Why There is No Problem of Normative Legal Language

A Reply to Joseph Raz

Noah D. Landay

Submitted to Central European University in partial fulfillment of the requirements for the degree of Master of Arts in Philosophy

Supervisor: Hanoch Ben-Yami

Vienna, Austria
June 2023

Contents

Abstract

We readily use normative terms to make claims about the law and legal situations. The same is true of moral claims. Legal philosopher Joseph Raz saw this as a problem for legal positivism and proposed a solution which he called the doctrine of statements from a point of view. Here I argue that his solution fails to work, and further that the problem itself is false. I explain the conceptual error that underlies Raz's alleged discovery of the problem by drawing from the work of Ludwig Wittgenstein and show how Wittgenstein offers a better framework for thinking about normative language.

0 Introduction

This paper addresses what Joseph Raz calls "the problem of explaining the use of normative language in describing the law and legal situations."[1] In Section 1, I reconstruct the problem from his treatment of it in two of his books on the subject, *The Authority of Law* and *Practical Reasons and Norms*, as well as a handful of essays on the matter. Section 2 summarizes and assesses Raz's own solution to the problem and a solution to a slightly different version of the problem offered by Robert Mullins. Finding these candidate solutions lacking in several critical respects, in Section 3 I dismiss the problem outright by showing how it is the result of unjustified assumptions about language and meaning. In Section 4, I argue that Raz's problem belongs to the category of what Ludwig Wittgenstein called *Luftgebäude*, variously translated as "castles in the air" or "houses of cards" – illusory philosophical claims arising from the misuse and misapplication of words. I end with some of my own observations about norms, reasons, and the normativity of law.

I am far from being the first person to suggest that Raz's problem is no problem at all. The inspiration for this paper comes from Daniel Duarte d'Almeida, whose dismissal of the problem is so comprehensive that it seems to obviate the need for any further writing on the subject. With this in mind, I hope to make an original contribution by differing from d'Almeida's paper in a few significant respects. Firstly, in my assessment of Raz's own proposed solution to his problem, I take a route of criticism not taken by d'Almeida. Next, while d'Almeida offers counterexamples to show that the central claim underlying Raz's "discovery" of the problem is wrong, this paper goes further by making explicit the false assumptions about language that led Raz to his mistaken claim in the first place. The result is to make a slightly different and stronger claim than d'Almeida; namely, that Raz's problem does not merely state something false about the world, but actually commits a conceptual error. Finally, this paper makes a modest contribution to Wittgenstein's metaphilosophical project of demolishing castles in the air, or, in his indelible words, showing the fly the way out of the fly bottle.

By far the most important philosophical concept addressed in this paper is that of normativity. In the spirit of Wittgenstein, and for reasons which will become clear towards the end of Section 3, it is often best to define concepts like this by giving examples and describing some of their salient shared features. Obeying the law is a norm, as is writing from left to right and drinking wine from a glass instead of a mug. Not stealing is a norm (regardless of what the

[1] Joseph Raz, *Practical Reason and Norms*, 1st ed. (Oxford: Oxford University Press, 1999), 170. (Henceforth: *PRN*)

law might be), and so is moving the bishop diagonally along the chessboard. Norms play an important justificatory role in practical reasoning by serving as the basis for certain actions, whether or not that justification is made explicit. Some norms are more flexible than others, and some may be superseded by others depending on the context. For Joseph Raz, norms are defined by the fact that they entail the existence of reasons for doing some action which generally exclude all possible reasons for not doing it; this definition is examined in Section 3.

The concept of the normativity of law, which is discussed extensively throughout this paper, refers to the fact that people often act in a certain way because the law requires them to act that way, regardless of whether or not they believe the law to be moral. This fact is perhaps the single greatest motivating factor behind Raz's investigation of norms, to which he dedicates the majority of both books discussed here. At the heart of this investigation is the question of "what difference the fact that a norm belongs to a legal system in force in a certain country makes to our practical reasoning."[2] This paper reconstructs his treatment of the subject in order to understand what he got right and what he got wrong. In fairness to Raz, I must note that the two books on which this paper is based were published 20 years apart. However, no contradictions are apparent in his treatment of the subject in the two books, nor does the later book contain any explicit retractions of views put forth in the earlier one. Despite this, the possibility persists that I have misunderstood or misrepresented Raz's ideas in some way. With this in mind, this paper aspires to make arguments which can stand alone, and not only in connection to Raz's particular ideas.

It is not possible to write a critique of this kind without letting my metaphilosophical views creep in, but I have done my best to present arguments which the reader can in principle accept without adopting those views. I will, however, briefly summarize those views here in order to explain why this paper takes the approach that it does. My metaphilosophy is broadly Wittgensteinian and centers on the belief that philosophy should take care not to become "too big for its boots."[3] Philosophy is an activity of description, of taking a skeptical eye toward what seems to be the case, of developing and organizing ideas in a way that makes them applicable to daily life and practical problems. Many philosophers seem to believe that their methods can grant them a special kind of knowledge, bewitched by the false idea so common among non-philosophers that philosophy is in the business of revealing fundamental truths about the nature of reality and the meaning of life and similar lofty abstractions. This is

[2] *Ibid*, 155.

[3] Michael Devitt and Kim Sterelny, *Language and Reality: An Introduction to the Philosophy of Language*, 2nd ed. (Cambridge, Mass: MIT Press, 1999), 3.

particularly common in the philosophy of language, which has often been mistaken for a method of settling traditional philosophical problems in metaphysics, epistemology, and ethics.[4] That this is not true is an unwelcome conclusion for many. But the fact that philosophy can do nothing more than describe what is already the case is in fact a great reason for doing it, for it can clarify many things. This I hope to do now.

1 The Problem

When we make statements about what the law permits or requires us to do, we readily use normative terms such as "right," "duty," "ought," "may," etc., seemingly regardless of our beliefs about the moral correctness of a given law or our commitment to any particular philosophy of law. In fact, normative legal statements (e.g., "legally, you may not do ϕ") and "sentences obtained from such sentences by the operations of sentential, quantificational, and modal logic"[5] are so fundamental in legal discourse that Raz views them as the canonical form of legal statements. The inclusion of a normative term is taken to be the defining feature of a sentence of this sort. The same types of sentences are fundamental to moral discourse as well (though of course without any qualification such as "legally") and it is this fact that Raz considers to be philosophically significant. For Raz, "the explanation of the use of normative language ... lies at the heart of the problem of the normativity of law."[6] But what exactly demands explanation?

For Raz, the fact that normative terms play the same role in legal and moral discourse is a threat to legal positivism, which refers to a category of legal theories on which the normativity of law has no necessary relation to its moral value. This is best expressed by the sources thesis (ST), which Raz formulates as follows:

> (ST): [T]he identification of the law and of the duties and rights it gives rise to is a matter of social fact. The question of its [moral] value is a further and separate question.[7]

From the fact that the normativity of law has no necessary basis in morality, it seems to follow that normative terms are being used in a different sense in legal sentences and in moral sentences, because they derive their force from different sources. In other words:

[4] *Ibid*, 3.
[5] Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 1st ed. (Oxford: Oxford University Press, 1979), 63. (Henceforth *AOL*)
[6] *PRN*, 169.
[7] *AOL*, 158.

> (S1): [Normative] terms like "rights" and "duties" cannot be used in the same meaning in legal and moral contexts.[8]

This belief, which I will call the different-sense semantic thesis is, according to Raz, "common to most positivist theories."[9] The problem, Raz contends, is that it is simply not true. If laws are norms – and they surely are – then a normative legal statement is simply an expression that one has reason for performing or not performing a certain action as dictated by law. These statements of legal reasons for action are taken by Raz to be "the most elementary stratum"[10] of legal statements, and thus the question of the normativity of law is a question about the normative force of this type of statement. Because the key feature of a normative legal statement is its use of a normative term, then it must be the case that the inclusion of a normative term is essential for that statement to perform its reason-giving function. The difficulty is that Raz sees the reason-giving function of normative moral statements in the same way as that of legal statements, and in both cases it is the inclusion of a normative term that makes this the case. If both legal and moral normative sentences entail reasons for action, with normative terms being the essential feature of both, then it follows that:

> (S2): Normative terms ... are used in the same sense in legal, moral, and other normative statements.[11]

Raz takes this same-sense semantic thesis, which is of course the negation of (S1), to be an empirical truth which any legal theory must explain. This is no problem for natural law theories, which, according to Raz, explain the normativity of law by holding that legal norms are simply moral norms, or are derivative of moral norms:

> The fact that the law is described and analyzed in terms of duties, obligations, rights and wrongs, etc., has long been regarded by many as supporting the claim of the natural lawyer that law is inescapably moral.[12]

But for Raz, a committed legal positivist, a basic desideratum for any explanation of the use of normative terms to describe the law and legal situations is that it "cannot depend on the truth of the controversial natural law theories."[13]

[8] *Ibid*, 38.
[9] *Ibid.*
[10] *Ibid*, 63.
[11] *Ibid*, 158.
[12] *Ibid*, vii.
[13] *PRN*, 169.

Raz's problem, therefore, is how to simultaneously maintain the sources thesis (ST) and the same-sense semantic thesis (S2), given that (ST) appears to entail the different-sense thesis (S1). His only option is to deny the entailment relation between (ST) and (S1). This task is not so simple:

> From [(ST)] and from the fact that terms like 'rights' and 'duties' are used to describe the law – any law regardless of its moral merit – [(S1)] seems to follow.[14]

To solve the problem as he frames it, he must be able to explain how the normative force of legal statements is a matter of social – not moral – fact, despite the fact that the terms which give these legal statements their normative force also give moral statements their normative force. And such an account cannot reduce normative statements to ordinary descriptive statements "about [other] people's beliefs, attitudes, or actions,"[15] as such an account fails to explain how such statements serve as reasons for action. In the familiar terminology of ethical discourse, such a "reductivist" account, which Raz ascribes to early positivists Jeremy Bentham and J. L. Austin,[16] fails to establish an ought from an is. In short, we need an non-reductivist explanation of the normativity of law based on the sources thesis (ST) which is compatible with the same-sense semantic thesis (S2).[17] This is Raz's problem.

2 Solutions

This section describes and assesses the solution to the problem to which Raz devotes much of the second half of *Authority of Law*. Even though I intend to argue that there is no such problem, like d'Almeida I believe that showing why Raz's solution fails to solve the problem also helps to reject the problem outright. This section also offers a critique of Raz's "legal man" concept, to which I think d'Almeida does not devote enough attention. This section also discusses Robert Mullins's work on the pragmatic dimension of normativity. Like Raz, Mullins believes that legal positivists owe a justification for making legal statements in terms which appear to be essentially moral. Unlike Raz, Mullins is agnostic on the question of whether such terms are used in the same sense in both contexts. It would thus be unfair to say that Mullins offers a solution to Raz's problem *per se*. Mullins is included in this section for two reasons. Like Raz, he commits the error of believing that the use of the same

[14] *AOL*, 38.
[15] *Ibid*, 153.
[16] Luís Duarte d'Almeida, "Legal Statements and Normative Language," *Law and Philosophy* 30, no. 2 (2011): 171
[17] *Ibid*, 72.

expression type in different contexts needs to be justified. At the same time, his account of the pragmatics of normative statements does identify an important feature of their actual use and helps to support my arguments about normativity in my conclusion.

2.1 Detached Statements

In addition to the desiderata described in Section 1, Raz requires that an explanation of the normativity of legal statements account for what he calls "detached" statements, such as in the case of an attorney who advises her client that the law prohibits abortion despite holding a personal belief that laws prohibiting abortion are immoral. On Raz's view, the defining feature of legal statements is that they are made from a point of view, and not necessarily that of the speaker. Being made from a point of view is considered necessary for a statement to have any normative force at all, for "if there is nobody whose point of view it is, why should we be interested in it?"[18] Norms being a social phenomenon, they need to be endorsed by someone in order to exist. These statements from a point of view are analogous to a scientific statement made on the assumption that a particular scientific theory is valid. They are not, says Raz, conditional statements in which the validity of the theory is the antecedent, and the normative statement the consequent. The following example, adapted from d'Almeida, illustrates the distinction:

> (1) If you accept the point of view of a vegetarian, you ought not to eat meat.
>
> (2) Speaking from a vegetarian's point of view, you ought not to eat meat.[19]

In (2), the speaker seems to adopt the point of view of the vegetarian, while the conditional (1) can be true from no particular point of view. For Raz, normative legal statements are analogous to (2), in which a point of view is adopted though not necessarily instantiated by the speaker. What makes a statement such as the one by the pro-choice attorney "detached" is not that the attorney herself does not believe the law in question to be morally justified, but simply that the statement on its own does not imply her taking any particular point of view. One can just as easily make a detached statement about a law which one does believe to be morally justified, as long as the statement does not convey personal acceptance of the point of view from which the statement is made.

[18] *AOL*, 159.
[19] d'Almeida, "Legal Statements and Normative Language," 179.

2.2 The "Legal Man"

From whose point of view are detached legal statements made, if not from that of the speaker? Raz's answer is that they are made from the point of view of the "legal man," a hypothetical person...

> ...whose moral beliefs are identical with the law [and who] has complete knowledge of all factual information, is completely and unwaveringly rational, and has worked out all the consequences of the ultimate rules of [the] law [governing the jurisdiction in question] including all those which follow from them when applied to facts as they are.[20]

It is clear that such a point of view is merely an abstraction, and Raz does not pretend that such a person could ever exist. Nor does his theory require such a person to exist, because the normative force of a legal statement from a point of view does not depend on that point of view actually being instantiated. Therefore, making a statement from the point of view of the legal man would amount to qualifying that statement with the phrase: "Speaking from the point of view of an omniscient and perfectly rational agent whose morality is identical to the law, you ought to..." But Raz overlooks the fact that the nonexistence of such a person is not just a practical matter stemming from limitations on human knowledge or rationality, but a logical one as well, given that legal rules by their very nature do not admit the sort of deduction of which the legal man must be capable. The notion that the legal man must be able to work out all the consequences of the ultimate rules of the law presupposes that such conclusions must follow deterministically from the application of rules to fact patterns. But legal rules are by their nature interpretive rules, not deterministic ones. They are what Friedrich Waismann called "open-textured," meaning that situations inevitably arise in which they do not indicate a correct answer. There is always the possibility of an unforeseen situation in which the applicability of a legal rule is in question, and which demands that that rule (be it a statute, a precedent, an interpretive doctrine, or something else) be revised. To borrow Waismann's words: we tend to overlook the fact that there are always other directions in which a rule has not been defined.[21] In some cases, problems arise when multiple rules compete. Consider the case of *Adams v. New Jersey Steamboat Company*, in which a steamboat passenger sued the boat's owner after valuables were stolen from his private cabin. Precedent at the time held innkeepers liable

[20] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed. (Oxford: Oxford University Press, 1980), 237.

[21] Friedrich Waismann, "Verifiability," in *Logic and Language*, ed. Anthony Flew, 1 (Oxford: Blackwell, 1951), 120.

for theft from guests' rooms, while the owner of a train was not held liable for theft from sleeping berths. There was no statute or case law governing liability in steamboat cabins. Should the steamboat fall under the precedent for inns or for trains?

It is also true that many legal facts, such as whether a person experienced fear, took reasonable precautions, or intentionally inflicted emotional distress, are not accessible even to an omniscient agent because concepts like fear, reasonableness, and intention are not defined according to rigid criteria (more on this in Section 3). The impossibility of determinately establishing legal facts involving these concepts is also logical, not merely epistemic. Raz himself even goes as far as to acknowledge that "because of the vagueness, open texture, and incompleteness of all legal systems there are many disputes for which the system does not provide a correct answer,"[22] but fails to see how this fact renders the point of view of the legal man not merely uninstantiated but inconceivable. There is no way to make a statement from the point of view of an agent who "has worked out all the consequences of the ultimate rules of [the] law." It is roughly analogous to qualifying a statement with the phrase "from the point of view of someone who can smell time..." – as if any possible continuation of that sentence could result in a meaningful statement. As Wittgenstein writes, "we don't know what description, portrayal, these words demand of us!"[23] And this is to say nothing of the fact that legal systems may at times be inconsistent, which cannot be overcome even by an omniscient and perfectly rational agent.

An objection may be made here that the concept of the legal man still works in cases in which the law needs no interpretation or extension in the manner I have described. Even if this is true, this makes it at best a partial explanation of normativity, and not the complete account that Raz claims to have given. Furthermore, it is possible to regard a law or its accepted interpretation as normative even if it is irrational, epistemically flawed, or inconsistent - that is, where the legal man would not regard it as normative.[24]

On Raz's view, what makes the pro-choice attorney's statement a detached one is that it does not necessarily convey her adoption of the point of view from which it is morally normative, that being the point of view of the "legal man." In other words, detached legal statements are normative because they are moral statements for the legal man from whose point of view they are made, and whose morality is identical to the law. In order for the legal man's morality to explain legal normativity, his morality cannot be coincidentally identical to the law; it must derive from the law by some premise to the effect that the law is

[22] *AOL*, 113.

[23] Ludwig Wittgenstein, *Remarks on Colour*, ed. G. E. M. Anscombe, trans. Linda L. McAlister and Margarete Schättle, vol. 1 (Oxford: Blackwell, 1977), §23.

[24] Thanks to Hanoch Ben-Yami for pointing this out.

always moral. It is clear from this that Raz's explanation of the normativity of detached legal statements still boils down to moral values, just not those of the speaker. The only other type of legal statements Raz identifies in the elementary stratum are committed statements, which he understands as "ordinary moral statements about what [the speaker believes] ought to be done, what rights and duties people have because of the law."[25]

The result is a semantics for legal normative terms that is ultimately parasitic on their moral semantics, but not, Raz maintains, to such a degree that the former collapses into the latter. This is a very delicate balancing act, because it threatens to put him into the very position which he attributed earlier to natural law theorists and rejected at the outset, on which all legal statements in their basic form "deriv[e] their validity from ultimate moral norms and values."[26] The only way to maintain the distinction Raz wishes to maintain between positivism and such natural law theories is to understand those natural law theories as deriving the normativity of legal statements from the *speaker's* moral norms and values. And indeed this does appear to be the crucial distinction for Raz, who claims that the main contention of the natural lawyer is that "every law ... has moral worth."[27] But this is not the only position available to someone who rejects positivism. While there may be some natural law theorists who insist that every law is necessarily and strictly moral, to deny positivism it is enough to adopt the position, famously promoted by Ronald Dworkin, that while the identification of specific rights and duties under law is a matter of social fact, the very existence of laws qua norms has to be explained by reference to some antecedent notions of morality common to most people for whom the law is normative. This sort of hybrid sources thesis holds great promise for explaining why the law is normative without committing to something as preposterous as the notion that all laws are morally valid. For that very reason, however, it does not solve Raz's problem. As long as the law is not identical to morality, any explanation of legal normativity appears to be *prima facie* incompatible with the same-sense semantic thesis (S2). However, as we shall see in Section 3, the fact is that (S2) is simply not true, or at least not in any way that demands explanation.

2.3 d'Almeida's Critique of Raz

Daniel Duarte d'Almeida criticizes Raz's solution from a different angle, noting that making a legal statement from a point of view is problematic as a matter of pragmatics. A legal statement may be directed at a person with a purely

[25] *AOL*, 308.
[26] *PRN*, 162.
[27] *PRN*, 162.

theoretical interest in knowing what the law permits or requires, or even toward one who believes that the law is unjustified and ought not to be followed. Regardless, the statement would convey the same information to both people, so the assumption that the law is justified is immaterial to the content of the statement. It is pragmatically pointless to "make a statement on the assumption that A when whether or not A is the case is absolutely irrelevant for the truth of the statement made."[28] On the other hand, it is equally pointless to make a statement on the assumption that A "when A itself exhausts the content of the statement made."[29] Therefore, in order for a normative legal statement to not be pragmatically pointless in this sense, the assumption that the speaker has adopted a point of view from which the statement is morally normative must be part, and only part, of what makes the statement informative. But this means that invoking the notion of points of view is at best a partial explanation of the function of normative legal statements.

D'Almeida turns this criticism on Raz's "orthodox Jew example," which Raz offers in *The Authority of Law* as support for his theory of statements from a point of view:

> Imagine an orthodox but relatively ill-informed Jew who asks the advice of his friend who is Catholic but an expert in Rabbinical law. "What should I do?" he asks, clearly meaning what should I do according to my religion, not yours. The friend tells him that he should do so and so. The point is that both know that this is not what the friend thinks that he really ought to do. The friend is simply stating how things are from the Jewish Orthodox point of view.[30]

On Raz's view, this question solicits an answer in the form of "from the point of view of an orthodox Jew..." For the purposes of this example, an orthodox Jew is taken to mean someone who believes that people should behave exactly as the Torah requires (this must be understood intensionally, as this orthodox Jew is unclear on exactly what it requires). Of course, it would be of no use at all to give this answer:

> (3:) From the point of view of an orthodox Jew, you ought to do as the Torah requires.[31]

This statement would be uninformative at best, and at worst redundant if being an orthodox Jew is defined in the first place by having the belief that one to do

[28] d'Almeida, "Legal Statements and Normative Language," 184.
[29] *Ibid.*
[30] *AOL*, 156-157.
[31] d'Almeida, "Legal Statements and Normative Language," 185.

as the Torah requires. What the orthodox Jew is asking for is some statement of the form: "The Torah requires you to ϕ." But this, says d'Almeida, is not a belief that one has simply by virtue of being an orthodox Jew, and precisely for that reason there is no need to make such a statement from that point of view.[32] Despite this, it is still normative for the orthodox Jew in that it entails to him that he has reason to ϕ. This shows how a normative statement being made from a point of view is neither necessary nor sufficient for that statement to play the role in practical reasoning which Raz attributes to it.

Another problem with this example which d'Almeida does not discuss is the claim that "both know that this is not what the friend thinks that [the Orthodox Jew] really ought to do." Surely the Catholic would answer his Jewish friend's question with some degree of detachment relative to a statement about what the Catholic faith would require one to do, but this is not the same as a total lack of personal endorsement. The Catholic might also morally endorse the recommended action independently of its relation to Rabbinical law, or he might wish to save his friend the distress of worrying whether he has disobeyed the Torah. The law in question may also be in dispute, so the Catholic's advice may carry a personal endorsement of one interpretation of the law which he believes to be most justified based on the Torah. This can be glossed as: "You ought to accept interpretation i," which is a normative statement from the Catholic's own point of view. In these cases and a number of others, the Catholic's answer to the Jew's question cannot be characterized as either fully committed or fully detached. Normativity and detachment do not seem to be as clear-cut as Raz makes them out to be.

2.4 Normativity as a Pragmatic Phenomenon

Like d'Almeida, Robert Mullins offers an account of normative legal statements that explores their pragmatic dimension. While acknowledging the holes in Raz's theory identified by d'Almeida and even the possibility that no such problem exists to be solved, he nevertheless maintains that "non-committed use of deontic language does require elucidation and justification"[33] (NB: Mullins uses "non-committed" and "deontic" in the way that Raz uses "detached" and "normative" respectively). Specifically, what needs to be elucidated is "the tension between the positivity of law and the presumptive commitment that is carried by deontic language," which "is in *prima facie* tension with the claim that the validity of rules depends on their sources, rather than their value or justifica-

[32] *Ibid.*

[33] Robert Mullins, "Detachment and Deontic Language in Law," *Law and Philosophy* 37, no. 4 (August 2018): 381.

tion."[34]

Mullins declares himself convinced by a critique by Scott Shapiro which describes Raz's account as "mysterious," since it "presupposes an unorthodox semantic theory according to which detached and committed legal statements express the same proposition but have different truth conditions."[35] At the same time, Mullins wishes to acknowledge the different roles that detached and committed legal statements play in legal discourse. His solution is to analyze the normative force of detached statements as arising from a generalized conversational implicature to the effect that the speaker is morally committed to the rule they are citing.

The phenomenon of implicature was first described by H. Paul Grice, who distinguished three different kinds: generalized conversational implicature, particularized conversational implicature, and conventional implicature.[36] The defining feature of generalized conversational implicatures is that they are relatively context-invariant, with a particular utterance type being associated with a stereotypical but defeasible interpretation (e.g., "some" = "more than one but not all" unless otherwise indicated). These implicatures follow from the Gricean cooperative principle and the four supermaxims of quantity, quality, manner, and relevance. Mullins argues that the combination of these maxims implies that someone who utters a normative legal statement does so because they personally endorse the legal rule in question and believe it to be relevant to the activity of providing reasons for action.

Applying the tests laid out by Grice, Mullins shows that this generalized conversational implicature of normative endorsement can be calculated, cancelled and reinforced with the following example:

> (4): Legally you ought to ϕ [Utterance]
>
> (4a): You have reason to ϕ [Implicature calculation]
>
> (4b): Legally you ought to ϕ but I don't think you have reason to ϕ [Cancellation]
>
> (4c): Legally you ought to ϕ, and I also think you have reason to ϕ [Reinforcement][37]

This view, on which statements of reason for action arise pragmatically from normative legal statements rather than from their semantic entailment, seems to avoid the criticism of "mysterious" semantics which Shapiro levels at Raz.

[34] *Ibid*, 380.
[35] *Ibid*, 353.
[36] see genereally: H. Paul Grice, *Studies in the Way of Words*. (Cambridge, MA: Harvard University Press, 1989)
[37] *Ibid*, 368.

It also avoids the dubious "legal man" doctrine. But while it does, in some sense, elucidate the detached use of normative legal language, it does have some problems. In Gricean theory, one of the necessary conditions for something to be an implicature is that it can be cancelled without contradiction. A statement like (4b) is only not contradictory if it is assumed that one has no reason to obey a law which one does not endorse morally. But people often have reasons for following laws to whose moral validity they are not committed. Fear of sanction, for instance, is a reason for following a law, even if it may be outweighed by other reasons against following the law. If we account for this, then in order to make the cancellation of the implicature not contradictory we have to gloss it as:

> (4d): Legally you ought to ϕ, but I do not think you have sufficient reason to ϕ

But having acknowledged that there may be a reason for doing something which is nonetheless not sufficient for doing it, in order to imply moral endorsement for doing ϕ we must also gloss the calculated implicature from (4) as:

> (4e): You have sufficient reason to ϕ

And the reinforcement of the implicature as:

> (4f): Legally you ought to ϕ, and you have sufficient reason to ϕ

Having made the necessary adjustments to Mullins's implicature scheme, we have a useful framework for showing that the presumptive commitment carried by normative language is defeasible, and this does go some way toward resolving the tension between that commitment and the positivity of law. But this account offers no affirmative conceptual account of how "you have sufficient reason to ϕ" follows from "legally you ought to ϕ." The maxim that legal statements should be endorsed by the speaker and relevant to the activity of providing reasons for action can establish, by a pragmatic mechanism, that someone who utters (4) is committed to (4e), but this would be the case even if the speaker's belief that (4) were not the *reason* for their belief that (4e). This is not so much a failure on Mullins' part; his paper never promised an explanation for the normativity of law. It does mean, however, that Mullins's paper does not solve Raz's problem.

An interesting feature of the pragmatics of normative legal statements which Mullins does not consider is that they can actually give rise to a pragmatic inference of *non*-endorsement. Mullins writes:

> . . . [if] I ask a friend whether or not I ought to fill out my tax return, then, on the assumption that he is being relevant, I will assume that

> an answer like "legally you ought to fill out your tax return" reflects his personal commitment to the rule as suitable for the guidance of conduct. His conformity with the maxim of relevance can serve to reinforce his personal commitment to the legal rules.[38]

It is certainly the case that obeying the maxim of relevance makes it likely that the speaker personally endorses the rule in question, yet the maxim of quantity in fact suggests the opposite. The inclusion of the word "legally" to qualify the normative statement where no such word is necessary (the friend could merely have said "yes, you ought to fill out your tax return") is pragmatically salient and leads to a quantity implicature that the "ought" in question is merely a legal one and not an indication of personal endorsement. This implicature can be tested according to the Gricean framework:

> (4): Legally you ought to ϕ [Utterance]
>
> (4g): I don't personally think you ought to ϕ [Implicature calculation]
>
> (4h): Legally you ought to ϕ, and I also personally think you ought to ϕ [Cancellation]
>
> (4i) Legally you ought to ϕ, but I don't personally think you ought to ϕ[Reinforcement]

To be sure, inference (4g) is less favored than (4a), on the basis that people are more likely to cite rules they personally endorse than those they do not (this fact is necessary for calculating an implicature of normative commitment in the first place). Nevertheless, inference (4g) is plausible and in many cases may be the more strongly supported inference depending on the hearer's background beliefs about the speaker. It can also be made more favored by placing stress on the word "legally" when uttering (4). This sort of quantity implicature is sometimes used by defense attorneys who wish to communicate to their client their personal objection to a law without explicitly endorsing the commission of a crime. One can easily imagine the pro-choice lawyer advising her client that "legally, you're not allowed to provide abortion services anymore" with the specific intention of communicating that she does not personally endorse the law as a guide for action and that its violation would be morally justified.

A statement like (4) made in the proper conversational context is not simply a detached statement. Rather than merely failing to convey the speaker's personal endorsement of the law as detached statements do, it goes as far as to convey the speaker's moral opposition to it. Of course, the fact that an utterance can give rise to contradictory inferences is perfectly compatible with –

[38] *Ibid*, 375.

and in many ways explained by – the indeterminacy inherent in the concept of implicature. But it is this very indeterminacy which weakens the predictive power of any pragmatic explanation of how such statements function. This is the inevitable trade-off that comes with asserting a unified explanation of an entire class of statements, and it is this very mistake which lies at the heart of Raz's problem in the first place – as I shall now try to explain.

3 Why There is No Problem

The law is a fundamentally linguistic practice, and legal concepts cannot be understood separately from the language which expresses them. Mullins rightly points out that legal scholars who ignore issues of language "resemble scientists who refuse to bother about the theory of their instruments."[39] Every aspect of the practice of law reflects philosophical commitments about legal language. Consider *Smith v. United States*, in which the United States Supreme Court held that a law which imposed additional penalties on anyone who "uses a firearm... to facilitate in any manner the commission of [a drug trafficking] offense"[40] applied to a man who had traded a firearm for cocaine, on the basis that such a trade did in fact constitute a "use" of the firearm, and relying in large part on dictionary definitions of the word "use." Especially in the world of law, theories about language have real consequences.

3.1 Norms and Exclusionary Reasons

Raz justifies his same-sense semantic thesis (S2) – that is, that normative terms are used in the same sense in legal, moral, and other normative statements – by pointing to the fact that, in every context in which normative terms appear, they entail the existence of reasons for action. Raz does not say that "norm" is synonymous with "reason for action," but rather that:

> A norm is an exclusionary reason, which means that it does not have to compete with most of the other reasons which are likely to apply to the situation governed by the norm, for it excludes them.[41]
>
> Norms and other exclusionary reasons do not differ in any way which is relevant to practical reasoning.[42]

In other words, the existence of a norm which governs a particular situation entails that one has an exclusionary reason to perform the action indicated by

[39] *Ibid*, 384.
[40] *Smith v. United States*, 508 U.S. 223, 227 (1993)
[41] *PRN*, 79.
[42] *Ibid*, 77.

the norm. But norms for Raz are only "second-order" reasons. That is, the existence of a norm of ϕ-ing entails the existence of an exclusionary reason to ϕ, but the norm in itself is not a reason to ϕ. Only rules are first-order reasons for action – whether legal, moral, or otherwise. In short, normative statements "are merely statements that there is a reason, whereas statements that there is a rule are statements of a reason – the rule being the reason."[43] This latter sort of statement canonically takes the form: "It is a rule that $x$ought to ϕ."[44]

There are several reasons to regard this account with skepticism, both on its own and as a premise for (S2). Most glaringly, it entails the claim that "it is a rule that $x$ought to ϕ" is an exclusionary and generally sufficient reason for x to ϕ. This immediately invites the question of what reason x has for obeying the cited rule, and all the more so because Raz has so forcefully rejected the notion that laws, which are a kind of rule, should be automatically obeyed. In fact, in cases in which the cited rule is a law, the claim that the rule is in itself the reason is squarely at odds with the most basic commitment of legal positivism. Even in the case that the rule is not a law (for example, if it is a moral rule), the fact remains that in order for a rule to be a reason, an additional premise is required to establish that the rule ought to be followed. But this premise cannot merely declare that there is a reason for following the rule; it must give the reason. To do this under Raz's theory, the premise must take the form "it is a rule that x ought to follow the rule that x ought to ϕ." But what reason is there for following that rule? And so on, forever...

Another problem with Raz's account of norms and reasons is that, even if accepted, it fails to support (S2), or at the very least fails to force an interpretation of (S2) which conflicts with the sources thesis (ST). This is because the fact that all normative statements are "statements that there is a reason," fails to justify, much less demand, a unified account of those statements. Consider the following statements:

> (5): Legally, you have a duty to truthfully declare your income
>
> (6): Morally, you have a duty to truthfully declare your income

On Raz's view, these statements entail the following, respectively:

> (5a): Legally, you have reason to truthfully declare your income which excludes all possible reasons for not doing so
>
> (6a): Morally, you have reason to truthfully declare your income which excludes all possible reasons for not doing so

[43] *Ibid*, 80.
[44] *Ibid*, 79.

Of course, these are only statements that there is a reason for truthfully declaring one's income, but not statements of what the reason is. The actual (first-order) reasons given for doing so will refer to rules, which will be different depending on whether one is speaking from a legal or moral perspective, and this much is acknowledged by Raz. This fact alone seems like it could be enough to conclude that the reason-giving function of normative terms is context-dependent, with normative terms in legal contexts entailing the existence of legal reasons and likewise with moral contexts and moral reasons. This of course acknowledges the possibility that some moral arguments are partly based in legal reasons and vice-versa, and it would permit the denial of (S2) and the dismissal of Raz's problem.

Obviously, Raz does not consider this a viable option, though he does not explicitly state why. The most likely reason is what Raz calls "the independence of norms" from the reasons that justify them:

> [I]t must be admitted that for the most part the presence of a norm is decisive. The complicating factors apply only in a minority of cases. The whole purpose of having norms is to achieve this simplification.
>
> Once it is established that a norm applies to the case at hand we need not be concerned with the weight of the conflicting reasons affecting the case. They are in most cases excluded and their exclusion is not a matter of weight. It is determined by the fact that the norm is a second-order reason.
>
> In order to know that the norm is valid we must know that there are reasons which justify it. But we need not know what these reasons are in order to apply the norm correctly to the majority of cases.[45]

This account explains how the fact that (5a) and (6a) are justified by different first-order reasons is not a barrier to a unified account of their reason-giving function. Being independent for most intents and purposes from the first-order reasons that justify them, (5a) and (6a) play the same role in practical reasoning. Their corresponding normative forms (5) and (6) differ only in the fact that they are modified by the sentential adverbs "legally" and "morally," which for Raz seems to be the canonical way to show that a term is used in a legal or moral context. Thus the conclusion is reached that normative terms are used in the same sense in legal, moral, and other contexts.

This is not a direct recounting of Raz's argument for (S2), but rather more of a forensic reconstruction of what such an argument would have to look like in order to justify a reading of (S2) which conflicts with (ST). This is necessary

[45] *Ibid.*

because Raz offers little explicit support for (S2) except for a passage at the end of Chapter 8 of *The Authority of Law*, right after introducing the doctrine of detached statements from the point of view of the legal man:

> [M]y very arguments so far show that [(S2) is a thesis] that positivists can and should adopt, for only through it and the doctrine of statements from a point of view can we understand the possibility of detached statements which are all the same normative...[46]

This argument requires some clarification, as it does not appear to be valid as written. In general, from the fact that B and from the fact that A is necessary to "understand the possibility" that B, it does not follow that A is true. The claim that "A is necessary to understand the possibility that B" is, in ordinary use, a claim about epistemic justification, and not a matter of logic. If this is indeed what Raz means by understanding the possibility, then nothing is proven by this argument. But to give Raz the benefit of the doubt, the notion of "understanding the possibility" can be taken to be a relation of material implication. The syllogism above is re-written accordingly, where S2 = "(S2) is true," POV = "the doctrine of statements from a point of view is true," and DET = "detached statements are all the same normative":

(7): $(\neg S2 \vee \neg POV) \rightarrow \neg DET$

And since Raz takes DET to be an unassailable fact, by Modus Tollens and DeMorgan's theorem:

(8): S2 & POV

But both I and d'Almeida have argued that the doctrine of statements from a point of view cannot be made to work, and on this view $v(\neg S2 \vee \neg POV) = \mathbf{T}$. This means that if one accepts DET, then (7) is false, and the argument here is unsound (and if one does not accept DET, then even more so) and again, we can reject this justification for (S2).

3.2 Language Games, Indeterminacy, and Family Resemblance

We are now left with only one compelling argument for (S2): the one reconstructed earlier in this section, which centers on the claim that the reason-giving function of norms is context-invariant. The rejection of this argument is the main goal of this paper. In order to do this, I draw heavily on the work of

[46] *AOL*, 159.

Ludwig Wittgenstein, who is best known for his claim that most philosophical problems result from misused or misunderstood words. Few phrases arouse the ire of philosophers more reliably than the oft-repeated Wittgensteinian refrain that "this is just linguistic confusion." It's not so much that the phrase is overused; it's just that philosophers don't like this view of their profession, which they take to be depreciative if not utterly dismissive.

In order to reject Raz's justification of (S2), a detour is necessary in order to introduce some important concepts from Wittgenstein. One of the greatest difficulties in understanding Wittgenstein is his preference for leading his reader to their own conclusions instead of explicitly spelling them out. Another great difficulty is that Wittgenstein died at 62, with his most influential works being stitched together posthumously from thousands of pages of his notes and published in his name by a squabbling trio of his disciples. The result is that English language editions of Wittgenstein's later works, which figure prominently in this paper, reflect several different people's preferences regarding interpretation and translation. Inevitably, some things are lost, or at least a bit skewed, in translation. An important example of this is the term "language game," which is translated from the German *Sprachspiel*, and which is often erroneously understood in a way that implies frivolity. A language game is not a crossword puzzle or a rap battle (although these are *kinds* of language games). It is not a subjective construct based on the will of an individual, nor it is something fixed and unchanging. In fact, Wittgenstein's idea of a language game is a much more serious and fundamental concept, referring to the way language is used in specific contexts or activities, and how it is embedded in a particular form of life. Of course, the boundaries of a language game are inexact.

The concept of language games can be illustrated in the use of the word "reduction," which has different meanings in the language game of natural science and the language game of the humanities. In the language game of natural science, reduction refers to the process of explaining a complex phenomenon in terms of its constituent parts, properties, or processes. In the language game of the humanities, reduction refers to the oversimplification or trivialization of complex ideas or phenomena. The difference is quite obvious, as is the fact that there is something common to those uses at a high level of abstraction: the breaking-down of something into its constituents in order to explain it. The idea that some similarities and some differences can be identified among various uses of a term is the basis of Wittgenstein's concept of family resemblance (*Familienähnlichkeit*):

> I can think of no better expression to characterize these resemblances than "family resemblances"; for the various resemblances between

> members of a family – build, features, colour of eyes, gait, temperament, and so on and so forth – overlap and criss-cross in the same way.[47]

Many concepts, particularly those which depend on what Wittgenstein calls "a pattern of life,"[48] have a "plurality of criteria or of dimensions of resemblance that determine their application."[49] This is the case with normative terms, as it is with the concept of normativity itself. Their boundaries – that is, the conditions under which these terms are to be used – cannot be specified with absolute exactness. There will always be borderline instances in which one finds reasons both for and against the use of a term, with none of them being – to use Raz's terminology – exclusionary. This is not to say that family resemblance concepts defy definition entirely, but only that exact definitions are neither necessary nor sufficient for the successful employment of these concepts in ordinary language.

To a great extent, this is reflected in contemporary legal doctrines, particularly in common law systems. The principle of analogical reasoning by which precedents are extended to novel fact patterns typically manifests in claims that circumstances bear a substantial similarity for some purpose or with respect to some law, without invoking any philosophical concept of sameness. The *Adams* court ultimately held that a steamboat is, "for all practical purposes, a floating inn."[50] The two, though not identical, were found to "bear such close analogy to each other that the same rule of responsibility should govern."[51] Whether or not one finds this reasoning convincing, the language is typical of how common law systems rely on the identification of family resemblances as a basis for applying a precedent.

3.3 The Essence Fixation

Offering a workable definition for a family resemblance concept consists in identifying some feature common to its uses within some context. This invariably involves a trade-off between generality and informativity. Neither of the definitions of "reduction" given above would clarify the meaning of a reduction in rank, which finds its home outside the language games for which the concept was defined. A maximally general definition of "reduction" which describes some

[47] Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe, 2nd ed. (Oxford: Blackwell, 1958), §67. (Henceforth *PI*)

[48] Ludwig Wittgenstein, *Remarks on the Philosophy of Psychology*, ed. G. H. von Wright and Heikki Nyman, trans. C. G. Luckhardt and M. A. E. Aue, 2nd ed., vol. 2 (Oxford: Blackwell, 1998), §652.

[49] Hanoch Ben-Yami, "Vagueness and Family Resemblance," in *A Companion to Wittgenstein*, ed. Hans-Johann Glock (Oxford: Wiley-Blackwell, 2017), 6.

[50] *Adams v. New Jersey Steamboat Co.*, 151 N.Y. 163, 167 (1896).

[51] *Ibid*, 170.

feature common to nearly all of its uses (e.g., "a decrease in quantity, number, or magnitude") would be almost entirely uninformative, while a maximally specific definition that individuates instances would give no guidance as to how the word is to be applied in unfamiliar cases.

Often in philosophy, the idea of a feature common to all uses of a word is erroneously understood to support the notion that there is:

> [some] thing in common, [some] shared essence, in virtue of which we use the same word for all.[52]

The false belief in the essence of a concept has been the basis for endless fruitless philosophical investigation dating back at least to the days of Plato, and whose specter still haunts contemporary metaphysics. I maintain that this project has yielded no useful insights about the nature of reality, except to the extent that people so engaged have incidentally described some interesting features of ordinary language along the way. Of course, I do not accuse Raz of undertaking a search for essences, or at least not of doing so deliberately. Rather, it seems to me that the false belief that concepts are defined by their essence has crept into Raz's justification for (S2). This I will show when I turn back to Raz in the coming pages. Instead of thinking about concepts as being defined by their essence, Wittgenstein suggests we should think about them more like a thread:

> [A]s in spinning a thread we twist fibre on fibre. And the strength of the thread resides not in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres.[53]

The activity of finding a common fiber running through all the uses of a word is part of our ordinary practice of description and nothing more. It does not grant the privilege of occupying some external vantage point from which the correctness of a word's use can be assessed in any special way. There need not be any single feature essential to a correct definition of a concept. The correctness of a definition is always assessed relative to its use – or, to be precise, its usefulness. The definition given above for "reduction" as it is used in the language game of natural science is correct in that it describes an important feature of most uses of the term within that context, but it would be deemed incorrect if it were offered to explain the mechanism of a reduction reaction, though that concept belongs to the same language game.

Of course, the fact that definitions must be given relative to some context and some level of abstraction opens up plenty of opportunities for making misleading philosophical claims. H. L. A. Hart shows how this can be done by offering a

[52] Ben-Yami, "Vagueness and Family Resemblance," 4.
[53] *PI*, §67.

broad definition of "ought" at a high level of abstraction which describes nearly every use of the term (as a verb):

> The word "ought" ... reflects the presence of some standard of criticism.[54]

This definition is instructive in identifying one feature common to all or almost all uses of the term, but so general as to fail to capture the philosophically salient ways in which those similar uses are nonetheless quite different, as noted by Hart:

> One [standard of criticism] is a moral standard but not all standards are moral. We say to our neighbor, "You ought not to lie," and that may certainly be a moral judgment, but we should remember that the baffled poisoner may say, "I ought to have given her a second dose."[55]

What is relevant here is not that poisoning is immoral, but that the poisoner's "ought" is of a different kind than that of the conscientious neighbor. It does not entail any moral judgment at all; it distinguishes an actual outcome from a hoped-for outcome. Defining "ought" at a level of abstraction which unifies its moral and non-moral uses is no more or less correct than doing so at a lower level which distinguishes them, or going further still by distinguishing among its various moral uses (e.g. describing obligations towards oneself versus obligations towards others). The fact that a common fiber appears at some level of abstraction does not in itself make a definition based on that common fiber the correct one. This is because a common fiber can almost always be identified through post-hoc maneuvering. Some level of abstraction can almost always be chosen such that every use of a term seems to share some feature. This technique of conceptual gerrymandering can be used to justify various claims about the meaning of the term, but these claims should be regarded with skepticism. The identification of some feature common to every use of a term would not license any claims to the effect that a term is used in the same sense in every context any more than the fact that bicycles and horses are both unpowered individual means of transportation would license the claim that the two are always used in the same way in every context.

3.4 Raz's Mistake

It seems to me that in asserting the same-sense semantic thesis (S2), Raz has made a horse-and-bicycle mistake. His definition of normative terms as entailing

[54] H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (February 1958): 613.
[55] *Ibid.*

exclusionary second-order reasons for action amounts to nothing more than identifying a common fiber that runs through those terms in all of their uses at a very high level of abstraction. The same sort of objection raised by Hart against the overbroad definition of "ought" can be raised against Raz's definition of normative terms: it may be a description to which any instance of a normative term can be made to fit, but it in no way exhausts the meaning of those terms simply because there is nothing else common to all of their uses, and it smooths over all the ways in which those terms function differently in different uses. The strength of the thread – that is, the meaningfulness of a term – does not rest on the fact that some fiber runs its length, but on the fact that many different kinds of "affinities"[56] overlap along it.

Hanoch Ben-Yami points out that this formulation is only committed "to the irrelevance of such a commonality to the use of an expression and ... its meaning,"[57] not to its non-existence. This means that there is a plausible perspective from which (S2) is true, in the same way that "ought" can be said to be used in the same sense in these statements:

(9): You ought not to lie

(10): I ought to have given her a second dose

But the fact that some level of abstraction exists at which normative terms share a common feature across their uses creates no conflict with legal positivism unless we assume, as Raz seems to, that in identifying this feature he has discovered the essence of normative terms which is the necessary and sufficient condition for their being such. This consequently appears to demand some explanation of how terms which derive their truth conditions and illocutionary effect from different sources can nonetheless share this essential feature.

This belief in the essence of normativity also manifests in the way Raz talks about detached statements, which, despite carrying no personal moral endorsement, he regards as "all the same normative." This demands no explanation if one recognizes family resemblances between moral and legal normativity, which share many features but come with undeniable differences. But Raz regards the normativity of detached statements as a problem, and this is precisely because he assumes that legal normativity shares some essence with moral normativity, and that this demands a unified explanation of the meaning of normative terms. This perspective should be rejected, and with it any claim that the use of normative language to describe rights and duties under law is philosophically problematic for legal positivism. Thus Raz's problem ceases to be a problem at all.

[56] Ben-Yami, "Vagueness and Family Resemblance," 4.
[57] *Ibid*, 5.

4 Raz's Castle in the Air

Having made my objections to Raz's account in broadly Wittgensteinian terms, in this section I show how Raz's mistake fits into the larger picture of Wittgenstein's metaphilosophy. I do this for two main reasons. Firstly, it is my hope that a reader still unconvinced of the falsity of Raz's problem might find in Wittgenstein's writing some additional reason to reject Raz's claims about language on which his problem depends. Secondly, Wittgenstein tended to argue his points with an esoteric combination of analogies, rhetorical questions, and elliptical comments for the reader to contemplate (many of which have become quite famous). In giving a concrete example of a phenomenon which figures prominently in Wittgenstein's writing, I hope to make a small contribution to the project of making sense of his extraordinary body of work, much of which remains unpublished. This is all the more appropriate because of his belief in the power of explaining concepts by giving examples and describing their common features instead of giving exact definitions.

4.1 Wittgenstein on Philosophical Problems

The conversational and occasionally cryptic tone of Wittgenstein's writing is far more than a stylistic choice; it is often the best way to communicate the ideas about language to which he dedicated his later career. One of his favored techniques was to consider various accounts of how language might work and show how they permit or entail things which are clearly preposterous, such as iridescent grey,[58] a southwesterly northwind,[59] or a thermometer that measures pain.[60] But far from simply undermining competing theories of language, this activity of showing how language does not work was an elegant way of showing how it does work.

Among the more controversial views attributed to Wittgenstein is one on which there are no philosophical problems and only linguistic ones. This claim has been misinterpreted time and again as a broad dismissal of every question which purports to belong to the discipline of philosophy, and this has made Wittgenstein the subject of much derision. This is, of course, not an accurate description of his view, which should be evident enough from the fact that he freely described himself as engaged in a productive practice of philosophy. There is plenty of excellent philosophical work which clarifies Wittgenstein's views on

[58] Ludwig Wittgenstein, *Remarks on Colour*, ed. G. E. M. Anscombe, trans. Linda L. McAlister and Margarete Schättle, vol. 1 (Oxford: Blackwell, 1977), Part I, §39.

[59] *Ibid*, Part III, §94.

[60] Ludwig Wittgenstein, *Last Writings on the Philosophy of Psychology*, ed. G. H. von Wright and Heikki Nyman, trans. C. G. Luckhardt and M. A. E. Aue, vol. 2 (Oxford: Blackwell, 1982), §93.

this issue, but it can be set aside for the purposes of this paper, as the argument presented here does not depend on the reader accepting any claim to the effect that there are no philosophical problems. It requires at most a recognition of the fact that it is entirely possible to create a philosophical problem from nothing by demanding for some phenomenon an explanation of a sort which cannot possibly be given, and then regarding the absence of such an explanation as something that can be remedied if one just thinks hard enough.

Creating a problem in this way is what Wittgenstein calls "the bewitchment of our intelligence through the means of language."[61] The belief that a concept has to have an exact definition – what Jerry Gill called "the essence fixation" – acts as a filter through which the "normal workings of our language are distorted in order to make them fit the ideal."[62] We are then "dazzled by the ideal"[63] and ignore the actual application of the word denoting the concept. Similarity among uses is mistaken as the perception of a "highly general state of affairs"[64] and reinforces the belief that the essence of a thing is real and open to view. In this way, the multifarious uses which we naturally find for a term in actual use are assimilated into one or a few uses, and the differences within each partition erased. As I have argued previously, there is nearly always a way to perform this maneuver to suit the degree of reduction that one desires, and for this very reason whatever common thread is identified among uses within some boundary does not justify a unified account of their meaning – "as if the meaning were an aura accompanying the word, which the word carried with it into every application!"[65] This activity of artificially placing rigid boundaries on concepts which in their actual use defy being confined in this way is a sure way to manufacture a philosophical problem.

4.2 Luftgebäude

Any time many different uses of a term are subsumed under the same definition, the application of that definition to those instances may permit false conclusions to be drawn. The explanation of these false conclusions (which may deceptively appear more like self-evident observations to be explained) then becomes a philosophical problem. This is the category to which Raz's problem

[61] *PI*, §109. My translation of the original German differs from the translation given in the cited edition. The original text reads: "die Verhexung unseres Verstandes durch die Mittel unsrer Sprache."

[62] Jerry H. Gill, "Wittgenstein and the Function of Philosophy," *Metaphilosophy* 2, no. 2 (1971): 139–40.

[63] *PI*, §100.

[64] *Ibid*, §114.

[65] *PI*, §117. My translation of the original German differs from the translation given in the cited edition. The original text reads: "Als wäre die Bedeutung ein Dunstkreis, den das Wort mitbringt und in jederlei Verwendung hinübernimmt."

belongs, along with most philosophical problems concerned with identity and similarity. Of course, "problem" is a family resemblance concept, and it can refer to the apparent problem of giving a definition as well as to the problems that arise where that definition is applied. What these things have in common is that they result from a failure to ask: "is the word ever actually used in this way in the language in which it is at home?"[66] This is the common fiber running along the thread which Wittgenstein called *Luftgebäude*. These "houses of cards" or "castles in the air" are philosophical problems and claims which are built on nothing and which must be demolished.

The entire edifice of Raz's account of the normativity of law must come crashing down. In one place, Raz comes very close to doing this himself by undermining his own claim that norms play the same role in practical reasoning across moral and legal contexts. As I noted previously, Raz's account of norms contains the following claim:

> Once it is established that a norm applies to the case at hand we need not be concerned with the weight of the conflicting reasons affecting the case. They are *in most cases* excluded and their exclusion is not a matter of weight.[67]

The exact circumstances under which conflicting reasons are not excluded are not given. In fact, for Raz, the "flexibility and complexity"[68] of practical reasoning make it impossible to do so. The introduction of the hedge phrase "in most cases" makes allowance for this indeterminacy. It rightly acknowledges that norms can play different roles in practical reasoning depending on the situation, the information available to the agent, and other factors. But this then demands an account of how normative terms can be used in the same sense in every context if they sometimes fail to perform the reason-giving function that Raz takes to be their defining feature. It seems that Raz gets around this by considering the "in most cases" clause to be a part of the definition of norms, rather than a caveat which is external to it. Raz does not say this explicitly, but it is the only interpretation of this definition that would allow his line of argument to proceed. It allows Raz to maintain his claim that normative terms are used in the same sense in every context, since in every context they entail the existence of exclusionary reasons for action in most cases.

This is an unconvincing attempt by Raz to escape a dilemma of his own construction, in which a rigid definition of norms which is necessary to support a conclusion about their identical function across contexts cannot coexist with

[66] *PI*, §116.
[67] *PRN*, 79. Emphasis my own.
[68] *Ibid.*

an open-ended definition which is necessary to account for their acknowledged flexibility and complexity. Raz's answer merely obfuscates the problem. In cases like this, what is demanded is not a better definition, but a recognition that no definition will do the work that is being asked of it.

5 Conclusion

I have argued here that both Raz's problem and his solution to it are based on the misuse of words. None of the arguments in this paper should be taken to deny the possibility of talking about categories or explanations, of common or essential features, of similarity, difference, or the definitions of things. These terms are constantly used successfully in ordinary language, including in this paper. There is no contradiction in referring to a category of problems, for example, while rejecting the traditional philosophical concept of kinds, or of calling two methods the same while criticizing philosophical investigations of identity. The Wittgensteinian project is not to abandon all words which are traditionally used in philosophy, but rather to be modest with the claims we make while using them. It requires a recognition that the uses of these words are multifarious and that the concepts they denote are inexact. From this the philosophical vacuity of the same-sense semantic thesis (S2) follows, but not its outright falsity. To say, as I did in Section 3.3, that there is a plausible sense in which (S2) is true requires recognizing that in ordinary use, sameness is a much less rigid concept. Consider these claims, in which the word "same" accomplishes very different things:

(11): Samuel Clemens is the same person as Mark Twain

(12): The Toyota 86 and Subaru BRZ are the same car

(13): A pen is used in the same way as a pencil

Each of these claims may be judged true or false in various contexts. We say that things are the same when we want to call attention to their interchangeable use in some relevant context, without denying that there may also be a context in which that is not case. For this reason, both (S1) and (S2) may be justifiably judged true or false by a reasonable person, and even more so because they use words like "sense," "use," and "context," which are also inexact concepts.

A better characterization recognizes that norms are a family resemblance concept. The various things which we call norms overlap in important respects. That the presence of a norm is in most cases a sufficient reason for an agent to act in a certain way is surely the common feature between them, but the exceptions are philosophically significant. An agent might obey a norm because

it belongs to a system of laws in force in some place, but might also violate it for that very reason as an act of civil disobedience. In some cases, fear of sanction alone is a sufficient reason for obeying a norm, while in other cases one might do so for moral reasons or personal gain. There is no single characterization of "what difference the fact that a norm belongs to a legal system in force in a certain country makes to our practical reasoning."[69]

Normative statements give reasons for action in vastly different ways. The statements "you have a right to ϕ" and "you have a duty to ϕ" can both be read to entail a reason for ϕ-ing, but clearly there are different and stronger reasons for performing a duty than for exercising a right, and those concepts play different roles in practical reasoning. There are differences even when statements use the same normative term; compare "you should stand up against fascism" with "you should come to my party this weekend." Certainly the latter statement is a boundary case of normativity, of which it might be said that it merely expresses a desire and not a norm of any kind. It does, however, still provide a reason for action, though clearly of a very different sort than the former statement. All of this is to say that words and phrases which may all be labeled as "normative" may nevertheless differ in kind, in degree, in justification, and in a variety of other dimensions. They may play very different roles in practical reasoning and linguistic practices across contexts and situations. The notion that there must be one single source of normativity is at odds with the actual use of the concept.

The same goes for the concept of reasons, which is as diverse and inexact as that of norms. Imagine an alternative Orthodox Jew example in which the Jew attends the Catholic friend's wedding and, gesturing toward a table of hors d'oeuvres, asks "which of these can I eat?" His friend points to a blue plate and tells him, "these ones mix meat and dairy, but the rest are safe." Even though this statement contains no normative terms, it clearly suffices as a reason for the Jew not to eat from that plate. This is how reasons for action function in ordinary use. To say, as Raz does, that only a rule can be a reason is to ignore the actual linguistic practices around reason-giving. In fact, in many cases, citing a rule as a reason for an action is uninformative. Imagine that the Orthodox Jew is asked by a different close friend why he has not tried the food on the blue plate. The friend is already familiar with Jewish dietary law, but does not know all the ingredients of the food in question. In that case, it would be pragmatically useless to respond by saying what the law requires, as the friend already knows this. The relevant information – the reason for action – would be a descriptive statement about the ingredients of the food in question.

This is not to say that the Orthodox Jew's reason for avoiding the food on

[69] *Ibid*, 155.

the blue plate does not rest on the content of Jewish dietary law; it surely does. But, as I argued near the beginning of Section 3, statements of rules do not give complete reasons for action either. The fact that the ordinary linguistic practice of justifying action does not result every time in an infinite regress of justification does not depend on the existence of ultimate reasons which do not admit any further justification, but rather on the fact that that practice is part of a shared form of life. Reasons do not exist in a vacuum; the activity of reason-giving presupposes some mutual desire to understand and be understood, and unfolds against a background of some epistemic and behavioral common ground. If someone asks me why I have left my house carrying an umbrella, a complete reason could be: "my weather app told me it will rain later." The fact that I want to avoid getting wet and the fact that an umbrella achieves this goal need not be made explicit, though they do play a role in my reasoning. The expectation of a basic common ground remains even between parties whose interests diverge in some important respect, much in the same way that Grice's cooperative principle still applies to interlocutors in an adversarial situation, though perhaps in a weakened form.

Being a reason for action is not an intrinsic feature of any statement. To say that something is a reason is only to describe its role in language games. It is easy to imagine any number of statements which might be regarded as a valid reason by a rational person in one context but not another, which is why it is possible to say that an action is morally justified but not legally. It is also possible for a legal reason to be satisfactory under one interpretation of the law but not another, and ditto for moral reasons. What is a complete reason for one person may be no reason at all for another. Reason-giving has the same indeterminacy common to other socio-linguistic phenomena. Disagreement is not merely possible, but fundamental to this activity; after all, what reason is there to justify an action to someone who already believes it is justified? Typically, if reasons are being given it is because there is some epistemic or normative discrepancy between speaker and hearer. Thus even if Raz is correct that the presence of a governing norm is in most cases an exclusionary reason for action, this does us very little good because the cases most likely to be discussed are the exceptional ones where the applicability or content of a norm is in dispute. This is what Raz missed by choosing to see reason-giving as a philosophical concept rather than a social practice.

If there is a problem of the normativity of law, it is not the one Raz thought he identified. The fact that the same terms appear in legal and moral normative statements is not philosophically problematic, except to the extent that it invites the question of why and when people believe that legal rules ought to be followed at all. This is as much a question for legal positivists as it is for

natural law theorists, though I suspect that if a satisfactory answer exists, a hybrid Dworkinian theory stands the best chance of offering it. It is at any rate a descriptive question about the social ontology of legal norms, and not about the statements which express them.

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