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## Relevance and Equality: An Analytical Account

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# Relevance and Equality: An Analytical Account<sup>†</sup>

PEDRO MONIZ LOPES\*

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## I. INTRODUCTION: THE RELEVANCE OF “RELEVANCE” IN JUDGMENTS OF EQUALITY

In day-to-day life, one is compelled to compare. In replying to a question on one’s favorite things, one will group them together based on the satisfaction one is provided with, leaving out the rest. In discussing the issue of spiteful people, one is promptly reminded of some common features of individuals whose actions typically meet the required criteria (or the criteria one sets for such category). In metaphorical speech—for instance, by descriptively asserting that “no man is an island”—one grounds the assertion on past knowledge of the prototypical isolation of islands to, then, negate the transfer of such features to human beings, also based on past knowledge that they lack self-sufficiency and require partaking in any kind of community to thrive. Lastly, if one wishes to open a box with no scissors or knives at hand, one might try with a key, if sharp enough: by purporting to do so, one is setting an analogy insofar one is transferring structural information (functionality for said purpose, *i.e.*, the active disposition to cut through) from a source (scissors and knives) to a target (sharp-enough keys).

The capacity to set analogies and categorize is naturally limited by many things: I have no intention to be exhaustive, thus I will just name a few. It is limited, on the one hand, by the information included in the knowledgebase (*e.g.*, one cannot list skydiving as a favorite thing if one has not even heard about it) and, on the other, by the degree of what in cognitive psychology is called “perceptual similarity,” which is developed with age and acquisition of expertise.<sup>1</sup> It is also limited by the set of terms of comparison: analogies and categories always fall prey to the availability bias which consists in heavily weighing judgments toward more recent information, making new opinions biased toward latest news. Thirdly, it would also be *naïf* to claim that reasoning by analogy is not impacted by

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1. Stella Vosniadou, *Analogical Reasoning as a Mechanism in Knowledge Acquisition: a Developmental Perspective*, in SIMILARITY AND ANALOGICAL REASONING 413, 421 (S. Vosniadou & A. Ortony eds., 1989); Ann Brown, *Analogical Learning and Transfer: What Develops*, in *Similarity and Analogical Reasoning* 369, 372 ff. (S. Vosniadou & A. Ortony eds., 1989).

background theories, to the extent that it is claimed that all knowledge is “theory-infused.”<sup>2</sup> Analogies and categories are formulated in a context of tendency, related to cognitive dissonance, to seek or interpret information in such a way that it confirms one’s preconceptions and discredit that which does not support it. Furthermore, similarities are somehow dependent upon people’s underlying representations—beliefs and phenomenal experience,—not necessarily based on whether they represent simple, descriptive properties.<sup>3</sup> The issue of these “salient similarities” becomes very clear, for instance, in discussions regarding descriptive similarities of same-sex couples if the discussants do not share underlying representations. Naturally, that is linked with the “status quo” bias towards things remaining relatively the same and avoiding disruptions and “stereotyping”—that is, hoping for a member of the projected category to possess certain properties and behave in a certain way without having any relevant information about that particular.<sup>4</sup>

Legal speech requires comparisons just as much as ordinary speech. To assign deontic status to a given action-type  $\phi$  performed by a group of individuals  $P$  in occasion  $Q$ , a lawmaker is required to compare. It is understood that “*smoking is forbidden in closed rooms*” assigns the deontic status  $F$  to the action-type “smoking” when performed by all individuals, provided

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2. DEAN BURNETT, *THE IDIOT BRAIN: A NEUROSCIENTIST EXPLAINS WHAT YOUR HEAD IS REALLY UP TO* 177 ff. (2016).

3. On differentiating “surface similarities” and “salient similarities,” the latter connected with people’s underlying representations, see Vosniadou, *supra* note 1, at 419. The example is quite illuminating: “[u]sing the earth as a source analog from which to reason about the moon may thus be considered rather trivial. Yet most children in our studies of knowledge acquisition in astronomy (. . .) would never use the earth as a source analog from which to reason about the moon, although adults would. The reason is that until the end of the elementary school years many children do not really believe that the earth is a sphere. Children’s phenomenal experience that the earth is flat is so strong that information coming from adult sources regarding the shape of the earth is consistently misinterpreted. Furthermore, many children do not know that the moon is spherical either. Many believe that the moon is shaped like a crescent or that it is circular but flat, like a disc. It is apparent from the above that the characterization of “spherical” as an object attribute of the earth and the moon carries no implications as to whether this is an easily accessible property of the objects in question or not.”

4. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974); Drew Westen, Pavel Blagov, Keith Harenski, Clint Kilts & Stephan Hamann, *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18 J. COGNITIVE NEUROSCI. 1947 (2006).

the door is not open.<sup>5</sup> One would say that there are good reasons to liken men and women (addressees) and not distinguish whether cigarettes and cigars are to be smoked (action-tokens), albeit there are also valid reasons to differentiate smoking in the occasion of closed doors, as opposed to smoking with the window open. Loosely speaking, the differentiation is tantamount to asserting a criterion of not harming the health of others, while *pari passu* presupposing that a window or door open, given the dimension of the room, *is good enough reason* to balance in favor of permitting smoking in said circumstances. In other words—and I will get back to the subject below—whether the door/window is open is critical for the deontic status of the action: *P* or *F*.

What one seems to be searching for is equalities and differences, based on given a standard of evaluation, precisely the one that sets the *relevant criteria* for comparison. For instance, suppose a given constitution forbids same-sex marriage. Suppose no reason in the *travaux préparatoires* is given for the assignment of such deontic status. It may be argued that “*same-sex couples* are different *from heterosexual couples*,” but this statement is nonsensical, elliptical at best. Even if one abstracts from the holistic comparison where specific features are not specifically addressed, no criteria is set forth for comparison. Now suppose it is claimed that the prohibition is grounded on the biological inability to produce offspring: the outcome of the comparison is, naturally, the highlight of a biological distinction between same-sex and heterosexual couples. But it very well seems the criterion is unsuitable: if one is searching for the relevant property of the ability to reproduce, the category reaches too far and is overinclusive to the extent it equally includes sterile heterosexual couples. If one counter-argues that the criterion should be the ability to reproduce if there were no medical conditions preventing such outcome, one would still be grounding a distinction based on a biological possibility which is logically unrelated to the action-type of “marrying.” Furthermore, such distinction would be pragmatically conflictive with constitutional *permissions* to raise a family (as it is common). The example simply goes to show that the choice of criteria of comparison is of paramount importance and that one should be as rigorous in transferring (or not) the “suitable” structural information from *source* to *target* in any comparison as one should be in designing categories.

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5. On the distinction between “action-types” and “action-tokens,” see Linda Wetzel, *Types and Tokens*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/archives/fall2018/entries/types-tokens/> [https://perma.cc/HU74-T4QY].

## II. THE BASIC CONCEPTUAL APPARATUS OF SIMILARITY AND EQUALITY

### *A. Introduction: Similarity, Identity and “Descriptive” Equality*

It is not uncommon in ordinary speech to use the terms “identical”, “equal” or “similar” with the same purpose. It is not even uncommon to assign the same meaning to those terms. For instance, the statement “*your two daughters look perfectly identical*” has the (toned-down) technical meaning that will be assigned below to “similar”, whilst the statement “*women and men should be treated in similar fashion*” has the (toned-up) technical meaning that will be assigned below to “equal.”

Even in legal (technical) speech, some authors use some of these terms interchangeably. Westen writes that “although some authorities distinguish between the terms ‘like,’ ‘similar,’ ‘equal,’ ‘identical,’ and ‘the same,’ unless I explicitly indicate otherwise, I shall assume that these terms are interchangeable for purposes of the proposition that ‘equals should be treated equally.’”<sup>6</sup> This statement, however, may provide the wrong picture about Westen’s theory as he does distinguish between some of those terms. Much unlike other legal scholars, Westen does accept that “equal” may have a meaning other than “similar.” Indeed, it does—or, at least, it should.<sup>7</sup> As should “different,” “dissimilar,” and “unequal” have different meanings amongst themselves.<sup>8</sup>

Definitions play a large role in analytical philosophy in clarifying the sense and reference of what is being uttered and in distinguishing different realities, so I should jump right into it.

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6. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 540 n.10 (1982). See also Leticia Gianformaggio, “Like”—“Equal”—“Similar”: *Are They to be Treated Alike?*, in NORMATIVE SYSTEMS IN LEGAL AND MORAL THEORY: FESTSCHRIFT FOR CARLOS E. ALCHOURRÓN AND EUGENIO BULYGIN 251, 255 (Ernesto Garzón Valdés, Werner Krawietz, Georg Henrik Von Wright & Ruth Zimmerling eds., 1997).

7. See Paolo Comanducci, *Igualdad*, in DEMOCRACIA, DERECHOS E INTERPRETACIÓN JURÍDICA—ENSAYOS DE TEORÍA ANALÍTICA DEL DERECHO 29, 32 (2010) (claiming that “equal” and “identical” are not simply equivalent, but with the carve-out that “that does not mean that in ordinary speech ‘identical’ is used as a synonym of ‘equal’”).

8. Hinting at the differences between “different” and “unequal” by claiming that the latter entails some sort of violation of equality, see Gianformaggio, *supra* note 6, at 271 n.79.

## B. Similarity

I take “similarity” to mean that *two or more objects (particulars) are in a relation such that they share one or more properties*.<sup>9</sup> This is the very basic notion, consisting of relations between “particulars” and “properties.” It is subject to further discussions.

Firstly, it should be noted that similarity is itself not a property, rather a “relation” between two or more objects or terms. According to Russell, a relation unites terms: “*a relation is distinguished as dual, triple, quadruple, etc., or dyadic, triadic, tetradic, etc., according to the number of terms which it unites in the simplest complexes in which it occurs.*”<sup>10</sup>

Secondly, in asserting a “similarity fact” between two or more objects, a given property is required to be singled out: *a* and *b* are always (dis)similar with regards to a given property.<sup>11</sup> Asserting that “*a* and *b* are similar” is an elliptical statement and so is asserting that “*a* and *b* are equal.” That, however, is not the case in asserting that “*a* and *b* are identical.”

Thirdly, some authors claim that asserting a similarity fact presupposes two or more objects sharing at least one *relevant* property.<sup>12</sup> But this statement can be misleading: it highly depends upon how the concept of “relevance” is being used in the context. Relevance may be defined, for the purpose at hand, as a predicate of a property of a particular, that which denotes the relation of a property of a particular with a given standard of relevance: a property of a particular is said to be relevant if and only if (henceforth “*iff*”), when contrasted with a given standard of relevance (e.g., a moral system), that property of that particular instantiates a hypothetical property represented in that standard of relevance.<sup>13</sup> I am using “instantiation” *qua* “property possession” here.<sup>14</sup>

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9. See Javier Cumpa, *The Neutralist Analysis of Similarity*, 49 *PHILOSOPHIA* 37, 43 (2021); Linda Smith, *From Global Similarities do Kinds of Similarities: the Construction of Dimensions in Development*, in *SIMILARITY AND ANALOGICAL REASONING* 146, 161, 165 (S. Vosniadou & A. Ortony eds., 1989); Ilkka Niiniluoto, *Analogy and Similarity in Scientific Reasoning*, in *ANALOGICAL REASONING—PERSPECTIVES OF ARTIFICIAL INTELLIGENCE, COGNITIVE SCIENCE, AND PHILOSOPHY* 271, 272 (D.H. Helman ed., 1988).

10. Bertrand Russell, *On the Relation of Universals and Particulars*, 12 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 1, 5 (1911).

11. For the sake of simplicity, I will merely refer, from now on, to relations between “objects.”

12. Stressing that similarity entails that two or more objects “possess” at least one “relevant property” in common, see Comanducci, *supra* note 7, at 33.

13. On “relevance” as a relation, claiming that *A* may be said to be relevant only in respect to a given *B*, see Yovel, Jonathan Yovel, *Two Conceptions of Relevance*, 34 *Cybernetics & Systems* 283, 309 (2003). See also GIOVANNI BATTISTA RATTI, *EL GOBIERNO DE LAS NORMAS* 61 (2013).

14. A neutralist account of instantiation as in Cumpa, *supra* note 9, at 1 n.1.

As it will be seen below, *judgments of equality* entail selecting a standard of evaluation of two or more objects which, in turn, amounts to highlighting one or more *relevant properties* that preside over the comparison and determine the categorization.<sup>15</sup> Equality entails disregarding dissimilarities between two particulars, much like constructing a self-constricting “tunnel-like” field of vision that considers shared properties only.<sup>16</sup> It entails *establishing, setting up, or instituting* a relation of equivalence that does not take into consideration the existing dissimilarities between two objects.<sup>17</sup> But the same does not happen in similarity: *a* and *b* are not *judged, evaluated, established, or instituted* as similar; they are simply *described* as similar.<sup>18</sup>

Naturally, describing *a* and *b* as similar presupposes singling out a shared property, that which is necessary for the assertion of the *similarity fact*. But singling out property *q* says nothing about the relevance of property *q* other than that the similarity fact is conditional to property *q*. It merely says that it is property *q* that is under scrutiny in that context: objects *a* and *b* are relationally similar with regards to property *q* [Sq (*a*, *b*)]. This does not solely amount to categorizing. In fact, the assertion of a similarity fact consistently and simultaneously presupposes that a “dissimilarity fact” can be asserted insofar it is conditional to properties other than *q*—*i.e.*, whilst objects *a* and *b* are relationally similar with regards to property *q*, objects *a* and *b* are relationally dissimilar with regards to property *w*. The assertion of a similarity fact lacks both the “tunnel-vision” and the epistemological constructivism of equality. The assertion of a “similarity fact” does not categorize. As detailed below, the utterance of a similarity fact—which, in turn, entails a description of a relation of similarity between *a* and *b*—is a necessary, although insufficient, condition for a judgment of equality. The opposite does not hold. See below:

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15. The meaning and function of the “relevance” of properties may even vary in both descriptive and prescriptive speech of equality. Naturally, to claim that there exists a prescriptive speech of similarity is nonsensical.

16. I take inspiration from the “focus” referred to in FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 21 (1991).

17. See Comanducci, *supra* note 7, at 32.

18. Sustaining that NIETZSCHE and LOCKE understand “similar” as the name given to the property of sharing some characteristics, *before any clear-cut criterion of relevance has been stated*, see Gianformaggio, *supra* note 6, at 272.



SIM: Neil Young and Jim Morrison are similar with regards to property “long hair”; [ $S_{\text{longhair}}(\text{NY}, \text{JM})$ ]

DISSIM: Neil Young and Jim Morrison are dissimilar with regards to property “place of birth”; [ $\neg S_{\text{placebirth}}(\text{NY}, \text{JM})$ ]

EQU: Neil Young and Jim Morrison are singers

DIF: Neil Young and Jim Morrison are not fellow countrymen

The analysis of similarity entails a philosophical problem that should be briefly addressed if one wishes to avoid criticism regarding similarity facts simply amounting to descriptions of relations of similarity. The question is twofold: “*is the relation of similarity a universal?*” and “*does asserting a similarity fact commits the utterer to the platonist existence of universals?*”<sup>19</sup> Russell believed so in his famous analysis of the “regress of similarity” as he affirmed that replacing facts about universals by facts about similarity is hopeless because one will necessarily conclude that similarity (or “resemblance” as Russell calls it) will have to be universal:

If we wish to avoid the universals *whiteness* and *triangularity*, we shall choose some particular patch of white or some particular triangle, and say that anything is white or a triangle if it has the right sort of resemblance to our chosen particular. But then the resemblance required will have to be a universal. Since there are many white things, the resemblance must hold between many pairs of particular white things; and this is the characteristic of a universal. It will be useless to say that there is a different resemblance for each pair, for then we shall have to say that these resemblances resemble each other, and thus at last we shall be forced to admit resemblance as a universal. The relation of resemblance, therefore, must be a true universal. And having been forced to admit this universal, we find that it is no longer worth while to invent difficult and unpalatable theories to avoid the admission of such universals as whiteness and triangularity.<sup>20</sup>

Recently Cumpa has sustained a sound neutralist account of similarity in which he claims that Russell’s “regress of similarity” is a *non sequitur* and that a Platonist and universalist account of similarity need not (and *should not*) be followed. In his view, what can be inferred from Russell’s “regress of similarity” is, at best, the existence of the similarity relation between two or more terms, but “*not the additional fact that it has a certain nature, universal or of other kind.*” Cumpa claims that the assertion of a “similarity fact” simply commits the utterer to two inferences: (i) a “relational inference” by which “if *a* stands in similarity relation *Sq* to *b*, and *c* stands in similarity relation *Sq* to *d*, then there is a similarity relation *Sq* with four

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19. This is the “problem of universals” or the “sharing problem” (*what is the similarity ground of a’s being q and b’s being q?*). According to Cumpa, *supra* note 9, at 2, a different problem is the “fundamental tie” or the “having problem” (*what is the compositional ground of a’s being q and b’s being q?*).

20. See BERTRAND RUSSELL, *THE PROBLEMS OF PHILOSOPHY* 55 (Oxford Univ. Press 2d ed. 2001) (1912). A more profound analysis of Russell and Grossman’s view may be found in Cumpa, *supra* note 9, at 5 ff.

terms (and other terms may be added); (ii) a “neutralist inference” by which “if  $a$  stands in similarity relation  $Sq$  to  $b$ , then there is a similarity relation,  $Sq(a, b)$ . The assertion of “similarity facts” ontologically commits oneself to the existence of similarity relations, but not that such similarity relations must be universal or of other metaphysical nature.<sup>21</sup> Both of these inferences suffice and there is no need for unreliable metaphysical commitments.

### C. Identity

I take “identity” to mean that *two or more objects have in common all their properties*. Describing two or more objects as “identical” means neither that they merely share some properties, nor that only “relevant properties” under some standard of evaluation are being considered. It rather means that they share all their properties or, better said, that *they are but one single object (or term)*. This is so under the Leibniz law of the identity of indiscernibles, formalized as  $(\forall x \forall y \forall \phi ((\phi x \rightarrow \phi y) \Leftrightarrow x=y))$ .<sup>22</sup> Much differently to what happens in judgments of “equality” in which—as detailed below—it is judged that  $a = b$  ( $a$  and  $b$  being two objects), a description of “identity” means that albeit the different name ( $x = y$  as per the logical formalization), it is stated that  $a = a$ . See below:

ID: Jim Morrison and “the Lizard King” are identical because they are one and the same;  $(\phi \text{ JimMorrison} \rightarrow \phi \text{ “LizardKing”}) \Leftrightarrow \text{JimMorrison} = \text{“LizardKing”}$

### D. Equality

In descriptive speech, I take “equal” to mean that *two or more objects belong to the same class or category, since they share “relevant” properties according to a given standard of evaluation*.<sup>23</sup> I am aware of the logical differences between classes and categories. A “class” is a collection of sets that can be unambiguously defined by a property that all its members

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21. See Cumpa, *supra* note 9, at 8–9.

22. If placement of objects in spatial context is seen as a relevant property, then no identity can ever be assigned to two different objects. See Comanducci, *supra* note 7, at 32. On the principle of identity (as applied to propositions), see DELIA TERESA ECHAVE, MARIA EUGENIA URQUIJO & RICARDO A. GUIBOURG, *LÓGICA, PROPOSICIÓN Y NORMA* 83 ff. (7th ed. 2008).

23. See, for instance, Comanducci, *supra* note 7, at 33; Ricardo Guastini, *La Gramática de “Igualdad,”* in *DISTINGUIENDO—ESTUDIOS DE TEORÍA Y METATEORÍA DEL DERECHO* 193 (1999); Gianformaggio, *supra* note 6, at 260.

share. “Category,” in turn, is a term used with multiple purposes. In its broader sense, following Strawson, “category” is any type of linguistic expression, concept, or entity that belongs to a set which is general and important enough for one to deal with it.<sup>24</sup> I am generally referring to “category” *qua* linguistic expression and, despite these conceptual differences, I am using “categories” and “classes” indistinctively in the text.<sup>25</sup>

A judgment of equality between two objects entails that they are non-identical objects, *i.e.*, they are not one and the same. This means not only that those two objects *may* be deemed “different” under a standard of evaluation other than the one under which they were deemed “equal”, but also that they *surely* will be deemed “different” under at least one other standard of evaluation. Why? Because there necessarily is a dissimilarity fact to be asserted regarding a dissimilarity relation between them, otherwise they would be identical.<sup>26</sup>

You have perhaps noticed two relevant aspects in the sentences above.

Firstly, in addressing “identity” I asserted that two or more objects *have* in common all their properties, *ergo* they are identical, whereas in addressing “equality” I asserted that if two or more objects *belong* to the same “class” or “category” then they are judged equal under that standard of evaluation. As opposed to “identity,” which refers to individuals, equality (as does similarity) refers to properties shared.<sup>27</sup> See below:

EQU1: Jim Morrison and Janis Joplin are singers

EQU2: Jim Morrison and Janis Joplin died at the age of 27

DIF: Jim Morrison is a man and Janis Joplin is a woman

The mere fact that two individuals are comparatively evaluated under the standard of “age of death” means that they cannot belong to other classes under the same standard of evaluation.<sup>28</sup> This is particularly important as

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24. The English word “category” comes from the word “κατηγορία” from Ancient Greek. In Modern English, it is often used as a synonym of “attribute,” “class,” or “set.” See Javier Cumpa, *Categories*, 15 PHIL. COMPASS e12646, 2 (2020), <https://doi.org/10.1111/phc3.12646> [<https://perma.cc/88XB-VJ3N>]. On the several meanings of “category,” see PETER FREDERICK STRAWSON, SUBJECT AND PREDICATE IN LOGIC AND GRAMMAR 25 (1974); ANASTACIO ALEMÁN PARDO, TEORIA DE LAS CATEGORIAS EN LA FILOSOFIA ANALITICA [THEORY OF CATEGORIES IN ANALYTICAL PHILOSOPHY] 19 (1985).

25. As does SCHAUER, *supra* note 16, at 18 n.4.

26. Gosepath claims that “[j]udgements of equality presume a difference between the things compared.” Stephan Gosepath, *Equality*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Summer 2021). I believe that may be misleading. A “judgment of difference” *may* be performed between the things compared but what a judgment of equality presumes is a dissimilarity fact between them, which is altogether different.

27. Gianformaggio, *supra* note 6, at 259.

28. The same does not hold, however, for the standard of evaluation of “role in a band” (*i.e.*, “singers”) because they may—and indeed did—additionally play instruments occasionally.

it shows that a judgment of equality entails partitioning the set of objects that can be evaluated under such standard into two mutually excluding and jointly exhaustive classes: (i) the class of objects equal amongst themselves under a given standard of evaluation (*e.g.*, individuals that died at the age of 27) and (ii) the class of all remaining objects (*e.g.*, individuals that did not die at the age of 27).<sup>29</sup> Both classes are *open*, as they are subject to logical variations in time. For instance, Jimi Hendrix also belongs to the class of individuals equal amongst themselves under the standard of evaluation “age of death”, but Leonard Cohen became a member of the class of the remaining.

A judgment of difference, on the other hand, entails a partition of the set of objects that can be evaluated under such standard in two mutually excluding and jointly exhaustive classes: (i) the class of objects different amongst themselves under a given standard of evaluation (people that died with different ages) and (ii) the class of all remaining objects (people that died with the same age). See below:

EQU: Jimi Hendrix, Jim Morrison, and Janis Joplin died at the age of 27

DIFF: Jimi Hendrix and Leonard Cohen died at a different age.

Secondly, you have perhaps noticed that I used the terms “*descriptions* of similarity” and “*descriptions* of identity” whereas I shifted to “*judgments* of equality.” This is of paramount importance. It is well known that “descriptive equality” and “prescriptive equality” are terms used in legal parlance but the terms “prescriptive identity” or “prescriptive similarity” are not. In fact, the latter terms are nonsensical. Similarities and identity are always described, never prescribed. This, however, does not mean to suggest that “descriptive equality”, as it is generally understood, entails a description (in the sense of “descriptive activity”) that is *identical* to the description in “descriptive identity” or “descriptive similarity”. I am suggesting it does not. In fact, I am suggesting that “descriptive equality” is an ill-suited term for representing the underlying intellectual operation it purports to represent.

In descriptive similarity, one aims at asserting a similarity fact between two objects regarding a given property—*e.g.*, one may bring about issues of quantitative vagueness in wondering whether the hair of Neil Young really is as “long” as the hair of Jim Morrison. In descriptive identity, the questions are whether a global analysis and thorough description was performed to the full extent over the object and whether the outcome of

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29. See Comanducci, *supra* note 7, at 33.

that global analysis entails the proposition that no unshared properties exist—e.g., one may include psychological data in the analysis and wonder whether the “Lizard King” is a *persona* created by Jim Morrison, thus *not really the same*.

In descriptive equality, the description of two objects as equal is never as “pure” as in descriptive identity and descriptive similarity. I do not mean to say that it is not pure because, epistemologically speaking, all knowledge is “theory infused” or grounded *pro tanto* and subject to the availability bias. Perceptual biases may well impact similarity, identity, or equality alike. What I mean to say is that, contrary to descriptive identity and descriptive similarity, descriptive equality does not address reality *wholly and directly*. Rather it denotes a scent of constructive epistemology. And by stating this I do not want to dabble into the foundations of constructivism, rather I simply mean to convey that “descriptive equality” entails “categorizing” while the latter involves recreating the objects of the world (the *datum*) through cognition and systematization which in turn allows for the understanding of the world as a meaningful whole (*sinnvolles Ganzes*).<sup>30</sup>

I have mentioned above that a judgment of equality entails establishing or instituting *a* and *b* as equal. Establishing *a* and *b* as equal amounts to categorizing, something that presupposes yet goes beyond describing similarities between *a* and *b* – i.e., asserting that similarity fact. Categorizing brings about the issue of the “propositional function” as a logical method for the determination of categories. According to Russell, a propositional function, devised as  $\phi(x)$ , has two main components: “variables” (*x*) and “ranges of significance” (the class of values of *x*), which make possible the formation of categories  $\phi$ . Russell asserts that “*ranges of significance form types, i.e., if  $x$  belongs to the range of significance of  $\phi(x)$ , then there is a class of objects, the type of  $x$ , all of which must also belong to the range of significance of  $\phi(x)$* .”<sup>31</sup>

“Forming” categories therefore may be seen as a two-step process that includes (i) establishing the range of significance of  $\phi(x)$  and (ii) including *x* in the range of significance of  $\phi(x)$ . See below:

SIM: Neil Young and Jim Morrison are similar with regards to property of “singing”

EQU: Neil Young and Jim Morrison are “singers” in the sense that:

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30. I borrow the expression “constructive epistemology” from HANS Kelsen, REINE RECHTSLEHRE [PURE THEORY OF LAW] 81 (Max Knight trans., 2d rev. ed. 2005) (1960).

31. BERTRAND RUSSELL, THE PRINCIPLE OF MATHEMATICS app. B (1964). The notion of “category” is purely linguistic, according to Gilbert Ryle, *Categories*, 38 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 189, 192 (1938). See also Cumpa, *supra* note 24, at 2 ff.

- (i) If there is a range of significance of “ $\phi$ (singers)”, then there is a class of objects, the type of “singers” all of which also belong to the range of significance of “ $\phi$ (singers)”
- (ii) Neil Young and Jim Morrison are particulars that belong to that class of objects, the type of “singers”

### 1. “Declaring” Equality

Comanducci rightfully claims that a judgment of equality in descriptive contexts entails “*setting up* (in Spanish “*instaurar*”) *a relation of equivalence [between two objects] that does not account for differentiating characteristics.*”<sup>32</sup> Russell, in turn, alluded to the “formation” of categories. You will note that “setting up”, “establishing” or “instituting” is somehow constitutive, not descriptive: it is a type of decision-making.<sup>33</sup> Furthermore, the illocutionary force of “setting up,” “establishing,” or “instituting” is not assertive, but declarative: it entails a performative effect.<sup>34</sup>

Assertive speech acts are *unidirectional speech acts* in the direction of fit: word-to-world. Success of fit in assertive speech acts is attained *iff* the segment of reality is represented faithfully in such a manner that what is asserted corresponds to reality. Declarative speech acts are *bidirectional speech acts* in the direction of fit: word-to-world and world-to-word. They conform reality in accordance with what was said, and present reality altered in such a way. As Searle claims, “*it is the defining characteristic of this class that the successful performance of one of its members brings about the correspondence between the propositional content and reality, successful performance guarantees that the propositional content corresponds to the world: If I successfully perform the act of appointing you chairman, then you are chairman.*”<sup>35</sup> Naturally, this is conditional on the individual having an active disposition—*i.e.*, a power—to do just that.

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32. Comanducci, *supra* note 7, at 32.

33. It is stated that “*categorization, the study of generalizable representations, is a type of decision making, and that categorization learning research would benefit from approaches developed to study the neuroscience of decision making.*” See Carol A. Seger & Erik J. Peterson, *Abstract, Categorization = Decision Making + Generalization*, 37 NEUROSCIENCE & BIOBEHAVIORAL REVS. 1187 (2013).

34. See JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 66–67 (1969).

35. See John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE IN SOC’Y 1, 13 (1976); Frank A. Hindriks, *The New Role of the Constitutive Rule*, 62 AM. J. ECON. & SOCIO. 185, 192 (2003).

In creating the category “singers” – and suppose I do it for the first time—I perceive as a result Neil Young and Jim Morrison not just as particulars, or even as particulars with a similarity relation with regards to property *q*. Quite differently, I perceive them and they present themselves as “particular x’s, being instances or tokens of more encompassing categories.”<sup>36</sup> Note the different illocutionary force in the two following sentences:

SIM: “Neil Young and Jim Morrison are singers”

*means*

“Neil Young and Jim Morrison are similar with regards to property of “singing”

Action: assertion of similarity fact

Speech act: assertive

EQU: “Neil Young and Jim Morrison are “singers”

*means*

(i) if there is a range of significance of “ $\phi$ (singers)”, then there is a class of objects, the type of “singers” all of which also belong to the range of significance of “ $\phi$ (singers)”; (ii) Neil Young and Jim Morrison belong to that class of objects, the type of “singers.”

Action: Establishment, setting-up or institution of equivalence

Speech act: declarative

“Equality” is therefore declared, not described. Henceforth all references made to “descriptive equality” will be made solely on the basis of that terminology being used and in force in literature and to avoid terminological inconsistency. However, those references should be read as “declared equality.”

## 2. “Declared Equality” and the Rule of the Category

“Declared equality” necessarily entails a *filter* of relevant properties previously selected under a criterion or meta-factor. In establishing the equivalence, declared equality presupposes *abiding* by a rule—usually dubbed the “standard of evaluation,” “meta-factor,” or “criterion.” I shall call this rule the “rule of the category” (RuleCatg). Descriptive similarity and descriptive identity presuppose no such RuleCatg.

The RuleCatg does not merely set out the relevant properties under comparison and the discarding of all the other (irrelevant) properties. It *prescribes* which properties are to be deemed relevant and *governs* the action of establishing, instituting or setting-up equality or difference. It is such a RuleCatg that prescribes that, in considering properties of “Neil

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36. SCHAUER, *supra* note 16, at 18.

Young” and “Jim Morrison” to create a category of “singers” and include these particulars as members to that category, *one ought (O) to consider only* whether they sing professionally. The “ought” in the RuleCatg is deontic, hence the rule. Evidently, the RuleCatg may also be read, under the interdefinability of deontic modes, that in considering properties of “Neil Young” and “Jim Morrison”, *one ought not (F) to consider* properties other than whether they sing professionally. The RuleCatg functions as an *exclusionary reason* that unburdens the decision-maker in comparison and class-creation: Jim Morrison and Janis Joplin ought to be deemed equal based on the RuleCatg “age of death” and one is forbidden to account, for example, that Janis had a much better voice.<sup>37</sup> Janis’ voice is normatively irrelevant under the RuleCatg “age of death.” See below:

TABLE I

	Speech act	Refers to	Amounts to	Action	Presupposes	Canonical Form	Negation
Similarity	Assertion	Properties Shared Between Particulars (or concepts)	Asserting similarity fact	Description	- At least one property $q$ being shared between $a$ and $b$ - a “dissimilarity fact” being assertable insofar it being conditional to properties other than $q$	- $a$ and $b$ are relationally similar with regards to property $q$ - $[Sq(a, b)]$	Dissimilarity
Identity	Assertion	Individuals or particulars	Asserting identity	Description	- all properties between $a$ and $b$ being shared - $a$ and $b$ being one and the same ( $a = b$ )	- “ $a$ and $b$ are identical” - $[\forall a \forall b \forall \Phi ((\Phi a \rightarrow \Phi b) \leftrightarrow a = b)]$	Non-identity / “otherness”
Equality	Declaration	Properties Shared by Particulars (or concepts)	Categorization: establishing a relation of equivalence between objects sharing similar “relevant” properties	Judgment <sup>1</sup> (“constructive epistemology”)	- at least one property $q$ between $a$ and $b$ being shared - that property $q$ being previously selected as “relevant” in accordance to a “RuleCatg $q$ ” (“tunnel-vision”) - $a$ and $b$ belonging to the same class or category under $q$ - $a$ and $b$ being different under at least a “relevant” property other than $q$	- if there is a range of significance of “ $\varphi(x)$ ”, then there is a class of objects, the type of “ $x$ ” all of which also belong to the range of significance of “ $\varphi(x)$ ” - $a$ and $b$ are particulars that belong to that class of objects, the type of “ $x$ ”	Difference

37. On rules as “exclusionary reasons” see JOSEPH RAZ, PRACTICAL REASONS AND NORMS 35 ff. (3d ed. 1999). See also Larry Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5 (1990).



It has been stated by neuroscientists that definitions of decision-making and categorization are similar up to the point that only categorization works on generalizable representations. In fact, generalization is said to be the key distinction between decision-making and categorization.<sup>38</sup>

Generalizations presuppose two main things: a set of particulars and one or more shared properties deemed common to such particulars. One can say that for every two related concepts, *a* and *b*, *a* is a generalization of *b* if and only *iff* each instantiation of concept *b* is also an instantiation of concept *a* and if there are instantiations of concept *a* which are not instantiations of concept *b*: say *a* = mammals and *b* = bats. In view of this, the issue boils down yet again to the selection of relevant properties for the purpose of generalizing.

As described by Schauer, much like what is stated in addressing “declared equality”, generalizations *do not negate* the existence of dissimilar properties of particulars included in a category; rather, they *suppress* the existence of such dissimilar properties within the context of the generalization.<sup>39</sup> Schauer adequately describes generalizations as purporting to “selective inclusions” and “selective exclusions.” Borrowing the expression of Alchourrón and Bulygin, I claim that the RuleCatg in “declared equality” entails putting forward *a thesis of relevance* of “similar-properties” (*e.g.*, whether Jim Morrison and Neil Young both sing professionally) which is necessarily accompanied by putting forward *a thesis of irrelevance* of “dissimilar-properties” between particulars (*e.g.*, whether Jim Morrison and Neil Young share a birthplace).<sup>40</sup> I hope to show below that this is quite relevant for the use of “equality” in prescriptive contexts.

### III. PRESCRIPTIVE EQUALITY AND THE CHIMAERA OF “OPTIMAL INCLUSIVENESS”

#### *A. Introduction: Some Ambiguities of “Prescriptive Equality”*

Notwithstanding the several ramifications pertaining to the application of prescriptive equality—which largely fall outside the scope of this essay—nobody denies that equality prescribes that one “ought to treat equals equally.”<sup>41</sup> There are, however, many ambiguities surrounding the “core” of the prescriptive concept of equality. For instance, irrespective of his

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38. Seger & Peterson, *supra* note 33, at 1189.

39. Compare SCHAUER, *supra* note 16, at 21–22 (referring to “suppression” of differences) and Comanducci, *supra* note 7, at 32 (referring to “abstracting” from differences).

40. See CARLOS E. ALCHOURRÓN & EUGENIO BULYGIN, INTRODUCCIÓN A LA METODOLOGÍA DE LAS CIENCIAS JURÍDICAS Y SOCIALES 153 ff. (2006); RATTI, *supra* note 13, at 61ff.

41. Comanducci, *supra* note 7, at 36.

illuminating clarity in other features of the concept, Comanducci claims that the concept of equality in prescriptive contexts is “*the concept through which it is prescribed, or constructed, a comparative relation between two or more objects, two or more actions and two or more circumstances.*”<sup>42</sup> The question then arises: what is specifically the difference between the “setting up” of a relation of equivalence between two objects—that Comanducci alludes to in descriptive contexts—and the “construction” of a comparative relation between two objects in prescriptive contexts?<sup>43</sup> And what exactly is meant with the prescription of a comparative relation? And how can it be, analytically, that a single “norm”—that of equality—simultaneously “prescribes” (i) a comparative relation and (ii) that one “ought to treat equals equally”? And could the same “norm” prescribe that equals ought to be treated equally and differents ought to be treated differently?

First, it seems odd that “prescriptive equality” simultaneously “prescribes” and “constructs” a comparison. In fact, the “construction” of the category through comparison and joint measurement is a feature of the so-called “descriptive equality,” which amounts to “declared equality.” Categorization is a necessary, although insufficient, condition for the prescription of “equal treatment.” Westen claims—though he bypasses the “declarative speech act” in the “descriptive equality” (*i.e.*, “declared equality”) and uses “identically” with the technical meaning of “equally”—that “*one cannot say that a particular group of persons deserve identical treatment unless one is able to distinguish those who are members of the group from those who are not. And, second, one cannot identify particular persons as members of a group without possessing a descriptive standard which specifies the features that together characterize them as members.*”<sup>44</sup> I believe that, in saying so, Westen is simply referring to the precondition of “categorization” for prescriptive equality. And, save for the terminological distinctions which carry relevant underlying importance, I fully agree.

Second, “treating” equals equally and “comparing” are two non-identical and independent actions. When one compares *a* and *b* such action does not entail that one treats *a* and *b* equally; and if *x* treats *a* and *b* equally does not mean that *x* compared *a* and *b*: she may as well have been told

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42. *Id.* at 34.

43. Comanducci claims that, in “descriptive equality,” a “relation of equivalence is set-up [in Spanish, “instaurada”].” *Id.*

44. PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF ‘EQUALITY’ IN MORAL AND LEGAL DISCOURSE 66 (1990).

or ordered to do so. I suggest that it cannot be so that a single norm—that of “equality”—governs two independent actions simultaneously. Sound “individuation criteria” for legal norms sets forth that two actions cannot—even if represented by one single provision—be governed by one and the same norm.<sup>45</sup> And it really does not matter whether the prescription of “treating equals equally” by “prescriptive equality” *presupposes* comparison and, or, categorization. That only means that *a category-product (and not the action of “categorization”) is the descriptive component or operative fact of the norm of equality*. The prescription of comparison and categorization—assuming there is a prescription and not merely a “necessity” to do so—must, therefore, arise from somewhere else.

Before moving forward with the tentative answer to these questions, I must lay down some relevant preconceptions on “equation” and “differentiation.” I hope these preconceptions prove worthy for the conclusions to be drawn afterwards.

*B. “We are Men, Not Gods”: The Risks of Legislating and the Risks of “Equating”*

In claiming that “the law must predominantly, but by no means exclusively, refer to *classes of persons*, and to *classes of acts, things and circumstances*,” H.L.A. Hart famously adverted that one cannot foresee all the possible combinations of circumstances that may arise in the future, while simultaneously noticing the two main handicaps in lawmaking: relative ignorance of fact and relative indeterminacy of aim.<sup>46</sup> One who lacks omniscience and seeks to regulate behavior in advance by means of *general standards* has no control over neither the unforeseen particulars that may enter, in future applications, the “open classes” one created, nor over the purpose and direction which will govern the application of such regulations to particular occasions. These handicaps arise from one being fated to resort to “fresh choices between open alternatives” since, as magnificently put by Hart, “. . . *the necessity of such choice[s] is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one)*.”<sup>47</sup>

One could simplistically sum it up in the following: *p1*: generalizing and categorizing is a risk because it is rooted in inductive reasoning; *p2*: legislating is (partly) generalizing and categorizing, because, as stated,

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45. On norm individuation, see JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF A LEGAL SYSTEM* 70–92 (2d ed. 2003).

46. And I stress that Hart refers to “must” [refer to classes] as in alethic necessity, not “ought” [refer to classes] as in deontic obligation. See H.L.A. HART, *THE CONCEPT OF LAW* 128 (2d ed. 1994).

47. *Id.*

“the law predominantly (. . .) refers to *classes of persons*, and to *classes of acts, things and circumstances*”; *c*: legislating is (partly) a risk.<sup>48</sup>

### 1. Legal Norms as “Relevance-Sorters”

Legal norms are generally understood to apply to a universal open class of subjects [*i.e.*, for all  $x$  ( $= \forall x$ ), a class which is subject to logical variations in time].<sup>49</sup> Statutes may refer to particulars through “legislative decisions” but norms, which are the common content of statutes, may not.<sup>50</sup> As Hart anticipated, categorization transcends the universe of addressees and spreads through the remaining components of norms: action-types and occasion-types (in hartian terms: “circumstances”) are also classes and include all the tokens that instantiate such classes.<sup>51</sup>

Within the analytical view, norms are deontic units generally broken down into three components: the norm-antecedent (*fattispecies*, *protasis*), the deontic operator, and the norm-consequent (*apodosis*). Setting aside the deontic operator (*P*, *F* or *O*), irrelevant for the present purpose:

- (1) the norm-antecedent is the descriptive component of norms, further divided subcomponents (ia) class of addressees, (ib) hypothetical action-types, and (ic) hypothetical types of states of affairs, *i.e.*, occasion-types.
- (2) the norm-consequent signifies a *deontic reduction* of the set of possibilities within the opportunities described in the antecedent [e.g., within the opportunities to do  $q_1$ ,  $q_2$ , or  $q_3$  in scenario  $p$ , addressees are obligated to do  $q_2$ ];<sup>52</sup>
- (3) for instance, in “when driving one should drink moderately”, the class of addressees is universal (= all), “driving” is the

48. SCHAUER, *supra* note 16, at 18 ff.; Pedro Moniz Lopes, The Syntax of Principles: Genericity as a Logical Distinction Between Rules and Principles, 30 *RATIO JURIS* 471, 474 ff. (2017).

49. ALF ROSS, *DIRECTIVES AND NORMS* 109–10 (1968).

50. The fact that statutes may refer to particulars is the plausible justification for Hart’s carve-out: “the law must predominantly, *but by no means exclusively*, refer to classes of person, and to classes of acts, things and circumstances”.

51. See EUGENIO BULYGIN & DANIEL MENDONCA, *NORMAS Y SISTEMAS NORMATIVOS* 16 (2005).

52. On the opportunity to perform the “norm-content” as a logical condition of norms (*e.g.*, in “the door ought to be shut at all times” requires the existence of a door and it being open), see GEORG HENRIK VON WRIGHT, *NORM AND ACTION* 71 ff., 74–75 (1963); ROSS, *supra* note 50, at 108.

occasion-type, “drinking” is the action-type and “moderately” represents the deontic reduction of the set of possibilities within the opportunities described in the antecedent, ranging from having a “sip” ( $q_1$ ) to drinking the “most amount of alcohol factually possible” ( $q_n$ ); say, for instance, that “up to ( $q_{10}$ )” meets the quantitatively vague criterion of “moderate” drinking.

Bearing this in mind, I shall now focus on highlighting one invariant of the antecedent of any norm: the “differentiation” implied in “equating” dissimilar things through legislation. It is said that “*to equate different things is the real task of the legislator*”<sup>53</sup> I shall borrow this sentence from Gianformaggio but wish to add up to it and claim that *in equating different things, the lawmaker necessarily differentiates*. This is by no means paradoxical. What I mean to convey is that from a set of particulars (a, b, c, d. . . n) the lawmaker establishes an equivalence between (a, b, c), thus forming “category x”, the members of which are a, b, c. But, in doing so, the formation of this category necessarily leaves out particulars d to n. “Equation” between a, b, c occurs in forming “category x” but “differentiation” occurs between members of “category x” and members of “category non-x”. In other words, in creating a norm, the lawmaker “declares” members of “category x” to be normatively relevant whilst simultaneously declaring members of “category non-x” to be irrelevant *vis-à-vis* the norm created.

Relevance was defined above as a predicate of a property of a particular, that which denotes the relation of a property of a particular with a standard of relevance. “Legal relevance” is a sub-type of relevance. It is but a predicate of a property of a particular that denotes the relation of such property with a given legal system: a property of a particular is said to be relevant *iff* when contrasted with a given legal system, that property of that particular instantiates a hypothetical property represented in it.<sup>54</sup> Law is a human artifact and lawmakers “construct” the legal system. This means that lawmakers “construct” the standard of relevance.

I suppose I am claiming something similar to what Comanducci claims when he asserts that legal norms institute a “class of equals” (the addressees of the norm) and a “class of differents” (those to which the norm does not apply, *i.e.*, the “non-addressees” of the norm).<sup>55</sup> But Comanducci’s explanation

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53. Gianformaggio, *supra* note 6, at 271. Stating that “*to legislate is to distinguish and, in a certain sense, to discriminate*,” see Guastini, *supra* note 23, at 194.

54. ALCHOURRÓN & BULYGIN, *supra* note 40, at 152; Yovel, *supra* note 13, at 309. Sustaining that “relevance” is a predicate of properties, conceived as the operative conditions of legal norms, see RATTI 2013: 61.

55. Comanducci, *supra* note 7, at 36.

seems to fall short with regards to norm components.<sup>56</sup> In fact, “classes of equals” and “classes of differents” are formed with regards to all norm components, not only addressees. One can envisage:

- (1) *inside* the standard of relevance several “classes of addresses,” “classes of hypothetical action-types,” and “classes of occasions,” those which are *equal under that standard of relevance*; and
- (2) *outside* the standard of relevance several “classes of non-addresses,” “classes of non-hypothetical action-types,” and “classes of non-occasions,” those which are *equal different under that standard of relevance*.

For instance, a norm statement that reads “no dogs allowed in the restaurant” assigns the deontic status *F* to relevant action-type “entering in the restaurant” in the relevant occasion “with dogs” (NORM1).<sup>57</sup> NORM1 does not specify any addressee (*i.e.*, it applies to *all persons*, not only “clients” or “dog-owners”), therefore there is no “classes of non-addresses.”<sup>58</sup> However, NORM1 awards relevance to both action-tokens subsumed to action-types “entering in the restaurant” (*i.e.*, all action-tokens included in the class of action-types “entering in the restaurant”) and circumstances subsumed in the occasion “with dogs” (*i.e.*, all circumstances included in the class of occasions “with dogs”).<sup>59</sup> In fact, NORM1 awards *isolated contributive relevance* and *joint sufficient relevance* to those specific action-tokens and circumstances. Simultaneously, NORM1 awards *sufficient irrelevance*, for instance, to action-tokens subsumed to action-types “passing by the restaurant” and circumstances subsumed in the occasion “smoking a cigarette.” Action-

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56. The same cannot be said of Guastini as, although he does not elaborate, he states that “to say that two operative facts are equal is not different to say that they are equal in all elements that they are comprised of.” Guastini, *supra* note 23, at 193.

57. I am borrowing Schauer’s well known example of Angus, the black Terrier. See SCHAUER, *supra* note 16, at 18 ff.

58. I am purposely avoiding the discussion over “scope of the norm” in terms of geography or time. In any case, I believe that has more to do with scope of competence norms and occasion of the norm itself than with addressees.

59. Whether or not the norm awards relevance to entering with a cat is a matter of it implying a strict biconditional. If it is read “iff (dogs) then F(enter)” it most certainly awards irrelevance to entering with cats. It is read “if (dogs) then F(enter)”, it is a matter of whether the norm is exemplary to an underlying principle according to which “no disturbing animals allowed in the restaurant.” See J. García Amado, *Sobre el Argumento a Contrario en la Aplicación del Derecho*, 24 DOXA 85 (2001); Adrian Rentería Díaz, *Silogismo Jurídico, Argumento “A Contrario” y Reglas Constitutivas*, 20 DOXA 317, 325–26 (1997).

types “passing by the restaurant” and circumstances subsumed in the occasion “smoking a cigarette” are respectively members of “classes of non-hypothetical action-types” and “classes of non-occasions” *vis-à-vis* NORM1.

Norms sort out the relevance of addressees, action-types and occasions. I shall call this characteristic of norms that of being “relevance-sorters.”

## 2. Causal Relevance and Descriptive (or “Declared”) Relevance

Alchourrón and Bulygin magnificently expounded, in *Normative Systems*, two types of properties when it comes to their relevance *vis-à-vis* a given legal system: “descriptive relevance” and “prescriptive relevance.” The descriptive relevance of a property in connection with a norm or a set of norms is obtained *iff* (i) some norm or norms of the legal system represents such property in the antecedent and (ii) that property ( $x$ ) and its complementary property ( $\neg x$ ) are assigned different deontic status—*i.e.*, if the legal system correlates the existence of such property and its negation with different normative solutions. A given property will be prescriptively relevant, in turn, if, from an external evaluative viewpoint, one concludes that such property ( $x$ ) and its complementary property ( $\neg x$ ) should have been assigned—regardless of that not being the case—different deontic status.<sup>60</sup>

It should be noted that both “descriptive relevance” and “prescriptive relevance” allude to the viewpoint of the observer. In the former case, the observer is describing relevant properties from *inside* the legal system (*i.e.*, the standard of relevance) whilst in the latter he is prescribing relevance from *outside* the legal system, by contrasting one standard of relevance (*i.e.*, the legal system) with an external standard of relevance (*e.g.*, a moral evaluative standard or a standard of efficiency).

Lawmakers, however, do not describe nor prescribe relevant properties: they rather prescribe actions and “declare” relevant properties. When enacting a legal provision, the lawmaker is not prescribing relevance; she is not stating that property  $x$  ought to be relevant. She is stating that property  $x$  “is” relevant, therefore legal consequences apply to whenever property  $x$  arises in a case.

But why and how is that relevance declared by lawmakers? “Class-creation”—which includes creation of “class of  $x$ ” and “class of non  $x$ ”, as described above—gives rise to the “justification problem.” The justification problem arises whenever a class is created, whether in the context of “rule-creation” or in the context of analogical reasoning.<sup>61</sup> In fact, there is no

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60. ALCHOURRÓN & BULYGIN, *supra* note 40, at 152.

61. I am using “analogical reasoning” as in Todd R. Davies, *Determination, Uniformity, and Relevance: Normative Criteria for Generalization and Reasoning by Analogy*, in ANALOGICAL REASONING: PERSPECTIVES OF ARTIFICIAL INTELLIGENCE, COGNITIVE SCIENCE,

difference in the sorting of relevance in each of these intellectual operations: one cannot analogically sustain any two cases are “relevantly equal” (note that some authors use “relevantly similar”) without presupposing a RuleCatg anymore than we can formulate a rule of decision for a series of cases without such rule.<sup>62</sup>

The justification problem may be defined as follows: one shall find a criterion which, if satisfied by any particular analogical inference, sufficiently establishes the truth of the projected conclusion from “potential member 1” of the category to “potential member 2” of the potential category. In analogical reasoning, the finding of such criterion implies specifying relevant background knowledge that, “*when added to the premises of the analogy, makes the conclusion follow soundly.*”<sup>63</sup> The same happens with the generalizations entailed in the formation of categories in prescriptive contexts.

Under the “bottom-up” methodological account for legislating, regulating behavior by means of general standards is twofold: “problem-solving” and “target-oriented.”<sup>64</sup> Therefore, it entails generalizing from those specific and particular cases (*i.e.*, persons, actions and occasions) that triggered the “problem” and presented it in the agenda of lawmakers in the first place. As stated above, the criterion for categorizing is conventional (there are no *necessary categories*). This hints at the basic tenet of lawmaking and regulating behavior: as “problem-solving” and “target-oriented” general standards of conduct, norms should include *all subjects and occasions (target-oriented) and hypothetical actions (problem-solving)* that share

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AND PHILOSOPHY 227, 228 ff. (D.H. Helman ed., 1988). The definition is the following: “[the] process of inferring that a conclusion property *Q* holds of a particular situation or object *T* (the target) from the fact that *T* shares a property or set of properties *P* with another situation/object *S* (the source) which has property *Q*. The set of common properties *P* is the similarity between *S* and *T*, and the conclusion property *Q* is projected from *S* onto *T*”. See also Damiano Canale & Giovanni Tuzet, *The A Simili Argument: An Inferentialist Setting*, 22 *RATIO JURIS* 499, 499 ff (2009).

62. PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF ‘EQUALITY’ IN MORAL AND LEGAL DISCOURSE 220 (1990); Gianformaggio, *supra* note 6, at 255 ff.

63. Davies, *supra* note 61, at 230. Davies divides the justification problem into two steps: (1) From the first premise  $P(S) \wedge Q(S)$ , conclude the generalization  $\forall x (x) \Rightarrow Q(x)$  and (2) instantiate the generalization to *T* and apply *modus ponens* to get the conclusion  $Q(T)$ .

64. On the “bottom-up” methodological account for legislating, see RAZ, *supra* note 37, at 187; Jeffrey J. Rachlinski, *Bottom-Up versus Top-Down Lawmaking*, 73 *U. CHI. L. REV.* 933 (2006).



the properties of those particulars (persons, actions and occasions) which triggered the “problem” and demanded for the assignment of a deontic status in the first place. Note, again, that the “equation” in lawmaking is similar to the one in analogical reasoning. As Holyoak shows, what really controls “analogical matching” is the search for *goal-relevant predicates and relations* that enter into systematic structures of the lawmaker: “typically ( . . . ) predicates as ‘causes,’ ‘implies,’ and ‘depends on,’ that is, causal elements that are pragmatically important to goal attainment.”<sup>65</sup>

The key concept here is, therefore, “causal relevance.” As defined by Schauer, “causal relevance” is the underlying justification of the prescription of the goal, or proscription of the evil, that the lawmakers intend to procure by relying on relevant background knowledge over previous particular cases.<sup>66</sup> When formulating the norm statement “no dogs allowed in the restaurant,” the restaurant owner is availing himself of the background knowledge regarding the disarray created by Angus, a black Scottish Terrier. In enacting that norm, the lawmaker generalizes from Angus to the class of “dogs” of which Angus is a member. And in doing so, the lawmaker is presupposing that it is the property of “dogness”—and not, for instance, that of “blackness”—that was *cause* to the *consequence* of the disarray at the restaurant. Normative relevance of “dogness” presupposes practical causation.<sup>67</sup> If read as a biconditional that enables *a contrario*, the presupposition is that only members of the class of “dogs” are cause to the consequence of “disarray” and, therefore, members of the class of “non-dogs” are no cause to the consequence of “disarray.”

*Causal relevance is, therefore, the cause of declared relevance* since it is the reason why occasion “with dogs” is foreseen in the norm antecedent of NORM1. In view of the previous presupposition, action type “entering into the restaurant” together with the occasion “with dogs” is relevant for the assignment of deontic status *F*. Note, however, that there is no restriction of the class of addressees. This is because a potential restriction of the class of addressees to “clients” would have no impact, *in projected hindsight*, to the state of affairs the lawmaker aims at obtaining or preventing. Both the class of clients and the class of “non-clients” (e.g., including suppliers, staff, bystanders looking for information, etc.), if accompanied with dogs,

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65. See Keith J. Holyoak, *The Pragmatics of Analogical Transfer*, in 19 THE PSYCHOLOGY OF LEARNING AND MOTIVATION 59, 75–76 (G. H. Bower ed., 1985). Critically, claiming Holyoak goes too far and that “*though one may sympathize with the desire to take plans and goals into account, discounting structure is the wrong way to go about it*”, see D. Gentner, *The Mechanisms of Analogical Learning*, in SIMILARITY AND ANALOGICAL REASONING 199, 220 (S. Vosniadu & A. Ortony eds., 1989: 220).

66. SCHAUER, *supra* note 16, at 25.

67. Yovel, *supra* note 13, at 300.

are *equal cause* to the disarray at the restaurant. “Non-clients” are declared equal to clients *vis-à-vis* NORM1.

### 3. *Relevance and Defeasibility: We Are Liable to Differentiate “Declared Equals”*

As stated above, categorization *does not negate* the existence of dissimilarities between particulars included in a category, rather it *suppresses or disregards* the existence of such dissimilar properties within the context of the generalization<sup>68</sup> This alone largely explains normative defeasibility as arising with the attribution of hypothetical relevance of a differentiating property in “time T2,” precisely that property which was *ex ante* disregarded as irrelevant in “time T1,” as the “equation of categorization” entailed in the creation of a given norm took place.<sup>69</sup>

Defeasibility is a universal dispositional property used to describe norms as “context-sensitive” both factually and legally.<sup>70</sup> The factual context surrounding the application of a given norm<sub>x</sub> may vary and the *relevant properties of the case may instantiate conflicting norms*<sup>71</sup> Under these standards, neither principles nor rules can never be deemed in the abstract to be definitive commands. No norm, regardless of its content or importance, can define solely by itself its own conditions of all things considered application.<sup>72</sup> The definitive character of any norm<sub>x</sub> is subject to the strengthening of the antecedent which, at best, can only be achieved through the epistemic proposition that no relevant conflicting and prevailing norms are instantiated by the properties of the case. In other words, the mere fact that norm<sub>x</sub> is

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68. SCHAUER, *supra* note 16, at 22; Comanducci, *supra* note 7, at 32.

69. On normative defeasibility, among many, Juan Carlos Bayón, *Why is Legal Reasoning Defeasible*, PLURALISM AND LAW 327ff (Arend Soeteman ed., Kluwer Academic Publishers 2001); Giovanni Santor, *Defensibility in Legal Reasoning*, in INFORMATICS AND THE FOUNDATIONS OF LEGAL REASONING 119 e ss (Zenon Bankowski, Ian White, & Ulrike Hahn eds., Springer Science & Business Media Dordrecht 1995).

70. Pedro Moniz Lopes, *The Syntax of Principles: Genericity as a Logical Distinction Between Rules and Principles*, 30 *RATIO JURIS* 471, 475 (2017).

71. The concept of conflict I am using is that of “normative contradiction” as devised in PABLO E. NAVARRO & JORGE L. RODRÍGUEZ, *DEONTIC LOGIC AND LEGAL SYSTEMS* 178 (2014): “a logical impossibility for a subject jointly to satisfy the deontic contents of every mandatory norm together with each of the deontic contents of every permissive norm of a system of norms enacted by a certain authority and in relation to a certain occasion.”

72. H.L.A. Hart, *Essay 3: Problems of the Philosophy of Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 106 (1983).

internally applicable, pursuant to the instantiation of its antecedent, is no credential that it will ultimately be applied and govern the case at hand.<sup>73</sup>

“Defeasibility” is therefore the passive disposition of a norm to enter into conflicts and, though internally applicable to a case, ultimately not be applied.<sup>74</sup> The application of norm<sub>x</sub> to a case will necessarily depend upon:

- (1) the properties of the case instantiating norm<sub>x</sub> and no other norm of the relevant legal system or;
- (2) the properties of the case instantiating norm<sub>x</sub> and other norms of the legal system that corroborate the consequent of norm<sub>x</sub> (in which case either norm<sub>x</sub> or the other norms are applicable, but the consequent is identical) or;
- (3) the properties of the instantiating norm<sub>x</sub> and other conflicting norms of the legal system and secondary norms of the “conflict-solver” type—like *lex specialis* or *lex superior*—operate as *external applicators* and single out norm<sub>x</sub> as applicable or;
- (4) the properties of the instantiating norm<sub>x</sub> and other conflicting norms of the legal system and, with no applicable “conflict-solver”, the outcome of a balancing between the conflicting norms operates as *external applicator* and points out to the application of norm<sub>x</sub>.

Now, defeasibility is fundamentally a matter of “declared relevance.” When formulating norm statement “no dogs allowed in the restaurant,” the restaurant owner availed himself of the background knowledge regarding the disarray created by Angus, the black Scottish Terrier. By declaring all dogs “equal” for the purpose of relevantly causing the disarray, the scope of NORM1 created by the restaurant owner is also including Barnaby—let us suppose, a nice and well-behaved Labrador. The restaurant owner declared all dogs to be “equal”—as in *equal causation* to the consequence of disarray—thus declaring all dogs to be “equally relevant.” In making the case that he should be allowed to enter the restaurant with Barnaby, the well-behaved Labrador, the owner of Barnaby is required to make an additional “allegation of relevance” regarding either himself, his action-token or the circumstance of entering “with Barnaby.”<sup>75</sup>

Most likely the owner would make an allegation of relevance regarding the occasion: Barnaby’s “well-behavedness” should be good enough reason

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73. Lopes, *supra* note 70, at 475.

74. Internal defeasibility is therefore nonsensical. Norms are defeasible to the extent they are necessarily liable to conflict with other norms and potentially not govern the case that instantiates the antecedent. *See id.* at 474.

75. One could try to see it the other way around, with “allegations of irrelevance.” I hope to make clear in the text the reason why “allegations of relevance” is much sounder.

for Barnaby to enter the restaurant along with its owner. Borrowing Alchourrón and Bulygin's concepts once again, whenever (i) there is, at least, one property that, in light of a given standard of relevance *all things considered*, should have been deemed relevant by the normative authority when enacting a given norm and (ii) such property is not foreseen in the antecedent of that norm, it is said that the universe of addressees, action-types, or occasions that correspond to the *hypothesis of relevance* are larger than the universe of either addressees, action-types or occasions that correspond to the *thesis of relevance*.<sup>76</sup>

But here is the gist: Barbaby's "well-behavedness" is most likely not relevant *vis-à-vis* the applicable legal system. Conversely, the hypothesis of relevance does not hold. In arguing for the hypothesis of relevance of Barnaby's "well-behavedness," most likely—though it entirely depends upon the relevant legal system—the owner will not succeed, as he is *prescribing relevance* through an external evaluative judgment. The owner of Barnaby would fail to see the difference in Bentham's partition between expository jurisprudence (*de lege lata*) and censorial jurisprudence (*de lege ferenda*).<sup>77</sup>

The allegation of relevance of Barbaby's "well-behavedness" by its owner is equivalent to the allegation that NORM1 is over-inclusive: it should leave Barnaby, the well-behaved Labrador, out of its scope. But over-inclusiveness may only be argued whenever the norm encompasses some addressees, action-tokens or occasions (whichever applicable) that, on the one hand, do not instantiate its underlying justification—*i.e.*, suppose the principle of not "harming" the peacefulness of the clients—and, on the other, instantiate the antecedent of a norm that assigns the opposite deontic

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76. ALCHOURRÓN AND BULYGIN, *supra* note 40, at 153 ff.

77. Bentham claims that "[a] book of jurisprudence can have but one or the other of two objects: 1. to ascertain what the law is; 2. to ascertain what it ought to be. In the former case it may be styled a book of expository jurisprudence; in the latter, a book of censorial jurisprudence: or, in other words, a book on the art of legislation." See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 293 ff (J.H. Burns & H.L.A. Hart eds., 1996). The distinction between expository jurisprudence and censorial jurisprudence means "crossing a theoretically significant dividing line: between the legal positivist's insistence on doing theory in a morally neutral way and the Natural Law theorist's assertion that moral evaluation is an integral part of proper description and analysis". See Brian Bix, *Natural Law Theory in Dennis Patterson*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 218 (Dennis Patterson ed., Blackwell Publishing, Ltd. 2d ed. 2010).

status ( $F, P$ ).<sup>78/79</sup> Barnaby's owner has no credential over declaring Barnaby "different" because Barnaby was declared "equal" by the legitimate lawmaker.

Let us now look at the case of Cassius, a guide dog for the blind. The owner of Cassius can make a reasonable allegation if he wishes to enter the restaurant with Cassius: (i) the owner is blind; (ii) Cassius is a guide dog, thus the only means for the owner to enter the restaurant. "Persons with good vision" and "blind persons" were declared "equal" by the restaurant norm, as were "guide dogs" and "non-guide dogs." Cassius's owner should not focus on Cassius being well-behaved—though that is usually the case with guide dogs, that is *normatively irrelevant*. Nor should he focus on carving out exceptions on the norm that forbids entry with dogs *tout court*. Exceptions are not carved-out from *inside* the norm, rather from "normative defeaters" that lie *outside* that norm. To make a case, Cassius's owner is required to make an allegation of relevance of the property of him being "blind" and walking with a "guide dog" *vis-à-vis* other norms of the legal system, that is, norms that conflict with the restaurant prohibition. He may do so by claiming that an applicable constitutional norm—if there is one—grants all persons the freedom of movement or foresees specific consumer rights. Such norms do not *explicitly* describe the relevance of "blindness" or "guide dogs" in the antecedent; but they do so *implicitly*. See below:

- (1) The norm (NORM1) that forbids entering the restaurant with dogs has the logical formalization  $\forall x (x(\text{EnterRest}) \wedge x(\text{WithDog}) \Rightarrow F x(\text{EnterRest}))$ , that is, "for all  $x$ , if there is an opportunity to enter the restaurant with dogs, then one ought not to enter restaurants with dogs";

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78. The meaning I ascribe to generic actions is similar—although not identical—to the meaning ascribed by Raz to "highly unspecific acts". See Lopes, *supra* note 70, at 476. Raz claims that, since highly unspecific acts can be carried out by means of a variety of more specific acts on different occasions, the opportunities for performing such acts encompass the opportunities for performing the more specific acts are therefore more general than the specific acts. Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 836–38 (1972).

79. On the contrary, it is said that a norm is "under-inclusive" when (i) certain legal cases are not subsumed to the conditions of the antecedent of a norm (ii) which governs cases similar to the class of cases at hand and (iii) the case at hand, though it does not trigger the norm, instantiates the underlying justification to such norm. In other words, when there is at least one property that, considering a given standard of relevance *all things considered*, should not have been relevant for the legal solution of the case but *indeed is relevant vis-à-vis* the under-inclusive norm, thus excluding its immediate application, it is said that the universe of cases corresponding to the hypothesis of relevance is narrower than the universe of cases corresponding to the thesis of relevance. In normative under-inclusion, the lawmaker introduced too many relevant properties in the antecedent—*i.e.*, too many distinctions and different deontic status for each distinguished property.

- (2) The constitutional norm (NORM2) that grants all consumers the right to access commercial goods has the logical formalization  $\forall x (x(\text{consumers}) \wedge x(\text{AccessingCommercial Goods}) \wedge x(\text{AnyCircunstance}) \Rightarrow P x(\text{AccessingCommercial Goods})$ , that is, “for all x, if x is a consumer and if there is an opportunity to access commercial goods, then one has the permission to access them”;
- (3) The constitutional norm referred to in (ii) grants a “claim-right”, the correlative of which is a directed duty<sup>80</sup>: a duty directed to tradesmen. The constitutional directed duty (NORM2) has the following logical formalization:  $\forall x (x(\text{tradesmen}) \wedge x(\text{GrantingAccessCommercial Goods}) \wedge x(\text{AnyCircunstance}) \Rightarrow O x(\text{GrantAccessCommercial Goods})$ , that is, “for all x, if x is a tradesmen and if there is an opportunity to grant access to commercial goods, then one has the obligation to grant access to them”;
- (4) By specification, one obtains that:
  - a. “restaurant owners” is an instantiation of “tradesmen”;
  - b. “entrance in the restaurant” (NORM1) is an instantiation of “granting access to commercial goods” (NORM2);
  - c. “with dogs” (NORM1) is an instantiation of “in any circumstance” (NORM2);
- (5) One can consistently formulate a technical rule the content of which is “the only means for a blind person to autonomously move about is with the aid of a guide dog”;<sup>81</sup>
- (6) Under the principle of obligation, it is obligatory, under the obligation to x, to perform all actions logically necessary to satisfy all obligations derived from x;<sup>82</sup>
- (7) The obligation to “grant access to commercial goods” entails the obligation to allow for the “entrance to consumers in the restaurant” which, in turn, entails the obligation to allow for the “entrance in the restaurant of blind consumers with guide dogs”;
- (8) One can logically derive from NORM2 a duty directed at restaurant owners to allow for the “entrance in the restaurant of blind consumers with guide dogs”;

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80. See Hillel Steiner, *Directed Duties and Inalienable Rights*, 123 ETHICS 230 (2013).

81. I refer to technical rules in the sense of Von Wright’s technical norms, “concerned with the means to be used for the sake of attaining a certain end.” See VON WRIGHT, *supra* note 52, at 9 ff.

82. Carlos Alchourrón & Eugenio Bulygin, *Fundamentos Pragmáticos para una Lógica de Normas*, in ANÁLISIS LÓGICO Y DERECHO 155, 159 (1991).

(9) NORM2 is a constitutional norm, therefore it prevails over NORM1 ( $N_2 \uparrow N_1$ ).

With the previous paragraphs I intended to show that “descriptive relevance” (as in description of “declared relevance”) need not be explicit in the sense of subject to express linguistic formulation. The generic antecedent of legal principles entails a great deal of relevance: by “declaring” relevant a “generic action-type” in “generic occasions,” the lawmaker is logically declaring relevant *all specific action-tokens of such generic action in any specific circumstance of such generic occasion*.<sup>83</sup> See below:

TABLE II

	Category of relevant addressees	Category of relevant action-types	Category of relevant occasions	Deontic status
Norm 1	Category of “all” (includes “blind consumers”)	Category of entering in the restaurant	Category of “with dogs”	Forbidden (F)
Norm 2	Category of “consumers” (includes “blind consumers”)	Category of “accessing commercial goods” (includes entering in the restaurant)	Category of “any circumstance” (includes with guide dogs)	Permitted (P)

Now, unlike the owner of Barnaby, the owner of Cassius is not “prescribing relevance” from the viewpoint of evaluative judgments over the standard of relevance. He is rather *describing* the “declared relevance” of himself (as being member to a category of equals that are “blind”), the action-type (entering into restaurant) and the occasion (with guide dogs). It could be said that, in making a case through the application of a constitutional norm that grants specific consumer rights to “all” in accessing to commercial goods, the owner of Cassius is arguing for “differentiation” *vis-à-vis* the norm that forbids entering the restaurant with dogs. He would be claiming for a *judgment of difference* by sustaining a partition of the set of objects in two mutually excluding and jointly exhaustive classes: the class of objects different amongst themselves under a given standard of evaluation that is of “autonomous and independent movement.” A partition would be set between, on the one hand, persons with the ability to move about autonomously, without any aid and, on the other, persons who cannot move about without the aid of a guide dog).

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83. For parallel reasoning, see Lopes, *supra* note 70, at 478.

The owner of Barnaby would then be sustaining that a *flawed criterion* was used for categorization in the descriptive component of NORM1 for he should not have been declared “equal,” rather he should have been declared “different.” But “differentiation” is a conclusion. In substance, all the owner of Barnaby is really doing is availing himself of the implicit “normative relevance” of the property of himself (*blind consumer*), his action-token (*entering in the restaurant*), and the circumstance (*with guide dogs*) *vis-à-vis* NORM2, as described above, together with the technical rule “the only means for a blind person to autonomously move about is with the aid of a guide dog.” If that claim holds, that, and that alone, amounts to the “differentiation.” And talk of “differentiation” adds nothing substantial to it.

Relevance was defined above as the relation of a property of a particular with a given standard. But one can ask: “*relevant for what?*” In prescriptive contexts, the relation of a property of a particular with a given standard is *relevant for a deontic status* under a given norm: the deontic status of an action-type performed by a particular in a certain occasion. For instance, occasion “with dogs” and property “blindness” are relevant for both deontic status *F* and *P vis-à-vis*, respectively, NORM1 and NORM2. “Not entering the restaurant” is an action-type irrelevant for both deontic status *F* and *P vis-à-vis*, respectively, NORM1 and NORM2. See below:

TABLE III

	Category of irrelevant addresses	Category of irrelevant action-types	Category of irrelevant occasions	Deontic status
Norm 1	None	Category of “not entering in the restaurant”	Category of “with no dogs”	Forbidden (F)
Norm 2	Category of “non-consumers” (includes “blind Non-consumers”)	Category of “not accessing commercial goods” (includes not entering in the restaurant)	None	Permitted (P)

In turn, one can envisage contributive and sufficient relevance for being “equal” or “different”:



- (1) “blindness” is a *prima facie* contributively irrelevant property for being “different” for deontic status *P vis-à-vis* NORM2;
- (2) “blindness” is a *prima facie* contributively irrelevant property for the purposes of being “equal” for deontic status *F* (i.e., the correlative obligation “O” for restaurant-owners) *vis-à-vis* NORM1;
- (3) “X(blind) entering in the restaurant with a guide dog” is *prima facie* sufficiently irrelevant for being “different” and *prima facie* sufficiently relevant for being “equal” for deontic status *F vis-à-vis* NORM1;
- (4) “X(blind) entering in the restaurant with a guide dog” is *all thing considered* sufficiently relevant for being “equal” and *all thing considered* sufficiently irrelevant for being “different” for deontic status *P vis-à-vis* NORM2—as NORM2 trumps NORM1 ( $N^2 \uparrow_{N1}$ ).<sup>84</sup>

Since NORM 1 and NORM 2 conflict, it seems that the overlap which is a necessary (albeit insufficient) condition for normative conflicts entails that relevance of addressees, action-types and occasions is identical *vis-à-vis* NORM1 and NORM2. Yet there is one slight difference:

- (1) while property of addressee “blind” conjoined with action-type “entering in the restaurant” are sufficiently irrelevant for deontic status *F vis-à-vis* NORM1, “entering in the restaurant” and occasion “with guide dogs” are *conditionally relevant* for deontic status *P vis-à-vis* NORM2;
- (2) this is to say that, changing the viewpoint for the correlative of the constitutional right, that “tradesmen” (specified as “restaurant owners”) have the *conditional duty* or obligation (“O”) directed at “consumers” to grant access to commercial goods (specified as “allowing entrance in the restaurant”) *insofar* such consumers are blind and presupposing the technical rule “the only means for a blind person to autonomously move about is with the aid of a guide dog” holds;
- (3) *A contrario*, action-type “entering in the restaurant” with a “guide dog” for members “non-blind” of the category of addressees

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84. The works of Araszkiewicz, Hage, and Sampaio provide some insightful ideas. See Michał Araszkiewicz, *Analogy, Similarity and Factors*, ICAIL ‘11: PROCEEDINGS OF THE 13TH INTERNATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE AND LAW 101 (2011); Jaap Hage, *The Logic of Analogy in the Law*, 19 ARGUMENTATION 401 (2005); Jorge Silva Sampaio, *Brute Balancing, Proportionality and Meta-Weighing of Reasons*, in PROPORTIONALITY, BALANCING, AND RIGHTS: ROBERT ALEXI’S THEORY OF CONSTITUTIONAL RIGHTS 49 (Jan-Reinard Sieckmann ed., 2021).

“consumers” is *conditionally relevant* for the negation of the duty or obligation (“O”) directed at “consumers” to grant access to commercial goods (specified as “allowing entrance in the restaurant”); the negation of such duty (“-O”) entails a “weak permission” of non-prohibition, addressed at the restaurant owners, to refrain from letting members “non-blind” enter with “guide-dogs.”<sup>85</sup>

See below:

TABLE IV

	Property “blindness” (R)	action type “entering in the restaurant” (ER)	occasion “with guide dogs” (WCD)	BA EIR (no WGD)	BA WGD (no EIR)	EIR A WGD	BAEIR A WGD
Norm 1	Contributively relevant for “equal” for <i>F</i> (irrelevant for “different” for <i>F</i> )	Contributively relevant for “equal” for <i>F</i> (irrelevant for “different” for <i>F</i> )	Contributively relevant for “equal” for <i>F</i> (irrelevant for “different” for <i>F</i> )	Sufficiently relevant for “equal” for <i>P</i> (irrelevant for “different” for <i>F</i> )	irrelevant	Sufficiently relevant for “equal” for <i>F</i> (sufficiently irrelevant for “different” for <i>F</i> )	<i>Prima facie</i> sufficiently relevant for “equal” for <i>F</i> (sufficiently irrelevant for “different” for <i>F</i> )
Norm 2	Contributively relevant for “equal” for <i>P</i> (irrelevant for “different” for <i>P</i> )	Contributively relevant for “equal” for <i>P</i> (irrelevant for “different” for <i>P</i> )	Contributively relevant for “equal” for <i>P</i> (irrelevant for “different” for <i>P</i> )	Sufficiently relevant for “equal” for <i>P</i> (irrelevant for “different” for <i>P</i> )	irrelevant	Sufficiently relevant for “equal” for <i>P</i> (sufficiently irrelevant for “different” for <i>P</i> )  Conditionally relevant for “equal” for correlative “O”	All things considered sufficiently relevant for “equal” for <i>P</i> (sufficiently irrelevant for “different” for <i>P</i> )

85. Whether or not the negation of prohibition entails a permission is one of the most discussed subjects in legal theory. Claiming that such permission is entailed, *see* HANS Kelsen, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW* 84 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 1992) (1934), and, with a slight difference, Kelsen, *supra* note 30, at 245–46. Claiming that it merely amounts to an “undefined deontic status” of non-prohibition, *see* Eugenio Bulygin, *Sobre la Equivalencia Pragmática entre Permiso y no Prohibición*, 33 DOXA 283 (2010). I fully agree with Bulygin here.

The conditional relevance of properties has the consequence of bearers of the directed duty being obligated to disregard any previous declaration of blind persons as “equal” and “differentiate” *vis-à-vis* NORM1. But blind persons are only “differentiated” *vis-à-vis* NORM1 because they were “equated” under NORM2. If restaurant owners are under the obligation prescribed by NORM2 to allow entrance in the restaurant and, furthermore, allowing for the entrance with a “guide dog” is *logically necessary* for that successful state of affairs, then, under the principle of obligation, they are obligated to allow it.

#### 4. Relevance and “Inclusiveness Optimality”

You have noticed that, in the example above, the owner of Cassius made allegations of relevance without prescribing hypothetical relevance of properties to the legal system. He did not argue for an “axiological gap,” complain over an “unfair decision,” or conduct a bad (moral or economic) evaluation over the restaurant prohibition. The hypothesis of conditional relevance of his “blindness” and the application of the technical rule that required him being accompanied by the “guide dog” to enter the restaurant was not external to the legal system.<sup>86</sup> He did not care much for allegations of relevance regarding the metaphysical *spirit of the legal system* or the rhetorical force of “discrimination.” Neither did he wish to *politically* improve the micro-system of norms applicable to him. He was faithful to *Occam’s razor* and simply made allegations of relevance regarding an applicable constitutional norm. In fact, he accepted that he had been declared “equal” under NORM1 with deontic status *F*. And *in lieu* of prescribing relevance and claiming he should have been deemed “different” under NORM1 with deontic status *F*—being additionally *permitted* to enter, which does not logically follow from the negation of the prohibition—in turn he claimed that he, along with his action-token and the circumstances, had been declared “equal” under NORM2 with deontic status *P*. He merely claimed that NORM2 was applicable to his case, that he was “equal” *vis-à-vis* such norm and that NORM2 prevailed and trumped the restaurant prohibition (NORM1). Nothing more.

The owner of Cassius was well aware that, if one wishes to make a case *de lege lata* as opposed to politically improve the law *de lege ferenda*, the standard of relevance that one should allege (*i.e.*, his “blindness”) is necessarily a *legal standard of relevance*. Allegations of relevance of properties to

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86. Differently, on hypothesis of relevance being necessarily external to the legal system under the so-called *opaque model* (*i.e.*, that does not allow for considering the goals, values or reasons underlying legal norms), see ALCHOURRÓN & BULYGIN, *supra* note 40, at 153 ff. Sustaining a *transparent model*, see Jorge L. Rodríguez, *Lagunas Axiológicas y Relevancia Normativa*, 22 DOXA 349, 355 ff. (1999).

solve a legal case are necessarily a *product of a discovery within the law*. Symmetrically, and epistemologically speaking, incomplete knowledge of the legal relevance of properties is only incomplete inasmuch one has incomplete knowledge of the set of norms that composes the law.<sup>87</sup> Taking stock, descriptive relevance of properties should, therefore, be adjusted. On the one hand, it should be divided into *prima facie* descriptive relevance and *all things considered* descriptive relevance; on the other, it should take into account the differentiation between rules (second order reasons or “exclusionary reasons”—for example, reasons that exclude considering *pros* and *cons* and unburden the decision-maker of questioning or even conceiving of the possibility of acting in manner different than that which is prescribed in the rule) and principles (first order reasons for action). In view of the above:

- (1) a property is *prima facie* relevant iff (i) some rule, or microsystem of rules, of the legal system represents such property in the antecedent and (ii) that property ( $x$ ) and its complementary property ( $\neg x$ ) are assigned different deontic status—i.e., if the legal system correlates the existence of such property and its negation with different normative solutions;
- (2) a property is *all things considered* relevant iff (i) though a given property is deemed irrelevant by a single rule (or a microsystem of rules), one concludes, through trumping “exclusionary reasons” and extending of the standard of relevance (the set of relevant norms), that such property is deemed conditionally or unconditionally relevant by other norms, notably by principles (i.e., metanorms that justify rules).<sup>88</sup>

One can see that the result of NORM2 prevailing over NORM1 is equivalent to a normative proposition according to which “*no dogs are allowed in the restaurant* except for guide dogs for the blind.” The carving-out of the exception in NORM1 arises out of the *external normative*

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87. It is purely a matter of *not exhausting the descriptive activity*. Similarly, but with slightly different arguments, see Stuart Hampshire, *Public and Private Morality*, in *PUBLIC AND PRIVATE MORALITY* 23 (Stuart Hampshire et al. eds., 1978); Rodríguez, *supra* note 86, at 355 ff.

88. See RATTI, *supra* note 13, at 67 (although Ratti is focusing on “temporal order” of intellectual operations of identifying the thesis of relevance and the hypothesis of relevance). On metanorms that justify other norms and rules as exclusionary reasons, see RAZ, *supra* note 37, at 187 ff; Alexander, *supra* note 37, at 5–22.

*defeater* that is the joint proposition of the applicability of NORM2 together with the proposition of prevalence (“external application”) of NORM2 over NORM1. From another viewpoint, NORM2 implicitly declares the *conditional relevance of “blindness” of addressees and occasions of “accessing commercial goods”* with the aid of “guide dogs” for deontic status *P*, thus trumping the irrelevance of such properties for deontic status *P vis-à-vis* NORM1. Such a normative proposition is a *refined version* of the two applicable norms:

- (1) NORM1 has the logical formalization  $\forall x (x(\text{EnterRest}) \wedge x(\text{WithDog}) \Rightarrow F x(\text{EnterRest}))$ , that is, “for all *x*, if there is an opportunity to enter the restaurant with dogs, then one ought not to enter restaurants with dogs”;
- (2) NORM2 has the logical formalization  $\forall x (x(\text{consumers}) \wedge x(\text{AccessingCommercialGoods}) \wedge x(\text{AnyCircunstance}) \Rightarrow P x(\text{AccessingCommercialGoods}))$ , that is, “for all *x*, if *x* is a consumer and if there is an opportunity to access commercial goods, then one has the permission to access them”;
- (3) NORM2 prevails over NORM1 ( $N^2 \uparrow N_1$ );
- (4) NORM2 prevailing over NORM1 entails formulating the normative proposition according to which “for all *x*, if there is an opportunity to enter the restaurant with dogs, then one ought not to enter restaurants with dogs, except if *x* is blind and the dog is a guide dog”; this is logically formalized as  $\forall x \text{ iff } x(\neg \text{blind}) \wedge x[\text{WithDog}(\neg \text{WalkingDog})] \wedge x(\text{EnterRest}) \Rightarrow F x(\text{EnterRest})$ ;
- (5) The conditional prohibition above entails, by *a contrario*, normative proposition  $\forall x \text{ iff } x(\text{blind}) \wedge x(\text{WithWalkingDog}) \wedge x(\text{EnterRest}) \Rightarrow P x(\text{EnterRest})$ , which is consistent with  $\forall x (x(\text{consumers}) \wedge x(\text{AccessingCommercialGoods}) \wedge x(\text{AnyCircunstance}) \Rightarrow P x(\text{AccessingCommercialGoods}))$ .

Suppose now that Cassius, the guide dog, was from an extremely dangerous breed of dogs and would most likely endanger the health of clients of the restaurant. To make his case of protecting the clients, the restaurant owner will make allegations of relevance of property “dangerous breed” with regards the occasion of “entering the restaurant.” In doing so, he will claim for the implicit relevance of property “dangerous breed” *vis-à-vis* NORM3, a constitutional norm according to which “health of citizens ought to be protected.”

Again, the owner of the restaurant is arguing for the conditional relevance of property “dangerous breed” *vis-à-vis* the deontic status *F* under NORM3, irrespective of the property “dangerous breed” being deemed unconditionally irrelevant *vis-à-vis* the deontic status *F* under NORM2. Again, the restaurant

owner accepted that the owner of Cassius had been declared “equal” under NORM2 with deontic status *P* and the normative proposition that followed, granting an exception. And *in lieu* of prescribing relevance of property “dangerous breed” and claiming the occasion should have been deemed “different” under NORM2 with deontic status *P* (thus, being *forbidden* to enter), he should claim that such occasion (“dogs of dangerous breed”) had been declared “equal” under NORM3 with deontic status *F*. And that includes “guide dogs of dangerous breed,” for the occasion of “guide dogs” was deemed irrelevant for deontic status *P* under NORM3. The owner of the restaurant would be sustaining that a *flawed criterion* was used for categorization for Cassius, the dangerous guide dog, should not have been declared “equal” under NORM2. Again, in substance, all the restaurant owner is really doing is availing himself of the implicit “normative relevance” of the property of the circumstance (entering the restaurant with “dangerous guide dogs”), together with the technical rule “the only means for protecting health from a dangerous dog is by keeping it away from people.” The restaurant owner is thus formulating an even more refined normative proposition:

- (1) normative proposition according to which “for all *x*, if there is an opportunity to enter the restaurant with dogs, then one ought not to enter restaurants with dogs, except if *x* is blind and the dog is a guide dog” is logically formalized as  $\forall x \text{ iff } x(\neg\text{blind}) \wedge x[\text{WithDog}(\neg\text{WalkingDog})] \wedge x(\text{EnterRest}) \Rightarrow F x(\text{EnterRest})$ ; this normative proposition follows from NORM2 prevailing over NORM1 ( $N^2 \uparrow_{N1}$ );
- (2) NORM3 is logically formalized as  $\forall x x(\text{all}) \wedge x(\text{EndangeringHealth}) \wedge x(\text{AnyCircunstance}) \Rightarrow F x(\text{EndangeringHealth})$ , that is, “for all *x*, if there is an opportunity to endanger health, then one is forbidden to do so”;
- (3) NORM2 and NORM3 have the same hierarchy and conflict; however, a rational balancing between them should determine that NORM3 is circumstantially weightier than NORM2 ( $N^3 \uparrow_{N2}$ );
- (4) NORM3 prevailing over NORM2 entails formulating the normative proposition according to which “for all *x*, if *x* is blind and there is an opportunity to enter the restaurant with guide dogs, then *x* is permitted to enter restaurants with guide dogs, except if the guide dog is from a dangerous breed”; this is logically formalized as  $\forall x \text{ iff } x(\text{blind}) \wedge x[\text{WithWalkingDog}(\neg\text{DangerousBreed})] \wedge x(\text{EnterRest}) \Rightarrow P x(\text{EnterRest})$ ;

- (5) The conditional permission above entails, by *a contrario*, normative proposition  $\forall x \text{ iff } x(\text{blind}) \wedge x[\text{WithWalkingDog}(\text{DangerousBreed})] \wedge x(\text{EnterRest}) \Rightarrow F x(\text{EnterRest})$ , which is consistent with  $\forall x x(\text{all}) \wedge x(\text{EndangeringHealth}) \wedge x(\text{AnyCircumstance}) \Rightarrow F x(\text{EndangeringHealth})$ .

The owner of Cassius could still counter-argue with muzzling Cassius and introducing further exceptions. I shall however refrain from further exemplifying the progressive refinement of normative propositions as the idea has been sufficiently expounded. It suffices to say that the refinement of norm propositions with aggregated exceptions is equivalent to the progressive construction of a “complete normative proposition.” In formulating the latter, and in addition to the relevance declared by the applicable norm at hand, relevance is bestowed upon all properties of a given legal case that instantiate hypothetical properties explicitly or implicitly represented in a certain legal system.<sup>89</sup>

Naturally, the transformation of such a “complete normative propositions” into a “complete norm”—an “all-things-considered norm” and “all-norms-considered norm”—is purely chimerical. Defeasibility precludes that any norm can solely declare in its antecedent “sufficient relevance” for its consequent<sup>90</sup> Norms are deemed necessarily to be suboptimal, therefore lawmaking necessarily presupposes the implicit insertion of a *clause of “that’s it”* relevance-wise.<sup>91</sup>

In fact, it is either the case that norms are over-inclusive by differentiating too little or under-inclusive by differentiating too much. In other words, it is (i) either that norms prescribe  $x$  and lack the ascription of relevance to properties that are declared relevant by other norms which prescribe the negation of  $x$  (ii) or that norms prescribe  $x$  and exceed in ascribing relevance to properties that are deemed irrelevant by other norms of the legal system that prescribe the negation of  $x$ .

Does this mean that the issue is theoretical and addressing it is simply idle? Quite the contrary. The conclusions on completeness of normative

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89. Properties of action-performer, action-token, and circumstances.

90. On the correlation of cases with maximal solutions, see ALCHOURRÓN & BULYGIN, *supra* note 40, at 79. Claiming that for any norm  $N$ ,  $N$  is complete iff its antecedent includes all the conditions the instantiation of which the consequent depends upon, see Luis Duarte D’Almeida, *Norme Giuridiche Complete*, 2009 ANALISI E DIRITTO 197, 212. On the foundations of the skepticism regarding the possibility of complete normative propositions (the cause of which is “defeasibility”), see Sartor, *supra* note 69, at 119, 143–44; BAYÓN, *supra* note 69, at 338.

91. On suboptimality of norms, see SCHAUER, *supra* note 16, at 100–02. On the “that’s it” clause in moral reasoning, see Garrett Cullity & Richard Holton, *Particularism and Moral Theory: Principles and Particularisms*, 76 PROC. OF THE ARISTOTELIAN SOC’Y (SUPP. VOLS.) 169, 199–209 (2002).

propositions prove fruitful for the purposes of addressing “equality” and “difference” in both expository legal reasoning and lawmaking.

Firstly, it shows that complete normative proposition should not be constructed as including prescription of relevance to all properties of the case according to external moral or economic evaluation. Since the standard of relevance is a “constructed” and relevance is “declared” by lawmakers, a complete normative proposition is rather that which embeds declarations of relevance by accounting for the *maximal extension of the applicable standard of relevance*. In a nutshell, it entails co-extensivity between the relevance declared in Norm<sub>x</sub> and the relevance declared in the maximal account of the applicable standard of relevance. The complete normative proposition departs from the applicable norm at hand and further “differentiates” by inserting exceptions of “equals” represented in the antecedent of all norms prevailing over the former.

Secondly, the chimerical nature of “complete norms” provides a realistic tone to “narrow tailoring” in lawmaking, specifically in the design of categories. It has been stated that “[n]arrow tailoring demands that the fit between the government’s action and its asserted purpose be ‘as perfect as practicable’ . . . [it] means that legislation must be neither overinclusive nor underinclusive.”<sup>92</sup> But suppression of overinclusiveness and underinclusiveness is completely unrealistic<sup>93</sup>: it suffices to show how dreadfully long the norm statement at the restaurant would have to be to relevantly account for guide dogs, dangerous breeds, muzzling, defective materials, etc. But more: aiming at the suppression of overinclusiveness is wholly focused on the “guidance value” provided by legal norms. This, however, is a partial assessment of the “lawmaker’s challenge” as it leaves out many factors that point towards a different outcome, notably pursuing the “private ordering value” and the “power allocation value” in lawmaking.<sup>94</sup>

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92. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 360–61 (2006).

93. For the sake of simplicity, I shall from now on refer exclusively to overinclusiveness as, from a logical standpoint, the underinclusiveness of a permissive norm is equivalent to the overinclusiveness of a prohibitive norm. See Jorge L. Rodríguez, *Against Defeasibility of Rules*, in THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY 89, 93–94 (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds., 2012).

94. On these concepts, see Timothy Endicott, *The Value of Vagueness*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 14, 28 (Andrei Marmor & Scott Soames eds., 2011). On the issue of optimal specificity, although with a different take on the subject, see Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision*



Thirdly, I intend to show below that “inclusiveness optimality” depends upon requirements of suitability and necessity in the formulation of a RuleCatg that simply do not provide for one right answer. Getting back to Hart, *lawmakers are men, not gods*, and there is no way around relative ignorance of fact and relative indeterminacy of aim in lawmaking.<sup>95</sup>

Let me first illustrate this point through zoology. Suppose one is designing the category of mammals around the prototype “humans”. If a given suitable standard of relevance assigns relevance to a) mammary glands, b) a neocortex and c) fur or hair, then “bats” are included in the category. But now “mammals” (at least one of them) can fly. At first sight, this would not be a problem as the “tunnel vision” of “declared equality” made the dissimilarity between “bats” and other members of category “mammals”—that of “flying”—irrelevant. But the addition of “bats” to the category entails that one similarity fact can be asserted between a member of the category of “mammals” and, say, a pterodactyl. You see the risk here.

Designing categories entails risks because the addition of members to a category has implications: on the one hand, the increase of internal dissimilarities between members and, on the other, similarity facts being assertable between members and non-members of the category. Exemplifying the latter: norms that govern how to treat “mammals” but do not assign relevance to “flying” may prove unsuitable and over-inclusive *vis-à-vis* “bats”. And norms that govern “flying creatures” and assign relevance to “mammary glands” may prove to be under-inclusive *vis-à-vis* “pterodactyls”. Naturally, lawmaking is not zoology: the *aim* of categorizing in prescriptive contexts is different. Unlike zoology, in which “relevant properties” for categorizing are relatively stable, lawmaking is prone to changes, even disruptions, in shifting “relevant properties”: lawmaking entails frequently changing the RulesCatg.<sup>96</sup> However different the goal of categorization in prescriptive contexts, it appears to also be the case that the *advantage* in inserting “bats” in the category of mammals should prove to be higher to the *disadvantage* under a given criterion. That should happen with any suitable criteria for categorization.

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*in the Law*, 82 CAL. L. REV. 541 (1994); Francesco Parisi & Vincy Fon, *Optimal Specificity in Law*, in THE ECONOMICS OF LAWMAKING 9 (2009). On the “lawmaker’s challenge”, see Hrafn Asgeirsson, *Vagueness, Comparative Value, and the “Lawmakers’ Challenge”*, 98 ASRP: ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE [ARCHIVE FOR PHIL. OF L. & SOC. PHIL.] 299 (2012).

95. See HART, *supra* note 46, at 128.

96. See, e.g., the same-sex marriage example.

## C. The Content of “Prescriptive Equality”

The previous chapters made it almost clear that the vast majority of problems related with categorization and the institution of “equals” and “differents”, as well as contributive and sufficient relevance or irrelevance for a deontic status has nothing to do with “prescriptive equality” *per se*. Equality as a prescriptive concept has been ill-constructed inasmuch, as stated above, it has been affirmed that it is simultaneously “*the concept through which it is prescribed, or constructed, a comparative relation between two or more objects, two or more actions and two or more circumstances*”<sup>97</sup> and “*the prescription to treat equals equally and differents differently.*”<sup>98</sup> And the overall problem, I suppose, is related with conceiving equality in prescriptive concepts as an overarching idea rather than focusing of the properties of the “norm of equality”, *i.e.*, the norm content or that which is prescribed.<sup>98</sup> One should therefore deploy an old analytical truism: “*one thing is one thing, and another is another.*”<sup>99</sup>

The careful analysis of the invariant components of any norm—“prescriptive equality” alike—shows otherwise. First, it seems obvious that “comparing” and “treating” are two different actions. “Comparing” is a specific action which entails examining or looking for similarities and dissimilarities between two or more things. To a certain extent, it entails measuring similarities between *a* and *b* and asserting (dis)similarity facts. “Treating,” on the other hand, is a generic action—or, if you will, a highly unspecific action in Raz’s conceptual apparatus—which consists in behaving towards someone or dealing with something in a particular way.<sup>100</sup> That alone suffices to affirm that these two behaviors cannot be simultaneously governed by one and the same norm, insofar sound individuation criteria entails that *one norm governs one action-type*.<sup>101</sup> I will try to illustrate my point with the aid of VON WRIGHT’s *implicit conditions* for the exercise of the norm-content.

VON WRIGHT drew his own division of categorical and hypothetical norms from Kant’s theory of imperatives. He claimed that the condition of application of elementary norms is the condition which must be satisfied

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97. Cf. Comanducci, *supra* note 7, at 34, 36.

98. See *id.* (Highlighting “equality” as an “idea” in prescriptive contexts.)

99. See ECHAVE, URQUIJO & GUIBOURG, *supra* note 22, at 83–85.

100. I am using the definitions in the Cambridge Dictionary, <https://dictionary.cambridge.org>. As for generic and unspecific actions, see Lopes, *supra* note 70, at 476; Raz, *supra* note 78, at 836–38.

101. RAZ, *supra* note 45, at 70–92.

if there is to be an opportunity (Opp) for doing the thing which is the content of a given norm (i.e., the permitted or obligatory action). This is a matter of logical implication. There cannot be a (valid) command obligating  $\emptyset$  if, under circumstances  $x$ , there is no Opp to  $\emptyset$ ing: *impossibilium est nulla obligatio*.<sup>102</sup> Norms regulate “contingent behavior”, not that behavior which is impossible or necessary.<sup>103</sup>

Norm statement<sub>1</sub> “*one ought to close the door*” may didactically be deemed “categorical”, even though the logically dependent condition of the consequent is implied (i.e., the door being open and not closing *by itself*): the condition of the norm is, in this case, as von Wright claims, “given” together with the norm-content (VON WRIGHT 1963, 74). The norm statement may also (didactically) be deemed “universal” although it encompasses conditions of application that are contrary to universality of application: no norm is universally applicable. Conditions of the norm-antecedent have a *fit* and are necessarily “connected” (functionalized) to the consequent. Differently, norm statement<sub>2</sub> “*one ought to close the door when it rains*” may didactically be deemed “hypothetical” since the norm entails, in addition to its logically dependent condition (i.e., the door being open and not closing *by itself*), a logically independent condition of the consequent, i.e., the state of affairs “raining”. The norm may (didactically) be deemed “occasional” simply because the antecedent encompasses such conditions which logically independent from the consequent.

If one accepts von Wright’s claim—and I do believe there are no reasons to do otherwise—the opportunities to “treat *a* and *b* equally” and the opportunities to “compare *a* and *b*” are different and, although the former presupposes the latter, logically independent. For instance, “comparing” requires two objects, instruments of measurement and probably—although this is not consensual—commensurability. On the other hand, “treating equals equally” requires a previous “declaration” of equality, that is, a “category” which was instituted pursuant to a RuleCatg. In fact, the “declaration” of equality for class-creation does indeed presuppose comparison to the extent that any declaration of “equality” entails selecting “relevant properties” out of asserted similarity facts between two or more objects. But the fact that “treating equals equally” presupposes a previous comparison deemed necessary for “class-creation” does not amount to say that it is the same

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102. VON WRIGHT, *supra* note 52, at 73 ff.

103. Stating that the content of norms cannot be neither alethically necessary (“die Menschen sollen sterben”) nor factually impossible (“die Menschen sollen nicht sterben”), see HANS Kelsen & OLIVIER BEAUD, THÉORIE GÉNÉRALE DES NORMES [GENERAL THEORY OF NORMS] 43–45 (Fabrice Malkani & Olivier Beaud trans., Presses Universitaires de France 1996) (1979); CARLOS S. NINO, INTRODUCCIÓN AL ANÁLISIS DEL DERECHO 291 (2d rev. ed. 2003).

action-type. Quite the contrary. Just like paying income tax presupposes collecting a salary, these are two different actions. In fact, “comparing”, “declaring equality” and “treating equals equally” are three autonomous and logically independent actions.

The logical independency of actions “comparing,” “declaring equality,” and “treating equals equally” is made clear by acknowledging the following facts. The action of “comparing” does not require “declaring equality” among terms of comparison, neither does it require “treating equals equally” let alone “treating differents differently”; it is perfectly possible that one compares *a* and *b* and subsequently does not “declare” equality between *a* and *b* (nor the “difference” between them); it is also perfectly possible that one compares *a* and *b* and subsequently, pursuant to a declaration of equality, treats *a* and *b* differently—or, pursuant to a declaration of difference, treats *a* and *b* equally (unlawfully, that is). *A fortiori*, the action of “declaring equality” *by itself* does not require “treating equals equally and differents differently”. Lastly, it is not required that the addressee of the command to “treat equals equally” or “treat differents differently” performed a previous comparison or even declared “equality” or “difference.” In fact, that is hardly the case; the restaurant owner in the example above was required to “treat equals equally and differents differently” but, as stated, he had no credential over “declaring” equals and differents: he merely abided by the applicable norms of the legal system.

It seems paradoxical to claim, as Comanducci does, that “prescriptive equality” is “*the concept through which it is prescribed, or constructed, a comparative relation between two or more objects, two or more actions and two or more circumstances.*” “Prescriptive equality” presupposes “declared equality” and the latter presupposes assertion of similarity facts which, in turn, presupposes comparison (two or more objects, instruments of measurement, and so on). As Gianformaggio claims, “*in order to prescriptively equate things, the legislator first equates them descriptively.*”<sup>104</sup> To formulate a category, for the purposes of the descriptive component of the norm of equality, is to “declare equality”—that is, to declare that *a* and *b* are “treated” by law in the same fashion.<sup>105</sup> How could it be that “prescriptive equality” governs actions—that of “comparing” and “categorizing”—that it itself presupposes? It is illogical for when similarity facts are being asserted through comparison, equality has not yet been declared. This means

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104. Gianformaggio, *supra* note 6, at 271

105. Guastini, *supra* note 23, at 196.

that a category as not been instituted and the requirements for “prescriptive equality” have not been met for there is no “equal” nor “different”, only “similar” and “dissimilar” or “identical” and “non-identical.” How could the norm of equality be triggered then? In logical terms, it is inconsistent and ill-suited to claim that “prescriptive equality” governs an action that is a necessary condition for declared equality which, in turn, is a sufficient condition for “prescriptive equality.” That, and that alone, should suffice to remove from the content of prescriptive equality the action of “comparing” or “categorizing.”

Furthermore, the fact that the descriptive component of the norm of equality represents the product of an action (a “category” *qua* product of the “action of categorization”) does not entail that such action, the product of which is represented in the antecedent, is governed by such norm. Quite the contrary. Let me exemplify this with a different norm:

- (1) The norm of equality is uttered through statement “treat equals equally,” reconstructed as “For all  $x$ , if there is an opportunity to [treat equally], then one ought to [treat equally]”. I shall use (PrescEqu) with the meaning of “treating equal”. The norm statement is logically described as  $\forall x (Opp \text{ PrescEqu} \Rightarrow x(\text{PrescEqu}))$ ; this is the same as  $\forall x (x(\text{DescEqu}) \Rightarrow x(\text{PrescEqu}))$  because “descriptive equality” is a precondition for “prescriptive equality”.  $(\text{DescEqu}) = (Opp \text{ PrescEqu})$ .
- (2) For the sake of the example, suppose a norm statement according to which “If taxi drivers go on strike, then unions ought to declare it”, clarified as “For all  $x$  (unions), if there is an opportunity to [declare strike] and taxi drivers go on strike, then  $x$  (unions) ought to [declare strike]”. This norm is “hypothetical” because the condition [taxi drivers going on strike] is logically independent from [unions declaring strike]. The norm statement is logically described as  $\forall x_{(\text{unions})} (x(Opp \text{ DeclStrike}) \wedge (\text{TaxiStrike}) \Rightarrow x(\text{DeclStrike}))$ .
- (3) The action governed by the norm statement in (iii) is “*declaring* (strike) and the addressees are “unions”. Taxi drivers going on strike is simply the occasion or states of affairs foreseen as a condition in the antecedent.
- (4) “Declaring strike” and “going on strike” are two different actions but the norm at stake only governs one, that of “declaring”. The deontic status of “going on strike” should be found elsewhere, most likely in a constitutional norm that foresees the freedom of employees to go on strike unconditionally or under certain conditions.

I believe this suffices to clarify that “prescriptive equality” neither governs the action of “comparing” nor that of “categorizing,” rather it presupposes both. Now, I have claimed above that the consequent of the “norm of equality” demands only to *treat equals equally* and I have claimed that “treating” is a generic action.<sup>106</sup> One can treat persons, actions, or circumstances in many different ways. The norm of equality “narrows” the scope of opportunities foreseen in the antecedent in such a way that, when treating persons, actions, or circumstances, one *ought* to treat them *equally*. The opportunity to treat *equally* merely presupposes a previous establishment or institution of equality between a group of persons, actions, or circumstances, precisely that of categorization (*i.e.*, the *declaration* of the so-called “descriptive equality”).<sup>107</sup> The same happens for the opportunity to treat *differently*. See below:

- (1) The norm of equality is uttered through statement “obligation to treat equals equally”, reconstructed as “For all  $x$ , if there is an opportunity to [treat equally], then one ought to [treat equally]”. (PrescEqu) = “treating equal”. The norm statement is logically described as  $\forall x \ x(Opp \text{ PrescEqu}) \Rightarrow O \ x(\text{PrescEqu})$ , the same as  $\forall x \ x(\text{DescEqu}) \Rightarrow O \ x(\text{PrescEqu})$  because “descriptive equality” is a precondition for “prescriptive equality”. (DescEqu) = (*Opp PrescEqu*); “O” = obligation.
- (2) By adding the strict biconditional in the antecedent we logically obtain the negation in the consequent; one can only obtain *a contrario* through strict biconditionals:  $\forall x \ \text{iff } x(\text{DescEqu}) \Rightarrow O \ x(\text{PrescEqu})$  or  $\forall x \ x(\text{DescEqu}) \Leftrightarrow x(\text{PrescEqu})$ . This entails that a negation of “descriptive equality” in the antecedent (*i.e.*, a “descriptive difference” or “declaration” of difference) normatively implies the negation of “prescriptive equality” in the consequent:  
 P1:  $\forall x \ \text{iff } x(\text{DescEqu}) \Rightarrow O \ x(\text{PrescEqu})$  or  $x(\text{DescEqu}) \Leftrightarrow x(\text{PrescEqu})$   
 P2:  $x(\neg \text{DescEqu})$

106. The norm of equality is therefore a “principle”. See Lopes, *supra* note 70, at 479 ff.

107. Prescriptive equality does not function absent previous categorization. Categorization, in turn, presupposes asserting a similarity fact between at least two particulars and the selection of a RuleCatg that sets out the criterion for the relevant *property*, but that RuleCatg which prescribes “relevance” may only result from a given legal system<sub>x</sub>.

- C:  $\neg O x(\text{PrescEqu})$ ;
- (3) The negation of descriptive equality does not amount to a prescription of difference, as seen in (ii). It merely amounts to the non-obligation to treat equally, that is a *weak permission* to treat differently which, in turn, amounts to an “undefined deontic status;”<sup>108</sup>
  - (4) The prescription of equality and difference arises from *positively constructed* norms with strict biconditionals:
    - (a) “For all  $x$ , if there is an opportunity to [treat equally], then one ought to [treat equally]”, logically described as  $\forall x \text{ iff } x(\text{DescEqu}) \Rightarrow O x(\text{PrescEqu})$ ; *a contrario*,  $\forall x x(\neg \text{DescEqu}) \Rightarrow \neg O x(\text{PrescEqu})$ ;
    - (b) “For all  $x$ , if there is an opportunity to [treat differently], then one ought to [treat differently]”, logically described as  $\forall x \text{ iff } x(\text{DescDiff}) \Rightarrow O x(\text{PrescDiff})$ ; *a contrario*,  $\forall x x(\neg \text{DescDiff}) \Rightarrow \neg O x(\text{PrescDiff})$ ;

With the latter I intended to show that “prescriptive equality” prescribes nothing more and nothing less than to treat equals equally.<sup>109</sup> Additionally, I intended to show that “prescriptive difference” does not logically follow from “prescriptive equality” *a contrario sensu*. Both norms presuppose a previous declaration of “equality” or “difference,” as stated above, but the negation of the antecedent of the norm of equality with a strict biconditional only amounts to a permission to differentiate. However, the negation of the antecedent of “prescriptive equality” is equivalent to the antecedent of “prescriptive difference” and the negation of the antecedent of “prescriptive difference” is equivalent to the negation of the antecedent of “prescriptive equality.”

“Prescriptive equality” and “prescriptive difference” are logically independent to the extent it is possible that a given legal system<sub>x</sub> (i) includes a prescription to treat equals equally and does not include a prescription to treat differents differently, (ii) includes a prescription to treat differents differently and does not include a prescription to treat equals equally, (iii) includes both a prescription to treat equals equally and a prescription to treat differents differently or (iv) includes neither. In any case, “prescriptive equality” and “prescriptive difference” are two independent norms. The fact that they are customarily accepted in most legal systems does not make them other than “contingent” to enactment. This is one more reason to nurture them as opposed to taking them for granted.

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108. See *supra* note 86 and accompanying text.

109. Guastini, *supra* note 23, at 194.

The single precondition of treating equals equally and differenters differently is that of a previous categorization—which, in turn, requires previous assertion of similarity facts and selection of a RuleCatg. Not rarely is that categorization a constitutional one. In constitutions throughout the world, it is frequent to encounter a provision of the type “all citizens *are* ‘equal before the law.’”<sup>110</sup> Controversies arise around the precise meaning and illocutionary force of *being* equal before the law.

Many scholars assign the meaning of “prescriptive equality” to constitutional provisions such as the latter. I do not wish to enter the discussion regarding whether a legal statement can purport to have simultaneous constitutive and prescriptive (regulative) content. I should say, however, that nothing seems to prevent it to the extent one can assign two different meanings (*e.g.*, two different norms) to the statement, one which is constitutive and one which is regulative. Evidently that does not mean that the constitutive statement makes it so that citizens *are* equal. That statement alone is nonsensical as equality cannot be asserted, rather it is *ex definitione* instituted, established or, better yet, “declared.”

For the present purposes, it is relevant to highlight that such a constitutional provision entails the establishment of equality among citizens. It therefore amounts to a declaration of a category comprising “members” and “non-members”, the RuleCatg of which is “citizenship.”<sup>111</sup> In this sense, such constitutional provisions express constitutive rules according to which “citizens” *count as having the status* of “equals” for the purposes of law-creation and law-application.<sup>112</sup> The thesis of relevance put forward is “whether *x* is a citizen” and the thesis of irrelevance includes the suppression of all dissimilarities between citizens.<sup>113</sup> Since “citizenship” is a *status*, the *status* of “equal” is a *status* grounded on a *status*.

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110. Among many, see CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], art. 13, no. 1, English translation available at <http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf> [<https://perma.cc/77LZ-YR66>].

111. Naturally, I do not wish to enter the philosophical discussion of “dignity” and “equal dignity” here—it would largely transcend the scope of this essay. See JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (2012); *THE ROLE OF LEGAL ARGUMENTATION AND HUMAN DIGNITY IN CONSTITUTIONAL COURTS: PROCEEDINGS OF THE SPECIAL WORKSHOPS HELD AT THE 28TH WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION FOR PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY IN LISBON, 2017* (Miguel Nogueira de Brito, Rachel Herdy, Giovanni Damele, Pedro Moniz Lopes & Jorge Silva Sampaio eds. 2019).

112. On this “status function” of the rule, see JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 46 ff. (1995); Hindriks, *supra* note 35, at 200 ff.

113. The category “citizens” is usually reconstructed by other constitutional norms, notably by extension or restriction. This happens, for instance, with constitutional provisions



Now, some claim it would be absurd to impose upon all individuals exactly the same obligations and confer the same duties without any distinction.<sup>114</sup> Naturally it is highly undesirable for any reasonable person, but “absurd” is perhaps too strong of a word because the latter is not logically self-contradictory. It would, however, be contradictory with constitutional provisions that command “promotion of equality.” This requires a clarification.

The constitutional provisions that command “promotion of equality” have little to do with prescriptive equality. In this case—in which the addressees are mainly, albeit not exclusively, the lawmaking bodies—the constitutional norm commands that “differences” ought to be declared in the legislation in such a way that subsequent prescriptions of different treatment (for example, according to “prescriptive difference”) are “suitable means” for obtaining factual equality.

These constitutional provisions are norms that govern the action of “declaring” equalities and differences, precisely that which is performed by legislation. Declaration of “differences” in turn, trumps the overarching declaration of all citizens *being* “equal before the law.” But, again, this only means that “differences” should be declared in the legislation so that “equality” should be obtained. It should clarify that the latter concept of equality is being used as “similarity” as pure factual equality does not exist. Similarity is a goal in the sense of obtaining the removal of factual (and not legal) barriers or dissimilarities in the *real world*.

“Prescriptive equality” is not the main point when it comes to constitutional provisions that command “promotion of equality.” It is “prescriptive difference” that works as the command to treat differently those which have already been previously declared “different,” even if they were declared “different” to for the purpose of *shaping the world* and removing dissimilarities. This is so under a technical rule with the following content: “if one aims at removing dissimilarities in the real world one ought to introduce differentiated treatment before the law.” Naturally, the degree of difference is fine-tuned according to necessity criteria.<sup>115</sup>

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that extend the category to “foreign citizens.” See CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], art. 15, no. 1, English translation available at <http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf> [<https://perma.cc/77LZ-YR66>].

114. See, quoting Kelsen, Guastini, *supra* note 23, at 194; Gianformaggio, *supra* note 6, at 271.

115. See Giovanni Sartor, *Doing Justice to Rights and Values: Teleological Reasoning and Proportionality*, 18 A.I. & LAW 175, 198 ff. (2010); David Duarte, *From Constitutional Discretion to the Positivist Weight Formula*, in PROPORTIONALITY, BALANCING, AND RIGHTS: ROBERT ALEXY’S THEORY OF CONSTITUTIONAL RIGHTS 11, 29 ff. (Jan R. Sieckman ed., 2021).

#### IV. THE TASK AHEAD: PROPORTIONALITY IN “DECLARATIONS” OF EQUALITY AND DIFFERENCE

My previous remarks amount to saying that all prominent discussions around the several concepts of “prescriptive equality” are, in fact, discussions regarding the suitability and necessity in the formation of categories, such as proposals for the “declarations” of equality and difference. They are placed at the level of the antecedent of “prescriptive equality” and “prescriptive difference,” not at the consequent. For instance, if a liberal and a feminist discuss around the concept of equality, they will most likely be discussing *de lege ferenda* the institution or declaration of “equalities” and “differences,” not the prescriptive component of the norms. The liberal will claim that categories should be built by abiding to RuleCatg<sub>x</sub> and the feminist will claim that categories should be built by abiding to RuleCatg<sub>y</sub>. The feminist will scrutinize RuleCatg<sub>x</sub> and claim it is ill-suited for it will provide for over and under-inclusive categories and the liberal will do the exact same thing regarding RuleCatg<sub>y</sub>. Both will be arguing for and against certain aims, purposes, and criteria. All philosophical arguments exchanged will be strictly focused on the suitability of categorization, and categories will correspond to the so-called the “descriptive” component of the norm of equality.

Speculation on how to epistemologically establish reliable methods, tests, or criteria for categorization has been going on since the time of Aristotle.<sup>116</sup> But, in legal speech, the formulation of theses of relevance and theses of irrelevance in categorization should be bound within a specific *fit* (*i.e.*, a means-end relation) between the categorization itself (a means) and the aim (end) to be pursued with the categorization. Holyoak sustains that, in cognitive science, “analogies are used to achieve the goals of the reasoner (. . .)” and “mapping is guided not only by relational structure

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116. Cumpa, *supra* note 24, at 3. For theories of categorization, see Mark Turner, *Categories and Analogies*, in *ANALOGICAL REASONING: PERSPECTIVES OF ARTIFICIAL INTELLIGENCE, COGNITIVE SCIENCE, AND PHILOSOPHY* 3, 6 ff. (David H. Helman ed., 1988).

and element similarity but also by the goals of the analogist.”<sup>117/118</sup> In establishing the “declared equality” or the “declared difference,” categorization has goals so it will draw from the “contextual relevance” given by those goals: generally, they are constitutional goals.<sup>119</sup> Schauer stresses that one generalizes in a certain direction, and one does so with a given purpose.<sup>120</sup> Equality depends on the “*intentions of the speaker*”—that is, the lawmaker.<sup>121</sup>

Building a model for assessing the suitability and necessity for categorization is a complicated task since such goals are contingent. But, contingent as the ends may be, I believe “inclusive optimality” is an invariant to be procured. And I believe that requirements of suitability and necessity play a large role in it.

Firstly, suitability is of the utmost importance in lawmaking since it requires that the *means* (i.e., categorization) probabilistically increases the chances of attaining a certain *end*. In this sense, “declarations of equality” and “declarations of difference” should have, prognostically speaking, a high degree of causal relevance in the definition of a “determination schema”:

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117. Keith J. Holyoak, *Analogy and Relational Reasoning*, in THE OXFORD HANDBOOK OF THINKING AND REASONING 234, 239, 247 (Keith J. Holyoak & Robert G. Morrison eds., 2012). In 1990, Thagard, Holyoak, Nelson, and Gochfeld claimed that “problem solving is not the only purpose of analogy. For example, analogies are often used in explanations, when we use a source analog to provide understanding of a target phenomenon. Sometimes the source generates understanding without much modification, but in other cases the source is used to form new explanatory hypotheses, a process that Thagard [60] calls *analogical abduction*. Analogies can be used, not only to form hypotheses, but also to help evaluate them [61]. Analogies are often used in political, historical, and legal arguments, functioning to convince someone that a particular conclusion is warranted. For example, arguments that Nicaragua is in danger of becoming another Cuba are used to support US intervention, while arguments that it is in danger of becoming another Viet Nam are used to support a hands-off policy. Finally, literary analogies can have an evocative function, calling forth relevant emotional responses to past events or situations with established emotional content.” Paul Thagard, Keith J. Holyoak, Greg Nelson & David Gochfeld, *Analog Retrieval by Constraint Satisfaction*, 46 A.I. 259, 260 (1990).

118. Duarte claims that “analogy is goal-oriented: no choice among comparison factors ( . . . ) can be carried out except in view of some purpose.” David Duarte, *Analogy and Balancing: The Partial Reducibility Thesis and Its Problems*, in ANALOGY AND EXEMPLARY REASONING IN LEGAL DISCOURSE 87, 98 (Hendrik Kapein & Bastiaan van der Velden eds., 2018).

119. See Gentner, *supra* note 65, at 220. Seger and Peterson claim that, in psychology and neuroscience, the functions of categorization go well beyond mere grouping: “one important reason to learn categories is that they provide a basis for inference: knowing that an item belongs to a category allows one to infer many additional characteristics about the item. Another is that categories have goals.” Carol A. Seger & Erik J. Peterson, *Categorization = Decision Making + Generalization*, 37 NEUROSCI. & BIOBEHAV. REVS. 1187, 1189 (2013).

120. SCHAUER, *supra* note 16, at 21.

121. Gianformaggio, *supra* note 6, at 261.

*F* is relevant to determining *G* iff *F* is a necessary part of some determinant of *G*.<sup>122</sup> For example:

- (1) *descriptively*: “species are part of the determinant of whether or not an animal can fly”;<sup>123</sup>
- (2) *prescriptively*: “WithDog” is part of the determinant of whether or not a person can enter in a restaurant.

Secondly, I believe necessity also plays a role here. Since categorization is class-creation, requirements of necessity demand that the expansion of categories by decreasing relevant properties or the restriction of categories by increasing relevant properties is subject to a “cost-benefit” analysis, ultimately connected with “exclusionary reasons” and models of unburdening decisions with balancing *pros* and *cons*.

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122. See Davies, *supra* note 61, at 244. The works of Todd R. Davies are illuminating.

123. See *id.* at 239.

