

Normativity in Language and Law^{*}

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Abstract

This paper develops an account of the meaning and use of various types of legal claims, and uses this account to inform debates about the nature and normativity of law. The account draws on a more general framework for implementing a contextualist semantics and pragmatics, called *Discourse Contextualism* (SILK 2014b). The aim of Discourse Contextualism is to derive the apparent normativity of claims of law from a particular contextualist interpretation of a standard semantics for modals, along with general principles of interpretation and conversation. Though the semantics is descriptivist, I argue that it avoids Dworkin's influential criticism of so-called "semantic theories of law," and elucidates the nature of "theoretical disagreements" about the criteria of legal validity. The account sheds light on the important social, interpersonal role of normative uses of language in legal discourse. It also gives precise expression to Hart's and Raz's intuitive distinctions among types of legal claims (internal/external, committed/detached), while giving them a uniform type of analysis. The proposed semantics and pragmatics of legal claims provides a fruitful framework for further (meta)normative theorizing about the nature and metaphysics of law, the relation between law and morality, and the apparent practical character of legal language and judgment. Delineating these issues can lead to a more refined understanding of the space of overall theories. Discourse Contextualism provides a solid linguistic basis for a broader account of legal discourse and practice.

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1 Introduction

Here are two not implausible claims about the law:

- A. *Normativity of Law*: The law of a community is intended to guide the behavior of the members of that community.
- B. *Sociality of Law*: Facts about the existence and content of the law are grounded in social facts — facts about judicial rulings, legislative enactments, the attitudes and actions of lawmakers and community members, and so on.

Intuitive support for (A): Legal claims are a paradigm type of normative claim. Statements about people's legal rights and duties and about what they must do in view of the law, such as in (1)–(3), are prototypically directive.

- (1) Alice has a legal right to privacy.
- (2) It is Bert's legal duty to pay the fine.
- (3) In view of the law, Chip must repay his debt.

Such statements are intended to guide, influence, regulate what we do.

Intuitive support for (B): It should be possible to describe a body of law without endorsing it. It would be surprising if one couldn't investigate the law of a community without making normative or ethical evaluations of it. Interpreting language in context doesn't ordinarily involve engaging in substantive normative or ethical theorizing (think: Natural Language Processing). Why should interpreting legal texts be any different? Or, at least, why should interpreting legal texts call for normative or ethical theorizing over and above any such theorizing involved in linguistic interpretation more generally? Legal scholars needn't be moral saints.

Though the claims in (A) and (B) are perhaps individually plausible, there is a *prima facie* tension between them. Suppose (A) is true. But if legal claims are paradigmatically normative, then how can claims about the (social) facts which make them true not be normative too? How could there be true claims about (e.g.) the interpretation of legal texts that weren't directive in the way that legal claims are directive? On the flip side, suppose (B) is true. Then it would seem that claims about the content of the law are ultimately about the obtaining of certain social facts. But claims about such facts aren't paradigmatically normative. So whence the normativity of legal claims? Why should the normativity of legal claims go beyond any normativity in claims about content or interpretation more generally?

The tension here is familiar from debates about legal positivism and what Joseph Raz has called the “problem of the normativity of law” (RAZ 1975/1990: 170). Hans Kelsen (1967) even saw it as *the* central problem in philosophy of law. There are various things one might say in reply. For instance, one might distinguish issues concerning the meaning and use of legal language from issues concerning the metaphysics or nature of law. Following H.L.A. Hart, and Raz after him, we might distinguish “external” from “internal” legal claims (HART 1961/1994: vi, 89, 102–103). *Internal* legal claims, according to Hart, are claims of law made from the “point of view” of an adherent of a given legal system; *external* legal claims are claims about a body of law made from the point of view of an observer. The former are normative, whereas the latter are merely descriptive. One can make external claims about the content of a body of law without thereby endorsing the prescriptions which would be issued in internal uses of those claims. Correspondingly, even if substantive normative or ethical facts aren’t among the fundamental grounds of legal facts, as positivism insists, one may still use legal language to express one’s normative or ethical views when taking an internal point of view. Hence, one might conclude, the normativity of legal language in its internal use is compatible with the sociality of law in its metaphysical grounds.

Our puzzle and not-so-hypothetical line of reply may be familiar. But they are insufficient. Rough-and-ready puzzles invite no less rough-and-ready solutions — a recipe for shoddy theorizing. Can the distinction between internal and external legal claims be implemented in a rigorous semantic theory? How are we to cash out the metaphorical appeals to “points of view”? What exactly do we mean in calling legal language ‘normative’? How is the putative normativity of internal legal claims to be derived from their conventional meaning? What is the relation between the meanings of internal and external legal claims, such that the explanation of the normativity of the internal claims doesn’t carry over and predict normativity in the external claims? How is the normativity of internal legal claims to be distinguished from the normativity of (e.g.) moral claims? If normative or ethical facts aren’t among the fundamental grounds of law, does analyzing the meaning of normative legal claims call for a non-truth-conditional approach to semantics? What is the relation between the meanings of legal claims and the basic social facts which (purportedly) make them true or false?

Progress can be made on these questions, I think, by viewing them as instances of more general questions about the nature of normative uses of language and the relation between the metaphysics and semantics of normative thought and talk. A promising general strategy is to look to advances in metaethics, philosophy of language, and formal semantics and pragmatics, and see what lessons we can extract

for philosophy of law. My aim in this paper is to develop an improved account of the meaning and use of various types of legal claims, and to use this account to inform debates about the normativity and metaphysics of law. The account is *contextualist* (in a manner to be explained), and draws on a more general framework for implementing a contextualist semantics and pragmatics, called *Discourse Contextualism*, which I develop in greater detail elsewhere (SILK 2014b). I will argue that we can derive the apparent normative features of internal legal claims from a particular contextualist interpretation of a standard semantics for modal expressions, along with general pragmatic principles (§§3–4). Though the semantics is descriptivist (in a certain sense), I will argue that it avoids Ronald Dworkin’s influential criticism of so-called “semantic theories of law,” and elucidates the nature of “theoretical disagreements” about the basic criteria of legal validity. The account sheds light on the important social, interpersonal function of normative language in the law, as highlighted in (e.g.) Kevin Toh’s recent expressivist interpretation of Hart. It also gives precise expression to Hart’s and Raz’s intuitive distinctions among types of legal claims (internal/external, committed/detached), while giving them a uniform type of analysis. The proposed semantic/pragmatic account provides a fruitful framework for further theorizing in ethics, metaethics, and philosophy of law — for instance, concerning the normativity and metaphysics of law, the relation between law and morality, and the nature of legal judgment (§5). Delineating these issues in Raz’s “problem of the normativity of law” can lead to a more refined understanding of the space of overall theories. This can suggest new, better motivated ways the dialectics may proceed. A Discourse Contextualist account of the meaning and use legal language is thus of interest to a range of theorists, regardless of their specific normative and metaphysical commitments. The project isn’t be to show that no other theory can succeed. It is to investigate one avenue for developing an improved linguistic basis for a broader theory of normativity and law.

2 Theoretical disagreement about the law

An important function of language is to create and develop interpersonal relationships in communication. In inquiry we share and coordinate our beliefs about how the world is. But we also take a stance and socially orient ourselves toward possible acts, attitudes, and states of affairs. We evaluate possibilities as desirable, horrible, trivial, permissible, obligatory. We make demands and grant permissions, emphasize commonality and breed antipathy. In communication we shape our identities as thinkers and feelers in a social world; we coordinate on how to act, what to feel,

and whom to be.

Language affords a variety of normative and evaluative resources for doing so. One such resource is the language of modality. In this paper I will focus specifically on practical normative uses of modal verbs, such as ‘must’, ‘may’, and ‘have to’ — so-called *deontic modals*. In the next section I will develop a certain kind of contextualist account of deontic modals, and I will apply it to uses of deontic modals in legal contexts.¹ Of course normative uses of language in the law aren’t limited to sentences with modal verbs. There are normative uses of adjectives (‘obligatory’), nominals (‘duty’, ‘right’), and so on. Though I think there are well-motivated ways of applying the proposed framework to other categories of expressions, I won’t argue for this here (see SILK 2014b for developments). Hopefully, what our discussion lacks in breadth of scope, it makes up for in detail of implementation.

A contextualist about an expression claims that the content of that expression depends on features of the context of utterance. Applied to the case of broadly normative language, contextualism claims — to a first approximation — that the content of a normative use of a sentence such as ‘Must ϕ ’ is the proposition that the relevant body of norms in the context requires (entails) ϕ . Contextualism about normative language often goes under the heading of ‘Metaethical Relativism’ or ‘Subjectivism’. The view’s past is, shall we say, checkered. A common objection to contextualism is that it cannot account for certain genuine normative disagreements. A version of this objection can be discerned in Ronald Dworkin’s (1986: ch. 1) influential criticism of Hart’s account of internal legal claims and other so-called “semantic theories of law” (cf. DWORKIN 2011: ch. 8).² In this section I will briefly describe the objection and note several constraints on adequate response. The depth of the problem raised

¹I use ‘deontic’ as a catchall term for any kind of practical normative reading. A distinction is sometimes made between narrowly deontic expressions (‘must’, ‘reason’, ‘permissible’) and evaluative expressions (‘good’, ‘bad’, ‘beautiful’). It isn’t uncontroversial how these families are related (for recent discussion in linguistics, see, e.g., VAN LINDEN 2012). I will use ‘deontic’ and ‘normative’ broadly to cover expressions and readings of both types. In calling a use ‘deontic’ I am not assuming that it need be performative, i.e. involve performing a directive/permissive speech act (more on this in §4.5). I will assume that legal language is just a register of ordinary natural language.

²It is contentious what exactly Dworkin’s argument is in *Law’s Empire*, how his argument there compares with his 1967 argument in “The Model of Rules I” (DWORKIN 1977), what he means by ‘semantic theory of law’, and whether his characterization of Hart’s view is accurate. My aim in what follows isn’t to do Dworkin (or Hart) exegesis (see, e.g., RAZ 1998, COLEMAN 2001, COLEMAN & SIMCHEN 2003, LEITER 2007, SHAPIRO 2007, KRAMER 2008, PLUNKETT & SUNDELL 2013b). What matters for present purposes is the content of the objection to be described. Though I focus primarily on the objection as an objection to certain semantic theories, this isn’t to deny that there are non-linguistic construals of the objection, or ways in which fundamental legal disagreement might undermine a specifically Hartian positivist metaphysics.

by disagreement phenomena is often not adequately appreciated by contextualists. In §§3–4 I will develop (what I regard as) a more successful contextualist account. In §5 I will show how the resulting semantics and pragmatics is compatible with a positivist theory, like Hart’s, of the conventionality of the criteria of legal validity.

Dworkin asks us to consider the US judicial case *Riggs v. Palmer*. The question was whether Elmer was entitled to the inheritance provided by his grandfather’s will, given that Elmer had murdered his grandfather in order to claim the inheritance. Judge Earl, writing for the majority, held that Elmer wasn’t entitled to the inheritance; Judge Gray dissented. The judges agreed on the relevant empirical facts of the case, the plain meaning of the statute of wills, and the intentions of the legislators who enacted the statute. The disagreement was a *fundamental legal disagreement*, what Dworkin calls a *theoretical* disagreement: the judges disagreed over what determined the very content of the law (more on this below). The disagreement was centered not on the particular implications of agreed-upon general legal norms, but rather on the content of the fundamental legal norms themselves which determine the existence and content of the law. The judges followed different Hartian *rules of recognition*, different basic norms specifying the criteria of legal validity. Judge Earl held that Elmer wasn’t legally entitled to inherit in light of the “no one may profit from his own wrong” principle, and on the grounds that the original legislature wouldn’t have intended a murderer to benefit from his crime in this way. Judge Gray, by contrast, rejected the fundamental status of this principle and the legal relevance of such counterfactual intentions: the grandfather’s will was valid, hence Elmer was legally entitled to inherit. We can imagine the following simplistic dialogue between Earl and Gray:

- (4) *Earl*: In view of the law, Elmer may not receive the inheritance.
 Gray: No, legally, Elmer may receive the inheritance.

The worry for contextualism is that there doesn’t seem to be any way of specifying the contextually relevant body of legal norms that captures how Earl and Gray can felicitously express their fundamental legal disagreement in this way.

Dworkin sums up the worry well:

If two lawyers are actually following *different* rules..., then [according to contextualism] each must mean something different from the other when he says what the law is. Early and Gray must mean different things when they claim or deny that the law permits murderers to inherit: Early means that his grounds for law are or are not satisfied, and Gray has in mind his own grounds, not Earl’s. So the two judges are not really

disagreeing about anything when one denies and the other asserts this proposition. They are only talking past one another. Their arguments are pointless in the most trivial and irritating way. (DWORKIN 1986: 43-44)

In other words: If Earl's utterance of (5) is just a claim about the basic legal norms he accepts — that they forbid Elmer from inheriting — then it is unclear how Gray can reasonably disagree with him. It is unclear how in uttering (6) Gray is disagreeing with Earl if each of them is making a claim about their respective norms.

- (5) In view of the law, Elmer may not receive the inheritance.
- (6) No, legally, Elmer may receive the inheritance.

Earl and Gray can agree about whether Elmer's inheriting is compatible with their respective legal norms, while disagreeing with what one another says. Gray's linguistic denial — his use of 'no' — is felicitous, whereas B's denial in (7) is not.

- (7) A: In view of R_E , Elmer may not receive the inheritance.
B: #No, in view of R_G , Elmer may receive the inheritance.

This puts pressure on the claim that (7a) and (7b) explicitly specify the semantic contents of (5) and (6), respectively. So, the objection concludes, contextualists cannot capture fundamental legal disagreements — disagreements about basic legal norms, or criteria of legal validity.

Several clarificatory remarks are in order. First, the purported locus of disagreement between Earl and Gray concerns the basic criteria of legal validity, which determine the content of the law itself. The disagreement is not, Dworkin claims, about "what [the law] should be" but rather about "what the law is" (1986: 7).

Second, in *Law's Empire* Dworkin often seems to treat theoretical disagreements specifically as disagreements about proper methods of interpreting authoritative sources of law. What is important here, however, is simply that the disagreements are about the fundamental grounds of law (criteria of legal validity, basic legal norms, rule of recognition, etc.). Such disagreements may be rooted in issues about proper methods of interpretation, but I won't require this in what follows.

Third, it isn't uncontentious precisely what the basis was of Earl and Gray's actual disagreement. (I suspect not a few readers may have bristled at my running together two distinct readings of the case, emphasized respectively in Dworkin's "The Model of Rules I" and *Law's Empire*.) For the sake of argument I will assume that fundamental legal disagreements are possible — and common enough to warrant theoriz-

ing about them³ — and that the disagreement between Earl and Gray is an example of such a disagreement.

Fourth, I will focus specifically on discourse disagreements, like (4), though of course not all disagreements are expressed in linguistic exchanges.⁴ The task here isn't to provide a general philosophical account of the nature of disagreement, or of fundamental legal disagreement at that. For our purposes what is to be explained is the licensing of expressions of linguistic denial ('no', 'nope', 'nu-uh', etc.) in discourses like (4). These expressions signal the speaker's rejecting (denying, objecting to) some aspect of the previous utterance. Importantly, not all cases in which speakers intuitively disagree can be marked in this way. *B*'s "disagreement in attitude" with *A* in (8) couldn't typically be signaled with a linguistic denial.

- (8) *A*: I like Mexican food.
 B: #No, I don't. I like Thai.

Our task is to generate a representation of discourses like (4) that correctly predicts the felicity of expressions of linguistic denial and the discourse moves they mark. (I will also use terms like 'conversation', 'discourse', 'utterance', etc. broadly to include uses of language in texts and individual deliberation, and not simply in dialogue.)

The epicycles from here are involved. I will spare the reader many of the details.⁵ I simply want to mention one not uncommon initial reaction. I am sympathetic with the informal impression that in discourses like (4) the judges are disagreeing about what sort of context to be in. Intuitively, Earl and Gray are disagreeing, not about whether Elmer's receiving the inheritance is permitted by such-and-such basic legal norms, but about what basic legal norms *to accept*. They are managing their assumptions about what criteria of legal validity are to be operative. But simply noting this is insufficient. The question isn't whether such "discourse-oriented" negotiations are *possible*. The challenge is to explain *why they are so systematic* with normative language, given that a contextualist semantics is correct.

According to contextualism, sentences such as (5)–(6) have ordinary representational contents; they have a mind-to-world direction of fit. Even if we find examples of ordinary descriptive claims sometimes having normative implications — consider 'It's cold in here' \rightsquigarrow 'You should shut the window' — it's not as if they systematically

³See LEITER 2009 for critical discussion.

⁴For discussion of inter-conversational disagreement, see, e.g., MACFARLANE 2007, SILK 2014b: §3.4.2. See also §4.2 below.

⁵For discussion in the broader literature, see, e.g., GIBBARD 1990, 2003, KÖLBEL 2003, RICHARD 2004, LASERSOHN 2005, VON FINTEL & GILLIES 2008, DREIER 2009, SWANSON 2011, MACFARLANE 2014, SILK 2014a,b. For prescient early discussion, see MOORE 1912: ch. 3, STEVENSON 1937.

carry those normative implications across uses. Why, then, should uttering a sentence which conventionally describes given legal norms systematically communicate something about what legal norms to accept? ‘I’m hungry’ doesn’t (systematically) trigger an implication that the addressee ought to be hungry. ‘That [demonstrating *b*] is a cute baby’ doesn’t (systematically) trigger an implication that the addressee ought to be demonstrating *b*. Denials like *B*’s in (9)–(10) are typically infelicitous.

- (9) A: I’m hungry.
B: #No, I’m not hungry.
- (10) A: That is a cute baby. [said demonstrating *b*]
B: #No, that isn’t a cute a baby. [said demonstrating *b*’]

When speakers use paradigm context-sensitive expressions with different intended asserted contents, the norm isn’t disagreement, but talking past. A prototypical use of deontic modals, by contrast, is to manage speakers’ assumptions about the very features of context on which their interpretation intuitively depends.

So, the worry is that the distinctive role of internal legal claims is unexpected given the contextualist’s semantics. If we cannot explain the distinctive behavior of legal language in terms of independently attested aspects of conventional meaning and general interpretive and pragmatic principles, then we should give up being contextualists. The force of this challenge has been underappreciated by contextualists.⁶

3 Deontic modals in legal contexts

The consensus is that the objection from discourse disagreement is devastating for standard versions of contextualism.⁷ But I am more optimistic. In the following

⁶In the broader literature, see CAPPELEN 2008, BJÖRNSSON & FINLAY 2010, SUNDELL 2011, PLUNKETT & SUNDELL 2013a,b, FINLAY 2014 (cf. RECANATI 2008: 60–61, SCHAFFER 2011: 219). PLUNKETT & SUNDELL (2013a: 4) claim to have an aim of explaining disagreement phenomena in terms of general, independently motivated semantic and pragmatic mechanisms (cf. FINLAY 2014: 246). However, as far as I can see, they don’t provide an account of what the specific mechanisms are or a derivation of how they generate the various phenomena. Plunkett & Sundell nicely highlight various examples of discourse disagreement over non-truth-conditional content. On this basis they claim *that* speakers negotiate about the values of contextual parameters, and “pragmatically advocate” for their proposed values in using normative language (pp. 13–19, 28; cf. their 2013b: 262–263, 267). But no substantive explanation is given as to how precisely this happens, given the contextualist’s semantics, or, more pressingly, why normative language contrasts with paradigm context-sensitive language in its tendency for this kind of use. For further discussion, see SILK 2014a,b.

⁷Cf., e.g., EGAN ET AL. 2005: 149; MACFARLANE 2010: 1, 11; 2014: 248–249.

sections I will motivate a contextualist framework, developed in greater detail elsewhere (SILK 2014b), and apply it to uses of deontic modals in legal contexts. I call the framework *Discourse Contextualism*. The strategy of Discourse Contextualism is to start with a particular contextualist interpretation of a standard semantics for modals, and then show how this formal semantics generates constraints on the interpretation of deontic modals and predicts distinctive features of their use. I will argue that with a more nuanced understanding of the role of context in interpretation, we can provide an improved contextualist account of the function of deontic modals in managing an evolving body of norms. This section develops the basics of a Discourse Contextualist treatment of internal legal claims and theoretical disagreements. §4 elaborates on various features of this account. §5 examines how the proposed semantic/pragmatic framework can fruitfully integrate with broader theorizing about the normativity and metaphysics of law (§1). *Pace* Dworkin, it’s not the case that legal positivism “has no plausible theory of theoretical disagreement in law” and hence “distorts legal practice” (1986: 6, 15).

3.1 From formal semantics to interpretive constraints

The use of modals is ubiquitous in legal contexts. Given the law, Alice *must* testify in court, Bert *may* park on the street on Saturdays, etc. Yet modal verbs can receive a variety of other readings as well, as reflected in (11).

- (11) a. (Given when she left,) Sally must/may have arrived by now. [epistemic]
 b. (To get to the concert on time,) you can take a cab. [teleological]
 c. (Given the state of my nose,) I have to sneeze. [circumstantial]

I am sympathetic with the standard view among formal semanticists that although modal expressions can be used to express different flavors of modality, “there is something in the meaning [of the modal] which stays invariable” (KRATZER 1977: 340). To capture this, modals are treated as semantically associated with a parameter or variable P that ranges over sets of premises (propositions). Roughly, ‘Must ϕ ’ says that ϕ follows from these premises, and ‘May ϕ ’ says that ϕ is compatible with these premises.⁸ This contextually supplied set of premises determines the reading of the

⁸On the standard semantic framework for modals, see esp. KRATZER 1977, 1981, 1991; see also VAN FRAASSEN 1973, LEWIS 1973, VELTMAN 1976. The premise semantic implementation adopted in this paper is equivalent (LEWIS 1981) to the perhaps more familiar implementation in KRATZER 1981, 1991 which uses a set of propositions to preorder the set of accessible worlds. Kratzer’s semantics makes use of two premise sets, calculated as a function of the world of evaluation: one premise set (a “modal base”) that describes a set of relevant background facts and another premise set (an “ordering

modal (epistemic, teleological, etc.). Broadly *deontic* readings call for a premise set that encodes the content of a body of norms (n. 1). Different types of deontic readings — moral, legal, evaluative, etc. — are associated with different deontic premise set variables.

It is common to include in a model of context a parameter representing the norms accepted for the purposes of conversation (or something similar).⁹ In conversation we not only share information in coordinating our beliefs about the world. We also express our normative views and coordinate our plans. Inquiry is, in part, inquiry about what to do. Yet normative inquiry isn't limited to norms of a single category. We investigate the nature of morality, non-moral value, the law, and so on. It isn't uncontroversial how these domains are related. Bracketing this issue for the moment, we can treat the contextual normative parameter as consisting of a sequence of premise sets, representing different types of norms that may be relevant in the conversation. It is natural to link deontic premise set variables with this discourse-level norms parameter, at least in the uses of modals we have been considering. (We will return to these points in §§4.5, 5.) The use of 'must' in (3) calls for a deontic premise set variable P_1 that represents the legal norms endorsed in the conversation; the use of 'must' in (12) calls for a deontic premise set variable P_m that represents the moral norms endorsed in the conversation.

(3) In view of the law, Chip must repay his debt.

(12) Morally, Chip must repay his debt.

This reflects the paradigmatic role of deontic modals in coordinating on an overall normative view.

Treating deontic modals as semantically associated with a contextual parameter places interesting constraints on their felicitous use and interpretation. Deontic modal sentences include a variable for a body of norms. When this variable is free, a

source") that represents the content of a relevant ideal. These complications won't be relevant here. For simplicity I assume our premise sets are consistent. I assume that premise set parameters are syntactically realized as variables (VON FINTEL 1994, FRANK 1996). I will use boldfaced type for parameters/variables, and italics for their values in context.

⁹See esp. PORTNER 2007; see also LOCHBAUM 1998, STARR 2010. I needn't commit here to a particular account of the nature and representation of context. For instance, I am not assuming that contexts are determined wholly by speaker intentions and attitudes. What will be important in what follows is simply that contexts determine premise sets for the interpretation of modals. For more attitude-dependent treatments of context, see CLARK 1996, STALNAKER 2002; for more objective treatments, see KAPLAN 1989, GAUKER 1998, DEVAULT & STONE 2006. For discussion of various notions of context in legal interpretation, see, e.g., WRÓBLEWSKI 1983.

value must be contextually supplied in order for the sentence to have a specific interpretation. So, for communication to succeed, the hearer must be able to retrieve the speaker's intended value;¹⁰ the hearer must be able to infer how the speaker takes the discourse context to be such that it determines such-and-such content for the speaker's utterance. Uttering 'The baby is laughing' assumes that context supplies a salience ordering on which some individual *b* is the most salient baby, and asserts that *b* is laughing. Likewise an utterance of 'In view of the law, must (/may) ϕ ' assumes a value for P_1 , say P_{1c} , and asserts that ϕ follows from (/is compatible with) P_{1c} .

Two clarificatory remarks: First, I am not claiming that the standard semantic framework for modals calls for contextualism about deontic modals.¹¹ All parties in the debate about deontic modals — contextualists, relativists, expressivists, invariantists — can accept that the modal verbs (qua lexical items) are context-sensitive, in the sense that the context of utterance determines what type of reading the modal receives. What is at issue is whether, given a specific type of normative reading (legal, moral, etc.), some particular body of norms supplied by the context of utterance figures in the sentence's semantic content, where what norms are supplied may vary across contexts in the same world. Non-contextualist accounts deny this.¹²

Second, I will leave open the exact relation between basic legal norms, like Hart's rule of recognition, and the subsidiary rules that are "validated" by them (see, e.g., HART 1961/1994: 107–110). What is important here is simply that the legal premise sets in the formal semantics encode the full content of the law. I will bracket precisely how this content should be structured in the formal objects which context supplies.

3.2 Managing the context

Before returning to our discourse disagreement with Earl and Gray, I would like to briefly look at agreement and disagreement phenomena more generally. Perhaps better understanding the role of context in collaborative action will shed light on the role of deontic modals in managing the context and what norms to accept.

Suppose it is common knowledge between Clara and Dan that several days ago

¹⁰Or, in some cases, at least a relevant range of values (SILK 2014b: §§3.5.2, 4.4, 5.2.4, 6.2, 6.3).

¹¹On this I disagree with the sentiments expressed in, e.g., VON FINTEL & GILLIES 2008, FINLAY 2009, 2014, BJÖRNSSON & FINLAY 2010, DOWELL 2011, 2012, BRAUN 2013, MACFARLANE 2014: 284. For related discussion, see EGAN 2011: 230; SILK 2013: 206n.12, 212; 2014b: §3.1.

¹²To reinforce this point, note that debates about contextualism arise for expressions whose lexical semantics already fixes a specific type of reading — e.g., 'probably', 'tasty', 'tall', etc. The debates would also arise for deontic modal markers in languages which, unlike English, lexically specify readings for modals. The preoccupation on lexically unspecific grammatical English modals is idiosyncratic.

she said something to him that could have been construed as rude. Clara isn't sure whether Dan took what she said that way, and, if he did, whether he is offended. She doesn't want to bring up their previous interaction explicitly since she wouldn't want to make something out of nothing. So the next time she sees Dan she acts as though everything is normal between them. She is warm and open as usual. Since Dan wasn't in fact offended by Clara's earlier remark, he responds in kind to Clara. Since Clara knows that Dan wouldn't respond this way if he was actually annoyed, and Dan knows that she knows this, etc., it becomes common ground that they are on good terms and that he didn't take her remark as rude.

Now consider a variant on the case. Suppose that Dan did in fact take Clara's remark as being rude. Though he didn't say so at the time, Clara knows he was annoyed. Nevertheless when she next sees Dan, she doesn't want to bring up their previous interaction. She wants to avoid the potential conflict if she can. So she acts as if everything is copacetic, even though she knows that it isn't. However, Dan doesn't want to go along with Clara's behavior. He *could* object by making their clash in attitudes explicit. He might say something like, "Why are you acting as if everything is okay between us? Don't you remember what you said?" Or perhaps, "I know you're just trying to get everything back to normal, but, listen, it isn't." But Dan needn't object in this way. Instead he simply acts aloof. In return Clara might continue to act amiably, hoping that he will eventually respond in kind. Clara and Dan can thus manage their assumptions about the status of their relationship without explicitly raising the issue.

My point in working through these examples is to highlight how commonplace a certain sort of reasoning about context is. The appropriateness of our actions often requires that circumstances are a certain way. *In acting*, we can thus exploit our mutual world knowledge and general pragmatic reasoning skills to communicate information and manage our assumptions about these circumstances. This can streamline collaborative action. The lesson is this: *by acting in such a way that is appropriate only if the context is a certain way, one can implicitly propose that the context be that way*. If the other party accommodates by proceeding in like manner, it can become taken for granted that the context is that way. If she doesn't, this can lead to negotiation over the state of the context. Crucially this can all happen without explicitly raising the issue of what the context is like.

I suggest that the linguistic case — the case of linguistic action, discourse, and interpretation — is a special instance of these phenomena. Deontic modal utterances presume an implicit, semantically unspecified body of norms. Nevertheless, utilizing general principles of pragmatic reasoning, speakers and hearers can integrate relevant features of the (past, present, and projected future) conversational situation

to interpret deontic modals and coordinate on an evolving normative view. We saw in §3.1 how the semantics for deontic modals generates constraints on their interpretation in particular contexts. By reasoning from these constraints speakers can effectively share information and coordinate their plans.

With this in mind, let's reconsider the discourse disagreement in (4) between Earl and Gray. Earl utters (5) 'In view of the law, Elmer may not receive the inheritance'. Upon hearing Earl's semantically underspecified utterance, Gray might reason roughly as follows (where i is the proposition that Elmer receives the inheritance):

- (13) "Earl is intending to say something about the possibility i . In order to do so, given the grammatical properties of modals, a set of premises must be contextually supplied. Since Earl wouldn't intend to say something false, he must be assuming a premise set P that is incompatible with i . The current question under discussion concerns whether Elmer is legally entitled to inherit. Since Earl is cooperative, his utterance of (5) must be relevant and realize an intention to provide at least a partial answer to this question. Assuming P as a value for P_1, P_{l_c} , would do so by ensuring that the legal norms endorsed in the discourse forbid Elmer from inheriting. So, Earl must be assuming a value for P_1, P_{l_c} , and have meant that P_{l_c} is incompatible with i ."

Rather than formalize this reasoning here, let's simply observe its principal features.¹³ Given the grammatical properties of deontic modals, Earl's utterance assumes a body of legal norms relevant for the particular task at hand: resolving the question of whether Elmer is legally entitled to inherit. The appropriateness of Earl's linguistic act of uttering (5) requires that the basic legal norms operative in the context be incompatible with Elmer's receiving the inheritance. Since it is mutually presupposed that Earl is obeying the conversational maxims (GRICE 1989), in uttering (5) Earl implicitly proposes that it become taken for granted that such norms are endorsed in the discourse. In accepting an utterance one normally accepts what the speaker committed to in uttering it. So, since it is common knowledge that Earl can expect Gray to undergo an abductive reasoning process like in (13), it is also common knowledge that he will object if he accepts different criteria of legal validity,

¹³For rigorous formalizations in artificial intelligence and logic, see, e.g., HOBBS ET AL. 1993, ASHER & LASCARIDES 2003, THOMASON ET AL. 2006. As these literatures have documented, we are quite skilled at inferring one another's intended context and coordinating interpretation, action, and planning accordingly. Research in psycholinguistics also establishes the ease with which speakers coordinate on linguistic meaning and use, both at the level of individual conversations in establishing local sub-languages (entrainment) and at the community-level in establishing more stable linguistic conventions (CLARK & WILKES-GIBBS 1986, GARROD & DOHERTY 1994; cf. DJALALI ET AL. 2011).

given their common goal of settling on what the law provides. So if Gray doesn't object, this will confirm that the context is as the appropriateness of Earl's act requires, and the discourse-level legal norms parameter P_1 can be set to a value that is incompatible with the proposition i that Elmer inherits. The legal norms assumed by Earl's utterance can then affect the interpretation of subsequent claims. This delimits interpreters' computational task of determining the intended contents of future uses of deontic modals, and facilitates a more efficient exchange of information and coordination of plans (n. 13).¹⁴

However, since Gray accepts an incompatible legal view, he ought to object.¹⁵ Suppose he replies as in (4); he says (6) 'No, legally, Elmer may receive the inheritance.' For reasons parallel to those above, his doing so is appropriate only if the legal norms in force are compatible with Elmer's inheriting. As he expects, Earl goes through an analogous abductive reasoning process and infers that he must wish to take for granted that the legal norms operative in the context are that way. By assuming a contrary value for the contextual variable P_1 , Gray fails to accommodate Earl's implicit proposal about the conversational situation, and exerts conversational pressure on Earl to accommodate him instead. If Earl accepts Gray's justification for his denial, it can become taken for granted that the context is as their present actions mutually require. If he doesn't, further negotiation can ensue over the state of context. By producing utterances that assume incompatible values for the contextual variable P_1 — i.e., by acting in ways that would be appropriate only if the legal norms parameter P_1 was assigned such-and-such contrary values — Earl and Gray can negotiate over what basic legal norms to accept. In using deontic modals Earl and Gray can exploit their mutual grammatical knowledge, and general pragmatic reasoning skills, to manage their assumptions about the conversational situation itself.

4 Basic features

This basic Discourse Contextualist account sheds light on various aspects of the use of modal language in the law.

¹⁴Cf. FARKAS & BRUCE 2010 on the importance of representing projected future states of the conversation in discourse models.

¹⁵The fact that Earl and Gray disagree doesn't imply that they aren't engaged in a "cooperative" conversation, in the sense relevant for interpreting their utterances. Rejection and denial are compatible with Gricean cooperativity (ASHER & LASCARIDES 2013; *pace* FINLAY 2014: 124, 180). *Pace* MARMOR 2008, strategic conversations needn't call for novel interpretive or pragmatic mechanisms.

4.1 Justified use

First, Discourse Contextualism captures how speakers like Earl and Gray are in a position to make their deontic modal claims. Since Earl can expect Gray to undergo the sort of pragmatic reasoning in (13) and retrieve his intended interpretation, he needn't be overstepping his epistemic bounds in using 'may' and assuming a value for the discourse-level legal norms parameter. And since Gray knows that Earl has similar semantic and pragmatic competencies, he can express his disagreement with Earl's assumption by means of a direct denial — that is, by performing an act, the linguistic act of uttering (6), which assumes an incompatible value for P_1 . In assuming a value for the contextual variable P_1 one needn't believe that the assumed norms are (already) commonly accepted in the context. The relevant attitude toward the proposition that the context is thus-and-so isn't belief but acceptance for the purposes of conversation (STALNAKER 1974, THOMASON 2002) — in our examples, acceptance for the purposes of legal discourse and practice. Given how skilled we are at inferring one another's intended context (n. 13), we can use deontic modals as a way of testing one another's normative views, inviting them to object if they accept different norms.

4.2 Locus of disagreement

The account makes sense of how speakers can express disagreements about the law in discourses like (4). For all I have said, the intended contents of Earl's and Gray's respective utterances may be compatible. It may be the case both that Earl's assumed value for P_1 , P_E , is incompatible with the proposition i that Elmer inherits, and that Gray's assumed value for P_1 , P_G , is compatible with i . Even so, contextualism needn't treat Earl and Gray as talking at cross-purposes. We can locate a precise sense in which Earl and Gray disagree: they disagree over the grammatically backgrounded content of what value for the contextual deontic premise set variable P_1 is determined by the concrete conversational situation. Their utterances carry incompatible assumptions about what body of legal norms is operative in their context.¹⁶ This gives precise expression to the informal idea from §2 that Earl and Gray are disagreeing about what sort of context to be in. *Pace* Dworkin, the contextualist can

¹⁶Slightly more formally: Successfully updating with Earl's utterance would result in a context set in which, for all worlds in that set, the conversational situation determines a value for P_1 that is incompatible with i ; whereas successfully updating with Gray's utterance would result in a context set in which, for all worlds in that set, the conversational situation determines a value for P_1 that is compatible with i . (The context set is the set of worlds compatible with the information taken for granted in the conversation (STALNAKER 1978).)

locate a “fulcrum of disagreement” (1994: 14) even when there is controversy about the content of the rule of recognition or basic grounds of law.

It is important to be clear about the relevant level at which Earl and Gray’s disagreement is explained as being “about the context.” The present challenge for contextualism, recall, is to explain the licensing of expressions of linguistic denial in discourses like (4), and represent precisely how the hearer rejects the speaker’s discourse move and issues a counter-move. For these purposes what is important is that we locate a specific incompatibility in the updates from Earl’s and Gray’s utterances: their utterances make incompatible assumptions about their conversational situation (n. 16). This needn’t imply that the disagreement is fundamentally “about the context,” how to use words, etc. More fundamentally, Earl and Gray’s disagreement concerns what basic legal norms to accept and why. It is this which grounds the incompatible representations of context presupposed by their respective utterances. Disagreement about context can be grounded in more basic disagreement about what attitudes to take up toward the relevant content-determining contextual features — what norms (values, standards, information, etc.) to accept. For these reasons I eschew classifying the present Discourse Contextualist account as a “meta-contextual” or “metalinguistic” account of discourse disagreement.¹⁷

4.3 Force and function in context

Discourse Contextualism elucidates the informal ideas from §2 concerning the role of internal legal claims in managing what legal norms to accept. Following Stevenson (1937, 1944), Allan Gibbard (1990) observes that when making a normative assertion, the speaker “is making a conversational demand. He is demanding that the audience accept what he says, that it share the state of mind he expresses” (172) — albeit in a “more subtle, less fully conscious way” than by issuing an explicit imperative (STEVENSON 1937: 26). In making normative assertions we *make claims on* our interlocutors. “Their typical use is to provide guidance by criticizing, commending, demanding, advising, approving, etc.” (RAZ 1981: 300). Discourse Contextualism locates this feature of normative discourse in the presuppositions of normative utterances.

Though the truth conditions of deontic modal sentences are ordinary representational contents, speakers can use deontic modals to communicate normative claims about what norms to accept. It is common to treat discourse moves like assertions as proposals to update the conversational common ground (e.g., STALNAKER

¹⁷Contrast PLUNKETT & SUNDELL 2013a,b, following BARKER 2002.

1978, FARKAS & BRUCE 2010). Since deontic modal sentences require a value for a contextual variable in order to express a proposition, the assignment of such a value is a precondition for making a discourse move at all. Making a deontic modal assertion creates a new discourse context in which that precondition is taken for granted, this even prior to the acceptance or rejection of the proposal which constitutes one's assertion.¹⁸ Failing to object to an internal legal claim thus typically communicates that one accepts the value for P_1 which it requires. This puts pressure on the hearer to conform her basic legal views to the assumed deontic premise set. In cooperative conversations this conversational demand will be able to be backed by some normative justification or epistemic story about why it would be reasonable to treat one as relevantly authoritative on the issue in question. One implicitly suggests that it would be reasonable to rely on the norms being presupposed and to give them weight in further deliberations. This can promote consensus about the law. Consensus isn't always in the offing, but that is no different from the ordinary non-normative case.¹⁹

This interpersonal aspect of legal practice is nicely emphasized in Hart's understanding of the rule of recognition and in Kevin Toh's recent expressivist interpretation of Hart (TOH 2005, 2011; *cf.* RAZ 1981, 1993). A characteristic feature of internal legal claims, on Hart's view, is that they presuppose that the speaker's assumed rule of recognition is also generally accepted and complied with in the community (e.g., HART 1959: 167–168; 1961/1994: 108). Such a view raises the question of how to interpret legal claims in contexts of disagreement, where this presupposition isn't satisfied. On the present account the relevant presupposition isn't that the basic legal norms assumed by the speaker's utterance are generally accepted. Rather what is presupposed is a value for a contextual parameter representing the legal norms accepted for the purposes of legal discourse and practice; what is presupposed is the body of basic norms itself. As we have seen, speakers needn't believe that these norms are in fact generally accepted. Speakers can manage their views on what legal norms to accept in using deontic modal language. Discourse Contextualism captures Toh's expressivist idea that “joint acceptance of the fundamental [legal] norms... [is] something that the speaker is... trying to instigate,” rather than “something that is always presupposed” (2011: 119).

The nature of deontic modal sentences' truth conditions may help explain their

¹⁸Compare STALNAKER (1978) remarking on the “commonplace effect” of speech acts: “the context on which an assertion has its ESSENTIAL effect is not defined by what is presupposed before the speaker begins to speak, but will include any information which the speaker assumes his audience can infer from the performance of the speech act” (86; *cf.* THOMASON ET AL. 2006).

¹⁹For further discussion, see esp. GIBBARD 1990: Part III. See also FORRESTER 1989 for developments of a “pragmatics of deontic speech,” along with applications to legal discourse.

propensity for discourse-oriented uses. There is much to be said about the distinctive linguistic behavior of (e.g.) deontic modals, and the various contrasts between deontic modals and paradigm context-sensitive expressions. For present purposes let us simply observe the following.²⁰ The asserted contents of deontic modal utterances are propositions about logical relations between propositions and premise sets. These logical matters can be at issue when working out the specific content of a body of general legal norms given the non-normative facts. Such is the case in what Dworkin calls “empirical disagreements” — disagreements about whether certain agreed-upon general criteria of legal validity are satisfied in a particular case (1986: 4–5). But, as Dworkin emphasizes, such empirical matters aren’t always what is at issue in legal inquiry. What is often interesting in a speaker’s deontic modal utterance is what value is being assumed for the discourse-level legal norms parameter, i.e. what legal norms the speaker is presuming to be operative in the conversation. Given the ease with which we can retrieve one another’s intended values for P_1 (as described above), using a deontic modal affords an efficient means of managing our assumptions about these norms. General pragmatic principles concerning efficiency and effectiveness in communication enjoin us to do so (*cf.* LEVINSON 1987, HEIM 1991). So, it wouldn’t be surprising if a primary function of deontic modals in legal discourse came to be to facilitate coordination on a body of legal norms. An ability to capture this is often taken to be a distinctive advantage of expressivist theories.²¹ Discourse Contextualism captures it in terms of a contextualist semantics and general pragmatic effects of using sentences with this semantics.

4.4 Expressing states of mind

Expressivist accounts highlight another important feature of legal claims in discourse: their role in expressing speakers’ states of mind. “The use of unstated rules of recognition... in identifying particular rules of the [legal] system,” Hart writes, “is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules” (1961/1994: 102). An internal legal claim “expresses its speaker’s endorsement,” or “acceptance... of standards of behaviour towards conformity with which the statement is used to guide its addressee” (RAZ 1981: 300, 1993: 148). A common complaint against contextualism is that it incorrectly treats normative utterances as *reporting*, rather than *expressing*,

²⁰For extensive further discussion see SILK 2014a: chs. 2–4.

²¹See, e.g., STEVENSON 1937, 1944, HART 1961/1994, GIBBARD 1990, TOH 2005, 2011, YABLO 2011; *cf.* also RICHARD 2004, YALCIN 2011, SWANSON 2012.

speakers' states of mind. This was one of the main motivations for emotivism against cognitivist speaker subjectivism.²² Discourse Contextualism avoids this worry.

Common characterizations of contextualism notwithstanding,²³ deontic modal utterances, on the present account, aren't fundamentally about a relevant individual or group. They make logical claims *given* a certain deontic premise set. Earl's utterance of (5) assumes a value for P_1 which represents the legal norms operative in the conversation. Given their (assumed-to-be) common goal of settling on what norms to accept, Gray can reasonably infer from Earl's act that he accepts a rule of recognition which, given the facts of the case, entails that Elmer doesn't receive the inheritance. Earl expresses his state of mind in the sense of performing an act that is appropriate only if he is in that state of mind (*cf.* BACH & HARNISH 1979). His utterance expresses his acceptance of certain legal norms via what it presupposes, not what it asserts. Discourse Contextualism can capture the core expressivist claim that deontic modal legal claims express, rather than report, the speaker's state of mind.

4.5 The varieties of legal claims: Internal, external, detached

So far we have been focusing on what Hart called *internal* legal claims — claims of law made by adherents of a legal system. But, as Hart noted, some legal claims are merely descriptive; they simply describe the laws of a given community. To capture this distinction, Hart, and Raz after him, posited a distinctive “internal point of view” on the law. It is only when taking up the internal point of view, according to Hart and Raz, that one's legal claims are genuinely normative. The present contextualist framework provides a precise way of cashing out the metaphorical talk of “points of view” and of representing the distinction between internal and external legal claims. (We will return to Hart's and Raz's substantive accounts of the internal point of view and the normativity of internal legal claims in §5.)

Uses of deontic modals are not essentially normative or prescriptive. The statements in (14)–(15) are coherent, even if misguided.

(14) Ernie has to be home by 10. Aren't his parents stupid? I'd stay out if I were him.

(15) Bert has to pay a fine. Isn't that crazy? I wouldn't do it if I were him.

Intuitively, in (14) it is consistent for the speaker to dismiss the act of getting home

²²See, e.g., AYER 1936, STEVENSON 1937; *cf.* HART 1961/1994: 102–103. For related contemporary discussion, see, e.g., GIBBARD 1990, KÖLBEL 2004, YALCIN 2011.

²³E.g., SILK 2013: 212–213, MACFARLANE 2014: 146–147, a.m.o.

by 10 because she isn't endorsing the norms that require it — the rules in Ernie's household. She is simply reporting what these norms require. The claim in (14) can be naturally paraphrased with an explicit 'according to' phrase, as in (16).

(16) According to Ernie's parents' rules, Ernie has to be home by 10.

Following LYONS 1977, it is common in linguistics to distinguish "subjective" uses of modals, like in (4), from "objective" uses, like in (14)–(15).²⁴ Roughly put, a modal is used *subjectively* if it presents the speaker as endorsing the considerations with respect to which the modal claim would be true. A modal is used *objectively* if it doesn't present the speaker in this way. (Objective uses are compatible with the speaker's endorsement; they simply fail to present it.) Applied to deontic readings, a deontic modal is used subjectively, in this sense, if it presents the speaker as endorsing the norms that would justify it, and objectively if it doesn't. Hart's "internal" and "external" legal claims correspond to Lyons's "subjective" and "objective" uses of modals, respectively.

We can capture the distinction between internal and external legal claims while giving them a uniform type of analysis. In both kinds of uses the deontic modals are interpreted with respect to a contextually supplied set of premises. The difference lies in what premise set variable is supplied. The external use of 'have to' in (14) calls for a variable P_{hr} that refers to Ernie's parents' house rules. The use in (15) calls for a variable P_{nh} that refers to (say) New Haven traffic law. These rules may be accepted in the context, but they may not be. What distinguishes internal uses — uses which resist being paraphrased in terms of an explicit 'according to'-type phrase — is that they call for a discourse-level contextual variable which represents the norms commonly accepted in the conversation. Internal legal claims don't simply say what is permitted, required, etc. according to a given body of legal norms. They assume that the relevant norms are endorsed in the discourse context. The distinctive features of internal uses can be derived from the contextualist semantics as explained in the foregoing sections.²⁵

This treatment helps clarify a further distinction which Raz draws among internal normative claims. Raz notes that, intuitively, not all claims of law made within

²⁴This distinction has been noted under various descriptions in a range of areas. See, e.g., HARE 1952, VON WRIGHT 1963, LASERSOHN 2005, NARROG 2005, VERSTRAETE 2007, NUYTS ET AL. 2010.

²⁵Toh (2005, 2007, 2011) and Raz (1975/1990, 1977) treat the meanings of internal claims as primary, and attempt to explain the meaning of external claims in terms of the meaning of internal claims (*cf.* FORRESTER 1989). In contrast, the account developed here gives both types of claims a common underlying contextualist semantics, and attempts to explain the distinctive features of internal claims as effects of using sentences interpreted with respect to a discourse-level norms variable.

a legal community are endorsed by the members of that community. In light of this Raz distinguishes between *committed* internal claims and *detached* internal claims (1975/1990: 171–177). *Committed* internal claims are internal claims in Hart’s sense: they express the speaker’s endorsement of the relevant norms. But Raz thinks there is an additional category of *detached* internal claims — claims which are normative although they don’t express the speaker’s acceptance of the relevant norms. In uttering a detached internal claim the speaker merely pretends or simulates such acceptance. For instance, an anarchist lawyer may advise her client that he “must pay the fine,” though she doesn’t in fact endorse the relevant laws. By analogy, Raz considers a meat-eater uttering (17) to a morally committed vegetarian.

(17) You shouldn’t eat this dish. It contains meat.

The meat-eater’s statement is made “from the point of view of a vegetarian,” but without endorsing that point of view. In this sense, the meat-eater’s utterance of (17) is “detached,” whereas a vegetarian’s utterance of (17) would be “committed.”

I agree with Raz that there is a distinction here, but I would not be the first to be puzzled by his way of drawing it. It is hard to see in what sense detached claims are genuinely “normative” although they are neither directive nor expressive of the speaker’s own attitudes. Such properties are often taken to be definitional of normative uses of language.²⁶ Simply invoking a distinctive “legal point of view” is unexplanatory. More helpful, I suggest, is to treat Raz’s detached internal claims as a species of external claims — specifically, external claims made in contexts where what is at issue is the particular implications of a general body of norms, given the relevant circumstances, which norms may be endorsed by certain relevant individuals in the context (though not necessarily by the speaker). For instance, (17) assumes a body of vegetarian moral norms (value for a moral premise set variable P_v) endorsed by the addressee, and proposes to restrict the set of live possibilities to worlds in which the addressee’s dish contains meat. The given moral norms variable P_v needn’t be identified with the discourse-level moral norms variable P_m representing the moral norms endorsed in the conversation — hence the “external” nature of the claim, and how it needn’t express the speaker’s endorsement of vegetarianism. Yet insofar as the addressee is a committed vegetarian, she may take the content of the speaker’s assertion — that P_v entails that she not eat the dish — to have direct

²⁶See, e.g., FORRESTER 1989: ch. 3; KORSGAARD 1996: 8, 226; THOMSON 1996: 130–131, 147–150; GIBBARD 2003: ix–x, 9–10, 137–139; FIELD 2009: 286; PARFIT 2011: 284, 288, 291; RAILTON 2012: 25. See SILK 2015: §6 for critical discussion on the theoretical utility of characterizing the phenomena in terms of “normative” vs. “non-normative” distinction.

practical implications, and she may guide her behavior accordingly. The speaker may even endorse that she do so, perhaps in light of a higher-order norm enjoining individuals to act in accordance with the moral norms they take to apply to themselves concerning eating meat. Analogous points hold concerning Raz's detached internal legal claims.

4.6 Recap

Let's take stock. I have argued that we can derive several seemingly problematic discourse properties of deontic modals from a contextualist semantics and general conversational principles. Semantically, "internal" uses of deontic modals are associated with a contextual parameter representing the norms endorsed for the purposes of conversation. Pragmatically, the "discourse-oriented" effects of such uses arise via general pragmatic reasoning from (*inter alia*) the requirement that a value for this parameter be assumed as input to semantic interpretation. In *using* deontic modals speakers can exploit their mutual grammatical and world knowledge, along with general pragmatic reasoning, to coordinate on an evolving normative view.

5 Legal language and a theory of law:

The problem of normative language in law, revisited

We have been focusing in §§2–4 on the meaning and use of modal language in legal discourse. Our discussion of Raz and distinctions among internal normative claims brings us back to our original problem from §1: the problem of "normativity" and "normative language" in the law. What originally motivated Raz to posit a distinct category of detached internal legal claims was an aim to capture "the use of normative terms to describe the law and legal situations" in a manner consistent with legal positivism (RAZ 1975/1990: 169). The challenge was to reconcile the apparent *normativity* of law with the *sociality* of law. We can do so, I will argue, without positing a spurious class non-endorsing internal normative claims. In this section I will show how the Discourse Contextualist framework developed in §§3–4 can fruitfully integrate with broader theorizing about the normativity of law, the relation between law and morality, and the nature of law and legal judgment. A Discourse Contextualist account of deontic modal language in the law provides the basis for an overall philosophical theory of law and legal judgment.

The apparent "problem of the normativity of law" for legal positivism, Raz argues, is this: Claims of law use "normative terms like 'a right,' 'a duty,' 'ought'" (1977:

158). If these terms “are used in the same sense in legal, moral, and other normative statements” (1977: 158), then legal statements must be “normative statements in the same sense and in the same way that moral statements are normative” (1981: 303). But this seems to imply that legal statements are just “ordinary moral statements” (1981: 306), contrary to the positivist thesis that “legal rights and duties... may and sometimes do contradict moral rights and duties” (1979: 38).

Hart’s response was to deny that expressions like ‘must’, ‘right’, ‘duty’, etc. have the same meaning in moral and legal contexts (e.g., 1982: 153–161). Positing a class of internal but non-endorsing legal claims allows Raz to maintain that these expressions have the same meaning in legal and moral contexts, and that claims of law are genuinely normative, while denying that legal claims need have moral, directive force. “Detached” legal claims provide a type of normative claim which, though “made by the use of ordinary normative terms, does not carry the same normative force of an ordinary legal statement” (RAZ 1977: 156). Such claims are merely made from the “point of view” of someone who treats the operative legal norms as morally justified; they needn’t express endorsement of that point of view.

Our Discourse Contextualist framework illuminates an alternative, and I take it more attractive, line of reply. We can maintain, with Raz, that expressions like ‘must’, ‘ought’, etc. have the same meaning in moral and legal uses. However, we needn’t take this to imply that legal discourse commits one to morally approving of the law, or that committed legal judgment is a species of moral judgment.

There is a problematic presupposition in how Raz sets up the problem. It is misleading, and I think unhelpful, to talk about normative *terms* (language, expressions, vocabulary) as such. There is nothing inherently “normative” in words like ‘must’, ‘ought’, ‘right’, ‘duty’, etc. Modal verbs can receive a variety of readings, including epistemic, teleological, and circumstantial readings, among others (§3.1). Even broadly deontic readings needn’t always be used with directive force (§4.5). The expressions themselves can be given a common underlying contextualist semantics. The linguistic *meaning* of (e.g.) ‘must’ in moral and legal contexts is the same: given a contextually supplied set of premises *P*, ‘Must ϕ ’ says that ϕ follows from *P* (§3.1). What is intuitively normative, rather, are *uses* of expressions such as ‘must’ in certain contexts (*cf.* SILK 2015: §6).

Raz claims that “the problem of the normativity of law is the problem of explaining the use of normative language in describing the law or legal situations” (1975/1990: 170). I disagree. Raz’s move to frame the problem in this way, as a problem about “normative language,” is unfortunate. Plausibly, what was of primary interest to theorists like Hart, Raz, and others was not a linguistic issue, an issue about the conventional meanings of certain natural language expressions. It

was a substantive issue about the normativity of law — whether facts about law provide (possibly moral) reasons for action, how the law can justifiably claim to guide behavior, etc. In the remainder of this section I will show how a Discourse Contextualist framework can provide a more helpful way of integrating issues concerning the normativity and nature of law with an account of the meaning and use of language in legal contexts.

On the contextualist account developed in this paper, what distinguishes intuitively normative uses of deontic modals from non-normative uses of language is their interpretation with respect to a contextual variable representing the norms endorsed for the purposes of conversation. Crucially, the compositional semantics — the representation of conventional meaning and speakers' semantic competence — takes as given an abstract representation of context that assigns values to such variables and other context-sensitive expressions. This leaves open the *metasemantic* question of what makes it the case about a given concrete discourse context that such-and-such abstract context represents it. The conventional meaning of deontic modals leaves open what makes it the case that such-and-such bodies of legal norms, moral norms, etc. — hence values for P_1 , P_m , etc. — are determined by a given conversational situation.

It is here in the metasemantics of deontic modals, I suggest, that we can locate various substantive (meta)normative questions the nature of law and legal judgment.²⁷ For instance:

Normativity of law

What is the relation between the value for P_1 in a given context and agents' normative reasons for action? Does the fact that, in view of the law, one must α necessarily provide one with a normative reason to α ? For instance, is it the case that, for any concrete context C , if the value for P_1 determined in C entails that x pays a fine, then x has a normative reason to pay a fine?

Law and morality

What is relation between the respective values for P_1 and P_m determined in concrete contexts? Does the fact that, in view of the law, one must α entail that, in view of morality, one must α , or even that one has a moral reason to α ? For instance, is it the case that, for any concrete context C , if the value for P_1 determined in C entails that x pays a fine, then the value for P_m determined in C entails that x pays a fine?

²⁷See SILK 2014b: §§3.6, 5.4 for elaboration on this way of thinking about the relations among the formal semantics, metasemantics, and (meta)normative theory, and the role of truth-value judgments in semantic theorizing; cf. SILK 2013: §3 for similar ideas in a different semantic framework.

Legal judgment

What is involved in accepting a body of legal norms and of making discourse moves that presuppose such acceptance? Does accepting a body of legal norms essentially involve having certain motivational dispositions or emotional capacities? What must a concrete context be like for a use of a deontic modal to call for being interpreted with respect to a discourse-level legal norms parameter? Must the use play a regulative, directive role in the planning and practical reasoning of the community? Does accepting ‘In view of the law, I must α ’ — accepting that the value for P_1 determined in one’s concrete situation entails that one α s — necessarily involve taking oneself to have a normative (and perhaps moral) reason to α ?

Metaphysics of law

What property, if any, do all and only lawful actions have? Fundamentally, what determines which body of legal norms (hence value for P_1) is operative in a given concrete context? Are moral properties among the fundamental grounds of law? Or are norms part of the law only in virtue of their social source? Can we provide a purely source-based criteria of legal validity?

Metaethicists and philosophers of law can all accept Discourse Contextualism in giving a formal semantics and pragmatics for broadly normative uses of language. Where they will differ is on these sorts of further philosophical questions. I won’t attempt to defend particular answers to these questions here. However, for concreteness it may be helpful to outline what one sort of Discourse Contextualist-based overall theory might look like.

Delineating the above issues brings into relief an overall theory which adopts a positivist metaphysics and yet treats judgments about the law as essentially practical, perhaps even as a kind of moral judgment. We might see Hart and Raz as offering theories of precisely this kind. Consider the following combination of views:

- (i) The law of a community needn’t always provide the members of the community with genuine normative or moral reasons for action. It is possible for there to be a concrete context C which determines operative bodies of legal norms P_{l_c} , moral norms P_m , and all-things-considered norms P_n such that P_{l_c} entails that one α s, but neither P_m or P_n entail that one α s (even in the absence of any defeating circumstances).
- (ii) Moral properties aren’t among the fundamental grounds of law.

- (iii) Accepting a body of legal norms essentially involves having certain motivational dispositions to act in accordance with those norms. In order for a belief ascription about the law (' x believes that, in view of the law, ϕ ') to be correctly interpreted with respect to P_l , and for the subject's state of mind to characterize a given value P_l , the subject must intend and be disposed to act in accordance with P_l , criticize others for failing to act in accordance with P_l , not criticize others for criticizing, and express one's criticism with evaluative and directive uses of language (*cf.* SHAPIRO 2006: 1163).
- (iv) In order for a body of legal norms P_{lc} to be determined by a concrete community C , it must be the case that the legal officials in C take up the sort of practical attitude toward P_{lc} described in (iii).

Claims (iii) and (iv) plausibly reflect the central roles of the internal point of view in Hart's theory: it specifies a kind of motivation that individuals take toward the law,²⁸ it provides a necessary condition for the existence of law in a community, and it captures apparent assumptions about the normativity of law in legal discourse and practice (SHAPIRO 2006). These substantive claims about the nature of legal judgment are compatible with the positivist theses about the nature and normativity of law in (i) and (ii).

To be clear, I am not claiming that Discourse Contextualism commits one to substantive views about the nature of law or legal judgment. It doesn't. It doesn't commit one to a positivist metaphysics or to treating legal judgment as essentially practical. These are extra-semantic issues in (meta)normative theory, philosophy of law, and psychology. The compositional semantics *takes as given* a syntactic structure and an abstract representation of context which assigns values to variables and other context-sensitive expressions. This leaves open whether a token use is to be interpreted with respect to a discourse-level norms variable, and what value for that variable is determined in concrete situations. It is in this way that Discourse Contextualism avoids building substantive (meta)normative assumptions into the conventional meanings of deontic modals. Maintaining this sort of neutrality is often taken to be a distinctive feature of expressivist theories (and their kin),²⁹ and Dworkin (1986, 2011) arguably claims it for his version of interpretivism. However, we can now see that contextualism, even a positivist version of contextualism, can capture

²⁸See also TOH 2005, 2011 for further discussion of the psychology and practical character of legal judgment in Hart's theory. For general discussion of the psychology of norm acceptance, and of legal norm acceptance in particular, see GIBBARD 1990 and RAILTON 2015, respectively.

²⁹See GIBBARD 1990: ch. 1, 2003: ch. 2, CHRISMAN 2007: 243, SILK 2013.

the idea as well. Legal officials can agree on the meanings of claims of law while disagreeing on what concrete features of the world would make them true or false.

In these ways, a variety of Discourse Contextualist-based accounts of legal discourse and practice are possible depending on one's broader philosophical commitments. I suspect some readers may find this conclusion unsatisfying. ("I was looking for a paper on law, not 'law'!" says a frustrated reader.) Such a reaction would be premature. Discourse Contextualism provides a framework for perspicuously articulating questions about the nature of law and legal judgment. (What must be the case for different types of deontic premise set variables to be called for in concrete contexts? What do these variables represent? What determines their values in concrete contexts? What makes it the case about a community that such-and-such deontic premise set represents the operative body of (moral, legal, etc.) norms?) This isn't a trivial feature. To modify a related point from David Kaplan, in delineating various issues concerning the meaning of deontic modals and the nature of law and legal judgment, "the result can only be healthy for all... disciplines" (1989: 537). Doing so can help us frame the questions directing our inquiry in ways that track the substantive philosophical issues of primary concern. Progress needn't be sidetracked by orthogonal issues concerning the semantics of natural language.³⁰ Clarifying what is at issue in various classic debates can motivate clearer answers and a more refined understanding of the space of overall views. Discourse Contextualism provides a solid semantic foundation for an overall (meta)normative theory and theory of law.

6 Conclusion

The central aims of this paper have been twofold: first, to develop an improved account of the meaning and use of various types of legal claims; and, second, to illustrate how this account can help advance the dialectics in debates about the normativity and metaphysics of law. I have focused in particular on the use of deontic modals in the law. The proposed account draws on a more general framework for contextualist semantics and pragmatics, which I call *Discourse Contextualism* (SILK 2014b). The strategy of Discourse Contextualism is to derive features of the meaning and use of deontic modals from a particular contextualist interpretation of a standard semantics for modals and general principles of interpretation and conversation. Discourses expressing fundamental legal agreement and disagreement can be understood in terms of speakers' assumptions about what body of legal norms is

³⁰For points in a similar spirit, see FORRESTER 1989: chs. 2, 13; PLUNKETT & SUNDELL 2013b: 275–277; SILK 2013, 2014b, 2015; PLUNKETT & SHAPIRO 2015.

determined by their conversational situation. Claims of law, or Hartian “internal” legal claims, presuppose a lexically unspecified value for a discourse-level parameter representing the body of legal norms operative in the context. In using deontic modals speakers can exploit their mutual grammatical and world knowledge, and general pragmatic reasoning skills, to manage the value of this parameter and coordinate on evolving normative view.

This treatment of deontic modals’ meaning and use can be fruitfully integrated with broader theorizing in ethics, metaethics, and philosophy of law. The Discourse Contextualist framework offers perspicuous ways of posing further questions about the nature and normativity of law, the relation between law and morality, and the apparent practical character of legal language and judgment. Delineating these issues can help refine our understanding of the space of overall theories and motivate more fruitful ways the dialectics may proceed. For instance, Discourse Contextualism provides the basis for an overall theory which combines features many have argued to be incompatible: a positivist metaphysics, a treatment of legal judgment as essentially practical and action-guiding, and a semantics/pragmatics of fundamental legal disagreement. A Discourse Contextualist semantics and pragmatics of legal claims provides an empirically adequate and theoretically attractive basis for a broader account of legal discourse and practice.

The development and defense of Discourse Contextualism in this paper is — to put it mildly — far from complete. For instance, I have focused only on deontic modal verbs. Though I think there are well-motivated ways of applying the Discourse Contextualist framework to expressions of other syntactic categories, I haven’t defended this claim here. Further, objections concerning disagreement are by no means the only objections that have been offered against contextualist semantics. More thorough investigation of similarities and differences among deontic modals and the varieties of context-sensitive expressions is necessary. (See SILK 2014b for a start.) Developing a Discourse Contextualist-based overall theory will require careful examination of how the semantic and broadly metasemantic issues interact. Our present understanding of these interactions and how they constrain theory choice is inchoate, at best. Detailed comparison with alternative frameworks will be necessary. Developments of a more general Discourse Contextualist account, and investigation of its prospects, must await future research.

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