes referred to, after Kant, as moral autonomy.

If we value the predictable and stable operation of law because it advances moral autonomy, then a legal system that allows unpredictability and vagueness is a threat to moral autonomy.[49] There are at least two senses in which the constitutional protection of rights is vague and unpredictable enough to raise this objection: a preliminary concern is that the generality with which rights are formulated in the text of a constitution makes it unclear how rights will apply in

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[45] Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?, in* THE RULE OF LAW AND SEPARATION OF POWERS 154 (Richard Bellamy ed., 2005).

[46] LON FULLER, THE MORALITY OF LAW (revised ed. 1969). *See also* TOM BINGHAM, THE RULE OF LAW (2010); Joseph Raz, *The Rule of Law and its Virtue, in* THE AUTHORITY OF LAW 211, 214-218 (1979); Lawrence B Solum, *Equity and the Rule of Law, in* THE RULE OF LAW – NOMOS XXXVI (1994).

[47] Raz, *supra* note 46 at 222; FULLER, *supra* note 46, at 162; Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B. U. L. REV. 781, 785 (1989).

[48] Raz, *supra* note 46, at 220; FA VON HAYEK, THE ROAD TO SERFDOM 80 (1994).

[49] FA VON HAYEK, LAW, LEGISLATION AND LIBERTY: VOLUME 1: RULES AND ORDER 72-73 (1973); Richard Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, 3 N.Y.U. J. L. & LIBERTY 491 (2008); RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION AND THE RULE OF LAW (2011); Ronald A Cass, *Property Rights Systems and the Rule of Law, in* THE ELGAR COMPANION TO PROPERTY RIGHTS ECONOMICS (Enrico Colombatto ed., 2003).

particular cases; and a second goes directly to the vagueness of proportionality analysis in the strict sense. I have little to say about the former. I note only that since rights are framed at the constitutional level in necessarily abstract language, they remain inchoate until court judgments or statutory or regulatory rules give them more concrete form.[50] Asking judges to give concrete meaning to abstract rights leaves the content of rights at the mercy of unpredictable judicial discretion and subjectivity.[51]

Proportionality analysis adds another layer of judicial subjectivity and discretion, and thus indeterminacy and unpredictability, to rights adjudication. One court's specification of the content of a right does not bring finality and clarity to the matter, because other courts may yet conclude that limitations of the right are justifiable. As with other 'hard cases' where the law has no determinate answer to a problem, judges must exercise discretion in making new law that resolves these limitations disputes.[52] The indeterminacy of limitations analysis can at least be mitigated if, as in other situations of judicial lawmaking in hard cases, judges formulate clear rules that will apply predictably and bring a degree of certainty to the outcome of similar cases in the future.[53]

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[50] HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 139 (William Eskridge & Philip Frickey eds., 1994). *See also* Grégoire Webber, *Rights and the Rule of Law in the Balance,* 129 L. Q. REV. 399, 410 (2013).

[51] A separate but related concern is that there is a serious tension between the logics of the rule of law and human rights. Since the constitutional formulation of rights is almost invariably abstract and the rule of law demands certainty, the concern arises that enforcing the rule of law is at best indifferent, and at worst inimical to fulfilling rights. *See* Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights?,* 27 L. & PHIL. 533 (2008); Andrei Marmor, *The Rule of Law and its Limits,* 23 L. & PHIL. 1 (2004); and Bronwen Morgan, *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship, in* THE INTERSECTION OF RIGHTS AND REGULATION: NEW DIRECTIONS IN SOCIOLEGAL SCHOLARSHIP (Bronwen Morgan ed. 2007). *See also* William A. Simon, *Legality, Bureaucracy and Class in the Welfare System,* 92 YALE L. J. 1198 (1983). Similarly, some theorists have argued that the rule of law is inconsistent with the unpredictable regulatory powers that 'social legislation', born of a commitment to social justice, confers on the administrative state: *see,* EPSTEIN, *supra* note 49; HAYEK, *supra* note 49. For a response to this 'inconsistency thesis', see Richard Stacey, *Falling Short of Constitutional Norms: Does Normative (In)Congruence Explain the Courts' Inability to Promote the Right to Water in South Africa?* LAW & SOC. INQUIRY (2017) (forthcoming).

[52] HLA Hart argued that there is a core of positive law where legal rules have a settled and determinate meaning, as well as a penumbra of uncertainty where the law is indeterminate and holds no settled answers to social problems. In the core of settled law, what law is or what conduct it requires is answered as a matter of fact with no need to resort to moral argument. Hart famously argued that in the hard cases that arise in the penumbra of legal uncertainty, judges exercise an unfettered discretion to make new law. Their decisions reflect and depend on whatever values each judge happens to hold (HLA Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 607-15 (1958)). Dworkin famously replied that this law-making discretion is cabined by the fundamental principles of justice that run through the legal system, with which each judgment must be consistent: *The Model of Rules* I, reprinted in DWORKIN, *supra* note 26, at 14ff.

[53] Antonin Scalia, *The Rule of Law as the Law of Rules,* 56 U. CHI. L. REV. 1175 (1989).

The sharp end of the objection from predictability is that proportionality in the strict sense requires judges to rely on subjective considerations that evade formulation as rules or standards and do not lend themselves to reconstruction for application in future cases.[54] The 'weight' that each judge attaches to a right and to a competing social objective is nothing more than an intuitive and discretionary judgment of comparative value. These intuitive and discretionary judgments of value are inevitably impressionistic and ad hoc,[55] and are required every time a judge has to balance a right against a competing social objective. The Canadian Supreme Court has gone as far as to admit that the value of a particular right will vary from one case to another, depending on context.[56] But an understanding of the value of rights as contextually variable 'at its core … resists the very logic of rules and standards.'[57] The balancing exercise is unpredictable precisely because it does not rely on or generate clear, objective and previously knowable decision rules. As Ronald Dworkin says in paraphrasing the more general objection to judicial discretion in hard cases, the outcome 'seems unfair, contrary to democracy, and offensive to the rule of law.'[58]

B. Constraining subjectivity by minimizing balancing: Canada's flirtation with factualism

One way of responding to the objection from predictability is to 'de-moralize' limitations analysis. If the source of unpredictability in proportionality analysis is the moral balancing involved in the inquiry into proportionality in the strict sense, then an enticing answer is to avoid this inquiry and rely instead on inquiries that can be conducted without having to intuitively or impressionistically balance the value of rights and competing social objectives. This form of analysis is more easily packaged as rules and standards that more predictably govern future cases.

David Beatty insists that courts should interrogate the constitutionality of rights limitations as matters of fact rather than matters of moral principle. By restricting proportionality analysis to the policy-oriented inquiries into the legitimacy of the goal, the suitability of the means, and the

[54] Tsakyrakis, *supra* note 4, at 482.

[55] Möller, *supra* note 4, at 728-30 (note that Möller is a defender of the principle of proportionality, and yet is happy to admit that proportionality analysis is impressionistic); Na'ama Carmi, *The Nationality and Entry into Israel Case before the Supreme Court of Israel*, 22 ISRAEL STUDIES FORUM 26, 33 (2007).

[56] Edmonton Journal v. Alberta (Attorney General) [1989] 2 S.C.R. 1326, at 1355-56.

[57] Webber, *supra* note 50, at 411, 416. *See also* Stuart Woolman, *The Amazing, Vanishing Bill of Rights,* 124 S. AFR. L. J. 762 (2007).

[58] DWORKIN, *supra* note 26, at 123.

necessity of the limitation, Beatty argues that courts need never reach the 'freewheeling' and 'unprincipled' balancing inquiry.[59] Whether the objective a government policy pursues is legitimate or important is, of course, an evaluative rather than a purely factual question, but the point for Beatty is that it can be answered without having to balance the value of the goal against the value of rights. In Germany, the government need only show that the objective it pursues by limiting a right is not unlawful,[60] a framing of the question that involves hardly any moral evaluation at all.

Once a court determines that the objective of a government policy is legitimate, Beatty maintains that the court need only conduct an empirical, fact-driven (or factualistic) inquiry into 'whether there are better policy alternatives than the law the government chose to enact.'[61] The 'better' policy is here understood to be the one that achieves the policy objectives as well as or better than others, with less intrusion on constitutional rights. On this approach, the argument goes, courts will be able to resolve limitations disputes with 'correct' decisions 'that can be verified empirically' with little work left to be done by discretion or moral intuition.[62]

Moshe Cohen-Eliya offers a similar argument, framed largely as a criticism of the Israeli Supreme Court's reliance on proportionality in the strict sense in resolving limitations disputes. Democratic commitments to transparency and to respecting the decisions of elected representatives are better served, Cohen-Eliya argues, if judges restrict analysis to the 'logical and empirical connections between the declared purpose and the means chosen'.[63] For Cohen-Eliya, judicial decisions can more easily be shown to be justifiable – are more transparent, in other words – when they rest on empirical arguments rather than on judicial discretion and moral balancing.

It appears from a cursory examination of the Canadian case law that the Supreme Court prefers the approach that Beatty and Cohen-Eliya advocate. Although the Supreme Court accepted the four-stage standard model in *Oakes*, proportionality in the strict sense has rarely been influential by itself in Supreme Court decisions upholding or striking down rights-limiting

[59] BEATTY, *supra* note 4, at 171.
[60] Grimm, *supra* note 16, 388-89.
[61] BEATTY, *supra* note 4, at 92.
[62] *Id.* at 74. Robert Alexy suggests that the inquiries into suitability and necessity concern what is 'factually possible', while proportionality in the strict sense concerns what is 'legally possible': ALEXY, *supra* note 4, at 67.
[63] Moshe Cohen-Eliya, *The Formal and Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 ISRAEL L. REV. 262, 263 (2005).

measures.[64] Instead, the Court's conclusion on proportionality in the strict sense has tended to track its conclusion on the necessity or least restrictive means (LRM) test. If the Court finds that a government measure is not the least restrictive means available, or infringes rights more than is necessary to achieve a stated goal, it usually goes on to conclude that the impugned measure is disproportionate.

In the 1995 decision in *RJR-MacDonald v Canada,* the Court admitted that the LRM analysis requires only reasonableness and not perfection, and that it will not as a rule conclude that an impugned measure is overbroad only because judges can conceive of less restrictive alternatives. A rights limitation need only fall 'within a range of reasonable alternatives' to meet the LRM requirement.[65] But in any case the *Oakes* test is laid out sequentially, meaning that if the Court determines that an impugned measure fails the LRM test – whether understood to require the absolutely least restrictive means or just a reasonably low degree of impairment from the impugned measure – the Court will usually strike it down without proceeding to consider proportionality in the strict sense.[66] If the Court considers proportionality in the strict sense at all, its discussion is often little more than a paragraph or two and does no more than confirm the conclusion already reached by the LRM inquiry.[67]

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[64] Tom Hickman, *Proportionality: Comparative Law Lessons,* 12 JUDICIAL REV. 31, at 47 (2007).

[65] RJR-MacDonald v. Canada (Attorney-General) [1995] 3 S.C.R. 199, at para. 160. Even so, the Court went on to find that the impugned law was not minimally impairing precisely because less restrictive alternatives were available: *id.* at para. 164.

[66] *See, e.g.,* Carter v. Canada (Attorney General) [2015] 1 S.C.R. 331, at para. 122. Jacob Weinrib's view that Canada's model of proportionality analysis amounts to a sequential 'chain of increasingly demanding justificatory conditions' suggests that a proportionate but not minimally impairing rights limitation is conceptually impossible (JACOB WEINRIB, DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW (2016), at 232-33): 'Government cannot satisfy the proportionality *stricto sensu* condition if the minimal impairment condition remains unsatisfied because to the extent that the rights infringement is gratuitous, the duty of public justice does not necessitate the right's limitation.' I myself am aware of no case in Canada where the Court found less restrictive alternatives to be available but nevertheless upheld the impugned limitation as proportionate. Contrast this with the approach taken by the South African Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) 1999 (7) BCLR 771 (CC), where it held that an impugned law requiring certain information from an accused at bail proceedings imposed a proportionate and therefore justifiable limitation on the right to silence and the right against self-incrimination, even though the law did not meet the LRM requirement because less restrictive means were available to ensure the integrity of bail proceedings (at paras. 62, 65-77).

[67] *See, e.g.,* Multani v. Commission Scolaire Marguerite-Bourgeoys [2006] 1 S.C.R. 256, at paras. 78-79; R v. Sharpe [2001] S.C.R. 45, at paras. 102-110; Greater Vancouver Transportation Authority v. Canadian Federation of Students [2009] 2 S.C.R 295; Nguyen v. Quebec (Education, Recreation and Sports) [2009] 3 S.C.R. 208; R v. Keegstra [1990] 3 S.C.R. 697, at 786-87; R v. Chaulk [1990] 3 S.C.R. 1303, at 1344-45. *See, also,* NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA (2017), at 102.

In only two cases has the Supreme Court relied primarily on proportionality in the strict sense to evaluate a rights-limiting measure. In *New Brunswick v G(J)*, the Court assumed without deciding that the impugned limitation was the least restrictive, going on to strike down the measure on the basis that its deleterious effects were more significant than its salutary advantages.[68] In *R v KRJ,* a more recent 2016 decision, the Court did find that the policy adopted by the government was the least restrictive means of achieving its objectives, but nonetheless found it an unconstitutional limitation of the affected right because its deleterious effects were significant and tangible while the benefits society stood to gain were marginal and speculative.[69]

These two cases are outliers to the general trend, however. In most cases the Court performs a perfunctory balancing exercise at the end of the analysis which, in the words of Supreme Court Justice Frank Iacobucci, offers little more than a 'résumé of previous analysis'.[70] The Court has at times understood the *Oakes* analysis in decidedly factualist terms, describing the assessment of the proportionality of a rights limitation as 'an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.' Instead of a subjective inquiry influenced by each judge's moral perspectives, it is 'by its very nature a fact-specific inquiry' tending to a 'reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement'.[71] This approach, which sees the outcome of the LRM test as dispositive of the inquiry into proportionality with no role allowed for proportionality in the strict sense, is what I call LRM dependence or the LRM-dependent approach to proportionality analysis.

LRM dependence, as a model of proportionality analysis limited to evidence and facts, promises a legal system that operates more predictably precisely because it purports to minimize the role for subjective and unpredictable moral reasoning on the part of judges. All of the Supreme Court decisions where proportionality in the strict sense plays a peripheral role suggest an LRM-dependent approach to proportionality analysis in Canada.[72] I focus on just a few here.

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[68] New Brunswick (Minister of Health and Community Services) v. G.(J.) [1999] 3 S.C.R. 46, at para. 98. In Alberta v. Hutterian Brethren of Wilson Colony [2009] 2 S.C.R. 567, the dissenting and minority opinions suggest the possibility that a measure which is minimally impairing may nevertheless be disproportionate.

[69] *R v KRJ* [2016] 1 SCR 906, paras 70-76; 90-92; 112-114.

[70] Frank Iacobucci, *Judicial Review by the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms: The First Ten Years, in* HUMAN RIGHTS AND JUDICIAL REVIEW 121 (David Beatty ed., 1994).

[71] RJR-MacDonald, *supra* note 65, at paras. 133, 129.

[72] See cases listed at *supra* notes 66 and 67.

In *Carter*,[73] the Court's inquiry into whether the prohibition on physician-assisted suicide was a justifiable limitation on the section 7 Charter right not to be deprived of liberty and security of the person, except in in accordance with the principles of fundamental justice, relied heavily on evidence from scientists, medical practitioners and others as to whether the prohibition was in fact the least restrictive means of protecting vulnerable people from being coerced to end their lives.

In *Thomson Newspapers,* the Court struck down a statutory prohibition on disseminating opinion survey results in the three days before a federal election as an unjustifiable restriction of the right to freedom of expression. In doing so, the Court held that 'there were other measures which would have achieved the government's purpose equally well or even better … and which would have been far less intrusive' of the affected right.[74]

In *Hutterian Brethren* the question was whether the requirement that every driver's license carry a photograph of the licensee, in order to enhance the security of the licensing scheme, was a justifiable limitation of the religious freedom of Hutterites who object on religious grounds to having their photographs taken. The majority's discussion of the balance between the salutary and deleterious effects of the limitation is longer and deeper than most, but the majority makes the point during this discussion – twice – that evidence suggested a universal photo requirement would achieve the salutary effects more effectively than less restrictive alternatives involving a religious exemption for Hutterites.[75] The majority's inquiry into the proportionality between the benefits of the universal photo requirement and the harm it caused to Hutterites' free exercise of religion was thus heavily dependent on the evidentiary showing that only the universal photo requirement would bring about the salutary benefits sought by the government.[76]

But even in these cases where the LRM test seems to be doing all the work, the Court remains ambivalent about a factualist, LRM-dependent approach and continues to see a place for a separate inquiry into strict proportionality. In *Thomson Newspapers* the Court explained that while the suitability and necessity tests focus on the empirical or probabilistic relationship between the goal and the means available to achieve it, proportionality in the strict sense focuses on the evaluative relationship between the benefits brought about by rights-limiting legislation

[73] Carter, *supra* note 66, at paras. 103-121.
[74] Thomson Newspapers v. Canada (Attorney General) [1998] 1 S.C.R. 877, at para. 122.
[75] Alberta v. Hutterian Brethren of Wilson Colony, *supra* note 68, at paras. 80 and 101.
[76] Sara Weinrib, *The Emergence of the Third Step of the Oakes test in Alberta v. Hutterian Brethren of Wilson Colony*, 68 U. TORONTO FAC. L. REV. 77, 89-90 (2010).

and the disadvantages of infringing rights.[77] In *Hutterian Brethren*, the Court explained that the LRM test does not capture everything there is to know about a rights limitation: even where the least restrictive means has been chosen to pursue a legitimate objective, 'the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law'.[78]

And in *KRJ*, citing *Thomson Newspapers* and Israel's former Chief Justice Aharon Barak, the Court affirmed that proportionality in the strict sense performs a role conceptually distinct from the other three inquiries of the standard model and remains 'the very heart of proportionality'.[79] Embracing the normative and moral implications of proportionality in the strict sense, the Court said:

> [T]his final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society. Although this examination entails value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision.[80]

In preserving a role for proportionality in the strict sense and avoiding total reliance on the LRM test, the Canadian Supreme Court is in good company: in Germany the majority of legislation that is found to be unconstitutional fails at the fourth stage of the analysis;[81] in South Africa the consideration of proportionality in its strict sense is an integral part of the global judgment on proportionality;[82] and in Israel the Supreme Court has also struck down minimally impairing government action because it nevertheless fails to strike a proportionate balance between rights and competing social objectives.[83]

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[77] Thomson Newspapers, *supra* note 74, at para. 125.

[78] Hutterian Brethren, *supra* note 75, at para. 76.

[79] KRJ, *supra* note 69, paras 77-78, quoting *Thomson Newspapers* at para 125 and Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO. L. J. 369, at 380 (2007).

[80] *Id.* at para 79. The Court here seems to reject Cohen-Eliya's contention that only empirical analysis can meet demands of transparency. Moreover, the Court's comments refute Peter Hogg's view that strict proportionality is conceptually redundant (CONSTITUTIONAL LAW OF CANADA ch. 38 at 44 (5th ed. 2010)). For a strenuous academic rejection of Hogg's view, see WEINRIB, *supra* note 66, at 231-32:

> The charge of redundancy overlooks that the obligatory objective condition concerns the kind of purpose that can justify the limitation of a constitutional right, while the proportionality *stricto sensu* requirement concerns issues of degree. Insofar as questions of kind and degree are irreducible, the charge of redundancy fails.

[81] Grimm, *supra* note 16, at 389.

[82] *S v. Bhulwana, supra* note 20.

[83] H.C.J. 2056/04 Beit Sourik Village Council v. Israel (2006) and Adalah v. Minister of the Interior, *supra* note 22.

C. The prevalence of moral reasoning

It may be that a factualist, LRM-dependent approach to proportionality analysis is a rule-bound, objective and predictable way of solving disputes about the constitutionality of rights limitations. But an LRM-dependent approach is able to meet the objection from predictability only as long as the first three stages of the analysis always provide an answer, and remain uncontaminated by subjective and impressionistic moral reasoning in doing so. There are reasons to doubt that either of these conditions holds in Canada. As *KRJ* demonstrates, the Court is not averse to striking down a minimally impairing policy when it is disproportionate in the strict sense.

But even in those Canadian cases where the LRM test seems to provide an answer and there is only a perfunctory fourth-stage inquiry, value judgment and proportionality in the strict sense continue to drive the analysis. While LRM dependence holds that an inquiry into proportionality in the strict sense is unnecessary because the policy inquiries of the standard model deliver an answer by themselves, Canada's jurisprudence reflects the different notion, expressed by Justice Iacobucci for example, that the strict proportionality test is unnecessary because it rehearses the considerations of the other inquiries of the standard model. In Canada, then, the Supreme Court's jurisprudence has not eliminated moral reasoning by eliminating the inquiry into proportionality in the strict sense, so much as it has folded the moral reasoning of strict proportionality into the first three legs of the standard model.[84]

Consider the first-stage inquiry into the importance of the objective of a rights-limiting measure. In *R v Big M Drug Mart*, a 1984 decision from the early years of the Charter, the Canadian Supreme Court interpreted this threshold question to mean that the purpose of a rights limitation must be 'of sufficient importance to warrant overriding a constitutionally protected right'.[85] This interpretation sees the first stage of the analysis as a comparative assessment of the value of constitutional rights and the interests served by limiting them. Although the value of the limitation is balanced against the value of rights in the abstract, rather than against the severity of the specific rights infringement in question, this is balancing all the same. A reason the Supreme

[84] Hickman, *supra* note 64 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* Mark Zion, *Effecting Balance: Oakes Analysis Restaged*, 43 OTTAWA L. REV. 431 (2013).

[85] R v. Big M Drug Mart Ltd [1985] 1 S.C.R. 295, at para. 139.

Court may have come to see the fourth-stage inquiry into proportionality in the strict sense as repetitive is because some of the normative work is already done at this initial stage.[86]

But the story is complicated by the Supreme Court's retreat from this interpretation of what the initial inquiry requires. Since 1984, the Court has shown great deference to the government's articulation of the purposes of rights-infringing legislation and accepts that just about any objective is important enough, in principle, to justify limiting rights.[87] Even in cases where the Court is skeptical that the objective is sufficiently important to warrant the limitation of constitutional rights, it prefers to accept or assume that it is and proceed to the remaining legs of the standard model.[88] The Court thus does very little balancing at the first stage of the inquiry.

So in cases where inquiries into both the legitimacy of the goal and strict proportionality are short and perfunctory, the balancing that renders the final stage of the inquiry repetitive must be going on during what the Court has described, and which Beatty extols, as the fact-based inquiries into suitability and necessity.[89] At least one judge of the Canadian Supreme Court has admitted openly that considerations of proportionality in the strict sense arise throughout the inquiry. Justice Abella, writing in dissent in *Hutterian Brethren,* said:

> The stages of the *Oakes* test are not watertight compartments: the principle of proportionality guides the analysis at each step. This ensures that at every stage, the importance of the objective and the harm to the right are weighed.[90]

In *Saskatchewan (Human Rights Commission) v Whatcott,* the Court said that assessing the constitutional acceptability of a prohibition on hate speech 'involves balancing between freedom of expression and equality rights'.[91] The Court concluded that the hate speech prohibition in question met the LRM requirement because it was 'one of the reasonable alternatives that could have been selected by the legislature. It impairs freedom of expression "no more than *reasonably*

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[86] Denise Réaume, *Limitations on Constitutional Rights: The Logic of Proportionality*, University of Oxford Legal Research Paper Series, Paper No. 26/2009, August 2009, http://ssrn.com/abstract=1463853 (accessed Nov. 1, 2016), 8.

[87] Sujit Choudhry, *So What is the Real Legacy of* Oakes?; *Two Decades of Proportionality Analysis under the Canadian Charter's* Section 1, 34 SUP. CT. L. REV. (2d) 501, (2006).

[88] *See, e.g.,* Eldridge v. British Columbia (Attorney General) [1997] 3 S.C.R. 624 at para. 84; Sauvé v. Canada (Chief Electoral Officer) [2002] 3 S.C.R 519, at paras. 25-26.

[89] Guy Davidov, *Separating Minimal Impairment from Balancing: A Comment on R v. Sharpe (BCCA)*, 5 REVIEW OF CONSTITUTIONAL STUDIES 195 (1999-2000).

[90] Hutterian Brethren, *supra* note 68, at para. 134.

[91] Saskatchewan (Human Rights Commission) v. Whatcott [2013] 1 S.C.R. 467, at para. 145.

necessary".'[92] The Court's assessment of minimal impairment here includes an independent conclusion on the limitation's reasonableness: the LRM test is not sufficient to reach a conclusion on proportionality, and even the least restrictive means to achieve a social objective must be reasonable if it is to be upheld. Justice Abella's openness about relying on balancing throughout the stages of the proportionality analysis suggests that this independent conclusion on reasonableness is the product of a balancing inquiry.

The Supreme Court's approach renders the fourth stage of the standard model redundant only to the extent that the Court already relies on proportionality in the strict sense to reach an answer to at least one of the first three inquiries. A model of proportionality analysis that succeeds in eliminating a distinct inquiry into proportionality in the strict sense, but still relies on the ad hoc and impressionistic balancing that the objection from predictability abhors, offers no answer to the objection from predictability.

D. The predictability of moral reasoning: a normative conception of the rule of law

Does this mean that in those jurisdictions where courts are loth to abandon proportionality in the strict sense and continue to engage in the moral reasoning it involves, society just has to swallow the pill of unpredictable limitations analysis? The answer to this question would be yes, if eliminating moral reasoning were the only way to ensure predictability in judicial decision-making. But I take the position that proportionality in the strict sense is just as predictable, intelligible and transparent as the other three inquiries of the standard model. There is accordingly no reason either to abandon proportionality in the strict sense or to accept unpredictability as a condition of limitations analysis.

Defending this position involves a different kind of response to the objection from predictability than LRM dependence offers. Instead of accepting that moral reasoning is unpredictable and should be eliminated from the proportionality analysis, I suggest that the charge of unpredictability rests on and presupposes an impoverished, formalistic conception of the rule of law that is not shared by courts in the paradigm countries. And since the conception of the rule of law on which this charge of unpredictability rests is not the conception of the rule of law at work in these systems, the objection from predictability has no purchase here.

[92] *Id.* at para. 146, quoting R v. Sharpe, *supra* note 65 (emphasis in original). *See also* Hutterian Brethren, *supra* note 68, at para. 62, and RJR-MacDonald, *supra* note 65, at para. 160.

To see the distinction between two conceptions of the rule of law, consider again how the rule-of-law principle of congruence is the foundation of predictability in the legal system. When a government official acts in a way that is not congruent with previously declared rules, her conduct cannot have been foreseen by those subject to her power and who expect her conduct to be consistent with and constrained by rules that meet the first seven of Fuller's principles of legality. In the judicial context, a custodial sentence that is longer than the statutorily prescribed sentence would be incongruent with, and in turn unpredictable in light of, the previously declared statutory rule about the length of certain custodial sentences.[93]

It is just as much a threat to the rule of law to ignore known and previously declared rules, the objection from predictability goes, for courts and officials to make decisions in the absence of any previously knowable rules. But the objection understands the rule-of-law principle of congruence as concerned only with those positively enacted rules that formally and expressly govern official conduct, and with which official congruence or incongruence can be objectively and mechanically determined. This understanding of the principle of congruence does not acknowledge how the background norms of a legal system govern the behavior of officials and inform official decision-making even in the absence of express and formal rules for official conduct.

On one hand, the normative principles and values that lie at the foundation of a political community infuse the positive law that orders that community and bring normative coherence to the legal system. On the other hand, these principles and values continue to operate in the hard cases where the positive law is vague or silent. In the absence of readily available and previously articulated rules, judges and public officials can meet the rule-of-law demand for congruence only by showing that their decisions are congruent with these normative principles and values. The rule of law not only encompasses this principle of normative congruence,[94] but indeed demands normative congruence in those cases where congruence with formal rules is rendered impossible by

[93] Ronald Dworkin addresses similar arguments in his discussions of judicial originality in hard cases. The lawyer who advises a client that the law allows a murderer to inherit from the estate of his or her victim, in the absence of a rule against this, predicts that a judge will rule consistently with this position of the law. But if a judge decides that there is a heretofore unrecognized or non-explicit principle that murderers cannot inherit from their victims, the lawyer's client's well-laid plans for inheritance will be upset by this unpredictable judicial decision (RONALD DWORKIN, LAWS EMPIRE (1986), 36). Similarly, where legislation sets out the duties of parties in their civil relationships, they will be on explicit notice of their legal duties and can arrange their affairs accordingly (DWORKIN, *supra* note 26, 85-86).

[94] Richard Stacey, *Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Enforcement of Economic and Social Rights*, 31 NOTRE DAME J. L. ETHICS & PUB POL'Y (2017) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2843765 (accessed Nov. 20, 2016).

the absence of the latter. And since these normative principles and values run throughout the legal system, there is no reason in principle that a decision that is justified through moral reasoning by its congruence with normative principles is any less predictable than a decision justified empirically against formal rules.

Support for the principle of normative congruence in proportionality analysis comes from an unlikely source. In *Taking Rights Seriously* and since, Ronald Dworkin made what I describe in this paper as the devaluation objection. He argues that any infringement of rights in pursuit of collective social objectives 'threatens to destroy the concept of individual rights',[95] discards the position that rights are trumps,[96] and is ultimately morally wrong.[97] At the same time, Dworkin is critical of the conception of the rule of law on which the objection from predictability rests. He describes the 'rule-book' conception of the rule of law as insisting that the power of the state be used against citizens only in accordance with rules explicitly set out in a public rule book available to all.[98] The rules in the rule book, moreover, are exhaustive of the law governing citizens, and since the state may not act except as the rule book sets out, citizens can arrange their lives with full knowledge of all the ways that state is empowered to act. Judges immersed in the rule-book conception of the rule of law will decide cases on what Dworkin calls the 'plain fact' conception of law, which accepts that judges need only look up the law in the rule books in order to proclaim what the law is, and need never consider what the law should be.[99] On the plain fact view a judge will have no option in those hard cases, where the rules previously set out in the rule book are silent or ambiguous on a particular matter, but to exercise a discretion to make new law that fills in the gaps or makes vague rules more precise.[100]

But Dworkin points out that there is at least one other way to understand the rule of law. The 'rights conception' of the rule of law presupposes that individuals have moral rights and duties with respect to one another and against the state, and insists that positive rules of law must recognize these rights.[101] On the rights conception, the rule book is not the only source of the rights that

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[95] DWORKIN, *supra* note 26, 197-99.
[96] RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE (2006), 48-49.
[97] *Id.* at 31.
[98] RONALD DWORKIN, A MATTER OF PRINCIPLE (1985) at 11.
[99] DWORKIN, *supra* note 93, at 7. Dworkin draws a link between the plain fact view and legal positivism, acknowledging the debate within positivism, between Austin's command theory and Hart's rule of recognition, about how citizens determine which rules are rules of law: DWORKIN, *supra* note 98, at 33-35.
[100] DWORKIN, *supra* note 93, at 8-9.
[101] DWORKIN, *supra* note 98, at 11.

citizens have and which the conduct of the state must respect. Rather, Dworkin sees the rule book as a community's attempt to capture the moral rights that people in that community accept they all bear.[102] In hard cases where the rule book is silent, legal argument cannot look only to the plain facts of how the law was positively enacted but must look also to the principles that underlie or are embedded in the positive rules of law.[103] The judge is not free to legislate within the 'open texture' of imprecise or incomplete rules,[104] but is rather bound to uncover the principle or set of principles that best justifies previous decisions and provides an answer in each hard case.[105] The point for Dworkin is that while judges will inevitably make new law in resolving hard cases, they should not strike out on their own moral frolic but must look to the existing rules in statute, common law and the constitution in order to distill the underlying principles of the legal system on the basis of which and in congruence with which they can resolve these disputes.

This normatively rich conception of the rule of law is consistent with what Dworkin says elsewhere about rights limitation. Although he extols rights as trumps, he nevertheless accepts that rights are not absolute.[106] He says for example that it is appropriate to resolve a conflict between two rights through a process of balancing, recognizing that one of these rights may need to be limited in order to preserve the integrity of the other.[107] But, he goes on, other than to preserve the integrity of another right a constitutional right can be limited only for a 'compelling reason … that is consistent with the supposition on which the original right must be based.'[108]

Implicit in Dworkin's reasoning here is the idea that the things rights protect are closely connected to the deep normative values or principles that a society recognizes as fundamentally important, and that constitutional rights are expressions of these fundamental values. If the pursuit of some social objective serves the same fundamental values on which a right rests, then limiting the right in order to achieve that objective is not inconsistent with the reasons we value the right in the first place. The objective is itself a trump.[109] A rights limitation can therefore be shown to be justifiable to the extent that it advances or protects – is congruent with – the same fundamental normative values that rights themselves exist to advance and protect.

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[102] *Id*. at 17.
[103] DWORKIN, *supra* note 26, at 105.
[104] Hart, *supra* note 52, at 121-32, quoted by DWORKIN, *supra* note 26, at 102.
[105] DWORKIN, *supra* note 26, at 105-18.
[106] *Id.* at 191; DWORKIN, *supra* note 97, at 49-51.
[107] DWORKIN, *supra* note 26, at 199.
[108] *Id.* at 200.
[109] WEINRIB, *supra* note 66, at 248-49.

Normative congruence, or something like it, turns out to be an analytical mechanism for investigating the justifiability of rights limitation that is acceptable even to opponents of rights limitation. Even though Dworkin's discussions do not use the language of proportionality,[110] the broader legal theory he articulates in response to those who take a plain fact view of the law relies just as much on the idea that fundamental normative values constrain and inform judicial decisions as does his argument about when balancing is appropriate.

Accepting a normative conception of the rule of law, which demands officials show their decisions to be justifiable even in the absence of clear rules, requires officials to refer to a set of deeper normative principles in justifying their decisions. But determining whether a right or its limitation better advances a normative principle, in turn, requires balancing the right and the competing interests its limitation serves. Moral reasoning is thus inevitable in legal communities that adopt a normatively rich conception of the rule of law. This calls for an answer to the objection from incommensurability. I offer this defense in Part IV below, describing how 'balancing as reasoning' relates the value of rights and competing social interests to the normative principles at the heart of a legal system without balancing them directly. Before advancing to that argument, I briefly describe how moral reasoning survives another de-moralizing construction of the principle of proportionality.

E. The included reasons model: India's abbreviated limitations analysis

The Indian Constitution's internal limitations clauses include lists of reasons for which rights may be limited. These constitutionally included reasons for limitation are the basis of a mechanical approach to limitations analysis which may prove effective in eliminating moral reasoning from proportionality analysis. The fundamental rights specified in article 19(1)(a)-(g) of the Indian Constitution may be limited only in order to achieve objectives that are expressly provided for in sub-articles 19(2)-(6). For instance, the right to freedom of expression (article 19(1)(a)) may be limited only:

> in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence (article 19(2)).

[110] *Id.* at 250; GRÉGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009), 117.

Similarly, the rights to freedom of assembly and association, mobility and settlement, and freedom of trade and occupation can be limited only in pursuit of objectives expressly defined in the remaining sub-articles of article 19.

But while *Big M* may invite a normative evaluation of the importance of each limitation's purpose in Canada, the Indian Supreme Court has understood the constitutionally included list of reasons to perform this normative evaluation on behalf of courts. As long as the purpose of a limitation is on the list of acceptable reasons for rights limitations, no court can question – nor need even consider – whether that purpose is important enough to warrant the limitation of a right. In *Gujarat v Mirzapur Moti*, the Court remarked that the list of constitutionally prescribed reasons for rights limitations 'can be relied on for the purpose of adjudging the reasonability of restrictions placed on the Fundamental Rights'.[111] In *People's Union of Civil Liberties v Union of India*,[112] the Court upheld limitations to the right to freedom of association and assembly under the 2002 Prevention of Terrorism Act solely on the basis that the objectives of the statute were professed to be the 'interests of sovereignty' and the 'integrity of the country', as provided for in article 19(2). There was no subsequent inquiry into the severity or suitability of the restrictions imposed, or whether the objectives of sovereignty and integrity could be served by measures less restrictive of rights to freedom of assembly and association.[113]

By reading the list of included reasons to be dispositive of the question of reasonableness in its entirety, the Indian Supreme Court has absolved itself of the need to engage in any moral reasoning. The Court need not conduct a free-standing inquiry into the proportionality of an impugned measure, but can instead accept that the limitation is proportional simply because it aims at achieving a purpose that already bears the imprimatur of constitutional value. This approach allows courts to manufacture predictable limitations analysis by bundling all consideration of the competing values of rights and public interests into the textual question of whether or not the limitation's purpose is constitutionally sanctioned.

F. Poland's approach to constitutionally included reasons

[111] State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat (2005) 8 S.C.C. 534, at para. 22.
[112] People's Union of Civil Liberties v. Union of India (2004) 9 S.C.C. 580.
[113] *See also* Papnasam Labour Union v. Madura Coats Ltd (1995) 1 S.C.C. 501, at para. 14; JINEE LOKANEETA, TRANSNATIONAL TORTURE: LAW, VIOLENCE, AND STATE POWER IN THE UNITED STATES AND INDIA 182-83 (2007).

Poland's Constitution takes a similar approach to the Indian Constitution in setting out a list of acceptable reasons for limiting rights in the general limitations clause in article 31(3). Limitations may be imposed only when they are necessary 'for the protection of … security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons'. In the German Basic Law, some of the limitations clauses internal to specific rights provisions also spell out the objectives for which rights may be limited.[114]

But while the Indian Supreme Court has treated the question of whether the purpose of a limitation is on the list as sufficient to determine the reasonableness of a limitation, the Polish Constitutional Tribunal sees this as a threshold inquiry that is necessary, but never sufficient, to establish the acceptability of a rights-limiting provision.[115] The Tribunal has made it clear that even if this threshold is met, a limitation can only be upheld if it is 'in adequate proportion' to the burden imposed on the right.[116] The German FCC's approach shows a similar commitment to a distinct proportionality analysis even when the purpose of the impugned limitation is listed in the Basic Law.[117]

It does not follow merely from the constitutional identification of acceptable reasons for limiting a right that any limitation that pursues a constitutionally specified purpose necessarily limits the right to a proportionate degree. Indeed, some benches of India's Supreme Court rely on the inquiry into proportionality in the strict sense even after establishing that the purpose of the limitation is on the list of included reasons.[118] There are thus two ways for a court to understand and apply a constitutional list of reasons for rights limitation. Whether such a list reduces or eliminates the role for moral reasoning in determining the acceptability of rights challenges depends on which of these two approaches a court takes.

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[114] *See, e.g.,* article 5(2), allowing limitation of the right to freedom of speech in order to protect young persons; article 10(2), allowing limitation of the right to privacy of correspondence, post and telecommunications in order to protect the free democratic basic order; and article 13(7), allowing limitation of the inviolability of the home in order to guard against a pressing threat to public security, such as combatting epidemics.

[115] *Polish Hunting Association,* CT judgment in case no K21/11 (Nov. 6, 2012) (Poland).

[116] *Independence of the National Bank,* CT judgment in case no KP 4/08 (Jul. 16, 2009) (Poland); *Unpermitted construction,* CT judgment in case no P 27/11 (Oct. 9, 2012) (Poland); *Police Intelligence Operations*, CT judgment in case no K 32/04 (Dec. 12, 2005) (Poland).

[117] ALEXY, *supra* note 4, at 77-80.

[118] *See e.g.,* Chintaman Rao v. State of Madya Pradesh AIR 1951 S.C.C. 118 (stating that limitations must 'strike a proper balance between the freedom guaranteed in the article 19(1)(g) and the social control permitted by clause (6) of article 19'); Ebrahim Vazir Mavat v. State of Bombay AIR 1954 S.C. 229 (blanket policy requiring all people entering India from Pakistan to seek special permission and allowing permanent deportations for failure to do so held to be disproportionate); and RM Seshadri v. District Magistrate, Tanjore AIR 1954 S.C.C. 747 (holding that statutory language conferring wide and unfettered discretion of officials to permit the screening of films in cinemas cannot be regarded as reasonable restrictions on the right to freedoms of expression).

But among the paradigm jurisdictions I consider here, the courts that have come closest to adopting a model of proportionality analysis free from moral reasoning, either by relying on a list of included reasons or through an LRM-dependent approach, have done so imperfectly at worst, and only occasionally at best. Moral reasoning continues to exert an attraction over proportionality analysis, which judges seem incapable of resisting. Accordingly, the complaint that proportionality in the strict sense is undermined by the incommensurability of rights and competing interests deserves serious attention.

IV. MEETING THE INCOMMENSURABILITY THESIS THROUGH BALANCING AS REASONING

A. Two understandings of incommensurability

The incommensurability thesis is critical of the moral reasoning involved in proportionality analysis for a reason unrelated to predictability. It holds that proportionality in the strict sense is an inherently flawed mechanism for choosing between rights and the objectives served by rights limitations because the value of rights and competing objectives cannot be measured and directly compared. This broad statement of incommensurability can be broken into three specific complaints. The first is that neither rights nor the public interests served by their limitation are amenable to the kind of quantification that is necessary if two goods are to be balanced against each other. Before any comparison or balancing of goods can take place, the value of each good has to be independently determined in some kind of Benthamite, quasi-mathematical utilitarian calculus. The difficulty is that the value of neither rights nor competing public interests is easily quantified.[119]

Second, even if the value of rights and the interests served by limiting them can be quantified and measured, there is no common metric on which these measurements can be compared.[120] While weighing quantities of stuff on a kitchen scale provides a clear measure of mass and allows us to decide immediately which of two things is weightier, the comparison is possible only when the things being compared both have mass. Those who object to the balancing involved in proportionality in the strict sense often carry forward this analogy with physical properties. It is futile to compare the length of string to the weight of a stone, they say, because

[119] Tsakyrakis, *supra* note 4, at 471, 475.
[120] Webber, *supra* note 4, at 194.

mass and length are qualitatively different physical properties.[121] This is so even though the properties of mass and length are each quantifiable in their own way. Now, assuming it were possible to quantify the value of a right and the value of the competing interests its limitation would serve, each in its own way, these values are nevertheless qualitatively different normative properties which, like mass and length, it is futile to balance or compare against one another.

These first two complaints constitute an objection from 'strong' incommensurability.[122] Both complaints understand commensurability to mean that two distinct goods are commensurable if and only if there is a single, common metric on which these goods can be measured, which captures everything we value about both goods.[123] When two policy options are commensurable in this way, their advantages and disadvantages can be balanced on a common scale – such as dollars – and the optimal option determined through the kind of cost-benefit analysis familiar to students of economics and public policy. When rights are sought to be balanced against competing interests in this way, the inquiry into strict proportionality becomes an exercise in balancing the quantifiable benefit produced by the rights-limiting measure against the quantifiable harm of limiting the right. Commentators have called this model of proportionality analysis 'interest balancing'.[124]

Goods are incommensurable in a strong sense when (1) there is no way to compare their value except according to a common metric or unit of measurement, and (2) there is no common metric or unit of measurement available. The objection from strong incommensurability attacks the interest balancing model of proportionality analysis because the benefits and harms that limiting a right would produce are qualitatively different normative properties which are incommensurable in this strong sense. Proportionality analysis conceived of as interest balancing thus provides no intelligible answer to the question of whether the limitation or the right should

[121] Justice Scalia, in Bendix Autolite Corp v. Midwesco Enter Inc 486 U.S. 888, 897 (1988). *See also* Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GERMAN L. J. 1387 (2013); John Finnis, *Natural Law and Legal Reasoning*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P George ed., 1992); James Griffin, *Incommensurability*, *in* INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON (Ruth Chang ed., 1997); Stuart Woolman, LIMITATION, IN CONSTITUTIONAL LAW OF SOUTH AFRICA (Stuart Woolman & Michael Bishop eds., 2nd ed. 2005).

[122] Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer,* 45 HAST. L. J. 813, 815-16 (1993-94).

[123] David Wiggins, *Incommensurability: Four Proposals,* in INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON, 53 (Ruth Chang ed., 1997).

[124] Möller, *supra* note 4, at 715.

be upheld, because there is no way to meaningfully compare the normatively different qualities of rights and competing interests.[125]

The third version of the incommensurability complaint posits a different way of understanding the relationship between rights and competing interests. This third way accepts that while rights and competing interests are not commensurable, neither are they incommensurable in the strong sense. A relationship of 'weak' incommensurability exists because while there may be no common metric on which to quantify the respective value of rights and competing interests (i.e. accepting condition (2) of strong incommensurability), there are ways of comparing the value of these goods other than on a common scale of measurement (i.e. rejecting condition (1) of strong incommensurability). This is so because we value rights for reasons beyond the extent to which they can be quantifiably measured. Property rights protect things we own and which have monetary value in the market, but dollar value is not exhaustive of the reasons we value property rights.[126] The things we think of as priceless have value to us as their owners beyond their quantifiable monetary value.

Weak incommensurability suggests a different understanding of balancing. Even if goods cannot be ranked on a cardinal scale according to a shared unit of measurement, it may be possible to assign priority to these goods in an ordinal ranking without having a quantified measure of their value.[127] The objection from weak incommensurability maintains that even an ordinal ranking of goods requires some criterion of evaluation according to which that ranking can be understood and justified. Since there is no self-evident criterion in light of which ordinal rankings of rights and competing interests can be explained or understood, it remains conceptually impossible to balance rights and competing interests in a meaningful or intelligible way.

To fully understand the objection from weak incommensurability, it may help to jettison the kitchen scale balancing metaphor. While a kitchen scale remains useful in providing precise measurements of, say, cake flour or methylamine, these measurements have absolutely no bearing on whether you would prefer to bake cupcakes or crystal meth in the first place. You know your preference as between confectionary and narcotics even though the value or benefit of

[125] John Finnis puts the problem this way (*On Reason and Authority in* Law's Empire, 6 L. & PHIL 357, 374 (1987)): '[I]n the absence of any metric which could commensurate the different criteria, the instruction to balance can legitimately mean no more than bear in mind, conscientiously, all the relevant factors, and *choose'*.

[126] Klatt & Meister, *supra* note 4, at 696.

[127] Klatt & Meister, *supra* note 4, at 698.

each – the taste of sweetness and the experience of short-term euphoria – is a qualitatively different thing, normatively speaking. There may be no way to quantify these different values or benefits in a way that makes a cardinal ranking of cupcakes and crystal meth meaningful, but you will know your preference for one over the other as long as you know that sweetness or euphoria is more important to you. But there is no intelligible way to determine or explain why sweetness or euphoria is more valuable to you. Your preference for cupcakes or crystal meth only makes sense given the plain fact that sweetness or euphoria is more valuable to you.

Robert Alexy's defense of balancing falls prey to the objection from weak incommensurability. First, he accepts that rights and the competing interests their limitations serve do not satisfy the conditions for commensurability, and he makes no attempt to defend the interest balancing that the objection from strong incommensurability targets. Second, Alexy seems to take for granted that rights and competing interests are incommensurable in only the weak sense. His proposed model of balancing involves ordinal rankings on a triadic scale that assesses whether the interference with a right is serious, moderate or light and whether the interests that limiting a right would serve are very important, moderately important or unimportant.[128] As long as it is possible to come to some justifiable assessment of the severity of the rights limitation and the importance of interests pursued, we can compare them on this triadic scale.

And here is the nub of the objection from weak incommensurability: What Alexy fails to tell us is how a court makes, or should make, intelligible and justifiable triadic assessments of the seriousness of a rights infringement and the importance of the interests it serves. As far as ordinal rankings may take us, there is an important difference between your individual preference for cupcakes or crystal meth and a court's ordinal ranking of rights and competing interests. The validity of your preference needs no additional justification beyond your mere assertion of the fact that you value sweetness or euphoria more highly. As a criterion for choosing between cupcakes and crystal meth, your preference for sweetness or euphoria is a self-evident matter of fact.

A court's decision to uphold or strike down a rights limitation, by contrast, does not depend on criteria that exist as self-evident matters of fact. Judicial decisionmaking is not a self-referential activity in the way that discovering individual preferences is. A court's ordinal

[128] ALEXY, *supra* note 4, at 402-11.

ranking of rights and competing interests on a triadic scale presupposes that there is an external justificatory criterion with reference to which that ranking can be made,[129] and an ordinal ranking of rights and competing interests is question-begging without an account of the criterion against which the court justifies the ranking. It follows, then, that if there is some value or criterion that is external to two weakly incommensurable goods and to which both goods can be related, the ordinal ranking of those goods can be justified against it. And here is the foundation of the answer to the objection from weak incommensurability.

B. Justifiability in judicial context: balancing as reasoning

In those cases where the proportionality analysis ultimately depends on the inquiry into proportionality in the strict sense, I understand judges to be engaged in justifying ordinal rankings in light of external and independent criteria or values. In these constitutional settings, though, there is no debate about what values judges must consider in ranking the importance or seriousness of rights and limitations. These values are explicitly stated in the text of the constitution. Judges do not have to be moral philosophers or ethical conjurers to generate the values according to which rights and limitations are to be weighed, or justify why a particular set of values should determine the preference in each case. They need refer only to the statement of values in the constitution.

In South Africa, section 36 of the Constitution requires rights limitations to be consistent with the commitment to 'human dignity, equality and freedom' in an 'open and democratic society.' In Canada, section 1 of the Charter requires limitations to be justifiable in a 'free and democratic society'. The Polish constitution requires limitations to be necessary 'in a democratic state' and, as in Germany, describes human dignity as the core value informing the entire constitutional project. In Israel, article 8 of the Basic Law: Human Dignity and Liberty requires that limitations befit 'the values of the State of Israel', while article 1A declares the purpose of the Basic Law to be 'to protect human dignity and liberty, in order to establish … the values of the State of Israel as a Jewish and democratic state.' Article 1, further, provides that rights rest on the 'recognition of the value of the human being, the sanctity of human life, and the principle

[129] Möller, *supra* note 4, at 720-21.

that all persons are free', and rights 'shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel'.[130]

In all of these constitutional settings, rights and the social interests that might justify limiting them do not pull society in opposite directions, towards incompatible or incommensurable values. Quite the opposite, the judicial or legislative preference for the protection of a right or the pursuit of a competing interest in a particular case – the balance to be struck between them – comes down to judges and lawmakers making arguments explaining which one of two options better realizes a single set of values. This is what is captured by the phrase 'balancing as reasoning'.[131] It is a form of reasoning and argumentation that brings rights and their limitations into a relationship, through their respective propensities to fulfill constitutional values, and allows both judges adjudicating challenges to the constitutionality of statutes and legislatures enacting laws to justify the preference for one over the other.

The paradigm courts that do conduct an inquiry into proportionality in the strict sense justify their preference for either upholding a right or allowing its limitation on the basis that it tends to promote, to a greater extent than the alternative, the constitutional values to which the limitations clause compels them to refer. Balancing as reasoning accepts that rights and the competing interests limitations serve are not commensurable because there is no single metric that captures everything valuable about them both, and the inquiry neither relies on nor engages in the kind of interest balancing that the objection from strong incommensurability targets. On this ground, the Israeli Supreme Court has rejected the cost-benefit rubric that interest balancing turns on, declaring its disinclination to compare the 'absolute values' of the advantages a limitation delivers with the damage that results from it.[132]

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[130] For discussion of these values and how the Supreme Court of Israel has attempted to provide concrete guidance to how they operate in assessing the constitutionality of laws, *see* Aeyal M Gross, *Global Values and Local Realities: The Case of Israeli Constitutional Law, in* AN INQUIRY INTO THE EXISTENCE OF GLOBAL VALUES THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW *(*Denis Davis, Alan Richter & Cheryl Saunders eds., 2015); AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., Princeton University Press, 2005); H.C.J. 6821/93 United Mizrahi Bank Ltd v. Migdal Cooperative Village IsrSC 49(4), 221 (1995); H.C.J. 212/03 at 354; H.C.J. 4112/99 Adalah – The Legal Center for the Rights of the Arab Minority v. Tel-Aviv-Jaffa Municipality IsrSC 56(5) 393 (2002).

[131] Möller, *supra* note 4, at 715. Jeremy Waldron argues that when legal professionals, judges, academics or policymakers resolve conflicts between goods by the application of, say, Rawlsian or Dworkinian principles, we engage in a process of moral reasoning and argumentation that might be regarded as 'balancing' by ordinary people (*Fake Incommensurability, supra* note 122, 821).

[132] H.C.J. 2056/04 Beit Sourik Village Council v. Government of Israel [2004] IsrSC 58(5) 807, at para. 41 (translated into English in 38 ISRAEL L. REV. 83 (2005)).

Insisting that there are ways of comparing rights and competing interests other than by cardinal rankings on a single metric – i.e. rejecting condition (1) of strong incommensurability – the Israeli Supreme Court prefers a proportionality inquiry that requires the outcome of limitations analyses to be justified on something like Alexy's triadic scale. In *Tzemach*, the Court said: 'The more important the limited rights and the more severe the limitation on that right, the more robust a public interest consideration is required in order to justify the limitation.'[133] The South African Constitutional Court echoes this approach in *Bhulwana*: 'The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification for the infringing legislation must be.'[134] The Canadian Supreme Court requires that 'the more severe the deleterious effects of a measure, the more important the objective must be if it is to be reasonable and demonstrably justified in a free and democratic society.'[135]

The Israeli Supreme Court has gone a long way in making it clear that the persuasiveness or robustness of the justification for the infringement of a right is to be assessed against fundamental constitutional values. The Court relies on the notion of 'social importance' as a justificatory shorthand for all of the Basic Laws' fundamental values.[136] Former Chief Justice Aharon Barak explains that what is socially important in each country is derived from 'political and economic ideologies, from the unique history of each country, from the structure of the political system and from different social values.'[137] The assessment of social importance, and the inquiry into proportionality in the strict sense relative to it, must be conducted 'against the background of the normative structure of each legal system'. 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'.[138] Whether a right should be upheld against a limitation or that limitation allowed depends ultimately on which of the two options delivers a more socially important outcome.

[133] H.C.J. 6055/95 Tzemach v. Minister of Defence [1999] IsrSC 53(5) 241, 273. Aharon Barak refers directly to Alexy in describing the Court's approach in his academic work: BARAK, *supra* note 4, at 364.
[134] *S v. Bhulwana, supra* note 20, at para. 18.
[135] Oakes*, supra* note 18, at para. 71.
[136] H.C.J. 14/86 Laor v. Israel Film and Theatre Council [1987] IsrSC 41(1) 421, 343.
[137] BARAK, *supra* note 4, at 349.
[138] *Id*. at 361.

The commitment to a model of proportionality analysis focused on fundamental values has led the Court to reject an LRM-dependent approach to proportionality analysis.[139] In the *Beit Sourik* case, the Court found the erection of a separation barrier between Palestinian farmers and their lands to be an unjustifiable violation of constitutional rights to property, freedom of movement and freedom of occupation.[140] On the necessity leg of the proportionality analysis, the Court accepted that the government had indeed adopted the least restrictive means available, since alternative, less restrictive routes for the barrier would not be as effective in achieving the state's security objectives. The Court nevertheless concluded that the impact of the rights violations imposed by erecting the barrier, along either the proposed or alternative routes, would cause an injury that 'strikes across the fabric of life of the entire population' that could not be justified by the marginal increases in security the barrier would deliver.[141] National security is not so important to Israeli society, the Court has said elsewhere, that any increase in security will invariably justify harsh limitations on the lives of thousands of Palestinian citizens.[142]

For the Court, the shortcoming of the LRM test is that its formality does not engage fundamental constitutional values in the justification of rights limitations. To uphold a rights limitation by relying entirely on the conclusion that the means adopted to achieve some legitimate purpose is the least restrictive available, implies that the infringement of the right will be upheld no matter how serious or extensive that infringement.[143] Balancing as reasoning pushes judges and lawmakers to justify rights limitations on the basis of reasons rooted in the most fundamental values of the constitutional order, rather than on the evidentiary showing that there is no less restrictive alternative.[144]

The South African Constitutional Court takes the same view, describing the 'global judgment on proportionality' required by section 36 of the Constitution as oriented toward 'the ultimate

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[139] Among the judges of the Israeli Supreme Court, Justice Edmond Levy presents a lone dissenting voice against the enthusiasm for proportionality in the strict sense. He prefers an LRM-dependent approach that seeks to minimize the role for balancing. See his judgments in Adalah v. Minister of the Interior, *supra* note 22; H.C.J. 2150/07 Abu Safiyeh v. Minister of Defence [2008]; and H.C.J. 466/07 MK Zahava Gal-On (Meretz-Yahad) v. Attorney General [2012].

[140] Beit Sourik, *supra* note 132, at para. 11.

[141] Beit Sourik, *supra* note 132, at paras. 82-85.

[142] See Adalah v. Minister of the Interior, *supra* note 22, at para. 93.

[143] Aharon Barak, *Proportional Effect: The Israeli Experience,* 57 U. TORONTO L. J. 369, 373 (2007); BARAK, *supra* note 4, at 342-43.

[144] Mattias Kumm calls this element of proportionality analysis 'public reason oriented justification' (*The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS OF HUMAN RIGHTS 141, 143 (2010)).

values' to which the Constitution commits the South African legal system.[145] The factors that section 36 enjoins courts to consider in coming to this judgment – in essence the steps of the standard model of proportionality analysis – provide a heuristic or rhetorical toolkit by which judges can relate rights and their limitations to the fundamental values of openness, democracy, human dignity, equality and freedom. The seriousness of the inroad into fundamental rights and the persuasiveness of the justification for the infringement are both assessed in light of their connection to these ultimate values. The closeness with which a right or its limitation is related to these values is the basis on which an ordinal preference of one over the other is justified, and the decision to either uphold a right or strike down a rights limitation turns on which option best advances these values.

V. WHY DO COURTS PREFER A NORMATIVELY RICH CONCEPTION OF THE RULE OF LAW?

Balancing as reasoning offers a way to meet the incommensurability objection, but the need to rely on it only arises if a court insists on conducting an inquiry into proportionality in the strict sense. I argued in Part III that LRM dependence and the included reasons approach are ways of reasoning about limitations that involve no balancing, but pointed out that it just so happens that courts in the paradigm countries continue to rely on balancing even when they eliminate a discrete inquiry into proportionality in the strict sense. So LRM dependence and the included reasons approach, if applied in a way that does not rely on proportionality in the strict sense, could resolve limitations disputes without raising complaints of either unpredictability or incommensurability.

The enduring question, then, is why courts continue to be so strongly drawn to balancing and moral argument. In this final section I make two arguments that purport to explain this attraction. The first involves a clarification of what the scope of the inquiry into proportionality in the strict sense actually involves, suggesting that balancing leaves far less room for the specters that the objections from predictability and incommensurability anticipate. The second involves a more fundamental argument about why the normative conception of the rule of law continues to dominate in contemporary legal systems.

[145] *S v. Manamela, supra* note 19, at para. 32; *Prince v. President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), at para. 155.

A. Balancing at the margins

In the words of the Israeli Supreme Court in the separation barrier case,[146] the balancing exercise does not consider whether the absolute value of a right is more closely aligned to constitutional values than the absolute importance of the interests sought by a measure limiting a right. The Israeli government had argued in this case that the limitation of rights to freedom of movement, occupation and property was justified by the greater security from terrorism that the barrier would provide. But it is difficult to work out whether a nation's security interests are more closely aligned with constitutional values than individual freedom of movement, the pursuit of an occupation, or the enjoyment of personal property. Further, this is a question over which people will reasonably disagree, making a court's job of justifying its conclusions all the more difficult.[147]

But the balancing inquiry does not focus on these absolute values. Rather, what a court puts into the balance when considering proportionality in the strict sense is the marginal effects of preferring one option to another. In considering whether a blanket prohibition on non-Israeli citizens from the Occupied Territories joining their Israeli spouses in Israel was a justifiable limitation of the dignity of the Israeli spouses, the Court held:

> The issue before us is not the national security of the residents of Israel or the respect of the human dignity of the spouses. … Rather, the issue is much narrower. Does the additional security achieved by the transition from the strictest individual examination possible by law of the non-Israeli spouse to a blanket restriction on entry into Israel have an adequate relation (that is, is proportional) to the additional harm caused to the human dignity of the Israeli spouse as a result of such a transition?[148]

Two observations follow. The first is that the first three inquiries of the standard model emerge as critical to balancing as reasoning. At the final stage of the analysis, courts consider whether the additional or marginal gains of a rights-limiting measure justify the infringement of

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[146] Beit Sourik, *supra* note 132.

[147] Jeremy Waldron offers convincing arguments about the need to acknowledge reasonable moral disagreement as a feature of modern political society and to take it seriously in the institutional and constitutional design of legal systems. See JEREMY WALDRON, LAW AND DISAGREEMENT (1999), and Jeremy Waldron, *Moral Truth and Judicial Review,* 43 AM. J. JURIS 75 (1998).

[148] Adalah, *supra* note 22, at para. 91. Echoing this approach in minority reasons in Hutterian Brethren, *supra* note 68, Justice LeBel argued that the Court should consider whether the pursuit of a narrower policy goal, or the incomplete achievement of the government's stated goal, would be proportionate to the less extensive infringement of the affected right.

rights. But these marginal gains have to be assessed relative to alternatives: the status quo on one hand and less restrictive alternatives on the other. What the gains of a rights limitation are likely to be, and what the likely gains of less restrictive alternatives would be are matters of empirical or at least probabilistic assessment. It is not possible for a court to conduct the balancing inquiry without this information before it. As the South African Constitutional Court emphasizes, the inquiry into proportionality is a global one that sets the conclusions to the first three inquiries alongside the assessment of proportionality in the strict sense.

The second point is that the conclusions of the early stages of the standard analysis act as a constraint on the balancing inquiry at the final stage. By narrowing the scope of balancing as reasoning from the absolute value of rights and competing interests to the relative or marginal impacts of the impugned limitation, the room for moral controversy is reduced. People will continue to disagree about whether security or individual freedom is more important or more closely related to constitutional values, but the moral stakes of a particular limitations inquiry do not reach as high as this disagreement. What is in the balance is the marginal gains in security that a particular rights limitation promises relative to alternatives or the status quo, rather than the wholesale commitment to security.

I recognize that whether this narrower, marginal balancing inquiry is in fact less controversial than the balancing of the absolute values of rights and competing interests is a matter of empirical or sociological inquiry, and I have no data to support of this assertion. But as a conceptual matter, the narrowing of the scope of the inquiry is incontrovertible: balancing as reasoning remains a moral exercise, but the constraints that the empirical and probabilistic components of the standard model impose on the balancing inquiry ensure that it is not a freewheeling moral frolic that puts the entirety of a society's commitments to either rights or competing public interests at the mercy of judicial discretion and moral subjectivity.

B. The rule of law and the meaning of moral autonomy

If there is less reason to be wary of moral reasoning on one hand, are there reasons that explain the attraction to moral reasoning on the other? I connect the magnetism of moral reasoning to the richer conception of the rule of law I described in Part III above, which compels courts and legislatures – indeed all officials who exercise public power – to justify their conduct to the subjects of that power on the basis of its congruence with normative principles. Consider again

the question of why we value the rule of law. It is certainly true that one of the benefits of the rule of law in a legal system is the predictability and stability that it generates. As legal subjects, we want the law to be predictable and stable because these conditions are necessary for individual and autonomous decision-making. We want to know the tax rate so we know how much to save and how much we can spend on cupcakes, whether using euphoria-inducing narcotics attracts criminal liability or not, and how fast we can drive on the roads from one place to another.

The instrumental value of predictability, then, is its service to moral autonomy. But the rule of law does not only serve moral autonomy: it also depends on moral autonomy for its capacity to make law effective as a tool for ordering behavior in society. Directives that claim the authority of law, and which purport to guide people's conduct in society, presuppose that people are capable of understanding rules and shaping their conduct to them.[149] This same view of human beings as morally autonomous agents capable of understanding legal rules and conforming their behavior to them demands that when officials apply legal rules to individuals to prohibit or compel certain conduct, the application of the law can be shown to be congruent with the content of the law as previously declared. The presumption that people understand and will obey the law imposes a reciprocal obligation on officials to ensure that their conduct remains within the limits the law sets.[150] While official congruence with law guarantees that the rules people accept as settled and to which they conform their behavior will continue to be enforced and applied as previously declared, official incongruence with previously declared rules undermines the efficacy of law as a tool for ordering society because it leaves legal subjects with no idea about how the law will actually operate, or what it requires them to do and refrain from doing.

This is true for ordinary law as much as for constitutional principles. 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 (democracy, dignity, equality or openness, for example), the rule of law demands that, just as a government must continue to charge the tax rates it sets and enforce the speed limits it posts,

[149] FULLER, *supra* note 46, at 162; Richard Stacey, *Popular Sovereignty and Revolutionary Constitution-making, in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW (David Dyzenhaus and Malcolm Thorburn, eds. 2016).
[150] Jeremy Waldron, *Why Law – Efficacy, Freedom, or Fidelity?* 13 L. & PHIL. 259, 275-80 (1994).

official conduct must be congruent with this set of fundamental values. More crisply, for officials to show that their conduct meets the requirement of congruence in hard cases, where no previously declared rules of law apply, they have no option but to refer to the deeper, background norms that underlie the legal system as a whole and which infuse all of the previously declared rules. This, in turn, implies an acceptance of the normatively rich conception of the rule of law.

Meeting the rule-of-law demand for normative congruence requires officials to demonstrate to the legal community, through a process of persuasion and argumentation, that some action or other is congruent with constitutional values. Moreover, justifying government conduct with reference to the values that a constitution entrenches at the foundation of a legal order, in circumstances where people hold a multiplicity of moral convictions and disagree reasonably about moral matters, requires direct and honest engagement with those moral considerations. Balancing as reasoning allows courts and policy makers to make these arguments. To be sure, both courts and lawmakers engaged in balancing as reasoning may fail to offer persuasive or convincing justifications for an ordinal ranking of rights and limitations. An argument that following one course of action over another will better advance fundamental constitutional values remains a difficult one to make. But the point is that the normatively rich conception of the rule of law at work in the paradigm countries and the moral autonomy it presupposes demands that officials and courts make these moral arguments.

CONCLUSION

The six constitutional democracies I consider have all entrenched a set of fundamental rights in their constitutions, and have all made provision for the limitation of those rights. In each jurisdiction, the principle of proportionality has emerged as the central analytical tool in assessing the acceptability of rights limitations, and each jurisdiction has adopted some version of the standard model of proportionality analysis in performing that assessment. The principle of proportionality has in turn been the target of three significant objections, which call into question the integrity of proportionality as the analytical fulcrum for resolving limitations disputes.

I have argued here that proportionality can be defended against all of these objections. The devaluation of rights objection and the objection from incommensurability can be overcome by soft trumping and balancing as reasoning, respectively. But I argue that the attempt to meet the

objection from predictability by eradicating moral reasoning from the proportionality analysis – what I call de-moralizing or LRM-dependent approaches – is undone by the fact that courts continue to rely on moral reasoning even when they conduct the empirical and policy-oriented inquiries of the standard model.

The response to the objection from predictability is not to design a new model of proportionality analysis that eliminates moral reasoning, but to illustrate that the demand it makes for predictability is premised on an impoverished and formalistic conception of the rule of law that is not shared by the paradigm jurisdictions. The jurisprudence in these countries reveals a normatively rich conception of the rule which acknowledges the demand for congruence not just between official conduct and formal rules, but also between official conduct and the deeply held normative commitments expressed in each country as constitutional values.

Balancing as reasoning is a mechanism by which courts can investigate whether an impugned rights limitation is justifiable, by asking if the limitation can be shown to be congruent with normative commitments. Moreover, the idea of normative congruence allows courts to uphold the moral autonomy on which the commitment to the rule of law is based in the first place, by making normative arguments that purport to justify exercises of public power in precisely those hard cases where there are no plain rules in effect. The ongoing attraction of courts in the paradigm countries to balancing as reasoning and proportionality in the strict sense suggests that these courts are committed to this richer conception of the rule of law.

Indulge me in one final reference to narcotics. In a similar way that we might think of a craving for crystal meth or for cupcakes as the product of an underlying predilection, I have argued in this article that the magnetic attraction of moral reasoning is the product of the courts' underlying understanding of the rule of law as committed to a view of legal subjects as autonomous moral agents, entitled to official conduct that can be shown to be justifiable even in hard cases where there are no readily available formal rules for official conduct. I have not argued that this is the correct understanding of the rule of law – although I think such an argument could be made. Were a political community to adopt the rule-book conception of the rule of law and understand it to require nothing more than congruence with plain and formal rules, an LRM-dependent approach to proportionality analysis may be both viable and preferable. But the fact that moral reasoning continues to exert its magnetic pull in the paradigm constitutional democracies suggests that a normatively rich conception of the rule of law, one

that connects the law to a political community's moral foundations, will continue to inflect constitutional jurisprudence in the twenty first century.