

# Analogical Arguments in Ethics and Law: A Defence of a Deductivist Analysis

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**Abstract.** The paper provides a qualified defence of Bruce Waller’s deductivist schema for *a priori* analogical arguments in ethics and law. One crucial qualification is that the schema represents analogical arguments as complexes composed of one deductive inference (hence “deductivism”) but also of one non-deductive sub-argument. Another important qualification is that the schema is informed by normative assumptions regarding the conditions that an analogical argument must satisfy in order for it to count as an optimal instance of its kind. Waller’s schema (in qualified form) is defended from criticisms formulated by Trudy Govier, Marcello Guarini and Lilian Bermejo-Luque.

**Résumé.** Cet article avance une défense nuancée du schéma déductiviste de Bruce Waller des arguments par analogie en éthique et en droit. Une nuance essentielle est que le schéma représente les arguments par analogie comme des arguments complexes composés d'une inférence déductive (d'où le "déductivisme") et d'un sous-argument non-déductif. Un autre aspect important est que le schéma est fondé sur des suppositions normatives concernant les conditions que l'argument analogique doit remplir pour qu'il compte comme une instance optimale de son genre. Le schéma de Waller (dans sa forme nuancée) est défendu contre les critiques formulées par Trudy Govier, Marcello Guarini et Lilian Bermejo-Luque.

**Keywords:** *a priori* analogical arguments, Bruce Waller, deductivism, ethics, law

## 1. Introduction

The topic of this paper is the use of *a priori* arguments from analogy in moral and legal contexts. In recent years, a fruitful debate de-

veloped in the pages of *Informal Logic* about whether these arguments may be regarded as deductive arguments. Waller (2001) defended a deductivist position that was opposed by Govier (2002) and Guarini (2004). Bermejo-Luque (2012) took a somewhat conciliatory position according to which *a priori* analogical arguments in ethics and law are deductive yet defeasible.

Let me emphasise that this paper focuses on *a priori* analogical arguments. The *a priori* character of the arguments at issue is due to the presence of the following features:

If we accept the conclusion of an *a priori* analogy we do not, in effect, *predict* that a feature will or may belong to the primary subject. Rather we decide to describe or treat the primary subject in some way. The basis of *a priori* analogies is an appeal to handle relevantly similar cases in relevantly similar ways. (Govier 1989, 142-3)

There may be *a priori* analogical arguments outside ethics and law, but they are not my current concern. This paper would run the risk of becoming too ambitious if it dealt also with *a priori* analogical arguments in, say, metaphysics. Therefore, whenever I refer simply to analogical arguments in this paper the reader should understand me to be referring to *a priori* analogical arguments in either law or ethics or both.

My main purpose is to defend a position that is sympathetic to (but does not unreservedly endorse) Waller's deductivist model for the analysis and evaluation of analogical arguments. More precisely, I will endorse Waller's schema for analogical arguments with the following qualifications and restrictions: (i) Waller's schema does not represent analogical arguments simply as deductive inferences, but rather as complexes of two inferences only one of which is deductive; (ii) The schema is an accurate representation, not of analogical arguments generally, but of analogical arguments as they are characteristically formulated by professional moral philosophers and judges; (iii) A deductivist analysis should also be regarded as including a normative claim to the effect that analogical arguments that do not fit Waller's schema are defective

or sub-optimal instances of their kind. I will also describe some interesting peculiarities of analogical reasoning in the legal context, where arguers are subject to specific “rule of law” constraints.

There is a sense in which the title of this paper is apt to mislead: the paper’s defence of *deductivism* is less an end than a by-product.<sup>1</sup> The main end or goal of the paper is to revisit and improve upon Waller’s position in a way that preserves and shelters from criticism what are arguably its main insights: namely, that the best and most professional analogical arguments are those that rely, at least implicitly, on a moral or legal principle. It is also the case that analogical arguments including a principle among their premises are, precisely in virtue of including a principle, (partly) deductive. Deductivism is, in this sense, a by-product: the paper’s qualified defence of Waller’s model is not motivated primarily by a wish to establish the view that analogical arguments are (partly) deductive. My true wish is to show how principles figure in (the best possible cases of) analogical arguments. The fact that a principle’s presence in an analogical argument renders that argument (partly) deductive is important and interesting—but it is still incidental to the paper’s central goal.

## 2. First qualifications

According to Waller, analogical arguments in law and ethics fit the following schema:

1. We both agree with case *a*.
2. The most plausible reason for believing *a* is the acceptance of principle *C*.
3. *C* implies *b* (*b* is a case that fits under principle *C*).
4. Therefore, consistency requires the acceptance of *b*.

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<sup>1</sup> In this article I use the terms “deductive,” “deductivist” and “deductivism” to refer to the deductive or deductivist analysis of *analogical arguments* and to the view that *analogical arguments* are to be analysed as (partly) deductive. I am not here arguing for deductivism in general.

Again, I want to endorse Waller's schema, but not without qualification. To begin, Waller characterises arguments fitting his schema as deductive. But it appears that some sort of non-deductive inferential move is made from 1 to 2. The nature of this move will be discussed in detail in Section 5.2; for now, it need only be said that the move amounts to a sub-argument within the larger analogical argument. This is not a trivial claim; I want to suggest that analogical arguments be viewed as complexes containing two inferences: one non-deductive and one deductive. The claim that analogical arguments are complexes composed of two inferences may sound unusual or unintuitive, but there is good reason to understand analogical arguments in this way, at least from the point of view of deductivism. Deductivist schemas that portray analogical arguments as simple (deductive) inferences condemn these arguments to having logically redundant premises.<sup>2</sup> Waller's schema, on the other hand, allows us to see that there is an inference involved in the move from 1 to 2 (although he might have made this clearer by inserting an illative term at the beginning of 2, or by adding another line to the schema—a possibility discussed in Section 5.2). The schema indicates that the principle in premise 2 depends upon reflection about what justifies agreement with respect to case *a*, i.e., about what justifies an assumed judgment about how the source of the analogy is to be (morally or legally) treated.<sup>3</sup>

Another qualification pertains to the move from 2 and 3 to 4 in Waller's schema. It could be argued that this move requires reconstruction in order for it to count as a truly deductive inference. Indeed, we will see below that the relevant reconstruction can be made fairly simply (by indicating not only that *C* is the most plausible reason for believing *a*, but also that it is in fact accepted by

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<sup>2</sup> Consider, for instance, a possible deductivist schema discussed by Govier (1989, 144), where the first and the third premises appear to be superfluous: (1) *A* has *x,y,z*; (2) *B* has *x,y,z*; (3) *A* is *W*; (4) All things which have *x,y,z* are *W*; (5) Therefore, *B* is *W*.

<sup>3</sup> Brewer (1996) also proposes a multi-step schema for analogical arguments. See Weinreb (2005, Chapter 1) for critical discussion.

the arguer). Finally, I want to suggest that we should not take too seriously Waller's use of "we" in 1: "*We* both agree with case *a*." This "we" is somewhat rhetorical. It is evident that the author of an analogical argument will want to begin with a judgment about the source of the analogy that does not strike the audience as implausible. But for the schema to be instantiated, it is only required that the author (not the audience in concert with the author) assert or believe something with respect to the source of the analogy. The importance of this apparently trivial qualification will become clear in the next section.

All these qualifications are important, but they have little to do with what has proved most controversial in Waller's schema (Guarini 2004, 167, endnote 2). All parties to the debate would agree that analogical arguments may be regarded as (at least partly) deductive *on the assumption that* they include a principle within their premises.<sup>4</sup> Accordingly, the main controversy turns on whether the relevant kind of principle is indeed part of analogical arguments.<sup>5</sup> Before attending to that controversy, however, we need to address a different one, pertaining to the very coherence of deductivism.

### 3. Is deductivism incoherent?

Waller's presentation of his model is admittedly in need of improvement. Critics, however, have gone as far as suggesting that Waller's position is utterly incoherent. It will be argued here that

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<sup>4</sup> Bermejo-Luque is somewhat of an exception, since she believes analogical arguments can be deductive even while lacking a principle. Whatever plausibility her position has depends on the idea that these peculiar, "principle-less" yet deductive, arguments are also defeasible. I will argue later in the paper that her position is problematic because she uses the term "defeasible" in a misleading way.

<sup>5</sup> To be clear, the principle at issue will only guarantee the (partly) deductive nature of the analogical argument if it is interpreted as a general claim about what ought to be done "all-things-considered." *Prima facie* or *pro tanto* principles would not do the job.

the charge of incoherence should be dropped for two reasons. First, the charge is based on an implausible reading of Waller's text. Second, the alleged incoherence, even if it did exist, would do little damage to the central insights animating Waller's account. Since the charge of incoherence draws attention away from those important insights and toward superficial problems in Waller's model, it should be dismissed as a red herring.

Govier and Guarini have described Waller's position in a way that makes it seem self-refuting. Govier says, for instance, that "to urge, as Waller does, that it is a 'challenge' for the critic or audience to arrive at the principle [underlying an argument from analogy] is in effect to admit that the principle is not a stated or an implicit premise in the original argument" (Govier 2002, 156). Guarini insists on the same point: "[T]o concede that the principle is not available when the argument is first offered—that it is only available after much reflection—is to concede that the *initial* argument does not trade on a principle underwriting a deduction" (Guarini 2004, 155). What could lead Govier and Guarini to say such things?

Let me back up for a moment and consider how Waller motivates his position. Waller apparently takes the paradigmatic case of analogical argument in ethics to be the sort of argument philosophers often make with the aid of carefully contrived hypothetical scenarios. Indeed, Judith Thomson's analogy to the violinist scenario<sup>6</sup> is Waller's central example. The following is a reconstruction of Thomson's argument according to Waller's schema (see Guarini 2004, 154-155):

1. We both agree that in the violinist case it is morally permissible to disconnect oneself from the violinist.

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<sup>6</sup> Thomson imagines a scenario where you are taken by force and connected to a famous violinist who needs to have his blood filtered with the aid your kidneys. You need to stay hooked (perhaps for as long as nine months) until the violinist finds a kidney donor. The question prompted by the scenario is whether it is morally permissible for you to disconnect yourself from the violinist, thus allowing him to die.

2. The most plausible reason for believing the above is that agent S is not obliged to sustain a life that became dependent on S through force. Call this the Force Principle, which we accept.
3. The Force Principle implies that a woman is not obliged to sustain a life that was conceived through rape.
4. Therefore, consistency in what we accept requires that we accept that a woman is not obliged to sustain a life that was conceived through rape.<sup>7</sup>

To agree with case *a* is, in this instance, to agree that the act of disconnecting oneself from the violinist is morally permissible. Acceptance of *b* amounts, in this instance, to acceptance of the moral permissibility of terminating the life of a foetus generated as a result of rape. The so-called Force Principle is that interpretation of C which justifies the claim about the moral permissibility of disconnecting oneself from the violinist and also entails that it is morally permissible for a woman to perform an abortion in case of rape.

Waller would likely accept this reconstruction of Thomson's argument. For him, Thomson devised a principle (with the help of a hypothetical scenario) and proceeded to perform a "deduction from [that] principle" (Waller 2001, 202). Waller's critics would have no objection to make had he rested his case with this: the author of an analogical argument *that effectively includes a principle* deduces from that principle a conclusion about how to treat the target of the analogy. But Waller goes on to talk about how principles are not always "logically and epistemically prior" (Waller 2001, 208), about how they emerge out of a process of "mutual adjustment" (Waller 2001, 208) between the author of the analogy and her audience, and about how analogical arguments are meant to "remind" (Waller 2002, 213) the audience of a principle that it comes consciously to accept during the argumentative exchange. These are the bits of Waller's paper that lead Govier and Guarini to interpret Waller's position as incoherent.

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<sup>7</sup> Notice that Waller's schema is interpreted here in a way that ensures that 4 is entailed by 2 and 3.

My own tendency is to downplay the importance of Waller's talk of "mutual adjustment" and so forth. In fact, I think this talk manifests nothing but Waller's anxiety to make it clear that one can be a deductivist about analogical arguments in ethics while rejecting Platonism about moral principles:

The principle [underlying Thomson's argument] is not a transcendent truth waiting to be found. It is not a principle that is enshrined among the Platonic Forms, it is not a "brooding omnipresence in the sky," it is not always logically and epistemically prior. Rather, the principle is one that we formulate and there is no "absolutely right" single way of stating it.... (Waller 2001, 208)

Waller's view, it seems to me, is that principles are included in analogical arguments but that they are not easily discerned—i.e., the move from 1 to 2 is not trivial—and they are always falsifiable, i.e., subject to revision in light of new cases. Again, Waller suggests that Thomson's original argument included (from the outset) something like the Force Principle (Waller 2001, 201-202). He then claims that counter-analogies (like one by John Martin Fischer) might be offered, which appeal to other hypothetical scenarios that prompt questions about the suitability of Thomson's principles, questions apparently ignored when the violinist scenario was the only one being considered (*ibid.*, 208-209). Waller's modest point seems to be that this sort of exchange between Thomson and her audience should lead her (and those initially persuaded by her argument) to reconsider and perhaps even modify the Force Principle. But Waller does not seem to hold that Thomson did not have the principle in mind from the beginning, or that the principle would only be discerned as a result of the argumentative exchange involved in the evaluation of Thomson's original (principle-less) argument.

This is directly at odds with Guarini's interpretation of Waller:

Waller claims that the principle making the entailment possible—the Force Principle in the above reconstruction—may only be available after much reflection. We may have to go through a process of generating principles, testing them against other cases, revising or generating new principles, testing them again, and repeating this process until we arrive at a set of cases and principles that is adequate. (Guarini 2004, 155)

This is puzzling to me. Guarini does not cite to any specific passages in Waller's text, but I assume he is referring to pages 208–210 of Waller's 2001 paper, where Waller talks about Fischer's counter-analogy to Thomson's analogy. I do not find any indication in these pages that Waller regards the Force Principle as the product of a process of principle reconstruction that Thomson and her audience go through. In fact, Waller claims that Thomson offered one discrete analogy—with one discrete principle, the Force Principle (or something close to it)—that Fischer then put to the test of accommodating a hypothetical scenario that is different from the violinist scenario. The right way, it seems to me, to characterise what is going on here is to say that Thomson proposed the Force Principle (as part of her original analogy) and Fischer raised concerns about its plausibility. The Force Principle did not emerge in the dialectic; rather, it was previously formulated and then challenged in the dialectic.

In any event, my central aim is not to write an exegetical paper about Waller's true but perhaps imperfectly expressed intentions. For good or ill, his critics take him to be making, not a banal anti-Platonist claim, but rather a self-defeating claim to the effect that principles underwriting analogies are constructed in the dialectic that typically follows the formulation of an analogical argument. Guarini, for instance, explores to that effect the following hypothetical dialogue:

Jack: I think abortions are always immoral, except when a woman's life is in immediate physical danger.

Jill: What about in cases where a life was made dependent on a woman through force, like in cases of rape?

Jack: That is profoundly unfortunate, but while rape is morally objectionable, the right to life of the foetus outweighs the concern that the life of the foetus was made dependent on the woman through force.

Jill: Well, imagine that you were kidnapped, knocked unconscious, and when you woke up you discovered you were connected to a world famous violinist. Your kidneys are filtering his blood. You can disconnect yourself, but if you do so, the violinist dies. The only way to keep the violinist alive is to stay hooked up until a suitable kidney is found for transplant, and that is expected to take about nine months. Isn't it okay to disconnect yourself?

Jack: I think so.

Jill: Shouldn't you then say that abortions are morally acceptable in cases of rape? (Guarini 2004, 155-6)

And Guarini continues,

Imagine that Jack and Jill continue this dialogue, exploring some similarities and differences between the violinist case and pregnancy resulting from rape, until Jack is persuaded that these cases should be treated in the same way. Imagine further that he is even persuaded of truth of the Force Principle. Surely it is implausible to say that Jack is *reminded* of the Force Principle he rejected in the third line of the dialogue. (*ibid.*, 156)

Here the red herring becomes clear. Guarini focuses on the point that Jack is not really *reminded* of anything. And indeed he is not. But notice how unimportant that conclusion is in the face of what we can learn from Jill and Jack's exchange. The important lesson to be gleaned from Guarini's well-crafted and realistic dialogue is that Jill, the author of an analogical argument, *does* commit to the Force Principle (as she indicates in the second line of the dialogue). She then tries to show that a particular judgment with respect to the

violinist case is justified by that very principle, which also entails her preferred treatment of abortion in case of rape. Thus, as Guarini would acknowledge, Jill's argument can plausibly be interpreted in a way that fits Waller's schema. And, I would want to add, the appealing familiarity of Jill's argument (which is really a simplified and casually expressed version of Thomson's argument) lends plausibility to Waller's model for analogical arguments.

If users of analogical arguments in ethics do argue like Jill, then they commit to a principle and thus produce arguments involving a deductive inference from that principle to a claim about how to treat the target of the analogy. In other words, if authors of analogical arguments argue like Jill, then their arguments fit Waller's schema. Accordingly, we should be discussing whether Jill's way of arguing really is representative of analogical argumentation as it is generally done. We should not let such an important question bearing on the correctness of Waller's schema be obscured by the question of whether his general account of analogical argument is incoherent for some other reason—especially when that reason pertains to some unclear statements about “mutual adjustment,” “reminding,” and so on, independently of which the schema can be understood and evaluated.

#### 4. When principles are not stated in an analogical argument

As I said at the beginning of the article, all parties to the controversy would agree that *if an analogical argument includes a principle*, then it involves a deduction from principle. So, everything rests on whether analogical arguments in fact include principles. Everything rests, for our purposes, on whether analogical arguments fit Waller's schema.

Arguments like Jill's clearly fit Waller's schema. This should be uncontroversial because the argument contains a fairly explicit formulation of a moral principle. But, as Govier says, principles *are not* explicit in many analogical arguments (Govier 2002, 155). To study the implications of this claim, we must begin by distin-

guishing between two types of analogical arguments that do not state principles. First, there are arguments based on bare analogies, i.e., on comparisons that make no reference to the relevant similarities between the things being compared. Consider, for instance, the following argument: “Having sex with people having severe mental retardation is like having sex with children. It is morally unacceptable” (Bermejo-Luque 2012, 18). Second, there are analogies that, while failing to provide a principle, indicate more or less explicitly what the relevant similarities are.<sup>8</sup> Consider a modified version of the previous argument: “Having sex with people with severe mental retardation is like having sex with children. It is morally unacceptable. Children and people with severe mental retardation don’t fully understand the physical and social consequences of having sex.”

#### *4.1 Arguments that list the relevant similarities*

Let us begin with the second type of analogical argument (and let us focus on moral reasoning for now). It is my contention that these arguments can be taken to carry a principle implicitly within their premises. The relevant principle can be discerned by interpreters even in the absence of precise information about the context in which the argument was formulated and about other pertinent beliefs of the argument’s author. To understand why this is so, consider that a moral principle is nothing but a general proposition that attributes a moral property (the same property attributed to the target of the analogy in the conclusion) to any object exhibiting the very features with respect to which source and target are similar. Accordingly, the principle implicit in the second analogical argument formulated in the previous paragraph says that “It is morally unacceptable to have sex with individuals who don’t fully understand the physical and social consequences of having sex.”

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<sup>8</sup> I say “more or less” explicitly in order to acknowledge the difference between giving a precise list of relevant similarities (as in the example in the text, immediately below) and contriving a detailed scenario (to serve the role of source of the analogy) the choice of whose details may indicate the relevant similarities.

Let me address an objection presented by Govier against the claim that analogies providing a list of relevant similarities carry implicit principles. Call it the objection from charity. It consists in the claim that the formulation of the principle taken to be implicit in an analogical argument “brings in a universal statement which is often not rationally acceptable, and thus the interpretation is questionable on grounds of charity” (Govier 1989, 145). I have doubts about Govier’s use of the interpretative principle of charity. The principle ought to serve merely as a sort of tie-breaker. I take it that the central goal of argument interpretation (as opposed to argument evaluation) is to discern the intentions of the arguer. Interpreters ought to inquire primarily into what the arguer meant to argue, not into what the arguer ought to have argued. The principle of charity comes in only when the evidence of what the arguer had in mind (i.e., evidence drawn from the arguer’s words and discursive context) is inconclusive. If two different interpretations are equally compatible with the evidence, then the interpreter ought, charitably, to opt for the interpretation that represents the argument in the most favourable light. But an indication of relevant similarities *is* conclusive evidence of the general properties by reference to which the arguer wanted to justify a particular treatment of the target of the analogy. The only reason to deny this would be if we, as interpreters, were to know that the author of the analogy subscribes to some form of moral particularism that, as matter of principle, prevents recourse to ethical generalisations.<sup>9</sup> Presentation of strong counter-analogies by interlocutors may show that the arguer was wrong to commit to that principle; but they do not show that he was not initially committed to it.

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<sup>9</sup> Govier herself seems to exclude this possibility by claiming that analogical arguments involve a commitment to *some* principle, the content of which is simply often indeterminate: “My position, then, is that some [universal claim] is implied when we reason from case to case. But we often do not know exactly what the [universal claim] is” (Govier 1989, 148). In saying this, Govier commits herself to the view that moral particularists cannot coherently make use of arguments from analogy in ethics.

By the same token, it is of little or no relevance to the evaluation of Waller's model that Govier does not "believe a situation where all relevant [similarities] have been fully and definitely spelled out will ever obtain [in analogical reasoning]" (Govier 1989, 148). There are several problems with Govier's scepticism. First, it is a contentious philosophical position for which she provides little argument. With the exception of radical particularists, moral philosophers (whether reasoning on the basis of analogies or not) systematically rely on ethical generalisations. It could therefore be argued that Govier's scepticism goes against the grain of current philosophical thought and brings with it a burden of argument, which she has yet to discharge. Second, to repeat the point of the previous paragraph, even if Govier's scepticism was justified, it would be irrelevant for the purpose of argument interpretation. What matters most for that purpose is whether *the arguer* has (rightly or not) committed herself to the belief that she has discerned all the relevant similarities between the source and the target of the analogy. Scepticism is of no consequence if the arguer herself is not a sceptic. Third, we should not ignore the fact that a sophisticated arguer may commit to a principle while being perfectly aware of the serious difficulties involved in fully spelling out all the relevant similarities between analogues. Scepticism does not, and indeed should not, paralyse us. This lesson applies generally, to all forms of argument, given that we cannot justify all our premises and need often to rely on claims that are plausible yet admittedly fallible. The same is clearly true of premises involving ethical generalisations. The use of a deductive analogical argument does not demand that the arguer be perfectly confident in the completeness of her proposed list of similarities. The arguer's commitment may be provisional: she may try to run the argument on what she thinks the relevant similarities are while being open to the possibility that she is missing something. Even if the principle at issue is later falsified, that does not alter the fact that it was present in the original analogical argument.

These considerations should serve at the very least to display the tortuousness of the path that has lead Govier from scepticism

about the plausibility of moral principles to the claim that analogical arguments are not to be interpreted as relying on principles. The objection from charity needs to be made clearer before it can be considered to raise a genuine problem for deductivism.

#### 4.2 *Arguments that do not list the relevant similarities*

Consider again the hypothetical argument, “Having sex with people with severe mental retardation is like having sex with children. It is morally unacceptable.” In the absence of information about the context of utterance and about the arguer’s general moral beliefs, we have little evidence of what principle the arguer may have in mind. I take it—as does Govier and perhaps Guarini—that the author of these statements can be taken to be committed to *some* indefinite principle, to *some* general rationale for treating in the same way sex with children and sex with people with severe mental retardation.<sup>10</sup> But if the exact principle assumed by the author of an analogical argument cannot be discerned by the interpreter, then the argument cannot be made to fit Waller’s schema. This becomes especially problematic for deductivists in light of Govier’s claim that principles are not given in *many* analogical arguments (Govier 2002, 155). What use is an argument schema that fails to capture the structure of frequent instances of the argument type for which the schema was built? It would be arbitrary and question-begging for Waller and me simply to dismiss as un-analogical all those arguments based on comparisons between cases that fail to list relevant similarities.

I think that an adequate assessment of this problem requires recognition of the fact that it involves at once an empirical and a normative question about analogical arguments. Take the empirical question first. Can it be said that analogical arguments that do not mention relevant similarities are equally frequent in different discursive contexts? To put it more concretely, do philosophers em-

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<sup>10</sup> See note 9, above. Guarini (2010) probably agrees, considering his views about the incapacity of moral particularism adequately to explain analogical arguments in ethics.

ploy bare analogies as frequently as, say, politicians or the folk in general? I would think not. Bare analogies like that between having sex with children and having sex with people with mental retardation seem casual and unprofessional. Philosophers are quite aware that analogies involve reference to relevant similarities, and they typically go to great pains in order to spell them out.

Of course, these empirical remarks (even if correct) will not settle the controversy between deductivists and their opponents. After all, the debate involves a conceptual question about what analogical arguments are (or more precisely, about what logical structure an argument must have for it to count as an analogical argument). And we would also need to settle the question of what discursive contexts are relevant to the debate before we could draw any lesson from, say, the fact that moral philosophers avoid bare analogies in their professional work. Informal logicians tend to be very ecumenical in that respect: a study of an argument type should be a study of its instantiation not only in specialised or professional environments but wherever rational communication takes place. The empirical remarks of the previous paragraph are still important, however, in that they serve to raise awareness of the possibility that the parties to the debate are speaking at cross-purposes. Waller's focus on arguments like Thomson's suggests that he may have constructed his account of analogical arguments around a different paradigm than Govier, for instance, who illustrates her views with several examples of relatively casual instances of argument from analogy (Govier 1989, 143-144).

Now, the normative question is more important than the empirical one. Recall that we are inquiring into what follows from the concession that some (or many) analogical arguments do not fit Waller's deductivist schema (in particular, those analogical arguments that make no mention of relevant similarities). The normative issue with these arguments is not that they do not qualify as analogical arguments, for indeed they do, but rather that they are defective or non-ideal instances of their kind. These analogical arguments rely on bare or intuitive analogies, as it were. They indicate that two objects are similar but do not articulate the relevant

similarities. The audience is meant to “see” the similarities. But what if they do not “see”? Consider what Waller has to say about this.

[I]n some cases we can indeed evaluate the analogical argument without ascertaining the underlying principle. But when we deal with tougher cases, that will not always be possible. If one person claims that a difference in the two cases invalidates the *a priori* analogical argument, and a second disputant insists that the difference is irrelevant to the force of the analogy, then resolution of that dispute may well require attempting to formulate the underlying principle. Suppose someone maintains that since the rape victim and the fetus are biologically related, and the kidnap victim and violinist are not, therefore the analogy fails. Without an explicit examination of *why* we believe we have a right to unhook ourselves from the violinist, the dispute is likely to gutter in conflicting “intuitions” that are affirmed with increasing vehemence. (Waller 2001, 205)<sup>11</sup>

Waller argues that a debate prompted by an analogical argument will amount to no more than a battle of intuitions (and we all know how sterile those tend to be) unless the debaters attempt systematically to articulate the morally relevant properties. Bare analogies may have persuasive power over an audience who shares the arguer’s intuitions; but even in moderately controversial matters, a bare analogy will make very little difference. It can but spark a debate that will only develop fruitfully if arguers attempt to articulate relevant similarities and, thus, commit to principles.

I think that an assumption behind Waller’s account, indeed a legitimate assumption that he should have brought out more vivid-

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<sup>11</sup> To be clear, Waller uses “intuition” in a normatively neutral way. There are people who use the term to refer only to true, probable, or justified belief. Waller, however, does not build any positive epistemic property into his concept of intuition. Following Sinnott-Armstrong (2008), I regard intuitions as strong immediate beliefs. Beliefs are “strong” when a confident believer does not give them up easily, and they are “immediate” when a believer forms and holds them independently of any process of inferring them from any other belief.

ly, is precisely that arguments that do not fit his schema are not good arguments, or at any rate, are not as good as analogical arguments can be. His schema is not meant just as an accurate representation of analogical arguments crafted by professionals; it is also a model informed by normative assumptions about what makes an analogical argument a good argument (or at least a better argument than other possible instances of its kind).

It might be thought that, in making such normative commitments, Waller runs the risk of talking past his interlocutors, who could be understood as making purely conceptual claims about what analogical arguments *are*. But the risk is not significant. Govier, for instance, also indicates that her non-deductivist position is informed by normative considerations. She says that “[t]he trick about analogies—and their charm as well, I think—is that we are often able to see or sense important resemblances between cases without being able to spell them out exhaustively in just so many words” (Govier 1989, 148). Bermejo-Luque offers this apposite gloss:

[Govier] contends that reconstructing [analogical] arguments as having [principles] among their premises is unwarranted. Actually, she claims that such a reconstruction would destroy the distinctive force and charm of analogical argumentation, which is a matter of the fact that comparisons of particulars can make us see that which is general in them without spelling out exhaustively what they have in common “in just so many words.” (Bermejo-Luque 2012, 2)

I take it that, for Govier, the force and charm of analogies pertain not only to their rhetorical power but also to their justificatory potential. Govier seems to believe that bare analogies serve as a distinct and independent source of evidence and, accordingly, that moral knowledge about particulars can be attained without the mediation of knowledge about the universal (which an analogical argument may only vaguely imply). The problem, of course, is that this sort of ambitious epistemological claim does nothing to satisfy those who, like Waller and me, are suspicious of arguments that

rest exclusively on an appeal to the audience's intuitions about similarities shared by particular objects. For us, fruitful argument in the moral domain requires an attempt to adjust intuitions about particular cases with general moral beliefs.

I think, therefore, that we should take deductivism about analogical arguments to include the normative claim that bare analogies do not amount to good analogical arguments. Bare analogies refer to relevant similarities (like any other analogy) but fail to articulate them. If the audience does not just "see" or "sense" the relevant similarities, i.e., if the audience does not share the arguer's intuitions, then a bare analogy does very little work as an argument (as opposed to a conversation starter that may lead to further, less question-begging arguments).

Lest the normative aspect of deductivism be confused with the infamous idea that only deductively valid arguments are good arguments, let me remind the reader that deductivism (as defended in this paper) regards analogical arguments as two-step complexes consisting of one deductive inference and one non-deductive one.

## 5. Objections

### 5.1 Bermejo-Luque

Little has been said so far about Bermejo-Luque's recent contribution to the debate. She writes:

[I]n the particular case of deductive analogical arguments, we can concede both the analogy (for example, that it is true that having sex with people having severe mental retardation is like having sex with children regarding its moral properties) and concede that if the inference-claim were true, it will be a necessary truth and yet, resist the conclusion by saying that the inference-claim is false because, despite it is true that having sex with people having severe mental retardation is like having sex with children regarding its moral properties, both things are morally acceptable, not unacceptable—

as Foucault, for example, claimed. This is why I contend that this type of analogical argumentation can be deductive (in the sense of its conclusion being meant to be established of necessity) and yet, defeasible: its defeasibility being a matter not of refusing the reason, i.e., the analogy, but of resisting the inference. (Bermejo-Luque 2012, 21)

I take it that Bermejo-Luque sees at least two reasons for considering her account of analogical arguments as superior to Waller's. First, since she echoes Govier's point that principles "are seldom part of non-inductive analogical arguments" (Bermejo-Luque 2012, 2), she thinks it is a virtue of her account that it "avoids the need to appeal to general principles or explicit comparisons of properties between the two analogues (when they are not actually stated by speakers)" (Bermejo-Luque 2012, 23). Of course, the doubts I expressed earlier about Govier's position make it seem (analogously) doubtful that the avoidance of principles is really a virtue of Bermejo-Luque's account. In particular, there is little in her paper that serves to dispel my worry about the justificatory limitations of bare analogies.

Bermejo-Luque also seems to believe that her account has the advantage of being able to explain how an analogical argument can be deductive yet defeasible. But I think that Waller's schema fares just as well with respect to this criterion. Take Bermejo-Luque's example cited above: to deny that having sex with children is impermissible is to deny the arguer's preferred way of treating the source of the analogy. For our purposes, this is a case of denying the truth of 1 in Waller's schema. Anyone who holds a deductivist account of an argument type will accept that the relevant arguments can be defeated—in the sense of being proved unsound—if any of their premises are shown to be false. It is unclear that deductivists need to accept the defeasibility of analogical arguments in any other sense in order to accommodate the type of example provided by Bermejo-Luque.

5.2 *Guarini*

Guarini presents two objections to Waller's account that also deserve to be addressed. One objection amounts to the claim that Waller's schema leaves out analogical arguments that end in an exclusive disjunction. For instance, someone who is undecided about the permissibility of having sex with children might conclude, upon recognising that having sex with people with severe mental retardation is relevantly similar to having sex with children, that the two actions are to be assigned the same moral property, whatever that property is. The argument would go like this: "Having sex with people with severe mental retardation is like having sex with children. Both actions are permissible or both actions are impermissible; there is no possibility that one is permissible but not the other." Guarini claims that such an argument "does not require that there be agreement on some specific principle C, as Waller's reconstruction requires" (Guarini 2004, 159).

It is clear that, as it stands, Waller's schema does not accommodate analogical arguments ending in disjunctions. But that is not to say that the schema could not be modified to account for such arguments in a way that preserves its deductive aspect. Now, the specific example of the previous paragraph eludes Waller's schema for an additional reason that has nothing to do with the fact that the argument ends in a disjunction. Indeed, that specific example eludes (any suitably modified version of) Waller's schema because it involves an intuitive analogy: we have no evidence of what similarities the arguer has in mind and thus cannot discern an implicit principle. But consider a different argument: "Having sex with people with severe mental retardation is like having sex with children, since individuals of both classes cannot understand the social and physical consequences of having sex. It is either permissible or impermissible to have sex with individuals of the two classes; there is no third option." This argument, ending in a disjunction about the moral properties of relatively specific courses of action, can be taken to carry implicitly the more general moral judgment that, with respect to all individuals who cannot understand the

social and physical consequences of having sex, having sex with these individuals is either permissible or impermissible. Acceptance of the more general claim logically requires acceptance of the more specific one. So, arguments ending in disjunctions can be made to fit a deductivist schema as long as they indicate relevant similarities.

It is noteworthy that Guarini also criticises Govier's preferred non-deductivist schema for failing to account for analogical arguments ending in disjunctions (Guarini 2004, 164). This is further evidence of the fact that Guarini's objection does not pertain to the specific question of whether analogical arguments are to be understood as including principles, but rather to a more general question about how exactly to formulate a schema (deductivist or otherwise) that allows for analogical arguments having disjunctions as conclusions.

The core of the second objection offered by Guarini is summarised in the following statement: "I will argue that analogical arguments come in varying degrees of strength, and that [Waller's schema] cannot capture the required degrees of strength" (Guarini 2004, 159). And he elaborates: "There are two ways in which these degrees of strength can be reflected in an argument reconstruction. First, the link between the premises and conclusion can have varying degrees of strength. Second, the premises can have varying degrees of strength (or acceptability)" (Guarini 2004, 159). It is obvious that Waller's account admits of varying degrees of strength in respect of premise acceptability: consider, for instance, that from one analogical argument to another the degree of our conviction about how the source case should be treated may vary. With that, our conviction about the strength of the analogical argument as a whole will also naturally vary.

But Guarini suggests that there are circumstances where analogies differ in strength while beginning with equally acceptable judgments about sources. That is what Waller's schema allegedly fails to capture. It is evident that the move from 2 and 3 to 4 in Waller's schema does not admit of degrees, since it is a case of entailment (i.e., an inference having maximal degree of strength).

And, for Guarini, the move from 1 to 2, albeit not maximally strong, also does not admit of degrees of strength. If 1 is equally acceptable in different analogical arguments, then “it would appear to follow that acceptability of claim 2 in each argument is equally strong because they are arrived at in the same way (as an inference from one case)” (Guarini 2004, 160).

I think Guarini trivialises the nature of the move from 1 to 2 in Waller’s schema. In devising a principle, one does not simply choose any general claim under which the particular judgment about the source case may be subsumed. Indeed, as Waller says, one looks for a principle that serves as the *most plausible reason* for holding the particular judgment. And, of course, a claim to the effect that a particular judgment is best justified by this or that principle can be regarded as more or less plausible. The strength of the analogical argument as a whole will vary according to the plausibility of that claim.

A principle’s ability to provide plausible justification for a particular judgment will depend on such questions as: (i) whether the principle is attractive as stated (e.g., Could it have been put in clearer terms? Could it have been put in less general terms so that we may avoid undesirable implications with respect to future cases that we cannot foresee?); (ii) whether the principle also justifies other particular judgments of ours about additional cases we can imagine (e.g., How well does the Force Principle deal with Fischer’s scenario?); and (iii) whether the principle is likely to have positive consequences if generally enforced (e.g., Does its use lead to an overall increase in utility?). These issues may not be addressed by the author of an analogical argument, but that does not mean that they fail to bear on the strength of the move from 1 to 2. A strong analogical argument is one which is not vulnerable to the objections that the principle is unclear or too general, that it has inadequate implications for other cases, or that its systematic application would lead to bad consequences.

I think this is enough to show that Guarini misunderstands what is involved in the move from 1 to 2 in Waller’s schema. It involves complex moral reasoning, not some unspecific “inference

from one case.” Yet Guarini’s objection exposes the need to treat Waller’s schema to some further reformulation and refinement. As the schema stands, it is indeed tempting to treat as a simple “inference from one case” the sub-argument that leads into the deductive part of the analogical argument.

So far I have not questioned the assumption that there *is* an inference from 1 to 2, that is, from a judgment about the source of the analogy to a claim about the most plausible reason for making that judgment and (in accordance with Guarini’s reconstruction of Waller’s schema) to a statement that amounts to an explicit endorsement of the relevant reason. Recall Guarini’s rendering of the first two premises of Judith Thomson’s argument:

1. We both agree that in the violinist case it is morally permissible to disconnect oneself from the violinist.
2. The most plausible reason for believing the above is that agent S is not obliged to sustain a life that became dependent on S through force. Call this the Force Principle, which we accept.

I suggest that 2 be broken down into two separate lines, one of them stating that the Force principle is the most plausible reason for believing what is claimed in 1, and the other stating that the Force Principle is accepted. Or better yet, that it is true. (We might as well, while meddling with Waller’s schema, eliminate the instances of “we” and “we accept” which have played a part in generating the red herring discussed at the beginning of the paper.) What follows is a modified (and to my mind, improved) version of Waller’s schema that makes clearer the nature of the sub-argument leading into the deduction:

1. It is true that *a*.
2. The most plausible (i.e., the best) reason for believing *a* is the principle C.
3. Therefore, it is true that C.
4. C implies *b*.
5. Therefore, it is true that *b*.

The move from 1 to 3 in the new schema resembles an inference to the best explanation, although moral principles are evidently not in the business of explaining but in that of justifying. The strength of the sub-argument turns not only on the acceptability of the judgment about the source analogue but also on the acceptability of the claim that a given principle provides the most plausible reason for holding the relevant judgment. The sub-argument is non-deductive and yet more complex than some simple “inference from one case.” The inference from 3 and 4 to 5 is the deductive inference that allows us to classify the new schema as a deductive one.

## 6. Peculiarities of the legal context

I have argued in defence of a modified version of Waller’s account of analogical arguments in ethics. This account has a descriptive as well as a normative element: it describes analogical arguments as they are characteristically formulated by professional moral philosophers and it also explains why these arguments are better than other possible instances of analogical arguments in ethics. This section has little to add in the way of normative analysis. It argues in defence of the descriptive accuracy of the paper’s account of analogies with respect to legal reasoning, while also pointing to some interesting peculiarities of the legal domain that could not be captured by any simple abstract argument schema.

Legal argumentation is a distinctively formalist type of argumentation. That is to say, legal arguers are subject to institutional constraints that limit their ability to appeal to ethical, political, economic or otherwise practical considerations freely used in other domains of argument. Unlike philosophers and political theorists, for instance, who are relatively free to deliberate by reference to all relevant considerations about how we ought to live, act and design our institutions, judges must stick fairly closely to standards and procedures drawn from authoritative sources such as statutes and precedents. Often, out of a sense of professional responsibility, judges acknowledge the need to enforce standards which, from a

wider practical perspective, are less than entirely efficient, fair or just (Schauer 2009, 8-10). In the absence of statutory or common law standards providing a clear solution to the case at hand, judges still manifest their allegiance to the rule of law by devising and applying principles taken to serve as the implicit rationale behind extant authoritative sources. In other words, even when the law as posited does not settle a case, judges argue that the matter can nevertheless be settled in accordance with the underlying spirit or purpose of the posited law.<sup>12</sup>

These claims are not meant to be controversial. Some people might be suspicious of legalist rhetoric and believe that judges often cite statutes and precedents only as part of after-the-fact rationalisations of decisions made on undisclosed ethical or political grounds. Whether one accepts this somewhat grim picture of judicial practice or not, it must be conceded that, however judges think intimately, they argue formalistically to the world outside.<sup>13</sup> That is, they speak *as if* they gave an exceptional amount of weight to statute and precedent, i.e., to the standards and procedures that statute and precedent express or to the principles that they embody.

Formalism, so understood, is the feature of legal argumentation that accounts for its familiar constrained and bureaucratic—some would say “artificial”—feel. This is a feel well captured in the following hypothetical (but realistic) legal argument:

Plaintiff: I claim that defendant owes me 500 euros.

Defendant: I dispute plaintiff's claim.

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<sup>12</sup> Jurists make fine distinctions between rules, standards, and principles. I do not make such distinctions here. I treat “standard” as a generic term designating any type of general norm. I tend only to reserve the term “principle” for those standards that are not explicit in authoritative sources but rather are taken to underlie them.

<sup>13</sup> Elsewhere I have argued at some length that although judges' formalist discourse is sometimes insincere, the insincerity is probably less pervasive than some may think: it is concentrated at the high appellate level, where judges decide a relatively small number of especially difficult and controversial cases (see Shecaira 2012). Although I focus on judges, the formalist character of legal discourse is also seen in the way that lawyers and jurists argue.

Judge: Plaintiff, prove your claim.

Plaintiff: Defendant owes me 500 euros since we concluded a valid sales contract, I delivered but defendant did not pay.

Defendant: I concede that plaintiff delivered and I did not pay, but I dispute that we have a valid contract.

Judge: Plaintiff, prove your claim that you have a valid contract.

Plaintiff: This document is an affidavit, signed by us.

Defendant: I dispute that this document is an affidavit.

Judge: Defendant, since the document looks like an affidavit, prove that it is not.

Defendant: This lab report shows that the notary's signature was forged.

Plaintiff: That evidence is inadmissible, since I received it too late.

Judge: I agree: The evidence is inadmissible. (Prakken & Sartor 2004, 129)

The institutional constraints to which legal arguers are subject have a significant impact on the way arguments from analogy are made and interpreted in the legal context. In law, intuitive analogies usually do not do the trick (Eisenberg 1988, 86; Alexander & Sherwin 2008, 75). Judges are expected at the very least to articulate relevant similarities and ideally to bind analogous cases under some standard, even if (from the perspective of the logic of discovery) they begin with an intuitive analogy: “similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case” (Levi 1962, 1-2).

Evidence of judicial reliance on principle in the context of analogical argumentation is provided, for instance, by the popularity of Ronald Dworkin's theory of legal reasoning among contemporary academic lawyers. The theory is controversial in various respects, to be sure, but even its critics allow that it “faithfully tracks traditional legal methodology” (Alexander & Kress 1997, 739). For Dworkin (1986), legal decisions are grounded on principles, understood as rationales for previous legal acts bearing more or less directly on the topic at issue. Reasoning according to Dworkinian principles is nothing but reasoning from analogy on

the basis of a large amount of source analogues (Brewer 1996, 960-1; Raz 2009, 295).

Formalism is what explains judicial worry with deciding on the basis of standards drawn from authoritative sources or, in their absence, newly formulated principles that serve as the rationale for past decisions of the legal authorities. Judges would proceed in this way even if their decisions did not bind as precedents. But in many legal systems decisions do bind as precedents, and where they do interesting things tend to happen. Where judicial decisions bind, judges are subject to more than the regular pressure of formalism; they are also aware that subordinate judges will be treating their decisions as sources of authoritative standards. One might think this double pressure would ensure that senior judges carefully formulate the principles grounding their decisions; but, in fact, sometimes judges will avoid formulating a principle precisely because they expect subordinate judges to come looking for one. If a judge is unsure about the adequateness of the implications of a certain principle or if she believes—perhaps for political reasons—that the law on some topic ought to be gradually developed by the courts, she may prefer not to impose a precise principle on subordinate judges.<sup>14</sup>

Again, given that judges are part of a formalist discursive culture, they will not often allow their decisions to seem unprincipled. If they employ analogical arguments, they will avoid leaving their analogies bare or intuitive. Yet occasionally they may do just that in order to avoid imposing on subordinate judges a norm of uncertain merit. Indeed, judges sometimes write opinions that contain a description of the facts of the case (e.g., defendant and plaintiff concluded a valid sales contract, plaintiff delivered but defendant did not pay the agreed-upon 500 euros) and a statement of a

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<sup>14</sup> “Judges are often reluctant to specify the principle involved in their deductive analogical arguments from precedents. That is not, however, because there is no principle to specify: rather, it is because stating the principle tends to bind future judges to that principle and thus makes it more difficult to develop a newly modified interpretation of the principle in light of changing circumstances.” (Waller 2001, endnote 29)

ruling (e.g., defendant ought to pay 500 euros to plaintiff), but no clear and concise description of the norm which permits the inference from facts to ruling. When this occurs, judges who are subject to the authority of that decision will want to construct a principle by considering what the standard is that, “combined with the facts of the [precedent] case, suffices to yield the ruling [of the precedent case]” (Gardner 2007, 68). This is not a trivial procedure, since there are different principles, at different levels of generality, that would equally suffice for the inference.

Systems with a developed tradition in the use of precedent have customary means of mitigating the uncertainty generated by the existence of alternative standards that can equally serve as the rationale for an authoritative decision. For instance, judges subject to that decision tend to opt for the narrowest standard among the alternatives and also to avoid standards that are inconsistent with other more or less authoritative decisions to which the judges also intend to cite in their opinions (Gardner 2007, 69).

This has a curious consequence for analogical argumentation in the legal context. Judges may rely on an analogy and yet fail to spell out the relevant principle. Now, they do this while being aware (i) that subordinate judges will look to their decisions as sources of standards and (ii) that customary procedures will likely be used for devising such standards if none are expressly given. So what principle might be implicit in a judicial decision involving an argument from analogy that does not state a principle? Provided that the senior judge knows how subordinate judges in her jurisdiction will handle an authoritative decision, her failure to formulate a principle may be understood as a way of tacitly assenting to the principle that will be constructed by means of the customary procedures.

So, to recapitulate, legal arguments from analogy are even more dependent on principles than moral arguments from analogy. Again, this is explained by the fact of formalism: judicial decisions ought to be based on standards drawn directly from authoritative sources or, in their absence, principles that at once provide the rationale for the authoritative sources and entail the result reached in

the instant case. But legal arguments from analogy are not special only with respect to the overwhelming presence of principles; they are also peculiar because of the specific way in which principles are discerned when they fail to be stated. The doctrine of binding precedent is such that principles may be constructed by an audience of subordinate judges according to procedures that the author of the argument tacitly endorses.

## 7. Conclusion

The main ambition of this paper was to provide a defence of a modified version of Waller's model for the analysis and evaluation of *a priori* analogical arguments in ethics and law. Waller's schema for analogical arguments was significantly modified, but its underlying insights were preserved. As characteristically formulated by professional moral philosophers and judges, analogical arguments include a (moral or legal) principle within their premises. This principle is derived by means of a non-deductive sub-argument resembling an inference to the best explanation, and is subsequently used as part of a deductive sub-argument entailing a claim about how the target analogue is to be treated. Analogical arguments relying on principles are better than analogical arguments based on so-called intuitive analogies. In failing to articulate relevant similarities between analogues, intuitive analogies are apt to alienate audiences who, through no clear fault of their own, just fail to "see" the similarities at issue.

The paper also contains a brief description of some peculiarities of the legal domain. In law, the articulation of principles is important, not only because judges recognise the inferiority of arguments based on intuitive analogies, but also because they are subject to institutional constraints that emphatically require them to make decisions on the basis of general norms having a more or less direct relationship with posited law. Judges sometimes (especially in high profile cases dealing with politically sensitive matters) refrain from articulating definitive principles, but they do so in the

knowledge that later judges will interpret their earlier decisions as being based on principles the content of which will be discerned according to customary procedures.

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