

# Normativity in Language and Law<sup>\*</sup>

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“We have fulfilled our obligation under the law.”

“It’s wrong.”

“No. We follow the law, Alicia. Sometimes it’s wrong, sometimes it’s right. But we always follow the law.”

(*The Good Wife*, “Fixed”)

## 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 theory, called *Discourse Contextualism* (SILK 2016). 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 social, interpersonal function 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 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 help refine our 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.

Rough-and-ready 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.

Rough-and-ready support for (B): It should be possible to describe a 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 language in legal contexts be any different? Or, at least, why should legal interpretation call for normative or ethical theorizing over and above any such theorizing involved in interpretation more generally? Legal scholars needn't be moral saints.

Though the ideas 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 could claims about the (social) facts which make them true not be normative too? How could there be true claims about, say, the interpretation of a legal text that weren't directive in the way that the legal claims which it issues are directive? On the flip side, suppose (B) is true. Then it would seem that claims about 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?

I have been intentionally sloppy in formulating our puzzle (hackles, be thou un-raised). 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 nature and metaphysics of law. Following H.L.A. Hart, and Joseph 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.

The above characterization of the tension between the “normativity” and “sociality” of law may have been sloppy, but it targets what some have regarded as *the* central problem in philosophy of law (KELSEN 1967) — what Raz has called the “problem of the normativity of law” (RAZ 1975/1990: 170). Our not-altogether-hypothetical reply brings out important distinctions for theorizing about the nature of law, and legal discourse and interpretation. Yet there is still more to explain. 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 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 former doesn’t carry over to predict normativity of the latter? What is the relation between the meanings of legal claims and the grounds of law that 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 sense to be explained), and draws on a more general framework for implementing a contextualist theory, called *Discourse Contextualism*, which I have developed elsewhere (SILK 2016). I will argue that we can derive the apparent normative features of internal legal claims from a particular contextualist interpretation of an independently motivated formal semantics, along with general principles of interpretation and conversation (§§3–4). Though the semantics is descriptivist, 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 social, interpersonal function of normative uses of 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 help refine our understanding of the space of overall theories. This can illuminate new 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.

Normative uses of language aren’t limited to expressions of a single category. For concreteness, however, I will focus specifically on normative readings of modal verbs — so-called *deontic modals* — such as in (3).<sup>1</sup> Though I think the proposed framework can be applied to expressions of other categories (‘obligatory’, ‘duty’, ‘right’, etc.), I won’t argue for this here (see SILK 2016: ch. 7).

## 2 Theoretical disagreement about the law

An important function of language is to create and develop interpersonal relationships in communication. Language affords a variety of normative and evaluative resources for doing so. For instance, in using sentences such as (1)–(3) above, or

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<sup>1</sup>I use ‘deontic’ as a catchall term for any kind of practical normative reading. In calling a use ‘deontic’ I am not assuming that it need be performative, i.e. perform a directive/permissive speech act; more on this in §4.5. I will assume that legal language is a register of ordinary natural language.

(4), speakers can express their normative views and coordinate on what norms to accept — sometimes in agreement, sometimes in disagreement, as in (5).

(4) Morally speaking, we must help reform our prison system.

(5) A: Morally speaking, we must help reform our prison system.

B: Yeah you're right. What should we do?

B': No, it's fine the way it is.

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.

Some theorists claim that the dependence of our evaluation of (e.g.) (4) on what moral norms we accept derives from a dependence of the interpretation of (4) on a contextually relevant body of norms. *Metaethical contextualism*, as I will understand it, treats this context-dependence as a dependence of semantic (conventional) content on features of the context of use. Sentences such as (1)–(4) are treated as context-sensitive in the same kind of way as sentences with paradigm context-sensitive expressions (demonstratives, pronouns, etc.). What information is conventionally conveyed by, say, 'She won a modal' depends on which female is most salient in the discourse context. Likewise, the content of (4) is treated (to a first approximation) as the proposition that the relevant moral norms in the discourse context require us to help reform our prison system.<sup>2</sup>

Contextualism about normative language, in this sense, often goes under the heading of 'Metaethical Relativism' (e.g., STEVENSON 1963, DREIER 1990). The view has a checkered past. Serious objections have been raised, both on linguistic and on substantive (meta)normative grounds. One prominent objection to contextualism is that it cannot account for certain normative disagreements. A version of this objection can be discerned in Ronald Dworkin's influential criticism of Hart's account of internal legal claims and other so-called "semantic theories of law" (1986: ch. 1; cf. 2011: ch. 8). In this section I briefly describe the objection and note several constraints on an adequate response. The depth of the problem raised by disagreement phenomena is often inadequately appreciated by contextualists. In §§3–4 I will de-

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<sup>2</sup>We will make this more precise shortly. I use terms like 'conversation', 'discourse', 'utterance' broadly to include uses of language in texts and deliberation, not simply in spoken dialogue. For now I gloss over the distinction between sentences-in-context and utterances (see §5); my talk about the semantic properties of utterances can be understood as short for talk about the semantic properties of the sentences uttered in the contexts of those utterances. Following YALCIN 2014, there may be reasons to avoid using '(semantic) content' as a label for a compositional semantic value in context; my use of 'content' for this type of object makes no assumptions about its broader theoretical role.

velop (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.

(NB: My aim here isn't to do Dworkin (or Hart) exegesis.<sup>3</sup> What matters for present purposes is the content of the objection to be described. Though I construe 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 Hartian positivist metaphysics.)

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 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 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. 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. Gray 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:

- (6) *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 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

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<sup>3</sup>See, e.g., RAZ 1998, COLEMAN 2001, COLEMAN & SIMCHEN 2003, LEITER 2007, SHAPIRO 2007, KRAMER 2008, PLUNKETT & SUNDELL 2013b.

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 (7) 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 (8) Gray is disagreeing with Earl if they are both making claims about their own respective norms.

- (7) In view of the law, Elmer may not receive the inheritance.
- (8) 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 denial in (6) is felicitous, whereas B's denial in (9) is not.

- (9) 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 the sentences used in (9) explicitly specify the semantic contents of the respective sentences used in (6).

Several clarificatory remarks: First, Earl and Gray's disagreement is "fundamental" in the sense of concerning the basic criteria of legal validity, which determine the very content of the law. As Dworkin puts it, the disagreement is not about "what [the law] should be" but rather about "what the law is" (1986: 7). In *Law's Empire* Dworkin often seems to treat theoretical disagreements as disagreements about proper methods of interpreting authoritative sources of law. What is important here is simply that the disagreements are about the fundamental grounds of law.<sup>4</sup> Such disagreements may be rooted in issues about proper methods of interpretation, but I won't require this in what follows. (Terminology in this area is fraught. I will use expressions like 'fundamental grounds of law', 'criteria of legal validity', 'basic legal norms', 'rule of recognition', etc. largely interchangeably. Differences among these notions won't matter for present purposes.)

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<sup>4</sup>Cf.: "a theoretical disagreement is a disagreement about the criteria of legal validity, that is, about the content of what Hart calls the Rule of Recognition" (LEITER 2007: 3); it "involves conflicting claims about what the grounds of law are" (SHAPIRO 2007: 36). See also n. 3.

Second, it isn't uncontentious what the basis of Earl and Gray's actual disagreement was. (Indeed the above exposition ran together two readings of the case, emphasized in Dworkin's "The Model of Rules I" and *Law's Empire*, respectively.) For dialectical purposes I assume that fundamental legal disagreements are possible — and common enough to warrant theorizing about them (cf. LEITER 2009) — and that the disagreement between Earl and Gray is an example of such a disagreement.

Third, I will focus specifically on discourse disagreements, though of course not all disagreements are expressed in linguistic exchanges.<sup>5</sup> 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 a certain discourse phenomenon: the systematic licensing of expressions of linguistic denial ('no', etc.) in discourses such as (6). These expressions signal the speaker's rejecting some aspect of the previous utterance. Not all cases in which speakers intuitively disagree can be marked in this way. B's "disagreement in attitude" with A in (10) couldn't typically be signaled with a linguistic denial.

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

Our task is to generate a representation of discourses like (6) that correctly predicts the felicity of expressions of linguistic denial and the discourse moves they mark.

The epicycles from here are involved; I simply wish to flag one not uncommon reaction.<sup>6</sup> I am sympathetic with the informal impression that in discourses like (6) the speakers 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*. Yet 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 uses of language, given that a contextualist semantics is correct.

According to contextualism, sentences such as (7)–(8) 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

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<sup>5</sup>For discussion of inter-conversational disagreement, see MACFARLANE 2007, SILK 2016: §3.4.2, and references therein. See also §4.2.

<sup>6</sup>For prescient early discussion, see MOORE 1912: ch. 3, STEVENSON 1937. For discussion in the broader literature, see GIBBARD 1990, 2003, KÖLBEL 2004, LASERSOHN 2005, VON FINTEL & GILLIES 2008, RICHARD 2008, DREIER 2009, MACFARLANE 2014, SILK 2014, 2016; see also nn. 7, 19.

‘It’s cold in here’  $\rightsquigarrow$  ‘You should shut the window’ — it’s not as if they systematically trigger those particular 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) imply that the addressee ought to be hungry. ‘That [demonstrating *b*] is a cute baby’ doesn’t (systematically) imply that the addressee ought to be demonstrating *b*. Denials like *B*’s in (11)–(12) are typically infelicitous.

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

When speakers use paradigm context-sensitive expressions with different intended asserted contents, the norm isn’t disagreement, but talking past.

In sum, the worry is that the distinctive role of internal legal claims is unexpected given the contextualist’s semantics. Although many contextualists have offered pragmatic diagnoses of disagreement in terms of non-conventional aspects of use, little attention has been paid to what specific mechanisms are involved and how they are linguistically constrained. The challenge is to explain how the (dis)agreement phenomena can be derived from the sentences’ specific contents and general conversational principles and features of contexts of use, *and* why the phenomena can be systematically derived with deontic modals but not with paradigm context-sensitive language. The force of this challenge has been underappreciated by contextualists.<sup>7</sup>

### 3 Deontic modals in legal contexts

The general consensus is that the objection from discourse disagreement is devastating for standard versions of contextualism (cf. EGAN ET AL. 2005: 149; MACFAR-

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<sup>7</sup>In the broader literature, see CAPPELEN 2008, BJÖRNSSON & FINLAY 2010, VON FINTEL & GILLIES 2011, SUNDELL 2011, PLUNKETT & SUNDELL 2013a,b, FINLAY 2014. Plunkett & Sundell nicely highlight 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 (2013a: 13–19, 28; 2013b: 262–263, 267). However, it isn’t part of their aim to explain precisely how this happens, given the contextualist’s semantics, or why normative language contrasts with paradigm context-sensitive language in its tendency for this kind of use. (Thanks to David Plunkett (p.c.) for clarifying this.) For further discussion of these issues, see SILK 2014, 2016.

LANE 2010: 1, 11; 2014: 248–249). But I am more optimistic. The following sections briefly motivate a contextualist framework, developed in greater detail elsewhere (SILK 2016), and apply it to uses of deontic modals in legal contexts. I call the framework *Discourse Contextualism*. The strategy is to start with a particular contextualist interpretation of a standard semantics for modals, and show how this formal semantics generates constraints on the interpretation of deontic modals and predicts distinctive features of their use. 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). We will see that, *pace* Dworkin, it's not the case that "our jurisprudence [i.e., 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

It is standard in linguistic semantics to treat modal verbs as semantically associated with a parameter or variable that ranges over sets of premises (propositions) (see esp. KRATZER 1977, 1981, 1991). Broadly deontic readings call for a premise set that encodes the content of a body of norms (n. 1). For instance, a moral premise set might include propositions like that no one steals, that everyone keeps their promises, etc. In the case of legal readings, for present purposes we can leave open the precise relation between basic legal norms, like a Hartian rule of recognition, and any subsidiary norms that are "validated" by them (e.g., HART 1961/1994: 107–110). What is important here is simply that the legal premise sets in the semantics represent the full content of a body of law. Roughly put, for a given premise set  $P$ , 'Must  $\phi$ ' says that  $\phi$  follows from  $P$ , and 'May  $\phi$ ' says that  $\phi$  is compatible with  $P$ .<sup>8</sup>

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<sup>8</sup>Kratzer's semantics uses two premise sets, calculated as a function of the world of evaluation: a "modal base"  $F(w)$  that represents a set of background facts in  $w$ , and an "ordering source"  $G(w)$  that represents the content of a relevant ideal in  $w$ . These complications won't be relevant here. For simplicity I treat modals as evaluated with respect to a single finite, consistent premise set, and I suppress the world-indexing on premise sets. My talk about a proposition  $p$  "following from (/being compatible with)  $P$ " can be understood as short for saying that  $p$  follows from (/is compatible with)  $P(w)$ , for any relevant world  $w$ . I treat ' $\phi$ ', ' $\psi$ ', etc. as schematic letters to be replaced with declarative sentences; for convenience I sometimes refer to the possible-worlds propositions they express by dropping the

It is also common to include in a model of context a parameter representing (roughly) norms accepted for the purposes of conversation.<sup>9</sup> In conversation we not only share information in coordinating our beliefs about the world. We 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 norms parameter as consisting of a sequence of premise sets, representing different types of norms that may be relevant in the conversation (cf. PORTNER 2007). It is natural to link deontic premise set variables (moral, legal, etc.) with this discourse-level parameter, at least in the uses we have been considering. For instance, the use of 'must' in (3) 'In view of the law, Chip must repay his debt' calls for a variable  $P_1$  that represents the legal norms endorsed in the conversation. This reflects the paradigmatic role of deontic modals in communal planning and deliberation, and in coordinating on an overall normative view. (Complications to these natural moves will follow shortly.)

Treating deontic modals as semantically associated with a deontic premise set variable places constraints on their felicitous use and interpretation. When this variable is free, a value must be contextually supplied in order for the sentence to have a specific interpretation in context. For communication to succeed, 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 her 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)  $\phi$ ' assumes a value for  $P_1$ , say  $P_{l_c}$ ,<sup>10</sup> and asserts that  $\phi$  follows from (/is compatible with)  $P_{l_c}$ .

To be clear, I am *not* suggesting that the standard semantic framework for modals calls for contextualism about deontic modals.<sup>11</sup> All parties can accept that certain

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single quotes. I use bold for variables, and italics for their values in context; any subscripts are included simply for expository purposes to indicate the intended assignment and interpretation of the variable. (See SILK 2016 for refinements and further details on the formal semantics.)

<sup>9</sup>See esp. PORTNER 2007; also LEWIS 1979, LOCHBAUM 1998, STARR 2010. I needn't commit to a particular account of the nature and representation of context. For instance, I am not assuming that contexts are determined wholly by speaker attitudes. What is important here is simply that contexts determine premise sets for the interpretation of modals. See WRÓBLEWSKI 1983 for discussion of various notions of context in legal interpretation.

<sup>10</sup>Or, in some cases, at least a relevant range of values (for discussion, see SILK 2016: §§3.3.6, 3.5, 4.4, 5.2.5, 6.3; see also nn. 2, 14).

<sup>11</sup>On this I disagree with sentiments in VON FINTEL & GILLIES 2008, FINLAY 2009, 2014, BJÖRNS-

modal verbs, qua lexical items, are context-sensitive in the sense that the context of utterance determines what type of reading the modal receives (see SILK 2016: §3.1). What is at issue between contextualists and non-contextualists is whether, given a certain type of normative reading (e.g., moral), some specific body of norms supplied by the context of utterance is used in calculating the semantic content, or compositional semantic value, of the sentence in context.

### 3.2 Managing the context

Before returning to the 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's common knowledge between Clara and Dan that several days ago 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 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 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 was in fact offended by Clara's remark, and, though he didn't say so at the time, Clara knows this. Nevertheless she still 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 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

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SON & FINLAY 2010, DOWELL 2011, 2012.

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: *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. By reasoning from deontic modals' semantically generated constraints, interlocutors can integrate relevant features of the (past, present, and projected future) conversational situation to interpret deontic modals, share information, and coordinate on an evolving normative view.

With these points in mind, let's reconsider Earl and Gray's discourse disagreement in (6). Earl utters (7) 'In view of the law, Elmer may not receive the inheritance.' Upon hearing Earl's semantically underspecified utterance, Gray might (tacitly) 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 (7) 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.<sup>12</sup> Given the grammatical properties of modals, Earl's utterance assumes a

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<sup>12</sup>For rigorous formalizations in artificial intelligence and logic of this sort of process and the tacit reasoning behind it, see, e.g., HOBBS ET AL. 1993, ASHER & LASCARIDES 2003, THOMASON ET AL.

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 (7) requires that the legal norms operative in the context be incompatible with Elmer's receiving the inheritance. Since it's mutually presupposed that Earl is obeying the conversational maxims (GRICE 1989), in uttering (7) Earl implicitly proposes that it become taken for granted that such norms be accepted in the discourse. In accepting an utterance one normally accepts what the speaker committed to in uttering it. So, since it's common knowledge that Earl can expect Gray to undergo an abductive reasoning process like in (13), it's also common knowledge that he will object if he has relevantly different views on the criteria of legal validity, 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 can be set to a value that is incompatible with *i*.

However, since Gray accepts an incompatible legal view, he objects.<sup>13</sup> He says (8) 'No, legally, Elmer may receive the inheritance'. For reasons parallel to those above, his doing so is appropriate only if the legal norms operative in the context 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 these discourse-level legal norms are that way. 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 may ensue. 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  $P_1$  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.

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2006. As these literatures have documented, we are quite skilled at inferring one another's intended context and coordinating accordingly (cf. RAILTON 2009 for rich related discussion of our fluency in tacit reasoning and integrating it in action). 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 level of communities in establishing more stable linguistic conventions (e.g., CLARK & WILKES-GIBBS 1986, GARROD & DOHERTY 1994). See STALNAKER 2014 for discussion of various philosophical motivations.

<sup>13</sup>The 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. Denials 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 Basic features

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

### 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 reasonably expect Gray to undergo the sort of pragmatic reasoning in (13) and retrieve his intended interpretation, he needn't be overstepping his bounds in using 'may' and assuming a value for the discourse-level legal norms parameter. Similarly, since Gray knows that Earl has similar semantic and pragmatic competencies, he can express his disagreement with Earl's assumption with a direct denial — that is, by performing an act, the linguistic act of uttering (8), 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 in fact (already) commonly accepted. 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 purposes of legal discourse and practice. Given how skilled we are at inferring one another's intended context (n. 12), 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 (6). 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 (*pace* TOH 2005). Our model of the discourse dynamics represents Earl and Gray as disagreeing 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.<sup>14</sup> *Pace* Dworkin, the contextualist can locate a “fulcrum of disagreement”

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<sup>14</sup>Slightly 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

(1994: 14) even when there is controversy about the basic grounds of law.

It is important to be clear about the level at which Earl and Gray's disagreement is explained as being "about the context." The present challenge for contextualism is to explain the licensing of expressions of linguistic denial in discourses like (6), and to represent how the hearer rejects the speaker's discourse move and issues a counter-move (§2). For this purpose what is important is that our formal pragmatics locates a specific incompatibility in the updates from Earl's and Gray's utterances: their utterances make incompatible assumptions about the conversational situation (n. 14). 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. This grounds the incompatible representations of context presupposed by their respective utterances. For these reasons I avoid classifying the present Discourse Contextualist account as a "meta-contextual" or "metalinguistic" account of discourse disagreement.<sup>15</sup>

### 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 C.L. Stevenson, 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 using an 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,

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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 what is taken for granted in the conversation (STALNAKER 1978).) As noted above (n. 10), in concrete discourses there may be various ways of accommodating a value for  $P_1$  that bears the stated relation to the embedded proposition, given the speakers' existing commitments; our purposes often don't require us to commit for the future course of the discourse to a particular body of norms. This also helps capture how in cases of *agreement* over particular legal issues, interlocutors needn't accept precisely the same norms. In an agreement with (say) Earl, although different norms may be determined by the concrete conversational situation in different worlds in the context set, the norms will be alike in implying  $\neg i$ . The basis for the speakers' agreement would be their attitudes regarding the legal status of Elmer's inheriting. (Note that these points about contextual underspecification in the discourse dynamics are compatible with treating the compositional semantics as taking a particular value for the premise set variable; see SILK 2016: §§3.3.6, 3.6, 5.2.5, 6.3 for detailed discussion.)

<sup>15</sup>Cf. PLUNKETT & SUNDELL 2013a,b, PLUNKETT 2015.

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. 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 deontic modal assertion. Doing so thus creates a new discourse context in which that precondition is taken for granted.<sup>16</sup> This puts pressure on the hearer to conform her basic legal views to the assumed deontic premise set. In cooperative conversations, exerting such conversational pressure will be able to be supported by some justification for why it would be reasonable to rely on the relevant presupposed norms, or reasonable to treat one as relevantly authoritative on the issue in question. 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.<sup>17</sup>

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.<sup>18</sup> On the present account the relevant presupposition isn’t that the 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 norms itself. As we have seen, speakers needn’t believe that these norms are already mutually accepted; interlocutors can manage their views on what legal norms to accept in *using* expressions such as deontic modals. 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

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<sup>16</sup>Cf. STALNAKER 1978 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, SILK 2016: §§3.5, 5.2.5, 6.2.2, 6.3).

<sup>17</sup>For further discussion, see GIBBARD 1990: Part III. See FORRESTER 1989 for developments of a “pragmatics of deontic speech,” along with applications to legal discourse.

<sup>18</sup>Cf. SILK 2016: §3.5.3 on theories invoking a “presupposition of commonality.”

always presupposed” (2011: 119).

The nature of deontic modal sentences’ truth conditions may help explain their propensity for discourse-oriented uses. There is much to be said about the distinctive linguistic behavior of deontic modals, and the various contrasts between deontic modals and paradigm context-sensitive expressions. For present purposes let’s simply observe the following (see SILK 2016 for extensive discussion). The truth-conditional contents of deontic modal sentences are propositions about logical relations (e.g., implication, compatibility) between propositions and premise sets. Such 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 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 interpretation (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, GRICE 1989, 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. Capturing this is often taken to be a distinctive advantage of expressivist theories.<sup>19</sup> 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: 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

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<sup>19</sup>See STEVENSON 1937, HART 1961/1994, GIBBARD 1990, TOH 2005, 2011; in the broader literature, see, e.g., RICHARD 2008, YALCIN 2012, SWANSON 2016.

1981: 300, 1993: 148). A common complaint against contextualism is that it incorrectly treats normative utterances as *reporting*, rather than *expressing*, speakers' states of mind.<sup>20</sup> Discourse Contextualism avoids this worry.

Common characterizations of contextualism notwithstanding,<sup>21</sup> deontic modal sentences, on the present account, aren't fundamentally about an individual or group. They make logical claims *given* a certain deontic premise set. Earl's utterance of (7) 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 basic legal norms which, given the facts of the case, imply that Elmer is not to 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 asserts *and* presupposes. Discourse Contextualism can capture the core expressivist claim that normative uses of language express the speaker's state of mind.

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

So far we have focused on what Hart called *internal* legal claims — claims of law made by adherents of a legal system. But, as Hart observed, 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 that one's claims are genuinely normative. The present account provides a framework for capturing Hart's and Raz's insights about internal and external legal claims, and cashing out the metaphorical talk of “points of view.” (We will return to Hart's and Raz's accounts of the internal point of view and the normativity of internal legal claims in §5.)

Not all uses of deontic modal expressions are prescriptive or express the speaker's endorsement of the relevant norms or values. Following LYONS (1977, 1995), it is common to distinguish (what I will call) *endorsing* uses of modals, like in (6), where the speaker is presented as endorsing the considerations with respect to which the modal is interpreted, from *non-endorsing* uses, like in (14)–(15), where the speaker isn't presented in this way.<sup>22</sup> The non-endorsing use in (e.g.) (15) simply reports what Ernie's parents' rules require; these rules needn't be accepted by the speaker. The

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<sup>20</sup>See, e.g., AYER 1936, STEVENSON 1937, GIBBARD 1990; cf. HART 1961/1994: 102–103.

<sup>21</sup>E.g., SILK 2013: 212–213, MACFARLANE 2014: 146–147, a.m.o.

<sup>22</sup>This distinction has been noted in many areas under various labels; see also, e.g., HARE 1952, VON WRIGHT 1963, NARROG 2005, VERSTRAETE 2007, SILK 2016.

claims in (14)–(15) can be paraphrased with an explicit ‘according to’-type phrase, like in (16).

- (14) Bert has to pay a fine. Isn’t that crazy? I wouldn’t do it if I were him.  
(15) Ernie has to be home by 10. Aren’t his parents stupid? I’d stay out if I were him.  
(16) According to Ernie’s parents’ rules, Ernie has to be home by 10.

The endorsing uses of deontic modals in (5)–(6), by contrast, present the speaker as endorsing the norms that justify the modal claim. A’s utterance in (5) expresses her acceptance of norms implying that Sally contribute to prison reform. Hart’s distinction between “internal” and “external” legal claims can be viewed as an instance of the more general, independently attested distinction between endorsing and non-endorsing uses of modals.

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 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  $P_{NH}$  that refers to (say) New Haven traffic law; the external use in (15) calls for a variable  $P_{hr}$  that refers to Ernie’s parents’ house rules. These rules may be accepted in the context, but they may not be. What distinguishes internal uses is that they call for a discourse-level variable that represents norms accepted for purposes of 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 norms are endorsed in the context. The distinctive features of internal uses can be derived from the contextualist semantics as explained in the foregoing sections.<sup>23</sup>

This treatment sheds light on a further distinction which Raz draws between internal normative claims that are *committed* and those that are *detached* (1975/1990: 171–177). *Committed* internal claims are internal claims in Hart’s sense. Yet Raz notes that not all claims of law made within a legal community are endorsed by the members of that community. This leads Raz to posit a class of *detached* internal claims: claims which are normative although they don’t express the speaker’s acceptance of the relevant norms. In a detached internal claim the speaker merely pretends or simulates such acceptance. For instance, an anarchist lawyer may ad-

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<sup>23</sup>Toh (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). The account developed here gives both types of claims a common underlying contextualist semantics, and explains the distinctive features of internal claims as effects of using sentences interpreted with respect to a discourse-level norms variable.

wise her client that he “must pay the fine,” though she doesn’t endorse the laws that imply this. By analogy, Raz considers a meat-eater uttering (17) to a 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. I find it hard to see a helpful sense in which detached claims are genuinely “normative” even though (like external claims) they are neither directive nor expressive of the speaker’s own views. Such properties are often regarded as definitional of normative uses of language.<sup>24</sup> More helpful, I suggest, is to treat Raz’s detached internal claims instead as a species of external claims — specifically, external claims made in contexts in which (i) what is at-issue is the specific implications of a general body of norms given the relevant circumstances, where (ii) these norms may be endorsed by certain relevant individuals in the context, though not necessarily by the speaker. For instance, the meat-eater’s utterance of (17) makes a claim about vegetarian moral norms that are endorsed by the addressee. The variable  $P_v$  representing the content of these norms, with respect to which the modal is interpreted, needn’t be identified with the discourse-level 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  $P_v$  implies that she not eat the dish — to have direct 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 regarding meat-eating. Analogous points hold for Raz’s examples of detached internal claims in legal contexts.

## 4.6 Recap

I have argued that a more nuanced understanding of the role of context in interpretation provides the basis for an improved contextualist theory of uses of deon-

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<sup>24</sup>See FORRESTER 1989: ch. 3; KORSGAARD 1996: 8, 226; THOMSON 1996: 130–131, 147–150; GIBBARD 1990: 33, 2003: ix–x, 9–10, 137–139; FIELD 2009: 286; PARFIT 2011: 284, 288, 291; RAILTON 2012: 25. For critical discussion, see SILK 2015b: §6.

tic modals in legal contexts. The aim of Discourse Contextualism is to start with a particular contextualist interpretation of a standard semantics for modals, and then derive distinctive discourse properties of deontic modals from this formal semantics and general conversational principles. Semantically, normative uses of deontic modals — “internal” uses, in Hart’s terminology — are associated with a contextual parameter representing 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 manage an evolving normative view.

## 5 Legal language and a theory of law: The “problem of the normativity of law,” revisited

§§2–4 focused on the meaning and use of modal language in legal discourse. In this section I examine how the Discourse Contextualist semantics/pragmatics from §§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.

Our discussion of Raz and internal normative claims brings us back to our puzzle from §1. What motivated Raz to posit a distinct category of detached internal legal claims was that it provided a response to what he called “the problem of the normativity of law” — the problem of explaining “the use of normative terms to describe the law and legal situations” in a manner consistent with legal positivism (1975/1990: 169). The challenge was to reconcile the *normativity* of law with the *sociality* of law (§1). The worry for 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 reply was to deny that ‘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 such 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 directive moral force: “Detached” legal claims are merely made from the “point of view” of someone who treats the relevant legal norms as morally justified; they needn’t express endorsement of that point of view. Hence, though “made by the use of ordinary normative terms, [they do] not carry the same normative force of an ordinary legal statement” (RAZ 1977: 156).

Our Discourse Contextualist framework brings into relief an alternative, and I think more attractive, line of reply to Raz’s “problem of the normativity of law.” We can reconcile a positivist theory of the nature of law with the idea that ‘must’, ‘ought’, etc. have the same meaning in legal and moral contexts, and without positing a spurious class of non-endorsing/non-directive normative claim.

First, there is a problematic presupposition in how Raz sets up the problem. It is misleading to talk about “normative *terms*” (expressions, vocabulary) as such (RAZ 1977: 158; emphasis mine). There is nothing essentially “normative” in lexical items such as ‘must’, ‘ought’, ‘duty’, etc. Many modal expressions can receive various types of readings, as in (18). As we saw in §4.5, even broadly deontic readings needn’t be used endorsingly or with directive force, as in (19).

- (18) a. (Given when she left,) Sally must 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]

- (19) [Context: We’re teenage siblings. It’s 10:30 p.m., and we plan on staying out and going to a party. We know our parents are already asleep.]

*You:* When is curfew, again? We need to make sure that we tell Mom we got back before then if she asks.

*Me:* We have to be home by 11. Aren’t her rules stupid? C’mon, let’s go.

Although modals can be put to different uses such as these, I am sympathetic with the standard view among formal semanticists that “there is something in the meaning [of the modal] which stays invariable” (KRATZER 1977: 340). The linguistic meaning of (e.g.) ‘must’ in moral and legal contexts is the same: roughly put, given such-and-such set of premises *P*, ‘Must  $\phi$ ’ is true iff  $\phi$  follows from *P* (§3.1). What is normative, rather, are *uses* of expressions such as ‘must’ in certain contexts (cf. SILK 2015b: §6).

Raz’s move to frame the “problem of the normativity of law” as a problem about “normative language” (1975/1990: 170) is unfortunate. Plausibly, what was of primary interest to legal theorists like Hart and Raz wasn’t 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 behav-

ior, etc. In the remainder of this section I will show how Discourse Contextualism provides a framework for integrating issues about the meaning and use of language in legal contexts with issues about the normativity and nature of law.

The project of compositional semantics is to give an account of the following: given an assignment of values to context-sensitive expressions, what are the conventional contents of expressions of the language, and how are the conventional contents of complex expressions calculated as a function of the conventional contents of their parts. Crucially, compositional semantics — the representation of conventional meaning and speakers' semantic competence — *takes as given* an abstract representation of context that assigns values to free variables and other context-sensitive expressions. This leaves open the broadly metasemantic question of what makes it the case about a concrete conversational situation that such-and-such abstract context (or perhaps range of abstract contexts) represents it. The conventional meaning of deontic modals leaves open what makes it the case that such-and-such deontic premise sets represent the operative norms (moral, legal, etc.) — and thus that such-and-such values for  $P_1$ ,  $P_m$ , etc. are determined — in a concrete discourse context.

Distinguishing questions about the metasemantics of deontic modals suggests precise ways of posing substantive questions about the nature of law and legal judgment. For instance:

#### *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 purely source-based criteria of legal validity?

#### *Normativity of law*

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

#### *Law and morality*

What is relation the between the operative legal and moral norms, and hence values for  $P_1$  and  $P_m$ , determined in a concrete context? Does the fact that, in view of the law, one must  $\alpha$  imply that, in view of morality, one must  $\alpha$ , or

even that one has a moral reason to  $\alpha$ ? For instance, is it the case that, for any concrete context C, if the value for  $P_1$  determined in C implies that  $x$  pays a fine, then the value for  $P_m$  determined in C implies that  $x$  pays a fine?

### *Legal judgment*

What is involved in accepting a body of legal norms, or 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 an utterance 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  $\alpha$ ' — accepting that the operative legal norms, hence value for  $P_1$ , determined in one's concrete context implies that one does  $\alpha$  — necessarily involve taking oneself to have a normative (and perhaps moral) reason to  $\alpha$ ?

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  $P_{m_c}$ , and all-things-considered norms  $P_{n_c}$  such that  $P_{l_c}$  implies that one does  $\alpha$ , but neither  $P_{m_c}$  nor  $P_{n_c}$  implies that one does  $\alpha$  (even in the absence of any defeating circumstances).
- (ii) Moral facts (properties, truths) 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,  $\phi$ ') to be correctly

interpreted with respect to  $P_I$ , and for the subject's state of mind to characterize a given value  $P_I$ , the subject must intend and be disposed to act in accordance with  $P_I$ , criticize others for failing to act in accordance with  $P_I$ , 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  $P_{I_C}$  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  $P_{I_C}$  described in (iii).

Claims (iii)–(iv) plausibly reflect the central roles of the internal point of view in Hart's theory: they specify a kind of motivation that individuals take toward the law,<sup>25</sup> provide a necessary condition for the existence of law in a community, and capture apparent assumptions about the normativity of law in legal discourse and practice (SHAPIRO 2006). These claims about the nature of legal judgment are compatible with the positivist theses about the nature and normativity of law in (i)–(ii).

To be clear, I am not suggesting that Discourse Contextualism commits one to a positivist metaphysics or to treating legal judgment as essentially practical. It doesn't. Discourse Contextualism offers a way of representing the conventional meanings of deontic modals (at a relevant level of abstraction), and of modeling how uses of deontic modals conventionally change the context. It doesn't commit one to substantive views about the nature of law or legal judgment. These are extra-semantic issues in (meta)normative theory, philosophy of law, and psychology. Maintaining this sort of neutrality is often taken to be a distinctive feature of expressivist theories (and their kin),<sup>26</sup> and Dworkin (1986, 2011) arguably claims it for his version of interpretivism. Yet we can now see that contextualism — even a version of contextualism supplemented with a positivist theory of law — can capture the idea as well.

Bringing our discussion full circle, let's return to Raz's "problem of the normativity of law." We have seen that various Discourse Contextualist-based accounts of legal discourse and practice are possible depending on one's broader philosophical commitments. 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. In this section we have seen how, perhaps contrary to initial appearances, the positivist can coherently maintain that expressions such as 'must', 'ought',

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<sup>25</sup>See 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.

<sup>26</sup>See GIBBARD 1990: ch. 1, 2003: ch. 2, CHRISMAN 2007: 243, SILK 2013.

etc. have a constant meaning in moral and legal contexts, without necessarily treating legal discourse as committing one to moral approval of the law or treating legal judgment as a species of moral judgment. Examining Raz's argument illustrates a more general lesson and feature of the account. Discourse Contextualism provides a framework for perspicuously articulating questions about the nature of law and legal judgment. Delineating these issues, and distinguishing them from the semantics proper, can free up our inquiry to better track relevant philosophical issues of primary concern. This can motivate clearer answers and a more refined understanding of the space of overall theories.<sup>27</sup> Discourse Contextualism provides a solid linguistic foundation for a broader (meta)normative theory and theory of law.

## 6 Conclusion

The central aims of this paper have been twofold: first, to begin to develop an improved account of the meaning and use of various types of legal claims, focusing on deontic modals; and, second, to illustrate how this account can help advance the dialectics in debates about the normativity and metaphysics of law. The proposed account draws on a more general framework for developing a contextualist theory, which I call *Discourse Contextualism* (SILK 2016). I have argued that we can derive various discourse properties of deontic modals in legal contexts 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 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 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 philosophy of law and (meta)normative theory. Discourse Contextualism provides a framework for posing further questions about the nature and normativity of law, the relation between law and morality, and the prac-

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<sup>27</sup>For points in a similar spirit, see FORRESTER 1989: chs. 2, 13; PLUNKETT & SUNDELL 2013b: 275–277; PLUNKETT & SHAPIRO 2015; SILK 2013, 2015a,b, 2016. See SILK 2016: §§3.6, 5.4, 7.5 for further discussion on the relations among the formal semantics, metasemantics, and (meta)normative theory, and the role of truth-value judgments in semantic theorizing.

tical 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. Notably, our discussion brings into relief a kind of 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 account of deontic modals' meaning and use provides a solid linguistic foundation for a broader account of legal discourse and practice.

The development and defense of Discourse Contextualism in this paper is by no means complete. For instance, I have focused only on deontic modal verbs. Yet there are important differences among types of normative readings with different categories of expressions. It is non-trivial how precisely to implement a Discourse Contextualist account in each case. Further, objections concerning disagreement are certainly not the only challenges facing contextualist semantics. More thorough comparisons of the discourse properties and embedding behavior of various types of paradigm context-sensitive expressions and normative uses of language is required. (For a start on these issues, see SILK 2016.) Developing a Discourse Contextualist-based overall theory will require careful examination of how the semantic, metase-mantic, and extra-linguistic issues interact and constrain theory choice. Detailed comparison with alternative frameworks will be necessary. I leave developments of a more general Discourse Contextualist account, and evaluation of its prospects, for future research.

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