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The law does not exist to guide us

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ABSTRACT

It has become a popular view in jurisprudence that the law exists to guide us. I argue in this article that it is plausible to think that the law does not necessarily exist to guide us. I do this while accepting that the law is necessarily normative. The upshot of the argument is significant. Viewing an attempt to provide guidance as a necessary feature of the law gives rise to a distinctive mode of operating that some think has inherently valuable qualities. We get to say, for example, that the rule of law provides some necessary constraints on how laws should be designed. These valuable aims and constraints become external aims and constraints once guidance is jettisoned from the concept of law. It would not, for example, be true just in virtue of the very nature of law that it should not be secret or oppress people into conformity.

KEYWORDS

Guidance; practical reasoning; normativity; legal systems; rule of law

1. Introduction

It has become a popular view in jurisprudence that the law exists to guide us. It is the 'business' and 'essence' of the law to guide human behaviour, according to Raz.[1] The 'primary function' of the law, for Hart, is not to coerce people through threats but to guide them through rules.[2] Indeed, law that is used not to guide but to coerce has been called 'degenerate law'.[3] Finnis says that laws 'provide directly applicable and authoritative guidance';[4] Waldron claims that the law 'strains as far as possible' to guide people into conformity with its directives over other means of securing such conformity.[5]

The aim of this article is to cast doubt on this popular view. I will argue that it is plausible to think that the law does *not* necessarily exist to guide us. By 'guidance' I have in

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[1]Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 221, 225.

[2]HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 249.

[3]John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 227.

[4]John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 318.

[5]Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 The Cambridge Law Journal 200, 206.

mind a certain kind of interaction between people and the law, an interaction that (at least partly) occurs in people's minds. When I say, therefore, that it is plausible to think that the law does not necessarily exist to guide us, I mean to say that the law does not necessarily exist to elicit this certain kind of interaction between people and the law. You might worry that this is not what people have in mind by 'guidance' when they say that the law exists to guide us. I will show that it often is what people have in mind, or at least is often what people are committed to saying.

The argument that it is plausible to think that the law does not necessarily exist to guide us will proceed as follows. First, I will show that it does not immediately follow from the fact that something is (or aims to be) normative that that something should be seen as there to provide normative guidance. To motivate this thought I will draw on accounts of the normativity of morality as well as examples of legal directives from tort law and criminal law. I will then show that we can imagine societies which have systems of norms established, adjudicated, and enforced by the state but which do not exist to guide those subject to the systems' norms. We would not be remiss, I will suggest, in calling such systems legal systems.

The claim that the law does not necessarily exist to guide us has significant consequences, if true. Viewing an attempt to provide guidance as a necessary feature of the law gives rise to some valuable functions that the law can aspire to achieve by guiding, as well as a distinctive mode of operating that some think has inherently valuable qualities.[6] We get to say, for example, that the brutish 'economy of threats' is a 'degenerate' case of law;[7] the rule of law, understood as a standard by which to measure how well the law is able to guide, gets to provide some necessary constraints on how laws should be designed. These valuable aims and constraints become external aims and constraints once guidance is jettisoned from the concept of law. It would not follow from the fact that the law is (or aims to be) normative that it is true in virtue of the very nature of law that it should not be secret or that it should not just oppress people into conformity.

Before offering any reasons to accept the truth of the claim that the law does not necessarily exist to guide us, we first need to get clear on what it would be for the law to exist to guide in the first place. Despite the central place traditionally given to it in the concept of law, 'guidance' is often left either ill-defined or undefined, a fact which also contributes to a common equivocation between two very different understandings of what guidance is. In the next section I will unpack this equivocation, justify my use of 'guidance' to mean an interaction between people and the law that takes place (at least partly) in people's minds, and bring some more precision to the target claim that the law 'exists' to guide.

2. Significant and insignificant conceptions of guidance

In arguing that it is plausible to think that the law does not necessarily exist to guide us, I am also accepting the premise that the law is (or aims to be) normative to begin with.[8] As

[6]Raz, *The Authority of Law* (n 1) 221; Waldron (n 5).

[7]Gardner, *Law as a Leap of Faith* (n 3) 227, quoting HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, OUP 2008) 40.

[8]I will from now on drop the '(or aims to be)' for ease of reading. I include it to accommodate those who do not think that the law necessarily succeeds at being normative. Whether the law necessarily succeeds at being normative depends

popular as the claim that the law exists to guide is the claim that the law is normative. This claim is so popular that explaining the normative aspect of the law has been described as 'one of the main challenges of general jurisprudence'.[9]

It is, however, often taken for granted that once we accept that the law is normative it follows that the law exists to guide. Gardner, for example, says that it 'is a conceptually necessary feature of a legal system' that it is a normative system, *from which it follows* that the 'proper way of functioning as a legal system' is by guiding.[10] This immediate move from the premise that the law is normative to the conclusion that the law exists to guide is unsurprising. It is widely accepted that normative phenomena must be capable of guiding the rational person to exist. Take the normative phenomena of reasons. Even those who are objectivists about reasons—that is, those who think that the existence of a reason ultimately depends on the existence of valuable properties of some object independent of us—accept that for something to be a reason it must be capable of guiding the substantively rational person.[11] If you think that the law is reason-giving, and if some ability to guide is a conceptually necessary feature of a reason, then it might seem to follow that the law exists to guide.

Given the popularity of explaining the normativity of law in terms of its relationship to the normative phenomena of reasons, then, and given the close connection between reasons and guidance, accepting that the law is normative whilst denying that the law necessarily exists to guide is an uphill struggle. Crucially, however, there is a difference between something having the capacity to guide and that guidance being there actually to be used in your practical reasoning—that is, the process of figuring out what to do. In order, then, to make this immediate move from the premise that the law is a reason-giving normative system to the conclusion that the law exists to guide we have to say that to guide *just is* to be reason-giving. This would give us the following:

(1) the law is a reason-giving normative system; and
(2) to give reasons just is to guide; therefore
(3) the law exists to guide.

Raz, at times, seems to have something like this answer in mind. By default, he says, reasons ought to be understood as reasons for *conformity*, that is understood as just requiring you to perform the action that they count in favour of, never mind which reasons, if any, you acted for in doing so.[12] Raz thinks that, on this view, reasons are guides 'only in the sense that' they may *justifiably* 'figure in one's [practical] reasoning'.[13]

both on what it is for something to be law and what it is for something to be normative, two issues that I do not have the space to deal with here. Suffice to say that whether you think that the law necessarily succeeds at being normative or only necessarily aims to be normative does not affect what follows.

[9]Andrei Marmor and Alexander Sarch, 'The Nature of Law' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University 2019) <https://plato.stanford.edu/entries/lawphil-nature/> accessed 21 October 2022.

[10]Gardner, *Law as a Leap of Faith* (n 3) 229.

[11]Derek Parfit, *On What Matters* (OUP 2011) vol 1, 51.

[12]Joseph Raz, *Practical Reason and Norms* (OUP 1999) 179. Raz contrasts reasons for conformity with reasons for *compliance*, which require you to perform the action required *acting for the reason* that required it: ibid 178–79.

[13]Raz, *Practical Reason and Norms* (n 12) 179.

Whether anyone actually uses a reason in their practical reasoning, or is 'even aware of its existence',[14] is irrelevant to this sense of guidance. If the reasons that the law provides are these default reasons for conformity,[15] to claim that the law exists to guide is on this view to say nothing more than that the law *provides* reasons. The claim that the law exists to guide would have nothing to say about how, if at all, the law's reasons are there to be used in people's practical reasoning.

There is, then, a way to move immediately from the premise that the law is a reason-giving normative system to the conclusion that the law exists to guide, but not without rendering the second claim *insignificant*, by which I mean that the claim conveys no new information. If all we mean by 'the law exists to guide' is 'the law is reason-giving', then the conclusion (3) above is just a restatement of premise (1). By reducing guidance to reason-giving in this way, so that to guide *just is* to give reasons, the claim that the law exists to guide tells us nothing that we did not already know by accepting that the law is normative.

And it seems that those who claim that the law exists to guide normally do mean to say something *significant*, that is to convey new information—indeed often they need to. Raz has also said that in order to be guided by a reason 'a person must come to *believe*' in the fact that gives rise to it.[16] Here guidance is not just the existence of a reason but an *interaction* with that reason, an interaction that (at least partly) occurs in people's minds. It is this significant kind of guidance that is needed to establish many claims about the function of legal guidance. Hart, for example, says that guidance is the 'specific character of law as a means of social control', requiring 'members of society […] to discover the rules and conform their behaviour to them' by applying those rules to themselves.[17] Waldron too considers it an essential feature of the law's guidance that people are left to apply legal directives to themselves.[18]

Guidance cannot now just be reduced to reason-giving; for legal guidance to function as a means of social control there must at least be some interaction with the reasons that the law provides. So too when Raz says that the function of legal guidance is to authoritatively settle disputes,[19] or when Finnis says that legal guidance eliminates 'the need for [people] to weigh up […] the pros and cons of many possible courses of actions [*sic*]'.[20] For any of this to happen, at least some people need to be aware of the law and actually interact in the proper way with its reasons. Raz acknowledges this necessity when he says that 'it is of the essence of law that it expects people to be *aware* of its existence and, when appropriate, to be guided by it'.[21]

[14]ibid.

[15]Raz is not always clear as to whether the reasons that the law provides are reasons for conformity. In earlier work, it seems as if the law's reasons need to be reasons for compliance, given that the 'mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions instead of by the reasons on which they are supposed to depend': Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 214–15. In later work, however, he insists that legal authority does not require compliance: Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota Law Review 1003, 1022.

[16]Raz, *Practical Reason and Norms* (n 12) 17 (emphasis added).

[17]Hart, *The Concept of Law* (n 2) 38–39.

[18]Waldron (n 5).

[19]Raz, *The Authority of Law* (n 1) ch 10.

[20]Finnis (n 4) 318.

[21]Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 93 (emphasis added).

Any claim that the law exists to guide, then, must be a significant one to establish that legal guidance is a means of social control, of settling disputes, or of aiding us in our practical reasoning. It requires understanding guidance as being something more than just the provision of reasons. But on any significant version of the claim that the law exists to guide you cannot move immediately to that conclusion from the premise that the law is normative. That is too quick. To say that the law has provided you with a reason, and thereby guided you, is to provide an entirely normative explanation of your relationship with the law; for us to say that the law exists to guide you by getting you actually to *use* the reasons it provides requires a move into the philosophy of action. We need to know what it is that someone needs to do (and to believe) in order to be guided by something in the significant sense before we can show that the law exists to elicit such interactions.[22]

When I say therefore that I will argue that it is plausible to think that the law does not necessarily exist to guide us, I am *not* referring to what I have called the insignificant sense of guidance. I am not denying that the law is normative; I am not denying that the law necessarily exists to guide us by *providing* us with reasons. Rather, when I say that it is plausible to think that the law does not necessarily exist to guide us, I mean to refer to what I called the significant sense of guidance. This article will argue that it is plausible to think that the law does not necessarily exist to guide us by eliciting a certain kind of interaction between people and the law, an interaction that (at least partly) occurs in people's minds. I do not, however, think that this qualification overly narrows the argument's scope: as I have said, many of the key proponents of the view that the law necessarily exists to guide are committed, either explicitly or implicitly, to the claim that the law necessarily exists to guide in this significant sense.

I have, until now, been treating the claim that the law necessarily exists to guide as a unified view. The term 'exists' in that claim is vague, however, and the possible relations that guidance could have to the nature of law are numerous. Whilst we have seen hints of some of them, it is not always explicit which relation is endorsed by whom. I will not attempt to give a comprehensive survey of existing views here; it will, however, be helpful to outline two possible relations that people seem broadly to have in mind.

The strongest possible relation would be that of *conceptual necessity*. Here, by the claim that the law 'exists to guide' we might mean that it is part of what it is for something to be law that one of its functions is to guide us.[23] We might therefore also think that, for something to be law, it must necessarily at least be the kind of thing that would be capable of sometimes succeeding at doing so. Thus, Raz says that 'for law to be law [it] must be capable of guiding behaviour, however inefficiently'.[24] Raz even expresses sympathy for (although does not definitively endorse) the view that for something to be *a* law it must be capable of guiding, so that potentially not only must a legal system be capable of guiding to be a legal system but also each individual law within it.[25]

Now, on the view that reduces guidance to the giving of reasons, some version of the conceptual necessity claim *must* hold. If we accept that the law is a reason-giving

[22]For a possible account of this interaction: Joshua Pike, 'How the Law Guides' (2021) 41 Oxford Journal of Legal Studies 169.
[23]Gardner, *Law as a Leap of Faith* (n 3) 229.
[24]Raz, *The Authority of Law* (n 1) 226.
[25]ibid 85–88.

normative system, then for anything to be a law it must at least be the kind of thing that is capable of being used in the rational person's practical reasoning, for otherwise it is not even the kind of thing that could be a reason. This is, however, a very low bar to meet. Indeed, according to certain views about the nature of reasons, that a purported law is secret potentially has no bearing on the question of whether the law can guide in the insignificant sense of being a reason for someone because it can still be possible that a rational person would be *capable* of using that law as a reason were they aware of the law's existence.[26] Yet secret laws are sometimes taken to bring into question their existence as laws precisely because they fail to be usable as guidance;[27] this move requires the significant sense of guidance, for secrecy is what precludes someone from *actually* using a law in their practical reasoning.

The significant version of the conceptual necessity claim, then, would be that it is a conceptually necessary feature of the law that one of its functions is to elicit a certain interaction between people and those reasons the law provides. It is this version of the claim that does not follow from the premise that the law is normative, and that I think there are good reasons to doubt. There are various ways in which something like the conceptual necessity claim might be expressed. Instead of 'function' we might talk of the law's 'point', 'business', or 'essence' as being to guide in this way. We might additionally say that it is part of what it is for something to be law that it necessarily *claims* to guide in this way. I will stick to the language of function for consistency, but my objections to this formulation of the claim are intended to be objections to this larger cluster of claims that see some necessary connection between what it is for something to be law and the law attempting or purporting to guide in the significant sense.

A related but distinct claim is what we might call the *central feature claim*. On this view, whilst something might still be law if it does not have as its function the aim of guiding in the significant sense of eliciting a certain interaction between people and those reasons the law provides, it is nonetheless in one way *deficient* qua law if it fails to guide in this way.[28] Within this claim we can distinguish between a *stronger* and a *weaker* version. According to the stronger version, law that does anything *other* than guide in the significant sense is in one way deficient for failing to pursue its aims in the manner that law ought to aspire to. Something like this strong view has been criticised for giving 'contemporary jurisprudence an air of sanctimonious unreality'.[29] In its place, Green proposes a weaker version when he says that whilst something that '*only* goads people into action would not be a legal system as we know it', something that both guides *and* goads could not just be a legal system but 'a central case of one'.[30] In short, so long as the law guides people into conformity it is in no way deficient for it also to pursue other means of securing conformity with its directives.

My main target is the conceptual necessity claim. That is, my focus will be on arguing that it is plausible to think that it is not a conceptually necessary feature of the law that one of its functions is to guide us by eliciting a certain interaction between people and those reasons the law provides. If, however, it is not a conceptually necessary feature

[26]Parfit (n 11) 34–35.
[27]Raz, *The Authority of Law* (n 1) 85–88; Lon Fuller, *The Morality of Law* (Yale University Press 1969) 39.
[28]Raz, *Between Authority and Interpretation* (n 18) 93; Gardner, *Law as a Leap of Faith* (n 3) 227.
[29]Leslie Green, 'Escapable Law' (2019) 19 Jerusalem Review of Legal Studies 110, 122.
[30]Green, 'Escapable Law' (n 29) (original emphasis).

of the law that one of its functions is to guide us in this way then we have, without more, no reason to think that the law would be in one way deficient *qua law* for failing to guide in the significant sense. I take it, therefore, that my objections to the conceptual necessity claim—if successful—will at least undermine the case for the central feature claim.

So, what *is* the law for? As I have said, nothing I say here is meant to cast any doubt on the premise that the law is a reason-giving normative system. But if the law exists to be reason-giving, what is the point of doing so if not thereby to guide people by getting them to use those reasons in their practical reasoning? I will offer a minimalist alternative based on what we *can* straightforwardly derive from the premise that the law is a reason-giving normative system. Namely, that the law necessarily seeks to be that in virtue of which some fact is a reason. Reasons are not only that which guide us to normative conclusions in our practical reasoning. Reasons are also that which *determine* the normative valence of our actions, beliefs, and feelings: the answers to normative questions. The law, then, necessarily aims to ground reasons for action. Whether it necessarily aims to ground robust reasons for action that answer the normative question of what we actually ought to do, or only legal reasons that answer the normative question of what we legally ought to do, depends on whether you think the law necessarily aims to be an authority in the practical domain or only in the legal domain.[31] But the law can seek to do either, I will argue, independent of any attempt to guide people to the answers it provides by eliciting a certain interaction between people and its reasons, robust or otherwise.

The next section aims to motivate that argument. First, I will show that it does not immediately follow from the fact that something is normative that that something should be seen as there to provide normative guidance. I then provide a sketch of possible worlds in which, I suggest, we can imagine legal systems the function of which is not to elicit a certain kind of interaction between people and those reasons the law provides. Stripped of their guiding function, these legal systems reveal the conclusion that does follow from the law's normativity: that the law necessarily seeks to determine the answer to normative questions by making it the case that we ought to do as it directs (whether robustly or legally), it being a further, contingent, matter whether legal directives are also there actually to be used in your practical reasoning and thereby to normatively guide you to such answers.

3. The function of law's normativity

That it should be seen as a contingent matter whether the function of a legal directive is to be used in your practical reasoning and thereby to normatively guide you will strike many as bizarre. We have seen that the conceptual necessity claim is sometimes taken to immediately follow from the premise that the law is a reason-giving normative system. I argued that, for the conceptual necessity claim to have the implications commonly ascribed to it, it requires a significant account of normative guidance. I also suggested, however, that so long as the conceptual necessity claim refers to a significant account of normative guidance, that the move from the premise that the law is a reason-

[31]For the suggestion that Hart endorsed the latter view: Mitchell Berman, 'Of Law and Other Artificial Normative Systems' in David Plunkett, Scott Shapiro, and Kevin Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (OUP 2019).

giving normative system to the conclusion that the law exists to normatively guide is too quick.

To see this, a good place to start is with the character of the law's normativity. Those who think that the law necessarily aims to be an authority in the practical domain *simpliciter*, rather than only within the legal domain, often draw connections between the law's normativity and the normativity of morality. Indeed, for Raz a legal reason is necessarily a purported moral reason from the law's point of view.[32] So too for Gardner, for whom legal reasons necessarily purport to be moral reasons and thus rationally inescapable, so that we need no further reasons for engaging with them.[33] Whilst the claim implied here that if on the balance of moral reasons you ought to perform some action φ it must be the case that you ought all things considered to φ *simpliciter* is controversial, I suspect that a good number in jurisprudence subscribe to it.[34] Combined with the thought that the law seems to treat legal reasons as defeating all other reasons, including pre-existing moral ones, it leads naturally to the view that legal reasons must necessarily be purported moral reasons if you think that the law necessarily aims to be an authority in the practical domain.

There is another potential connection to the normativity of morality that is being ignored here, however. It does not follow from the fact that morality is normative that morality exists to be used in your practical reasoning and thereby to normatively guide you. Whilst it is an open question whether moral theories *should* be seen to provide such normative guidance,[35] 'providing an account of right-making characteristics is not *the same thing* as … providing a decision-making procedure'.[36] That is, it is one thing for morality to be that in virtue of which something is morally right or wrong; it is another for it also to be something that is there to be used in your practical reasoning to form a belief about what you ought to do in a given situation. It could be the case, for example, that utilitarianism provides a true account of what it is for an action to be morally right or wrong whilst providing little guidance on what action utilitarianism endorses in a given situation. The directive 'you ought to maximise utility' can tell you which facts are reasons for you in a given situation—those facts which make it the case that some action would maximise utility—and therefore provide you with normative guidance. But that directive does not provide an 'immediately helpful description' of which action to perform in a given situation.[37]

Because the directive 'you ought to maximise utility' only provides indirect normative guidance on what action you ought to perform,[38] it is up to you to figure out what reasons require in your situation. At least sometimes, however, it will be counter-productive to figure things out for yourself. The burden on your time and mental faculties, combined

[32]Raz, *Between Authority and Interpretation* (n 21) 111.
[33]Gardner, *Law as a Leap of Faith* (n 3) 149–50.
[34]Greenberg describes the point as 'obvious', taking it to be 'fundamental to the nature of morality that if, all-things-considered, one is morally required to take some action, it cannot be the case that other reasons make it permissible not to take the action': Mark Greenberg, 'The Standard Picture and Its Discontents' in Leslie Green and Brian Leiter (eds), *Oxford Studies in the Philosophy of Law: Volume 1* (OUP 2011) 82.
[35]For a suggestion that it should only be a secondary concern: Linda Zagzebski, 'Exemplarist Virtue Theory' (2010) 41 Metaphilosophy 41.
[36]Eugene R Bales, 'Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure' (1971) 8 American Philosophical Quarterly 257, 261 (original emphasis).
[37]Bales (n 36).
[38]On the distinction between direct and indirect normative guidance: Pike, 'How the Law Guides' (n 22) 181–84.

with the risk of mistake, could result in a situation where it is sub-optimal in terms of utility to use 'you ought to maximise utility' as a directive. Especially in particularly complicated situations, it might therefore be more optimal to use some different directive that *does* provide direct normative guidance on what action you ought to perform as a proxy or heuristic for utility. Here the directive 'you ought to maximise utility' still has a crucial function to serve, namely making it the case that certain facts are reasons for you, including the fact that using some other directive will maximise utility. It does not follow, however, that anyone should engage with the directive 'you ought to maximise utility' in their practical reasoning—in other words, that the directive should be used to provide normative guidance—for doing so may result in decisions that are suboptimal in terms of utility.

It does not, then, immediately follow from the fact that morality is normative that it should be seen as there to provide normative guidance in the significant sense. At least some possible moral directives exist to make it the case that some action is morally right or wrong without being there to be used in your practical reasoning, whether because they are unhelpful or even potentially because using them makes it more likely that you will arrive at a morally worse decision. We should similarly question the move from the premise that the law is normative to the conclusion that it is part of what it is for something to be law that one of its functions is to be used in your practical reasoning and thereby to normatively guide you.

You might object that, whilst it might be plausible to think that moral directives primarily serve a grounding rather than a guiding function, there is necessarily a guiding function to legal directives, even those that are unhelpful or counter-productive. It might just be that the guiding function of such legal directives is necessarily directed towards *legal officials* rather than us. Whilst legal directives might necessarily have this function of guiding legal officials in order that they can be applied, if it is only part of what it is for something to be law that one of its functions is to normatively guide legal officials, then this is a very different, and much more limited, version of the conceptual necessity claim than the one commonly envisaged. The normative guidance that the law is commonly portrayed as attempting to provide is seen as there for us, as citizens.[39] Normatively guiding legal officials into applying legal directives is, however, simply an instance of the law guiding *itself* in so far as legal officials comprise an essential part of a legal system.

A more serious objection is the seeming futility of a legal system the function of which was to make it the case that you ought to φ but not to guide you to that answer. Crucially, however, fulfilling such a function gives the law *normative control*. Take a legal directive to be 'reasonable'. According to some views, such a directive is nothing more than a direction to do what you ought to have done anyway, apart from the law.[40] Whilst it may not be a function of such a directive to normatively guide us (it has almost no guidance to provide), it is a function of such directives that they are used to evaluate our behaviour ex post facto. Despite the reluctance to say in advance what action directives of reasonableness require, the law is more than happy to tell you *retrospectively* in court

[39]Eg Hart says that the law's guidance is the 'specific character of law as a means of social control', requiring '*members of society* […] to discover the rules and conform their behaviour to them' by applying those rules to themselves: Hart, *The Concept of Law* (n 2) 38–39 (emphasis added).

[40]John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 Law Quarterly Review 563.

what the right answer was, and to hold you in breach of the directive if you failed to figure it out. For this to work there needs to be a legal directive that is claimed ultimately to ground the fact that you ought to have done as directed. This is the case regardless of whether you think the law necessarily aims to be a normative authority in the practical domain (that is, that the law necessarily aims to be robustly normative) or only in the legal domain (that is, that the law only aims to be artificially normative). On either view, the law cannot intervene without first having brought some normative question into the legal domain by issuing a directive that regulates it. The difference is just whether you think the function of the legal directive is to make it the case that you *actually* ought to do as it directs, or only to make it the case that you *legally* ought to do as it directs.

Either way, it can be valuable for the law to determine the answer to normative questions independent of any attempt to guide us to that answer. Take the criminal prohibition on rape. It is a common misconception that someone's lack of consent to sex is a sufficient condition for a conviction for the crime of rape. According to section 1 of the Sexual Offences Act 2003, however, it is not sufficient. The defendant must also lack a reasonable belief that the victim consented. It is plausible to think that it could be valuable for the law to contain this additional condition, in order not to lead to unjust results in rare cases. It is also plausible to think, however, that it is valuable for people to *mistakenly believe* that whether someone consents to sex is the only legally relevant consideration if, say, such a belief engenders greater awareness of issues around consent which in turn leads to fewer incidences of rape. Just as it could be the case, as with the utilitarian directive 'you ought to maximise utility', that a moral directive might determine the answer to a normative question but that it is better to be guided by some different directive, it can be better for the law to make it the case that we ought (not) to do one thing but for people to be guided by a directive that requires us (not) to do something else.

Indeed, if such a causal link were established between a mistaken belief that φing was wrong and a reduction in the incidence of some different, truly wrongful, action ψ then, if all we were concerned with was the reduction of incidences of ψing, that would be an argument for making it *appear* as if the law prohibited φing and keeping secret some part of the law that revealed that, in fact, the law only prohibited ψing. As Green notes, the 'moral ideal for the law, even in the paradigm case, is simply that it should help *get the moral job done*, not that it should get the job done in some particular way'.[41] Thus, it might sometimes be better for the law to 'shape our social world in a way that is relatively invisible' rather than by normatively guiding us.[42] Now, Green takes this to endorse something like the weaker version of the central feature claim, according to which the law is only deficient qua law if it *fails* to normatively guide, not if it *also* seeks to affect people's behaviour in other ways.[43] My suggestion here, however, is that once we separate the law's normativity from the distinct function of attempting to normatively guide we have, without more, no reason to think that the latter is *necessarily* a function of law. So long, therefore, as the law attempts to be

[41]Green, 'Escapable Law' (n 29) 122 (original emphasis).
[42]ibid.
[43]'Something that *only* goads people into action would not be a legal system as we know it; but something that *also* goads them can be not only a legal system but also even a central case of one': ibid (original emphasis).

reason-giving—to make it the case that we ought to do what its directives require of us, whether robustly or only legally—we would also have, without more, no reason to think that the law would be in one way deficient qua law if it *only* sought to affect our behaviour through non-normative means.

Granted, the examples I have given so far to motivate this thought were isolated examples of particular legal directives. You might object that it is not possible to imagine an *entire* legal system that does not seek to normatively guide. I think, however, that it is possible to imagine just such a legal system.

Imagine a society that, for now, was sufficiently small and/or well-organised so that it managed to resolve common coordination problems, such as which side of the road to drive on, by mutual agreement. Rather than imposing rules solving such problems, this society is able to get by through the recognition of social practices such as 'around here we drive on the left'. This society, however, still has a system of rules adjudicated upon and enforced by the state. It is just that this system seeks only to regulate those actions that were morally wrong independent of the existence of the system, such as murder and rape.

Let us further say that it is an explicit aim of the state in this community that it wishes to encourage people to engage with morality on their own terms, to come to decisions for themselves about what action is right in a given situation. This is not so far-fetched. Perhaps this society is particularly religious, and places great value on people doing what they morally ought to do for the reasons that make that action morally right rather than because they were told to do so by the law. In other words, this society wants to encourage appropriate moral motivations among its population. To that end, the state actively encourages people *not to act* for the reason that some rule enforced by the system forbids it. Perhaps the system even has rules about which reasons it is impermissible to act for, so that doing as the system requires but acting for the reason that the system required it is liable to sanctions.[44] It would not be a function of such a system that its directives are there to be used in your practical reasoning and thereby to normatively guide you. I do not think that it would be remiss to call the normative system of this community a legal system.

Again, the function of these legal directives would be to make it the case that you ought (whether robustly or only legally) not to perform those actions prohibited by the legal system, such as murder and rape. It is simply that this legal system would not announce these prohibitions in advance, for it wishes you to come to those conclusions for yourself. And making it the case that you, at least legally, ought not to commit these actions is still a vital function for the law to fulfil. As explained above, doing so brings the normative question of whether you ought, say, to have murdered someone into the legal domain. This would then allow the law to respond to and punish acts of murder. It is in no way inconsistent for the law to do this whilst encouraging citizens not to be guided by the law. Indeed, it is in line with the conventional understanding of legal punishment, namely that punishment is a response to the violation of those moral reasons we ordinarily take to justify the intervention of the criminal law in the first place, rather than a punishment for contravening the authority of the state.[45]

[44]This would be an example of a legal system which imposed a legal duty of compliance (see n 15), but a legal duty to comply with moral reasons rather than legal directives themselves.

This imagined legal system simply takes this idea to the extreme, by making it explicit that you ought to ignore the law entirely when it comes to your reasoning about what you ought to do.

This society, then, fulfils the core function of law: it regulates behaviour through directives that create reasons to perform or not to perform certain actions.[46] Those reasons make it the case that, at least legally, you ought to perform or not to perform those actions. In doing so, it provides the answers to normative questions, allowing the law to then intervene and respond to those who fail to reach the answer that the law provides. And we can imagine such a system even though it is not a function of this system to normatively guide people to the answers to those normative questions by eliciting a certain interaction between people and the system's directives.

Of course, I introduced a large caveat at the beginning of the story: namely, that the society has no need of directives to solve coordination problems. You might think that it is a crucial function of the law to solve such problems, and that it can only do so by normatively guiding people. I agree that it can be a very *valuable* thing for the law to solve coordination problems such as which side of the road to drive on. It can, therefore, be very valuable for the law to solve such problems by normatively guiding people and indeed that is what most if not all modern legal systems attempt to do. Normative guidance, however, is only *one way* in which the law can solve coordination problems; to the extent that it is part of the nature of law to solve such problems, therefore, it is only contingently true that it solves them through normative guidance.

To see this, imagine now a suitably modern and complex society that is incapable of solving coordination problems through the mutual agreement of the population. Imagine also, however, that this society is some kind of Orwellian dystopia. It has an institutionalised normative system, replete with directives, some of which regulate coordination problems such as which side of the road people ought to drive on. This normative system, however, is hidden from anyone other than the officials who implement it and its directives are a state secret. Instead, conformity to these directives is secured through the use of mass manipulation—indoctrination, subliminal messaging, and so on. People drive on the side of the road that the directives require them to drive on, in other words, because they have been unwittingly *caused* to. This society has secured the valuable outcome (albeit by morally dubious means) of solving coordination problems through a normative system of directives enforced by officials but through causation, not through normative guidance.[47] Whilst, then, there are reasons why legal systems might choose to normatively guide people towards valuable ends, that is a contingent feature of the law. If it is part of the nature of law that it must solve coordination problems, it is only part of the nature of law that it must cause people to act in ways that solve them, not that it specifically uses normative guidance to solve such problems.

A tempting objection might be that both of the above imagined societies are too unrealistic to occur in reality. So too, however, is Raz's society of angels.[48] But that

[45]Grant Lamond, 'What is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609, 618–20.
[46]It 'regulates' behaviour in the normative sense of creating reasons that count in favour of φing or not φing, not in the sense of seeking to guide people into φing or not φing.
[47]Remember that, as discussed above, the normative guidance of legal officials alone is not sufficient to satisfy the conceptual necessity claim.
[48]Raz, *Practical Reason and Norms* (n 12) 158–63.

thought experiment tells us something important about the nature of law that is otherwise hidden by the ubiquitous, yet contingent features of existing legal systems; namely, in that case, that the law is not necessarily coercive. The above examples are meant to motivate the thought that the same is true of the law's provision of normative guidance. It is a ubiquitous, yet contingent feature of legal systems that they seek to elicit a certain interaction between people and legal directives that constitutes a relationship of normative guidance. There might be various valuable upshots of that feature; we have discussed previously its claimed connections to dignity and autonomy, and have now discussed its connection to the resolution of coordination problems. Those valuable upshots, however, do not follow from the premise that the law is a reason-giving normative system. The law can be such a system without having as its function the aim of normatively guiding people.

I acknowledge, however, that the above thought experiments so far rely on the *intuition* that we can appropriately call such systems legal systems. You may not share this intuition. Fuller, famously, did not. A system the norms of which are (at least totally) incapable of guiding people in the significant sense—whether because they are all secret, retrospective, or otherwise—is not a legal system, according to Fuller.[49] There is a danger here of engaging in a fruitless competition of intuitions: to some extent Fuller's parable of Rex the would-be lawmaker relies on the intuition that each of Rex's failed attempts is not a legal system precisely because they fail to be capable of guiding anyone in the sense of eliciting the appropriate interactions between people and those reasons Rex's directives (purport to) provide. I can, however, offer the following responses in an attempt to justify why we ought not to exclude the possibility that the kind of normative systems I describe above could be legal systems.

The first response is that it is important to distinguish the following claims: (1) a normative system that is incapable of guiding in the significant sense cannot be a legal system because it is part of what it is for something to be law that it must be capable of so guiding; and (2) a normative system that is incapable of guiding in the significant sense cannot be a legal system because it is part of what it is for something to be law that it must to some extent be *effective*. Claim (1) is a version of the conceptual necessity claim. Claim (2), however, is not. Claim (2) is the claim that for something to be law it must to some extent be effective at influencing the behaviour of those subject to its norms. There is a danger of conflating claim (2) with claim (1) if you buy into the assumption that, for any legal system to be sufficiently effective, it must be sufficiently capable of normatively guiding people in the significant sense.

I, however, have no interest in denying the claim that for something to be law it must to some extent be effective at influencing the behaviour of those subject to its norms. The hypothetical Orwellian society that I describe above is incredibly successful in securing conformity with its directives, no doubt more successful than any currently existing legal system.[50] The point is that it can be that successful whilst being incapable (intentionally, this time) of normatively guiding the general population. Now, I grant that there are very good reasons to think that in our *current* societies a normative system

[49]Fuller (n 27).

[50]We can also imagine that in the small religious society cultural and educational pressures could result in a high degree of conformity with those secret legal directives which prohibit immoral actions.

which kept all of its directives secret from the general population—or issued only retrospective directives, or incredibly unclear directives, and so on—would be highly ineffective. That, however, is not the point. We should not make the mistake of thinking that, for something to be a legal system, it must be capable of normatively guiding us in the significant sense just because, *as things currently stand*, such normative guidance is the only reliable means of ensuring that the law is sufficiently effective.[51] We can imagine possible systems which can effectively secure conformity through means other than normative guidance.

A second response concerns the conceptual necessity claim's incompatibility with a different aspect of the nature of law. A key feature of a legal system, and one which sets it apart from many other normative systems, is that it necessarily claims to be *comprehensive*.[52] That is, legal systems necessarily claim the power to regulate any aspect of human life.[53] Of course, many legal systems contain constitutional limitations on the ability of the law to interfere with certain aspects of human life. Crucially, however, that is a limitation imposed on the law by the law itself, and it is the law itself (often in the form of a supreme court) that decides the existence and extent of those limitations. More accurately, then, legal systems necessarily claim the power to regulate any aspect of human life, a power which only the law itself can limit.

It would, therefore, be at odds with the comprehensive nature of legal systems if we admit that there are certain things which the law, *by necessity*, does not have the power to regulate. This must include the power to regulate which reasons we act for, as in the above example of a system which prohibits anyone from acting for the reason that the system required them to, and instead requires them to act for those moral reasons which justified the action in the first place. If legal systems really do necessarily claim to be comprehensive normative systems, then the law should necessarily claim the power to require that people act solely for non-legal reasons.

Yet, if it is a conceptually necessary feature of the law that one of its functions is to normatively guide people in the significant sense, then it would be a strange feature of the law if it also necessarily claimed the power to do the opposite. This is especially so if you think that the law necessarily *claims* to normatively guide people in the significant sense, which is one possible rendering of the conceptual necessity claim that I gave earlier. Any claim by the law to normatively guide in the significant sense would here be contradictory with any claimed power to require people to act for non-legal reasons. Again, in reality there are good reasons why the law would never *exercise* the power to require that people always act for certain reasons. The difficulty in identifying those who violate such a requirement—especially those who perform the *action* the law requires but do so for the wrong reasons—is probably itself a sufficient reason not to exercise such a power. Again, however, the point is that we can imagine a normative system which would exercise such a power, and to deny that such a normative system is a legal system just in virtue of the fact that it does not have as its function the aim

[51] I am, for the sake of argument, granting that this is even true of current legal systems. There is evidence to suggest that the threat of coercion does most of the work in ensuring general conformity with legal directives, rather than any normative guidance they provide: Frederick Schauer, *The Force of Law* (Harvard University Press 2015).
[52] Raz, *Practical Reason and Norms* (n 12) 150–51.
[53] ibid 150.

of normatively guiding in the significant sense seems at odds with the comprehensive nature of legal systems.

That a legal system's power to regulate any aspect of human life is limited only by the law itself, usually through the operation of a supreme court, is related to the third response. A central feature of legal systems is that they are *institutionalised* normative systems.[54] They contain primary institutions the purpose of which is to create and adjudicate upon the rules of that system, and in doing so are governed by the rules of that system themselves. Furthermore, such primary institutions are *authoritative*: their decisions are binding within the normative system 'even when wrong', just in virtue of the fact that they are decisions of that institution.[55] Thus, when the supreme court decides that φing is legally prohibited, such a decision is binding in the legal system even if (at least prior to the decision) φing was in fact legally permissible.

The normative systems in the above hypothetical societies can possess all these central features of a legal system. The Orwellian dystopia can have the full range of primary institutions the roles of which are to create, adjudicate, and enforce the rules of that system. These institutions may operate behind a cloak of secrecy: they may reveal their requirements only to those chosen officials who operate the state's mass manipulation programme; they may haul citizens before courts which only announce in public the verdict of 'guilty' or 'not guilty' without giving any indication as to which rule of the system the citizen was accused of violating and why. Such secrecy does not preclude, however, these institutions from fulfilling their one essential function: they regulate behaviour by creating reasons to perform or not to perform certain actions and adjudicate disputes concerning the answers to normative questions in accordance with those reasons.

Whilst I hope that the above responses help to bolster my intuition that the hypothetical normative systems I described above are properly called legal systems, it may ultimately be the case that what it is for something to be a legal system is a question that admits of degrees, with no clear and determinate boundary between legal and non-legal normative systems.[56] If my argument is insufficiently persuasive, we might still be willing to accept that those normative systems which do not seek to normatively guide are to be found at that borderline. Regardless, it is still important to emphasise the distinction that has underpinned the above argument. That distinction was the difference between something's being *normative*, by which I mean reason-giving, and something's function being to *normatively guide* in the significant sense of eliciting a certain interaction between people and the reasons that something provides. We have seen that we cannot move, as some have sought to do, immediately from the premise that the law is normative to the conclusion that it exists to guide in the significant sense; at the very least, the above demonstrates the need for an independent argument for that conclusion, relying on an explicit and fully developed account in the philosophy of action about what guidance is.

It is important that such an argument be given, for much is at stake. Viewing an attempt to provide guidance in the significant sense as a necessary feature of the law

[54]ibid 123–48; Raz, *The Authority of Law* (n 1) ch 6.
[55]Raz, *The Authority of Law* (n 1) 109–10.
[56]Raz, *Practical Reason and Norms* (n 12) 150.

gives rise to some valuable functions that the law can aspire to achieve by guiding, as well as a distinctive mode of operating that some think has inherently valuable qualities.[57] We get to say, for example, that the brutish 'economy of threats' is a 'degenerate' case of law;[58] the rule of law, understood as a standard by which to measure how well the law is able to guide, gets to provide some necessary constraints on how laws should be designed. These valuable aims and constraints would become external aims and constraints once guidance is jettisoned from the concept of law. It would not follow from the fact that the law is (or aims to be) normative that it is true in virtue of the very nature of law that it should not be secret or that it should not just oppress people into conformity.

It matters whether these valuable aims and constraints are part of the concept of law itself. The centrality afforded to the idea that the law exists to normatively guide us has led, in one sense, to a very benevolent view of the law. Waldron sees an 'implicit commitment to dignity in the tissues and sinews of law' given by 'the character of its normativity',[59] for in being 'an action-guiding rather than a purely behaviour-eliciting mode of social control' the law treats people as 'the bearers of reason and intelligence'.[60] Raz says that conformity to the rule of law is 'necessary if the law is to respect human dignity',[61] for in guiding people the law respects people's autonomy by treating them as rational agents capable of planning their lives.[62] Gone, on these views, is the image of the law as a system of orders backed by threats to be found in Austin.[63] Indeed, the centrality afforded to the idea that the law exists to normatively guide us has been depicted as a sanitising of the law's 'official story',[64] hiding the 'inescapable force, pain, and violence' that lies behind legal authority in favour of its 'value-declaring, rights-enhancing, and community-building aspects'.[65] We need to be wary, however, of thinking that 'legality shines with a heavenly light',[66] of being quicker to find necessary connections between the law and morality that have a positive valence rather than a negative one.[67]

If it transpires that it is no part of the very concept of law that it necessarily seeks to normatively guide us in the significant sense, then that would serve as a warning that it is in fact no part of the 'tissues and sinews' of the law itself that it should respect our dignity by treating us as intelligent and autonomous agents. This is especially so given the minimalist alternative that I have suggested we *can* straightforwardly derive from the premise that the law is a reason-giving normative system. Namely, that the law necessarily seeks to be that in virtue of which some fact is a reason. In doing so, the law would necessarily seek to determine the normative valence of our actions, beliefs, and

[57]Raz, *The Authority of Law* (n 1) 221; Waldron (n 5).
[58]Gardner, *Law as a Leap of Faith* (n 3) 227, quoting HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, OUP 2008) 40.
[59]Waldron (n 5) 222.
[60]ibid 208, 211.
[61]Raz, *The Authority of Law* (n 1) 221.
[62]ibid.
[63]John Austin, *The Province of Jurisprudence Determined* (Murray 1832).
[64]Austin Sarat and Thomas Kearns, 'A Journey Through Forgetting: Toward a Jurisprudence of Violence' in Austin Sarat and Thomas Kearns (eds), *The Fate of Law* (Ann Arbor 1993) 265.
[65]ibid 268, 218. We might now add to the list: 'dignity-respecting'.
[66]Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 New York University Law Review 1035, 1052.
[67]Green, 'Positivism and the Inseparability (n 66) 1052–54.

feelings. The law, on this view, is not necessarily about controlling our social lives through *social* control and authoritative adjudication; rather, the law is necessarily about exercising *normative* control over a normative domain, whether the practical or the legal. In this way the law is more like morality, if you think that morality exists to determine what is morally right or wrong without necessarily existing to be used in your practical reasoning. But in this way too the law is more *dangerous*. There would be no conceptual bar to the possibility that something like the Orwellian dystopia would be a fully functioning legal system;[68] the 'economy of threats' would no longer be a 'degenerate' case of law qua law.[69] The only certain thing is that the law will attempt to determine the answers to normative questions; to what end it does so, and whether its directives are there to be used in your practical reasoning to help reach the answers it provides, are on this view contingent matters.

4. Conclusion

The aim of this article was to cast doubt on the popular view that the law exists to guide. I argued that it is plausible to think that the law does *not* necessarily exist to guide us. By 'guidance' I had in mind a certain kind of interaction between people and the law, an interaction that (at least partly) occurs in people's mind. I argued, therefore, that it is plausible to think that the law does not necessarily exist to elicit this certain kind of interaction between people and the law.

The argument that it is plausible to think that the law does not necessarily exist to guide us proceeded as follows. First, I argued that it does not immediately follow from the fact that something is (or aims to be) normative that that something should be seen as there to provide normative guidance. To motivate this thought I drew on accounts of the normativity of morality as well as examples of legal directives from tort law and criminal law. I then sought to show that we can imagine societies which have systems of norms established, adjudicated, and enforced by the state but which do not exist to guide those subject to the systems' norms. We would not be remiss, I suggested, in calling such systems legal systems.

The claim that the law does not necessarily exist to guide us has significant consequences, if true. Viewing an attempt to provide guidance as a necessary feature of the

[68]You might think that, as the law is a social institution created by people, we have to some extent the ability to choose which concept of law to adopt. To the extent that we do have that choice, you might then think that we ought to choose that concept of law which is better for us. In other words, the fact that my proposed concept of law portrays the law as more morally dangerous might be a reason to prefer the concept of law which includes those inherent safeguards in respect of our dignity and autonomy via the law's commitment to provide normative guidance in the significant sense. I am very grateful to one of the reviewers for raising this possibility. Adequately responding to it would require resolving the question of whether we ought to pursue descriptive or evaluative theories of law, which I do not have the space to do here. Even if we were to adopt an evaluative approach, however, it is not clear that it would in fact be morally preferable to adopt the concept of law which contains those inherent safeguards. It could be the case, for instance, that an overly benevolent view of the law could lead to morally worse legal systems if such a view leads to complacency about the dangers that the law inherently poses. We have already seen above that some think that the focus on the role that normative guidance plays in the law has obfuscated the 'inescapable force, pain, and violence' that lies behind legal authority: Sarat and Kearns, 'A Journey Through Forgetting' (n 64) 265. I am tempted to say, therefore, that even on an evaluative approach to legal theory it would at best be an empirical question whether we ought, on moral grounds, to prefer a concept of law which commits the law to necessarily seeking to provide normative guidance in the significant sense.

[69]Gardner, *Law as a Leap of Faith* (n 3) 227, quoting HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, OUP 2008) 40.

law gives rise to some valuable functions that the law can aspire to achieve by guiding, as well as a distinctive mode of operating that some think has inherently valuable qualities.[70] We get to say, for example, that the brutish 'economy of threats' is a 'degenerate' case of law;[71] the rule of law, understood as a standard by which to measure how well the law is able to guide, gets to provide some necessary constraints on how laws should be designed. These valuable aims and constraints become external aims and constraints once guidance is jettisoned from the concept of law. It would not follow from the fact that the law is (or aims to be) normative that it is true in virtue of the very nature of law that it should not be secret or that it should not just oppress people into conformity.

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[70]Raz, *The Authority of Law* (n 1) 221; Waldron (n 5).
[71]Gardner, *Law as a Leap of Faith* (n 3) 227, quoting HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, OUP 2008) 40.