The Nature and Limits of Guidance

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Abstract

It has become a popular view in jurisprudence that the law exists to guide us. The aim of this thesis 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. I do this while accepting that the law is necessarily normative. The argument is qualified in two key ways, however. The first is that by 'guidance', I have in mind a certain kind of interaction between people and the law, an interaction that (at least partly) occurs in people's minds. The second is that, in arguing that it is plausible to think that the law does not necessarily exist to guide us, I do so from the premise that the law necessarily aims to be a supreme normative authority. Whilst qualified in this way, the upshot of the argument is significant. Viewing an attempt to provide guidance so understood as a necessary or central 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. 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. In short, therefore, the thesis argues that if the law necessarily aims to be a supreme normative authority, then it does not follow from the fact that the law is a reason-giving normative system 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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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 thesis 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. For reasons that I will go on to explain, this is an ambitious argument to make. The ambition of the argument is qualified in two key ways, however. The first qualification is that, when I say that it is plausible to think that the law does not necessarily exist to guide us, I have in mind a specific kind of guidance. As I will go on to explain in this introduction, by 'guidance' I have in 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

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

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

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

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

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

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 in this introduction that it often is what people have in mind, or at least is often what people are committed to saying.

The second way in which the ambition of the argument is qualified is that, in arguing that it is plausible to think that the law does not necessarily exist to guide us, I am arguing that it is plausible *given a certain view about the nature of law*. As I will also go on to explain in this introduction, this certain view about the nature of law is the view that the law necessarily aims to be a supreme normative authority. You may not buy into this starting premise. Whilst I think that the view is correct, ultimately that is not the point. The point is that, led by Raz, the view that the law necessarily aims to be a supreme normative authority is an influential one, and one that is held in *conjunction* with the view that the law necessarily exists to guide by eliciting a certain kind of interaction between people and the law. My aim is to show that, *if* we accept that the law necessarily aims to be a supreme normative authority, then we have good reasons to *reject* the view that the law necessarily exists to guide by eliciting a certain kind of interaction between people and the law. If, therefore, you already resist the starting premise that the law necessarily aims to be a supreme normative authority, then you might take my argument as a further reason for rejecting that starting premise. That is not the route that I will take, but it is one that I will leave open as a possibility.

This second qualification, however, is also part of the explanation for why the argument is ambitious. In arguing that it is plausible to think that the law does not necessarily exist to guide us if we accept that the law necessarily aims to be a supreme normative authority, I am also accepting the premise that the law is normative to begin

with. What is it for the law to be normative? Normativity concerns the phenomena in virtue of which it matters how we live our lives—the phenomena which determine whether it is right or wrong to act, believe, or feel some way. To say, then, that the law is normative is to say that the law is concerned, in some way yet to be specified, with how we ought to live.[6]

Now, some deny the existence of normative facts. That is, they deny that there are any facts about how we ought to live that are capable of being true or false. The view that there are no such truth-bearing normative facts is known as *non-cognitivism about normativity*.[7] One example of such a non-cognitivist view is *expressivism*. Expressivists hold that normative statements such as 'you ought not to murder' are not properly understood as claims about the existence of normative facts in virtue of which something is right or wrong, for there are no such normative facts. Rather, such statements are expressions of a certain kind of attitude towards the relevant behaviour, such as a preference that the world contain less murder.[8]

I will proceed on the basis that non-cognitivist views such as expressivism are false. The view that the law necessarily aims to be a supreme normative authority is decidedly *cognitivist* in its outlook. Given that I am adopting the view that the law necessarily aims

[6] Some would qualify this statement by saying that the law is normative only in so far as it is concerned with how we *legally* ought to live, rather than how we ought to live *simpliciter*. I discuss this qualification below.

[7] Mark van Roojen, 'Moral Cognitivism vs Non-Cognitivism' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford University 2008) <https://plato.stanford.edu/entries/moral-cognitivism/> accessed 1 November 2021.

[8] For examples of such expressivist views: Alfred Jules Ayer, *Language, Truth, and Logic* (2nd edn, Dover Publications 1946); Simon Blackburn, *Spreading the Word: Groundings in the Philosophy of Language* (Clarendon Press 1984); Allan Gibbard, *Wise Choices, Apt Feelings: A Theory of Normative Judgment* (Clarendon Press 1990); Simon Blackburn, *Essays in Quasi-Realism* (Oxford University Press 1993); Allan Gibbard, *Thinking How to Live* (Harvard University Press 2003).

to be a supreme normative authority in order to attack the view that the law necessarily exists to guide us, and given that proponents of the former view ordinarily take it to endorse the latter, I would be guilty of talking past my opponents were I not to assume cognitivism about normativity.

More fundamentally, it is hard to reconcile a commitment to non-cognitivism with the view that the law necessarily exists to guide us. If a normative statement made by the law such as 'you ought not to murder' is only a statement about when it is appropriate for legal officials to respond critically to our murdering someone, then at most the law seems concerned with guiding its own officials, rather than the population at large. It is for this reason that some have resisted one of the more notable moves towards non-cognitivism in jurisprudence. In his later work, Hart rejected a 'cognitive interpretation of legal duty' and instead preferred to say that an individual has a legal obligation to act in some way just when 'such action may be properly demanded or extracted from him according to legal rules or principles regulating such demands for action'.[9] As Berman notes,[10] this is inconsistent with Hart's prior view 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.[11]

For similar reasons, I will proceed as if *error theory* about normativity is false. Error theorists accept that normative statements such as 'you ought not to murder' are

[9] HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 159–60.

[10] 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* (Oxford University Press 2019) 157.

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

claims about the existence of normative facts but deny that any such facts exist. That is, error theorists think that *all* normative claims are false.[12] Whilst the account of guidance that I will go on to develop is compatible with such an error-theoretic view of normativity, error-theory would nonetheless present any attempt to guide normatively as a fundamentally mistaken endeavour, for there could never be any normative facts to be guided towards. Were, therefore, error-theory to be correct, it may fundamentally alter how we understand any attempt by the law to be a supreme normative authority. For that reason, an error-theoretic view might make it easier to argue that it is plausible to think that the law does not necessarily exist to guide. Given that those who think that the law necessarily exists to guide are not commonly error-theorists, I would again be talking past my opponents if I did not proceed on the basis that error-theory about normativity is false.

So far, then, I have said that normativity is concerned with the phenomena in virtue of which it matters how we live our lives—the phenomena which determine whether it is right or wrong to act, believe, or feel some way. I have also said that I will proceed on the basis that it is conceptually possible that there are normative facts, so that it could be true that it is right or wrong to act, believe, or feel some way. We can say, then, that the thesis will adopt a *minimalist realism* about normativity. It is 'realist' in so far as it accepts the possibility of true normative facts. It is 'minimalist' because, so far, we have only accepted the possible *existence* of true normative facts. There is a further question about the *independence* of such normative facts.

Specifically, there is the question of whether, if true normative facts exist, those normative facts are *mind-independent* facts. A mind-independent fact is a fact that

[12] The leading example of an error-theoretic view of normativity is JL Mackie, *Ethics: Inventing Right and Wrong* (Penguin 1977).

ultimately exists independent of any mental states that you might have.[13] *Subjectivism about normativity* rejects the possibility of mind-independent normative facts. Instead, subjectivists hold that normative facts exist ultimately in virtue of certain facts about us, 'us' being the subjects of normativity. A classic example of a subjectivist view is given by Hume. For Hume, normative facts exist ultimately in virtue of facts about our desires.[14] To give a crude example, such a view might hold that for it to be true that there is a normative fact with the content 'you ought not to murder someone', it must be true that you have a desire not to murder someone.[15]

In contrast to subjectivism about normativity, *objectivism about normativity* holds that normative facts are ultimately mind-independent: they exist in virtue of some object independent of us. Objectivists about normativity are thus *robust realists about normativity*: not only do they accept the possibility of true normative facts, but they also claim that such true normative facts have an existence that is ultimately independent of

[13] The 'ultimately' is necessary here because it is possible for normative facts to be mind-independent and still to be sensitive to the mental states of a particular person in some cases; if normative facts are ultimately mind-independent, however, then that sensitivity to the mental states of a particular person must in those cases be due ultimately to some further mind-independent fact.

[14] David Hume, *Treatise Concerning Human Nature* (LA Selby-Bigge ed, Oxford University Press 1888).

[15] Contemporary subjectivist theories are not usually this crude. Modern subjectivist theories often involve some 'cleaning up' of your mental states. A modern desire theory of normativity, for example, might hold that for it to be true that there is a normative fact with the content 'you ought not to murder someone', it must be true that you *would* have a desire not to murder someone, *were you thinking in a procedurally rational way*. For examples of modern subjectivist theories: Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge University Press 1996); Christine M Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (Oxford University Press 2008); Sharon Street, 'Constructivism about Reasons' in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics* (3rd edn, Oxford University Press 2008); Sharon Street, 'What Is Constructivism in Ethics and Metaethics' (2010) 5 Philosophy Compass 363.

facts about us.[16] Thus, for Parfit, normative facts exist in virtue of the valuable properties of some object.[17] According to such a view, if there is a normative fact with the content 'you ought not to murder someone', that fact exists in virtue of the value that there is in not murdering someone, regardless of whether you yourself appreciate that value or have any desire to secure it.

I will remain neutral as between objectivism and subjectivism about normativity. When I come to develop my account of guidance, including my account of what it is to be *normatively* guided, it will not be necessary to make any claims about whether normative facts exist ultimately in virtue of facts about us or in virtue of some object independent of us. This is because my account of normative guidance does not require the fact that you are guided by to be a *true* normative fact (hence why my account of guidance is also compatible with an error-theoretic view of normativity). My account of guidance, therefore, will be neutral as between explanations of what ultimately makes normative facts true.

We have one more preliminary matter to deal with. The above ground clearing exercise has dealt with various issues about the nature of normativity in general. I said that normativity concerns the phenomena in virtue of which it matters how we live our lives—the phenomena which determine whether it is right or wrong to act, believe, or feel some way. I said that the thesis will proceed on the basis of a minimally realist view of normativity; that is, I will proceed accepting the possibility of true normative facts. I said that the thesis will remain neutral as to whether we should be robust realists; that is, I will remain neutral as between objectivist and subjectivist views about normativity. We are not,

[16] For examples of such objectivist views: Jonathan Dancy, *Moral Reasons* (Blackwell 1993); Derek Parfit, *On What Matters* (Oxford University Press 2011) vol 1; Thomas Scanlon, *Being Realistic About Reasons* (Oxford University Press 2016).

[17] Parfit, *On What Matters* (n 16) vol 1 pt 1.

however, just concerned here with normativity in general. Rather, we are concerned with *legal* normativity.

I said that for the law to be normative is for the law to be concerned, in some way yet to be specified, with how we ought to live. We need now to bring some specificity to that idea. For some, the claim that the law is concerned with how we ought to live needs to be qualified. We saw earlier that, in his later work, Hart was tempted by a non-cognitivist view of the law's normativity. We also saw that such a move has been criticised for its inconsistency with the view that the law necessarily exists to guide.[18] As Berman has suggested, however, Hart's move towards non-cognitivism about legal normativity can be seen to be motivated by a rejection of the claim, of which Raz is a leading proponent, that the law is necessarily concerned with how we ought to live *simpliciter*.[19] That is to say, Hart rejected the idea that the law is necessarily concerned with how we *actually* ought to live.

Rather than adopt non-cognitivism about legal normativity, however, Berman suggests that we can avoid the claim that the law is necessarily concerned with how we actually ought to live by viewing the law as an *artificial* normative system.[20] An artificial normative system is not concerned with how we ought to live *simpliciter*, but rather with how we ought to live given the normative phenomena *of that system*.[21] On this view, to say

[18] Berman, 'Of Law and Other Artificial Normative Systems' (n 10) 157.

[19] ibid 158.

[20] ibid 158–59.

[21] ibid 143.

that the law is normative is to say that the law is concerned only with how we *legally* ought to live—whether it is *legally* right or wrong to act, believe, or feel some way.

The view that the law is normative only to the extent that it is concerned with how we legally ought to live is rejected by Raz. For Raz, the law necessarily claims *legitimate* authority: it necessarily claims that what you legally ought to do just is what you actually ought to do.[22] As I have said, this thesis seeks to argue that it is plausible to think that if the law necessarily aims to be a supreme normative authority, then the law does not necessarily exist to guide us. The leading proponent of the view that the law necessarily aims to be a supreme normative authority and that the law *does* necessarily exist to guide us is Raz. I will therefore proceed at first as if the law is not just an artificial normative system, but at least necessarily aims to be a *robust* normative system—that is, that it is necessarily concerned with how we actually ought to live.

I do, however, think that my arguments against the view that the law necessarily exists to guide hold even if you think that the law is only an artificial normative system, so long as you accept the premise that the law necessarily aims to be a supreme (artificial) normative system. I will therefore explore how my argument relates to the view that the law is only an artificial normative system towards the end of the thesis.[23]

I said that the argument of the thesis—that it is plausible to think that the law does not necessarily exist to guide—is an ambitious one. I said that the second way in which the ambition of that argument is qualified—that I will only be arguing that it is plausible to think that the law does not necessarily exist to guide from the premise that the law

[22] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 111.

[23] See 'A Pirate's Code', s 3.

necessarily aims to be a supreme normative authority—is also part of the explanation for why the argument is ambitious. We can now see why. As 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'.[24]

In arguing from the premise that the law necessarily aims to be a supreme normative authority, I am accepting that the law is normative. It is, however, often taken for granted that once we accept that the law is normative that 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.[25] 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 some 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 some object independent of us—accept that for something to be a reason it must be capable of guiding the substantively rational person.[26] 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.

[24] 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 1 June 2021.

[25] Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 3) 229.

[26] Parfit, *On What Matters* (n 16) vol 1, 51.

It has become popular to explain the normativity of law in such terms, that is in terms of its relationship to the normative phenomena of reasons.[27] Indeed, some in jurisprudence think that normativity in general can be entirely explained by reference to the normative phenomena of reasons—a view known as *reasons fundamentalism*. Thus, Raz claims that the 'normativity of all that is normative consists in the way it is, or provides, or is otherwise related to reasons'.[28]

Reasons fundamentalism is controversial.[29] I will, however, couch my argument in terms of reasons, both for ease of reading and because of the popularity of explaining the normativity of law in terms of them. Nothing I go on to say depends on reasons fundamentalism being true. I will, therefore, rely on a very broad understanding of what it is for something to be a reason. A reason is that normative phenomena which counts in favour of some action, belief, or feeling.[30] The relationship of some normative phenomena counting in favour of some action, belief, or feeling is fundamental to normativity: if normativity is concerned with how we ought to live—whether it is right or wrong to act, believe, or feel some way—then there needs to be some phenomena that endorses acting,

[27] Marmor and Sarch, 'The Nature of Law' (n 24).

[28] Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (Oxford University Press 2002) 67. For another proponent of reasons fundamentalism: John Skorupski, *The Domain of Reasons* (Oxford University Press 2010).

[29] For examples of notable objections to reasons fundamentalism: Jonathan Dancy, 'Reasons and Rationality' in Simon Robertson (ed), *Spheres of Reason: New Essays in the Philosophy of Normativity* (Oxford University Press 2009); John Broome, 'Reason Fundamentalism and What Is Wrong With It' in Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (Oxford University Press 2018).

[30] Thomas Scanlon, *What We Owe to Each Other* (Belknap Press 1998) 17. Some think that all reasons are reducible to reasons to act, believe, or feel something: John Skorupski, 'The Unity and Diversity of Reasons' in Robertson Simon (ed), *Spheres of Reason: New Essays in the Philosophy of Normativity* (Oxford University Press 2009). I will adopt this way of categorising reasons but nothing I say turns on whether it is the most basic categorisation. For the most part, I will only be concerned with reasons for action.

believing, or feeling some way. It is that basic counting-in-favour-of relationship that I am interested in, not in the question of whether that relationship is ultimately best understood in terms of reasons.

The vague formulation of describing a reason as 'that normative phenomena which' counts in favour of some action, belief, or feeling is necessary to remain neutral between those who think that reasons are facts and those who think that reasons are a relation between facts.[31] For ease of reading I will refer to reasons as those *facts* which count in favour of some action, belief, or feeling, but those who disagree can substitute 'those facts' for 'those relations between facts' if they prefer.

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

[31] For examples of those who think that reasons are facts: Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999); Parfit, *On What Matters* (n 16) vol 1. For an example of the view that reasons are a relation between facts: Skorupski, *The Domain of Reasons* (n 28).

(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.[32] Raz thinks that, on this view, reasons are guides 'only in the sense that' they may *justifiably* 'figure in one's [practical] reasoning'.[33] Whether anyone actually uses a reason in their practical reasoning, or is 'even aware of its existence',[34] is irrelevant to this sense of guidance. If the reasons that the law provides are these default reasons for conformity,[35] to claim that the law exists to guide is on this view to say nothing more than that the law *provides* reasons.[36] 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

[32] Raz, *Practical Reason and Norms* (n 31) 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.

[33] ibid 179.

[34] ibid.

[35] 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. I will turn to the question of whether, and if so in what sense, the law's authority requires compliance in Chapter 2.

[36] The earlier quotation from Finnis that laws 'provide directly applicable and authoritative guidance' is also compatible with this reading: Finnis, *Natural Law and Natural Rights* (n 4) 318.

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.[37] 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. We have already seen that 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.[38] Waldron too considers it an essential feature of the law's guidance that people are left to apply legal directives to themselves.[39]

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

[37] Raz, *Practical Reason and Norms* (n 31) 17 (emphasis added).

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

[39] Waldron, 'How Law Protects Dignity' (n 5).

authoritatively settle disputes,[40] 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]'.[41] 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'.[42]

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 this significant sense—and more specifically in order to be *normatively guided* by something—before we can show that the law exists to elicit such interactions.

No such significant account of what it is to guide is forthcoming among those who claim that the law exists to guide. It is clear from the above that some kind of mental state

[40] Raz, *The Authority of Law: Essays on Law and Morality* (n 1) ch 10.

[41] Finnis, *Natural Law and Natural Rights* (n 4) 318.

[42] Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 22) 93 (emphasis added).

in respect of the law is required—whether awareness, belief, or something else—and some have made brief reference to the need for people either to follow or to apply legal reasons to be guided by them.[43] This, however, is far from a complete account. And whilst much attention has been paid in the philosophy of action to the question of what it is for a reason to *motivate* or to *explain* action,[44] not every interaction with a reason ends in that reason motivating or explaining my action. I still, for instance, interact with something as a reason if I take it to count *against* performing some action in my practical reasoning even if, ultimately, I perform that action because I concluded that the reasons in favour were stronger. We need therefore also to give an account of what our interaction with reasons *prior* to action involves. Regardless, it is possible that the specific nature of the law's normativity has implications for any relationship of guidance between the law and those who accept that the law is normative for them, so that we ought to consider those issues in the philosophy of action with specific reference to the law.

This, then, is the first way in which the ambition of the argument is qualified. When I say that the thesis 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, so that 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. The thesis will argue that it is plausible to think that the law

[43] Hart, *The Concept of Law* (n 2) 38–39; Waldron, 'How Law Protects Dignity' (n 5); Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 3) 158–60.

[44] For example: GEM Anscombe, *Intention* (2nd edn, Cornell University Press 1963); Donald Davidson, 'Actions, Reasons, and Causes' (1963) 60 Journal of Philosophy 685; Robert Audi, *Action, Intention, and Reason* (Cornell University Press 1993); Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (n 15) esp ch 7.

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 also said, however, that in arguing that it is plausible to think that the law does not necessarily exist to guide us, I am arguing that it is plausible given a certain view about the nature of law. Whilst it is possible not to take this further step, those who claim that the law exists to guide do not commonly think that the law exists to guide *simpliciter* but rather to guide as an *authority*.[45] What is it to guide as an authority? For Raz, guiding as an authority involves providing protected reasons, that is a first-order reason to do as directed and a second-order exclusionary reason not to act for certain conflicting reasons.[46] Not everyone, however, accepts that exclusionary reasons exist.[47] A more inclusive account of what it is for the law to guide as an authority would involve the provision of reasons which take precedence over other reasons. Hart, for example, says that the law's standards are meant to take 'priority over other standards'.[48] For Finnis, the law seeks to 'take over' people's practical reasoning by giving itself 'an unquestioned or dogmatic status'.[49] And

[45] For examples of those who make this further claim: Raz, *The Authority of Law: Essays on Law and Morality* (n 1) 43; Finnis, *Natural Law and Natural Rights* (n 4) 318; John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 14.

[46] Raz, *The Authority of Law: Essays on Law and Morality* (n 1) 29.

[47] For example: Larry Alexander, 'Law and Exclusionary Reasons' (1962) 18 Philosophical Topics 5; Stephen Darwall, 'Authority and Reasons: Exclusionary and Second-Personal' (2010) 120 Ethics 257.

[48] Hart, *The Concept of Law* (n 2) 249.

[49] Finnis, *Natural Law and Natural Rights* (n 4) 318.

whilst Raz insists that the law does not require blind obedience,[50] he does say that it claims *supreme* authority, both in the sense that the law claims the ability to regulate any sphere of human activity and in the sense that it cannot recognise the superiority of any other normative system.[51]

Rather than say that the claim that the law exists to guide as an authority entails that the law provides protected reasons, we can instead therefore say that it entails that the law provides *conclusive* reasons, that is reasons that defeat all conflicting reasons.[52] If the law has authority above any other normative system, then the law's protected reasons would exclude *all* conflicting non-legal reasons. Excluding a reason is a way of defeating a reason, and so this protected reason would also be a conclusive one.

It is this view of the nature of law—that the law necessarily aims to be a supreme normative authority—from which I will be arguing that it is plausible to think that the law does not necessarily exist to guide us. In other words, the thesis will argue that it is plausible to think that the law does not necessarily exist to guide us *as a supreme normative authority*, where guidance is understood in the significant sense of requiring a certain kind of interaction between people and the law, an interaction that (at least partly) occurs in people's minds.

As I have said, you may resist this starting premise—you can think that the law necessarily exists to guide and yet deny that the law necessarily exists to guide as an authority, much less a supreme normative authority. Yet the conjunction of the views that

[50] Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 35) 215.

[51] Raz, *Practical Reason and Norms* (n 31) 151–54.

[52] ibid 27.

the law necessarily exists to guide and that the law necessarily aims to be a supreme normative authority is one that is held among highly influential theorists. Further, if you accept my argument that if the law necessarily aims to be a supreme normative authority then it is plausible to think that the law does not necessarily exist to guide, you may take this as an additional reason to reject the view that the law necessarily aims to be a supreme normative authority, if you would prefer to save the claim that the law necessarily exists to guide. Whilst that is not the route that I will take—I think it is worthwhile to explore the possibility that the law necessarily aims to be a supreme normative authority and yet does not necessarily exist to guide in the significant sense—it is a route that I will leave open as a possibility.

Once we accept that the law necessarily aims to be a supreme normative authority, we might then ask in which *domain* the law's reasons would be conclusive. It could be that the law's reasons only defeat all others *within* the legal domain. That is, it might be that for the law to have supreme normative authority is for the law to decide, when it comes to the law, what you have conclusive reasons to do. This would be sufficient to explain the fact that, in court, it will do you no good to argue that you did not conform to some legal reason because it was defeated by some different non-legal reason. Courts of law, after all, are institutions of the legal domain. But outside of court, it often is taken to be a good argument that some reason given to you by the law was defeated by some different non-legal reason. On this restricted view of any supreme normative authority that the law might have, the claim that the law exists to guide has nothing to say about how that guidance is meant to interact with reasons from other domains of normativity, if indeed there are multiple

domains.[53] This restricted view is the result of combining the claim that the law necessarily aims to be a supreme normative authority with the view considered earlier that the law is normative only in the sense that the law is concerned with how we *legally* ought to live; in other words, this restricted view is the result of the claim that the law necessarily aims to be a supreme *artificial* normative system.

We saw earlier, however, that some like Raz would consider this restricted view as *too* restricted. Often, those interested in explaining how the law is normative are not just interested in explaining how it is that the law can give us reasons *from the legal point of view*. If they were, Raz would have no need for a theory of when legal authority is justified, so that it really does give us conclusive reasons to do as directed.[54] This is because, for legal positivists in the Razian vein, the law provides reasons in the legal domain just in virtue of social facts about what legal officials have said and done.[55] When, however, Raz and others speak of the law as *claiming* to give us reasons, they mean reasons that bear on how we ought to live *simpliciter*; that is, reasons that are rationally inescapable, so that we need no further reasons for engaging with them.[56] This is what Raz and Gardner mean when they say that legal reasons are necessarily purported *moral* reasons.[57] The person who asks 'why should I be moral?', according to Gardner, is conceptually confused, for there is no

[53] For doubts as to the number of distinct normative domains there are, including whether the law is one of them: Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 The Yale Law Journal 1160.

[54] Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 35) ch 10.

[55] ibid.

[56] Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 3) 149–50.

[57] Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 22) 111; Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 3) 162.

'rationally intelligible alternative to being engaged with morality'.[58] It is this rational inescapability that legal guidance is often seen as aspiring to achieve, so that, in the ideal world for the law, what the law requires you to do *just is* what you ought to do.

Regardless of whether we ought to conceive of morality as rationally inescapable, the idea is that if the law necessarily aims to be a supreme normative authority, it aims to be a supreme normative authority in the *practical domain simpliciter*, rather than just within the legal domain. That is, the conclusive reasons that the law gives you to do as directed are meant to make it the case that you ought on the balance of *all* reasons all things considered to do as directed. As I have mentioned, I will proceed at first on the basis that the law is not just an artificial normative system, but at least necessarily aims to be a robust normative system—that is, that it is necessarily concerned with how we actually ought to live, so that if the law necessarily aims to be a supreme normative authority it aims to be one in the practical domain rather than just the legal domain. I do this because the leading proponents of the view that the law necessarily aims to guide as a supreme normative authority reject the view that the law is only artificially normative.

As I also said, however, I do think that my arguments against the view that the law necessarily exists to guide hold even if you think that the law is only an artificial normative system, so long as you accept the premise that the law necessarily aims to be a supreme (artificial) normative system. I will therefore explain how my argument relates to the view that the law is only an artificial normative system later on in the thesis.[59]

[58] Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 3) 150.

[59] See 'A Pirate's Code', s 3.

You might think that the idea that the law necessarily aims to have supreme normative authority in the practical domain *simpliciter* is so extreme as to be implausible. But the question of if and to what the extent the law actually *has* such supreme normative authority is not a question that I will be concerned with. It does not matter for my purposes, therefore, whether you think that the law only *claims* to give us conclusive reasons in the practical domain, or whether you think it is part of what it is for something to be law that it *necessarily* gives us such reasons. I will primarily be interested in the question of what it would be for someone to be guided by the law in the significant sense of interacting in the proper way with the reasons that the law provides, *were they to accept* that the law's reasons really are conclusive reasons for them. What I have to say will not therefore depend on whether the law's reasons are actually conclusive reasons in the practical domain, and so does not depend on whether someone is ever justified in being guided by the law in this way.

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 the kinds of 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.[60] 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

[60] Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 3) 229.

of sometimes succeeding at doing so. Thus, Raz says that for 'the law to be law [it] must be capable of guiding behaviour, however inefficiently'.[61] Raz even expresses sympathy, 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.[62]

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 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.[63] As we will see in Chapter 6, however, this is a very low bar to meet. Indeed, according to certain views about reasons, that a purported law is secret potentially has no bearing on the question of whether that law can guide in the insignificant sense of being a reason for someone because it can still be possible that the rational person would be *capable* of using that law as a reason were they aware of the law's existence.[64] Yet secret laws are sometimes taken to bring into question their existence as

[61] Raz, *The Authority of Law: Essays on Law and Morality* (n 1) 226.

[62] ibid 85–88.

[63] You might object that the law can still be a normative system if not all of its outputs are capable of being used as a reason, because those outputs could still constitute other normative phenomena, such as a norm. Remember, however, that I am understanding reasons to be that normative phenomena which counts in favour of some action, belief, or feeling. In this way I am treating the normative phenomena of reasons as the fundamental phenomena of normativity, given that this counting-in-favour-of relationship is fundamental to normativity. As I said, however, I am open to the possibility that reasons are not the fundamental phenomena of normativity, so that this counting-in-favour-of relationship is better described by a different normative phenomena (or, indeed, cannot always be reduced to one normative phenomena alone). It remains the case, however, that all normative phenomena must be capable of guiding a rational person to exist. It must, then, be the case that the outputs of a normative system must be capable of guiding a rational person to count as outputs of that system, whether those outputs are reasons, norms, oughts, or something else.

[64] See 'The Rule of Reason', 218–19.

laws precisely because they are claimed to fail to be usable as guidance;[65] this move requires the significant understanding 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, so that there is a plausible view according to which it is not a conceptually necessary feature of the law that one of its functions is to guide people by eliciting a certain interaction between people and those reasons the law provides. There are a number of 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 also 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

[65] Raz, *The Authority of Law: Essays on Law and Morality* (n 1) 85–88; Lon Fuller, *The Morality of Law* (Yale University Press 1969) 39.

in this way.[66] 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'.[67] 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'.[68] In short, so long as the law guides people into conformity it is in no way deficient for it to pursue other means of securing conformity with its directives.

A third potential claim is the *priority claim*. According to the priority claim, the law's guidance is meant to take priority over any other means the law might pursue to secure your conformity with its directives. Thus, Hart describes coercion as the 'secondary function' of the law,[69] the fallback option for when people fail to guided by the reasons the law provides. Whilst the priority claim and the central feature claim are similar, they are separable, and the latter does not entail the former (although the reverse may be true). You can think that the law is in one way deficient qua law if it fails to normatively guide without thinking that normative guidance is meant to take precedence over other methods of securing conformity, akin to Green's suggestion above.

[66] Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 22) 93; Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 3) 227.

[67] Leslie Green, 'Escapable Law' (2019) 19 Jerusalem Review of Legal Studies 110, 122.

[68] ibid (original emphasis).

[69] Hart, *The Concept of Law* (n 2) 249.

My ultimate target is the conceptual necessity claim. That is, I will ultimately be 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. I will build to that argument, however, by first demonstrating that there are good reasons to doubt both the central feature claim and the priority claim also. I will therefore also be arguing that it is plausible to think that the law is not in one way deficient for failing to guide in the significant sense, or that the law prefers to guide people into conformity with its directives over other means of securing such conformity.

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. If we accept that the law necessarily aims to be a supreme normative authority, then the law necessarily aims to ground conclusive reasons for action. Whether it necessarily aims to ground robust conclusive reasons for action that answer the normative question of what we actually ought to do, or only legal conclusive reasons that answer the normative question of what we legally ought to do, depends on whether you think the law necessarily aims to be a supreme normative authority in the practical domain or only in the legal domain, as discussed above. 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 purportedly conclusive reasons, robust or otherwise.

You might now accuse *me* of making an insignificant claim. Any claim to be normative *just is* a claim to determine the answer to a normative question, at least partially. The shift in emphasis is important, however. 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 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 and wrong, without necessarily existing to be used in your practical reasoning in order to guide you to what is morally right and wrong.[70] In this way too the law is more *dangerous*. Viewing an attempt to provide guidance in the significant sense as a necessary or central 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.[71] We get to say, for example, that the brutish 'economy of threats' is a 'degenerate' case of law;[72] 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 in the significant sense is jettisoned from the concept of law. It does not follow from the fact that the law is a reason-giving

[70] R Eugene Bales, 'Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?' (1971) 8 American Philosophical Quarterly 257.

[71] Raz, *The Authority of Law: Essays on Law and Morality* (n 1) 221; Waldron, 'How Law Protects Dignity' (n 5).

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

normative system 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. The only certain thing is that the law will attempt to determine the answer 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.

The argument that builds to this conclusion is structured as follows. In order to provide an account of what it is to be guided by the law as a supreme normative authority, Chapter 1 begins by giving an account of what it is for something to guide in general. Specifically, it provides a significant account of what it is for something to guide normatively as opposed to non-normatively—that is, an account of the interaction that needs to take place between a person and the fact that they use as a reason in order to be normatively guided by that fact. To that end, the chapter provides an account of guidance with particular reference to two questions: (i) what is it that distinguishes relationships of normative guidance from relationships of non-normatively guided movement, such as the relationship of guidance between a driver and their car; and (ii) what is the distinct nature of the interaction that we must engage in to use something as a reason so that we are normatively guided by that something?

In focussing on these two questions, two features of how the law guides emerge, features which form the foundation of the following chapters. The first feature is that, despite the involvement of reasons, the law can sometimes exert a large degree of control over us in a manner that is at least analogous to non-normative guidance, if not being an instance of non-normative guidance itself. The second is that, with an appreciation of a distinction that I will draw between direct and indirect normative guidance, we can better understand the limits of the law's ability to normatively guide us.

Chapter 2 builds on the significant account of normative guidance from Chapter 1 to give an account of what it is to act for, and thereby comply with, a reason. In doing so, we will begin to see that there are some moral costs to the claim that the law exists to normatively guide us. Specifically, this chapter will argue that the law's normative guidance risks getting people to act for morally worse reasons than they would otherwise, even where the law is morally justified.

With an account of what it is to act for, and thereby comply with, a reason we will see that for something to succeed at normatively guiding action that something must succeed at securing people's compliance. If the law exists to guide as a supreme normative authority, however, then the law's guidance depends on a certain type of compliance, for to attempt to guide people as a supreme normative authority is to give them independently sufficient reasons to do as directed. It is plausible to think, however, that we ought to act for those moral reasons that make doing as the law requires the right thing to do, at least in addition to any other reasons that we might act for. By presenting people with an alternative set of independently sufficient reasons, the law risks getting people to act for morally worse reasons than they would otherwise, even where the law is morally justified.

The purpose of Chapter 3 is to develop this thought further, and to show how the moral danger identified in Chapter 2 is significant enough to cast doubt on both the central feature claim—according to which the law is in one way deficient qua law if it fails to normatively guide in the significant sense—and the priority claim—according to which the law's guidance is meant to take priority over any other means the law might pursue to secure your conformity with its directives. Starting with faith in God, I will show that, for the rational believer who accepts that God's directives are necessarily conclusive reasons for them, the relationship of guidance between God and that believer is one in which God

is able to exploit the believer's structural rationality in such a way as to bypass the need for any substantive practical reasoning on the part of the believer. The result is that God is able to cause and control the formation of the rational believer's intentions to do as directed.

Whilst it might seem strange to think that the law guides the person who accepts its authority in the same way as God guides the person who has faith in them, I will argue that this is the case if the law necessarily claims to be a supreme normative authority. Whilst the analogy with faith is imperfect, by reconstructing John Gardner's idea of a leap of faith in the law, we will see that to be guided by the law as a supreme normative authority involves this same exploitation of your structural rationality. This, we will see, gives us good reasons to doubt both the central feature claim and the priority claim. It is both undesirable and implausible, I will suggest, to think that the law is in one way deficient qua law for failing to exploit your structural rationality in this way, or that the law ought to take steps to ensure that you conform to its directives by being guided in this way, so that we should reject both the central feature claim and the priority claim.

Chapter 4 then defends these objections against the central feature claim and the priority claim from some potential responses. In doing so, we will see that a relationship of causation and control is necessarily present whenever a person is guided by something that they believe has the power to give reasons. This reveals that the law's ability to exploit the structural rationality of the person who accepts its supreme normative authority reflects a deeper fact about relationships involving powers of reason-giving in general, namely that such relationships preclude what I call relationships of unadulterated normative guidance. Relationships of unadulterated normative guidance, I argue, can only exist in the absence of an ongoing belief in the power of another to give reasons. By showing that it is a deeper fact about relationships involving powers of reason-giving in general that makes them

incompatible with relationships of unadulterated normative guidance, we will be better able to understand why the view that the law's reasons are meant to be conclusive reasons poses such difficulties for the central feature claim and the priority claim. We will also see that viewing the law as an artificial normative system does not rescue us from those difficulties, so long as you accept that the law aims to be a supreme artificial normative system.

Chapter 5 then turns to the conceptual necessity claim, according to which it is part of what it is for something to be law that one of its functions is to guide in the significant sense. Here, I argue that the action that some of the most central legal directives—such as directives of reasonableness and fairness—require us to perform just is the action that reasons independent of the law require us to perform. I will show that not only do such legal directives provide little to no usable guidance, but that the law actively avoids providing us with such guidance. Stripped of their guiding function, these directives 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 to actually be used in your practical reasoning and thereby to normatively guide you to such answers.

Chapter 6 concludes with an exploration of some of the implications of denying that it is a necessary feature of the law that it attempts or ought to attempt to guide us in the significant sense. Specifically, the chapter focusses on the implications for the relationship between the law and those principles that are traditionally referred to under the label 'the rule of law'. I argue that, if it is not a necessary feature of the law that it attempts or ought to attempt to guide us in the significant sense, then those principles simply reflect first-order moral reasons about autonomy and the proper use of coercion, moral reasons which

the law ought to conform to in just the same way that it ought to conform to any other first-order moral reasons. The principles traditionally referred to under the label ‘the rule of law’, on this view, do not reflect a standard which the law ought to conform to in virtue of the very nature of law.

Even on an insignificant account of normative guidance, which reduces normative guidance to reason-giving, I argue that none of the traditional rule of law principles are relevant to answering the question of whether the law is the kind of thing that is capable of being a reason for someone. Rather, that question is regulated by what we can call the rule of reason, which is simply the widely accepted condition in metaethics that for some fact to be a reason for someone that fact must be capable of being used in the rational person’s practical reasoning. We will see that this is a much lower bar to meet than that set by the traditional rule of law principles.

The upshot is that those valuable aims and constraints imposed by the principles traditionally referred to under the label ‘the rule of law’ become external aims and constraints once guidance in the significant sense is jettisoned from the concept of law. It would no longer be 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. The only certain thing is that the law will attempt to determine the answer 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.

1

Cruise Missiles and Cookbooks

In order to provide an account of what it is to be guided by the law as a supreme normative authority, we first need an account of what it is for *something* to guide in general. Specifically, we need a significant account of what it is for something to guide *normatively* as opposed to *non-normatively*—that is, an account of the interaction that needs to take place between a person and the fact that they use as a reason in order to be normatively guided by that fact.[1]

To that end, this chapter provides an account of guidance with particular reference to two questions: (i) what is it that distinguishes relationships of normative guidance from relationships of non-normatively guided movement, such as the relationship of guidance between a driver and their car; and (ii) what is the distinct nature of the interaction that we must engage in to use something as a reason so that we are normatively guided by that something? Whilst much attention has been paid in metaethics and the philosophy of action to different but related questions about the nature of reasons,[2] and to the psychological role that reasons play in motivating and explaining action,[3] there is a need to address questions

[1] As opposed to an insignificant account of normative guidance, which reduces normative guidance to reason-giving: see 'Introduction', 19–20.

[2] Eg Christine M Korsgaard, *Creating the Kingdom of Ends* (Cambridge University Press 1996); Thomas Scanlon, *What We Owe to Each Other* (Belknap Press 1998); Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999); Jonathan Dancy, *Practical Reality* (Oxford University Press 2000); Simon Robertson (ed), *Spheres of Reason: New Essays in the Philosophy of Normativity* (Oxford University Press 2009); John Skorupski, *The Domain of Reasons* (Oxford University Press 2010); Derek Parfit, *On What Matters* (Oxford University Press 2011) vol 1 pt 1 and vol 2 pt 6.

[3] Eg GEM Anscombe, *Intention* (2nd edn, Cornell University Press 1963); Donald Davidson, 'Actions, Reasons, and Causes' (1963) 60 Journal of Philosophy 685; Robert Audi, *Action, Intention, and Reason* (Cornell University Press 1993); Christine M Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (Oxford University Press 2008) esp

(i) and (ii) in relation to the law. In doing so, two features of how the law guides emerge, features which form the foundation of the following chapters. The first feature is that, despite the involvement of reasons, the law can sometimes exert a large degree of control over us in a manner that is at least analogous to non-normative guidance, if not being an instance of non-normative guidance itself. The second is that, with an appreciation of a distinction that I will draw between *direct* and *indirect* normative guidance, we can better understand the limits of the law's ability to normatively guide us.

I will argue that both our and the law's ability to cause and control the formation of certain mental states we might have in respect of legal directives reveal how our relationship with the law is sometimes at least analogous to a relationship of non-normative guidance. It is through this ability to guide the formation of certain mental states that we can explain our ability to understand the normative world from the legal point of view, as well as our ability to follow rules that we do not ourselves endorse.[4] I also argue that, whilst much attention has been paid to the limits of the law's ability to normatively guide in virtue of the vagueness or indeterminacy of legal directives,[5] it is important to realise that it is a conceptual feature of some legal directives that they only provide indirect normative guidance, so that further practical reasoning on our part *necessarily* remains to be done in

ch 7. I take no position here on what it is to act for a reason, or for something to be an action in the first place. These are further questions from what it is to use something as a reason when *deciding whether* to act, and from what it is for some *movement* to be guided, independently of whether that movement is also an action.

[4] A phenomenon that Adam Perry describes as accepting rules in a 'belief-independent' way: Adam Perry, 'The Internal Aspect of Social Rules' (2014) 35 Oxford Journal of Legal Studies 283, 290.

[5] Eg HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) ch 7; Timothy Endicott, *Vagueness in Law* (Oxford University Press 2000) esp ch 9; Jeremy Waldron, 'Vagueness and the Guidance of Action' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011).

order to answer the normative question of what action that directive requires us to perform, independent of that directive's vagueness or indeterminacy.

1. *Cruise Missiles: Automatic Guidance*

Many things are guided. I guide my hands when playing the piano; the driver guides their car when driving; the operator guides a cruise missile when piloting it. A common feature of these examples is that the guided object can be remote from the thing doing the guiding, in two ways.

First, the guided object can be remote in terms of *awareness*. The guided object need not be—indeed, often cannot be—aware that it is being guided. This is obvious in the case of a car, but it can also be true of people. Think of the Machiavellian villain whispering falsehoods in someone's ear to make them perform some action. That person's action is, unbeknownst to them, guided by the villain.[6] Think also of some forms of religious guidance. Consider this from *Proverbs*:[7]

> *Trust in the Lord with all thine heart; and lean not unto thine own understanding. In all thy ways acknowledge Him, and He shall direct thy paths.*

It seems that all you need is faith: God will take care of the rest and guide the course of your life, even if you are unaware of how or to what end.

[6] It might feel more natural to describe this as manipulation rather than guidance. Perhaps manipulation is a malevolent version of the type of guidance I am describing, when applied to agents. The connotations of malice will not always be appropriate, however, as the following example of religious guidance demonstrates.

[7] 'Proverbs 3 - King James Version (KJV)' (*Biblica*) <www.biblica.com/bible/kjv/proverbs/3/> accessed 1 June 2021.

Secondly, the guided object can be remote in terms of *distance*, both temporal and spatial. You always guide things in the future by something you do now. When I will my hand to move, it takes time for the signal to travel from my brain to the nerves in my hand, albeit the delay is imperceptible. In terms of spatial distance, that the guided object need not be in the same location as the thing doing the guiding is clear from the example of the cruise missile.

Given that the guided object can be remote in these two ways, it might be tempting to think that guidance is to be explained in terms of causation. Clearly not all causes are guides: my ancestors are a cause of my existence and thus a cause of my actions, yet they do not guide my actions. But all guides are causes: I cannot guide the movements of my hands if I do not also cause their movements. The question is whether guidance is *reducible* to causation, so that to guide an event just is to cause it.

It is plausible to think that there is more to guidance than just causation. When you are driving a car, you are guiding its movements. But if you jump out of the car, then you are no longer guiding it when it tumbles over a cliff. Yet, you were still a cause of the car going over the cliff. When guiding the car, it seems that there exists an additional factor beyond being a cause of the car's movements. This additional factor ceases to obtain when you jump out of the car, bringing the relationship of guidance to an end.

That additional factor is *control*. The operator who guides a cruise missile does something in the present (moving a joystick, for example) that not only causes the missile to move but controls that movement. The missile's future movements are *responsive* to the operator moving the joystick. This is not true of many causes, such as the fact that engineers designed the missile to take instructions from the operator. It may still be true of some other causes, such as the wind. Given my interest is in the law, which is not simply an inanimate

force, I am only interested in those things that guide in accordance with some *intention*.[8] Thus, I am only interested in the kind of case where the operator of the cruise missile intentionally causes the missile to move by moving the joystick, rather than knocking it accidentally. Whether inanimate forces such as the wind can guide does not affect what follows.

Revisiting the Machiavellian villain will help to flesh out this requirement of control. It is not obvious that the guided event is responding to things the villain does in the present when those whispered falsehoods could be a one-off action in the distant past. The villain will be guiding the course of events, however, so long as they can *intervene* to alter the course of those events. If the villain can intervene, then whether some event occurs in a particular way is conditional on the villain choosing not to intervene to make it occur in a different way. This makes it the case that the future course of events is responsive to what the villain does—or does not do—in the present. This is how the villain controls the course of events, just as the operator controls the missile through their ability to intervene by moving the joystick.

Were the villain to die, they would therefore no longer be guiding the course of events. Once the course of events no longer responds to something the villain does or does not do in the present, there is no *existing* relationship of guidance between the villain and the course of events. In the absence of any intervening cause after the villain's death, we might still describe some event as 'guided' by the villain. But to describe some event as 'guided' in this sense is to convey that some *prior* relationship of guidance played a significant causal role in the event's occurrence. The dead villain cannot guide—in the present tense—the events at the time they occur without the villain having control over

[8] I will discuss how the law could be said to intend things below.

them. This reinforces the idea that to guide some event cannot just be to cause that event: you must also control it.[9]

I will call the type of guidance I have identified here *automatic guidance*. 'Automatic' because it consists in causing and controlling things in the natural world, so that it is unnecessary for the guided object to be aware of or to consent to being guided.[10] To summarise the account formally, Y automatically guides X at t_1 if and only if:

(1) Y causes X to move in some way at t_1 by something Y did at t_0; and

(2) Y controls X's movement at t_1; where

(3) Y has control over X's movement at t_1 if Y could have intervened to alter the course of X's movement at t_1.

For example, an operator (Y) automatically guides a cruise missile (X) when it moves left at t_1 if and only if:

(1) the operator causes the missile to move left at t_1 by moving the joystick at t_0; and

(2) the operator controls the missile's flight path at t_1; where

(3) the operator has control over the missile's flight path at t_1 if the operator could have intervened to alter the course of the missile's flight path at t_1.

[9] On an interventionist account of causation, where assessing causal relationships requires asking counterfactual questions about intervention in a manner similar to what I have in mind here, guidance could be reducible to causation. I would be happy to accept this, as it would not affect anything that follows. For an example of such an account of causation: Judea Pearl, *Causality* (Cambridge University Press 2009).

[10] In that sense the guided object acts as an 'automaton'. I take no position, however, on whether the movements of the thing being automatically guided could in some situations constitute an action.

That to control something you must be able to intervene to alter the course of that thing's movement makes any relationship of guidance sensitive to individual circumstances, even very transient ones. Whether you can intervene at a given moment is hostage to a range of conditions that must obtain to make the intervention possible. If my hands are jolted by an electric shock, I do not have control them—and thus do not guide them—in that moment. Similarly, the Machiavellian villain's victim is not susceptible to manipulation whilst they sleep, and so the relationship of guidance between the villain and the course of the victim's life comes to a brief end. When you guide something over extended periods of time, there are likely to be many successive periods of guidance that cover that time period rather than one unbroken relationship of control.[11]

A counterfactual test of intervention is unlikely to be the whole story. We would also need an account of how to individuate events. You could have control over whether you have sex, potentially automatically guiding whether you have a child, but you have no control over the propagation of your genes five generations from now. Whether some event is guided by you therefore depends on how the events are individuated. My interest here, however, is in explaining the role guidance plays in the law. This sketch of automatic guidance is sufficient for us to make some progress.

Before we make that progress, however, we need an account of normative guidance. For we now have an account of non-normatively guided movement, which I have called

[11] This may explain what Frankfurt has in mind when he claims that for the bodily movements of someone to constitute an action by that person just is for those movements to be under that person's guidance: Harry G Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge University Press 1988) 73. Frankfurt, however, does not give an explicit account of guidance. It is also important to emphasise again that the question of what it is for the movements of my hand to constitute an action by me is distinct from the question of what it is for the movements of my hand to be guided, whether by me or something else, and whether as part of an action or not. As I have said, I take no position here on whether my account of automatic guidance bears any relation to an account of action.

automatic guidance, but it is clear that automatic guidance cannot account for all relationships of guidance. We are guided by cookbooks, yet they do not control us when we cook. We also need to be aware of the cookbook for it to guide us, in contrast to relationships of automatic guidance. We need a second type of guidance to account for examples like the cookbook.

2. *Cookbooks: Normative Guidance*

How does a cookbook guide us? Whilst awareness is necessary, it is not sufficient. If I am aware of the contents of a cookbook but disregard its instructions, then I have not been guided by the cookbook. We need to *interact* with the cookbook in some way.

The purpose of cookbooks gives an indication as to what this interaction must involve. Cookbooks contain instructions about how to cook certain meals. They tell us which facts *count in favour of* certain actions if we want to cook a certain meal. The counting-in-favour-of relation is fundamental to normativity. We cannot answer the question of what we ought to do, believe, or feel without some appreciation of how some fact or set of facts counts in favour of performing some action, forming some belief, or feeling some emotion. In seeking to provide an answer to the question of which facts count in favour of performing which actions for the purpose of cooking a certain meal—that is, the question of how we *ought* to cook a certain meal—cookbooks are in the business of *normative guidance*.

I have explained why I take this fundamental counting-in-favour-of relation to be captured by the concept of a *reason*.[12] Thus, a fact which counts in favour of doing,

[12] See 'Introduction', 17–18.

believing, or feeling something is a reason to do, to believe, or to feel something, so that the normative question of what we ought to do, to believe, or to feel is determined by what we have reasons to do, to believe, or to feel.[13] In providing an answer to how we ought to cook a certain meal, the cookbook is therefore *reason-giving*. To be normatively guided by the cookbook must then involve a certain interaction with the reasons that the cookbook provides. We need to understand the nature of that interaction.

A. Interacting with Reasons

We have said that in order to answer the normative question of whether to perform a given action in our situation we need first to appreciate how some fact or set of facts counts in favour of performing it. We have also said that a fact which counts in favour of performing some action is a reason to perform it. In order to answer the normative question of whether to perform some action φ, then, we need first to appreciate that some fact p is a reason to φ.

But what is it to 'appreciate' that p is a reason to φ? Clearly, I have not appreciated the fact that p is a reason to φ if I am unaware that p. I cannot interact with p as a reason in any way if I am not even aware that p. Given that to be normatively guided by something requires some kind of interaction with the reasons that something provides, we could also not then be normatively guided by something if we are ignorant of its existence. As above,

[13] Some think that all reasons are reducible to reasons to act, believe, or feel something: John Skorupski, 'The Unity and Diversity of Reasons' in Robertson Simon (ed), *Spheres of Reason: New Essays in the Philosophy of Normativity* (Oxford University Press 2009). I take no position on whether this way of categorising reasons is exhaustive. Given that the claim that the law is in the business of guiding as a supreme normative authority is usually a claim about how the law guides our *action*, I will for the most part only be talking about reasons for action rather than for beliefs or feelings.

cookbooks do not guide by exerting some force out into the world, a force which affects our behaviour whether we are aware of it or not; we need first to at least read the cookbook.

We can say, then, that *some kind of mental state in respect of p* is necessary to be normatively guided by p. I will attempt to resolve some of the vagueness in that formulation in a moment. For now, this suffices to capture the idea that p must at least figure in some way in our psychology in order to be normatively guided by it.

Having some kind of mental state in respect of p, however, cannot be sufficient to be normatively guided by p. Say that I am merely aware, on some level, that p. I have not yet related p to the normative question of whether to φ in any way. I need also to appreciate the fact that p counts in favour of—is a reason for—φing. We can say, then, that we do not just need some kind of mental state in respect of p, but rather some kind of mental state in respect of the fact that p *is a reason* to φ.

Still more is needed, however. Say that I merely believe, in the abstract, that p counts in favour of φing but that I have never yet been faced with making a decision about whether I ought to φ; or say that, when I was faced with such a decision about whether to φ, my belief that p is a reason to φ played no role in that decision. We would not say here that you were normatively guided by the reason that p in reaching an answer to the normative question of whether to φ. Your mental state in respect of the fact that p is a reason to φ needs to *figure in some way* in your process of reaching an answer to the normative question of whether to φ.

These two elements combined would give us the following account of what we can call *using* something as a reason. You use some fact p as a reason to φ if and only if:

(1) you have the right kind of mental state in respect of the fact that p is a reason to φ; and

(2) that mental state figures in the right kind of way in your process of reaching an answer to the normative question of whether to φ.

We have here a barebones account of *practical reasoning*. Practical reasoning is the process of using reasons to answer the normative question of which action you ought to perform in your situation. To be normatively guided by some fact, therefore, is to use that fact as a reason in your practical reasoning. Much more needs to be said, of course, as to what the 'right kind' of mental state is in respect of the fact that p is a reason to φ, as well as the 'right kind of way' that mental state needs to figure in your process of reaching an answer to the normative question of whether to φ.

Almost everything about the nature of practical reasoning is controversial, however—hence the vague formulations of the above two limbs. Starting with the required kind of mental state in respect of the fact that p is a reason to φ, some insist on nothing less than a genuine belief that p counts in favour of φing. Thus, Korsgaard says, the 'person who acts for a reason *declares* that what he does is good',[14] for such action is 'motivated by the awareness or belief that these facts *constitute* good-making properties of the action'.[15] Similarly, Audi maintains that to act for a reason is not just to be caused to act by that reason, but is a knowing response to a belief that one has about what will realise

[14] Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (n 3) 229 (original emphasis).

[15] ibid 214 (original emphasis).

one's goals.[16] On these views, to be normatively guided must involve being motivated by what one genuinely believes to be good.

Indeed, views such as Korsgaard's and Audi's are stricter still, in so far as they view the required belief as to the fact that p is a reason to φ as being at the forefront of your *conscious* thought. Korsgaard, for instance, insists that reasoning is a 'self-conscious, self-directing activity' in which you must be 'motivated by the consciousness of the appropriateness of your own motivation'.[17] This is coupled with a correspondingly strict interpretation of the 'right kind of way' that conscious belief must figure in your process of reaching an answer to the normative question of whether to φ. When we act for a reason, Audi maintains, we must be *non-inferentially* disposed to attribute that reason to our action.[18]

Put together, such views portray practical reasoning as involving an explicit, conscious movement from the belief that p is a reason to φ to a conclusion about whether we ought to φ. It is not, on these views, an instance of practical reasoning if, without deliberating about the matter, I have chocolate ice-cream for dessert even if, once pressed, I offer 'because I like it' as an explanation for doing so.

Broader views of practical reasoning might want to allow for the possibility that I was normatively guided by the fact that I like chocolate ice-cream when I chose to have it for dessert. Such a view might start by relaxing the requirement that your belief that p is a reason to φ plays a non-inferential role in the process of reaching an answer to the

[16] Audi, *Action, Intention, and Reason* (n 3) 155.

[17] Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (n 3) 207 and 215.

[18] Audi, *Action, Intention, and Reason* (n 3) 158.

normative question of whether you ought to φ, allowing instead that the belief may play an *inferential* role. Rather than reasoning consciously from the premise that you like chocolate ice-cream to the conclusion that you ought to eat it for dessert, the fact that you like chocolate ice-cream might figure inferentially in some unconscious process that leads you to that conclusion, a process that might be revealed upon further reflection. Thus, were someone to ask you 'why did you eat chocolate ice-cream for dessert?', you might infer from your actions that your belief that you like chocolate ice-cream led to your decision to eat it.

We might want to relax the requirements for what counts as an instance of practical reasoning further still. In broadening the 'right kind of way' that your mental state in respect of the fact that p is a reason to φ must figure in your process of reaching an answer to the normative question of whether to φ, we kept as constant the idea that this mental state is a conscious belief that p is a reason to φ. We might allow instead that practical reasoning can occur with latent, rather than conscious, beliefs. For example, you may not only be inferentially disposed, upon further reflection, to discover that the fact that you like chocolate ice-cream led to your decision to eat it for dessert, but even that you liked chocolate ice-cream in the first place. In other words, you may only discover retrospectively through inference that you possessed this latent belief that you like chocolate ice-cream.

If we allow that a subconscious movement from a latent belief to a decision to perform some action can count as an instance of practical reasoning, we have moved considerably far from Korsgaard's claim that practical reasoning is a 'self-conscious, self-

directing activity'.[19] This broadening of what counts as an instance of practical reasoning will not sit well with those who think, like Korsgaard, that reasons are grounded by—exist in virtue of—an act of will. The more latent the belief, and the more inferential the reasoning, the harder it will be to find the act of will that some think is necessary to make it the case that we are involved in a normative endeavour involving reasons, and thus an instance of practical reasoning.

Bearing in mind therefore that we are already in controversial territory, could the scope of what counts as an instance of practical reasoning (and thus normative guidance) be expanded still further? You might think that mental states other than beliefs in respect of the fact that p is a reason to φ can figure in practical reasoning.

One possible candidate for such a mental state might be *aliefs*.[20] An alief is a proposed kind of mental state that is 'developmentally and conceptually antecedent' to the more sophisticated mental states that potentially distinguish humans from arational animals.[21] A paradigmatic example is meant to be given by the reaction that many of us might have when walking out on to a glass viewing platform attached to the side of a cliff.[22] Despite having a firm belief that the glass will hold our weight, so that on a rational level we do not believe that we will fall to our death, we may still experience a visceral feeling of vertigo and imminent danger. The suggestion is that in addition to our belief that the glass will hold our weight, we have an alief that has something like the content 'watch out!

[19] Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (n 3) 207.

[20] Tamar Szabó Gendler, 'Alief and Belief' (2008) 105 The Journal of Philosophy 634.

[21] ibid 641.

[22] ibid 634.

You're about to walk off a cliff!'[23] The alief responds not to reasons but to sensory stimuli, stimuli which trigger associated actions and feelings.[24]

Are we normatively guided by the alief that has something like the content 'watch out! You're about to walk off a cliff!' when, in a moment of fright, we flee from the glass platform despite our belief that the glass will hold our weight? Even the existence of aliefs is controversial,[25] let alone the question of whether they are the right kind of mental states that could figure in our practical reasoning. Notice that were we to allow that aliefs figure in our practical reasoning, then we may well have to admit that non-human animals engage in practical reasoning too. Aliefs are, in the paradigmatic case, likely products of the primordial hardwiring in our brains that conditions us to react in certain ways to external stimuli; primordial hardwiring that we share with many arational animals.

It is in this fact that aliefs—if they exist—are mental states that are shared between rational and arational animals alike that tells us that we have probably gone beyond the kind of mental state that can appropriately figure in practical reasoning. In their arationality, aliefs are *non-cognitive* mental states. That is, they are not propositional attitudes that seek to track the truth of reality;[26] they are instead mental states which automatically trigger 'chains' of associatively linked actions and feelings. Indeed, aliefs are paradigmatically *opposed* to what is true, as in the example of the glass viewing platform.

[23] ibid 635.

[24] ibid 640.

[25] Eg Eric Mandelbaum, 'Against Alief' (2013) 165 Philosophical Studies 197.

[26] Gendler, 'Alief and Belief' (n 20) 651.

Most, however, would think you open to criticism were you to engage in practical reasoning insensitive to the truth of reality. Say that you consciously reason from the premise that p to the conclusion that you ought to φ. If, upon hearing that p did not in fact obtain, you responded with 'so what?', most would take that to be a defective response, the expectation being that you should now revise your conclusion that you ought to φ. Fleeing from the glass viewing platform, by contrast, is a defective response of a different kind. When confronted with the news that, in fact, the glass floor is more than capable of carrying their weight, the vertigo sufferer might justifiably snap back 'I *know* that; I couldn't help it'. Aliefs, unlike beliefs, are not capable of conscious revision, for they do not aim to track the truth of reality.[27] The defect for which the vertigo sufferer can be criticised, to the extent that they can, is not a failure to revise their reasoning, but a failure to overcome the automatic processes triggered by the alief.

From this discussion of why aliefs are not the right kind of mental state to figure in practical reasoning, we have discovered a baseline from which to move forward. To use some fact as a reason in your practical reasoning, and thereby be normatively guided by that fact, you must have some kind of *cognitive* mental state in respect of that fact. That is, the mental state that you have in respect of the fact that p is a reason to φ must be truth-bearing, rather than merely some disposition to act in some way or a trigger of some set of automatic reactions. Going forward, for ease of reading I will refer to this cognitive mental state as a 'belief'. This is not to preclude the possibility that cognitive mental states other than beliefs might appropriately figure in practical reasoning. Nor do I need to take a position here on whether this cognitive mental state must be a conscious one or whether latent beliefs could also qualify as the right kind of mental state for practical reasoning, or

[27] ibid.

whether this mental state must play a non-inferential role in the process of answering the normative question of what action you ought to perform. This gives us the following formulation. You use some fact p as a reason to φ if and only if:

(1) you have a belief [some kind of cognitive mental state] in respect of the fact that p is a reason to φ; and

(2) that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ.

From here, we can ask the following question: need your belief have a *positive* valence? That is to say, in order to be normatively guided by the fact that p when answering the question of whether you ought to φ, must you believe that it is *true* that p is a reason to φ, or can you believe that it is *false* that p is a reason to φ but nonetheless engage in practical reasoning *pretending* that p is a reason to φ, and still be normatively guided by p?

In answering this question, it will help to draw a distinction between what I have called using something as a reason, and a potentially distinct interaction that we can call *treating* something *as if it were* a reason. You treat p as if it were a reason to φ when you are aware that p yet lack the belief that it counts in favour of φing, but nonetheless deliberate as if it does.

Treating something as if it were a reason allows us to deliberate about how we might act, think, or feel were the normative world to be other than how we believe it to be. Say that your friend is upset at something their partner has done. You, however, cannot understand why your friend is upset; you do not believe that what their partner has done is a reason to feel as your friend feels. By treating the fact of what their partner has done as if it were a reason to feel upset, you can engage in *hypothetical deliberation* about what you would have most reason to feel in an imaginary world in which that fact really is a

reason to feel upset. The conclusion of this hypothetical deliberation will help you to understand your friend better. Treating some fact as if it were a reason allows us to be empathetic by seeing the normative world through the eyes of others.[28]

To express the idea behind this example formally, you treat some fact p as if it were a reason to do some action φ if and only if:

(1) you are aware that p but do not believe that p counts in favour of φing; and

(2) you deliberate as if p counted in favour of φing.

We can see that, on the narrower view of practical reasoning that requires a genuine belief that some fact counts in favour of φing, treating some fact as if it were a reason cannot be an instance of practical reasoning and thus does not count as an instance of normative guidance.

Indeed, we can see that treating some fact as if it were a reason would be an instance of *automatic* guidance. In constructing this mental picture of a world in which p really is a reason to φ, I could at any given moment end the exercise by ceasing to imagine such a world; or I could tinker with it by making p a reason to do some different action φ′ instead. I am *causing* this mental picture to exist by an act of will, and I am in *control* of its continued existence and shape. Through an exercise of will, I am automatically guiding the parameters of any future hypothetical deliberation because I cause and control which facts get to count as imaginary reasons. And, crucially, we do not get to *choose* what we genuinely believe.[29] What I genuinely believe is an *involuntary* response to my perception

[28] This is a description of how this is possible on a metaphysical level. Whilst I am speaking in the second person, I am not suggesting that people consciously think about constructing alternative normative realities when comforting their friend.

[29] This might strike you as inconsistent with my claim, a few pages ago, that aliefs are not subject to 'conscious revision' in the way that beliefs are. Conscious revision, however, is not the same

of what I have most reason to believe.[30] If practical reasoning requires genuine beliefs in respect of which facts are reasons for us, therefore, then so long as I am automatically guiding the parameters of hypothetical deliberation by choosing which facts to treat *as if* they were reasons, I cannot be normatively guided by those facts, for I lack any belief that those facts genuinely count in favour of something.

This is important because it identifies some crucial relationships with the *law* that, despite the involvement of reasons, could be said to involve automatic guidance. One example is the following. The law expects me to perform the actions its directives require of me even if I do not believe those directives are reasons to do so. I may think that they are bad laws. Nevertheless, I probably risk sanctions if I do not conform to them. I therefore need to understand what the law requires of me in my given situation. One way to do this is by treating the law as if it were a reason to do what it requires. Through the hypothetical deliberation that this exercise enables, I can understand what the law requires of me, as well as better predict the behaviour of law-abiding citizens and legal officials.[31] Whilst this is an instance of me, through an exercise of my will, automatically guiding the parameters of my future hypothetical deliberation, the law has enabled this by communicating its directives to me. Through treating legal directives as if they were reasons by automatically

thing as *wilful* revision. I can consciously decide to sit down and consider the reasons for and against whether I should continue to believe that p. It is in that sense we can say, for example, that someone 'decides' whether or not to continue believing in God. What we cannot do, however, is determine through an act of will that we will believe that the reasons in favour of believing in God are stronger than those against.

[30] Parfit, *On What Matters* (n 2) vol 1, 34–35; Bernard Williams, *Problems of the Self: Philosophical Papers 1956–1972* (Cambridge University Press 1973) ch 9. Whilst some disagree, that we cannot choose what to believe has been described as the 'dominant consensus' stretching as far back as Hume: Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (Oxford University Press 2002) 7.

[31] I am not suggesting that this is the only way of predicting such behaviour. You could also collect empirical data on the question, for example.

guiding certain mental states in respect of those directives, we can understand how we ought to act *from the legal point of view*.

Automatic guidance therefore potentially provides an explanation for how we can make what have been called detached or non-committed normative statements.[32] We are able to inform someone of how they 'ought' to act according to some set of beliefs that we do not ourselves subscribe to because we can engage in hypothetical deliberation about what we would have most reason to do were it the case that we held those beliefs, a process enabled by an ability to automatically guide certain of our own mental states. Making a detached or non-committed normative statement would just be to express the conclusion of that hypothetical deliberation, having treated the relevant facts as if they were the reasons others claimed them to be. In this way, automatic guidance reveals a connection between the law and empathy, for our ability to automatically guide our own mental states is what allows us to see the normative world from different perspectives, whether the law's or our friend's.

Treating some fact as if it were a reason to do some action can even result in you performing that action. An example in the law, and in social life more generally, is given by the practice of following rules which we do not ourselves endorse. Adam Perry has described this phenomenon as rule following in a 'belief-independent' way.[33] Sometimes, the suggestion is, we might be guided by a rule even where we lack the belief that this rule counts in favour of doing as it requires. Perry gives the example of an anarchist judge, who follows the rule of accepting what Parliament says as law only when professionally

[32] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 153–57.

[33] Perry, 'The Internal Aspect of Social Rules' (n 4) 290.

required: in court, the judge follows this rule and applies the law *as if it were true* that they believe they ought to but, 'like an actor in a play', the judge will 'shrug off his persona' outside of court and resume living the life of a devoted anarchist.[34]

We can see now that it is the judge's ability to automatically guide their own mental states that makes this possible. The judge is treating the rule *as if it were* a reason to apply the law, engaging in hypothetical deliberation to understand what they would have reason to do in a world in which it were actually true that the rule gave them a reason to apply the law, and then acting accordingly. Those who think that practical reasoning requires genuine beliefs in respect of which facts are reasons for us would deny that the judge is *normatively* guided by the rule itself. Instead, if they are a rational judge, they must be normatively guided by whatever facts they believe count in favour of pretending that the rule is a real reason—in Perry's example, it is the judge's goal ultimately to undermine the law from the inside.[35] According to this view, whenever a disillusioned official or citizen applies or follows some legal rule the application and following of which they do not endorse, the relationship of guidance is, despite the involvement of reasons, better described as one of automatic guidance between them and the formation of certain mental states in respect of the rule, rather than normative guidance between them and the rule itself.

Now, I cannot settle the question of whether practical reasoning requires genuine beliefs in respect of the facts which are reasons for us or whether it should be taken to include cognitive mental states with a negative valence—that is, those instances in which we do not believe that p genuinely makes it the case that φing is a good thing but nonetheless deliberate as if p is a reason to φ. You might think the narrow view is too

[34] ibid 293. The example is originally from Raz, *Practical Reason and Norms* (n 2) 148.

[35] Perry, 'The Internal Aspect of Social Rules' (n 4) 293.

restrictive and overly intellectual in requiring people to be consciously motivated by an awareness of the facts which 'constitute good-making properties' of the action they are performing, as Korsgaard insists it requires.[36] Admitting that these genuine beliefs need only be cognitive mental states that are revealed upon further reflection, as I suggested above, would go some way to ameliorating this concern. It would still entail, however, that many instances of being guided by the law were not really instances of normative guidance, namely any instance of doing as the law requires in the absence of a belief that what the law requires is the right thing to do.

The crucial point to note, however, is that *even if* we accept that the interaction that I have called treating some fact as if it were a reason is an instance of normative guidance, it is at least *analogous* to relationships of automatic guidance; crucially, it retains this element of causation and control. Indeed, we could say here that the relationship of normative guidance is *part* of a broader relationship of automatic guidance. Relationships of automatic and normative guidance are not mutually exclusive. Many relationships of automatic guidance *include* relationships of normative guidance. Return to the example of the Machiavellian villain. The ways in which the villain might automatically guide the course of the victim's life may well include instances of normative guidance. The whispered falsehood in the victim's ear might be used by the victim as a reason for belief; in doing so, the victim will be normatively guided by the villain. That relationship of normative guidance, however, is part of a broader relationship of causation and control—of automatic guidance—being exercised by the villain. We can imagine, for example, that

[36] Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (n 3) 214.

this Machiavellian villain caused the victim to use the falsehood as a reason in the way that they did, and had control over that use through their ability to intervene.

In the same way, if we grant that treating some fact as if it were a reason is an instance of normative guidance between you and that fact, it is still part of a broader relationship of automatic guidance between you and certain of your mental states. As we have seen, in constructing the mental picture of a world in which p really is a reason to φ, I cause that mental picture to exist and I am in control of its continued existence and shape. If we admit, therefore, that when the judge who treats the law as if it were a reason to do as it requires is an instance of the judge being normatively guided by the law—despite their lack of a genuine belief that the law *really is* a reason to do as it requires—we can see that this relationship of normative guidance is enabled by a broader relationship of automatic guidance. The judge is able to be normatively guided by the law because of the broader relationship of automatic guidance that the judge exercises over certain of their own mental states, namely the mental states required to treat the law as if it were a reason to do as it requires.

It is important to realise that relationships of normative guidance can at least be analogous to relationships of automatic guidance, for there is an important way in which the law can exercise a large degree of control over us despite the involvement of reasons. To see it, it is worth exploring further this suggestion that it is not only exterior movements that can be automatically guided but also the formation of mental states, in particular the formation of *other people's* mental states.

Imagine that someone nearby shouts 'burglar!' and that, upon hearing this, you form the belief that this person thinks that there is a burglar nearby—that is, you form a belief about what someone else believes. We can say that the person who shouted 'burglar!'

caused you to form this belief by causing certain things to occur in the natural world. With their voice, the person caused certain vibrations in the air which, upon travelling to your ear, caused certain electrical signals to be sent through your nervous system to your brain. These electrical signals firing through the neurons in your brain cause you to form the belief that this person thinks there is a burglar nearby.

Crucially, the person who shouts 'burglar!' can not only cause you to form the belief that this person thinks that there is a burglar nearby but can potentially control the formation of this belief. Were they to later shout 'false alarm!', the same process can cause you to cease to have the belief that this person thinks that there is a burglar nearby. It is therefore sometimes possible to have the ability to intervene to alter a person's movements of mind and thus to automatically guide the formation of certain beliefs that that person has.

The point does not depend on a naturalistic account of belief, according to which a belief *just is* a certain set of electrical signals firing through the neurons in your brain. It would be enough to say that X was able to automatically guide the formation of Y's belief if the electrical signals caused by X played a decisive role in the formation of Y's belief on this particular occasion, whatever else a belief might be, and regardless of whether, on a different occasion, those electrical signals would not play such a decisive role. Thus, if over the din of a crowded street you catch what *might* be someone shouting 'burglar', you might only take this to be a reason to believe that someone thinks that there is a burglar nearby but withhold judgment as to what you actually believe to be the case. Here, there is no automatic guidance over the formation of a belief that someone thinks that there is a burglar nearby.[37] The kind of case that I have in mind when I talk of someone automatically guiding

[37] Although there is, potentially, automatic guidance of a belief that someone *might* think that there is a burglar nearby.

the formation of someone else's beliefs, therefore, is the kind of case where the formation of that belief is automatic rather than those cases where the formation is slow and deliberative.

It is in this way that we can sometimes potentially describe the law as automatically guiding us. By communicating to me that I ought not to possess cannabis, for example, the law can cause certain movements of mind so that I come to believe that the law prohibits the possession of cannabis. And the law can control such movements of mind when it is able to intervene to alter my beliefs by communicating something different to me, such as 'the possession of cannabis is now permitted'. Assuming, therefore, that someone was receptive to the law's communications, the law would be able to automatically guide their beliefs about what the law requires.

You might doubt that the law is the right kind of thing to be able to cause and control things in the natural world, least of all intentionally. If the law is a normative system of reason-giving facts, then it would not seem possible for the law to automatically guide, for facts are not the kind of thing that are capable of controlling us. Rather, if the law is to automatically guide, it would have to do so as a system of legal officials who act in its name, for it would be legal officials who would communicate to us what the law requires, intending thereby to cause us to form a belief about what the law requires, and who would be able to intervene by communicating that the law now required something different.

I will return to the issue of how best to understand references to 'the law' when speaking of the law normatively guiding versus automatically guiding later,[38] for it is important to avoid equivocation between the law as a normative system and the law as a

[38] See 'Lean Not unto Thine Own Understanding', 127–28.

system of legal officials to avoid talking past those who might have in mind only one or the other understanding. For now, it is enough to say that, when I speak of the law automatically guiding, I mean to refer to automatic guidance exercised by legal officials in the law's name.

Another worry with the idea that the law can automatically guide is that, even when the law communicates to us what it requires through legal officials, that communication is not the kind which results in the automatic belief formation that I have in mind, but rather the slower, deliberative kind. For lawyers, accustomed to difficult cases and conflicting opinions, it might seem implausible to think that the law often communicates so directly what it requires that it is analogous to the person who shouts 'burglar!'. Rather, figuring out what the law requires involves parsing various statutes, cases, and any other relevant materials, so that there is no one legal official or set of legal officials who could cause and control the formation of a belief about what the law requires.

The first response to this worry that the law's communication is not sufficiently direct and unequivocal to reliably allow the law to automatically guide the formation of people's beliefs about what the law requires is that at no point will I be concerned with the question of how *often* the law automatically guides. Indeed, it will be compatible with everything that I have to say if, in practice, the law is *never* in a position to control the formation of people's beliefs. Everything I have to say depends only on the conceptual claim that it is possible for the law to be in that position. And it is possible to imagine forms of legal communication that are sufficiently direct and unequivocal to amount to automatic guidance. Imagine a world in which legal directives are continuously announced over loudspeakers in the street. Further, I suspect that the worry that legal communication is often not so sufficiently direct and unequivocal is too legalistic. For the non-lawyer, the

law is not found in convoluted judgments and sprawling statutes but in the commands of a police officer, the orders of a court, and in government-issued instructions. It is these more direct forms of communication that I have in mind when I speak of the possibility that the law can automatically guide the formation of beliefs that people have in respect of what the law requires.

Indeed, such automatic guidance could go further. Say that I have absolute faith in the law, so that I come to form an *intention* to do whatever I believe the law requires me to do. The law, when it can automatically guide those beliefs about what the law requires, would also therefore be able to cause and control—and thus automatically guide—my intentions. Whilst intentions do not necessarily result in action—they can be frustrated or abandoned—they are the kind of thing that *tends* to result in action. The law therefore could potentially have great influence over our behaviour by automatically guiding our intentions.

The potential for the law to automatically guide the intentions of the person who has faith in it is something to which I will return in Chapter 3. It is worth making some more general remarks here, however, on the automatic guidance of movements of mind. Remember that I have acknowledged that relationships of automatic guidance and relationships of normative guidance are not mutually exclusive. Indeed, notice that the distinction between automatic and normative guidance is only a strong one if we adopt one of the stricter views of practical reasoning, requiring for example conscious deliberation from a conscious belief that p is a reason to φ to the conclusion that it is a genuinely good thing to φ.

If we adopt one of the broader views of practical reasoning, allowing that practical reasoning can involve latent cognitive mental states that play only an inferential role in

your decision to φ, then the distinction between automatic and normative guidance is not always a sharp one. In fact, they can become two different ways of describing the same phenomenon. With a broad enough view of practical reasoning, you may be happy to describe the above example of the law causing and controlling you to form the belief that the law requires you to φ as an instance of normative guidance. It is important to note that nothing that I will go on to say depends on whether the relationships that I describe as automatic guidance could equally be described as relationships of normative guidance. In other words, I will remain neutral as to whether we should adopt a narrower or broader view of what counts as an instance of practical reasoning. What will matter is that such relationships of guidance are at least analogous to relationships of automatic guidance in so far as they involve this element of causation and control. We will see that such relationships, normative or not, are at least of a different character than *paradigmatic* cases of practical reasoning.

Before we explore the different character of such relationships of causation and control that the law can potentially exercise and why it matters, however, there is an important way in which the law *is* limited in the normative guidance it can provide.

3. *Direct and Indirect Normative Guidance*

Not all directives are immediately usable as a reason to answer the normative question of what action you ought to perform in your situation.[39] An example is 'you ought to be fair'. If faced with the normative question of whether to be fair or efficient, the directive 'you ought to be fair' can be used as a reason to answer this question. You can believe that the

[39] For ease of reading, I will talk of using a directive as a reason. Directives, however, are not facts. It is therefore *the fact that* there is a directive requiring you to φ that you use as your reason to φ.

directive counts in favour of being fair, and that belief can immediately figure in a decision to be fair or efficient. But being fair or unfair is not an action. Rather, fairness or unfairness is a *property* of an action when that action is fair or unfair. We know this because there must always be some fact *in virtue of which* an action is fair or unfair. If it is unfair not to pay your taxes, it is unfair just when and because there is some fact or set of facts that make it unfair, such as the fact that by not paying your taxes you are failing to contribute excess wealth for the benefit of the community. Without such a fact, failing to pay your taxes would still be an action, but it would not be an unfair one.

When it is true that we ought to be fair, we might call these facts in virtue of which some action has the property of being fair or unfair *reasons of fairness*—these facts count in favour or against some action because they make that action fair or unfair. We can say, then, that when we use the directive 'you ought to be fair' as a reason to answer the normative question of whether to be fair or efficient, we are using the directive as a reason for *belief* rather than for action. Specifically, we are using the directive as a reason to believe that we ought to conform to reasons of fairness. It remains to be seen what action, if any, those reasons endorse in your situation.

When it comes to answering the normative question of what action to perform in a given situation, such as whether to pay your taxes, you cannot therefore use the directive 'you ought to be fair' as a reason to answer this question directly. You cannot believe that the fact that you ought to be fair counts in favour of paying your taxes without reference to some further fact that makes not paying your taxes unfair, for otherwise you are treating fairness as *just being* paying your taxes. Instead, it is this further fact that makes not paying your taxes unfair—the fact that not paying your taxes fails to contribute excess wealth for

the benefit of the community—that you can use as a reason to answer the normative question of whether to pay your taxes.

A directive cannot, therefore, always be used as a reason to answer the normative question of what action to perform in a given situation. We can, however, often still *derive* reasons from a directive that *can* answer this question. If you asked someone *why* they believed the fact that not paying your taxes fails to contribute excess wealth for the benefit of the community was a reason to pay your taxes,[40] they might well say that it was because they are required to be fair. Often, we come to see some fact as a reason because we *derived* that reason from some other, often more general, requirement. The reason you derive from the directive is a *further* reason than the one given by using the directive as a reason itself—the further reason to pay your taxes, rather than just the reason to conform to reasons of fairness, in the case of the directive 'you ought to be fair'. It is this interaction between a person and a fact—the process of deriving further reasons—that I will call *using some fact to derive a reason*.

To give a complete account of normative guidance, we need to know what is involved in this second, more complicated interaction in which we derive further reasons. Consider the following example. It is your child's birthday, and you are having a party. It falls to you to cut the cake. You are faced with a decision: do you give your child the same sized piece as every other child (φ) or do you give your child a bigger piece (φ')? What would it be for you to be normatively guided by a directive requiring you to be fair when cutting up a birthday cake in making this decision?

[40] As distinct from the question of why that fact *made it the case* that not paying their taxes was unfair.

First, you need to believe in the existence of the directive. You cannot be normatively guided by a directive that you are unaware of. As before, by 'belief' I mean only a certain kind of cognitive mental state that at least plays an inferential role in your psychology, remaining neutral as to whether the interaction calls for something stronger. From this belief, you know that there are *certain kinds* of facts that are relevant to your decision: those facts that are reasons of fairness. More needs to be done, however, to resolve the situation at hand. You need to identify *which* facts are reasons of fairness and whether they count in favour of φing or φ′ing. Your belief in the directive alone will not help you here. The directive 'you ought to be fair when cutting up a birthday cake' does not *on its own* tell you whether the fact that your child got a bigger piece of cake last year is a reason of fairness in favour of φing.

You need a further belief. You need to believe that were you not to φ you would not be *complying* with the directive. To comply with something is to do as that thing requires, acting for the reason that thing required it.[41] We therefore need a belief that not acting for a certain reason in your situation would not count as doing as the directive requires. Contrast this with mere *conformity*. To conform to something is just to do as that thing requires, never mind the reason you acted for in doing so. We need to be careful, however, to distinguish between two things with which we might comply: we can comply with the reason that we derive from the directive, but we can also comply with the directive *itself*.[42] To be normatively guided by the directive by deriving further reasons from it requires the latter, not just the former.

[41] The distinction between conformity and compliance is from Raz, *Practical Reason and Norms* (n 2) 178–79.

[42] You might think it odd to talk of 'complying' with a reason, as opposed to complying with a directive. The distinction between 'conformity' and 'compliance' is, however, linguistically stipulative. The distinction is not meant to track linguistic usage but to demarcate two interactions

Say that I believe the fact that my child got a bigger piece of cake last year is a reason to cut the cake equally this year. If I then cut the cake equally, acting for the reason that my child got a bigger piece last year, then I have complied with that *reason*. But I have not necessarily used the directive that required me to be fair. I have conformed to it, if cutting the cake equally is the fair outcome, but I have also conformed to another directive, 'you ought not to give your child too much sugar'. When we perform an action for a certain reason, we are potentially conforming to many different requirements. To be normatively guided by a directive by deriving further reasons from it, you need to comply with the directive itself.

You comply with the directive itself when you do as that directive requires, believing that p is a reason to φ *because the directive requires you to do some other thing* ψ. It is this belief that makes it the case that you derived a further reason from *that* directive and did not merely conform to it. If someone tells you that you ought to be fair when cutting up a birthday cake, you can already use that fact as a reason to cut birthday cakes fairly (ψing). But to derive a reason in favour of giving everyone an equal piece (φing), you need to believe that there is some further fact in your situation—such as the fact that your child got a bigger piece last year—that counts in favour of φing *because* you are required to be fair.

This gives us the following. You use some fact N to derive a reason to φ if and only if:

(1) you believe that N requires you to ψ;

which are distinct: performing an action that a reason counts in favour of, and performing an action *acting for* the reason that counted in favour of it.

(2) you believe that were you not to φ you would not be complying with N itself; where

(3) complying with N itself requires a belief that p is a reason to φ because N required you to ψ.

In the case of the birthday cake, this gives us the following example of what it would be to be normatively guided by some fact that required you to be fair (ψ) when deciding whether to give everyone an equal piece of cake (φ):

(1) you believe that you ought to be fair when cutting up birthday cakes;

(2) you believe that were you not to give everyone an equal piece of cake you would not be complying with the requirement to be fair; where

(3) complying with the requirement to be fair requires a belief that the fact that your child got a bigger piece of cake last year is a reason to give everyone an equal piece this year because you are required to be fair.

From this, an important distinction emerges. When we use something as a reason, we are provided with guidance directly on the normative question that we sought to answer, so that *potentially* no further practical reasoning is required to answer the question of what action to perform in your circumstances.[43] Contrast this with deriving a further reason from some fact. When you engage in this second interaction of normative guidance, you do not arrive at a decision that answers the normative question of whether to φ. Rather, you arrive at the conclusion that some fact is a *reason* to φ. You must then go on to use *that* fact as a reason to answer the question of whether to φ. Deriving further reasons from something

[43] I say 'potentially' because you may have only used this fact as a *pro tanto* reason, so that other facts remain to be used as reasons before you reach a decision about what you ought to do.

therefore provides you with the *means* to answer the normative question of whether to φ by allowing you to identify facts in your situation as reasons.

Say that prior to deriving further reasons from anything you already believed that the fact that your child had a bigger piece of cake last year would make it unfair not to cut the cake equally. Without believing that you *ought* to be fair—that is, without believing that there is a requirement to be fair—you could not yet rationally believe that this fact therefore *counts in favour* of cutting the cake equally as a reason of fairness. You must derive further reasons from some fact that requires you to be fair in order to see that p is a reason to φ.

We can say, then, that using something as a reason provides us with *direct normative guidance*, for it directly addresses the normative question of what action to perform in your situation, in such a way that potentially no further practical reasoning is required to reach a decision. Deriving further reasons from something, on the other hand, provides us with *indirect normative guidance*, for some further practical reasoning *necessarily* remains to be done before we can figure out what action we are required to perform. Deriving further reasons from something allows you to identify a fact in your situation as a reason to φ, but it remains up to you to then actually use that fact as such a reason.

We now have a significant account of normative guidance—that is, an account of the interaction that needs to take place between a person and some fact in order to be normatively guided by that fact.[44] You are normatively guided by some fact p if and only if:

[44] I am less concerned here with what unifies this account with my account of automatic guidance, so that both can be said to be two *types* of guidance. You might think, for example, that only

(1) you use p as a reason to φ; where

(a) you use p as a reason to φ if and only if you have a belief [some kind of cognitive mental state] in respect of the fact that p is a reason to φ and that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ; or

(2) you use p to derive a reason to φ; where

(a) you use p to derive a reason to φ if and only if you believe that p requires you to ψ and you believe that some different fact p′ is a reason to φ because p requires you to ψ.

If you accept a broader understanding of what it is to engage in practical reasoning, you might also add:

(3) you treat some fact p as a reason to φ; where

(a) you treat some fact p as a reason to φ if and only if you are aware that p but do not believe that p counts in favour of φing and you deliberate as if p counted in favour of φing.

A. *Indirect Normative Guidance and Legal Directives*

The normative question that you are likely to want guidance on when it comes to the law is 'what action should I perform in my current situation?' Most of the time, the law holds you accountable for what you do, not (just) for how you deliberate. With an appreciation of this distinction between direct normative guidance and indirect normative guidance, we can now identify an important way in which the law can be limited in the normative

automatic guidance is guidance in the literal sense, whilst someone can only be metaphorically guided by a fact when they use it as a reason. Whether the use of the word 'guidance' here is just a metaphor does not affect what follows.

guidance it can provide on this question. That the law's ability to normatively guide action can be limited is not a new claim. Much attention has been paid to the problems posed in this area by the vagueness or indeterminacy of legal directives.[45] What I want to show here, however, is that it is a conceptual feature of some legal directives that they can only provide indirect normative guidance, so that further practical reasoning on our part necessarily remains to be done in order to figure out what action that legal directive requires, *independent* of that directive's vagueness or indeterminacy.

To see that some legal directive's ability to provide direct or indirect normative guidance is independent of its vagueness or indeterminacy, take the directive 'you ought not intentionally to kill another person'. When faced with the normative question of whether to kill another person, this legal directive provides direct normative guidance because it is usable as a reason. You can believe that the legal directive counts against killing another person without reference to any further facts and that belief can immediately figure in a decision about what to do in your situation.

Let us say, however, that a judge is faced with a case in which the defendant has killed a foetus. Has the defendant violated the legal directive? There might be disagreement as to whether a foetus is a person for the purposes of the directive. If it transpired that the directive is indeterminate on the question, then the directive's ability to guide here is limited. This limitation, however, arises because the directive provides *no answer* to the question. Whilst, therefore, indeterminacy can pose a crucial threat to a legal directive's ability to guide action, it is one that exists *prior* to any question of whether that directive provides direct or indirect normative guidance, for indeterminacy is a question about whether the directive provides any guidance at all. It remains the case that, *were* this

[45] See n 5.

directive determinate on the question of whether a foetus is a person, it would provide direct normative guidance on the question of what action it required.

Similarly, take the directive 'public officials ought to exercise their powers fairly'. For the sake of argument, say that this directive is *fully determinate*, so that in every possible situation to which the directive applies there is an antecedent answer to what action it requires you to perform. Despite its determinate nature, when faced with a normative question of whether, say, to approve a planning application (φ), the directive can only provide indirect normative guidance, for it is not usable as a reason to answer this question. As above, you cannot just believe that the fact that the law requires you to be fair (ψ) counts in favour of φing without reference to further facts. If you asked a public official who used the directive in this way why they did φ, all they would be able to offer in response is 'because to not φ would be unfair'. They would not be able to answer the inevitable follow-up: 'but *why* was not φing unfair?'[46] You need to believe that there is some fact in your situation that makes it the case that not φing is unfair. As we have seen, you need then to believe that this fact is a *reason* to φ by deriving that reason from the directive 'you ought to be fair'. This fact is the one that you use as a reason to answer the question of whether you ought to φ.

Whether a legal directive provides direct or indirect normative guidance, then, is independent of its indeterminacy. The indeterminate directive 'you ought not intentionally to kill another person' is still the kind of legal directive that provides direct normative guidance on the question of what action you ought to perform, when it has normative

[46] The one possible escape route for the public official is if being fair *just is* φing, so that φing is all there is to being fair. This could only be true in the unrealistic scenario that φing is the only action that the law ever considers to be fair. This would be the equivalent of saying in the birthday cake example that cutting birthday cakes equally is all there is to being fair, so that fairness had nothing to do with anything else.

guidance to provide, because it is usable as a reason; whereas the directive 'public officials ought to exercise their powers fairly' can only provide indirect normative guidance on that question, even if it is fully determinate, because it is only possible to *derive* reasons from it. You might think, however, that even if it is not their indeterminacy that distinguishes the ability of these two directives to provide direct or indirect normative guidance, it is their *vagueness*. Is it not precisely because the legal directive 'you ought not intentionally to kill another person' is clear as to the behaviour required, whereas the directive 'you ought to be fair' is not, that explains why only the former can provide directive normative guidance on the question of what action to perform in a given situation?

In order to see that it is not, we need first to be clear on what we mean by 'behaviour' here. We can imagine that the directive 'public officials ought to exercise their powers fairly' is vague as to the *meaning of fairness*.[47] If this were the case, then it would be hard to know *which* facts in your situation make it the case that not φing is unfair.[48] This, however, would be an *epistemic* limitation on the directive's ability to guide, for it would pose an obstacle to knowing whether you are in a situation which is relevant to the directive. It is, of course, important that we have an account of what epistemic conditions must obtain to access the normative guidance that something can provide us with.[49] That question is distinct, however, from the question of what that normative guidance consists

[47] Indeed, we do not need to imagine. The courts are clear that in this context the meaning of fairness is 'essentially an intuitive judgment': *R v Home Secretary, ex p Doody* [1994] 1 AC 531 (HL), 560 (Lord Mustill).

[48] Assuming again for the sake of argument that the directive is fully determinate despite its vagueness.

[49] Waldron's model of how rules and standards guide can be seen as such an account, to the extent that it requires an agent to know when they are in the circumstances to which a directive applies: Waldron, 'Vagueness and the Guidance of Action' (n 5); as can Holly Smith's 'Using Moral Principles to Guide Decisions' (2012) 22 Philosophical Issues 369.

in, which is the question my account addresses. Epistemic limitations are not, therefore, the kind of limitation I have in mind here. It remains the case that, were you to have perfect knowledge of fairness, the directive would still only provide indirect normative guidance: that you could easily identify which facts made it the case that not φing was unfair still requires you to use the directive to identify those facts as *reasons*, and then to use *those* reasons to answer the question of whether to φ.

The same holds for any vagueness as to what counts as *conformity*. You might think that it is clear as to what killing is, which is why the first directive provides direct normative guidance as to action, whereas the second directive essentially just tells you to 'conform to reasons of fairness' without specifying what that looks like in any given situation, hence it only provides indirect normative guidance. Again, any vagueness here is a separate limitation. Imagine that 'you ought not intentionally to kill' was vague (but not, for the sake of argument, indeterminate) as to whether 'killing' included 'causing death via omission'. It remains the case that *were you to know* whether killing included causing death via omission that the legal directive would provide direct normative guidance on the question of what action to perform because it is usable as a reason. Similarly, even if it was *obvious* what conformity with reasons of fairness looked like, it remains the case that the directive 'public officials ought to exercise their powers fairly' only provides indirect normative guidance to answer the same question, because it remains up to you to use those facts the directive identifies as reasons to reach that obvious conclusion.

Of course, you might now think that any limitation on a legal directive's ability to guide given by its ability to provide only indirect normative guidance on a given question is a trivial one. If the directive 'public officials ought to exercise their powers fairly' is perfectly clear as to what fairness means and requires, then the necessity of engaging in

further practical reasoning by using the reasons you derived from the directive to figure out what action to perform in your situation is hardly a burden. What is important to realise here, however, is that it is a conceptual feature of some legal directives that further practical reasoning on our part *necessarily* remains to be done before we can reach a decision about what action to perform, independent of vagueness or indeterminacy. Thus, while it has been noted before that some legal directives direct us to perform a specific action and others to pay attention to a specific set of reasons, that the latter directives leave some further practical reasoning to be done has been said to arise because they are 'vague or unclear or imprecise'.[50] We can see now that it is instead a deeper fact about how we use some legal directives in our practical reasoning that we are left with the job of figuring the rest out for ourselves. The vagueness or indeterminacy of legal directives can make that job harder, but it is not *because* of that vagueness or indeterminacy that we have the job in the first place.

4. *Conclusion*

We now have the foundations of a significant account of normative guidance—that is, an account of the interaction that needs to take place between a person and the fact that they use as a reason in order to be normatively guided by that fact. In providing an account of guidance that focusses on two questions—(i) what is it that distinguishes relationships of normative guidance from relationships of non-normatively guided movement; and (ii) what is the distinct nature of the interaction that we must engage in to use something as a reason—this account has revealed two features of how the law guides, features which form the foundation of the following chapters.

[50] Waldron, 'Vagueness and the Guidance of Action' (n 5) 59.

The first is that, despite the involvement of reasons, the law can sometimes exert a large degree of control over us in a manner that is at least analogous to non-normative guidance, if not being an instance of non-normative guidance itself. The second is that, with an appreciation of a distinction that I drew between *direct* and *indirect* normative guidance, we can better understand the limits of the law's ability to normatively guide us. It is a conceptual feature of some legal directives that they only provide indirect normative guidance, so that further practical reasoning on our part *necessarily* remains to be done in order to answer the normative question of what action that directive requires us to perform, independent of that directive's vagueness or indeterminacy.

The next chapter will build upon these foundations of a significant account of normative guidance to give an account of what it is to act for, and thereby comply with, a reason. In doing so, we will begin to see some of the dangers inherent to the relationships of normative guidance that the law, as a supreme normative authority, would seek to secure.

2

The Price of Normativity

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',[1] 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'.[2] Raz says that conformity to the rule of law, understood as a standard by which to measure the law's ability to guide conduct, is 'necessary if the law is to respect human dignity',[3] for such guidance respects people's autonomy by treating them as rational agents capable of planning their lives.[4] Gone, on these views, is the image of the law as a system of orders backed by threats to be found in Austin.[5] Indeed, the shift to normativity in jurisprudence has been depicted as a sanitising of the law's 'official story',[6] hiding the 'inescapable force, pain, and violence' that lies behind legal authority in favour of its 'value-declaring, rights-enhancing, and community-building aspects'.[7]

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[1] Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 The Cambridge Law Journal 200, 222.

[2] ibid 208, 211.

[3] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 221.

[4] ibid.

[5] John Austin, *The Province of Jurisprudence Determined* (Murray 1832).

[6] 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.

[7] ibid 268, 218. We might now add to the list: 'dignity-respecting'.

We need to be wary, however, of thinking that 'legality shines with a heavenly light',[8] of being quicker to find necessary connections between the law and morality that have a positive valence rather than a negative one.[9] The purpose of this chapter is to build upon the account of normative guidance provided in the previous chapter to give an account of what it is to act for, and thereby comply with, a reason. In doing so, we will begin to see that there are some moral *costs* to the claim that the law exists to normatively guide us. Specifically, this chapter argues that the law's normative guidance risks getting people to act for morally worse reasons than they would otherwise, even where the law is morally justified.

With an account of what it is to act for, and thereby comply with, a reason we will see that for something to succeed at normatively guiding action that something must succeed at securing people's compliance. If the law exists to guide as a *supreme normative authority*, however, then the law's guidance depends on a certain type of compliance, for to attempt to guide people as a supreme normative authority is to give them *independently sufficient* reasons to do as directed. It is plausible to think, however, that we ought to act for those *moral* reasons that make doing as the law requires the right thing to do, at least in addition to any other reasons that we might act for. By presenting people with an alternative set of independently sufficient reasons, the law risks getting people to act for morally worse reasons than they would otherwise, even where the law is morally justified.[10]

[8] Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 New York University Law Review 1035, 1052.

[9] ibid 1052–54.

[10] Similar arguments have been made under the guise of the 'just laws paradox': Scott Hershovitz, 'The Authority of Law' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012); Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and*

By the costs of legal guidance, then, I do not have in mind the risk that the law may get things wrong, so that its guidance might lead you astray. That risk is well understood by those who laud the benevolent potential of the law.[11] Rather, the risk that I have in mind obtains even when the law is at its best; this chapter, in other words, seeks to demonstrate that even where the law is morally justified, any normative guidance it provides is not cost-free. It is important to realise that the law is dangerous not just because the law may err, or because legal enforcement can be harmful, but also because the particular kind of normative guidance it is meant to provide is itself morally hazardous.

1. *Acting for Reasons*

When your friend performs an action of dubious justification, you might well inquire what reasons they had for doing such a thing. To ask this is to engage someone's basic responsibility by requiring them to account for their behaviour in the currency of justification: reasons.[12] It is, in short, a variation of asking 'why did you believe that was justified?'

Politics (Clarendon Press 1994) 342–43. We will see, however, that without an account of what it is to act for a reason such arguments have relied on an overly narrow account of compliance.

[11] Eg John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) ch 8.

[12] John Gardner, 'The Negligence Standard: Political Not Metaphysical' (2017) 80 The Modern Law Review 1, 13.

Various sophisticated accounts of what it is to act for a reason have already been given,[13] and they are hotly debated in the philosophy of action.[14] I do not aim to solve any of those debates here. My aim is more modest: I want to give a partial and, as far as can be, uncontroversial account that will allow us to make some progress in understanding what it is for your actions to be normatively guided by the law. It is important to do so, given that the language of compliance is often used in jurisprudence to mean an act performed for the reason that it was required.[15] As far as I can tell, no explicit account of what it is to act for a reason is relied upon when discussing the relationship between the law, compliance, and normative guidance. This, we will see, has resulted in an implicit reliance on an overly narrow account of compliance.

Given, as we have said, that a fact which counts in favour of performing some action is a reason to perform that action, the question of what reasons someone acted for is a question about what facts that person took to count in favour of doing as they did. In Parfit's terminology, we are inquiring as to what someone's *apparent* reasons for action were.[16] We are trying to understand which facts figured in your friend's practical reasoning so that

[13] Eg GEM Anscombe, *Intention* (2nd edn, Cornell University Press 1963); Donald Davidson, 'Actions, Reasons, and Causes' (1963) 60 Journal of Philosophy 685; Robert Audi, *Action, Intention, and Reason* (Cornell University Press 1993); Christine M Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (Oxford University Press 2008) ch 7.

[14] One example of a contested issue is whether all actions for a reason are intentional actions: Alfred R Mele, 'Acting for Reasons and Acting Intentionally' (1992) 73 Pacific Philosophical Quarterly 355; Maria Alvarez, 'Acting Intentionally and Acting for a Reason' (2009) 52 Inquiry 293.

[15] As distinguished from conformity, which is to do as required, never mind the reason you acted for in doing so: Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 178–79. As discussed in the previous chapter, whilst you might think it odd to talk of 'complying' with a reason, the distinction between 'conformity' and 'compliance' is linguistically stipulative. The distinction is not meant to track linguistic usage but to demarcate two interactions which are distinct: performing an action that a reason counts in favour of, and performing an action *acting for* the reason that counted in favour of it

[16] Derek Parfit, *On What Matters* (Oxford University Press 2011) vol 1, 34–35.

they were *motivated* to act as they did. It is, then, an explanatory question the answer to which must at least partly consist in what mental states your friend had in respect of which facts were reasons for them.

I have already provided an account of what it is to *use* some fact as a reason, and thereby be normatively guided by it. I said that you use some fact p as a reason to φ if and only if:

(1) you have a belief in respect of the fact that p is a reason to φ; and

(2) that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ.

I will continue to use the word 'belief' in a stipulative way to refer to some kind of cognitive mental state. The controversies from the last chapter over whether we should adopt a narrower or broader view of practical reasoning carry through to the debate over what we should consider an instance of acting for a reason. Thus, you might adopt a narrower view of practical reasoning and insist that someone only acts for the reason that p if they were motivated by a conscious belief that p makes it the case that φing is a genuinely good thing to do.[17] Or you might adopt a broader view and allow that you can act for the reason that p even if p only played some inferential role in a subconscious decision to φ. As before, in using the word 'belief' to refer only to some kind of cognitive mental state, I will remain neutral on that debate here.

What *is* clear is that the mere use of a reason does not entail the performance of the action you took that reason to endorse. It is possible to use a fact as a reason against φing

[17] Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (n 13) 207, 214.

but ultimately to form the belief that you ought to φ having, after taking it into account, concluded that it was defeated by countervailing reasons. We might then say that the reason against φing has guided your practical reasoning, but it has not guided your action. Acting for a reason must consist of *both* the use of that reason *and* the performance of the action that reason endorses. This would give us the following account. You act for the reason that p if and only if:

(1) you φ having used p as a reason to φ; where

(2) you use p as a reason to φ if and only if you have a belief in respect of the fact that p is a reason to φ and that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ.

Remember, however, that in asking what reasons someone acted for we are seeking to understand what explanatory role someone's motivation played in relation to their action. Say, however, that I believe that p counts in favour of φing and I believe that I ought to φ in my situation having taken into account p, but that I am then made to φ by some intervening force. In performing the action φ having used p as a reason to φ, I have satisfied conditions (1) and (2), but it is the intervening force that explains my φing rather than my practical reasoning. We need, then, to add a third condition. Your use of p as a reason to φ must partly explain your φing *in the proper way*. I am being deliberately vague here, for there is a debate to be had over what role external forces may play in causing you to φ whilst being compatible with you also acting for a reason when φing.[18] The debate does

[18] For a discussion: Audi, *Action, Intention, and Reason* (n 13) 162–70.

not affect what follows, however, so the following account is enough for us to make some progress. According to that account, you act for the reason that p when φing if and only if:

(1) you φ having used p as a reason to φ; where

(2) you use p as a reason to φ if and only if you have a belief in respect of the fact that p is a reason to φ and that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ; and

(3) your use of p as a reason to φ at least partly explains your φing in the proper way.

Whilst I said that I am only seeking to give a partial and, as far as can be, uncontroversial account of what it is to act for a reason that does not seek to resolve any debates in the philosophy of action, it is worth motivating this account against some potential objections that would otherwise undermine what follows.

You might worry that the account is over-inclusive because sometimes the facts that we use as reasons to φ appear to be causally redundant. For instance, you might use p as a reason to φ having also used some different fact p′ as an *independently sufficient* reason to φ. Here p seems to make no causal difference to the question of whether you end up φing, so that you might doubt whether you can really be said to have acted for the reason that p when φing. It is better if my account allows for the possibility of acting for more than one independently sufficient reason, in order to be generous to the law. It would be easier to prove that the law's normative guidance risks getting people to act for morally worse reasons than they would otherwise if it were impossible to act for the independently sufficient reason that the law requires you to φ *and* for the independently sufficient moral reasons that you had to φ.

Thankfully, such a worry confuses the kind of causal explanation that we are looking for when we ask what reasons someone acted for. We are not straightforwardly asking what caused someone to φ; instead, we are asking what beliefs as to a set of facts caused them to be *motivated* to φ. And overdetermined practical decisions of the kind that we are considering here are not subject to the 'no difference' problem posed by the above response because such overdetermination does not necessarily detract from the motivating force that p has over the person who uses it as a reason.

To see this, it helps to realise that we often intentionally overdetermine our practical reasoning by playing a kind of confidence trick on ourselves. Say you believe that p is an independently sufficient reason to φ, but that φing is a pretty big decision, so you are anxious about whether your judgment is correct. You might, to reassure yourself, continue your practical reasoning to discover that some other fact p′ is also an independently sufficient reason to φ. 'Well', you can now tell yourself, 'even if I am wrong that p is a good enough reason to φ, I also think that p′ is'. This trick can reassure us because both p and p′ retain their motivating force in the face of causal redundancy. You already believed that p was an independently sufficient reason to φ, so that absent p′ you would have decided to φ anyway, but nonetheless p′ still independently motivated you to φ. Both of these reasons therefore continue to provide an explanation for what motivated your action in terms of what facts you took to justify that action.[19] You can, therefore, act for more than

[19] You might disagree and think that the role of p′ here is just to reinforce my prior belief that it is acceptable to act for p because I can now think that were p not to be a conclusive reason, I *would* have acted for the reason that p′ and done φ anyway. I think this probably describes an *additional* kind of confidence trick that we can play on ourselves rather than an alternative reading of the one I just described. As I said, however, if it is true that we cannot act for more than one independently sufficient reason this would make what I have to say about the law easier to prove. I will not, therefore, pursue the point further.

one reason on my account, and you can act for more than one independently sufficient reason.

A. Compliance

With an account of acting for a reason, we can reach an account of compliance, for to comply with a reason just is to act for that reason.[20] For example, say the fact that you made a promise to your friend to have lunch with them is a reason to have lunch with them. If you have lunch with your friend, having acted for the reason that you promised to do so, then you have complied with that reason. If, instead, you had lunch with your friend but did not use the fact that you promised as a reason, then you have only *conformed* to that reason given by your promise. To conform to a reason is to perform the action that reason counts in favour of, never mind the reasons you acted for in doing so.[21]

An account of compliance must be more nuanced than this, however. There are different types of reasons. It follows that there are different ways to use a fact as a reason. Given that to comply with a reason involves using the fact in question as a reason, those different ways of using a fact as a reason denote, when combined with performance of the required action, different *types of compliance*.

One type of reason—the type that I have been implicitly referring to throughout—is just the type of reason that counts in favour of φing, which is then to be balanced against all those reasons that count against φing when deciding whether to φ. To adapt Raz's terminology, call it an *ordinary first-order reason*.[22] You use some fact p as an ordinary

[20] Raz, *Practical Reason and Norms* (n 15) 178–79.

[21] ibid.

[22] ibid 36ff.

first-order reason when you have a belief in respect of the fact that p is a reason to φ and that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ *qua ordinary first-order reason*. That is, as part of your process of reaching an answer to the normative question of whether to φ, you weigh p in the balance with all the reasons against φing. You therefore comply with such a reason when you φ having used p as an ordinary first-order reason to φ.[23]

Some reasons are not to be weighed in the balance with all the other ordinary first-order reasons, however. The law, at least according to Raz's service conception of authority, attempts to *pre-empt* our decision-making by excluding from consideration certain such ordinary first-order reasons.[24] Raz calls such reasons not to act for certain first-order reasons *second-order exclusionary reasons*.[25] They are second-order because they are reasons about how to deliberate with other reasons. You can combine an ordinary first-order reason to φ with a second-order exclusionary reason not to act for certain conflicting reasons in what Raz calls a *protected reason*.[26]

You could use some fact not just as an ordinary first-order reason but as a protected reason. You would do this when you have a belief in respect of the fact that p is a reason to φ and that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ *qua protected reason*. This might

[23] Assuming throughout that the further explanatory condition (3) in my account of acting for a reason is satisfied.

[24] Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 10) 214.

[25] Raz, *Practical Reason and Norms* (n 15) 40ff. Not everyone agrees that such reasons exist: Larry Alexander, 'Law and Exclusionary Reasons' (1962) 18 Philosophical Topics 5; Stephen Darwall, 'Authority and Reasons: Exclusionary and Second-Personal' (2010) 120 Ethics 257. If you reject their existence, then just omit them from my account of the different types of compliance. Their absence will not affect what follows.

[26] Raz, *Practical Reason and Norms* (n 15) 191.

involve excluding from your practical reasoning some different fact p′ that you should otherwise have counted in favour of not φing. To act for, and thereby comply with, a protected reason qua protected reason would be to φ having used p as a protected reason in this way.

A step up from protected reasons are *conclusive reasons*. Some fact p is a conclusive reason to φ if there is no currently existing different fact p′ that is either a stronger first-order reason against φing or a second-order reason not to act for p.[27] You therefore use p as a conclusive reason to φ when you have a belief in respect of the fact that p is a reason to φ and that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ *qua conclusive reason*. This requires you to engage in the process of reaching an answer to the normative question of whether you ought to φ already believing that there is no currently existing p′ in your situation that is either a stronger first-order reason against φing or a second-order reason not to act for p. You would then comply with a conclusive reason qua conclusive reason were you to φ having used p in this way.

Of course, it must be the case that the rational person who decides to φ ended up believing that at least a reason or a set of reasons were sufficient to justify φing. In other words, they must end up believing that at least one reason they used was a conclusive reason. The difference here is that you are engaging in your practical reasoning *already* believing that some fact is a conclusive reason, rather than deciding that it is a conclusive reason *after* weighing it in the balance with other competing reasons. The latter would just be a case of complying with a conclusive reason *qua ordinary first-order reason*, for in weighing it in the balance with other competing reasons you used it as such. Notice now

[27] ibid 27.

that were you therefore to use p as a conclusive reason but then fail to conclude that you ought to φ in your situation, you would be irrational.[28] This is not necessarily true for ordinary first-order reasons or for protected reasons, given that in using them you may discover that they are defeated by competing non-excluded reasons. By contrast, when you use p as a conclusive reason to φ you ought rationally to conclude that you ought to φ because you already believe that it outweighs or excludes any competing reasons.

Above even conclusive reasons stand *absolute reasons*. Some fact p is an absolute reason to φ if there is no possible different fact p′, *existing or otherwise*, that could ever be a stronger first-order reason against φing or a second-order reason not to act for p. I am departing somewhat from Raz's framework here. For Raz, an absolute reason is not necessarily a conclusive reason because it is still susceptible to being cancelled or excluded.[29] Given that I am interested in explaining types of compliance, and you ought not to comply with cancelled or excluded reasons, I also need absolute reasons to be conclusive reasons. The difference between them, on my account, is that conclusive reasons could be defeated by some *potential future fact* p′ whereas an absolute reason can never be defeated in *any* possible situation, future or otherwise. Were you therefore to use p as an absolute reason to φ any practical reasoning ought to be short-lived, for it is just always the case that you should conclude that you ought to φ all things considered. Barring irrationality (including weakness of will), the intervention of third parties, or an act of God, using p as an absolute reason all but guarantees that you will φ.

[28] In the procedural sense of not responding to what you believed yourself to have most apparent reasons to do: Parfit, *On What Matters* (n 16) vol 1, 33–37, 62.

[29] Raz, *Practical Reason and Norms* (n 15) 27–28.

These four types of reasons—ordinary first-order reasons, protected reasons, conclusive reasons, and absolute reasons—correspond to four different ways of using some fact as a reason. They also, therefore, correspond to four different ways of acting for a reason. If you φ having used p as a conclusive reason to φ, then you have acted for the conclusive reason that p; if you only used p as an ordinary first-order reason, then you still acted for the reason that p but qua ordinary first-order reason. Given that to comply with a reason is to act for that reason, we can also derive four different types of compliance. Call those types (1) *ordinary compliance*; (2) *protected compliance*; (3) *conclusive compliance*; and (4) *absolute compliance*.

These types of compliance can form predictors of someone's conformity. We can order them into a scale according to the likelihood that a rational person would, in any given future situation, conclude that they ought to φ all things considered. If someone complies in the ordinary sense with the reason that p, then there is little guarantee that in any other given situation they will comply with that reason again. Imagine that you issued someone with a directive to φ. If you knew that the most you could hope for from this person was ordinary compliance, so that each time they were faced with a decision whether to φ they were only going to use your directive as an ordinary first-order reason, you would have little assurance of their compliance on any given occasion. There would always be the risk that next time they will conclude that some different fact that counts in favour of not φing will outweigh your directive.

Compare this to the other types of compliance. If you require someone to comply with your directive to φ in the protected sense, and they believe your directive to be such a protected reason, then the likelihood that they will in any given future situation reach the

conclusion that they ought to φ is greater.[30] Now your directive does not have to outweigh every conflicting first-order reason against φing, for some of those conflicting reasons will be excluded from consideration. You would feel even more assured if you knew that someone was going to use your directive as a conclusive reason to φ. Remember that if you use p as a conclusive reason to φ you would then be irrational if you did not subsequently conclude that you ought to φ all things considered. If, therefore, you required conclusive compliance with your directives and someone came to believe that your directives were such conclusive reasons, there would be much less cause to worry that in any given future situation there was a risk that your directive would not be complied with.[31]

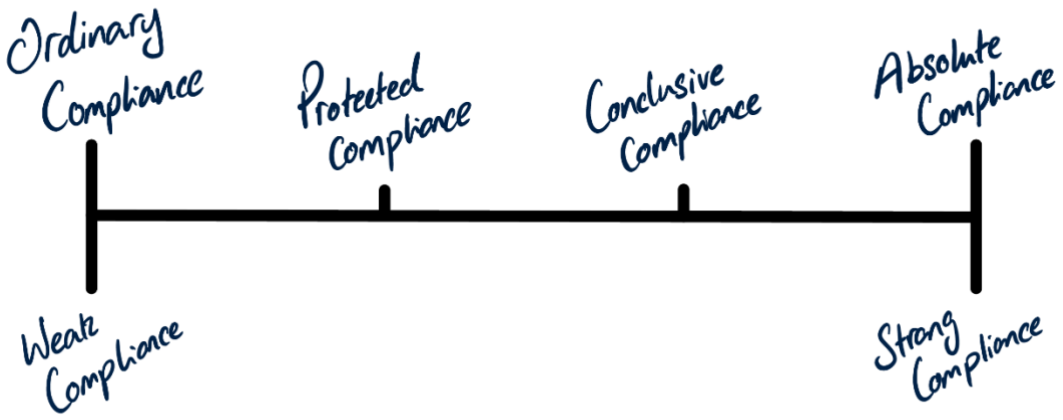
This leaves requiring absolute compliance with your directives as the ultimate assurance that people will do as required. Here you would be requiring people to believe that your directive was always a conclusive reason to φ, and that no possible fact—existing or otherwise—could ever outweigh or exclude it.[32] Were someone to buy into this claim, then barring irrationality it is guaranteed that they will form the belief that all things considered they ought to φ in *any* given situation to which the directive applies. We can thus talk of 'weaker' and 'stronger' types of compliance to refer to how someone used the

[30] Holding as constant the weight afforded to the first-order reason as between ordinary and protected compliance.

[31] Given that to require compliance is to require someone to φ, and for a rational person to end up φing they must have believed that p was a conclusive reason to φ, can you actually require only ordinary or protected compliance from someone? You can, it just makes your directive conditional. To require ordinary compliance from someone is to require them to φ just in case your directive remains standing once weighed in the balance with the competing reasons against φing. You might think this is just to require someone to act rationally, rendering your directive redundant, but in requiring ordinary compliance you are still claiming to add a further reason into the mix, ie the fact that you directed them to φ. To require protected compliance would similarly be to require someone to φ just in case your directive is not outweighed by non-excluded conflicting reasons.

[32] It is not clear that absolute compliance with someone's authority (as opposed to a particular directive) is actually possible, given the contradiction between believing that there is no possible future fact that would defeat the current directive and the possibility that the authority issues a new, contradictory, directive which you would also believe to be an absolute reason.

reason they complied with, giving an indication as to the likelihood that they would similarly comply on any given future occasion, as the following diagram illustrates.



B. Legal Compliance

We can now ask what type of compliance is involved when we are normatively guided by the law. From the perspective of the person being guided, this is just a matter of how that person used the fact that the law required them to do something. If, in φing, you used the fact that the law required you to φ as an ordinary first-order reason to φ, then you have complied with the law in the ordinary sense.

My aim, however, is to give an account of what it is to be guided by the law as the *supreme normative authority* of society. We have already seen that this view is best understood as portraying the law as aiming to provide *conclusive* reasons for action.[33] If our action is to be guided by the law qua supreme normative authority, then, we must use legal directives as conclusive reasons. To be normatively guided by the law qua supreme normative authority when φing is to comply in the conclusive sense.

[33] See 'Introduction', 23–24.

This shows us that, if someone *chose* to allow their action to be normatively guided by the law qua supreme normative authority, they would be choosing to comply with the law in the conclusive sense. But does the law *require* conclusive compliance? If the law exists to normatively guide, I think it does require compliance, although we need to be careful to disambiguate two different ways in which the law might require it. I do not have in mind the claim that the law *normatively* requires compliance, so that you do something wrong, in the eyes of the law, when you do as the law requires but without having used the law's directive as a reason for doing so. Rather, I want to show that, if and to the extent that the law exists to normatively guide as a supreme normative authority, the law *functionally* requires conclusive compliance; that is, for the law to succeed at normatively guiding people as a supreme normative authority, people must comply with the law in the conclusive sense.

That said, it is worth pausing for a moment to see that following my account of compliance the normative claim is not as implausible as is sometimes thought,[34] at least if you already accept that the law exists to normatively guide. First, though, we should not confuse the claim that (a) we have a *legal* duty to comply with the law, with the claim that (b) we have a *moral* duty to comply with the law in virtue of the nature of the law's authority over us when it has such authority. The former is just a doctrinal question, the answer to which could vary from system to system. Some of the objections to (b) are (at best) only objections to (a), such as the observation that judges sometimes encourage conformity with legal directives for non-legal reasons.[35] Legal officials could be ignorant of, or mistaken as to, the conceptual implications of the law's authority. And (b) does not

[34] Raz says it is a 'truism' that the law only requires conformity: Raz, *The Authority of Law: Essays on Law and Morality* (n 3) 30.

[35] ibid.

seem so implausible when we remember that to comply with something is for your action to be normatively guided by it. The question of whether the law's authority entails a moral duty to comply with the law is therefore just the question of whether you are morally required to be guided by its directives. Given that, according to Raz's normal justification thesis at least, you ought (morally) to be guided by the law when by doing so you would better conform to your pre-existing reasons than you would otherwise,[36] it would seem that Raz's account of authority does entail duties to comply with the law, when the law has legitimate authority.

Some of the resistance to the idea that the law normatively requires compliance stems from what we can now see is an overly narrow account of compliance. Raz rejects the move that I just made on the grounds that the law's second-order exclusionary reasons need only exclude reasons *against* doing as the law requires in order to get you to better conform to your pre-existing reasons. It is unnecessary, he says, for them to exclude non-legal reasons *in favour* of doing as the law directs.[37] True enough, but the view of compliance that Raz seems to be attacking here is a strawman. He seems to think that to comply with a reason is to act *solely* for that reason, so that for the law to require compliance it must also exclude other reasons in favour of doing as the law directs. But as we have seen, to act for a reason to φ is to φ having used that reason. This imposes no restrictions on the number of *other* reasons in favour of φing that you can also use. Whilst it is conceptually possible that someone could require you to act for one reason alone—we could call it *exclusive compliance*—this seems an extreme case. To take it as the only type

[36] Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 10) 214.

[37] Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota Law Review 1003, 1022.

of compliance is overly simplistic, and an overly narrow starting point for asking whether the law normatively requires compliance.

Whilst it is not as implausible to think that the law's (legitimate) authority entails a duty to comply with the law as is sometimes made out, I will not pursue the claim further. As I mentioned, all I need is for the law to functionally require compliance. The above will hopefully have demonstrated that *that* claim should be uncontroversial. If people are not using the law's directives as their reasons for action, then those directives are not normatively guiding people's actions. For the law to succeed at normatively guiding as a supreme normative authority, therefore, it is necessary for people to conclusively comply with legal directives. That is all I mean by the law functionally requiring conclusive compliance, and that the law functionally requires conclusive compliance is enough to establish the danger that necessarily arises from any attempt by the law to normatively guide in this way. That danger is the risk that the law will get people to act for morally worse reasons than they would have otherwise, even where the law is morally justified.

2. *Acting for Morality*

That the law risks getting people to act for morally worse reasons than they would otherwise has, in a way, been considered before, under the guise of the 'just laws paradox'. The paradox as previously presented suffers from a number of problems. Nonetheless, it provides a useful starting point from which to arrive at the moral danger that I have in mind. The just laws paradox is this:

(1) the law requires you to comply with its directives; but

(2) we should follow just laws for the reasons that make them just; therefore

(3) the more just a law is the less reason we have to comply with it.[38]

First, it should be noted that 'paradox' is too strong here. The conclusion, (3), is at most counterintuitive; it is not a logical contradiction. It does not say that the more just a law is the less reason we have to *conform* to it. That would be a paradox. Rather, (3) says the more just a law is the less reason you have to be guided by the law in φing because, according to (2), you ought morally to be guided by those reasons that made the law just in the first place. The just laws paradox is therefore what Hershovitz, borrowing Quine's terminology, describes as a 'veridical paradox': namely, a 'conclusion that at first sounds absurd but that has an argument to sustain it'.[39]

Even with this concession, the paradox is overblown. First, it can immediately be deescalated by making my distinction between the law normatively requiring compliance and functionally requiring compliance. Premise (1) assumes that the law normatively requires compliance, portraying the law as imposing an obligation to comply with it that is then said to be incompatible with your pre-existing obligation to comply with the moral reasons that made the law worth following. But we could instead see the law as only functionally requiring compliance, so that you have no such obligation to comply.

Second, the entire paradox rests on the idea—that I just glossed over a moment ago—that to comply with the law would be *incompatible* with complying with the moral reasons that made the law just. The paradox as described by Raz and Hershovitz seems implicitly to assume that same narrow view of compliance that I called exclusive

[38] Hershovitz, 'The Authority of Law' (n 10) 65–66; Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 10) 342–43.

[39] WV Quine, *The Ways of Paradox and Other Essays* (Harvard University Press 1976) 1, quoted in Hershovitz, 'The Authority of Law' (n 10) 67.

compliance, namely that to comply with the reason that p is to act solely for the reason that p. As we have seen, this is an overly simplistic view: there are many other types of compliance, all of them compatible with acting for more than one reason. With any other type of compliance, therefore, the just laws paradox is resolved. Compare the would-be murderer who says that they refrained from killing solely because the law forbids it with the one who says 'oh, I felt like murdering this person, but I didn't do it because the law forbids it *and* it would be morally wrong'. You would be much less worried by the latter's response: 'well, sure', you might think, 'those both *are* reasons not to murder', even if you still hope that they had given considerably more weight to one of them over the other.

Still, we can rescue something from the just laws paradox as presented above. Modifying it to rely only on the law functionally requiring compliance, and acknowledging that someone can comply with multiple reasons, it still reveals a moral danger inherent in any attempt by the law to normatively guide people.

As we have said, for the law to succeed at normatively guiding you into φing qua supreme normative authority you need to use its directive as a conclusive reason to φ. Whilst I suggested earlier that causal redundancy does not preclude acting for multiple independently sufficient reasons it is, nonetheless, *rationally* redundant to do so. If you believe that some fact p is a conclusive reason to φ, you should cease your practical reasoning. Claiming that p is a conclusive reason to φ is therefore to claim that p *is all you rationally need* to reach the conclusion that you ought to φ. Thus, were you to believe that both p and p′ were conclusive reasons to φ, rationally you need only use one as your reason to φ.

If, therefore, the law is meant to guide us as a supreme normative authority by giving us conclusive reasons for action, legal directives are meant to be rationally sufficient

to reach the conclusion that you ought to φ. But the legal directive is *not* all you need. It is plausible to think that we should *also* follow just laws acting for the additional reasons that made them just in the first place. Rather than use the legal directive as a conclusive reason to φ, you should use that *set* of reasons that is the legal directive and those moral reasons that ground its justness. The law then appears to be sending the incorrect message, namely that it is permissible just to act for the reason that the law required you to do so. There is a risk that this message is taken up, with the result that people do the right thing (by following a just law) but for morally worse reasons than is ideal, by not also acting for the reasons that made the law just in the first place.[40]

Of course, you might disagree that when φing you ought to be guided by those moral reasons that count in favour of φing (at least in addition to any other reasons that you might use). But, whilst controversial, it is not an uncommon view. Some think that you are justified in φing if and only if φing is the right thing to do *and* you acted for the reasons that made it so.[41] We need not go that far to reach the problem that I am seeking to establish. All I need is for it to be the case that it is morally *better* for someone to do the right thing for the right reasons than for them to do the right thing for reasons that are *not as good*. They need not even be bad reasons. Not murdering someone because the law told them not to, for example, is not the *worst* motivation someone could have,[42] but it is plausible to think that there are better ones. Unless you think that conformity is *all* that matters when it

[40] It is of course an empirical question as to whether and to what extent people in any given legal system would buy into the law's implicit message that, by giving them a conclusive reason to φ, they need not look elsewhere for other reasons to be guided by. I am only claiming that the law necessarily introduces a *risk* of this problem arising.

[41] Eg John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) ch 5.

[42] Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 10) 344.

comes to doing the right thing—a view that is not borne out in how people behave in ordinary life—then my claim should be acceptable.

Nor is the scope of this moral danger a narrow one. You might think that the danger only arises for those who are not assiduously attentive to moral reasons in the first place, those being the people the law is most able to guide. These people are not likely ever to want to murder someone, but nor are they likely ever to contribute to the wellbeing of others were the law not to create a taxation scheme. Is it only this group of people who will be guided into doing the right thing (contributing to others' wellbeing by paying taxes) but for morally less than ideal reasons (because the law told them to)?

Notwithstanding that a rather large group of people might plausibly be thought to fall into this category, the problem is more pervasive than that, and worryingly so. Imagine that the government constructed traffic lights without issuing any legal directives in relation to them. There was just a *recommendation* to stop at the red light when you decided on any given occasion that it was safer to do so. Imagine further a good person who does the right thing for the reasons that make it right. When driving, they are therefore attentive to all the moral reasons that they have to be careful and not to risk injury to others; when those moral reasons are in favour of stopping at the red light, they stop at the red light, acting for those reasons, and vice-versa. But even good people can make innocent mistakes. It does not matter how conscientious you are about responding to moral reasons, sometimes you may still injure someone. In such situations, it can be the case that by being normatively guided by a law that requires you to stop at the red light *no matter what*, you will lessen the risk of committing such innocent mistakes. Always stopping at a red traffic light, even when those pre-existing moral reasons to be careful would not require you to do so in that particular instance, can lead to you more often doing the right thing overall than you would

otherwise. When this is the case, what Raz calls the 'normal justification thesis' is satisfied, and the law's directive really is a conclusive reason for you.[43]

The good person, then, can be faced with a situation in which it is no longer necessary to act for those pre-existing moral reasons that justify stopping at the red light. The fact that being normatively guided by the legal directive to stop at the red light makes you more likely to conform to those moral reasons than you would otherwise is itself an independently sufficient reason to stop at the red light, and one that defeats the pre-existing moral reasons that otherwise justified driving through such lights.

Of course, the good person can still act for the reason that the law told them to stop *and* for the reason that in doing so they are more likely to conform to their pre-existing moral reasons. The fact that the normal justification thesis is satisfied is a reason that you are permitted to act for. The problem is that acting for any reason other than for the justified legal directive is rationally unnecessary. When the legal directive really does give you an independently sufficient reason to φ, it renders all other reasons rationally redundant, including the reason given by the normal justification thesis.[44] That is the point: the law's value here is as a heuristic, allowing us to bypass moral reasoning by relying on the law's normative guidance in its place.[45]

Whilst, therefore, there will in any given situation be a moral reason that justifies following the legal directive that you are permitted to act for, namely the reason given by

[43] ibid 214.

[44] Rationally redundant in the sense that you do not need to *use* it as a reason in order rationally to conclude that you ought to φ; it is not redundant to the extent that the normal justification thesis being satisfied is still necessary to *ground* the law's authority over you.

[45] The point, Raz says, is to rely 'on [the directives] rather than on our own independent judgment of the merits of each case to which they apply': Raz, *Practical Reason and Norms* (n 15) 193.

satisfaction of the normal justification thesis, there is the risk that even the good person will φ solely because the law told them to. It would be overly intellectual to think that large numbers of people would regularly act for the additional reason that the normal justification thesis is satisfied. Thus, whereas before the law came along the good person was forced to confront moral reasons in all their complexity, it does not seem so farfetched to think that, comforted by the heuristic value of justified laws, they will shy away from this complexity and form a comfortable habit of being normatively guided by the law alone. Not only is this a morally worse motivation than acting for the further reason that the normal justification thesis is satisfied, it is also dangerous. For the normal justification thesis will not always be satisfied. That the law's attempt to normatively guide potentially encourages people not to act for the reasons that justify that normative guidance therefore risks creating a situation in which people become too trusting of the law, forgetting that legal directives must always pass a test of justification before it is permissible to be normatively guided by them at the expense of pre-existing moral reasons.

That said, I do not want to overstate the moral problem. It is by no means the worst thing in the world for someone to accept that the law's directive is an independently sufficient reason for stopping at a red light, and thereby cease to rely on any other reasons, when it is actually justifiable to do so. Nor am I saying that this problem undermines the law's authority when it has it. Nonetheless, the normative guidance provided by even those laws that are morally justified is not an unequivocally benevolent force. It has a potentially subtle yet corrupting influence, even on those who would otherwise do the right thing for the right reasons.

Whilst there might be a number of necessary connections between the law and morality born of legal normativity's dignity- and autonomy-respecting features, we need

to be alive to those connections with a negative valence too. Thus, Gardner might be right to observe that there is 'only value and our engagement with it',[46] and that the law's authoritative guidance can help us to navigate the 'struggle with the doubts and disagreements' that are born of the complexity and plurality of that value.[47] I have tried to show here, however, that even when the law does successfully fulfil that role of facilitating our engagement with value, some value is nevertheless potentially lost by rendering all other moral reasons rationally redundant: namely, the value in acting for those reasons that made the law just in the first place.

3. *Conclusion*

This chapter built upon the account of normative guidance provided in the previous chapter to give an account of what it is to act for, and thereby comply with, a reason. In doing so, we began to see that there are some moral costs to the claim that the law exists to normatively guide us. Specifically, this chapter argued that the law's normative guidance risks getting people to act for morally worse reasons than they would otherwise, even where the law is morally justified.

With an account of what it is to act for, and thereby comply with, a reason we saw that for something to succeed at normatively guiding action that something must succeed at securing people's compliance. If the law exists to guide as a supreme normative authority, however, then the law's guidance depends on a certain type of compliance, for to attempt to guide people as a supreme normative authority is to give them independently sufficient reasons to do as directed. It is plausible to think, however, that we ought to act

[46] Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 11.

[47] ibid 14.

for those moral reasons that make doing as the law requires the right thing to do, at least in addition to any other reasons that we might act for. By presenting people with an alternative set of independently sufficient reasons, the law risks getting people to act for morally worse reasons than they would otherwise, even where the law is morally justified.

Whilst I acknowledged towards the end of the chapter that this moral danger may not seem that significant, we will see in the next chapter that the moral danger is in fact more serious than it at first appears. Using my account of what it is to be guided by the law as a supreme normative authority, we will see that the relationship of guidance between the law and the person who accepts that authority is nothing more than an exploitation of that person's structural rationality, in such a way that bypasses the need for that person to engage in any substantive practical reasoning. This, we will see, elevates the moral danger identified here into something sufficiently serious to provide good reasons to reject both the central feature claim—according to which law that fails to normatively guide is in one way deficient qua law—and the priority claim—according to which the law's guidance is meant to take priority over any other means the law might pursue to secure your conformity with its directives.

3

Lean not unto Thine Own Understanding

Over the last two chapters, I have developed a significant account of normative guidance—that is, an account of the interaction that needs to take place between a person and the fact that they use as a reason in order to be normatively guided by that fact. In doing so, I focussed on the question of what it is that distinguishes relationships of normative guidance from relationships of non-normatively guided movement, which I called relationships of *automatic guidance*. This revealed that, despite the involvement of reasons, the law can sometimes exert a large degree of control over us in a manner that is at least analogous to automatic guidance, if not being an instance of automatic guidance itself. In particular, I raised the possibility that, were someone to have *faith* in the law, so that they came to form an intention to do whatever the law required them to do, the law would be able to exercise a level of control over the formation of that person's intentions that is at least analogous to a relationship of automatic guidance.

The purpose of this chapter is to develop this thought further, and to relate it to the moral danger inherent to the law's attempt to guide as a supreme normative authority identified in the previous chapter. Starting with faith in God, I will show that, for the rational believer who accepts that God's directives are necessarily conclusive reasons for them, the relationship of guidance between God and that believer is one in which God is able to exploit the believer's *structural rationality* in such a way as to bypass the need for any substantive practical reasoning on the part of the believer. The result is that God is able to cause and control the formation of the rational believer's intentions to do as directed.

Whilst it might seem strange to think that the law guides the person who accepts its authority in the same way as God guides the person who has faith in them, I will argue that this is the case if the law necessarily aims to be a supreme normative authority. Whilst the analogy with faith is imperfect, by reconstructing John Gardner's idea of a leap of faith in the law, we will see that to be guided by the law as a supreme normative authority involves this same exploitation of your structural rationality. This, we will see, gives us good reasons to doubt both the *central feature claim*—according to which law that fails to normatively guide is in one way deficient qua law—and the *priority claim*—according to which the law's guidance is meant to take priority over any other means the law might pursue to secure your conformity with its directives. It is both undesirable and implausible, I will suggest, to think that the law is in one way deficient qua law for failing to exploit your structural rationality in this way, or that the law ought to take steps to ensure that you conform to its directives by being guided in this way, so that we should reject both the central feature claim and the priority claim.

1. *Rationality and Faith*

To have faith in something is, to some extent, to relinquish your rationality. By this I do not mean that having faith is irrational. Rather, I mean that to have faith in something you must to some extent cease relying on your own judgment about the reasons for or against doing, believing, or feeling whatever it is that your faith requires.

Take faith in God. If every day you question the existence of God, weighing up the reasons for and against believing in their existence, your constant doubt throws into question the strength of your faith. That does not mean that doubt is incompatible with faith; indeed, doubt is often seen as essential to faith. It is plausible to think, however, that doubt is only supposed to manifest itself at crucial junctures, when faced with hard choices

or crises. In these moments, you may reconsider the reasons you have *for having faith*—should you continue to live your life according to this set of beliefs you have subscribed to or should you abandon them? When opting for the former, you once again take a leap of faith.

A person's religious journey, then, could contain many leaps of faith, prior to which the reasons for and against believing in God are carefully re-examined. We are all familiar with the idea that some kinds of events might lead to such renewed leaps of faith: the death of a loved one, natural disasters, or simply the exposure to new ideas at various stages in your life. This is how doubt can strengthen faith, for a faith affirmed is a faith tempered by newly tested conviction.

Faith does not require you to relinquish your rationality wholesale, then. Every so often a significant event will lead to a re-examination of the reasons for and against having it. Outside of such moments, however, in its day-to-day manifestations, faith requires you to trust that this is the right path to take. If every time you came to observe some regular religious ritual you weighed the reasons for and against observing it, you could not be said to have faith that this is the right thing to do; rather, you would be relying on, and trusting, your own judgment. Think of the service that the law is said by Raz to provide you with via its authority: getting you to conform to reasons better than you would otherwise by allowing yourself to be guided by the law's directives and not by the first-order reasons upon which they depend.[1] That service is otiose if, rather than allowing the law to pre-empt your decision, you examine all of the first-order reasons for yourself. So too with God.

[1] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 214–15.

What need have you of God's guidance if you refuse to 'trust in the Lord with all thine heart' and instead 'lean … unto thine own understanding'?[2]

Faith can therefore be said to require you to relinquish your *first-order rationality*. It is open to you, on occasion, to re-examine the reasons you had for having faith in the first place. Once you are in, however—once you take that leap of faith—you ought not regularly to resort to your own faith-independent first-order reasoning about whether you should act, believe, or feel as your faith requires you to. The upshot of relinquishing your first-order rationality in this way is that the relationship of guidance between God and the person who has faith in them is one in which God is able to exploit the structural rationality of the believer, in a way that bypasses the need for the believer to engage in any substantive practical reasoning.

God's ability to exploit the structural rationality of the person who has faith in them begins with the kind of reasons that a God would provide us with. At least according to Raz, the protected reasons that an authority provides you with by directing you to perform some action φ exclude only those reasons against φing *that the authority considered*. If an authority issued a directive against lying, but in doing so had failed to consider a situation in which lying might save someone's life, then the directive does not exclude those reasons in favour of lying from consideration. Only dependent reasons—that is those reasons that

[2] 'Proverbs 3 - King James Version (KJV)' (*Biblica*) <www.biblica.com/bible/kjv/proverbs/3/> accessed 1 June 2021. Whilst this shows that legal authority and religious authority are in this way similar, I am not necessarily suggesting that faith in religion must also be justified in the same way. It could be that whilst religious and legal authority operate in certain similar ways, the reasons that ultimately ground their authority over us may be of a fundamentally different nature (without prejudicing the question of whether we need to make faith in God rational in the first place).

the directive is supposed to get you to conform to better than you would otherwise—are excluded.[3]

It is plausible to think, however, that when an omniscient being such as God directs you to φ, God's directive excludes *all* conflicting reasons against φing. An authority is usually limited by time, resources, and knowledge, and can only issue directives that approximate the complexity of life,[4] potentially failing to consider many of the relevant reasons that bear on an issue. The most we can usually hope for is that the authority will do a *better* job than us at figuring out what reasons require, which potentially still leaves a great many relevant reasons left unconsidered or improperly accounted for. But God would not be bound by such earthly constraints and, with a complete understanding of every fact that bears (or could possibly bear) on the situation, could issue a directive that takes into account all relevant reasons. God's directives would not therefore just be protected reasons: they would be conclusive reasons. That is, the fact of God directing you to φ would, by necessity, either outweigh or exclude any existing different fact that counted in favour of not φing, as any relevant fact would be a dependent reason of the directive.

Still, we conclude that facts are conclusive reasons to φ all the time. The catch is that usually we conclude that some fact is a conclusive reason to φ *after* having taken it into account. When you have taken a leap of faith, however, you have already bought into the idea that God's directives are conclusive reasons. If you have relinquished some of your first-order rationality and placed your trust in God then you are not supposed to 'second-

[3] Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 1) 214.

[4] Aristotle, *Nichomachean Ethics* (WD Ross tr, Oxford University Press 2009) 98–99.

guess the wisdom or advisability' of God's directives.[5] This includes doubting (outside of exceptional cases at least) whether God really did correctly take into account all the dependent reasons when directing you to φ.

There are two ways, then, in which some fact p could feature as a conclusive reason to φ in your practical reasoning. First, you might initially just believe that p counts in favour of φing as an ordinary first-order reason to be balanced against all those reasons against φing and discover, after taking p into account, that p defeats those conflicting reasons. As we saw in the previous chapter, this would be to use and thereby be normatively guided by p qua ordinary first-order reason, for the fact that p ended up being a conclusive reason to φ is just a contingent conclusion of your practical reasoning. We also saw in the previous chapter, however, that you can use p qua conclusive reason. This is where you *already* believe that p is a conclusive reason to φ *before* considering other competing reasons, so that your practical reasoning simply involves acknowledging what you already believed to be the case, namely that there is no currently existing different fact p′ that outweighs or excludes p.

How, then, does this open the door for an exploitation of your structural rationality, in a way that bypasses the need for any substantive practical reasoning? It will help to track the different stages of mental processes that occur in the mind of the person being guided here.

The first stage is the leap of faith, that is forming the belief that God's directives are necessarily conclusive reasons to do as directed. This amounts to forming a belief in the fact that you ought all things considered to do as God directs. What reasons you used

[5] Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota Law Review 1003, 1018 (emphasis added), talking about authority in general.

in forming this belief do not matter here. Perhaps following God's directives has turned out well for you in the past. You can use this fact as a reason to believe that God's claim to supreme normative authority is justified. Notice that any relationship of normative guidance at this stage is between you and those facts that you use as reasons to believe that God's directives are necessarily conclusive reasons to do as directed, rather than between you and God themselves.

The second stage is when God communicates to you a directive to φ and you subsequently come to form the belief that God requires you to φ.

The third stage is your identification of God's directive to φ as a conclusive reason to do so. Recall that you can derive reasons to φ from some fact N that requires you to do some other thing ψ in the following way:

(1) you believe that N requires you to ψ;

(2) you believe that were you not to φ you would not be complying with N itself; where

(3) complying with N itself requires a belief that p is a reason to φ because N required you to ψ.

You have a pre-existing belief in the fact that you ought all things considered to do as God directs (ψ). You can use this fact to identify the fact that God directed you to φ as a conclusive reason to φ. You can believe that the fact requires you all things considered to do as God directs. You can believe that were you not to φ you would not be complying with this requirement, where complying requires a belief that the fact that φing is what God requires is a conclusive reason to φ because you are required all things considered to do as God directs.

Stage four is when you use God's directive as a reason to φ to conclude that you ought all things considered to φ in your situation. You use some fact p as a reason to φ if and only if:

(1) you have a belief in respect of the fact that p is a reason to φ; and

(2) that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ.

Condition (1) is satisfied through stage three, when you used the fact that you ought all things considered to do as God directs to identify God's directive as a reason to φ. You need now only take that reason into account in the ordinary process of practical reasoning and form a belief about whether to φ in your situation. Remember, however, that you are taking God's directive into account *qua conclusive reason*. That is, you already believe that God's directive is a conclusive reason to φ before taking into account any competing reasons. As we saw in the previous chapter, you would therefore be *irrational* if you failed to conclude that you ought all things considered to φ having used God's directive as a conclusive reason to φ.[6] The rational person who arrives at stage four, then, *will necessarily* form the belief that they ought all things considered to φ.

We then finally arrive at stage five, where you form the intention to φ. You already believe, from stage four, that you ought all things considered to φ. According to the rational requirement of *enkrasia*, the person who believes that they ought to φ must rationally form an intention to φ.[7] Rational requirements operate at the level of what we might call our

[6] See 'The Price of Normativity', 90–91.

[7] John Broome, *Rationality Through Reasoning* (Wiley-Blackwell 2013) ch 16. Or, if we take the requirement of enkrasia to have a *wide* rather than a *narrow* scope, you must either (a) form an intention to φ; or (b) cease to have the belief that you ought to φ: John Broome, 'Wide or Narrow Scope?' (2007) 116 Mind 359. The wide-scope version of enkrasia allows for the rational person to return to stage one, to re-evaluate the reasons they have for having faith and to abandon their

structural rationality.[8] Structural rationality concerns not what we have reason to do—the domain of *substantive rationality*—but rather what relations must obtain between our attitudes and beliefs in order to be consistent with oneself.[9] The person who believes that they ought all things considered to φ but who fails to form an intention to φ is structurally irrational because their failure to form an intention is inconsistent with their pre-existing belief, never mind whether they actually have sufficient reasons to φ.

The five stages of mental processes that occur in the mind of the person being guided by God into forming an intention to φ, then, can be summarised as follows:

(1) you form a belief in a directive that requires you all things considered to do as God directs;

(2) God communicates to you that they require you to φ;

(3) you use the fact that you are required all things considered to do as God directs to identify the fact that God requires you to φ as a conclusive reason to do so;

(4) you use the fact that God requires you to φ as a conclusive reason to form the belief that you ought all things considered to φ in your situation;

(5) you form the intention to φ.

belief in fact that you ought all things considered to do as God requires. The relationship between God and the person who returns to stage one is not the relationship that I am interested in here, however. I am interested in how God (or the law) guides the rational person who *accepts* the supreme normative authority of God (or the law). Whether we adopt the wide- or narrow-scope version of enkrasia therefore makes no difference for my purposes, given that my hypothetical rational person will not return to stage one and therefore does not have the option of ceasing to have the belief that they ought all things considered to do as God (or the law) requires.

[8] Thomas Scanlon, 'Structural Irrationality' in Brennan Geoffrey (ed), *Common Minds: Themes from the Philosophy of Philip Pettit* (Clarendon Press 2007). Cf 'procedural rationality' in Derek Parfit, *On What Matters* (Oxford University Press 2011) vol 1, 33–37, 62.

[9] Scanlon, 'Structural Irrationality' (n 8) 84–85.

Notice that a number of these stages can be described as relationships of *automatic* guidance between you and God. We saw in Chapter 1, for example, how an act of communication can amount to a relationship of automatic guidance. I said that Y automatically guides X at t_1 if and only if:

(1) Y causes X to move in some way at t_1 by something Y did at t_0; and

(2) Y controls X's movement at t_1; where

(3) Y has control over X's movement at t_1 if Y could have intervened to alter the course of X's movement at t_1.

We saw that it is not only exterior movements that can be automatically guided but also movements of mind.[10] When God communicates to you that you ought to φ, God causes certain movements of mind so that you come to believe that God requires you to φ. God would have control over the formation of this belief, for God could at any given moment belay or vary the directive, thereby altering your belief about what God requires. One way in which to describe the relationship of guidance between you and God at this second stage is therefore as a relationship of automatic guidance.

We might then say the same of stage five, when you form the intention to do as God directs. One way to describe this stage is to say that, through God's ability to automatically guide the formation of your belief that God requires you to φ, God is able to exploit your structural rationality and thereby automatically guide the formation of your intention to φ. We have already seen that the rational person will necessarily form the belief that they ought all things considered to φ at stage four, and subsequently will necessarily form the intention to φ at stage five, given the operation of structural rationality. Because God can

[10] See 'Cruise Missiles and Cookbooks', 61–62.

cause and control your belief as to what God requires, and because the rational person is guaranteed ultimately to form the intention to do whatever God requires, God can also cause and control what intentions the rational person will form.

Think of the binding of Isaac.[11] God issues a directive to Abraham: sacrifice your son. Abraham, having such faith in God, binds his son to an altar, dagger in hand. At the last moment, however, God intervenes by belaying the directive, and so Abraham sacrifices a ram in his son's place. Scripture describes this as a test of Abraham's faith, which he passes with flying colours.[12] There is no mention of an Abraham conflicted, weighing the reasons for and against sacrificing his son; God directs Abraham to do something, and Abraham forms the intention to do it. When God, at the last moment, directed Abraham not to kill his son, he formed the contrary intention. Given his absolute faith, we might describe the overall relationship of guidance between God and Abraham as one in which God is automatically guiding Abraham's intentions.

Now, I acknowledged in Chapter 1 that, depending on whether you take a broader or narrower view of what it is to engage in practical reasoning, you might consider such relationships of automatic guidance as just a kind of normative guidance. The distinction between automatic and normative guidance is only a strong one if we adopt one of the narrower views of practical reasoning, requiring for example conscious deliberation from a conscious belief that p is a reason to φ to the conclusion that it is a genuinely good thing to φ.[13] This will preclude the kind of automatic belief formation displayed by Abraham

[11] Genesis 22: 'Genesis 22 - King James Version (KJV)' (*Biblica*) <www.biblica.com/bible/kjv/genesis/22/> accessed 1 June 2021.

[12] ibid; Hebrews 11: 'Hebrews 11 - King James Version (KJV)' (*Biblica*) <www.biblica.com/bible/kjv/hebrews/11/> accessed 1 June 2021.

[13] See 'Cruise Missiles and Cookbooks', 65–66.

from being an instance of normative guidance, in so far as Abraham does not engage in conscious deliberation about what the balance of reasons requires. But if we adopt a broader view of practical reasoning, allowing for example that practical reasoning can involve latent cognitive mental states that only play an inferential role in your decision to φ, then we might still describe the relationship of automatic guidance between God and the believer as also being a kind of normative guidance.

The crucial point, however, is not whether the relationship of guidance between God and the believer can be described as both a relationship of automatic guidance and normative guidance, or solely one or the other. The crucial point is that, however we describe that relationship of guidance, it involves no *substantive practical reasoning*. Remember that, when using God's directive qua conclusive reason, the rational person will necessarily form the belief that they ought all things considered to φ. This is again structural rationality at work. It is internally inconsistent to believe that p is a conclusive reason to φ and not subsequently to form the belief that you ought all things considered to φ. What practical reasoning occurs is little more than a rubber-stamping exercise; there is no room for rational deliberation about the matter. To the extent that this is a relationship of normative guidance, it is normative guidance in a *thin* sense only, given that practical reasoning paradigmatically involves grappling with the question of how to *relate* different facts to each other in order to answer a normative question. When you already believe that p is a conclusive reason to φ before taking it into account, the question of how p relates to other facts is moot. Whilst describing this relationship as one of automatic guidance nicely highlights the absence of substantive practical reasoning, it is not essential to the point. Those who are still willing to describe this relationship of guidance as normative must still acknowledge that the lack of substantive practical reasoning is a fundamental difference to the paradigmatic case.

This may all seem a rather extreme case. Whilst the law and religion bear a number of similarities, you might think that the analogy runs out when we get to guidance. Being guided by God involves having faith in their divine authority, such faith providing a justification for following religious directives even where such directives would otherwise be contrary to reason. Some even think that faith allows us to drop the 'otherwise' and transcend reason itself.[14] When it comes to being guided by the law, however, it seems plausible to think that we need more secular, instrumental, justifications for accepting its authority. From here, you might think that, rather than accepting the law's authority wholesale, we should approach legal directives in a piecemeal fashion, asking each time whether there are sufficient reasons to be guided by them. John Gardner, however, has suggested that even instrumental reasons might justify having something like faith in the law as a whole.[15] Whilst this analogy is imperfect, by reconstructing Gardner's argument we will be able to see that the person who accepts that the law is a supreme normative authority for them must believe in advance that legal directives are necessarily conclusive reasons, in the same way as the believer who takes a leap of faith in God. The result is that the relationship of guidance between the law and the person who accepts the full extent of the law's authority is similarly one in which the law is able to exploit this person's structural rationality, in a way that bypasses the need to engage in any substantive practical reasoning.

2. *The Faith in Authority*

In *Law as a Leap of Faith*, Gardner suggests that it can be rational to embrace the law's authority and accept that it can change the moral valence of a decision by making right

[14] Søren Kierkegaard, *Fear and Trembling* (Hong & Hong tr, Princeton 1983), quoted in John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) 3.

[15] Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 14).

what would otherwise be wrong.[16] This leap of faith is made possible by the *grundnorm*, or the ultimate rule of a legal system from which all legal directives derive their validity. This ultimate rule, Gardner says, is valid not because of its source but because of its merits.[17] Because of this, the grundnorm can perform the role of a 'juristic God', bestowing all legal directives derived from it with merit.[18] That is how, by making a leap of faith in the grundnorm, we can accept that all legal directives are reasons for us, despite the fact that these legal directives are valid only because they were made in accordance with the grundnorm and otherwise have no merit just in virtue of being legal.

But why take this leap of faith? We have seen that the authority the law is meant to have is extreme. The law, Raz says, necessarily claims to be the *supreme* normative system of human behaviour: the law claims the ability to regulate any sphere of human activity and, when it does so regulate, to take precedence over any other normative system.[19] We have already seen that this view is best understood as portraying the law as aiming to provide *conclusive* reasons for action.[20] Yet, despite the enormity of taking a leap of faith and believing that the law's reasons really are such conclusive reasons, Gardner thinks that such a leap can be justified by instrumental reasons alone. It could even, Gardner says, be justified by something as simple as the fact that the law has served you well in the past.[21]

[16] ibid 10.

[17] ibid.

[18] ibid.

[19] Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 151–54.

[20] See 'Introduction', 23–24.

[21] Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 14) 12.

How so? Gardner does not go into detail. This leap of faith can, however, be made rational. We just need first to disambiguate the various leaps of faith involved.

To understand the leap of faith involved in accepting—through the grundnorm—the law's authority in *general*, we need to understand the leap of faith involved in accepting the authority of any legal directive in *particular*. According to Raz's normal justification thesis, we should treat a particular legal directive as authoritative when by following it we would better conform to reason than we would otherwise.[22] The trouble is that, if you are in need of some guidance, you may well not know what better overall conformity with reason looks like. When this is the case, you instead need to have *faith* that the normal justification thesis is satisfied when you treat any directive as authoritative.

Take the example of a doctor. When you are unwell, the doctor may prescribe you a certain medicine. Should you follow the doctor's directive to take this medicine? If you tried, without medical training, to diagnose yourself and pick the correct drug from the countless available, your chances of conforming to reason are unlikely to be much better than just randomly selecting a drug to take. Hopefully, the doctor's chance of picking the right drug is better than that; when it is better than that, then the normal justification thesis is satisfied. But herein is precisely the problem: you know nothing about medicine. You therefore cannot access the medicine-based reasons that the doctor's directive needs to be better at conforming to, with the result that you cannot *know* whether the doctor's directive satisfies the normal justification thesis. You must, instead, submit to the doctor's authority with a degree of what Raz calls 'reasoned trust'.[23]

[22] Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 1) 214.

[23] Raz, *Practical Reason and Norms* (n 19) 193.

In what sense can your faith in the doctor be said to be ‘reasoned’? In the sense that there are reasons for having it. You might know that in your country doctors must undergo many years of training before they are qualified to prescribe medicine. Or this may just be your family doctor who has successfully treated you before. All of these can be reasons to have faith that the normal justification thesis is satisfied in respect of the doctor’s directive to take this medicine. But notice that these are not the medicine-based reasons better conformity with which satisfies the normal justification thesis. The fact that the doctor has treated you well in the past is a reason to *believe* that there are sufficient instrumental reasons to ground the doctor’s authority over you; that is, they are reasons to believe that the doctor’s directive better conforms to medicine-based reasons than you would yourself. You cannot, however, know whether this is really the case, for to know that you would have to understand the medicine-based reasons themselves. It is precisely because of your lack of understanding that you have need of the doctor.

You might think that so far this does little to help make Gardner’s leap of faith seem rational. The doctor, you might think, is not like the law. What reasons would be strong enough to justify accepting the law’s supreme normative authority? We can now return to the grundnorm. The reasons for having faith in the grundnorm are those reasons for having faith that the law in general satisfies the normal justification thesis. This is how something as simple as the fact that the law has served you well in the past could be a reason to put your faith in it in the future. The fact that following legal directives in the past has often turned out well for you is a reason to believe that whatever *process* produced those legal directives is the kind that produces directives which satisfy the normal justification thesis. That process being, ultimately, that those directives were made in accordance with the grundnorm.

To see this, consider the following more complex picture. You live in what you consider to be a well-developed and successful country in which you are sufficiently prosperous to live a good life. You believe that, for the most part, this has been the case since the founding of your country several hundred years ago. You buy into the story that this success is partly owed to how the constitution of your country was originally drawn up: establishing a democratic process of law-creation that enshrines a certain set of values as aims and constraints on that process. Now, some legal directive comes along requiring you to φ. The issue is too complex for you to understand the reasons for and against φing. You therefore cannot know whether the normal justification thesis is satisfied in respect of this particular legal directive. Should you take a leap of faith and φ? Well, this legal directive was made in accordance with the grundnorm, namely the founding constitution of your country. The fact that legal directives made in accordance with this grundnorm have served you well in the past is a reason to believe that the democratic process it mandates tends to produce directives which satisfy the normal justification thesis. So, you first have faith that the grundnorm has merit, thereby allowing you to have faith that this particular legal directive made in accordance with it has merit too. The merit is their ability to satisfy the normal justification thesis.

The key to making Gardner's leap of faith rational is therefore to see it as a conjunction of *two* leaps of faith. Often, accepting the authority of a legal directive involves a leap of faith, for if you need guidance from the law often you will not have a sufficient understanding of the reasons better conformity with which satisfies the normal justification thesis. You must instead rely on a separate set of reasons, namely reasons to believe that the directive will better conform to those first-order reasons than you will. In the case of the law, the reasons we might have for making that leap of faith in respect of any given legal directive can be provided by the merit bestowed on those directives by the grundnorm.

And we can have reasons to believe that the grundnorm is of sufficient merit to make the process by which legal directives derive their validity from it the kind of process that produces directives which satisfy the normal justification thesis. By making the first, general, leap of faith we make all the subsequent, particular, leaps of faith possible.

Now, I take no position here on whether there could ever be *sufficient* reasons to have faith in the law in this way. Nor is it clear that 'faith' is the appropriate term, if you think that what it is to have faith is distinct from what it is simply to have trust. The analogy to faith is also imperfect for another reason, namely that there are instances in which you *can* know what reasons require you to do and yet the normal justification thesis is still satisfied, so that you can sometimes have knowledge that the law has authority over you. Take the example of a legal directive to pay a certain percentage of your income in tax.[24] If reasons of fairness endorse contributing excess wealth for the benefit of the community through whatever taxation scheme the law creates, then perfect knowledge of these reasons will not prevent the law from being an authority over you, for the only way of conforming to these reasons is to treat the legal directive as authoritative. Crucially, however, in these cases you will still believe in advance that the legal directive has authority over you. And it is this feature of my reconstruction of Gardner's leap of faith that I am interested in here, rather than the question of whether it can really be said to be 'faith' or indeed whether it can ever be justified. Rather, the point is that, if someone is to be guided by the law as a supreme normative authority as the Razian picture envisages, then that person must believe in advance that legal directives will have authority over them.

And one similarity that *does* hold between God and the law is that they are both meant to be supreme normative authorities. Thus, like God, the law's directives are meant

[24] I am grateful to Timothy Endicott for this example.

to be conclusive reasons to do as directed. It follows that when we take a leap of faith in the law, and accept the full extent of its authority, we need to believe that legal directives are conclusive reasons to φ *before* taking them into account in any practical reasoning. Not necessarily because the law normatively requires us to,[25] so that legal directives are tests of faith analogous to the binding of Isaac. Rather, it is that in order to be guided by the law as a supreme normative authority we need to believe that legal directives are necessarily conclusive reasons.[26]

It follows that, as with faith in God, to accept the law's supreme normative authority is to enter into a relationship of guidance with the law which involves nothing more than an exploitation of your structural rationality. Return again to those five stages of mental processes that occur in the mind of the person being guided into forming an intention to φ, but this time replacing God for the law:

(1) you form a belief in the fact that you are required all things considered to do as the law directs;
(2) the law communicates to you that it requires you to φ;
(3) you use the fact that you are required all things considered to do as the law directs to identify the fact that the law requires you to φ as a conclusive reason to do so;
(4) you use the fact that the law requires you to φ as a conclusive reason to form the belief that you ought all things considered to φ;
(5) you form the intention to φ.

[25] Although I suggested that it is not as implausible to think that it does so than might first appear: see 'The Price of Normativity', 95–96.

[26] In the terminology of the previous chapter, the law functionally requires conclusive compliance.

The above reconstruction of Gardner's leap of faith is meant to show that someone can rationally arrive at stage (1). The important point, however, is not whether it is ever justified to arrive at stage (1) but that accepting the law's supreme normative authority *entails* arriving at stage (1). In other words, the above is an account of what it is to be guided by the law as a supreme normative authority. And we can see that, as with the person who has faith in God, the rational person who accepts the law's supreme normative authority will necessarily arrive at stage (5), so that the relationship of normative guidance between that person and the law at stage (4) is nothing more than an exploitation of your structural rationality.

As above, we could therefore say that the law automatically guides the formation of the rational person's intention to φ and, depending on whether you adopt a broader or narrower view of what counts as practical reasoning, that this is a more accurate description of the overall relationship of guidance between the law and the rational person who accepts its authority given the absence of substantive practical reasoning.

Granted, the law is not omniscient or omnipotent in the way that God might be. The law, therefore, could not have as much control as God over the formation of our mental states so that it could intervene to alter them at any given moment. The law could not ordinarily do what God did with Abraham and communicate some different directive at the last second before the performance of the originally required action. I do not think, however, that the law's inability to be in continuous control over the formation of our intentions is much of an obstacle to the idea that it is able sometimes to automatically guide the formation of those intentions. Most relationships of automatic guidance are in reality transient ones. I do not have control over the movements of my hands whilst I sleep, for example. Every night the relationship of automatic guidance between my hands and I

therefore comes to an end. That does not detract, however, from the significant influence that I have over their movements via a *series* of relationships of automatic guidance that exist across time. Whilst the relationship of automatic guidance between the law and a person's mental states may often be broken, therefore, that does not mean the influence of a series of such relationships across time is not significant. Even if the law was only rarely in a position to change our beliefs about what it requires of us by issuing a new directive, just one instance of automatic guidance will cause someone who has taken that leap of faith to form the intention to do as the law requires in every situation to which the legal directive applies going forward.

If we want to say that the law automatically guides the formation of the rational person's intention to φ in such circumstances, however, then we now need to deal with a potential problem that I noted in Chapter 1: the equivocation over what we mean by 'the law'. We are normatively guided by those facts that we use as reasons. When we talk of the law as normatively guiding, then, we are referring to those legal facts that we use as reasons—that is, those facts that are legal reasons. In this sense, 'the law' is an institutional normative system of reason-giving facts.[27] We cannot, however, be automatically guided by facts, for facts are not the kind of thing that are capable of controlling us. When we talk of the law as automatically guiding us, then, it seems more apt to think of the law as a system which also includes legal officials who act in its name.

If, therefore, we wanted to adopt the narrower view of practical reasoning and claim that the law automatically guides the formation of the rational person's intention to φ when that person has faith in the law's supreme authority *rather* than normatively guides them, the potential objection is that such a claim equivocates between these different

[27] Raz, *Practical Reason and Norms* (n 19) ch 5.

understandings of the law. Those who suggest that the law's attempt to guide is best characterised as normative, the critic might say, are only concerned with the law as an institutional normative system of reason-giving facts. Such a system of facts could not automatically guide, and so the overall relationship of guidance between the law *so understood* and the person who accepts its supreme normative authority cannot be one of automatic guidance. Such a critic, however, may well be guilty of the very same equivocation. For those who think, like Raz, of the law as an institutional normative system of reason-giving facts also see the law as making *claims* for itself, such as the claim to supreme normative authority.[28] Facts cannot claim things any more than they can exercise control in the manner necessary to automatically guide. Rather, if and to the extent that the law makes claims it makes them through legal officials who claim on the law's behalf.[29] Those who think that the law necessarily claims to normatively guide as a supreme normative authority, then, are already helping themselves to a broader understanding of the law than *just* a system of reason-giving facts. In just the same way that the law makes claims for itself through legal officials acting in its name, then, the law can automatically guide things in the world through legal officials.

Of course, not everyone thinks that the law is the kind of thing that is capable of making claims for itself. Nonetheless, I think it is necessary to fully understand the nature of law that we take a sufficiently holistic understanding of the law to incorporate that which legal officials do and say in its name. To narrowly construe the law as *just* being that institutional normative system of reason-giving facts will be at the expense of understanding those features of the law as a social practice. If and to the extent that the law

[28] Joseph Raz, 'Authority, Law, and Morality' (1985) 68 The Monist 295, 300, quoted in Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 14) 127.

[29] Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 14) ch 5.

is coercive, for example, it is coercive only through the threats made and enforced by legal officials.

As I have said previously, however, I do not intend to settle the debate between the broader and narrower views of practical reasoning—that is, I will ultimately remain neutral as to the question of whether practical reasoning requires conscious deliberation from a conscious belief that p is a reason to φ to the conclusion that it is a genuinely good thing to φ, or if it allows for latent cognitive mental states that play only an inferential role in your decision to φ. I will not, therefore, pursue the claim that the law is best understood as automatically guiding the formation of the rational person's intentions to φ when that person has faith in the law's supreme normative authority them further. Rather, as before, the important point is that, even if you are happy to call this relationship of guidance a kind of normative guidance, it is a relationship of normative guidance that involves no substantive practical reasoning, being instead an exploitation of your structural rationality.

3. *Law's Religion*

We can now deepen the analogy between faith in God and the law that we began with. As with the person who has faith in God, to be guided by the law as a supreme normative authority you must believe in advance that the law's directives are necessarily conclusive reasons to do as directed. It follows that any relationship of normative guidance between you and the law involves nothing more than an exploitation of your structural rationality, in a way that bypasses the need to engage in any substantive practical reasoning. This is a result of both God and the law directing us not to rely on our own understanding of a situation but to just do as directed, trusting that it is the right thing to do.

Of course, as much as the analogy might reveal similarities between the ways in which God and the law attempt to guide, it also reveals a number of differences. There is a sense in which you need a greater degree of faith to be guided by God. I have been largely ignoring the issue until now, but the existence of God is a live question in the way that the law's existence is not. To be guided by God therefore requires an additional leap of faith not present when being guided by the law. Once you take that leap of faith in God's existence, however, the tables are turned; once you accept the existence of God comparatively less faith is needed to be guided by their directives than the law's. For it may be that only the first, general, leap of faith in respect of God's existence and nature is necessary rather than any subsequent, particular, leaps of faith in respect of any directive issued by them. This is because if God is omniscient and omnipotent then it would necessarily follow that any directive issued by them would satisfy the normal justification thesis. In this way you could actually claim to *know* that God's directives satisfy the normal justification thesis on every occasion. Whilst you would still not necessarily understand the dependent reasons which made this the case, and in that sense would be taking a leap of faith on each occasion, the leap of faith is less extreme than is required in respect of particular legal directives.

The leap of faith in respect of God's directives is less extreme because the law is ultimately made by people, and only a fool would believe that legal institutions are omniscient and omnipotent.[30] Whereas if you believe in the existence of an omniscient and omnipotent God you do not have to worry so much about the risk that their directives will be a mistake, even when we take a leap of faith in the grundnorm we will know that the

[30] Unless, of course, you believe that your legal system is divine, legal directives simply being the human manifestation of God's directives. At this point, however, the law becomes co-extensive with religion.

law will make mistakes and sometimes direct us to do the wrong thing. The premise of our faith in the law is a belief that through the grundnorm the law will *overall* make fewer mistakes than us, and that any given directive to φ is not one such mistake. Such a relative benchmark still leaves plenty of scope for error, and in that sense the leap of faith we take in respect of particular legal directives is larger than the one we take in respect of God's directives. In the case of the latter, we have already taken the hardest step, that of accepting the existence and nature of God.

That said, taking a leap of faith might sometimes *strengthen* the case for the law's authority over us. It is plausible to think, for example, that I will more often do the right thing if I follow the law's directive always to stop at a red traffic light instead of deciding for myself each time whether it is safe to continue driving. Now, strictly speaking, I do not have to accept the entirety of the law's supreme normative authority to take advantage of the authoritative service this directive can provide. I could take a *partial* leap of faith, only trusting that the law took a certain range of reasons into account when issuing the directive, and thereby only treating the directive as a protected reason rather than a conclusive one. Perhaps I know that the law did not consider the fact that when you are in a dire emergency reason requires you to skip red lights. I can still treat the legal directive as a protected reason that excludes from consideration other first-order reasons, and in doing so improve the rate of my conformity with *them*; but I also know that, when it comes to dire emergencies, I will do better than the law, and so disregard the directive in such circumstances. Here I do not believe going into any situation that the legal directive is a conclusive reason, but I am still conforming to reason better than I would otherwise.

We will not always know, however, which reasons the law has taken into account when issuing a directive. And the more complex the issue, the less able we will be to tell

which are dependent reasons and which are not. Remember that if we are in need of the law's guidance in the first place we will often only have partial access to the first-order reasons that the directive is trying to get us better to conform to (because we lack the necessary training, resources, and so on to access them). There is therefore a risk that, were we only to take a partial leap of faith and try to determine for ourselves which reasons fall to be excluded by the directive, that we will commit the mistake of double-counting reasons.[31] If the law has already taken into account the fact that p as a reason against φing when directing me to φ, then if I weigh the directive in the balance against the fact that p, the normative weight of p will be counted twice. This may result in me making the wrong decision. The more complex the issue, therefore, the more reason we have to take the full leap of faith and accept that the law's directives are conclusive reasons, for it is only by excluding all reasons from consideration that we will remove the risk of mistakenly taking into account dependent reasons.[32]

As I have said, however, my main concern here is not with whether fully accepting the law's authority can be justified but rather in giving an account of what it is to be guided by the law *were you to accept* the full extent of its authority, justified or not. It is important that the above is an account of how people would be guided by the law were they to accept the full extent of the law's authority, no matter how unjustified or unrealistic such complete acceptance would be, because if the law is meant to be such a supreme normative authority, then the ideal world for the law is one in which it actually has such supreme normative

[31] Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 1) 215.

[32] Of course, it can cut both ways. As the traffic light example suggests, there are some situations where you are less likely to do the right thing overall by taking the full leap of faith than a partial leap of faith. These are likely to be situations in which the relevant reasons are particularly sensitive to individual circumstances that the law, as a system of general directives, is ill-placed to accurately approximate.

authority, and that people accept this. The point is that, in an ideal world for the law, in which its supreme normative authority is accepted, the overall relationship of guidance between the law and the rational person would be one in which the law exploits the structural rationality of that person, so that the law is able to cause and control the formation of that person's intentions to do as directed. This exacerbates the problems that I identified in the previous chapter, in a way that starts to give us good reasons to doubt both the *priority claim* and the *central feature claim*.

According to the priority claim, the law's attempt to normatively guide is meant to take priority over any other means the law might pursue to secure your conformity with its directives. Recall in the previous chapter the moral danger that I identified as being inherent to the law's attempt to normatively guide. By attempting to provide conclusive reasons for action, I argued, the law presents us with reasons which are meant to be independently sufficient alternatives to acting for those moral reasons which justified doing as directed in the first place. In doing so, the law risks getting people to act for morally worse reasons than they would otherwise. Specifically, I highlighted the risk that even the good person might accept that the law's directives are conclusive reasons to φ and thereby φ solely because the law directed them to. It would be overly intellectual to think that large numbers of people would regularly act for the additional reason that the normal justification thesis is satisfied. Thus, whereas before the law came along the good person was forced to confront moral reasons in all their complexity, it does not seem so farfetched, I suggested, to think that this person might become comforted by the heuristic value of justified laws and form a comfortable habit of being normatively guided by the law alone. This is dangerous for the normal justification thesis is not, of course, always satisfied. There is then the risk that the law's attempt to normatively guide potentially encourages people not

to act for the reasons that justify that normative guidance and become too trusting of the law.

If we reject the priority claim, and view the normative guidance that the law provides as just one method among many for securing our conformity, the moral danger disappears, for if we deny the priority claim it is perfectly compatible with the function of the law that we completely ignore the law's directives to φ and act solely for those moral reasons that justify φing, so long as we ultimately perform the action that the law requires us to perform. I admitted in the previous chapter, however, that the moral danger might not seem that severe; you might therefore doubt that the problem is therefore serious enough to warrant rejecting the priority claim. Now that we can see, however, that the relationship of guidance between the law and the rational person who accepts its authority is nothing more than an exploitation of that person's structural rationality, involving no substantive practical reasoning about whether they ought to do as the law directs, we can also see that the moral danger from the previous chapter is more significant than it might have appeared at first.

The moral danger is more significant because we can now see that the priority claim would entail that the law *prefers* to exploit the rational person's structural rationality by causing and controlling the formation of that person's intention to φ *over* any other means of securing that person's conformity. Indeed, it entails that it is the *primary function* of the law to do so.[33] Yet, bypassing someone's substantive practical reasoning and exploiting

[33] Hart said it is the law's 'primary function' to guide through setting standards of behaviour: HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 249; Raz describes the 'ideal citizen' as being, from the law's point of view, the person who treats the law as a system of norms rather than as a coercive force: Raz, *Practical Reason and Norms* (n 19) 171; Waldron says the law 'strains as far as possible' to normatively guide over other means of securing conformity: Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 The Cambridge Law Journal 200, 206.

their structural rationality will only increase the risk that this person will not also act for those moral reasons which justify being guided by the law in the first place and, subsequently, will increase the risk that a legal directive's failure to be justified on any given occasion will go unnoticed. It, in other words, comes close to depicting the law's primary function as securing something like the blind obedience that Raz was keen to avoid portraying the law as requiring.[34] If that were true, we should expect the law to take steps to make it the case that people are guided by the law in this way, on the assumption that if the law has a primary function it will take steps to achieve that function. It seems implausible to think that the law does in fact take such steps.

Denying the priority claim, on the other hand, avoids portraying the law as pursuing this morally dangerous function. For, whilst it would still be the case that the law necessarily attempts to provide conclusive reasons for action as a supreme normative authority, it would *not* be the primary function of the law to ensure that people actually *use* its directives as such conclusive reasons. Rather, it would be compatible with the function of the law for people to conform to legal directives using the legal directive as only an ordinary first-order reason to do so or, indeed, using only those reasons they had to φ independent of the law. As we saw in the previous chapter, this seems to be the position that Raz wishes to reach in more recent work, when he denies that the law requires our compliance rather than our conformity.[35] It is not, however, a position that can be reached without denying the priority claim if by 'requires' here we mean *functionally* requires.

We can turn now to the central feature claim, according to which law that fails to normatively guide is in one way deficient qua law. Within the central feature claim, I

[34] Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 1) 215.

[35] Raz, 'The Problem of Authority: Revisiting the Service Conception' (n 5) 1022.

distinguished between a stronger and a weaker version. According to the stronger version, law that does anything *other* than normatively guide is in one way deficient for failing to pursue its aims in the manner that law ought to aspire to.

We have seen that, if you adopt a narrower view of practical reasoning that requires conscious deliberation from a conscious belief that p is a reason to φ to the conclusion that it is a genuinely good thing to φ, then the relationship of guidance between the law and the rational person who accepts its supreme normative authority is one of automatic, not normative, guidance. Specifically, it is a relationship in which the law automatically guides the formation of the rational person's intentions to do as directed.

If you accept this claim, then we must deny the stronger version of the central feature claim. The ideal situation for the law, in which people accept its claim to supreme normative authority and are guided by the law in the way that it attempts to guide, cannot also be a situation in which the law is in one way deficient *qua law*. This would, however, be the implication of the stronger version of the central feature claim if you also adopt this narrower view of practical reasoning. If the relationship of guidance between the law and the rational person who accepts its supreme normative authority is one of automatic guidance, then the law is eliciting interactions with people that amount to something other than interactions of normative guidance.

Now, it is not clear whether Raz himself endorses the stronger version of the central feature claim. He says that:[36]

[36] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 93.

> *… 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. They may not be. But that marks a failure in the law. It shows that it is not functioning as it aspires to function.*

This suggests that in a world in which, say, the law secures everyone's conformity by subconscious manipulation, the law is in one way deficient qua law, for it has failed to function by means of normatively guiding people. This claim, however, is also compatible with the weaker version of the central feature claim, according to which so long as the law is in the business of normatively guiding it is in no way deficient for it to pursue other means of securing conformity with its directives.[37]

I also said that I wanted to remain neutral as to whether we should adopt a narrower view of practical reasoning or a broader one, so that I would avoid relying on the claim that the relationship of guidance between the law and the rational person who accepts its supreme normative authority is one of automatic guidance *rather than* a relationship of normative guidance. Remaining neutral in this way, is there any problem for the central feature claim here?

We have seen that, if we are willing to describe the relationship of guidance between the law and the rational person who accepts its supreme normative authority as a relationship of normative guidance, then that relationship of normative guidance is a thin one, involving nothing more than an exploitation of your structural rationality. For the proponent of the central feature claim to accept that the law is here not in one way deficient, they must accept this thin form of normative guidance as sufficient for the law to be

[37] Leslie Green, 'Escapable Law' (2019) 19 Jerusalem Review of Legal Studies 110, 122.

functioning in the appropriately law-like way. I am not sure that the proponent of the central feature claim will want to accept this. Raz says that it is the 'business' and 'essence' of the law to normatively guide.[38] If the provision of normative guidance is of such fundamental importance to the way in which the law ought to function, you would expect the nature of that normative guidance in the ideal world for the law to be the full-blooded kind that involves substantive practical reasoning, rather than the thin exploitation of structural rationality that I have identified here.

This is especially so as this fundamental status accorded to the provision of normative guidance is often said, as we saw in the previous chapter, to create necessary connections between the law and the promotion of dignity and autonomy. That the proper way of functioning as a legal system is by way of normatively guiding is said to dignify us as 'the bearers of reason and intelligence',[39] and to respect our autonomy by treating us as rational agents capable of planning our lives.[40] To the extent that normative guidance promotes these values, it is not clear that normative guidance absent substantive practical reasoning can do so. It is not open to the person who has accepted the law's claim to supreme normative authority to deliberate about whether they have sufficient reasons to φ without being structurally irrational. This looks more to be a case of the law exploiting or *instrumentalising* our rationality as a means to securing our conformity, rather than a method it pursues in order to respect us.

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

[39] Waldron, 'How the Law Protects Dignity' (n 33).

[40] Raz, *The Authority of Law: Essays on Law and Morality* (n 38) 221.

More would need to be said on whether normative guidance absent substantive practical reasoning fails to respect our dignity or autonomy in this way. We can also see, however, that even if a proponent of the central feature claim were willing to accept this exploitation of structural rationality as sufficient for the law to be functioning in the appropriately law-like way, such a proponent is still committed to saying that the law is *deficient qua law* if it fails to guide people in this way. In other words, the central feature claim still entails that the law ought to take steps to make it the case that we do not engage in substantive practical reasoning about whether we ought to do what the law requires. Again, this seems a morally dangerous function to ascribe to the law, as well as a function it does not seem to take steps to achieve. We can avoid ascribing to the law this function which it does not seem plausible to think it has by denying that the law is in one way deficient qua law if it fails to make it the case that people actually use its directives as conclusive reasons.

4. *Conclusion*

Whilst it might at first sound strange to say that the law guides the person who accepts its authority in the same way as God guides the person who has faith in them, I have argued that this is the case if the law necessarily aims to be a supreme normative authority. Whilst the analogy with faith is imperfect, by reconstructing John Gardner's idea of a leap of faith in the law, we have seen that to be guided by the law as supreme normative authority involves the same exploitation of your structural rationality as with the rational believer who has faith in God, in such a way that bypasses the need for any substantive practical reasoning. This, we saw, gives us good reasons to doubt both the central feature claim—according to which law that fails to normatively guide is in one way deficient qua law—and the priority claim—according to which the law's guidance is meant to take priority

over any other means the law might pursue to secure your conformity with its directives. It is both undesirable and implausible, I suggested, to think that the law is in one way deficient qua law for failing to exploit your structural rationality in this way, or that the law ought to take steps to ensure that you conform to its directives by being guided in this way, so that we should reject both the central feature claim and the priority claim.

In the next chapter, I defend these objections against the central feature claim and the priority claim from some potential responses. In doing so, we will see that a relationship of causation and control is necessarily present whenever a person is guided by something that they believe has the power to give reasons. Relationships involving powers of reason-giving, I suggest, preclude what I call relationships of unadulterated normative guidance. This will enable us to better understand why any view which portrays the law as a supreme normative authority poses such difficulties for the central feature claim and the priority claim.

4

A Pirate's Code

We have seen that were someone to be guided by the law as a supreme normative authority, that someone must believe in advance that legal directives are necessarily conclusive reasons to do as directed. This belief allows the law to exploit your structural rationality in such a way as to bypass the need for any substantive practical reasoning on your part. This, we saw, gave us good reasons to doubt both the central feature claim—according to which law that fails to normatively guide is in one way deficient qua law—and the priority claim—according to which the law's guidance is meant to take priority over any other means the law might pursue to secure your conformity with its directives. It is both undesirable and implausible, I suggested, to think that the law is in one way deficient qua law for failing to exploit your structural rationality in this way, or that the law ought to take steps to ensure that you conform to its directives by being guided in this way, so that we should reject both the central feature and the priority claim.

In this chapter, I defend these objections against the central feature claim and the priority claim from some potential responses. In doing so, we will see that a relationship of causation and control is necessarily present whenever a person is guided by something that they believe has the *power to give reasons*. This reveals that the law's ability to cause and control the intentions of the person who accepts its supreme normative authority reflects a deeper fact about relationships involving powers of reason-giving in general, namely that such relationships preclude what I call relationships of *unadulterated normative guidance*. Relationships of unadulterated normative guidance, I argue, can only exist in the absence of an ongoing belief in the power of another to give reasons.

To see this, I begin by exploring whether a legal system consisting only of *guidelines*, understood as directives that are only epistemically, rather than robustly, reason-giving could help to shore up the central feature claim and the priority claim. I argue that the distinction between epistemic and robust reason-giving is too thin to prevent the possibility that relationships of causation and control exercised by the reason-giver will have an influence on someone's practical reasoning. By showing that it is a deeper fact about relationships involving powers of reason-giving in *general* that makes them incompatible with relationships of unadulterated normative guidance, we will be better able to understand why the view that the law's reasons are meant to be conclusive reasons poses such difficulties for the central feature claim and the priority claim. We will also see that viewing the law as an artificial normative system does not rescue us from those difficulties, so long as you accept that the law aims to be a supreme artificial normative system.

1. *The Power of Reason-Giving*

In Disney's *The Pirates of the Caribbean*, a recurring joke is the pirates' treatment of their code of behaviour. Elizabeth Swan, the sheltered governor's daughter fascinated with tales of honourable swashbucklers, is horrified when the villainous Capitan Barbossa reneges on their agreement to return to shore. When Elizabeth protests that this is in violation of 'the Code', Barbossa offers the following response: 'the Code is more what you'd call *guidelines* than actual rules'.[1]

Barbossa's retort reflects a common connotation of the words 'guidance' and 'guidelines' in ordinary language that I have until now left unexplored. It is not uncommon for someone to say that you ought to perform some action φ but that the direction is 'just a

[1] Gore Verbinski (dir), *The Pirates of the Caribbean: The Curse of the Black Pearl* (Disney 2003).

guideline'. There is a sense in which guidance, and guidelines, are forms of *advice*, conformity with which is recommended but, in some as yet unspecified way, optional.

In one way, the conception of guidelines as advice fits well with the nature of normative guidance generally. Normative guidance involves using some fact as a reason to form a belief about what you ought to do. Paradigmatically, this involves some process of substantive practical reasoning, in which you assess the various reasons you believe yourself to have in order to determine, all things considered, what you ought to do. If a guideline is just another fact thrown into that mix of reasons, then there is a sense in which it is 'up to you' whether you conform to it, for it is up to you to decide whether you ought all things considered to perform the action that the guideline endorses.

Of course, there is a clear sense in which normative guidance cannot simply be equated with such an understanding of guidelines as advice. Conformity with a guideline could never be optional as a matter of conceptual necessity, if by 'optional' we mean *normatively* optional. So long as the balance of reasons all things considered endorses φing, then φing is normatively mandatory, regardless of whether it was just your friend's advice that you ought to φ or some guideline recommending the action. It cannot be the case, then, that guidelines are necessarily optional when it comes to conformity.

An alternative approach to understanding guidelines as advice is instead to focus on the nature of the *normative relationship* that exists between a guideline and the behaviour it endorses. We can, for example, accept that the behaviour that some guideline endorses is compulsory whilst denying that it is compulsory *in virtue* of the guidelines. On this view, guidelines describe what you already have reason to do, independent of the guidelines. Barbossa's retort, therefore, is not necessarily a denial of wrongdoing but rather a denial that any wrong he has committed is a wrong in virtue of having breached the

pirates' code. This allows us to say that guidelines are 'take it or leave it' advice whilst leaving open the possibility that conformity with them is compulsory. The guidelines are there to help you to understand what you already have reason to do, so that you do nothing wrong simply in virtue of ignoring the guidelines.[2]

It does not follow that guidelines are normatively inert. On this understanding, guidelines can still give us new reasons. It is just that those new reasons are about what we ought to *believe* rather than about how we ought to act. When the government issues explanatory notes saying that a parliamentary statute requires you to φ, the guidelines themselves give you no reason to φ: it is the statute that does that. Rather, the guidelines give you a reason to believe that the statute requires you to φ. Guidelines, on the view that I have just sketched, are *epistemically reason-giving*.[3] They give us reason to believe that some already existing fact is a reason to φ.[4] Contrast this with a statute, which on many accounts of the law's normativity is thought to be *robustly reason-giving*. Something is robustly reason-giving if it gives you a reason just in virtue of its creation or issuing.[5] For instance, it is possible that requests are robustly reason-giving, if you think that simply by issuing a request that you φ I give you a new reason to φ just because I requested it.[6]

[2] At least, nothing wrong vis-à-vis your failure to φ. It might have been the case that you had reason to pay attention to the guidelines because you were more likely to do the right thing by doing so, so that you did something wrong in ignoring them. That wrong, however, is separate from the wrong committed by not φing.

[3] David Enoch, 'Reason-Giving and the Law' in Leslie Green and Brian Leiter (eds), *Oxford Studies in the Philosophy of Law: Volume 1* (Oxford University Press 2011).

[4] ibid 4.

[5] ibid 5–6.

[6] ibid.

Now, I am not claiming that this is the definitive account of what it is for something to be a guideline; rather, it is one view which captures the sense in which guidelines are thought to be a form of advice. Nor do I wish to take any stance on whether, as Barbossa implies, guidelines are distinct from *rules* and, if so, whether the distinction lies in the former being epistemically reason-giving and the latter robustly reason-giving. I simply want to ask whether, if we conceived of the law as a system of guidelines *so understood*, we can rescue the central feature claim and the priority claim from the objections of the previous chapter. For you might think that those objections only arise if the law is meant to be robustly reason-giving, regardless of whether it aims to be a supreme normative authority.

As we saw, those objections rest on the idea that were you to be guided by the law as a supreme normative authority, you would believe in advance that legal directives are necessarily conclusive reasons for you. It follows that, if you are structurally rational, once you believe that the law has directed you to φ you will form the further belief that you ought all things considered to φ. Granting that we are interested here only in the rational person who accepts the law's authority rather than abandons it, you will therefore also necessarily form an intention to φ, given the rational requirement of enkrasia.

Crucially, because the structurally rational person will *necessarily* form the intention to do as directed, the law is able to exploit your structural rationality in such a way that bypasses any need for substantive practical reasoning about whether you ought to φ all things considered. Thus, the objection to the priority claim and the central feature claim: it is both undesirable and implausible, I suggested, to think that the law is in one way deficient qua law for failing to exploit your structural rationality in this way, or that

the law ought to take steps to ensure that you conform to its directives by being guided in this way, so that we should reject both the central feature claim and the priority claim.

We can see now that this exploitation of your structural rationality can occur not just in the extreme case that someone believes that all legal directives are necessarily conclusive reasons for them. In fact, this exploitation can exist whenever a person is guided by something that they believe is robustly reason-giving. Say that, rather than believing in advance that all legal directives are necessarily conclusive reasons, you believe that legal directives are only ordinary reasons to do as directed just in virtue of the fact that the law said so. That is, you believe that the law is robustly reason-giving but that the reasons the law gives are only to be weighed in the balance with all those other first-order reasons for and against φing. Let us reconstruct the five stages that I outlined in the previous chapter that trace someone's journey in forming an intention to do as directed, but this time substituting the belief that legal directives are necessarily conclusive reasons for the belief that they are only ordinary first-order reasons.

The first stage is forming the belief that the law's directives are ordinary first-order reasons just in virtue of the fact that the law said so. This amounts to forming a belief in the fact that you ought (pro tanto) to do as the law requires. It is not important for our purposes why someone might form a belief in such a fact. Perhaps they believe that, in a democratic society, the law necessarily has some thin legitimacy sufficient to give any legal directive *some* weight to do as directed. Regardless, as with the leap of faith in the previous chapter, any relationship of normative guidance here is between you and those facts that you use as reasons to believe that legal directives are necessarily ordinary first-order reasons. There is no relationship of normative guidance between you and the law itself.

The second stage is when the law communicates to you a directive to φ so that you come to believe that the law requires you to φ.

The third stage is your identification of the law's directive to φ as an ordinary first-order reason to do so. Recall that you can derive reasons to φ from some fact N that requires you to do some other thing ψ in the following way:

(1) you believe that N requires you to ψ;

(2) you believe that were you not to φ you would not be complying with N itself; where

(3) complying with N itself requires a belief that p is a reason to φ because N required you to ψ.

You have a pre-existing belief in the fact that you ought (pro tanto) to do as the law requires (ψ). You can use this fact to identify the fact that the law has directed you to φ as an ordinary first-order reason to φ. You can believe that the fact requires you (pro tanto) to do as the law directs. You can believe that were you not to φ you would not be complying with this requirement, where complying requires a belief that the fact that φing is what the law requires is an ordinary first-order reason to φ because you are required (pro tanto) to do as the law directs.

Stage four is when you use the law's directive as a reason to φ in order to form a belief about whether you ought all things considered to φ in your situation. Previously, when we were concerned with the person who, at stage one, forms the belief that they ought all things considered to do as the law directs, this relationship of guidance at stage four involved no substantive practical reasoning. If you use a legal directive as a conclusive reason, then there is no substantive practical reasoning to be done: the structurally rational person will, at this stage, necessarily form the belief that they ought all things considered

to do as directed. Now, however, you are only using the legal directive as an ordinary first-order reason to φ. It is still an open question, therefore, whether the structurally rational person will conclude that they ought all things considered to φ in their situation, for they may conclude that the law's reason is defeated by other, competing, reasons. Some substantive practical reasoning needs to be done.

Once we have in mind the person who only believes that legal directives are ordinary first-order reasons, therefore, whether that person arrives at stage five and forms an intention to φ is contingent on the outcome of their substantive practical reasoning. We can no longer say that the structurally rational person will necessarily reach this stage and form the intention to do as the law directs, for it is no longer guaranteed that at the previous stage the structurally rational person will form the belief that they ought all things considered to do as the law directs in their situation. If someone does reach this stage and forms an intention to φ, therefore, we can no longer say that the law *controlled* the formation of their intentions. The law is not in control of the formation of the intention to φ because there is no guarantee that, were the law to intervene by issuing a directive to perform some different action φ′ instead, the rational person will again conclude that they ought all things considered to do as the law directs.

That said, the law *is* still in control of something else. Namely, the law is able to cause and control the formation of the rational person's belief that they have a reason to φ in virtue of the legal directive. Remember that this person still believes that legal directives are necessarily reasons to do as directed, it is just that they only believe such reasons are ordinary first-order reasons rather than conclusive ones. As such, it is still the case that the outcome of stage *three* is guaranteed in the mind of the structurally rational person. If you believe that you ought (pro tanto) to do as the law directs, and if you believe that the law

has directed you to φ, you are structurally irrational if you do not subsequently form the belief that the law's directive is a reason to φ. When the law is able to cause and control the formation of your belief that the law requires you to φ at stage two, therefore, the law is also able to cause and control the formation of your belief that you have a first-order reason to φ.

Whilst, then, the law cannot cause and control the formation of any subsequent intention to φ, the law still retains an important degree of control over your practical reasoning if you believe the law to be robustly reason-giving. You were normatively guided by the law when you used the law's directive to φ in order to form a belief about what you ought all things considered to do in your situation. And this time, this normative guidance involved substantive practical reasoning: it was not simply a case of the law exploiting your structural rationality as with the person who uses legal directives as conclusive reasons. On the other hand, your use of the legal directive as an ordinary first-order reason is guaranteed by the law's ability to cause and control your beliefs about what reasons you have, namely your belief that the legal directive is a reason to φ in the first place.

For reasons that I will go on to explain, even this element of control exercised by the law may not sit well with proponents of the central feature claim or the priority claim. Such proponents might instead prefer that the law facilitated what I will call relationships of *unadulterated normative guidance*—that is, relationships of guidance between someone and the law that involve no element of control.[7] We might think that conceiving of the law

[7] By calling such relationships 'unadulterated' normative guidance, I do not necessarily intend to imply that relationships of guidance involving no substantive practical reasoning are less than fully normative, given I am remaining neutral as between the broader and narrower views of practical reasoning. Rather, I call them relationships of 'unadulterated' normative guidance because such relationships are not even *analogous* to relationships of automatic guidance in the way that relationships involving the exploitation of your structural rationality are, because they involve no element of control.

as a system of guidelines that are only meant to be epistemically reason-giving rather than robustly reason-giving would bring us closer to a system that facilitated such relationships of unadulterated normative guidance.

At first glance, guidelines so understood do seem to bring us closer to eliminating any element of control in the relationship of guidance. Say that your doctor informs you that a certain medicine will cure your illness and that, rather than believe the doctor is robustly reason-giving, you believe them to be epistemically reason-giving. That is, you do not believe that the fact of the doctor *saying* that the medicine will cure your illness is a reason to take the medicine. Rather, the fact that the medicine will cure your illness (if true) is the reason to take it. You instead believe that the fact that the doctor says the medicine will cure your illness is a reason to believe that you have a pre-existing reason to take the medicine, a reason that exists independent of the doctor.

Say that you go on to form the belief that you have a reason to take this medicine as a result of the doctor's statement. You are still faced with the question of whether you ought to take the medicine. You still need to relate the fact that the medicine will cure your illness to other facts that may be reasons against taking it, such as the potential side-effects. You still need, therefore, to engage in substantive practical reasoning in order to figure out what you ought all things considered to do. And, crucially, once you have formed the belief that you have a reason to take the medicine the doctor can drop out of the picture. Because you only believe the doctor to be epistemically reason-giving, rather than robustly reason-giving, the fact that the doctor said something does not bear on the question of whether you ought to take the medicine. Consequently, the doctor cannot intervene to give you a new reason to take or not to take the medicine in the same way that something that is robustly reason-giving can. This might seem to bring us closer to a relationship of unadulterated

normative guidance, for it precludes the possibility that the doctor can alter what reasons you have to φ just in virtue of saying so, and thereby preclude the possibility that the doctor can control the formation of your beliefs about what reasons you have *in that way*.

That epistemic reason-giving might be thought to be in this way closer to a relationship of unadulterated normative guidance than robust reason-giving mirrors a distinction drawn previously by Falk between *guiding* and *goading*.[8] To guide, according to Falk, is to make an *impersonal plea* to someone by putting forward some facts for their consideration, such as telling someone that they are running late for work.[9] When guiding in this way, the speaker is not directing the person to do anything. Rather, the facts are meant to speak for themselves, leaving it up to the recipient to use that fact as a reason to figure out for themselves what they ought to do in the light of this information.[10] Falk distinguishes this from goading, where the speaker *directly* conveys an intention or desire that the person do something: 'I want you to leave for work now'. Falk says that in all such cases there is an element of compulsion, in that the speaker is trying to direct someone by requiring something of them.[11]

The above analysis of the distinction between epistemic and robust reason-giving provides some insight into why we might want to distinguish between guiding and goading in this way. When your friend asks you to do them a favour by φing, your friend can be thought to be attempting to be robustly reason-giving. If you accept that your friend *is* robustly reason-giving, your friend is potentially able to control the formation of certain

[8] WD Falk, 'Goading and Guiding' (1953) 62 Mind 145.

[9] ibid 157.

[10] ibid 151, 159.

[11] ibid 151.

beliefs that you have about what you have reasons to do. They can cause you to believe that you now have a reason to φ that you did not previously have (namely, the fact of their request). They can also control the formation of that belief to the extent that they can intervene to alter it. If five minutes later your friend said 'actually, never mind', this can cause you to cease to have the belief that you have a reason to φ in virtue of their request. There is therefore a way in which your friend can be seen to be attempting to control your normative situation, a control that can enable them to exploit your structural rationality and also control the formation of certain beliefs that you have about what you have reasons to do.

Contrast this with the case where your friend might attempt only to be epistemically reason-giving and says, 'you are late for work'. Here your friend is just informing you of a fact that is already a reason for you to leave the house. They are not claiming to give you any new reason to leave in virtue of their statement. Your friend, therefore, cannot be said to be exercising any control over your normative situation in the same way as before. You already had the reason to leave the house: your friend's statement is just 'take it or leave it' advice and you do nothing wrong just in virtue of ignoring it. Hence, it might seem more appropriate to call epistemic reason-giving 'guiding' and robust reason-giving 'goading'. Whilst I will not adopt this terminology—it implies that goading is not a kind of guidance, whereas even if you think it is not a case of normative guidance it is at least a case of automatic guidance—and we might also doubt whether the element of control really amounts to 'compulsion', Falk's distinction is useful for drawing out this point that epistemic reason-giving brings us closer to a relationship of unadulterated normative guidance. We need to be careful not to overstate the extent to which it is closer, however. The line between epistemic and robust reason-giving is not as sharp as it might first appear.

To see this, let us return to the example of the doctor who informs you that this medicine will cure your illness. As we have seen, the fact that the doctor said something does not bear on the question of whether you ought to take the medicine if you only believe them to be epistemically reason-giving. It thus appears that no relationship of control can exist through any belief in the doctor's ability to alter what reasons you have. But the fact that the doctor said something does bear on a *prior* normative question, namely the question of what you ought to believe. Here you do have a reason just in virtue of what the doctor says. The fact that an expert who knows better than you says that some fact p is a reason to φ is itself a reason to believe that p is a reason to φ.[12] Once it is realised that epistemic reason-giving is still about giving us new reasons in relation to a normative question, we can see that *epistemic reason-giving in respect of action is just robust reason-giving in respect of belief*.

This should not be too surprising, given that the conceptual distinction between epistemic and practical authority can become very thin. My example of the doctor here is very similar to the one from Chapter 3. The previous example, however, involved a doctor *directing* you to take a certain medicine, so that the doctor was attempting to be robustly reason-giving by attempting to give you a new reason for action just by saying so. In the current example, rather than directing you to take a certain medicine the doctor merely issues you with guidance or advice, effectively just saying 'you have a reason to take this medicine because it will cure your illness'. But this doctor gives you a new reason just by saying so too: a new reason to believe in the existence of another reason. If you believe that the doctor is reason-giving, it ultimately makes little difference whether you treat them as

[12] They can be seen to have, to use Raz's terminology, *theoretical authority*: Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) ch 10.

being epistemically or robustly reason-giving: either way you end up with a belief that you have a reason to take the medicine.

Given this similarity between relationships of epistemic and robust reason-giving, it is possible for the former to also devolve into a relationship of guidance that involves nothing more than an exploitation of your structural rationality, in such a way that bypasses the need for any substantive practical reasoning, just as with relationships of robust reason-giving. Supreme normative authority is not restricted to reasons for action. We can imagine, for example, that God might be a supreme epistemic authority. Thus, in the same way that you could have faith that something necessarily provides you with conclusive reasons for action, you could accept that something necessarily provides you with conclusive reasons for belief. Further, you could believe that an epistemic authority necessarily gave you conclusive reasons to believe that some already existing fact is a conclusive reason to φ. In other words, you could believe that something is epistemically reason-giving in respect of what you ought all things considered to do.

Once we have reached the point where you believe that something necessarily gives you conclusive reasons to believe that some already existing fact is a conclusive reason to φ, we have returned to the situation in which that something is able to exploit your structural rationality in such a way that bypasses the need to engage in any substantive practical reasoning by controlling the formation of your intention to φ. If you believe that God is a supreme epistemic authority about what you ought to do, then God can cause and control your beliefs about what you have conclusive reason to do. If God says 'p is a conclusive reason to φ', where p is an already existing fact, then you, as a structurally rational believer, will necessarily form the belief that p is a conclusive reason to φ and subsequently an intention to φ. It makes little difference whether you believe p to be a conclusive reason to

φ in virtue of God's say so or in virtue of some already existing fact, for either way God can control the formation of your belief that p is a conclusive reason to φ and thereby control the formation of your intention to φ.[13]

We can see, therefore, that a system of guidelines would not by itself be sufficient to bring us closer to a system of unadulterated normative guidance, where guidelines are understood to be epistemically reason-giving rather than robustly reason-giving. Once it is realised that epistemic reason-giving in respect of action is really just robust reason-giving in respect of belief, we can see that it is still possible for someone you believe to be epistemically reason-giving to control the formation of your beliefs about what you have reasons to do. Further, if you accept any claims that the epistemic reason-giver might make to supreme epistemic authority, so that you believe that their advice is necessarily a conclusive reason to believe that some already existing fact is a conclusive reason to φ, we have returned to the situation in which the reason-giver is able to control the formation of your intentions to φ.

2. *Unadulterated Normative Guidance*

What, then, would a relationship of unadulterated normative guidance look like? Given that we are looking for a relationship of guidance that does not involve any element of control, we might start by trying to remove the possibility that anything relevant to the formation of your intention to φ is capable of being controlled. The problem for the possibility of any relationship of unadulterated normative guidance that is shared between epistemic and robust reason-giving is the presence of a third party who is able to use their power to give

[13] Although the means of intervention will be different. In the case of robust reason-giving, an intervention would take the form of 'you ought instead to φ′', whereas for epistemic reason-giving it would be 'p is instead a reason to φ′'.

reasons to intervene to control your beliefs about what you have reasons to do. A good place to start, then, might be to imagine the case of someone who is faced with a moral quandary which they must resolve on their own.

Say that you are faced with a difficult and novel decision of whether to φ, and no one is around to help you—whether by giving you advice on which facts are already reasons for you, or by creating new reasons by issuing directives. You therefore have two questions that you need to find the answers to: first, which facts are reasons for and against φing; second, whether those reasons ultimately endorse φing. In such a situation, cut off from outside help, there is nothing to be guided by except the facts themselves. Even the normative question of which facts are reasons for and against φing can only be answered by reference to further facts, that is those facts that are reasons for and against believing that some other fact is a reason for or against φing. You need to use the facts available as reasons in order to figure out the answers to these questions, and in doing so you will be normatively guided by these facts.

This relationship of normative guidance between you and the facts that you are using as reasons will involve the archetypical case of substantive practical reasoning. Without any pre-existing beliefs about the normative relation between any given set of facts, it is up to you to figure out what normative weight to accord to p, to figure out the normative relationship between p and some different fact p′ (for example, does p exclude p′ from consideration?), and to bring it all together in order to decide whether the balance of reasons all things considered requires you to φ. Crucially, these facts exert no control over you or the formation of your beliefs. Becoming aware of the fact that p may cause you to form the belief that p is a reason to φ. Facts may also cease to obtain, or transition into some different fact if circumstances change, so that your beliefs about what you have

reasons to do also change. It is not the facts themselves, however, that are doing anything to bring this about. We saw in the previous chapter how this is true of the fact that the law directed you to φ; it is the law qua collection of legal officials that controls your beliefs about what the law requires, because it is through the officials that act in its name that the law is able to change what it requires and, in doing so, to alter your beliefs about what it requires, rather than the fact that the law requires you to do something itself. Facts are not the kind of thing that are capable of exercising control over something.

If (1) the only relationship of guidance that exists when you are faced for the first time with a moral quandary which you must resolve on your own is between you and the facts that you use as reasons; and (2) facts are incapable of exercising control over something; it seems safe to conclude that (3) we have reached a situation of unadulterated normative guidance. Once we have removed the possibility that a third party is able to exercise any degree of control over your beliefs in respect of the relevant set of facts—whether through epistemic or robust reason-giving—then we are left with a direct and unadulterated relationship of normative guidance between you and the reasons you use to determine whether you should φ.

It is somewhat ironic that a relationship of unadulterated normative guidance can only obtain when you are free to engage in unconstrained substantive practical reasoning free from the control of others, given that guidance is often portrayed as a form of 'help' that we are provided with. It is still the case, however, that reasons help us to make decisions through the normative guidance that they provide us with; it is just that hard work is sometimes required to obtain that help. It is also important to emphasise that it is only *ongoing* relationships of epistemic or robust reason-giving that preclude relationships of unadulterated normative guidance. It is not, therefore, the case that simply because you

believe that something has given you a reason that you are not engaged in a relationship of unadulterated normative guidance. It is the *ongoing* belief that something has the *power to alter* the reasons that you have that gives that something the ability to intervene to change your beliefs about what reasons you have, so that they are able to exercise control over some element of your practical reasoning. Thus, were you to ask *of each and every* legal directive whether that directive is a reason for you, you could still be engaged in a relationship of unadulterated normative guidance with the law, for you do not have an ongoing belief in the power of the law to give you reasons but rather engage in substantive practical reasoning each time to assess whether the legal directive is a reason.

We can see now therefore that on *any* account which portrays the law as attempting to guide as a supreme normative authority that the relationship of guidance between the law and the person who accepts the law's authority is one in which the law is able to exploit that person's structural rationality, so that the law is able to control the formation of that person's intentions to do as directed in a way that bypasses the need for substantive practical reasoning. Indeed, we can see now that it is a deeper fact about powers of reason-giving in *general* that they are incompatible with relationships of unadulterated normative guidance. Accepting the reason-giving powers of another necessarily involves a relationship of control between the reason-giver and the formation of the addressee's beliefs about what they have reason to believe (in the case of epistemic reason-giving) or to do (in the case of robust reason-giving).

On any account that portrays the law as reason-giving, therefore, the law would be unable to facilitate relationships of unadulterated normative guidance. But why should we care that any account of the law as necessarily reason-giving precludes the law from facilitating relationships of unadulterated normative guidance? Remember that for some

the law's attempt to normatively guide facilitates certain moral goods, such as respect for dignity or autonomy. Waldron, for example, places a great emphasis on how legal systems rely on the 'self-application' of legal directives by citizens, counting on their 'capacities for practical understanding, for self-control, for self-monitoring and modulation of their own behaviour in relation to [directives] that they can grasp and understand'.[14] It is in this reliance on self-application that the law respects dignity, for to respect dignity is, according to Waldron, to recognise someone as having this ability to 'control and regulate' their behaviour in the light of reasons.[15]

The kind of relationship that would most respect dignity so understood is a relationship of unadulterated normative guidance. It is only when we are free of any control over our normative situation exercised by the reason-giving powers of other agents that we are left to engage in practical reasoning that fully reflects our ability to understand the reasons that apply to us. In this way to respect someone's dignity is to place your trust in that person's ability to engage in practical reasoning and arrive at the correct outcome on their own. For instance, if legal institutions simply claimed to change our factual circumstances, making no claim to be reason-giving and leaving it up to us to grapple directly with the full complexity of reasons in order to figure out what impact, if any, legal directives have on our normative situation, we can say that the law fully respects our dignity as Waldron understands it.

Contrast this with any view which sees the law as robustly reason-giving, purporting to give you a reason to φ just because the law said so. The law is still relying on you appreciating that the directive is a reason to φ and to engage in practical reasoning to

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

[15] ibid 202.

regulate your own behaviour accordingly. Much less is now expected of you, however, for you are meant simply to take the law at its word that its directives are necessarily reasons; if you accept this on its face, then it is not only you that has control over your practical reasoning but also the law, through its ability to control what reasons you believe yourself to have.

This allows us to see more clearly why some proponents of the central feature claim or the priority claim might be unwilling to accept the thin kind of normative guidance that both portray the law as attempting to provide if it is also meant to be a supreme normative authority. Were someone to accept that not only is the law reason-giving, but conclusively so, then the self-application of reasons involved here respects dignity in a very minimal way. The law would control not only the formation of your beliefs about what you have reasons to do, but also the formation of your intentions to do as directed. The result, as we have seen, is that what relationship of normative guidance that does exist between the law and the person who accepts its supreme normative authority simply involves the exploitation of your structural rationality to relate the directive to the conclusion that you ought all things considered to φ. There is no reliance here on your ability to engage with normative phenomena beyond the law's directive. The law is treating us as rational but only in so far as it treats us as capable of understanding that the law is the supreme normative authority in our lives.

This is the cost of accepting the central feature claim and the priority claim: we have to admit that the kind of normative guidance that characterises the law-like way of guiding is nothing but an exploitation of our structural rationality. This cost might not be compatible with the claim that the law's attempt to normatively guide necessarily respects our dignity. That cost cannot be avoided by claiming that the law is epistemically reason-

giving rather than robustly reason-giving: the problem for the central feature claim and the priority claim posed by the law's claim to supreme normative authority reflects a deeper problem concerning powers of reason-giving themselves. Of course, Waldron's is just one account of dignity. And, regardless of the dangers that I have identified in attributing to the law the function of making it the case that it is able to exploit our structural rationality in this way, some version of the central feature claim or the priority claim might nonetheless follow from the *conceptual necessity claim*, according to which, for something to be law, it must be one of its functions to normatively guide. I will turn to the conceptual necessity claim in the next chapter, where I will suggest that there are good reasons to think even that claim is false. Before we do that, however, we should consider one last attempt to rescue the central feature claim and the priority claim from the objections that I have raised against them.

3. *Law as a Supreme Artificial Normative System*

There is another reading of Barbossa's retort that the pirates' code is merely a set of 'guidelines'. Rather than view the code as epistemically reason-giving, we might view the code as only *artificially* reason-giving. In other words, that the code does not purport to tell the pirates how actually to live their lives; rather, the code merely tells the pirates how to live if and to the extent that they *decide* to live by the code. The pirates code, on this view, only gives 'code-based' reasons to do as the code requires, reasons which the pirates need only take account of to the extent that they have signed up to the code. Barbossa's retort, on this reading, is potentially a denial of wrongdoing on the basis that he has not signed up to live by these code-based reasons, at least in respect of the circumstance in issue.

It is controversial whether there really can exist these distinct domains of normativity, these artificial systems of normative phenomena.[16] I have until now been treating legal normativity as an attempt to tell us how we actually ought to live. I promised in the introduction, however, that I would consider how my arguments relate to a view of the law which sees it as an artificial normative system, as some maintain.[17] As with the pirates' code, on this view to say that the law is normative is to say that the law is concerned only with how we *legally* ought to live—whether it is *legally* right or wrong to act, believe, or feel some way.

You might think that viewing the law as an artificial normative system allows us to avoid the problems that I have identified with the claim that the law exists to guide. If the law has nothing to say about how we actually ought to live, then it does not purport to provide us with robust reasons for action—reasons that actually make it the case that we ought to do as the law directs. If that is the case, then it would no longer seem to be the case that for the law to guide in the appropriately law-like way, anyone must believe that legal directives are necessarily robust reasons for them, let alone robust conclusive reasons. If it is unnecessary for anyone to believe that legal directives really are conclusive reasons for them, then claiming that the law exists to guide would no longer seem to entail that the law aims to guide us by exploiting our structural rationality in such a way that bypasses the need for any substantive practical reasoning.

[16] Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 The Yale Law Journal 1160.

[17] 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* (Oxford University Press 2019), who suggests that this is the correct reading of Hart's position also.

I believe this response is too quick. To see this, we need to make two clarifications. The first is that we can draw a distinction between the law as an artificial normative system and the law as a *supreme* artificial normative system. What would it be for the law to be a supreme artificial normative system? I discussed in the introduction how, if we accept that the law aims to be a supreme normative authority, we can still ask in which *domain* the law's reasons are meant to be conclusive. I mentioned the possibility that the law's reasons are only meant to defeat all others *within* the legal domain. That is, it might be that for the law to have supreme normative authority is for the law to decide, when it comes to the law, what you have conclusive reasons to do. This restricted view of what it would be for the law to have supreme normative authority, I suggested, is a result of combining the claim that the law necessarily aims to be a supreme normative authority with the view that the law is normative only in the sense that the law is concerned with how we legally ought to live; in other words, this restricted view is the result of the claim that the law necessarily aims to be a supreme artificial normative system.

It is plausible to think that, even if the law is only an artificial normative system, it still necessarily aims to be supreme in this way. After all, it is still the case that, in court, it will do you no good to argue that you did not conform to some legal reason because it was defeated by some different non-legal reason. Once you are in the law's normative domain, artificial though it may be, it still seems to be the case that legal reasons are meant to take priority over any other reasons. Hart himself—whom Berman suggests should be read as endorsing the view that the law is only artificially normative—said that the law's standards are meant to take 'priority over other standards'.[18]

[18] HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 249.

Still, that the law might necessarily purport to give conclusive *legal* reasons for action that, within the legal domain, take priority over any other kind of reason, does not yet show that for the law to guide in the appropriately law-like way people must necessarily believe that such reasons are *actually* conclusive reasons for them. The law, on this view, still makes no claim to tell us how we actually ought to live. Here, however, is the second clarification. Whilst we are now considering the view that the law only aspires to be an artificial normative system, we are still holding as constant the claim that the law exists to guide. That the law exists to guide is a central pillar of Hart's theory of law,[19] and one that Berman also seeks to maintain.[20] It is just that, on this view, to say that the law exists to guide is to say that the law exists to get people to use its directives as reasons for action *if and to the extent that* they choose to enter into the law's normative domain. Like with the pirates' code, the law as an artificial normative system exists to guide those people who decide to live their life (or part of their life, or in some circumstances) according to its directives.

A crucial difference, therefore, between the view that the law is an artificial normative system and the Razian view that the law also aspires to be robustly normative, is that the former is agnostic as to *why it is* that someone accepts that the law's directives are reasons for them. For Raz, the 'ideal law-abiding citizen' from the law's point of view is the person who accepts that the law really does give them the robust reasons it aims to give them.[21] Whereas if the law is only artificially normative, the person who takes Hart's 'internal point of view'—that is the person who treats legal directives as reasons for them—

[19] The 'primary function' of the law, for Hart, is not to coerce people through threats but to guide them through rules: ibid.

[20] Berman, 'Of Law and Other Artificial Normative Systems' (n 17) 157.

[21] Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 171.

may do so for any or no reason at all. They may, for example, do so merely out of habit, social pressure, and so on.[22] It is no part of the function of the law, on this view, that people ought genuinely to believe that they ought to do as the law requires when they are guided by its directives.

It is important to remember, however, that throughout I have also been agnostic as to why it is that someone accepts that the law's directives are reasons for them. Though I gave a sketch as to why it might be justified to take that leap of faith in the law and believe that its directives are necessarily conclusive reasons for you, I was ultimately interested in what it is to be guided by the law *were* you to take that leap of faith, not with whether that leap of faith was justified or why you took it. Whilst, then, I have up until now been considering Raz's 'ideal citizen' who believes that the law necessarily gives them robust conclusive reasons for action, I think my arguments still hold for the more agnostic person who simply signs up to the law's artificial normativity, for any or no reason at all.

It is still the case that *once you sign up to the law's artificial normativity* you have chosen to act according to the reasons of that system. If, therefore, the law still aims to be a *supreme* artificial normative system, then to sign up to the law's artificial normativity is to sign up to treating the law's reasons as conclusive reasons for you. It follows that the relationship of guidance between the law and the person who signs up to its supreme artificial normativity is one which necessitates no substantive practical reasoning. It is, again, a relationship in which the law is able to exploit your structural rationality and cause and control you to form the intention to φ. Granted, the mental processes that occur can be somewhat different. If you sign up to the law's supreme artificial normativity you need only believe that you ought to *treat* the law's directives as conclusive reasons for you, you

[22] Hart, *The Concept of Law* (n 18) 257.

need not believe that they actually are robust conclusive reasons. The outcome is the same, however. To be structurally rational, the person who believes that they ought to treat the law's directives as conclusive reasons for them must necessarily form the intention to φ once they believe that the law directs them to φ.[23]

I think, therefore, that my arguments against the central feature claim and the priority claim (and my following arguments against the conceptual necessity claim) still hold even if you think that the law is only an artificial normative system, so long as you accept the premise that the law still necessarily aims to be a supreme artificial normative system. It remains morally problematic and descriptively inaccurate to say that it is part of the nature of law that it *ought* to guide those who sign up to its artificial normativity by exploiting their structural rationality in such a way that bypasses the need for any substantive practical reasoning.

Of course, whilst I gave some reasons as to why it is plausible to think that even if the law is only an artificial normative system it still necessarily aims to be a supreme one, you may still reject this premise. I will not attempt to motivate the premise further, however. Ultimately my aim is to argue that it is plausible to think that the law does not necessarily exist to guide as a supreme normative authority. As I said in the introduction, if you accept my argument that if the law necessarily aims to be a supreme normative authority then it is plausible to think that the law does not necessarily exist to guide, you may take this as an additional reason to reject the view that the law necessarily aims to be a supreme normative authority, if you would prefer to save the claim that the law necessarily exists to guide. Whilst that is not the route that I will take—I think it is

[23] Remembering that the alternative of abandoning your belief that you ought to treat the law's directives as conclusive reasons is not of interest here, as we are only concerned with what it is for the law to guide the person who accepts its normativity (artificial or otherwise).

worthwhile to explore the possibility that the law necessarily aims to be a supreme normative authority (whether robustly or artificially) and yet does not necessarily exist to guide—it is a route that I will leave open here as a possibility.

4. *Conclusion*

We have seen that were someone to be guided by the law as a supreme normative authority, that someone must believe in advance that legal directives are necessarily conclusive reasons to do as directed. This belief allows the law to exploit your structural rationality in such a way as to bypass the need for any substantive practical reasoning on your part. This, we saw, gave us good reasons to doubt both the central feature claim—according to which law that fails to normatively guide is in one way deficient qua law—and the priority claim—according to which the law's guidance is meant to take priority over any other means the law might pursue to secure your conformity with its directives. It is both undesirable and implausible, I suggested, to think that the law is in one way deficient qua law for failing to exploit your structural rationality in this way, or that the law ought to take steps to ensure that you conform to its directives by being guided in this way, so that we should reject both the central feature and the priority claim.

In this chapter, I defended these objections against the central feature claim and the priority claim from some potential responses. In doing so, we saw that a relationship of causation and control is necessarily present whenever a person is guided by something that they believe has the power to give reasons. This revealed that the law's ability to cause and control the intentions of the person who accepts its supreme normative authority reflects a deeper fact about relationships involving powers of reason-giving in general, namely that such relationships preclude what I called relationships of unadulterated normative

guidance. Relationships of unadulterated normative guidance, I argued, can only exist in the absence of an ongoing belief in the power of another to give reasons.

To see this, I began by exploring whether a legal system consisting only of guidelines, understood as directives that are only epistemically, rather than robustly, reason-giving could help to shore up the central feature claim and the priority claim. I argued that the distinction between epistemic and robust reason-giving is too thin to prevent the possibility that relationships of causation and control exercised by the reason-giver will have an influence on someone's practical reasoning. By showing that it is a deeper fact about relationships involving powers of reason-giving in *general* that makes them incompatible with relationships of unadulterated normative guidance, we were better able to understand why the view that the law's reasons are meant to be conclusive reasons poses such difficulties for the central feature claim and the priority claim. We also saw that viewing the law as an artificial normative system does not rescue us from those difficulties, so long as you accept that the law aims to be a supreme artificial normative system. We are now in a position to turn to the conceptual necessity claim, according to which, for something to be law, it must be one of its functions to normatively guide.

5

The Fair, the Just, and the Reasonable

Practical reasoning is as difficult as life is complicated. The number and complexity of those facts that could possibly be reasons for and against performing some action in your situation can be overwhelming. When it is, we might look for some guidance. We have seen that, for some, it is part of what it is for something to be law that one of its functions is to provide that guidance by eliciting a certain interaction between people and those reasons the law provides. I called this the *conceptual necessity claim*.

Sometimes, however, a legal directive will simply refer you back to those same reasons that you were struggling with. Sometimes, the law will *pass the buck*, directing you to 'do as you ought to do', as if the law did not exist.[1] According to the conceptual necessity claim, such buck-passing directives are at best an anomaly.[2] With a better understanding of the nature and role of buck-passing directives in the law, however, we will see that the move from the premise that the law is a reason-giving normative system (whether robustly or artificially) to the conclusion that the law exists to normatively guide is unmotivated.[3] Once we realise that the action that some of the most central legal directives—such as directives of reasonableness and fairness—require us to perform just is the action that

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

[2] Some of the most ardent defenders of private law, where the role of such buck-passing directives is particularly prevalent, have bent over backwards to rescue it from what they see as an otherwise fatal inability to provide normative guidance: Benjamin C Zipursky, 'The Inner Morality of Private Law' (2013) 58 The American Journal of Jurisprudence 27.

[3] Where normative guidance is still understood in the significant sense of requiring an interaction to take place between a person and the fact that they use as a reason: see 'Introduction', 21.

reasons independent of the law require us to perform, we can see that not only do such legal directives provide little to no usable guidance but that the law actively *avoids* attempting to provide such guidance. Stripped of their guiding function, these directives 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 only legally), it being a further, contingent, matter whether legal directives are also there to actually be used in your practical reasoning and thereby to normatively guide you to such answers.

1. *Between the Ordinary and the Legal*

Many legal directives borrow normative terms from our ordinary lives. There are legal directives that require us to be fair, to be just, and to be reasonable. But there were reasons to be these things independent of the law. The neighbour who complains that it is unreasonable to play loud music at midnight is not made conceptually incoherent in a world without the tort of nuisance. I will refer to these reasons that exist independent of the law as 'ordinary' reasons.

It does not follow from the fact that a legal directive borrows normative terms from our ordinary lives that the legal directive bears any relation to the ordinary reasons that those terms refer to. A legal directive that requires us to be fair might give us legal reasons of fairness, but those legal reasons may be quite different from ordinary reasons of fairness. Call them *distinctly legal* reasons of fairness. Parliament could pass a statute containing the directive 'public officials ought to exercise their powers fairly' but then specify that 'fairness requires powers to be exercised for the benefit of the ruling class'. Such a statute would give rise to legal reasons of fairness that count in favour of doing something that ordinary reasons of fairness do not, at least if some version of legal positivism is true. The

legal directive and the normative term from our ordinary lives would now be little more than homonyms.[4]

Sometimes, however, a legal directive bears a direct relation to the ordinary reasons to which those normative terms refer. Sometimes, when a legal directive requires you to be fair the law is making reference to the ordinary reasons of fairness themselves. When this is the case, I will argue, the action the legal directive requires you to perform is determined, at least partly, by reference to what ordinary reasons of fairness require. In practice, many such legal directives will require consideration of a mixture of ordinary reasons and distinctly legal reasons.

An example of such a potentially mixed legal directive is found in the Consumer Rights Act 2015. Section 62(1) states that an *unfair* term of a consumer contract is not binding on the consumer. Section 63(6) goes on to state that a term *must* be regarded as unfair if it requires a consumer to prove non-compliance with distance selling rules. The directive 'unfair terms of consumer contracts ought not to be regarded as binding on consumers' potentially makes reference to ordinary reasons of fairness, so that whether a term is unfair is to be determined according to whether the balance of ordinary reasons of fairness counts against it. Section 63(6), however, potentially adds a distinctly legal reason into the mix when it says that a certain term is *always* unfair. If it is the case that ordinary reasons of fairness would not, in every possible situation, always count against such a term, then what the legal directive requires is not completely determined by what ordinary reasons require. Instead, the legal directive requires what ordinary reasons of fairness

[4] Leslie Green, 'Introduction' in HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) xli.

require *subject to* those distinctly legal reasons that are always conclusive reasons against a given contractual term, such as that found in section 63(6).

Legal directives that begin with a direct relation to ordinary reasons can become more distinctly legal over time. If in deciding that a certain contractual term is unfair a judge thereby creates a precedent which requires future courts to decide the same, then the judge is creating new distinctly legal reasons. Whilst, therefore, the first judge that has to decide whether some term is unfair might resolve the case solely by reference to ordinary reasons of fairness, the second judge may only be permitted to use the distinctly legal reason created by the first judge. In this way, a legal directive which begins by referencing, say, ordinary reasons of inequality may still become 'encrust[ed]' with distinctly legal reasons provided by judge-made 'factual paradigms of inequality, and multi-prong doctrinal tests for inequality, and so on'.[5]

At the other extreme, however, what a legal directive requires could be determined *entirely* by the ordinary reasons to which it refers. If a legal directive requires you to be fair, where this is solely a reference to ordinary reasons of fairness, and judicial decisions about what is fair in any given case do not give rise to distinctly legal reasons, then the action the legal directive requires you to perform in any given situation *just is* the action required by ordinary reasons of fairness.

You might immediately object that such direct relations between what a legal directive requires and what ordinary reasons require is incompatible with exclusive legal positivism. Whilst inclusive legal positivists allow that the content of the law can be

[5] ibid.

determined by social facts *and* those normative facts to which social facts refer,[6] exclusive legal positivists insist that the content of the law is determined *solely* by reference to social facts.[7] It would not then seem possible for what the law to require just to be what ordinary reasons require, for we would need to refer to the normative fact of what ordinary reasons require in order to determine what the law required. Thus, the conventional response of an exclusive legal positivist to a legal directive that required you solely to conform to ordinary reasons of fairness would be that there is a lacuna in the law: the directive is a kind of 'deregulation', purporting to leave us 'in just the same position we would be in if that law had not existed'.[8] As such, unless the law subsequently gives some specification to what fairness is, thereby adding some distinctly legal reasons into the mix, the legal directive does not require you to φ, where φing is the action that ordinary reasons of fairness endorse in a given situation.

To say, however, that unless the law specifies what fairness requires we are not legally required to φ is to confuse the *contents* of a directive with what that directive *requires* in a given situation. The contents of the legal directive 'you ought to be fair' can be determined solely by reference to social facts: we can tell, just by reference to what legal officials have said and done, that the directive amounts to a legal directive to conform to ordinary reasons of fairness. The problem is that this is where the social facts run out. But we already have enough to reach the conclusion that you are legally required to φ. We have enough because, whilst it is no part of the content of a legal directive 'you ought to be fair'

[6] HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) postscript.

[7] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) ch 10.

[8] Gardner, 'The Many Faces of the Reasonable Person' (n 1) 570.

that you ought to φ, it *is* part of the content of that directive that you have a legal reason to do something else, namely conform to ordinary reasons of fairness.

If the law gives us a legal reason to conform to ordinary reasons of fairness, and if ordinary reasons of fairness require us to φ, then it follows that the law requires us to φ. Not because we have a first-order legal reason to φ—*that* claim would be incompatible with exclusive legal positivism. Rather, it is no different from Raz's example of the father who instructs his son to obey his mother, thereby creating a positive second-order reason to act for the reasons that the son's mother creates.[9] The father creates no new first-order reason to φ, where φing is the action endorsed by the reasons that the mother's instructions create. Yet, the father still requires the son to φ, for a failure to φ necessarily entails a failure to do as the father's second-order reason required. In the same way, the legal reason to conform to ordinary reasons of fairness is a positive second-order reason to conform to those reasons, so that it requires you to φ just when ordinary reasons of fairness require you to φ.

This is how we can say that, sometimes, what a legal directive requires you to do just is what ordinary reasons require you to do, without saying that those ordinary reasons become legal reasons, as inclusive legal positivists would have it. Just as the law can direct a judge to go *outside* of the law to resolve a case,[10] the law can direct us to conform to non-legal reasons, thereby requiring us to perform the action that those non-legal reasons endorse.[11] Imagine that the law required a judge to decide a case according to ordinary

[9] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 16–17.

[10] Gardner, 'The Many Faces of the Reasonable Person' (n 1).

[11] As Raz himself acknowledges, a legal reference to ordinary reasons makes the application of those reasons 'legally required, and rights and duties according to law include thereafter rights and duties determined by those [ordinary reasons]. But they do not make those [ordinary reasons] part

reasons of fairness but that the judge came back and said that they decided the case in a grossly unfair way. The judge will have failed to do as the law required. Similarly, we fail to do as the law requires by failing to perform the action endorsed by ordinary reasons of fairness when the law requires us to be fair. It does not follow from the fact that it is no part of the content of the law that we have a legal reason to φ that we are not legally required to φ by virtue of a legal reason to do some other thing ψ. And where ψing is conforming to some set of ordinary reasons, what ψing requires of us just is what those ordinary reasons require of us.

Whilst this might seem an extreme thing for the law to do, the action that some of the most central directives in the law require us to perform just is the action that ordinary reasons require us to perform. Indeed, the law is intent on maintaining that direct relationship, actively resisting any attempts to allow these directives to become mixed through the creation of distinctly legal reasons. This, we will see, gives us good reason to think that the conclusion that follows from the premise that the law is a reason-giving normative system is not that it is a necessary function of the law to normatively guide but instead to determine the answer to normative questions.

2. *Passing the Buck*

A. Reasonableness

Directives of reasonableness are some of the most fundamental and pervasive legal directives in English law, with a central role across public law, private law, and criminal

of the law': Joseph Raz, 'Incorporation by Law' (2004) 10 Legal Theory 1, 10. The mistake is in thinking that the legal reference to an ordinary normative term only imposes legal requirements on the judge to determine a case according to ordinary reasons, rather than also imposing legal requirements on the rest of us similarly to go outside of the law to determine what we ought to do.

law. How should the government run the country? As a reasonable government would.[12] How much care should a carpenter take in the course of their work? No less care than the care a reasonable carpenter would take.[13] How much force may I use in defending myself against an aggressor? That level of force which it is reasonable to use.[14] If it is part of what it is for something to be law that one of its functions is to normatively guide, it would seem that directives of reasonableness are there to provide much of that guidance. Directives of reasonableness, however, are one of the most prominent examples of the law passing the buck to ordinary reasons.

To see that the action legal directives of reasonableness require us to perform in any given situation just is that action ordinary reasons require us to perform, we need to look at how legal directives of reasonableness are applied in practice. A good place to start is in the tort of negligence. Here a person will be liable when, among other things, they fail to act as a reasonable person would have acted. What does a failure to be reasonable look like? The law simply says it is a failure to be guided by 'those considerations which ordinarily regulate the conduct of human affairs'.[15] A consideration, being that which is relevant to how we ought to behave, is just another word for a reason. To be reasonable in the eyes of the law, then, is just to respond in the proper way to those reasons that you already had, independent of the law. This is why Gardner maintains that to be reasonable is just to act in conformity with the balance of reasons all things considered.[16]

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[12] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA).

[13] *Wells v Cooper* [1958] 2 QB 265 (CA).

[14] Criminal Justice and Immigration Act 2008, s 76.

[15] *Blyth v Birmingham Waterworks* (1856) 11 Ex 781, 784.

[16] Gardner, 'The Many Faces of the Reasonable Person' (n 1).

Now, I doubt that to be reasonable is just to conform to the balance of reasons *all things considered*. More often directives of reasonableness are used in the law to demarcate that set of reasons which it is *acceptable* to conform to, never mind that you could have done better.[17] On this view, reasonableness separates the obligatory from the supererogatory, that is those actions that we ought to perform all things considered but which a failure to perform is not blameworthy.[18] On either view, however, the crucial point is this: the legal directive 'you ought to be reasonable' simply requires you to conform to those reasons you ought to have conformed to anyway, independent of the law. The action the legal directive requires you to perform just is the action that ordinary reasons require.[19]

Nor is this direct relationship an accident, or simply a legal directive that has yet to acquire distinctly legal reasons. The courts actively seek to maintain this direct relation between what the legal directive requires and what ordinary reasons require. Take *Bolton v Stone*,[20] one of the most important cases on reasonableness in private law. The claimant was injured by a stray cricket ball from a nearby pitch. It was accepted that only very rarely in the past had a ball ever been struck over the fence—never injuring someone—and that

[17] For a similar suggestion in the context of public law: Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84 Modern Law Review 265.

[18] An example is the soldier who goes 'beyond the call of duty' by throwing themselves on a live grenade to save their comrades: JO Urmson, 'Saints and Heroes' in AI Melden (ed), *Essays in Moral Philosophy* (University of Washington Press 1958).

[19] You might have a different view of what it is to be reasonable, which is closer to the idea of an excuse, as in 'they ought not to have done what they did but it was reasonable for them to do so'. I think the two views can be made compatible, if we take what it is to be reasonable to be conforming to what *you believed* ordinary reasons to require. If you still think, however, that someone can be reasonable without having even conformed to what they believed ordinary reasons to require, then you might doubt the following doctrinal account of English law. It will ultimately be enough for my purposes, however, if you can *imagine* the law requiring you to do what ordinary reasons require you to do and still call it law, in which case the following should be read as a possible, if not an actual, account of English law.

[20] [1951] AC 850 (HL).

the 'hit was altogether exceptional in comparison with anything previously seen on that ground'.[21] The House of Lords held that the reasonable person only took reasonable precautions against a risk that was *reasonably* foreseeable, not risks that were foreseeable but extremely remote. How was this conclusion reached? Not by reference to the law, but by reference to what ordinary reasons require in everyday life. The ordinarily prudent pedestrian, according to Lord Oaksey, need not always 'avoid the use of the highway for fear of skidding motor cars',[22] and so ordinarily prudent cricketers need not always take every precaution to prevent injuries from stray hits.

Crucially, this conclusion was said to be one 'not of law but of fact and degree'.[23] The result being that, were the appeal to have been allowed, it would not follow that 'in every case where cricket has been played on a ground for a number of years without accident or complaint' that someone will not be found to have acted unreasonably for taking no precautions.[24] In other words, judicial decisions on what is (un)reasonable do not form binding precedents for future courts. In every situation, what reasonableness requires falls to be determined by ordinary reasons. There are no distinctly legal reasons here, and the law wants to keep it that way.[25]

[21] ibid 851.

[22] ibid 863.

[23] ibid 867 (Lord Reid).

[24] ibid.

[25] Remember that, whilst the finding that ordinary reasons required you to φ is a finding of fact, so that those ordinary reasons do not thereby become legal reasons, it is still part of the content of the law that you have a second-order legal reason to conform to those ordinary reasons. Thus, the fact that ordinary reasons required you to φ entails that you were legally required to φ.

B. Fairness

We can see the same with another central set of legal directives, this time in public law, where public officials are required to exercise their powers fairly. What is it to be fair? In answer to this question, Lord Mustill said 'it is unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained *what is essentially an intuitive judgment*'.[26] Distinctly legal reasons are not susceptible to elucidation via intuition: you need to look for them in cases and statutes. This strongly suggests that the legal directive 'public officials ought to exercise their powers fairly' is just referring to ordinary reasons of fairness. True, Lord Mustill goes on to generalise some key principles that he claims to have derived from past cases. The principles he derives, however, only reinforce the suspicion that what fairness requires just is what ordinary reasons of fairness require. The principles include the claim that standards of fairness are 'not immutable' but 'change with the passage of time' and are 'not to be applied by rote identically in every situation'.[27] Lord Mustill is emphasising the lack of distinctly legal reasons of fairness that tell you what is and is not fair in every case. Indeed, the House of Lords have said that were fairness to be reduced to such a set of distinctly legal reasons it would be a degenerative step.[28]

Of course, I do not mean to suggest that the courts have never said anything substantive about what fairness requires. It has been said, for instance, that 'fairness will

[26] *R v Home Secretary, ex p Doody* [1994] 1 AC 531 (HL), 560 (emphasis added).

[27] ibid.

[28] 'Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules': *Wiseman v Borneman* [1971] AC 297 (HL), 308 (Lord Reid).

very often require that a person who may be adversely affected' by an administrative decision be given the opportunity to make representations to the relevant public body.[29] Whilst 'very often' does not mean 'always', we can imagine an extreme case. What if a court said that it was fair for a judge to be biased? Clearly the court would be mistaken. Do we not have then a mixed legal directive, containing at least some distinctly legal reasons about what is *always* fair or unfair?

No, not necessarily. I said at the beginning that practical reasoning is as difficult as life is complicated. That is why rules can rarely approximate the complexity of life so that we would always reach the right answer by following them.[30] Sometimes, however, what ordinary reasons require *is* obvious. It is possible that reasons of fairness would never, in any situation, permit a judge to hear a case in which they have a personal interest. It would not follow, therefore, that if a court were condemned for failing to follow past decisions by allowing a biased judge to hear a case that any distinctly legal reasons of fairness were in play. We would need to know whether those past decisions created distinctly legal reasons of fairness that preclude biased judges from hearing cases, or whether such repeated decisions simply reflect the fact that what ordinary reasons of fairness require in such a situation is obvious.

A closer inspection of how judges think about fairness provides further evidence that what the legal directive requires in any given situation just is what ordinary reasons of fairness require. Applying the directive has been described as a 'difficult balancing operation taking into account the nature of the individuals' interest and the effect of

[29] *R v Home Secretary, ex p Doody* (n 26) 560.

[30] Aristotle, *Nichomachean Ethics* (WD Ross tr, Oxford University Press 2009) 98–99.

increased procedural protection upon the administration'.[31] Thus, in *Re Pergamon Press*, when deciding whether inspectors appointed by the Board of Trade had acted fairly in compiling a report on the affairs of a certain company, the court balanced the interests in maintaining confidentiality and safeguarding administrative efficiency against the interest of the company directors in protecting their reputation.[32] Such an exercise is indistinguishable from ordinary practical reasoning about fairness. There are no distinctly legal considerations which require specialist knowledge to appreciate: the ordinary reasons of fairness *would* require us to take the interests of others, the purpose of any decision, and the surrounding context as reasons for and against something being fair.

Lord Justice Lawton put the point best in *Maxwell v Department of Trade and Industry*.[33] He lamented futile efforts by lawyers to define what fairness requires in the abstract.[34] The result of such efforts, he said, was that 'a word in common usage has acquired the trappings of legalism'.[35] The criticism seems to be that what should be a matter of applying ordinary reasons of fairness, accessible to anyone, has become obscured by Latin maxims and terms of art that serve 'no useful purpose'.[36] Lord Justice Lawton instead declares that for the purposes of his judgment, 'I intend to ask myself this simple question:

[31] Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) 673.

[32] [1971] Ch 388 (CA); Martin Loughlin, 'Procedural Fairness: A Study of the Crisis in Administrative Law Theory' (1978) 28 University of Toronto Law Journal 215, 227–28.

[33] [1974] QB 523 (CA).

[34] 'Like defining an elephant, it is not easy to do although fairness in practice has the elephantine quality of being easy to recognise': ibid 539.

[35] ibid.

[36] ibid.

did the inspector act fairly towards the plaintiff?',[37] before turning straight to the facts of the case.

We have good reason to think, then, that some of the most central directives in the law are buck-passing directives, requiring us simply to conform to those reasons that we have independent of the law. We are now in a position to ask just how much guidance, if any, such directives can therefore provide.

C. Indirect Normative Guidance and Buck-Passing Directives

I drew a distinction in Chapter 1 between using something as a reason to φ, and using something to *derive* a reason to φ. You use some fact p as a reason to φ, I said, if and only if:

(1) you have a belief in respect of the fact that p is a reason to φ; and

(2) that belief figures in the right kind of way in your process of reaching an answer to the normative question of whether you ought to φ.

You use some fact N to derive a reason to φ if and only if:

(1) you believe that N requires you to ψ;

(2) you believe that were you not to φ you would not be complying with N itself; where

(3) complying with N itself requires a belief that p is a reason to φ because N required you to ψ.

[37] ibid.

The example I gave was of someone using the directive 'you ought to be fair when cutting up a birthday cake' in order to decide whether to give their child the same sized piece as every other child (φ). Such an example might look like this:

(1) you believe that you ought to be fair when cutting up birthday cakes;

(2) you believe that were you not to give everyone an equal piece of cake you would not be complying with the requirement to be fair; where

(3) complying with the requirement to be fair requires a belief that the fact that your child got a bigger piece of cake last year is a reason to give everyone an equal piece this year because you are required to be fair.

In this example, you derived from the directive a new reason in favour of giving everyone an equal piece (φing) because you identified some fact in your situation, namely the fact that your child got a bigger piece last year, as counting in favour of φing because you are required to be fair.

My account of using something as a reason to φ and using something to derive a reason to φ revealed an important distinction. When we use something as a reason, we are provided with guidance directly on the normative question that we sought to answer, so that potentially no further practical reasoning is required to answer the question of what action to perform in your circumstances.[38] Contrast this with using something to derive a further reason. When you engage in this second interaction of normative guidance, you do not arrive at a decision that answers the normative question of whether to φ. Rather, you arrive at the conclusion that some fact is a *reason* to φ. Deriving further reasons from

[38] I say 'potentially' because you may have only used this fact as a *pro tanto* reason, so that other facts remain to be used as reasons before you reach a decision about what you ought to do.

something therefore provides you with the *means* to answer the normative question of whether to φ by allowing you to identify facts in your situation as reasons.

I said, therefore, that using something as a reason provides us with *direct normative guidance*, for it directly addresses the normative question of what action to perform in your situation, in such a way that potentially no further practical reasoning is required to reach a decision. Deriving further reasons from something, on the other hand, provides us with *indirect normative guidance*, for some further practical reasoning *necessarily* remains to be done before we can figure out what action we are required to perform. Deriving further reasons from something allows you to identify a fact in your situation as a reason to φ, but it remains up to you to then actually use that fact as such a reason.

We can see that buck-passing directives therefore *necessarily* only provide indirect normative guidance. They are quite literally directives to use something *other* than the legal directive as a reason to answer the question of whether you ought to φ. I have already shown in Chapter 1 how this is the case for the directive 'public officials ought to exercise their powers fairly'. When faced with the normative question of whether, say, to approve a planning application (φ), you cannot just believe that the fact that the law requires you to be fair (ψ) counts in favour of φing without reference to further facts. You need to believe that there is some fact in your situation that *makes it the case* that not φing would be unfair. Your use of the directive 'you ought to be fair' is what allows you to identify such facts as therefore being *reasons* to φ. When the legal directive 'you ought to be fair' is also a buck-passing directive, those facts the directive identifies as reasons are those facts which make it the case that φing is in conformity with the balance of ordinary reasons of fairness.

The same holds for directives of reasonableness. Say that you are faced with a decision whether to give employees protective equipment (φ). You cannot just believe that

the fact that the law requires you to be reasonable (ψ) counts in favour of φing without reference to further facts. You need to believe that there is some fact in your situation that makes it the case that not φing would be unreasonable, such as the fact that your employees are engaged in dangerous work. It is your use of the directive 'you ought to be reasonable' to derive further reasons that allows you to identify *that* fact as a reason to φ. When the directive of reasonableness is a buck-passing directive, so that the action it requires you to perform just is the action that reasons require independent of the law, those facts the directive identifies as reasons just are all those facts which make it the case that φing is in conformity with the balance of reasons independent of the law.

Of course, it does not yet follow that such buck-passing directives have little guidance to provide. Indirect normative guidance can be incredibly helpful. Indirect normative guidance can potentially help you to narrow the field of reasons to which you must conform from a dizzying array to something more manageable. When the law directs public officials to conform to ordinary reasons of fairness, the official at least knows that they must conform to *those* ordinary reasons rather than, say, reasons of efficiency. In order for this indirect normative guidance to be helpful, however, the public official has to be in the right epistemic conditions to access it. Deriving further reasons from the directive 'public officials ought to exercise their powers fairly' allows an official to identify some fact as a reason to φ *because* that fact makes it the case that not φing is unfair. Deriving further reasons from the directive, however, does *not* tell the official which facts make it the case that not φing is unfair in the first place. The official needs to get that information from elsewhere.

This is why I said in Chapter 1 that the *kind* of guidance that a directive is capable of providing is independent from that directive's vagueness or indeterminacy. It is a

conceptual feature of some legal directives that they can only provide indirect normative guidance, so that further practical reasoning on our part necessarily remains to be done in order to figure out what action that legal directive requires. The vagueness or indeterminacy of legal directives is what makes that job harder, by affecting the law's *ability* to provide the kind of guidance it is otherwise capable of providing. And the law does indeed make that job harder here for the public official. By insisting that what it is to be fair is an intuitive judgment, the law has little to say on which facts make it the case that some action is fair or unfair, so that the directive cannot easily be used to pick those facts out as reasons. Of course, as with the biased judge it will sometimes be obvious as to what those facts are. When it is, that the law only provides indirect normative guidance, leaving it up to the public official to figure out that obvious answer for themselves, is not much of a limitation on the law's ability to guide.

Public administration is, however, a complex business. The epistemic burden on public officials to figure out which facts make it the case that not φing is unfair will often not be trivial. In doing little if anything to alleviate that burden, the law appears to be throwing its chances of normatively guiding to the wind, leaving it up to chance whether public officials can actually access the indirect normative guidance that the legal directive can provide. This limited ability to guide is a necessary feature of buck-passing directives. For the law to intervene by specifying certain facts as making it the case that φing is fair or unfair, the law would be creating distinctly legal reasons that always count in favour of some action being fair or unfair, and the direct relationship between the legal directive and the ordinary reasons would cease to obtain. When the law uses buck-passing directives, therefore, the law must not only leave it up to us to figure out what ordinary reasons require by providing only indirect normative guidance: it must also provide no help in identifying the facts which are those ordinary reasons in the first place.

Things get even worse for the law's ability to guide when it comes to directives of reasonableness. Here the law's indirect normative guidance does not even narrow the field of reasons to which you must conform. As we have seen, to be reasonable in the law is just to conform to ordinary reasons *simpliciter*. It would be too quick, however, to say that the law could never provide any guidance at all. For it is still possible to derive further reasons from a legal directive to be reasonable. Return again to the question of whether you should provide protective equipment to your employees (φ). Deriving a further reason to φ from the legal directive 'you ought to reasonable' would look something like the following:

(1) you believe that the law requires you to be reasonable;

(2) you believe that were you not to give employees protective equipment you would not be complying with the requirement to be reasonable; where

(3) complying with the requirement to be reasonable requires a belief that the fact that your employees are engaged in dangerous work is a reason to give everyone protective equipment because you are required to be reasonable.

As long as someone is in the epistemic conditions necessary to form the belief that some fact makes it the case that not φing is unreasonable, that someone can use the directive 'you ought to be reasonable' to identify that fact as thereby being a reason to φ. You might wonder, however, what the point of using a legal directive in this way is. If someone already believed that some fact made it the case that not φing is unreasonable, and if to be reasonable is just to do what ordinary reasons require, then the rational person who believes that p makes it the case that not φing is unreasonable must already believe that p is a reason to φ prior to using the legal directive. If you need the law to tell you that you ought to be conforming to those reasons that you already had independent of the law, then something has gone wrong.

That is precisely, however, what the law is telling you. In the example above, your use of the directive identifies some fact as a reason to give employees protective equipment *because the legal directive* requires you to be reasonable. Of course, before the law came along, the fact that your employees were engaged in dangerous work was already a reason to give them protective equipment. The thing that you would use to identify that fact as a reason, however, could be any number of pre-existing normative facts, such as the normative fact that you ought to keep people safe. Crucially, however, when you use the legal directive 'you ought to be reasonable' to identify the fact that your employees are engaged in dangerous work as a reason to give them protective equipment, the thing in virtue of which you believe that fact to be a reason is different. Rather than using some pre-existing normative fact, such as the fact that you ought to keep people safe, here it is the *legal fact* that you ought to be reasonable that you are using to identify the fact that your employees were engaged in dangerous work as a reason to give them protective equipment.

That using the legal directive to identify some fact as a reason to φ entails believing that p is a reason to φ because the *law* directed you to conform to ordinary reasons explains why it is a mistake to reason from the premise that the law is meant to make a normative different to our lives to the conclusion that, where the law tells you to do what you ought to have done anyway, it must be an instance of legal deregulation.[39] If and to the extent that the law is meant to make a normative difference to our lives, it would be precisely *because* the law is meant to make such a normative difference that, when the law directs us to conform to ordinary reasons, we should see it as giving us a new legal reason, namely a positive second-order legal reason to conform to those ordinary reasons. Whilst such a buck-passing directive is still an instance of deregulation to the extent that the law has

[39] Gardner, 'The Many Faces of the Reasonable Person' (n 1) 570.

passed the buck to ordinary reasons to determine what *action* we are required to perform in a given situation, the *grounds* for why we ought to be conforming to those ordinary reasons in the first place are meant to be different. For, rather than say 'do as you ought to do because you ought to do it anyway', by giving us a legal reason to conform to those ordinary reasons the law is effectively saying 'do what you ought to do *because you are legally required to*'.[40] It is important to realise that affecting the balance of what we have most reason to do is not the only normative difference that something can make to our lives. Something can also make a normative difference by giving us alternative grounds for doing what we already ought to have done.

Whilst, then, it is true that buck-passing directives purport to leave us in just the same position we would be in if they did not exist in respect of the action that we ought ultimately to perform, once we understand what it is to use such a buck-passing directive to identify the facts that are reasons to perform that action we can see that the directives are *not* meant to leave us in the same position in respect of the reasons for *why* we ought ultimately to perform those actions.

Whether anyone would or should use legal directives to derive reasons that they already had in this way is a further question. I highlighted some of the dangers of being normatively guided by even justified legal directives in the preceding chapters. All else being equal, it seems preferable that someone choose to be guided by the reasons that they already had because some pre-existing normative fact required them to do so rather than because a legal directive required them to.

[40] I am not suggesting that the law requires your compliance, so that it requires you to φ acting for the reason that the law required you to. Rather, the 'because' here refers only to the grounds of the reason to φ.

Perhaps, however, the point of such buck-passing directives is not to be used. Whilst buck-passing directives are necessarily *capable* of being used in our practical reasoning, it does not necessarily follow that such directives are meant *actually* to be so used. And remember that there is a significant and an insignificant version of the conceptual necessity claim. According to the insignificant version, which reduces normative guidance to reason-giving, for something to be law it must necessarily be the kind of thing which is capable of being used in the rational person's practical reasoning. We will see in the next chapter that this is a very low bar to meet. According to the significant version, however, which sees normative guidance as a certain kind of interaction that needs to take place between a person and the fact that they use as a reason, it is a conceptually necessary feature of the law that one of its functions is to normatively guide us by eliciting such interactions.

We have just seen, however, that not only do buck-passing directives provide little meaningful guidance but that the law seems actively to avoid attempting to provide such guidance. We might think, therefore, that the law has no particular interest in anyone actually using the legal directive to be reasonable in their practical reasoning to derive reasons that they already had. Whatever function such buck-passing directives are intended to fulfil, on this view, that function could be just as well served if no-one beyond the legal system was aware of their existence.

What could such a function of buck-passing directives be, if not to be used in people's practical reasoning and thereby to normatively guide them? I think the fact that such directives provide alternative grounds for why we ought to perform the action endorsed by the ordinary reasons to which they refer suggests that the function of the law here is to *make it the case* (whether robustly or only legally, depending on your view of the law's normativity) that you ought to conform to ordinary reasons *because the law required*

you to do so. On this view, when the law issues such buck-passing directives such as 'you ought to be fair' or 'you ought to be reasonable', the point is to make it the case that the *law* requires you to perform some action that you were already required to perform, apart from the law. Whether it is also a function of such directives to be used in your practical reasoning and thereby to normatively guide you is a contingent matter.

3. *The Function of Law's Normativity*

That whether the function of a legal directive is to be used in your practical reasoning and thereby to normatively guide you should be seen as a contingent matter will strike those who accept the conceptual necessity claim 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. Gardner says that it 'is a conceptually necessary feature of a legal system' that it is a reason-giving normative system, *from which it follows* that the 'proper way of functioning as a legal system' is by normatively guiding.[41] I argued that, for the conceptual necessity claim to have the implications commonly ascribed to it, it requires a significant account of normative guidance—that is, an account of the interaction that needs to take place between a person and the fact that they use as a reason in order to be normatively guided by that fact.[42] 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-giving normative system to the conclusion that the law exists to normatively guide is too quick. We are now in a better position to see why.

[41] John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) 229.

[42] See 'Introduction', 21.

A good place to start is the character of the law's normativity. Those who think that the law necessarily aims to be a supreme normative 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 moral reason from the law's point of view.[43] 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.[44] Whilst the claim implied here that a moral reason to φ all things considered makes it the case that you ought all things considered to φ *simpliciter* is controversial, I suspect that a good number in jurisprudence subscribe to it.[45] 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 a supreme normative authority in the practical domain.[46]

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

[43] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 111.

[44] Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 41) 149–50.

[45] 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* (Oxford University Press 2011) 82.

[46] Incidentally, this is a major source of objections to Razian legal positivism. Hershovitz, for example, suggests that, if the only practical reasons that we should care about are moral ones, we should not see legal normativity as a distinct domain of normativity, so that 'legal' reasons are just those moral reasons created by the actions of legal institutions: Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 The Yale Law Journal 1160. The view also motivates Greenberg's 'bindingness' criticism of the claim that the content of the law is determined by the communicative content of authoritative speech acts made by relevant legal officials: Greenberg, 'The Standard Picture and Its Discontents' (n 45) 84ff.

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,[47] 'providing an account of right-making characteristics is not *the same thing* as … providing a decision-making procedure'.[48] That is, it is one thing for morality to be that in virtue of which something is 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 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 indirect normative guidance. But that directive does not provide an 'immediately helpful description' of which action to perform in a given situation:[49] in other words, it does not provide direct normative guidance because the directive itself is not usable as a reason to answer the normative question of what action to perform in your situation.

Because the directive 'you ought to maximise utility' only provides indirect normative guidance on what action you ought to perform, 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,

[47] For a suggestion that it should only be a secondary concern: Linda Zagzebski, 'Exemplarist Virtue Theory' (2010) 41 Metaphilosophy 41.

[48] Eugene R Bales, 'Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure' (1971) 8 American Philosophical Quarterly 257, 261 (original emphasis).

[49] ibid.

combined 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 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.

This is beginning to sound very similar to how buck-passing directives work in the law. We have seen that buck-passing directives such as 'you ought to be reasonable' provide little to no usable guidance and that the law actively works to keep it that way. In fact, it is highly problematic to use such directives in your practical reasoning. Whilst the directive 'you ought to be reasonable' can be used to derive a new reason to conform to all those ordinary reasons that you had independent of the law *because the law requires it*, all else being equal it seems preferable that someone choose to be guided by the reasons that they already had because some pre-existing normative fact required them to do so rather than because a legal directive required them to. In other words, you will do *morally worse* by using the legal directive in your practical reasoning than by using the pre-existing normative facts to derive a reason to do what you already ought to have done. Yet, these legal directives still fulfil a function: they make it the case that you have a legal reason to conform to those ordinary reasons.

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 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. Given the prevalence of buck-passing directives in the law, 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. Rather than view such buck-passing directives as aberrant anomalies, their centrality in the law should be seen to reflect a more general truth about the nature of law: that it is not part of what it is for something to be law that one of its functions is to provide normative guidance in the significant sense.

You might object that, whilst it might be plausible to think that moral directives can primarily serve a grounding rather than a guiding function, there is necessarily a guiding function to legal directives, even those buck-passing ones. It might just be that the guiding function of such legal directives are necessarily directed towards *legal officials* rather than us. When the law issues a directive requiring us to be reasonable in certain circumstances, the law is at least telling the judge that in those circumstances they ought to determine the case according to ordinary reasons. I have already said that it would be a mistake to think, as some exclusive legal positivists think, that this is *all* such legal directives do—they also require us, as ordinary citizens, to be reasonable. We might still think, however, that the guiding function of such a directive is only aimed at officials.

Whilst legal directives might necessarily have this function of guiding legal officials in order that they can be applied, in terms of how the judge must actually decide a case in front of them a buck-passing directive such as 'you ought to be reasonable' provides no more helpful guidance to them as it does to us. And, more fundamentally, 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. Remember that this was one of the criticisms raised against Hart's later turn towards non-cognitivism about legal normativity.[50] The normative guidance that the law is commonly portrayed as attempting to provide is seen as there for us, as citizens.[51] 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*. Whilst it may not be a function of buck-passing directives to normatively guide us, 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 or fairness require, the law is more than happy to tell you *retrospectively* in court what the right answer was,

[50] 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* (Oxford University Press 2019). For further discussion, see 'Introduction', 14–15.

[51] Eg Raz says that 'the law claims to provide the general framework for the conduct of all aspects of social life and sets itself as the supreme guardian of society': Raz, *Practical Reason and Norms* (Oxford University Press 1999) 154; 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 6) 38–39 (emphasis added).

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 whether or not you think the law necessarily aims to be a supreme 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.[52] 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.

And 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 legal directives granting certain powers to the police and intelligence agencies in extreme circumstances. The Terrorism Act 2000 provided that, in certain circumstances, police and border officials could exercise powers to stop and search *irrespective* of whether the official had reasonable grounds for exercising it.[53] It would be implausible to think that a function of the legal directive here is to normatively guide officials into exercising their power *unreasonably*. That would be an irrational function to attribute to the law, just as it would be irrational for any official to believe that an exercise of their power would be contrary to reason but that they ought to exercise it. Instead, the function of the directive is to make it the case (whether just as a matter of law or also in the robust sense) that an officer has the power to stop and

[52] This further reinforces the need to see a buck-passing directive as creating a legal reason to conform to the ordinary reasons to which the legal directive refers. Without such a legal reason there would be no legal justification for a court to subsequently find that you failed to do as the law required when you, for example, acted unreasonably.

[53] Terrorism Act 2000, s 47A (previous s 44) and sch 7.

search anyone that they need to but leaving it entirely up to them to decide whether and when they ought to do so. In other words, the law seeks to determine the answer to the normative question 'is the officer permitted to stop and search this person?' in the affirmative, without taking any position on whether the officer ought to be guided by that answer.

The crime of rape is another potential example where it can become valuable to separate the function of determining the answers to normative questions from any guiding function. 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, 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 that the law contains 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 how 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'.[54] 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.[55] 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.[56] 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. Indeed, the previous objections raised against the central feature claim and the priority claim give us good reasons to think that it is in fact morally problematic and inaccurate to ascribe that function to the law, once we realise what it is to be guided by the law as a supreme normative authority. In other words, I am suggesting that so long as the law attempts to be *reason-giving*—to make it the case that we ought to do what its directives require of us, whether robustly or only legally—the law would be in no way deficient qua law if, for example, the law *only* sought to affect our behaviour through non-normative means.

Granted, the examples I have given so far to motivate this thought have been isolated examples of particular legal directives, albeit in the case of buck-passing directives some very central and prevalent examples. You might nonetheless object that it is not

[54] Leslie Green, 'Escapable Law' (2019) 19 Jerusalem Review of Legal Studies 110, 122 (original emphasis).

[55] ibid.

[56] '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).

possible to imagine an *entire* legal system that does not seek to normatively guide. I think, however, that it is possible to imagine 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 system. 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 (and what their religion requires them to do) for the reasons that make that action morally right rather than because they were told to 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.[57] It would not be a function of such a system that its directives are there to be used in your practical reasoning and

[57] This would be an example of a legal system which imposed a *legal* duty of compliance, but a legal duty to comply with moral reasons rather than legal directives.

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 yourselves. 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.[58] 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 legal reasons to perform or not to perform certain actions.[59] Those legal 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

[58] Grant Lamond, 'What Is a Crime' (2007) 27 Oxford Journal of Legal Studies 609, 618–20.

[59] 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.

to then intervene and respond to those who fail to reach the answer that the law provides. This is what it is for something to be normative: to provide, at least partly, the answers to normative questions—to make it the case that you ought or ought not to do something. And this is the case regardless of whether you think that the law is normative only to the extent that it seeks to make it the case that you *legally* ought or ought not to do something, or whether you think it necessarily aims also to make it the case that you *actually* ought or ought not to do something. The crucial point is that 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 is certainly a very *valuable* thing for the law to solve coordination problems such as which side of the road to drive on. It is, therefore, 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 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 legal 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. It is, essentially, a society run by the Machiavellian villain of Chapter 1.[60] This society has secured the valuable outcome (albeit by highly immoral means) of solving coordination problems through a normative system of directives enforced by officials but through causation, not through normative guidance.[61] 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 resolve 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 farfetched. So too, however, is Raz's society of angels.[62] Yet that 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—in addition to the prevalence of buck-passing directives and the problems identified previously with the central feature claim and the priority claim—are meant to motivate the thought that the same is true of the law's

[60] See 'Cruise Missiles and Cookbooks', s 1.

[61] Remember that, as discussed above, the normative guidance of legal officials alone is not sufficient to satisfy the conceptual necessity claim.

[62] Raz, *Practical Reason and Norms* (n 51) 158–63.

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 are various valuable upshots of that feature; we have discussed previously its claimed connections to dignity and autonomy,[63] 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.

4. *Conclusion*

We have seen that some of the most central directives in the law, such as directives requiring us to be fair and to be reasonable, pass the buck when it comes to the provision of normative guidance, for they simply direct us to do as we ought to have done anyway, independent of the law.[64] With a better understanding of the nature and role of buck-passing directives in the law, however, we saw that the move from the premise that the law is a reason-giving normative system (whether robustly or artificially) to the conclusion that the law exists to normatively guide is unmotivated. Stripped of their guiding function, these directives 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 only legally), it being a further, contingent, matter whether legal directives are also there to actually be used in your practical reasoning and thereby to normatively guide you to such answers.

[63] See 'The Price of Normativity'.

[64] Gardner, 'The Many Faces of the Reasonable Person' (n 1).

You might accuse me of making an overly reductive claim here. The above can be seen to reflect the simple fact that for something to be normative just is for that something to, at least partly, determine the answer to a normative question. Disentangling the claim that the law is a reason-giving normative system from the claim that it is a conceptually necessary feature of the law that one of its functions is to normatively guide gives rise to an important shift in emphasis, however—a shift that has important implications for the values and dangers that the law does and does not facilitate by its very nature. I will turn to some of those implications for the relationship between the law and the rule of law in the next, concluding, chapter.

6

The Rule of Reason

The rule of law, understood as a standard by which to measure the law's ability to guide conduct,[1] has been described as the 'inner morality' of law,[2] its 'specific excellence'.[3] The idea is that, if the 'essence' of the law is to normatively guide,[4] so that it is part of what it is for something to be law that one of its functions is to normatively guide, then it follows that it is part of the very nature of law that it ought to conform to the rule of law.

I have, however, suggested that we have good reasons to doubt the significant version of the conceptual necessity claim, according to which for something to be law it must not only be capable of being used in the rational person's practical reasoning but that it is also one of its functions to actually be so used. We will see that, on such a significant account of normative guidance as a certain kind of interaction between a person and the fact that they use as a reason, a radical failure to conform to those principles that are traditionally referred to under the label 'the rule of law'—that the law should be clear, open, general, prospective, and so on—is compatible with the law facilitating such interactions. Rather than regulating the law's ability to guide *simpliciter*, the rule of law here seems to

[1] There are, of course, other ways to understand the rule of law. In focussing here on the rule of law as a standard by which to measure the law's ability to guide conduct, I do not mean to suggest that this understanding is to be preferred over others. If anything, what I have to say here—namely, that understood as a standard by which to guide conduct the rule of law is not a standard that the law ought to conform to in virtue of the very nature of law—could be taken as a reason to endorse rival understandings of the rule of law which *do* constitute such a standard.

[2] Lon Fuller, *The Morality of Law* (Yale University Press 1969) 42.

[3] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 225.

[4] ibid.

reflect reasons for the law to normatively guide *in such a way* as to promote the value of autonomy and the proper use of coercion. If we reject the significant version of the conceptual necessity claim, however, these reasons are simply first-order moral reasons that the law ought to conform to in the same way that it ought to conform to any first-order moral reason; conformity to the traditional rule of law principles do not reflect, on this view, a standard which the law ought to conform to in virtue of the very nature of law.

Even on an insignificant account of normative guidance, which reduces normative guidance to reason-giving, we will see that none of the traditional rule of law principles are relevant to answering the question of whether the law is the kind of thing that is *capable* of being used in the rational person's practical reasoning and thereby being a reason for them. Rather, that question is regulated by what we might call the *rule of reason*. The rule of reason is simply the widely accepted condition in metaethics that for some fact to be a reason for someone that fact must be capable of being used in the rational person's practical reasoning. We will see that this is a much lower bar to meet than that set by the traditional rule of law principles.

If, therefore, by 'the rule of law' we mean to refer to a standard which the law ought to conform to in virtue of the very nature of law, then we ought not to use the label to refer to the principles traditionally given for assessing whether the law is able to guide conduct. The upshot is that those valuable aims and constraints that conformity to those traditional principles is said to impose on the law become external aims and constraints once we reject the significant version of the conceptual necessity claim. It is no part of the nature of law, on this view, that it should not be secret or that it should not just oppress people into conformity. The only certain thing is that the law will attempt to determine the answer to normative questions; to what end it does so, and whether the law's directives are there to

be used in your practical reasoning to help reach the answers the law provides, would be contingent matters.

1. *Against Exceptionalism*

Scepticism about the rule of law is not new. There is of course the long-standing debate over whether conformity to the rule of law ameliorates or exacerbates the evil in evil regimes.[5] When it comes to scepticism about the relationship between the traditional rule of law principles and the nature of law itself, however, that scepticism has sometimes taken the form of *exceptionalism*. It has become a popular refrain in private law theory that, whilst the rule of law might impose valuable aims and constraints on criminal and public law, there is something distinct about private law that renders the concept inapplicable to that area of law.[6] Such arguments, I think, fail on their own merits.[7]

More important for our purposes, however, is that the motivation for private law exceptionalism is misguided in the first place, for it takes as its premise the claim that private law is incapable of normatively guiding. Zipursky accepts that private law

[5] Eg Matthew Kramer, 'On the Moral Status of the Rule of Law' (2004) 63 The Cambridge Law Journal 65; Raz, *The Authority of Law: Essays on Law and Morality* (n 3) ch 11; John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) ch 8.

[6] Eg Benjamin Zipursky, 'The Inner Morality of Private Law' (2013) 58 The American Journal of Jurisprudence 27; William Lucy, 'The Rule of Law and Private Law' in Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014); Benjamin Zipursky, 'Torts and the Rule of Law' in Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014).

[7] Lucy, for example, offers the following argument: (1) the rule of law is a standard for law-making; and (2) law-making is the domain of the legislature; and (3) the legislature is primarily concerned with public law; therefore (4) the rule of law has little applicability to private law: Lucy, 'The Rule of Law and Private Law' (n 6). Leaving aside the dubious claims that 'private law is ready-made law' (ibid 42) and that the rule of law has nothing to say about how to *apply* such ready-made law, (3) is at best outdated and, regardless, system specific. Swathes of private law, particularly as it concerns consumers and the regulation of businesses, are now governed by legislation.

'drastically fails' to live up to key rule of law principles.[8] Tort law, he says, is 'notorious' for its 'unclarity and vagueness'; its rules are often not promulgated in advance of their application; it holds people liable to standards they did not have the capacity to live up to; and new duties of care are applied retrospectively on conduct which, at the time, was not unlawful.[9] Granting this, Zipursky's worry is the following: that tort law is not law.[10] This alarming conclusion is seen to follow from the premise that law which radically fails to conform to the rule of law is not law at all, because it is incapable of normatively guiding.[11] Rather than challenge that premise, Zipursky counters what he takes to be an existential threat to private law via private law exceptionalism.

Thankfully for private law, recourse to exceptionalism is unnecessary. For private law is capable of normatively guiding just as well as other areas of law. Say that you are faced with a decision whether to give employees protective equipment (φ), and that private law requires you to be reasonable. We saw in the previous chapter how you can use the fact that the law requires you to be reasonable to derive a reason to φ and thereby be normatively guided by the law in deciding whether to give employees protective equipment. Recall that you use some fact N to derive a reason if and only if:

(1) you believe that N requires you to ψ;

(2) you believe that were you not to φ you would not be complying with N itself;

where

[8] Zipursky, 'The Inner Morality of Private Law' (n 6) 31.

[9] ibid 31–32.

[10] ibid 36.

[11] Fuller, *The Morality of Law* (n 2) 39; Raz, *The Authority of Law: Essays on Law and Morality* (n 3) 86.

(3) complying with N itself requires a belief that p is a reason to φ because N required you to ψ.

Using something to derive a reason provides you with the means of answering a normative question by allowing you to identify facts in your situation as reasons. Thus, you might use the legal directive to be reasonable (ψ) to answer the question of whether to give employees protective equipment (φ) in the following way:

(1) you believe that the law requires you to be reasonable;
(2) you believe that were you not to give employees protective equipment you would not be complying with the requirement to be reasonable; where
(3) complying with the requirement to be reasonable requires a belief that the fact that your employees are engaged in dangerous work is a reason to give everyone protective equipment because you are required to be reasonable.

As long as someone is in the epistemic conditions necessary to form the belief that some fact makes it the case that not φing is unreasonable, that someone can use the directive 'you ought to be reasonable' to identify that fact as thereby being a reason to φ. We can see, therefore, that there is no conceptual bar to being normatively guided by this private law directive.

Of course, the objection will be that it is precisely because the private law directive 'you ought to be reasonable' is so *vague* that rarely will we be in the epistemic conditions necessary to know in advance which facts the directive identifies as reasons in any given situation. The first response to this is that we have already seen that this is true of some public law directives. The legal directive to public officials to exercise their powers fairly is also vague, leaving it up to officials to decide for themselves which facts are reasons of fairness in any given situation, whilst the courts make retrospective pronouncements on

what the fair outcome actually was.[12] If such a failure to live up to the rule of law principles threatens the very existence of private law directives such as 'you ought to be reasonable', then it also threatens the same of public law directives such as 'you ought to be fair'.

The second, and for our purposes the more significant, response is the fact that such epistemic difficulties do not preclude someone from having the right kind of interaction with the directive 'you ought to be reasonable' in order to be normatively guided by it. Take a *Donoghue v Stephenson*-type case,[13] where a court holds for the first time that you owe a duty of care in a novel situation so that the directive 'you ought to be reasonable' ultimately requires you to φ in circumstances where before the law did not require you to φ, and simultaneously holds the defendant liable for having failed to φ in those circumstances. This seems a clear violation of the rule of law principle that laws should not be retrospective. And yet that is no bar to the defendant using the legal directive to derive a further reason in order to answer the normative question of whether they *should have* φ-ed. They can believe that the legal directive required them to be reasonable, and they can believe that were they not to have φ-ed they would not have complied with the requirement to be reasonable, and they can believe that p was a reason to φ because they were required to be reasonable. In doing so, they have been normatively guided by the directive in coming to the conclusion that p was a reason to φ in their situation.

The obvious objection is that this is *not* the right kind of interaction, for the point is for the legal directive to normatively guide your action *at the time you were required to perform it*. But why is that objection obvious? Why is it not enough for the law to normatively guide you into forming beliefs about what you had reason to do, about what

[12] See 'The Fair, the Just, and the Reasonable', s 2(B).

[13] [1932] AC 562 (HL).

you ought to regret and make reparations for, instead of guiding you into not making the mistake in the first place? Hart provides a common answer: because you ought to be able to plan your life so as to avoid legal sanctions, should you wish.[14] The worry is that, if you want to avoid having to pay someone compensation for negligently injuring them, you need to know *in advance* that a failure to φ in some circumstances amounts to a failure to be reasonable.

Imagine, however, that the law simply declared that you ought to be reasonable but that no legal consequences followed from a failure to conform to the directive. What, now, would be the objection to the directive radically failing to live up to the rule of law? If we are to rely on Hart's focus on coercion, there can be none. The rule of law on this view is not a standard by which to measure the law's ability to normatively guide *simpliciter*; we have just seen how a radical failure to conform to rule of law principles does not preclude someone from having the kind of interaction with the law necessary to be normatively guided by it. Rather, it is a standard for regulating the law's use of coercion, to make sure that we can be normatively guided by the law *in such a way* that we can plan our lives according to the threat of legal sanctions.

We know, however, that the law is not necessarily coercive.[15] The traditional rule of law principles, then, on this view cannot amount to a standard which the law ought to conform to in virtue of the very nature of law. Rather, it simply reflects first-order moral

[14] Hart says that we should 'consider the law not as a system of stimuli but as what might be termed a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways': HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, Oxford University Press 2008) 44 (original emphasis).

[15] HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 6–7, on how the law obligates people to do things, not just obliges them to; Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 158–63, on how even a society of angels would need law, but not coercive enforcement.

reasons about the proper use of coercion that the law ought to conform to in just the same way that the law ought to conform to any such moral reasons. To the extent that parents threaten their children with sanctions for failing to do as they are told, they too ought to avoid surprising their children with such sanctions by making sure that their instructions are clear, prospective, and so on. Of course, often it is more serious for the law to surprise you with a sanction than your parents. And there might well be special reasons for why legal sanctions, as a form of *state coercion*, need to be announced in advance. It remains the case, however, that if it is no part of the nature of law that it is coercive it is also no part of the nature of law that it ought to normatively guide in such a way as to respond to those moral reasons that regulate the proper use of coercion.

Rather than think that the rule of law is all about ensuring that people are given notice about the legal consequences of some action, you might think that conformity to the rule of law promotes the values of dignity and autonomy *regardless* of whether the law is coercive. You might think that simply by pronouncing a directive in advance in a clear manner the law treats us as rational people capable of using that directive in our practical reasoning and altering our behaviour accordingly. The value of the rule of law here becomes the value the law supposedly promotes by normatively guiding people, as opposed to just oppressing them into conformity.[16] It is here that, if we accept that there is a special relationship between an attempt to normatively guide and the nature of law, that the rule of law becomes the 'specific excellence' of the law,[17] for it is by conforming to the rule of

[16] Raz, *The Authority of Law: Essays on Law and Morality* (n 3) ch 11; Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 The Cambridge Law Journal 200.

[17] Raz, *The Authority of Law: Essays on Law and Morality* (n 3) 225.

law that the law functions in the 'proper way of functioning as a legal system', that is by normatively guiding people.[18]

I have argued, however, that we have good reasons to doubt both the priority claim, according to which the law's guidance is meant to take priority over any other means the law might pursue to secure your conformity with its directives, as well as the central feature claim, according to which law that fails to normatively guide is in one way deficient qua law. Indeed, in the previous chapter I suggested that there is a plausible view of the law according to which even the significant version of the conceptual necessity claim is false, so that whilst it might be part of what it is for something to be law that it is necessarily *capable* of being used in the rational person's practical reasoning, it is *not* part of what it is for something to be law that one of its functions is to actually be *used* as such and thereby to normatively guide in the significant sense of eliciting a certain kind of interaction between people and those reasons the law provides.

If it is true that these claims about the relationship between an attempt to normatively guide and the nature of law are false, then the proper way of functioning as a legal system is not by normatively guiding in the significant sense. Whether the law attempts to normatively guide by eliciting a certain kind of interaction between people and those reasons it claims to provide is just as contingent, on this view, as whether the law attempts to coerce, and the law would in no way be deficient qua law for failing to normatively guide in this way. If, then, conformity to the rule of law promotes the values of dignity and autonomy by ensuring that the law normatively guides people in such a way that promotes these values, that value has no special relationship to the law. Rather, promoting dignity and autonomy by normatively guiding in a specific way is simply an

[18] Gardner, *Law as a Leap of Faith: Essays on Law in General* (n 5) 229.

external moral value that the law ought to pursue, in just the same way that the law ought to pursue any moral value.

2. *In Favour of Eliminativism*

On a significant account of normative guidance, requiring a certain kind of interaction between people and those reasons the law claims to provide, the traditional rule of law principles do not reflect a standard which the law ought to conform to in virtue of the very nature of law, if we deny that it is one of the necessary functions of the law to normatively guide by eliciting such interactions. Rather, those traditional principles simply reflect first-order moral reasons about autonomy and/or the proper use of coercion, first-order moral reasons that the law ought to conform to in just the same way that it ought to conform to any first-order moral reasons.

It does not yet follow, however, that the traditional rule of law principles do not reflect a standard which the law ought to conform to in virtue of the very nature of law. For it may be that the principles reflect such a standard for the law according to the insignificant account of normative guidance. On the insignificant account of normative guidance, normative guidance is reduced to reason-giving, so that to normatively guide *just is* to give reasons, never mind whether anyone ever interacts with those reasons in their practical reasoning. You might think that here, at least, there is a special connection between the traditional rule of law principles and the law. After all, nothing that I have said casts any doubt on the idea that the law is a reason-giving normative system. If the rule of law measures the law's ability to guide in the sense of its ability to be reason-giving, and if, for something to be law, that something must necessarily be the kind of thing that can be

reason-giving,[19] then we will have established the rule of law as a standard that the law ought to conform to in virtue of the very nature of law.

The trouble is that the traditional rule of law principles do *not* measure the law's ability to be reason-giving. It is widely accepted in metaethics that for some fact to be a reason that fact must be capable of being used in the rational person's practical reasoning. The disagreement is over what it is for some fact to be capable of being used in this way. For internalists, some fact is capable of being used in the rational person's practical reasoning only when that someone's individual psychology is such that an awareness of that fact would motivate them to act, believe, or feel in some way, at least if that given individual were thinking clearly.[20] Thus, for an internalist, if the psychological make-up of a given individual was such that an awareness of the fact that performing some action φ causes great suffering could not induce any psychological motivation not to φ in that individual, even when that individual is thinking clearly, then that fact is *no reason* for that individual not to φ.

Externalists, on the other hand, deny that whether some fact is capable of being used in the rational person's practical reasoning depends on the psychological make-up of a given individual.[21] Rather, whether some fact is capable of being used in the rational person's practical reasoning is for an externalist just the question of whether that fact is

[19] Raz says that 'if the claim to authority is part of the nature of law, then whatever else the law is it must be capable of possessing authority … it must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority': Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 215. Given that a legitimate authority is necessarily reason-giving, on this view the law must necessarily be the kind of thing that *could* be reason-giving.

[20] Eg Bernard Williams, *Moral Luck: Philosophical Papers 1973–1980* (Cambridge University Press 1981) ch 8.

[21] Eg Derek Parfit, *On What Matters* (Oxford University Press 2011) vol 1 pt 1.

capable of being used in the practical reasoning of the *substantively* rational person, that is the person who properly appreciates value. For an externalist, therefore, some fact can be a reason for you *even if* an awareness of that fact might not motivate you in any way; thus, the fact that φing causes great suffering might be said to be a reason for *everyone* not to φ in virtue of the value there is in avoiding suffering, regardless of whether you personally would be motivated not to φ by an awareness of that suffering, because the substantively rational person *would be* motivated not to φ by such an awareness.

Both internalists and externalists agree, therefore, that for some fact to be a reason it must be capable of being used in the rational person's practical reasoning. The disagreement is over whether a fact is capable of being used in this way just when a given person's psychology would allow them to be motivated by such a fact, or just when the fully substantively rational person would be motivated by such a fact. Thus, both internalists and externalists would agree that for some fact p to be a reason to φ, p must be the kind of fact which is *capable* of being used in the rational person's practical reasoning. Call this the *standard view* of reasons.

None of the traditional rule of law principles measure whether some legal fact is the kind of fact that could be a reason for someone according to the standard view of reasons. For an externalist, the most vague and secret law is still the kind of fact that could be a reason for someone, given that it would still be possible for the substantively rational person to use that fact as a reason were they to be in the epistemic conditions necessary to access that fact. Parfit, for example, maintains that you have a conclusive reason to stand still in the face of a poisonous snake that responds only to movement, even if you falsely believe that fleeing is the only way to save your life. The conclusive reason is given by the value that there is in saving your life, value that *would* motivate the substantively rational

person to stand still, *were they aware* that the snake only attacks moving targets.[22] Whereas for an internalist, there could never be one set of conditions according to which some fact could be a reason *simpliciter*, given that whether some fact could induce a certain psychological motivation in a given person will vary according to the psychological features of that person.

If, therefore, what we are concerned with is whether the law is able to normatively guide in the insignificant sense of being the kind of thing which is capable of being a reason, rather than speak of 'formal' and 'substantive' conceptions of the rule of law,[23] we should speak of externalist and internalist conceptions of the *rule of reason*. That is, that set of conditions which must obtain for some fact to be the kind of fact that could be a reason for someone. For an externalist, what the rule of reason requires is very minimal. As we have seen, for an externalist it is enough to say that some fact is the kind of fact that could be a reason if the substantively rational person would be capable of using that fact as such. Never mind that no currently existing human could use that fact as a reason, so long as some future person with a proper appreciation of value could do so the rule of reason would be satisfied. Thus, if the rule of law is concerned with whether some legal fact is the kind of fact that could be a reason for someone, whether that fact is secret, unclear, retrospectively applied, and so on, is no obstacle.

On an internalist conception of the rule of reason, there will necessarily be a different set of conditions for each fact, and in respect of every given rational person, that need to be satisfied in order for that fact to be a reason. The legal directive 'you ought not to murder' will meet those conditions for some people, who could be motivated by the fact

[22] ibid 34–35.

[23] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law' (1997) 21 Public Law 467.

of the law's directive not to murder, but potentially not for others. If you do not care, even when you are thinking clearly, that the law has directed you not to murder, so that you are in no way motivated by that fact not to murder, then the legal directive is not the kind of fact that could be a reason for you.

Notice that the rule of reason is not a *standard*. It is a set of conditions that are, at least partly, constitutive of what a reason *is*: a fact that is capable of being used in the rational person's practical reasoning. This is another reason why the rule of law cannot be a standard for measuring the law's ability to be reason-giving. Conformity to the rule of law admits of degrees: a purported law can be more or less vague, or it can be very clear but retrospective, and so on. But something cannot be more or less the kind of fact that is capable of being a reason. Either a rational person would be able to use some fact as a reason, or they would not.

Even on an insignificant account of normative guidance, then, the traditional rule of law principles do not reflect a standard that the law ought to conform to in virtue of the very nature of law. Indeed, they have *no* relationship to the law, if we think the rule of law is a measure of the law's ability to be reason-giving. For whether something is the kind of thing that is capable of being reason-giving is governed by that set of conditions that we might call the rule of reason, of which conformity to the traditional rule of law principles forms no necessary part.

If, therefore, by the label 'the rule of law' we mean to refer to a standard that the law ought to conform to in virtue of the very nature of law, we should cease to refer to those traditional principles that the law should be clear, open, prospective, and so on, under that label. We should, in other words, be *eliminativists* about 'the rule of law', unless we can find another set of principles that do reflect a standard which the law ought to conform

to in virtue of the very nature of law.[24] For on neither a significant account of normative guidance nor on an insignificant account do the traditional principles reflect such a standard. The upshot is that, if we are to deny the significant version of the conceptual necessity claim, not only is it no part of the nature of law that one of its functions is to normatively guide by eliciting a certain kind of interaction between people and those reasons it claims to provide, but that it is also no part of the nature of law that it should not be secret, unclear, retrospectively applied, and so on. Those aims and constraints that the traditional rule of law principles impose on the law are, on this view, relegated to external aims and constraints, in so far as they simply reflect the first-order moral reasons there are for the law to respect our dignity and autonomy by normatively guiding us in certain ways, first-order moral reasons that the law ought to conform to in just the same way that the law ought to conform to any such moral reasons.

3. *The Nature and Limits of Guidance*

We began with the popular view in jurisprudence that the law exists to guide us. The aim of this thesis was to cast doubt on this popular view. I argued that it is plausible to think that the law does *not* necessarily exist to guide us. The ambition of the argument was

[24] Alternative rationales for the rule of law which might provide such a set of principles might be the prevention of arbitrary government: Timothy Endicott, 'The Impossibility of the Rule of Law' (1999) 19 Oxford Journal of Legal Studies 1. Or helping to ensure that the law is used 'in the interests of the governed': Joseph Raz, 'The Law's Own Virtue' (2019) 39 Oxford Journal of Legal Studies 1, 7. You might wonder whether such alternative rationales might rehabilitate the traditional principles of clarity, openness, prospectivity, and so on. It is not clear that they could as a matter of necessity, however. There can, for example, be good reasons for a law to be retrospective, including reasons given by the interests of the governed, acting for which would preclude arbitrariness. Consider *R v R* [1992] 1 AC 599 (HL), in which the House of Lords overturned the rule whereby a wife was presumed to consent indefinitely to sexual intercourse with her husband upon marriage, and therefore retrospectively found the defendant guilty of attempted rape. Far from being arbitrary, the decision can be said to uphold what Endicott refers to as 'the reasons of the law', the decision reflecting the more modern principles around consent and the relationship between spouses that the law now embodies. Similarly, there is a strong argument to be made that such a decision is ultimately in the interest of the governed.

qualified in two key ways, however. The first qualification was that, 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 minds. The second way in which the ambition of the argument was qualified was that, in arguing that it is plausible to think that the law does not necessarily exist to guide us, I argued that it is plausible *given a certain view about the nature of law*. That certain view about the nature of law is the view that the law necessarily aims to be a supreme normative authority.

I started in Chapter 1 by giving an account of what it is for something to guide in general. Specifically, I provided a significant account of what it is for something to guide normatively as opposed to non-normatively—that is, an account of the interaction that needs to take place between a person and the fact that they use as a reason in order to be normatively guided by that fact. To that end, the chapter provided an account of guidance with particular reference to two questions: (i) what is it that distinguishes relationships of normative guidance from relationships of non-normatively guided movement, such as the relationship of guidance between a driver and their car; and (ii) what is the distinct nature of the interaction that we must engage in to use something as a reason so that we are normatively guided by that something?

In focussing on these two questions, two features of how the law guides emerged, features which formed the foundation of the following chapters. The first feature was that, despite the involvement of reasons, the law can sometimes exert a large degree of control over us in a manner that is at least analogous to non-normative guidance, if not being an instance of non-normative guidance itself. The second was that, with an appreciation of a distinction that I drew between direct and indirect normative guidance, we can better understand the limits of the law's ability to normatively guide us.

Chapter 2 built on the significant account of normative guidance from Chapter 1 to give an account of what it is to act for, and thereby comply with, a reason. In doing so, we began to see that there are some moral costs to the claim that the law exists to normatively guide us. Specifically, this chapter argued that the law's normative guidance risks getting people to act for morally worse reasons than they would otherwise, even where the law is morally justified.

With an account of what it is to act for, and thereby comply with, a reason we saw that for something to succeed at normatively guiding action that something must succeed at securing people's compliance. If the law exists to guide as a supreme normative authority, however, then the law's guidance depends on a certain type of compliance, for to attempt to guide people as a supreme normative authority is to give them independently sufficient reasons to do as directed. It is plausible to think, however, that we ought to act for those moral reasons that make doing as the law requires the right thing to do, at least in addition to any other reasons that we might act for. By presenting people with an alternative set of independently sufficient reasons, the law risks getting people to act for morally worse reasons than they would otherwise, even where the law is morally justified.

The purpose of Chapter 3 was to develop this thought further, and to show how the moral danger identified in Chapter 2 is significant enough to cast doubt on both the central feature claim—according to which the law is in one way deficient qua law if it fails to normatively guide in the significant sense—and the priority claim—according to which the law's guidance is meant to take priority over any other means the law might pursue to secure your conformity with its directives. Starting with faith in God, I showed that, for the rational believer who accepts that God's directives are necessarily conclusive reasons for them, the relationship of guidance between God and that believer is one in which God is

able to exploit the believer's structural rationality in such a way as to bypass the need for any substantive practical reasoning on the part of the believer. The result is that God is able to cause and control the formation of the rational believer's intentions to do as directed.

Whilst it might seem strange to think that the law guides the person who accepts its authority in the same way as God guides the person who has faith in them, I argued that this is the case if the law necessarily claims to be a supreme normative authority. Whilst the analogy with faith is imperfect, by reconstructing John Gardner's idea of a leap of faith in the law, we saw that to be guided by the law as a supreme normative authority involves this same exploitation of your structural rationality. This, we saw, gave us good reasons to doubt both the central feature claim and the priority claim. It is both undesirable and implausible, I suggested, to think that the law is in one way deficient qua law for failing to exploit your structural rationality in this way, or that the law ought to take steps to ensure that you conform to its directives by being guided in this way, so that we should reject both the central feature claim and the priority claim.

Chapter 4 then defended these objections against the central feature claim and the priority claim from some potential responses. In doing so, we saw that a relationship of causation and control is necessarily present whenever a person is guided by something that they believe has the power to give reasons. This revealed that the law's ability to cause and control the intentions of the person who accepts its supreme normative authority reflects a deeper fact about relationships involving powers of reason-giving in general, namely that such relationships preclude what I called relationships of unadulterated normative guidance. Relationships of unadulterated normative guidance, I argued, can only exist in the absence of an ongoing belief in the power of another to give reasons. By showing that it is a deeper fact about reason-giving in general that makes it incompatible with

relationships of unadulterated normative guidance, we were better able to understand why the view that the law's reasons are meant to be conclusive reasons poses such difficulties for the central feature claim and the priority claim. We also saw how viewing the law as an artificial normative system does not rescue us from those difficulties, so long as you accept that the law aims to be a supreme artificial normative system.

Chapter 5 then turned to the conceptual necessity claim, according to which it is part of what it is for something to be law that one of its functions is to guide in the significant sense. Here, I argued that the action that some of the most central legal directives—such as directives of reasonableness and fairness—require us to perform just is the action that reasons independent of the law require us to perform. I showed that not only do such legal directives provide little to no usable guidance, but that the law actively avoids providing us with such guidance. Stripped of their guiding function, these directives revealed 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 only legally), it being a further, contingent, matter whether legal directives are also there to actually be used in your practical reasoning and thereby to normatively guide you to such answers.

This chapter then concluded with an exploration of some of the implications of denying that it is a necessary feature of the law that it attempts or ought to attempt to guide us in the significant sense. Specifically, the chapter focussed on the implications for the relationship between the law and those principles that are traditionally referred to under the label 'the rule of law'. I argued that, if it is not a necessary feature of the law that it attempts or ought to attempt to guide us in the significant sense, then those principles simply reflect first-order moral reasons about autonomy and the proper use of coercion, moral reasons

which the law ought to conform to in just the same way that it ought to conform to any other first-order moral reasons. The principles traditionally referred to under the label 'the rule of law', on this view, do not reflect a standard which the law ought to conform to in virtue of the very nature of law.

Even on an insignificant account of normative guidance, which reduces normative guidance to reason-giving, I argued that none of the traditional rule of law principles are relevant to answering the question of whether the law is the kind of thing that is capable of being a reason for someone. Rather, that question is regulated by what we can call the rule of reason, which is simply the widely accepted condition in metaethics that for some fact to be a reason for someone that fact must be capable of being used in the rational person's practical reasoning. We saw that this is a much lower bar to meet than that set by the traditional rule of law principles.

If, therefore, by 'the rule of law' we mean to refer to a standard which the law ought to conform to in virtue of the very nature of law, then we ought not to use the label to refer to the principles traditionally given for assessing whether the law is able to guide conduct. The upshot is that those valuable aims and constraints that conformity to those traditional principles is said to impose on the law become external aims and constraints once we reject the significant version of the conceptual necessity claim. It is no part of the nature of law, on this view, that it should not be secret or that it should not just oppress people into conformity. The only certain thing is that the law will attempt to determine the answer 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.

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