

According to law

Adam Perry

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Legal discourse consists largely of legal claims: claims that there is a legal obligation, right, permission, liability, or other deontic incident. What is the meaning of *legal obligation*, *legal right*, and so on in legal claims? Philosophers of law almost all take *obligation*, *right*, and so on to have the same meanings they do in moral discourse. They disagree sharply, however, about the meaning of *legal*.

One view is that *legal* is an adjective indicating that a moral obligation is grounded in legal practice. For example:

- (1) There is a legal obligation not to park on double yellow lines.

would mean the same as:

- (2) There is a moral obligation not to park on double yellow lines,
grounded in legal practice.

Call this view *adjectivalism* (Shapiro 2011: 185). Adjectivalism has an important implication. Grounding operators are factive. So, there is a legal obligation, right, and so on only if there is a corresponding moral obligation, right, and so on. This implication is unacceptable to legal positivists, who hold that the content of the law is ultimately determined solely by social and not moral facts (Wodak 2018: 802).

Positivists therefore need an alternative to adjectivalism. One alternative is that *legal* indicates that the rest of the sentence in which it is embedded is put forward as a claim about what is true from the law's perspective or according to law. (1) would be the same as:

- (3) According to law, there is a moral obligation not to park on double yellow lines.

Call this view *perspectivalism* (Shapiro 2011: 185). A perspectival operator is *not* factive. This makes perspectivalism a natural complement to positivism. And indeed, contemporary positivists are typically perspectivalists (Raz 1990: 175-77; Coleman 2011: 78; Shapiro 2011: 185-91; Gardner 2012: 131). Given the dominance of positivism in legal philosophy, that makes perspectivalism the standard interpretation of legal claims.

Here I set out a new objection to perspectivalism. The objection is that perspectivalism is unable to account for the use of legal claims in common forms of logically complex arguments.

2

Consider the following argument:

- (4a) If a person parks on a double yellow line, then that person is legally liable to pay a fine.
- (4b) *A* is not legally liable to pay a fine.
- (4c) So, *A* did not park on a double yellow line.

This argument is valid. Its premises are, I shall assume, true. The issue is whether the argument remains valid, and its premises true, on the perspectivalist interpretation.

The perspectivalist says that legal claims are claims according to law. If that's right, then we should be able to rewrite (4) this way:

- (5a) According to law, if a person parks on a double yellow line, then that person is morally liable to pay a fine.
- (5b) According to law, *A* is not morally liable to pay a fine.

(5c) So, *A* did not park on a double yellow line.

But this argument is *not* valid. That is because we cannot derive a conclusion that is not perspectively prefixed solely from premises that are so prefixed. We cannot ‘export’ conclusions from within a perspective, in other words.

To see this clearly, consider an argument with the same structure:

(6a) According to the Woyagubek cult, if a person is not visited by angels, then that person is visited by demons.

(6b) According to the Woyagubek cult, you are not visited by demons.

(6c) So, you are visited by angels.

This conclusion does not, of course, follow. The truth of (6a) and (6b) does not guarantee the existence of angels.

The prefix in (5a) takes scope over the whole conditional. That might seem to beg the question against the perspectivalist, since if the prefix took scope over only the consequent, then the argument would be valid. However, what is true according to law includes at least the content of general legal norms, that is, the law. As Raz writes, the ‘legal point of view (of system S) ... consists of the norms of S’, as well as certain other reasons (Raz 1990: 171; see also Shapiro 2011: 186). It is a law (of England) that a person who parks on a double yellow line is liable

to pay a fine. So, what is true according to law must include that a person who parks on a double yellow line is liable to pay a fine. The consequent of (5a) may additionally be true according to law; but that is not the issue.

Here, then, is the problem: the perspectivalist interpretation fails to preserve the validity of arguments that include legal claims. Call this *the inferential objection* to perspectivalism.

3

How could perspectivalists respond to the inferential objection? One response is to bite the bullet and concede that perspectivalism struggles to account for the validity of inferences based, like (4), on *modus tollens*.

The objection goes beyond *modus tollens*, however. Here, for instance, is an example using a constructive dilemma:

- (7a) Hunting bear is legally prohibited only in winter.
- (7b) Hunting deer is legally prohibited only in spring.
- (7c) Either hunting deer is now legally prohibited or hunting bear is now legally prohibited.
- (7d) So, it is now either winter or spring.

The perspectivalist takes (7) to be the same as:

- (8a) According to law, hunting bear is morally prohibited only in winter.
- (8b) According to law, hunting deer is morally prohibited only in spring.
- (8c) Either according to law hunting bear is now morally prohibited or according to law hunting deer is now morally prohibited.
- (8d) So, it is now either winter or spring.

Whereas (7) is valid, (8) is not. From (8a)-(8c), it may be possible to infer that, according to law, it is either winter or spring. (I return to this possibility in §4.)

But what is true according to law may be false in fact. Indeed, this is a possibility perspectivalists are keen to emphasise. After all, it is the potential divergence of legal obligations, rights, and other incidents from their moral counterparts that is supposed to embarrass adjectivalists and help motivate perspectivalism.

Finally, here is an argument using disjunction elimination:

- (9a) B is legally obligated to φ only if B is over 18.
- (9b) B is legally obligated to ψ only if B is over 18.
- (9c) Either B is legally obligated to φ or legally obligated to ψ .
- (9d) So, B is over 18.

The perspectivalist says that (9) is the same as:

- (10a) According to law, B is morally obligated to φ only if B is over 18.
- (10b) According to law, B is morally obligated to ψ only if B is over 18.
- (10c) Either according to law B is morally obligated to φ or according to law B is morally obligated to ψ .
- (10d) So, B is over 18.

(9) is valid, but (10) is invalid. That the law is committed to the view that B is over 18 is no guarantee that B is over 18.

These are just possible examples. There is a range of inference patterns that perspectivalism fails to preserve.

4

Here is another possible response to the inferential objection. When uttered in legal contexts, sentences like ‘Adolphus did not park on a double yellow line’ could be implicitly prefixed with ‘According to law ...’. Making this prefix explicit would give us:

- (5a) According to law, anyone who parks on a double yellow line is morally liable to pay a fine.
- (5b) According to law, A is not morally liable to pay a fine.

(5c*) So, according to law, *A* did not park on a double yellow line.

The conclusion follows provided that the legal perspective is deductively closed. That is, it follows provided that what is entailed by what is true from the legal perspective is itself true from that perspective. So, assuming an implicit prefix and deductive closure, there is a perspectivalist interpretation of (4) that preserves its validity.

I have two worries. One is about the implicit prefix. We sometimes want to use legal claims to work out what is true in the actual world, not just what is true according to law. Suppose I want to know which horse won a race. It seems I should be able to reason this way:

(11a) Either Loose Goose or Jumping Shark won the last race.

(11b) If Loose Goose won the last race, then Cuthbert is legally entitled to £100 from the bookies.

(11c) Cuthbert is not legally entitled to £100 from the bookies.

(11d) So, Jumping Shark won the last race.

The suggestion is that we interpret (11d) as implicitly prefixed by ‘According to law ...’. But I would then have failed to do what I set out to do. I would have worked out which horse won *according to law*; I would not have worked out which

horse *actually* won. That's not right, though. Intuitively, given the truth of (11a)-(11c), I *have* reasoned to a correct conclusion about which horse won.

The second worry is about deductive closure. Necessary truths are trivially entailed by any proposition. A common view is that some moral truths are metaphysically necessary (Vayrynen 2020). If the legal perspective is deductively closed, then any necessary moral truths would be legal truths. Suppose that the categorical imperative is a necessary truth. We could infer from (5a) or (5b) that according to law there is a moral obligation to treat people as ends not as means. Perspectivalists will take that to mean that there is a *legal* obligation to treat people as ends not as means. But of course, there is no such legal obligation. Deriving a legal obligation based on the truth of the corresponding moral obligation is also inconsistent with positivism, and hence with the motivation for perspectivalism.

5

Perspectivalism renders a range of valid arguments invalid. It should be rejected, as a result. This objection does not apply to adjectivalism. For Adjectivalists,

unlike perspectivalists, do not struggle to account for the use of legal claims in logically complex arguments. For example, this adjectivalist version of (5):

(12a) If a person parks on a double yellow line, then that person has a moral liability to pay a fine, grounded in legal practice.

(12b) *A* does not have a moral liability to pay a fine, grounded in legal practice.

(12c) So, *A* did not park on a double yellow line.

is perfectly valid. Should we all be adjectivalists, then?

Not necessarily. Perspectivalists and adjectivalists alike think that within legal discourse deontic terms like *obligation* and *right* are relativised to morality. But that may be wrong. And if it is wrong, then there will be alternatives to perspectivalism and adjectivalism. For example, *right* and *obligation* could have a single meaning in legal and moral discourse, and *legal* and *moral* modify these terms by indicating the relevant source of normativity (Wodak 2018: 791, 802). Or perhaps *right* and *obligation* have sharply different meanings in legal and moral discourse (Hart 1982: 127-8). There may be other possibilities. So, while we should *not* be perspectivalists, what we *should* be is an open question.

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