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Arguing *a fortiori*

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Abstract: Courts and lawyers often argue *a fortiori*. Sometimes they actually use the Latin phrase to indicate that their conclusions do not just follow, but “follow *a fortiori*” from certain premises. These are taken to be inferences of a distinct and important kind. But how exactly are they distinct, and why are they important? Despite their popularity, *a fortiori* arguments are not well understood and have not drawn much attention from legal theorists. This paper pursues two goals. The first is to bring out the form of *a fortiori* arguments, articulating those assumptions that, though typically left unstated, are necessary elements of arguments of this kind. The second goal is to say something about the point of such arguments, and to characterise the sort of context in which an arguer will have reason to deploy an *a fortiori* rather than an inference of a different type.

INTRODUCTION

Courts and lawyers often argue *a fortiori*. Sometimes they actually use the Latin phrase to indicate that their conclusions do not just follow, but “follow *a fortiori*” from certain premises. These are taken to be inferences of a distinct and important kind. But how exactly are they distinct, and why are they important? That is less clear. Despite their popularity, *a fortiori* arguments are not well understood and have not drawn much attention from legal theorists.

I try in this paper to make some progress on the topic. I will be pursuing two goals. The first is to bring out the form of *a fortiori* arguments, articulating those assumptions that, though typically left unstated, are necessary elements of arguments of this kind. That will be the object of the first four sections. The second goal is to say something about the point of such arguments, and to characterise the sort of context in which an arguer will have reason to

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deploy an *a fortiori* rather than an inference of a different type. That will be my task in the fifth and last section.

The first three sections are dedicated to identifying several features that lawyers will, I think, recognise upon reflection as the key components of the *a fortiori*. I will therefore be relying on my readers' pre-theoretical familiarity with such arguments: that is precisely what will enable them to evaluate the soundness of my proposed account. I will also rely on readers' ability to know an *a fortiori* argument when they see it. For courts do occasionally misuse the "*a fortiori*" label in connection with arguments of other kinds; and genuine instances of the argument do not need, of course, to come explicitly marked or classified in any way.

So, for example, I take it that you will agree that Lord Kerr in *Moohan and another v The Lord Advocate* [2014] UKSC 67 was offering an *a fortiori* argument (among other considerations) in support of his view that Article 3P1 of the European Convention on Human Rights was applicable to the Scottish independence referendum. This Article imposes an obligation on states to hold elections "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." Lord Kerr writes:

This phrasing [of Article 3P1] may, on one view, point to a focus on legislative elections, but it by no means justifies an exclusion of other votes. Why should it? If voting for a representative in a legislature is deemed sufficiently important that it should be guaranteed to all, why would voting for the *form of government* be deemed less important?

This is a good example of an *a fortiori* argument, and I will say more about it in the fourth section of this paper. By contrast, the following passage, from *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37, is not—the Court of Appeal's own claim notwithstanding—an instance of an *a fortiori* argument:

Had we reached the conclusion that the law in respect of parts or products of a living human body precluded our holding that the men had ownership of sperm for the purposes of their claims in the tort of negligence, it would clearly have been important for us to proceed to inquire whether nevertheless they had such lesser rights in relation to it as would render them capable of having been bailors of it. Our conclusion that the men had ownership of it for the purposes of their claims in tort obviates the need for that particular inquiry: for from that conclusion it follows *a fortiori* that the men had sufficient rights in relation to it as to render them capable of having been bailors of it.

If someone has ownership of a thing, then he does have sufficient rights as to render him capable of having been bailor of it. So the court's conclusion follows—just not *a fortiori*. It is simply that ownership is a bundle of normative positions that contains those latter rights as a sub-class.

Scholars too sometimes give confused examples. David Daube points out that certain kinds of argument that courts typically use—including arguments *a fortiori*—are not the exclusive province of lawyers; they are also used in everyday argumentation:

[T]ake as illustration the inference *a fortiori*—to be sure, any layman might reason thus: “Here is a teetotaler who does not touch cider; he will certainly refuse whisky.”¹

But this is not a good illustration. The putative *a fortiori* inference would rely on the fact that the teetotaler does not touch cider, to infer that he will refuse whisky. Yet if we know that he is a teetotaler, then the fact that he does not touch cider plays no role in the argument: if he is a teetotaler, then it already follows that he will certainly refuse whisky. A better illustration would be simply this:

“He does not touch cider; he will certainly refuse whisky.”

Daube is right, though, that *a fortiori* arguments are just as usual and natural outside the law as they are among lawyers. There is nothing specifically *legal* about this type of inference, regardless of what some authors suggest.² And perhaps it will be helpful to adopt Daube's (revised) illustration as a working example as we begin to make progress in understanding how these inferences actually work. We will come back, of course, to real instances of the legal *a fortiori*—in the third and especially in the fourth section, when the preceding conclusions will be tested against several examples from judicial decisions. But the cider-and-whisky argument—stripped of any reference, explicit or implicit, to teetotalers—is a good specimen to tackle at first precisely because it is an everyday example. It is easy to grasp, and free of legal jargon and distracting technicalities. So let us start by trying to identify its elements and structure.

¹ David Daube, “Rabbinic Methods of Interpretation and Hellenistic Rhetoric” (1949) 22 *Hebrew Union College Annual* 239-264 at 254.

² Klug classifies the *a fortiori* as one of the “special arguments of legal logic” (“spezielle Argumente der juristischen Logik”). See Ulrich Klug, *Juristische Logik* (4th ed., Berlin: Springer 1982) 109.

THE ELEMENTS OF THE *A FORTIORI*

The first thing to note is that in arguing “He does not touch cider; he will certainly refuse whisky” we will be comparing two things—cider and whisky—and inferring, on the basis that he (our friend, say) will (or would) not drink the former, that he will also not drink the latter. Why exactly not? The argument as expressed is silent about that. But we will only understand the inference if we grasp the point of the comparison. Suppose, then, that the context in which the argument is being put forward makes clear that the comparison concerns the alcohol content of the two kinds of beverage, and more specifically the fact that cider is lower in alcohol content than whisky. And the thought behind the argument as expressed would seem to be this: if cider, lower in alcohol content as it is, is nevertheless already *so high* in alcohol content that our friend would refuse it—if it is already *too high* in alcohol content for our friend to accept it—then surely whisky, too, is high enough in alcohol content that our friend would refuse it.

In order to begin to make sense of the argument, then, we have to track and bring out an assumption which we take the arguer to be relying upon regarding the reason why our friend will—or so the arguer claims—refuse whisky. The assumption is that the friend’s refusal is due to the beverage’s alcohol content. It is only in view of some such property that cider and whisky can be meaningfully contrasted for the purposes of the argument. If our friend’s objection to cider was based instead, say, on the fact that cider is made from fruit, or that it is a fermented beverage, then we would not be able to infer from that that he would also object to whisky. After all, refusing cider and accepting whisky are perfectly compatible actions; taken by itself, the claim that our friend would refuse cider is logically consistent with the claim that he would accept whisky.

Now in identifying this assumption—that the reason our friend rejects cider is that its alcohol content is too high—we have singled out what I will call a “scalar” property: a property—alcohol content—that something can have either more or less of. And we have also made clear that there is a relevant threshold in the scale, a point or degree *T* of alcohol content, such that if the alcohol content of a certain beverage meets the threshold—if it is equal to or higher than *T*—then our friend will, the arguer claims, refuse it. That seems to be an implicit premise in the argument; we can perhaps spell it out as follows:

- (P) There is a point *T* in the scale of alcohol content such that if a beverage meets *T*, then our friend will refuse it.

What seems to be going on in the argument, then, is that on the basis of the information that cider meets the relevant threshold (whatever that threshold is), we can validly infer that whisky meets it, too, given that whisky ranks even higher on the scale of alcohol content. If cider meets the threshold, then so does whisky.

Here is a first attempt at reconstructing the full cider-and-whisky argument, bringing out all of its premises—that is, all the premises (whether or not they have been explicitly stated) on which we take the arguer to be relying:

- (1) There is a point T in the scale of alcohol content such that if a beverage meets T , then our friend will refuse it.
- (2) Cider meets T .
- (3) Whisky ranks higher than cider on the scale of alcohol content.
Therefore (from (2) and (3)),
- (4) Whisky meets T .
Therefore (from (1) and (4)),
- (5) Our friend will refuse whisky.

This will need to be refined, but it puts us on the right path. And there are two important aspects of this argument that we can highlight straight away. First, it is deductively valid; it is, more precisely, a chain of deductively valid arguments. (We could have reconstructed the inference as a single deductive step from the conjunction of (1), (2), and (3), to the conclusion in (5), omitting the first inference—from (2) and (3) to (4)—altogether; but we make things much clearer by differentiating the two steps.) If all the premises are true, then the conclusion too will be true.

Second, there is one further intermediate conclusion—call it “(2a)” —which follows deductively from (1) and (2), and which we could also have brought out:

- (1) There is a point T in the scale of alcohol content such that if a beverage meets T , then our friend will refuse it.
- (2) Cider meets T .
Therefore (from (1) and (2)),
(2a) Our friend will refuse cider.
- (3) Whisky ranks higher than cider on the scale of alcohol content.

Therefore (from (2) and (3)),

(4) Whisky meets T .

Therefore (from (1) and (4)),

(5) Our friend will refuse whisky.

Note that, interestingly, the claim in (2a) was the *single* one that the arguer had actually made explicit: the argument as expressed, remember, ran simply as “He does not touch cider; he will certainly refuse whisky.” On the face of it, then, the arguer gives us a single premise—the claim that our friend will refuse cider—in support of the conclusion that our friend will refuse whisky. That single claim, together with information discerned from the context in which the argument is being made, provided the basis for our interpretative reconstruction of the further premises we take the arguer to be implicitly relying on, and of how those premises connect with the conclusion of the argument; but once we have unpacked these premises into the conjunction of (1), (2), and (3), the claim in (2a) no longer needs to be spelled out as a part of the argument in order for the inference to run. In a sense, then, the argument as originally stated included *none* of its crucial premises; and that, as we will see, is one of the noteworthy features of *a fortiori* arguments.³

I said that our reconstructive work is not yet finished—there may be more to the cider-and-whisky argument than we have uncovered so far. But before we proceed with that task we can try to begin to isolate the *form* of this argument: the *common* form, that is, of arguments like this. What should we say? Here is a first, half-way attempt:

(i) There is a point T in the scale of P such that, for every x , if x meets T , then our friend will refuse x .

(ii) a meets T .

(iii) b ranks higher than a on the scale of P .

Therefore (from (ii) and (iii)),

(iv) b meets T .⁴

³ Let me also reiterate—even though the point is obvious—that (2a) does not entail (5). That is why I said in the Introduction that the court’s argument in the *Yearworth* case, or Daube’s original version of the cider-and-whisky inference, are not instances of *a fortiori* arguments. If your “target” claim just follows from your “source” claim, you are not arguing *a fortiori*.

⁴ This intermediate inference—the inference from (ii) and (iii) to (iv)—bears some structural similarity to what Sion isolates as one (complete) valid pattern of *a fortiori* argument: he calls it the “positive subjunctal

Therefore (from (i) and (iv)),
(v) Our friend will refuse *b*.

Any instance of this pattern will be a deductively valid argument. But the formulation in (i) does not give us an adequate formalisation of the relevant premise. The problem does not lie with its first part—the part before the consequent of the conditional. The cider-and-whisky example is about beverages, but that is not a distinctive formal feature of the argument: what matters formally is not (of course) that our arguer is concerned with the consequences of the fact that a certain beverage meets a certain threshold of *alcohol content*. (It is obviously not a characteristic of *a fortiori* arguments that they are about alcoholic drinks.) What matters, rather, is that the arguer is concerned with the consequences of the fact that some item or object—it could be anything—meets a certain threshold of some scalar property—it could be any property. So it does seem appropriate to formalise the first part of premise (1) by writing, as I have above, that

mood” of the “copulative” *a fortiori* argument—he also calls it the “paradigm of a fortiori argument”—and renders it as “P is more R than (or as much R as) Q (is R); and Q is R enough to be S; therefore, all the more (or equally), P is R enough to be S.” See Avi Sion, *A Fortiori Logic: Innovations, History and Assessments* (Geneva: 2013) 10-11, 117. In this striking (and self-published) book, which includes, among other things, a minute study of the topic, Sion distinguishes between “copulative” and “implicational” *a fortiori* arguments, each of which comes in four moods, in a total of eight different valid patterns. All eight patterns are patterns of two-premise arguments combining four terms (or theses, as the case may be) P, Q, R, S, and all have conclusions of the form “. . . is (is not/implies/does not imply) . . . enough to be (to imply) . . .” But Sion’s formalisations are, I think, too crude to do justice to his insights. They are also potentially confusing. In his explanations he sometimes uses a scheme like “Rx” to represent the point on a given continuum R at which a certain *item* x stands—which suggests that “x” is to be taken to be an individual constant—but sometimes he also uses it to represent a relevant threshold on a continuum (for example, a point that *any* item x needs to meet in order to have a certain property)—which would make “x” a variable instead; and as a result he is led to say that an *a fortiori* argument orders *three items* (P, Q, and S), rather than just two, “according to their position in a common continuum” (21). Sion’s formalisations also fail to reflect the fact that *a fortiori* arguments are not—certainly not necessarily—arguments for conclusions of the form “. . . is (is not/implies/does not imply) . . . enough to be (to imply) . . .” The cider-and-whisky argument is not an *a fortiori* inference for the conclusion that whisky is high-in-alcohol-content enough to be the sort of beverage that our friend would refuse (or something along those lines); it is an *a fortiori* inference for the conclusion that our friend *will* refuse it. Furthermore, the semantics of “. . . is . . . enough (or not enough) to be x” does not always licence inferences to “. . . is x”; I may be tall enough to be a basketball player, and yet not be one.

- (i) There is a point T in the scale of P such that, for every x , if x meets T , then . . .

But what about the consequent of this conditional? How should we fill the ellipsis? In the formulation I gave above—formulation (i)—the consequent read:

“. . . our friend will refuse x .”

But this is unsatisfactory; *a fortiori* arguments are no more about friends and what they will refuse than they are about beverages and their alcohol content. That is why I said that the scheme above gives just a half-way formalisation of the argument. So we need to revise formulation (i), as well as formulation (v). What should we write?

There is no principled limit to the range of kinds of consequences that could be attached to the fact that a certain object meets a certain threshold of some scalar property. In our cider-and-whisky example we have a descriptive consequent with a particular form: we have a claim about what someone will do—refuse it—with regard to the alcoholic beverage in question. But we can easily imagine similar arguments with either differently shaped descriptive consequents (“. . . it will not freeze in a regular home freezer”) or with normative consequents (“. . . we should not overuse it in our sauce”). All that matters is that the consequent of the conditional somehow involve the threshold-meeting object; that, indeed, is what lends relevance to the fact that the object does meet the threshold.

There is therefore, it seems, no single formalisation that would equally fit the wide range of consequences that are eligible to feature in an *a fortiori* argument. With this proviso in place, however, we can adopt the following simplified formulation as a way of highlighting the fact that the consequent of the conditional in the first premise of our argument—and so too the conclusion of the argument—is any claim, descriptive or normative, involving the threshold-meeting item:

“. . . then x is Q .”

To be clear, the point of my proviso is not merely that the consequent can be either a descriptive or a normative claim. The point, more generally, is that there is no reason to think that the consequent must be a claim in which something is *predicated* of the threshold-meeting item. All that is necessary is that the consequent involve the threshold-meeting item in some way. By the same token, there is also no requirement that we have in the consequent

a variable specifically standing for the threshold-meeting items themselves: we could have variables standing for more complexly described items that involve but are not reducible to the threshold meeting items. (We can also have more complex premises involving further variables performing other roles.) We will see some examples of this further ahead, when we look at some real instances of the *a fortiori* in legal argument.

If we rewrite (i) accordingly, then, this is what we get as the form of our cider-and-whisky inference:

- (i') There is a point T in the scale of P such that, for every x , if x meets T , then x is Q .
 - (ii) a meets T .
 - (iii) b ranks higher than a on the scale of P .
- Therefore (from (ii) and (iii)),
- (iv) b meets T .
- Therefore (from (i) and (iv)),
- (v) b is Q .

But as I said, we have more to uncover.

THE TWO FORMS OF THE *A FORTIORI*

Our discussion so far has revealed three simple but important features of the *a fortiori*. First, an *a fortiori* is an argument for a conclusion about a certain item or object. (The cider-and-whisky argument, for example, is an argument for a conclusion about whisky.) We can call such an item the “target” of the argument.⁵ That is what the individual constant “ b ” stands for in the scheme above. Second, an *a fortiori* argument appeals to some scalar property P and to

⁵ This terminology is imported from the literature on analogy. I discuss analogical arguments at length in Luís Duarte d’Almeida and Cláudio Michelon, “The Structure of Arguments by Analogy in Law” (forthcoming). We can, of course, also have *a fortiori* arguments that target, not individual items, but *any* item satisfying a given description D . In that case, the relevant premises and conclusions would have correspondingly more complex forms (e.g. “For every x , if x is a D_1 , then x meets T ”; “For every x and every y , if x is a D_1 , and y is a D_2 , then y ranks higher than x on the scale of P ”; and so on). To keep things manageable and readable, however, I gloss over these complications: they are but variations on the schemes discussed in the text, and have no bearing on our understanding of how an *a fortiori* runs.

a certain threshold T on the scale of P , such that the position of the target with regard to the threshold is relevant for the conclusion of the argument. And third, the argument relies for its conclusion on information about both (a) whether some *other* item (which we can call the “source” item, symbolised as “ a ” in the scheme above) meets T , and (b) the relative positions of a and b on the scale of P .

But there are two ways in which the position of an item with regard to a certain threshold can be relevant to the conclusion of an argument. In our cider-and-whisky example, what matters is that a beverage *does* meet a certain threshold. But we can think of contexts in which what matters is instead that a certain threshold is *not* met by a certain target item; and such contexts offer the same opportunities for deploying *a fortiori* inferences.

To see this more clearly, consider once again the first intermediate inference in our scheme—the inference that takes us from (ii) and (iii) to (iv):

- (ii) a meets T .
- (iii) b ranks higher than a on the scale of P .
- Therefore (from (ii) and (iii)),
- (iv) b meets T .

Any instance of this valid inference form will combine, as I just noted, information on two issues. One issue is whether a meets T . The other issue is the relative position of a and b on the scale of P . But of course not every possible combination of information on these two issues would allow us to construct a valid inference. Suppose that our information about the relative position of a and b on the scale of P was instead a claim of the following form:

- (iii*) b ranks lower than a on the scale of P .

In that case we would not be able to conclude anything about whether b ranks high enough on the scale of P to meet T . Instances of the following scheme, in other words, would *not* be formally valid arguments:

- (ii) a meets T .
- (iii*) b ranks lower than a on the scale of P .
- Therefore (from (ii) and (iii*)),
- (iv) b meets T .

The conclusion might still be true, of course. It might be true that b does meet the relevant threshold. But the point is that this is something that cannot be established on the basis of (ii) and (iii*): even if these premises are both true, the conclusion could still be false.

Likewise, if, instead of (ii), what we knew about the place of a on the scale was that

(ii*) a does not meet T ,

we would not be able to derive, from the conjunction of (ii*) and (iii), any conclusion about whether b meets T . In other words, the joint truth of

(ii*) a does not meet T ; and

(iii) b ranks higher than a on the scale of P

is consistent with b either meeting or not meeting the relevant threshold.

Instances of the following scheme, on the other hand, *would* be formally valid inferences:

(ii*) a does not meet T .

(iii*) b ranks lower than a on the scale of P .

Therefore (from (ii*) and (iii*)),

(iv*) b does not meet T .

There are two ways, then, in which we can rely on combined information about (a) whether an item a meets a given threshold T on the scale of P , and (b) what the relative position of items a and b is on that scale, in order to validly derive a conclusion about (c) whether item b meets T .

Now an inference of this second type—the valid inference from (ii*) and (iii*) to (iv*)—would not be of much use in conjunction with an instance of premise (i') above. We would not be able to derive any conclusion from the conjunction of (i') and (iv*):

(i') There is a point T in the scale of P such that, for every x , if x meets T , then x is Q .

(iv*) b does not meet T .

It would be fallacious to conclude from (i') and (iv*) that *b* is *not Q*. For a premise like (i') establishes that *x*'s meeting the threshold is a sufficient condition of *x* being *Q*, not a necessary one. So it could still be the case that *b* is *Q* even if *b* does not meet the threshold.

But if on the other hand we couple (iv*) with a premise attaching relevance to the fact that the threshold is *not* met, a premise of the form

(i*) There is a point *T* in the scale of *P* such that, for every *x*, if *x* does not meet *T*, then *x* is *Q*,

we will then be able to run a valid inference, and to put together an argument instantiating the following valid (complex) pattern:

(i*) There is a point *T* in the scale of *P* such that, for every *x*, if *x* does not meet *T*, then *x* is *Q*.

(ii*) *a* does not meet *T*.

(iii*) *b* ranks lower than *a* on the scale of *P*.

Therefore (from (ii*) and (iii*)),

(iv*) *b* does not meet *T*.

Therefore (from (i*) and (iv*)),

(v*) *b* is *Q*.⁶

There are therefore two forms of the *a fortiori*. Both proceed from source to target: both rely on a specific kind of information about the source item to establish a conclusion about the target item. The difference is that in one case—exemplified by our cider-and-whisky example—the source ranks lower than the target on the scale of the relevant property, while in the other case the source ranks higher than the target.

That there are two forms of *a fortiori* arguments in law is not exactly a new point. In Continental jurisprudence lawyers and scholars draw a distinction between arguments *a*

⁶ It makes no difference that the consequent of the conditional in (i*), and therefore also the conclusion in (v*), is the claim that *b* is *Q*. We would have an inference of the exact same kind if the consequent of the conditional in the first premise was instead the claim that *b* is *not Q*. What matters is that the *antecedent* of the conditional in (i*) is the claim that *x* does *not* meet the threshold, rather than (as in (i')) the claim that *x* does meet it.

maiore ad minus (literally, “from the greater to the lesser”) and arguments *a minore ad maius* (“from the lesser to the greater”), which they identify as two species of *a fortiori* arguments (even though “*a fortiori*” means, literally, “from the stronger”).⁷ What the actual difference between the two species is, though, is no better understood by Continental lawyers and theorists than it is by their common law counterparts; and although courts in common law jurisdictions today do not often use those two Latin phrases—the “*a fortiori*” label they do use frequently—they do, of course, offer arguments of both kinds.

It will be helpful at this stage to start looking at some examples from actual judicial decisions—not just for illustration purposes, but also as a means of testing whether my proposed schemes do actually capture the arguments that courts are deploying. In this paper I look almost exclusively at examples from common law decisions. Here is one old but good example of an *a fortiori* of the second kind: an inference that proceeds from information about a higher-ranking source to a conclusion about a lower-ranking target. It is from *Davies v. Jenkins* [1900] 1 QB 133:

In my opinion the county court judge’s decision in this case cannot be upheld. The schedule describing the “stock” as “2 horses, 4 cows” is not sufficiently specific to satisfy the statute [section 4 of the Bills of Sale Act, 1882]. In *Carpenter v. Deen* it was held that “21 milch cows” was an insufficient description. By that decision we are bound. Moreover, the cows here are not even described as milch cows. The description is therefore even less specific than in that case. As to the two horses, it follows a fortiori that their description is insufficient, for even Lopes LJ, the dissentient judge in *Carpenter v. Deen*, was of the opinion that, as it was usual to describe horses by their colour, a greater degree of particularity was required in the case of horses than in that of cows. The bill of sale was therefore bad as to the horses and cows.

⁷ See Georges Kalinowski, “Interprétation juridique et logique des propositions normatives” (1959) 6-7 *Logique et Analyse* 128-142 at 135-137; Jan Gregorowicz, “L’argument *a maiore ad minus* et le problème de la logique juridique” (1962) 17/18 *Logique et Analyse* 66-75; Eduardo García Maynez, “Die Argumente *a simili ad simile*, *a maiore ad minus* und *a minore ad maius*” (1965) 41 *Archiv für Rechts- und Sozialphilosophie: Beiheft* 115-135 at 123-133; Ilmar Tammelo, *Outlines of Modern Legal Logic* (Wiesbaden: Franz Steiner 1969) 127-128; Zygmunt Ziemiński, *Practical Logic* (Dordrecht: Springer 1976) 325-327; Giovanni Tarello, *L’Interpretazione della Legge* (Milano: Giuffrè 1980) 355-357. Klug remarks that the phrases are not always consistently used: see *Juristische Logik* (n. 2) 147. There is a review of literature up to 1990 in Thomas Kyrill Grabenhorst, *Das argumentum a fortiori: Eine Pilot-Studie anhand der Praxis von Entscheidungsbegründungen* (Frankfurt: Peter Lang 1990) 9-62. And see also, outside the jurisprudential context, Sion’s discussion of the difference of orientation between what he identifies as the positive (from major to minor term or thesis) and the negative (from minor to major term or thesis) moods of *a fortiori* arguments, in *A Fortiori Logic* (n 4) 12-16.

There are two arguments here, and only the second is an *a fortiori*. The first is an argument for the conclusion that the description “4 cows” is insufficient; and this conclusion is based on the premise—backed by judicial authority—that a description specifying (a) that the cows are milch cows and (b) how many they are, is an “insufficient description.” It follows—though this is not an *a fortiori*—that a description specifying *only* how many cows there are is also an “insufficient” description: if the conjunction of (a) and (b) is insufficient, then it follows logically that (b) alone is also insufficient. But then the court gives an *a fortiori* argument for the conclusion that “two horses” is also an insufficient description. Here is how this argument looks like when reconstructed as an instance of our second scheme:

- (1) There is a point *T* on the scale of *amount of information provided relative to the amount of information required* such that, for any description *x* of livestock, if *x* does not meet *T*, then *x* fails to satisfy section 4 of the Bills of Sale Act, 1882.
- (2) A description of cows specifying only their number does not meet *T*.
- (3) A description of horses specifying only their number ranks lower than a description of cows specifying only their number on the scale of *amount of information provided relative to the amount of information required*.

Therefore (from (2) and (3)),

- (4) A description of horses specifying only their number does not meet *T*.

Therefore (from (1) and (4)),

- (5) A description of horses specifying only their number fails to satisfy section 4 of the Bills of Sale Act, 1882.⁸

What is the court comparing? Not cows and horses; what the court is comparing is the “4 cows” and the “2 horses” descriptions—or rather, more generally, a description of cows that specifies only their number, and a description of horses that also specifies only their number. And the court’s point is that, since the amount of information required of a description of horses is higher than that required of a description of cows, the amount of information still

⁸ This is one example of an *a fortiori* argument whose target is actually *any* description of horses specifying only their number; the form of the conclusion would be “For any *x*, if *x* is a description of horses specifying only their number, then *x* fails to satisfy section 4 of the Bills of Sale Act, 1882”, and premises (2) and (3) have similarly complex forms: see n. 5 above. (The court could then go on to apply—by universal *modus ponens*—the general conclusion in (5) to the individual description contained in the schedule at issue in the particular the case at hand.)

missing from a description of horses that specifies only their number is *greater* than the amount of information missing from a description of cows that specifies only their number.

There are a few things to note about this argument. One is that the threshold *T* mentioned in premise (1) is, of course, 100%. It is a tautology that a description of livestock needs to provide every single element that it needs to provide to satisfy the statutory provision. But that does not mean that premise (1) is itself a tautology. It isn't. For the point, again, is that the precise catalogue of elements that a description of livestock needs to provide will vary depending on the type of livestock involved. What elements exactly does a description of cows need to meet? The court does not say. Nor does it have to take a view on that. For the court already knows that a description that specifies only the number of cows does not provide 100% of the elements it needs to provide to satisfy the statutory requirement. That is what premise (2) asserts. How can the court know this if it takes no view on exactly what elements are required? Because it can rely on the *Carpenter v. Dean* authority (combined with a simple logical inference) to establish that claim. *Whatever* the list of elements required for a sufficient description of cows is, one thing is clear: there is more to it than just specifying the number of cows and what they are kept for (e.g. their milk), and thus more to it than just specifying their number. And how many *more* (and exactly what) elements does a description of horses have to provide to meet the requirement? Again, the court does not say—or care. For, again, the court is able to justify on independent grounds the view, captured in premise (3), that, *whatever* the catalogue of required elements in descriptions of horses is, it is larger—more demanding—than the catalogue of required elements in descriptions of cows.

The reason that I am drawing your attention to these features of the cows-and-horses argument is that they reflect what is, as I will suggest in the last section, the characteristic point of *a fortiori* arguments. But let us look at another example before we try to consolidate our thoughts. Consider the following argument, from *Hallamshire Industrial Finance Trust Ltd v. Inland Revenue Commissioners* [1979] 2 All ER 433:

Once the actual issues have become defined and the parties have had a full opportunity to argue all the points open to them on the notice of appeal, the commissioners give their decision on the issues actually raised. Having done so, in my opinion they have in any ordinary sense of the words “determined the appeal.” It is not open to a taxpayer to come back as of right and say: “There is another point which I have thought of on which there is an issue: please decide it.” Even less is it open to a taxpayer (such as the company in the present case) to come back and say: “There is another point as to which there is *no* issue between the parties which I require you to determine.”

This is an example of an *a fortiori* argument, although the court does not actually use the Latin expression; but the phrase “even less,” placed as it is just before the court’s conclusion, gives an indication (albeit a non-conclusive one) as to the nature of the intended inference. What then is the argument? I take the court’s point to be that there is *more* reason to allow a taxpayer to raise a new point on which there *is* an issue between the parties, than to allow a taxpayer to raise a new point on which there is *no* issue; but in the law’s view even that stronger reason is not strong or important or weighty enough to justify allowing a taxpayer to have a new decision made on the point. So here is one way of presenting the argument:

- (1) There is a point *T* on the scale of *normative importance* (or *weight*, or *strength*) such that, for every fact *x*, if *x* does not meet *T*, then *x* does not entitle a taxpayer to have a new decision made after the commissioners have determined all the issues that the parties had previously raised when given the opportunity to do so.
- (2) *The fact that there is a previously unraised point on which there is (or may be) an issue between the parties* does not meet *T*.
- (3) *The fact that there is a previously unraised point on which there is no issue between the parties* ranks lower than *the fact that there is a previously unraised point on which there is (or may be) an issue between the parties* on the scale of *normative importance* (or *weight*, or *significance*).

Therefore (from (2) and (3)),

- (4) *The fact that there is a previously unraised point on which there is no issue between the parties* does not meet *T*.

Therefore (from (1) and (4)),

- (5) *The fact that there is a previously unraised point on which there is no issue between the parties* does not entitle a taxpayer to have a new decision made after the commissioners have determined all the issues that the parties had previously raised when given the opportunity to do so.

Note that here, again, there are some questions that the argument does not answer or need to answer. What exactly is the relevant threshold? *How* weighty, that is, would a new fact have to be to justify re-opening a decision process that we took to have been determined with finality? The court does not take a view on that; for it is in a position to assert—this is premise (2)—that, whatever that threshold exactly is, the mere fact that a new point would

have counted as a genuine issue between the parties is not important or weighty enough to meet it. And that, together with the further claim, in premise (3), about the relative position, on the scale, of the source and the target of the argument, is all it takes for the inference to run.

But is there not, you may ask, one important aspect of this argument which the reconstruction above does not capture, and my proposed schemes do not include? I drew attention to the court's use of the phrase "even less": but is the thought expressed by this phrase reflected at all in my proposed reconstruction? The court's claim, it seems, is not merely that a taxpayer is not entitled to a new decision on a point on which there is no issue between the parties (which is the claim that features as the conclusion of the reconstruction above). The court's claim, rather, seems to be that such a taxpayer is *even less* entitled to a new decision than a taxpayer who might want to raise a point on which there is an issue between the parties.

Now, taken literally, of course, this may sound nonsensical. How could something be *less*—or *more*—allowed than something else? Surely all we can say is that something either *is* or *is not* allowed; being allowed is not a matter of degree. And what could it mean to say that a conclusion, like the one in (5) above, is being put forth as being either *more* or *less* true than some other conclusion also put forth as true?

But what this shows is not that the court is talking nonsense. What it shows is that the court's use of the "even less" phrase is not to be taken literally. But perhaps it is to be taken seriously. Indeed, this and similar phrases—phrases like "all the more", "even more so", "even less so", and so on—are phrases that arguers typically use when deploying *a fortiori* arguments. Sometimes, of course, these phrases will be used simply to emphasise the relative position of source and target: to mean that the target ranks *even* lower, or *even* higher, than the source on the relevant scale; and maybe that was all that the *Hallamshire* court meant. Sometimes, however, it seems that by those phrases arguers intend to point out a distinctive kind of relation between the premises and the conclusion—a distinctive kind of way in which the premises of an *a fortiori* argument support its conclusion. And scholars too seem to find it natural to use such phrases to refer to the conclusion of arguments of this sort. Here, for example, is how Arnold Kunst reports the fact that *a fortiori* arguments—in both the *a maiori ad minus* and the *a minori ad maius* varieties—were "favoured by the Talmud and the Scriptures as a significant means of expressing ritual commands and prohibitions":

The inference *de minore ad majus* and vice versa . . . became an important instrument of legal disputations, and because of its convincing character was used as a means for the formulation of bye-laws. Unlike the Indians the Jews made no use of highly scientific and sometimes far-fetched formulations. They rather preferred, specially in their legal treatises, the method of common sense and the language of common parlance . . . The rites of religious festivals, the relative sanctity of which was settled with the utmost punctiliousness, were splendid objects for that kind of inference. What is prohibited at a minor festival, is so much the more illicit at a major one, and what is permitted at a greater festival, is so much the more licit (or less illicit) at an inferior one.⁹

More illicit? Less illicit? But this is indeed “the language of common parlance.” Or take another legal example, from *Glen Dowling v. The Minister for Justice, Equality, and Law Reform* [2003] 2 IR 535:

The termination of the applicant’s temporary release in this case occurred because it had come to the respondent’s attention that he was “the subject of a garda investigation into a serious claim,” as stated in the letter sent to him on behalf of the respondent on the 16th March, 2000. As this court made quite clear in *The State (Murphy) v. Kielt* [1984] IR 458, the mere fact that a prisoner has been charged with an offence is an insufficient reason for the revocation of his temporary release. In so holding in that case, Griffin J explained at p. 473 that:—

“Charges are frequently dropped or not proceeded with and, if a temporary release can be revoked *merely* or *solely* because the person released has been charged with an offence, what of the apparent injustice done to such a person who, in the period intervening between the charge and the dropping of the charges, has lost the liberty to which he would otherwise had been entitled under the Act and Rules?” (emphasis added.)

This reasoning must apply with even greater force in circumstances, such as this case, where a prisoner on temporary release was solely the subject of an investigation in relation to an alleged offence, arrested for that purpose, but never charged with any offence.

Here again we can see the pattern that we have identified above. The court relies on a claim about a source item—the mere fact that a person has been charged with an offence is not sufficient to justify revoking their temporary license—to support a conclusion about a target item—the fact that a prisoner was solely the subject of an investigation in relation to an alleged offence, arrested but never charged, is also not sufficient to justify their temporary license. But we also find a claim about how the “reasoning”—the premises—supporting that

⁹ Arnold Kunst, “An Overlooked Type of Inference”, *Bulletin of the School of Oriental and African Studies, University of London* 4 (1942) 976-991 at 984.

conclusion about the target item does not merely support the conclusion, but supports it “with even greater force.” But again: what does this mean? Does it mean that the first claim is not as solidly established as all that? That does not seem to be the point; the court looks certain that it really is the case that the mere fact that a prisoner was charged does not suffice as a reason to revoke his license. So what *is* this distinctive relation between premises and conclusions, this relation that arguers who give *a fortiori* arguments seem sometimes to assume when they use phrases like “with even greater strength,” “all the more,” “even less,” and so on? Whatever it is, it is true that it is not reflected in the schemes introduced so far. So let us see if there is a way of revising our schemes to accommodate this further aspect of the *a fortiori*.

“ALL THE MORE,” “EVEN LESS,” AND SO ON

One possibility that might come to mind as a way of explaining the import of these common phrases would be to suggest that the idea that the final conclusion of an *a fortiori* argument follows from its premises “even more strongly” or “with even greater strength” than the parallel conclusion regarding the source of the inference, means that that final conclusion really *is* stronger, in some sense, than the conclusion about the target.

The plaintiff in *In re Besterman (deceased)* [1983] 2 All ER 656 tried to press such a view of what “a fortiori reasoning” involves; here is how the Court of Appeal reported his argument:

[B]earing in mind that the plaintiff is the only person to whom it could be said that the deceased owed any duty to make provision and that he left an estate of about £1½ m, [£259,000] is by no means a generous figure. It amounts to a little over one-sixth of the estate and so far as one can judge from those reported cases in the Family Division where very wealthy spouses have been involved it appears to bear very little relation to the provision which she would have been likely to have achieved if the marriage had ended in divorce. Counsel for the plaintiff submits that it is so plainly too low that this court ought to interfere . . . It would, he suggests, be a curious result that a party to a happy and contented marriage who has behaved impeccably should be thought to be entitled to a lesser provision from her husband than one who has, perhaps, behaved quite improperly and whose marriage has, in consequence, ended in divorce and dissension . . . Counsel for the plaintiff was contending that a figure of £350,000 would have been appropriate in the case of divorce and that by a fortiori reasoning £450,000 was appropriate in the case of death.

But this—this claim of the plaintiff’s about what follows a *fortiori*—won’t do. For one, we have already seen that the idea that the conclusion of an *a fortiori* inference follows “even more strongly” from the premises than does the conclusion about the source is an idea that holds even when the conclusions involved are all-or-nothing claims (like the claim that an action is forbidden), claims that cannot be “weakened” or “strengthened” in any meaningful sense. And what that seems strongly to suggest is that even when the claim that features as the final conclusion of an *a fortiori* argument is indeed a claim that could in some sense be either weakened or strengthened (like the claim that someone is entitled to a certain amount of money), the *a fortiori* argument itself is an argument that justifies applying the *same* conclusion to the target that applies to the source. Oliver LJ, who delivered the main judgment in *Besterman*, was right to write that

I do not think that I can accept that because the marriage did not terminate by divorce in fact, therefore and a fortiori, she must be entitled to more; counsel for the plaintiff puts it (perhaps rather arbitrarily) at £100,000 more.

This does not mean that the plaintiff did not have a good *a fortiori* argument. What it means is that the plaintiff did not have a good *a fortiori* argument for the conclusion that she was entitled to *more* than she would have been if her marriage had ended by divorce: that was just not the conclusion that the plaintiff’s *a fortiori* argument supported. But the plaintiff might have a valid *a fortiori* argument for the conclusion that she was entitled to the *same* as she would be entitled if the marriage had ended by divorce. And this does also not rule out, of course, the possibility that the plaintiff was indeed entitled to *more* than that, even to £100,000 more; it is simply that she would need a separate argument to establish *that*.

If the final conclusion that is warranted by an *a fortiori*—the conclusion that concerns the target of the inference—is the same conclusion that is taken to apply to the source, should we then give up on trying to explain the idea that that final conclusion is “more strongly” supported by the premises than the conclusion about the source? Should we discount as a mere rhetorical flourish an arguer’s claim that the final conclusion follows “even more so” from the premises?

Here is what we can say. The schemes introduced so far show, as I noted, that the conclusion that applies to the *source* of the argument is already *deductively* justified in the argument. In our cider-and-whisky argument, for example, (2a) follows deductively from (1) and (2):

- (1) There is a point T in the scale of alcohol content such that if a beverage meets T , then our friend will refuse it.
- (2) Cider meets T .
Therefore (from (1) and (2)),
(2a) Our friend will refuse cider.
- (3) Whisky ranks higher than cider on the scale of alcohol content.
Therefore (from (2) and (3)),
- (4) Whisky meets T .
Therefore (from (1) and (4)),
- (5) Our friend will refuse whisky.

Now, if (2a), the conclusion about the source, is already deductively established in the argument—if the argument already puts it forth as being *certainly* true if premises (1) and (2) are true—then the final conclusion in the argument, (5), cannot be “more strongly” justified or supported on the basis of (1) and (4). For these are two deductive inferences with exactly the same form; and when it comes to the strength of an inference, the support afforded by deductive validity is as strong as it gets. But there is, I think, another sense in which it is perfectly meaningful to say that the claim in (5) may be more strongly supported than the claim in (2a). For it may be the case that our friend, despite his principled stance of refusing beverages that exceed a certain degree of alcohol content, might be willing, on some occasions, to make exceptions to the principle. He will have his reason or reasons for not drinking at least some alcoholic beverages: the reason is, suppose, that beverages with an alcohol content above a certain degree will give him a terrible headache. But he may find himself in a situation in which he will also have reasons *for* having a drink, and these reasons may outweigh his reasons for not doing it: imagine, for example, that our friend has presented with a newly produced wine by his son, a winemaker, who would really like to know his father’s opinion on how it tastes. Now suppose, additionally, that the higher the alcohol content of the beverage, the more intense our friend’s headache would be, ranging all the way up to almost paralyzing pain. In that case, it seems clear that the higher the degree of alcohol content of a certain beverage, the harder it will be for his reason against drinking it to be outweighed. In other words, the range of reasons that might outweigh his reason for not drinking whisky is narrower than the range of reasons that might outweigh his reason for not drinking cider. But what that means is that our friend has a stronger reason against drinking

whisky than against drinking wine; and thus that the conclusion that he would refuse whisky is also stronger, in a sense—harder to defeat—than the conclusion that he would refuse cider.

Now the mere fact that our friend has reason to refuse any beverages that meet the relevant threshold of alcohol content—which is the fact that justifies the assertion of premise (1)—does not suffice to make it true that he has stronger reason to refuse higher-ranking threshold-meeting beverages than to refuse lower-ranking but still threshold-meeting ones. The assertion of premise (1) would be equally justified even if every threshold-meeting beverage had identical headache-giving properties; and in that case the conclusion in (2a) would be neither easier nor harder to defeat than the conclusion in (5). So in order for the cider-and-whisky argument to justify the claim that (5) is indeed more “strongly” supported than (2a), we need to expand the inference to include a further premise making it clear that what matters is not only that, as we learn from premise (1), the threshold is met, but also how far up the scale each threshold-meeting item ranks. We need to revise our scheme to include something like premise (6)—which despite its complex-looking formulation is stating a simple point—and the extra inferential step to the conclusion in (7):

- (1) There is a point T in the scale of alcohol content such that if a beverage meets T , then our friend will refuse it.
- (2) Cider meets T .
Therefore (from (1) and (2)),
(2a) Our friend will refuse cider.
- (3) Whisky ranks higher than cider on the scale of alcohol content.
Therefore (from (2) and (3)),
- (4) Whisky meets T .
Therefore (from (1) and (4)),
- (5) Our friend will refuse whisky.
- (6) For any two beverages x and y , if both x and y meet T , and if y ranks higher on the scale of alcohol content than x , then the range of reasons capable of countervailing the reason(s)-in-favour-of-our-friend-refusing- y given by the fact that y -has-the-degree-of-alcohol-content-that-it-does is narrower than the range of reasons capable of countervailing the reason(s)-in-favour-of-our-friend-refusing- x given by the fact that x -has-the-degree-of-alcohol-content-that-it-does.
Therefore (from (2), (3)—which together imply (4)—and (6)),

- (7) The range of reasons capable of countervailing the reason(s)-in-favour-of-our-friend-refusing-whisky given by the fact that whisky-has-the-degree-of-alcohol-content-that-it-does is narrower than the range of reasons capable of countervailing the reason(s)-in-favour-of-our-friend-refusing-cider given by the fact that cider-has-the-degree-of-alcohol-content-that-it-does.

This would give us a reconstruction of the cider-and-whisky inference if we suppose that the arguer was trying to establish not merely the conclusion that our friend would refuse whisky—that is the claim in (5)—but also the further claim that *that conclusion* is “all the more” justified, or that it follows “even more strongly” from the relevant premises.

I think this third inferential step, or something like it, is what we need to bring out in order to make sense of the idea that the conclusion that is drawn in an *a fortiori* argument about the target of the inference is a conclusion that follows “even more so” from the relevant premises than does the parallel conclusion about the source. This explanation is also suggested by what courts themselves sometimes say about the matter. Consider, for example, the following excerpt from the European Court of Human Rights decision in *Uner v. Netherlands* [2006] 3 FCR 340:

Even if art 8 of the [European] Convention [of Human Rights] does not . . . contain an absolute right for any category of alien not to be expelled, the [European Court of Human Rights] case law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision . . . In *Boultif v Switzerland* (2001) 33 EHRR 1179 the court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure [of an alien who had first come to the host country as an adult] was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria [include]:

. . .
— the length of the applicant’s stay in the country from which he or she is to be expelled.

. . .
Although the applicant in *Boultif v Switzerland* (2001) 33 EHRR 1179 was already an adult when he entered Switzerland, the court has [later] held the “*Boultif* criteria” to apply all the more so (*à plus forte raison*) to cases concerning applicants who were born in the host country or who moved there at an early age (see *Mokrani v France* [2003] ECHR 52206/99 at para 31). Indeed, the rationale behind making the duration of a person’s stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be.

The *a fortiori* argument described here—the argument in the *Mokrani* decision—is relying (a) on the premise that *alien residents who came to the host country as adults* (the source item in the inference) have a connection with the host country that is sufficiently strong or important for the length of their stay in the country to be one of the criteria to be taken into account when assessing whether their expulsion is warranted (which does not mean that they are taken to have a connection with the host country sufficiently strong for their expulsion to be deemed unwarranted); and (b) on the premise that both *alien residents who came to the host country as children* and *alien residents who were born in the host country* (the target items) rank higher on that scale of *importance of connection with the host country*; so in their case, too, length of stay is to be taken into account. But on top of this there is the suggestion that in the case of aliens who came to the host country as children and in the case of aliens born in the host country, the reasons that count in favour of making length of stay a criterion are *even stronger*—harder to defeat—than those that count in favour of making length of stay a criterion when assessing the expulsion of aliens who have come to the host country as adults. A duration of stay of, say, 20 years, gives a stronger reason against expelling a resident who came into the country as a child than it would against expelling a resident who came into the country as an adult. So the conclusion about the target is one that follows, as the *Mokrani* court puts it, “*à plus forte raison*”—with stronger reason.

If my proposed account of what these phrases purport to convey is right, however, then a different worry emerges: for the insertion of a premise like (6) in the cider-and-whisky argument appears to upset rather than complement the previous steps in my proposed reconstruction. Why so? Because if there are reasons capable of outweighing our friend’s reasons against drinking threshold-meeting beverages, then it seems that premise (1) can no longer be true. As currently stated, this premise asserts that if a beverage meets the relevant threshold of alcohol content, our friend *will* refuse it; it presents the fact that a beverage meets the threshold as *sufficient* for our friend to refuse it:

- (1) There is a point *T* in the scale of alcohol content such that if a beverage meets *T*, then our friend will refuse it.

But this cannot be the case if, as we are supposing, there are circumstances under which our friend would *accept* a drink, and with good reason, even if the drink does meet the relevant threshold. So we should rewrite premise (1) to reflect this. But then the revised premise—call it “(1’)”—will no longer present the mere fact that a beverage meets the relevant threshold as

sufficing to make it true that our friend will refuse it. And that means that the conclusion in (2a) would no longer follow from the conjunction of (1') and (2), and likewise that the conclusion in (5) would no longer follow from the conjunction of (1') and (4). It seems, therefore, that if we do add something like premise (6) to our previous reconstruction of the cider-and-whisky argument, we will have to rethink all the previous steps.

This is all true, but for our present purposes the worry is relatively easy to allay. All we need is to interpret the conditional sentence in premise (1) as a statement of what some might want to call a “defeasible” conditional: a statement that specifies, not a condition whose truth suffices *on its own* for the consequent to be true, but a condition whose truth suffices *in the absence of defeating considerations* for the consequent to be true. So we can rewrite premise (1) to read:

- (1') There is a point *T* in the scale of alcohol content such that if a beverage meets *T*, and there are no defeating considerations, then our friend will refuse it.

My suggestion is not that a formulation like (1') is the best way of representing defeasible conditionals. In fact, I do not think it is. There is a great deal of controversy around the issue of how best to characterise the idea of a defeasible conditional, and some theorists would argue that if we incorporate into the antecedent of such a conditional—as I did in (1')—a rider like “there are no defeating considerations,” we fail to do justice to the very idea of a defeating consideration. Surely, they say, defeating considerations—exceptions—stand “outside” rather than “inside” the very conditional or rule they purport to defeat, the conditional or rule they are exceptions *to*. There is some truth in this view. On the other hand, we also want to be able to rely on claims like (1) to draw deductively valid inferences; and that seems to imply that we *do* need to reformulate them in such a way that the antecedent specifies a condition whose truth does suffice for the consequent to be true—which does call for a rider of some sort specifying that no exceptions are present. This sounds like a dilemma, but I think it can be solved. But this is not the place to engage further with this topic, which I have discussed at length elsewhere.¹⁰ For the discussion would no longer specifically concern—or teach us anything about—*a fortiori* inferences. All we need in order to move forward with our understanding of the *a fortiori* is the assumption, which I think is true, that there is a way of reformulating the conditional in (1)—and any similar conditional—that

¹⁰ See Luís Duarte d’Almeida, *Allowing for Exceptions* (Oxford University Press 2015).

meets the two desiderata of (a) allowing the absence of defeating considerations to feature as one of the elements in the antecedent, while (b) doing full justice to their very nature as defeating considerations. So for our present purposes my suggestion is that we just take the simple formulation given above as (1') to *stand for* whatever formulation turns out (in the light of one's theory of defeasibility) to best meet those two desiderata: for (1') gives us a simple but vivid way of illustrating the *kind* of revision to our schemes that is needed once we have included premise (6) and the inference to the further conclusion in (7).

Let us, then, reformulate our schemes to incorporate this further inferential step—with one caveat, which is that the claim that the conclusion about the target of an *a fortiori* inference is “more strongly” supported than the parallel conclusion about its source, appears to be a claim only typically rather than necessarily made by whoever gives an *a fortiori* argument. What does seem to be essential to what we recognise as *a fortiori* arguments is their focus on the fact that a certain item meets (or fails to meet) a certain relevant threshold. It is only when, in addition to that, it is also the case that the *normative significance*—the reason-giving strength—of *an item's having the relevant threshold-meeting-making property* will itself *vary* according to where on the scale the threshold-meeting item falls, that there will be room for an arguer to claim that her conclusion about the target is indeed “all the more” justified than the parallel conclusion about the source. To mark this difference, I will place square brackets around those elements that are characteristic but not essential components of *a fortiori* inferences. So here is how we can revise the first of our two patterns, the pattern of *a fortiori* inferences that rely on the fact that the relevant threshold *is* met:

(i') There is a point T in the scale of P such that, for every x , if x meets T [and there are no defeating considerations], then x is Q .

(ii) a meets T .

(iii) b ranks higher than a on the scale of P .

Therefore (from (ii) and (iii)),

(iv) b meets T .

[(iv') There are no defeating considerations.]

Therefore (from (i) and (iv) [and (iv')]),

(v) b is Q .

[(vi) For every x and every y , if both x and y meet T , and if y ranks higher than x on the scale of P , then the range of reasons capable of countervailing the reason(s)-in-

favour-of- y -being- Q given by the fact that y -has- P -to-the-degree-that-it-does is narrower than the range of reasons capable of countervailing the reason(s)-in-favour-of- x -being- Q given by the fact that x -has- P -to-the-degree-that-it-does. Therefore (from (ii), (iii)—which together imply (iv)—and (vi)),

(vii) The range of reasons capable of countervailing the reason(s)-in-favour-of- b -being- Q given by the fact-that- b -has- P -to-the-degree-that-it-does is narrower than the range of reasons capable of countervailing the reason(s)-in-favour-of- a -being- Q given by the fact that a -has- P -to-the-degree-that-it-does.]

What about *a fortiori* inferences of the second kind—inferences that rely on the fact that a certain relevant threshold is *not* met by the source, and that the target ranks *even lower* on the relevant scale? Is there room here for an arguer to claim that the conclusion about the target is “even more strongly” justified than the conclusion about the source? (Or should the claim rather be that the conclusion about the target is “even less” justified than the one about the source? That would not make sense.) The answer is “Yes.” But, again, such a claim would turn on (a) there being a normative connection between the fact that a non-threshold-meeting items does *not* have the relevant threshold-meeting-making property, and the fact that it is Q ; and (b) that normative connection being such that the reason-giving strength of *of an item’s not having the relevant threshold-meeting-making property* would *vary* according to where on the scale the non-threshold-meeting item falls. The correspondingly revised scheme (again with the square brackets around the non-essential components) looks like this:

(i*) There is a point T in the scale of P such that, for every x , if x does not meet T [and there are no defeating considerations], then x is Q .

(ii*) a does not meet T .

(iii*) b ranks lower than a on the scale of P .

Therefore (from (ii*) and (iii*)),

(iv*) b does not meet T .

[(iv') There are no defeating considerations.]

Therefore (from (i*) and (iv*) [and (iv')]),

(v*) b is Q .

[(vi*) For every x and every y , if neither x nor y meets T , and if y ranks lower than x on the scale of P , then the range of reasons capable of countervailing the reason(s)-in-favour-of- y -being- Q given by the fact that y -has- P -to-the-degree-that-it-does is

narrower than the range of reasons capable of countervailing the reason(s)-in-favour-of- x -being- Q given by the fact that x -has- P -to-the-degree-that-it-does. Therefore (from (ii*), (iii*)—which together imply (iv*)—and (vi*)), (vii*) The range of reasons capable of countervailing the reason(s)-in-favour-of- b -being- Q given by the fact-that- b -has- P -to-the-degree-that-it-does is narrower than the range of reasons capable of countervailing the reason(s)-in-favour-of- a -being- Q given by the fact that a -has- P -to-the-degree-that-it-does.]

HANDLING REAL ARGUMENTS

Two aspects of the previous discussion may have struck you as odd. One is how much more complex my proposed schemes are than the statements with which actual arguers present their *a fortiori* inferences. It took our imaginary arguer ten words to *give* his cider-and-whisky argument. Is it really plausible to think that such a simple statement conceals an inference as intricate as the reconstructions I have put forth?

The second aspect regards the first premise in my reconstructions: the premise that identifies the relevant scalar property against which the source and the target of the inference are being compared. In the case of the cider-and-whisky inference, which is a simple example concocted for discussion purposes, the identification of the relevant scale may seem an easy enough task. But in none of the legal examples I gave so far is it obvious what the relevant scale is. Take the cows-and-horses inference from *Davies v. Jenkins*. While the court's argument seems quite plausible when we read what the court actually wrote, it is far from clear—to say the least—that the items the court is comparing really are (as I suggested) a *description of cows specifying only their number* and a *description of horses specifying only their number*, and that the scale against which they are being compared is (as again I suggested) the scale of *amount of information provided relative to the amount of information required*. Is this not, you might wonder, a somewhat farfetched interpretative hypothesis of mine, rather than a clarification of the court's actual argument?

These two aspects are closely related. It is true that there is a considerable mismatch between the elements featured in my proposed schemes, and the relative paucity of information actually conveyed by courts when they do give *a fortiori* arguments. But that is not a shortcoming of the schemes. It is, rather, I think, a distinctive feature of arguments of this kind. Very often, an arguer who offers an *a fortiori* argument will explicitly say only that

given that a certain claim is true of the source, it follows *a fortiori* that a claim of the same kind is true of the target. In other words, the elements that the arguer will put forth are two *conclusions*—one about the source, the other about the target—of underlying arguments that it will be for the audience to discern. And one crucial component of these underlying arguments is indeed the relevant scale against which the source and target are to be contrasted in order for the argument to run. More interesting, however, than the fact that arguers may leave many crucial elements of their inferences unstated, is the fact that some of those elements will occasionally be opaque—at least that is my impression—even *to the arguers themselves*; and that certainly includes the relevant scale.

Sometimes, of course, the scale is just as obvious as the one in the cider-and-whisky argument. Consider this example, from the decision of the Inner House (Second Division) in *Manson v. Chief Constable for Strathclyde* (1983):

I would also be prepared to hold . . . that the action is rendered incompetent by the principle of the common law that Acts and decrees of the Court of Justiciary cannot be reviewed by the Court of Session, from which it would follow a fortiori that they cannot be reviewed in a civil action in the Sheriff Court.

Here too all the court gives us is (a) a statement about the source of the inference, (b) a statement about the target, and (c) the claim that the latter “follows a fortiori” from the former. But it seems clear that the two items being compared are the Court of Session on the one hand, and the Sheriff Court on the other; and that the court is implicitly relying on the fact that even though the Court of Session ranks higher than the Sheriff Court on the hierarchical scale of the judiciary—which is a scale that tracks the scope of each court’s powers—it still does not rank high enough for the Court of Session to have the power to review acts of the Court of Justiciary. As soon as we understand this, then, we realise that—as I have suggested—each of the Court’s explicit claims (a) and (b) above, is being put forth as the conclusion of an unstated inference; but the inferences are easy enough to reconstruct.

Another example in which the relevant scale would not seem too hard to identify—perhaps a scale ranking actions by an employee in breach of his or her duty of confidentiality, according to how potentially harmful they are to the employer’s business?—is the following argument from *Roger Bullivant Ltd v. Ellis* [1987] IRLR 491:

[I]t is obvious that, if it is a breach of the duty of good faith for the employee to make or copy a list of the employer’s customers, the removal of a card index of the customers is an a fortiori case.

And sometimes the court itself makes the relevant scale, which might not otherwise be obvious, explicit, as in this example from *The Grovehurst* [1910] P 136:

I want to say a word about trawlers getting out of the way of other vessels. In my opinion, the whole object of putting into law the necessity for carrying the triplex light when the trawl is down is to shew vessels approaching, not that the trawler will act under the ordinary sea rules, but that she, at the time, is incapable of following the sea rules, and that the vessel which is approaching must get out of the way. There is a case in which it was held that a sailing vessel should do so, and there is a rule which says that sailing vessels shall do so, but there is no rule which says that a steamer must get out of a trawler's way. But if a sailing vessel should do so, a fortiori a steamer should, because she has more power to get out of the way of a trawler which is denoting by her lights that she has her trawl down.

In order to understand relatively straightforward examples like these—and to assess their plausibility—it is true that there might be little use in seeking to reconstruct and display the court's argument with the schemes I have proposed. Sometimes, however, things are less transparent. Consider the case of *In re Gramophone Company's Application* [1910] 2 Ch 423. The Gramophone Company, which sold machines that it advertised as “gramophones”, was seeking to register the word “gramophone” as its trade mark. To the general public the word designated record-operating talking machines without reference to any particular source of manufacture. Among the trade, however, the word did refer to a specific kind of machine in connection with its source. The court turned to what it referred to as the “Perfection Soap Case”—the case of *In re Joseph Crosley & Sons, Ltd* [1910] 1 Ch 130—in which the Court of Appeal had refused an application to register the word “perfection” as a trade mark, even though that word had in fact come to acquire “both in the trade and to some degree also among the public, a secondary meaning connoting the soap of the persons applying for the registration.” The reason behind this refusal was (as the *Gramophone* court reports it) that

the word [“perfection”] was a mere laudatory epithet, likely to be required by others to describe their goods, and a monopoly in the use of which could not fairly be granted to any single manufacturer.

The *Gramophone* court then offers an *a fortiori* argument based on this decision in the “Perfection Soap Case”:

If a laudatory word such as “perfection” ought not to be admitted to registration, although among the trade it has become distinctive of the goods of a particular manufacturer, it seems to me to follow, a fortiori, that

the name by which an article is popularly known ought not to be admitted to registration as a trade mark for that article, although in the trade it may have come to connote the source of manufacture.

Is this a good *a fortiori* argument? Is it an *a fortiori* argument at all? It is not easy to say. And the reason it is not easy to say is precisely that the court, in perfectly typical fashion (as *a fortiori* arguments go), fails to specify what the relevant scale—the scale against which both source and target are being compared—is supposed to be.

I think the *Gramophone* argument is an *a fortiori* argument. The court's point is, I think, that (a) admitting to registration as the trade mark of a company a word which in its popular use refers (as does "gramophone") primarily to a kind of product of which that company is not the sole manufacturer, would confer upon that company a greater benefit than admitting to registration as trade mark a word which in its popular use refers (as does "perfection") only secondarily to a kind of product of which the company is not the sole manufacturer; and that (b) the latter benefit is already in excess of what could fairly be granted to any single company. But the very fact that this is something that cannot be immediately detected illustrates rather than diminishes the importance and the practical usefulness of the schemes put forth in the previous sections of this paper. For it is precisely by virtue of having discerned the characteristic forms of *a fortiori* inferences that we even know what to look for when assessing real arguments as they are deployed in judicial decisions. It is the fully unpacked scheme that reveals that the inference will not run without premises of a certain sort; and this enables us to consider the plausibility of ascribing to the court, despite its lack of explicitness, a commitment to premises of the relevant sort—as I tried to do with the *Gramophone* example.

The critical gains are also considerable. If we do succeed in reconstructing a full *a fortiori* argument that we can attribute to the court, we will then be well-placed to assess how good the court's *a fortiori* actually is: for although the inference will be valid, any one of its premises may be false, in which case the argument will have failed to justify its conclusion. By being fully clear about what those premises all are—and clarity about this is again what the schemes provide us—we can be sure that we have thoroughly assessed the court's argument; and if we do *not* succeed in piecing together a full *a fortiori* argument attributable to the court as *its* argument, then we can safely conclude that the court has failed—despite what it may claim—to provide a valid inference of this kind.

Sometimes, indeed, the *prima facie* plausibility of a court's claim to have justified a conclusion by means of an *a fortiori* argument turns out, upon reflection, to be deceptive; and

this too can be harder to detect or fully criticise if we have no clear picture of the scheme that such an argument should instantiate. A good (if somewhat lengthy) illustration of this point comes from the case of *Mann Macneal and Steeves v. Capital and Counties Insurance Company* [1919 M2050], in which the Court of Appeal took issue with what looked like a plausible *a fortiori* inference; this is an excerpt from Younger LJ's opinion:

The learned judge [whose decision is being appealed] . . . labelled this gasoline as dangerous cargo in the abstract, as merchandise which, when included in a general cargo . . . substantially increases the risk of an insurance upon her hull, as goods so attended with hazard beyond the common that their certain inclusion as part of the cargo to be carried deprives the insurer of his useful chance that nothing so dangerous to the safety of the ship will be on board during the voyage insured. Not that the learned judge was not well entitled to deal with this question as he did; much of the evidence given before him seemed plainly to convey that everything that could be said against these gasoline drums on a steel or iron ship would a fortiori apply to them on a wooden ship, and perhaps most of all on an auxiliary wooden vessel like the *Elmir Roberts*. But a careful consideration of all the evidence in the case . . . impresses me with the conviction that the only aspect of the matter with reference to which the statements just referred to are well-founded has little if any relevance to the question of materiality in relation to this particular risk when looked at from what I conceive, upon the whole evidence, to be the only proper standpoint. For while it is undoubtedly true that the presence of such a cargo, whether on a well-found iron or steel ship or on a wooden sailing, steam, or auxiliary oil vessel, may seal the fate of the vessel should the gasoline caught by the fire explode, and will do so with greater certainty in the case of a wooden vessel than in the case of one otherwise constructed, the relevant distinction for present purposes between the well-found iron or steel ship and such a vessel as the *Elmir Roberts* is that the first class of ship need not, in the event of fire, be at risk of destruction at all, apart from the presence of the gasoline amongst her general cargo, while in the case of a vessel like the *Elmir Roberts* it approaches certainty that in the event of a fire breaking out sufficiently serious to reach, if unimpeded, the drums in the hold, her fate would be irrevocably sealed, long before the flames got so far, by the intermediate burning of her own stores of oil fuel and of any other general cargo—in the present case, for instance, the 600 tons of claret staves stowed in the near hold and on deck—more immediately inflammable than gasoline itself and equally effective to bring about the total destruction of this vessel. In other words, the evidence I think clearly shows that if the vessel was to be lost at all by fire it would be only in the remotest contingency that these gasoline drums, stowed away in her hold as they were, would play any effective or other part in bringing about her destruction. That this is so appears, as it seems to me, from a consideration of the evidence both with reference to this type of vessel and with regard to the nature of these gasoline drums.

My impression is that this assessment of what seemed *prima facie* to be a plausible *a fortiori* inference could have been much more clearly and forcefully expressed—and correspondingly easier to evaluate—in the language and format of my proposed schemes. Younger LJ seems

to be pointing out that the two items being compared—the source and the target of the putative *a fortiori*—were not relatively placed on the relevant scale as the previous judge might have thought. But what exactly is the relevant scale, and what exactly should we say were the relevant items? Iron ships and wooden ships? Something else? The exercise of trying to formulate explicitly, in the language of our schemes, the view that the Younger LJ seems to be endorsing, is bound to be instructive, for it is not immediately obvious how to phrase the crucial premise. It takes a moment to realise that what Younger LJ is relying on must be something along these lines:

- (1) There is a point *T* in the scale of *increase in risk of destruction in the event of a fire* such that if the presence of gasoline in the cargo of a ship brings about an increase in the risk that the ship would be destroyed in the event of a fire, which increase meets *T*, then the presence of gasoline in that ship's cargo counts as a substantial increase in the risk of an insurance beyond what the insurer may be presumed to have accepted.

If we take this as our first premise, why then could the judge whose decision was being appealed not have constructed a plausible *a fortiori* argument? Younger LJ agrees that

- (2) The presence of gasoline in the cargo of an *iron* ship brings about an increase in the risk that the ship would be destroyed in the event of a fire, which increase meets *T*.

This is a claim about the *source* of the putative *a fortiori* inference: it asserts that the source does meet the relevant threshold. But with regard to the target of the inference, Younger LJ's point, more clearly expressed in terms of our schemes, seems to be that

- (3) The presence of gasoline in the cargo of a *wooden* vessel brings about an increase in the risk that the ship would be destroyed in the event of a fire, which increase ranks *lower* on the scale of *increase in risk of destruction in the event of a fire* than the increase in risk brought about by the presence of gasoline in the cargo of an *iron* vessel.

The target, then, ranks *lower* than the source on the relevant scale. And this enables us to recast Younger LJ' point as the—correct—claim that (2) and (3) together do *not* entail (4):

- (4) The presence of gasoline in the cargo of a *wooden* ship brings about an increase in the risk that the ship would be destroyed in the event of a fire, which increase meets *T*.

Indeed, the attempt to justify (4) on the basis of (2) and (3) would be an instance of what we have already identified, in the second section of this paper, as a formally fallacious pattern.

And our schemes do not just help us to be clearer about the import and cogency of earnest efforts—like Younger LJ's—to engage with and refute an *a fortiori* argument submitted by some other party or court. The schemes also allow us to look with a critical eye at somewhat hasty attempts to dismiss *a fortiori* inferences as the following, from Lord Hewart CJ's leading judgment in *Carpenter v. Fox* [1929] 2 KB 458:

The [respondent's] argument seems to be that because the restrictions contained in these regulations [forbidding motor cars to stand on the highway so as to cause unnecessary obstruction] are applicable to motor cars properly so called [where the class of "motor cars" was defined by regulations as including vehicles with a maximum weight of 9 $\frac{3}{4}$ tons] . . . therefore a fortiori they are applicable to vehicles which exceed those weights. That argument, with all due respect to the learned counsel who put it forward, seems to me to be a complete non sequitur. It is as if one were to say that because a statute applies to a dog, which may be a little fox terrier, it must apply much more to a horse which is a much larger animal. The answer is that the two things are on different planes, and the law relating to the one may be found in quite a different plane from the law relating to the other.

But of course whether the respondent's *a fortiori* really was a "complete non sequitur" will turn on whether the two items did rank in the right way relative to each other on the relevant scale. As we know from our discussion in the preceding sections, there is nothing suspicious in and by itself about the fact that an arguer who offers an *a fortiori* argument might *say* simply "the regulations apply to motor cars; therefore a fortiori they are applicable to weightier vehicles", leaving the other elements of the inference unstated. Likewise with fox terriers and horses: one can easily imagine scenarios in which a plausible *a fortiori* argument *could* indeed be given in justification of the claim that if a certain statute applies to dogs, then a fortiori it does also, or should, apply to horses.

Many of the examples we have been looking at are examples of *a fortiori* arguments in which the premise asserting that the source of the inference meets (or fails to meet) the relevant threshold, is a premise derived from past judicial authority; and in which the *a fortiori* argument is being deployed to directly justify deciding a certain substantive issue in a certain way. But *a fortiori* inferences can also be used to justify drawing conclusions about the applicability of statutory provisions and other kinds of legal texts, and this is something on which our schemes can throw some light as well. One interesting use of *a fortiori* arguments in this regard is to justify the application of a provision to a situation not contemplated in its text; and one reason this use is interesting is that the premise asserting that the source of the *a fortiori* meets (or fails to meet) the relevant threshold is typically justified by reference to the statutory provision itself.

This is very frequent in civil law jurisdictions, but common law courts do sometimes argue in the same manner. One example is Lord Kerr's argument from *Moohan and another v The Lord Advocate* [2014] UKSC 67, which I quoted in the Introduction. As I then said, Lord Kerr was arguing that Article 3P1 of the European Convention of Human Rights, which explicitly mentions only "elections" for "the choice of the legislature", might nonetheless be applicable to votes of other kinds, and namely to the Scottish independence referendum:

This phrasing [of Article 3P1] may, on one view, point to a focus on legislative elections, but it by no means justifies an exclusion of other votes. Why should it? If voting for a representative in a legislature is deemed sufficiently important that it should be guaranteed to all, why would voting for the *form of government* be deemed less important?

We now have the tools to reconstruct this argument. The relevant scale will be something like political "importance." How then should we formulate the first premise? The first part is easy enough to put together:

- (1) There is a point *T* on the scale of political importance such that, if a type of vote *x* meets *T*, then . . .

But what should the consequence be? We should keep in mind that Lord Kerr is arguing for the conclusion that Article 3P1 may be applicable to types of votes *not mentioned in its text*. But surely the mere fact that an event or type of vote *not mentioned in the text* ranks higher than legislative elections on the scale of political importance will not suffice to justify the

conclusion that Article 3P1 does “apply” or “extend” to it. After all, there may be (and there typically are) constraints of different sorts on the admissibility of extending enacted provisions to situations “beyond” their text. This suggests that we should complete the formulation of premise (1) along the following lines:

- (1) There is a point T on the scale of political importance such that, if a type of vote x meets T , then if x is not contemplated in the text of Article 3P1, then Article 3P1 is applicable to x if . . .

This ellipsis would then be filled with whatever further constraints would have to be met for the provision to be applicable. This could then be combined with the following two premises:

- (2) An election for the choice of legislature meets T .
- (3) An independence referendum ranks higher than an election for the choice of legislature on the scale of political importance,

which together justify the conclusion that

- (4) An independence referendum meets T .

The justification for premise (2) would be the very fact that elections for the choice of legislatures are explicitly contemplated in Article 3P1. And premises (1) and (4), together with the (true) claim (which we could write as a further premise) that an independence referendum is an event not contemplated in the text of Article A3P1, would justify the conclusion that

- (5) Article 3P1 is applicable to an independence referendum if . . .

which would then enable the arguer to go on asserting that the remaining conditions for the applicability of the provision were met.

In civil law jurisdictions, *a fortiori* arguments of this kind—arguments used to “extend” enacted provisions beyond the scope of their “letter”—are often said to rely on two supposed

interpretative “principles” or “maxims,” sometimes rendered in Latin.¹¹ One is the principle “*qui potest plus potest minus*”: he who may (which is taken to mean: is explicitly permitted to) do the more, may also (implicitly) do the less. The other is its contrapositive: “*qui non potest minus non potest plus*”: he who may not (which is taken to mean: is explicitly forbidden to) do the less, may also not do the more. It seems obvious, however, that these principles cannot be taken to hold true in general; and they fail to warrant inferences of the right sort. First, we can never say of any two items that one is “more” and the other “less” without appealing to a scale on which they can be set alongside each other and classified.¹² But for every two items, there will always be some property with regard to which each is “more” or “less” than the other. So we do not just have to identify a scalar property; we need to identify *the* relevant scalar property.¹³ And even when we have identified a scalar property that we take to underlie some explicit prohibition or permission, it does not necessarily follow—as we have just seen when discussing Lord Kerr’s argument in *Moohan*—that courts will be authorised to “extend” the provision, or to take it to apply “implicitly,” to any “greater” or “lesser” case. Whether that is so will vary from jurisdiction to jurisdiction, and,

¹¹ See Georges Kalinowski, *Introduction à la logique juridique* (Paris: R. Pichon & R. Durand-Auzias 1965) 162-165.

¹² Maccoby reports an ancient “parodic” *a fortiori* inference, said to have been presented by a certain rabbi—Rabbi Jose ben Taddai of Tiberias—who argued that since he was forbidden to marry the daughter (his own daughter) of someone who was *permitted* to him (his wife), then *all the more so* should he be forbidden to marry the daughter of someone (e.g. his neighbour’s wife) who was *forbidden* to him. Therefore “all marriages should be forbidden except to the daughters of unmarried mothers, widows, or divorced women.” This is funny, but it also illustrates what can go wrong when there is no (true) premise to be found identifying a scale (and a relevant threshold) against which to compare both source and target. The joke, incidentally, was poorly received: Maccoby also reports that the rabbi “was actually excommunicated for presenting a frivolous [*a fortiori*] argument, since this was held to bring rabbinic methods of argument into disrepute.” Tough crowd. See Hyam Maccoby, “Some Problems in the Rabbinic Use of the *Qal Va-Chomer* Argument” (2010) 4 *Melilah* 80-90 at 86-87.

¹³ Goltzberg seems to me to confuse these points. He thinks that if we grant that *guilty* and *suspect* are notions can be ranked on the same “argumentative scale,” we must grant that a statutory provision that protects the guilty will *automatically* protect the charged (“Si la législation protège le coupable, elle protège automatiquement—à plus forte raison—celui qui est seulement poursuivi”) and vice versa (“Si la législation [ne] protège le suspect, elle ne protège pas le coupable”). But these, as stated, are non sequiturs. See Stefan Goltzberg, *Théorie bidimensionnelle de l’argumentation juridique: Présomption et argument a fortiori* (Brussels: Bruylant 2012) 70-71.

within each jurisdiction, from area of law to area of law. Remember how Portia succeeded, in Shakespeare's *The Merchant of Venice*, in preventing Shylock from exacting his bond:

The words expressly are "a pound of flesh":
Take then thy bond, take thou thy pound of flesh;
...
Therefore prepare thee to cut off the flesh.
Shed thou no blood, nor cut thou less nor more
But just a pound of flesh: if thou cut'st more
Or less than a just pound, be it but so much
As makes it light or heavy in the substance,
Or the division of the twentieth part
Of one poor scruple, nay, if the scale do turn
But in the estimation of a hair,
Thou diest and all thy goods are confiscate.

There is nothing odd, argumentatively, about this: it could have been the law. Or consider this passage from the European Court of Human Rights decision in *Deweere v. Belgium* [1980] ECHR 6903/75:

[I]n the area of human rights he who can do more cannot necessarily do less. The [European] Convention [of Human Rights] permits under certain conditions some very serious forms of treatments, such as the death penalty (article 2(1), second sentence), whilst at the same time prohibiting others which by comparison can be regarded as rather mild, for example "unlawful" detention for a brief period (Article 5(1)) or the expulsion of a national (Article 3(1) of Protocol No. 4). The fact that it is possible to inflict on a person one of the first-mentioned forms of treatment cannot authorise his being subjected to one of the second-mentioned, even if he agrees or acquiesces[.]

The "*qui potest*" principles, then, are not reliable; and in contexts in which courts *are* indeed allowed to "extend" enacted provisions, on the basis of *a fortiori* arguments, to situations not contemplated by the provision's text, what we need in order to be clear about the relevant inference, are (as our discussion of *Moohan* illustrates) the schemes identified in this paper.¹⁴

¹⁴ Let me also stress that—contrary to what is sometimes supposed—this is not the only way in which *a fortiori* arguments can be used to justify conclusions about the applicability of legal provisions. There is in principle nothing preventing a court from relying on an *a fortiori* inference to support the claim that the case at hand falls *under* some concept or term featured *in the text* of relevant provision: that it is a case to which the provision's text applies *directly* rather than one to which the provision can be "extended." If there is a question

My goal in this section has been to illustrate the illuminating power of the argument schemes articulated and explained in the previous sections; and to deflate the possible objection that to engage with those schemes is to bring in a degree of complexity that hinders rather than helps our understanding and assessment of real instances of *a fortiori* arguments as they are deployed in judicial decisions. I hope to have shown that the schemes are not merely very helpful, but indeed necessary for the proper analysis of such real arguments. And now that we have a sufficiently clear picture of what an *a fortiori* argument is and how it runs, we can perhaps draw some conclusions about why and when an arguer might want to avail herself of an inference of this kind.

THE USES OF *A FORTIORI* ARGUMENTS

Let me bring you back to our cider-and-whisky example in order to emphasise one important point. We saw that this argument—an argument for the conclusion that our friend will refuse whisky—relies on the following premise:

- (1) There is a point *T* in the scale of alcohol content such that if a beverage meets *T*, then our friend will refuse it.

This is, as we also saw, a characteristic feature of *a fortiori* inferences: an arguer who deploys an argument of this kind is relying on it being the case that there is a certain threshold *T* on the scale of a certain property, such that the issue of whether that threshold is (or is not) met is relevant to the question the arguer is trying to settle. But there are, of course, other ways in which an arguer might rely on this very premise—premise (1)—to support the same conclusion that our friend will refuse whisky. Indeed, there is a *direct* inference to be

about whether the case at hand (the target case) counts as an instance of a certain notion featured in the text of the provision; and if an affirmative answer to that question depends on the case meeting a certain threshold on the scale of a certain property; then if there is, say, authority for the claim that a certain *other* case (the source case) does count as an instance of the relevant notion; and if the court is in a position to affirm that the target case ranks higher on the relevant scale than the source case; then the court can argue *a fortiori* for the applicability of the provision to the source. The (false) assumption that the role of *a fortiori* arguments in law is to “extend” statutory provisions beyond their text is a common theme of many of the items quoted above in n 7.

drawn for that conclusion, an inference that does not rely on any claim about cider or any other beverage:

- (1) There is a point *T* in the scale of alcohol content such that if a beverage meets *T*, then our friend will refuse it.
 - (2) Whisky meets *T*.
- Therefore (from (1) and (2)),
- (3) Our friend will refuse whisky.

This is a deductively valid argument. Why then should our arguer not offer *this* rather than the cider-and-whisky *a fortiori* inference in support of the conclusion? One answer might be that our arguer is not in a position to straightforwardly assert premise (2) and combine it with premise (1). Why not? Perhaps our arguer does not know what the alcohol content of whisky actually is. But if she nevertheless knows that the alcohol content of whisky (whatever it is) is higher than the alcohol content of cider, and that cider does meet the relevant threshold, then she can on that basis validly infer that the claim in (2) is true, and *then* go on to combine it with the claim in (1) in support of the final conclusion—which is, as we have seen, the pattern of the *a fortiori*.

Similarly, an arguer does not need to know *what the relevant threshold is* in order to be in a position to assert premise (1). An arguer may have no idea of *where* to draw the line on the relevant scale—she may not know exactly how high in alcohol content a beverage has to be for our friend to refuse it—and yet know that there is such a threshold: know that there is *a* threshold, whatever it is. And again an arguer who *did* know what the relevant threshold is, and knew also what the alcohol content of whisky is, could construct another valid inference that would directly support the same conclusion—that our friend will refuse whisky—without having to rely on either the claim in (1) or the claim in (2).

This suggests, I think, that the characteristic point of deploying an *a fortiori* argument is that it allows us to sidestep certain types of constraints—constraints like one’s lack of evidence that would directly support a claim like (2) above, or one’s lack of knowledge of the relevant threshold—that render certain other kinds of inferences unavailable. To be more systematic, my suggestion is that it is one distinctive feature of *a fortiori* arguments that they are uniquely suited to justify conclusions in contexts in which (a) the question that the arguer is trying to settle turns on whether a certain relevant threshold has been met, but (b) the

arguer is prevented from settling that question by directly assessing whether the relevant threshold is met in the case at hand.

What could prevent an arguer from doing that? I see two types of constraints. First, as we have just observed, there could be *epistemic* constraints: constraints due to the arguer's (or indeed the arguer's *audience*) ignorance of either (a) what the relevant threshold is, or (b) where exactly on the relevant scale the target of the inference ranks, or (c) both. But, second, there could also be what I will refer to as *normative* constraints, and these come into play when an arguer—regardless of her knowledge of the relevant aspects—has *reason not to take a stand* on either (a) what the relevant threshold is, or (b) where exactly on the relevant scale the target of the inference ranks, or (c) both.

When could there be such a reason? Well, the legal context is certainly one in which arguers' use of *a fortiori* arguments does often seem to be a way of justifying a decision in the instant case while consciously avoiding to take a view on what the relevant threshold exactly is. Think back to the several examples from judicial decisions that we have had occasion to consider. One feature that runs through all of them is that there is no directly applicable authority on the basis of which the court can settle the question at hand and justify the conclusion about the target. If there were, indeed, there would be no pressing need for the court to resort to an *a fortiori* argument. (Which is not to say that the court would be prevented from doing so; it could give an *a fortiori* argument alongside a direct authority-based argument for the same conclusion, and there may be contexts in which there would be reason to do so—for example if the court thinks its interpretation of the authoritative provision or precedent is bound to be controversial.) A second common feature is that there is also *no authority* on the—different—question of whether the target of the *a fortiori* meets the relevant threshold. But a third feature that runs through most of the examples is that the premise asserting that the *source* of the *a fortiori* meets (or fails to meet, as the case may be) the relevant threshold, *is* a premise that the court is able to justify by reference to previous judicial authority. This is not to say that the present court's considered view on the matter would have coincided with the previous court's. But if there *is* authority for the claim that the source *does meet or fail to meet the relevant threshold*; and if it is the present court's view that the target item ranks either higher or lower (as the case may be) on the relevant scale than the source; then that is, it seems, a reason for the present court to adopt, with regard to the target, the same view—the view that *the target meets or fails to meet the relevant threshold*—that the previous court had adopted with regard to the source; and to then go on to justify, on that basis, its decision on the question at hand.

What kind of reason? It is still an authority-based reason. It is true that the previous court's decision is not strictly binding in the present case, for the simple reason that it is not directly applicable to it. The present case is a case about the target item, not about the source; and because there is no authority on whether the *target* meets the relevant threshold, the question falls outside the scope of the doctrine of *stare decisis*. But the same considerations that underlie the doctrine of *stare decisis*—consistency, coherence, equality, predictability—also count in favour of deciding this question in the same way that the parallel question about the source case was previously decided. And if in the present court's view, the previous court's take on the threshold-meeting status of the source of the inference is not obviously wrong or objectionable, then the present court will have reason to rely on that previous decision as a premise for an *a fortiori* argument—adopting it as true or correct—even if its own assessment of the matter in the absence of this previous authority might have turned out to be different.

This by itself counts against the previous court's addressing itself directly to the question of whether the target of the inference does indeed meet (or fail to meet) the relevant threshold. It is therefore an example of what I would classify as a *normative* constraint against dealing directly with that issue. On top of that, it could also be that the question of whether any given item—including the target of the inference—does indeed meet the threshold is a particularly difficult or controversial question; and this (apart from constituting an epistemic constraint on its own) might pose further normative constraints: for the court may want to avoid committing itself to a view of which it may not be fully sure, but which, if indeed the court were to commit itself to it, might come to influence (as either binding or persuasive authority) future courts' decisions on similar cases. By deciding to settle the case at hand by means of an *a fortiori* argument, the court avoids these potentially unwelcome consequences by dealing with the matter in a different way.

(To be clear, I do not mean to suggest that the premise asserting that the source of the inference meets or fails to meet the relevant threshold is a premise necessarily to be justified on the basis of previous authority. There can be other, non-authoritative reasons for accepting such a premise regardless of its substantive correctness. It could be common ground between the parties, for example; or it could be granted by the party against whom the *a fortiori* inference is being deployed. It could *also* be that the court's assertion of that premise is the product of its own direct application of the relevant threshold to the source item: ignorance of what the threshold is is only one sort of epistemic constraint that an *a fortiori* inference can help to overcome.)

This account shows that *a fortiori* arguments have some features in common with analogical arguments in law. Should we say, as some authors do, that the former are just a species of the latter?¹⁵ The answer, I think, is negative, but this is not a question that can be satisfactorily dealt with in this paper: that would presuppose that we have before us an equally clear picture of arguments by analogy in law. We can note, however, that there are similarities between the two kinds of argument. Like arguments by analogy, arguments *a fortiori* that rely on previous judicial authority in support of the premise about the source case are a way of “extending” that previous authority to a target case that is similar to the source in some relevant respect. Moreover, we can now also point out that the schemes that we have identified as the schemes of *a fortiori* inferences would be equally suitable, with just one minor amendment, to represent those arguments in which the court’s view is that the source case and the target case are *identically ranked* on the relevant scale, and thus that the threshold is met by either both or neither. An argument like this, which might plausibly be called “analogical” in some sense of the word, would not be an *a fortiori* one—it would be what is sometimes called an argument *a pari* (“from the similar”: from the similarly placed or graded)¹⁶—but in order for it to fit our schemes all we need is to slightly rewrite the form of third premise to read as follows:

(iii**) *a* and *b* are equally ranked on the scale of *P*.

But there also seem to be important dissimilarities between arguments *a fortiori* and the kinds of argument that both lawyers and theorists normally refer to as “analogical” arguments. One salient difference is that even in fully reconstructed arguments by analogy, the comparison between items—between the source and the target case—does not rely on the identification of any unifying rule specifying their relevant common features.¹⁷ In a fully reconstructed *a fortiori* inference, on the other hand, the relevant unifying scale does have to be specified in the premises in order for the argument to run. A broader exploration of the contrast, however, I must leave for another day.

¹⁵ This issue is discussed in most of the pieces quoted in n. 7 above.

¹⁶ See e.g. Carlos E. Alchourrón, “Los argumentos jurídicos *a fortiori* y *a pari*” in C. E. Alchourrón and E. Bulygin, *Análisis Lógico y Derecho* (Madrid: Centro de Estudios Constitucionales 1991) 3-24 at 19-23.

¹⁷ For details, see “The Structure of Arguments by Analogy in Law” (n. 5).

CONCLUSION

Perhaps the most notable feature of *a fortiori* arguments is that very often an arguer who offers an argument of that kind will leave almost every essential component of the inference unstated. The crucial elements of the argument—the premises on which the arguer is relying, or needs to be relying in order for the inference to run—are typically omitted, if not concealed, in what an arguer actually says or writes. This may lend *a fortiori* arguments considerable rhetorical strength. But it makes it all the more difficult to assess whether the argument being given really is a good one. To compound this difficulty, very little scholarly attention has been paid so far to inferences of this kind, which have remained considerably obscure to legal practitioners and theorists alike.

This paper was an attempt to remedy this state of affairs. I have sought to bring out the distinctive form of *a fortiori* inferences, and to show how an awareness of their structural features can assist us in assessing real instances of the argument for both logical validity and substantive soundness. I argued in the main body of the paper that *a fortiori* arguments are arguments that (a) rely on premises about (a1) the relative position of two items—the “source” and the “target” of the inference—on the scale of a certain property, and (a2) whether the source item meets a certain relevant threshold on that scale; and (b) validly derive conclusions on (b1) whether that threshold is also met by the target item, and (b2) on the consequences thereof. And I went on to argue, in the final section, that the characteristic role of *a fortiori* arguments is that they enable arguers to circumvent certain sorts of epistemic and normative constraints that prevent them from directly tackling the question of whether the target item does meet the relevant threshold.