would make law seem best is fairly obviously deeply unappealing to anyone who has any kind of attraction to the positivist picture. The positivist is likely to say that trying to make law look good is precisely what she is against; in fact, it is the importance of a cool, detached, stance toward law that motivates her positivism in the first place.

So we don't seem to have progressed very far from our accounts in previous chapters of positivism and nonpositivism as two different fundamental understandings of the kind of thing law is. It's not that the two camps each think that the other side is missing something. Each side thinks that the other is fundamentally and hopelessly mistaken about what law is. For the reasons given, I am skeptical about the availability of substantive argument that might have the power to move either side closer to the other. All the arguments I have seen inevitably include some premise or methodological commitment that is sure to seem less compelling to one of the sides than their initial fundamental convictions about the kind of things law is.

I am not arguing that there is no truth of the matter about the nature of law. What I believe is that the disagreement in this case is stark and fundamental, and does not seem to connect sufficiently to other matters we care about, or at least not in the right way, to make substantive argument possible.

Eliminativism

The standoff is hardly surprising for those who all along have thought that our dispute was purely verbal, that the two sides are merely using the term "law" in different ways and that's all there is to it. What has made this conclusion seem implausible is the simple thought that the dispute about the nature of law must be important because it is important to know the content of the law in force. Unlike the case of democracy, it hasn't seemed that we do just as well talking about adjacent issues and leaving the content of law aside. But perhaps we should now reconsider.

The proposal that we should simply stop talking about the content of law is more radical, though more plausible, than the proposal that we should replace talk about law with talk about, say, positivistic law. The suggestion is that, in place of inquiry into the content of the law in force, we need nothing at all.[7]

Of course, there is no chance that people will stop talking about what the law is, so the proposal really amounts to the claim that this talk plays no important role in legal practice and social life generally – it is a wheel spinning on its own. We can get on perfectly well by discussing a range of other questions. Within legal practice, judges and other legal officials need a theory of legal decision making, which is a political theory setting out what textual materials and other considerations it is appropriate to take into account and in what way. As we saw in Chapter 2, such an account can be expressed without reference to the content of the law in force prior to the decision; it is entirely possible for positivists and nonpositivists to agree about the best theory of adjudication. Legal practice also requires a theory of legal counsel, of how lawyers should advise clients. This is where Holmes's (1897) "bad man" theory of law can seem plausible: Lawyers should advise clients on the assumption that all they care about is how the legal system will affect their interests and so offer predictions about what it is most likely to do to them if they make certain choices. Whether or not the "bad man" description is necessary, the idea that lawyers do and should advise clients based on predictions about what will happen, as opposed to considered judgments about the content of current law, is not novel. Finally, considering legal practice in the broadest political sense, we need a theory of what legal systems should strive for if they aspire to realize good governance. In addition to legitimacy and justice, there are the distinctly legal issues associated with the ideal of the rule of law, such as the separation of powers, procedural fairness and respect for the agency of subjects, along with questions of legal

[7] My account of eliminativism emerged out of many conversations over nearly two decades with Lewis Kornhauser. See Kornhauser (2004) for his own framework.

design such as whether it is better for legislatures and judges to produce texts and pronouncements made up so far as possible of formally realizable rules.[8]

We can say and do a lot with these accounts of legal decision making, legal counsel, and good governance. What we cannot do is discuss what the law now is: any such question must be paraphrased into a moral question about what a person ought to do or a descriptive question about the state's likely responses to people's decisions.

We need not try our hand at eliminativist rephrasings of familiar discourse about law. For even if coherent paraphrases were available for every familiar kind of claim about the law, it would not be plausible to think that nothing important had been lost in the translation.

As I have said, law governs the categorization of rules and standards into those that are presented by the state to its subjects as legitimate demands and those that are not. For the criminal law, in particular, it seems ridiculous to propose that, properly understood, there are no crimes, just good or bad decisions in criminal cases and better and worse predictions about our interactions with the criminal justice system. There is, at the very least, an expressive significance to the criminal law that this redescription cannot capture. Consider the situation in Singapore with respect to Section 377A of the *Penal Code*, which criminalizes sex between consenting adult males. In a 2007 speech to Parliament opposing repeal of this section, the prime minister of Singapore announced that the government would not "proactively enforce" it.[9] Does that mean that gay men in Singapore have nothing to complain about until

[8] The issue of design is the one that "normative positivists" are most centrally concerned with. See Campbell 1996, 2004, 2005; Waldron, 2001, 2009a. Methodologically, Campbell embraces the instrumentalist approach: we should stipulate the concept of law that, among other good effects, fits best with the model of law as a set of formally realizable rules (2005, 27). One possible interpretation of Waldron's "normative positivist" articles has him embracing a version of Dworkin's interpretive method. This method is explicitly embraced in Waldron 2008, 47 n. 143).

[9] Lee Hsien Loong speech's to Parliament http://www.yawningbread.org/apdx_2007/imp-360.htm.

the government changes its mind and starts prosecuting gay men for having sex?

But more important than law's expressive function is the role of law in people's practical lives. Consider first the legal subjects that are the typical focus of legal philosophy – individuals in more or less well-functioning states. Many people "accept" the law in Hart's sense: for some reason or other, they treat valid law as giving them reasons for action. The point Hart wanted to make with his notions of acceptance and the internal point of view was that for many or most people, legal norms do not simply set prices on possible actions, where the price varies from context to context. We do not typically deliberate about the costs and benefits of following the law "for this case only," but adopt a standing policy about the reason-giving force of law in general. This standing policy might, but need not, be based on a sense of moral obligation. We might, for example, accept legal norms out of a sense of self-interest or a mere preference to conform with the conduct of others.

Suppose that I accept legal norms out of a belief that, in general, my life goes better if I comply. If all I am worried about is the effect of my compliance on my own welfare, it might seem that I would do better with a Holmesian theory of legal counsel than a theory of law. What I need to know is how my welfare will be affected if I do certain things, and since legal norms are not magically enforced, that might suggest that I need a predictive theory about the behavior of judges and the executors of law. So if concern with my self-interest leads me to accept the law, the eliminativist may claim that I am making a mistake, that the rational thing to do is regard legal rules as setting prices for particular decisions.

This is not, however, an obviously compelling claim, since it may well be that I generally do better simply following the law as I understand it rather than deliberating about the effects of compliance in each particular case. This seems particularly evident when we take into account reputational factors, the good that comes my way, as I might plausibly believe, from being generally regarded as a law-abiding character. I cannot

reliably predict or control these effects, nor the success of efforts to conceal noncompliance. So a sensible course would be to adopt a deliberative "rule of thumb" according to which I will follow the law unless some special reason presents itself to me that might justify my taking the time to think about whether I would in fact do better not complying in a particular case. Now of course whether all this makes sense will depend on the circumstances. If I am very badly off without a career to protect, the Holmesian approach may well be appropriate, since relatively speaking I have more to gain from certain forms of noncompliance and reputational effects are less important to my welfare. But if my circumstances are fortunate, the gains from noncompliance in particular cases will not, relatively speaking, be so important. If I can assume that other people, officials and ordinary legal subjects alike, have mostly the same views about the content of law as I do (or will form after I consult a lawyer), it cannot be asserted a priori that it is irrational to accept the law for self-interested reasons.

Suppose now that I accept legal norms because I believe that they are morally binding. Here too it could be claimed that I am confused. Isn't what I should be concerned about rather the judicial decision that authoritatively declares my legal duties and rights? So wouldn't I actually get closer to my goal of performing my legal obligations if I accepted instead the outputs of good adjudication, actual or hypothetical?[10]

We consider the strength of the moral reasons there in fact are for accepting the law in the next chapter. But supposing for now that there are moral reasons to accept the law, the question is whether anything would be lost if people instead treated as reason-giving good legal decisions, what those with authority to resolve disputes ought to decide. For those who accept the adjudicatory view of law that would in any case be equivalent to treating the law as reason giving, since on that view the law just is what a judge, acting in her professional capacity, ought to base

[10] I am grateful here to Lawrence Sager.

her decision on.[11] But for positivists and for nonpositivists who reject the adjudicatory view, the proposal would obscure something of importance: the ability to be able to say, for example, that while I accept the law as it is, I believe that the courts ought to overrule the relevant precedent or invalidate what has until now been valid legislation. It is an important aim of positivists to bring to the surface (what they regard as) the fact that judges have the authority to change the law. It is not as if is this idea were exactly revolutionary, at least in the common-law world. Sometimes even judges announce that they and the litigants before them are bound to one set of norms (current law) though the case for the highest court to reach a different decision (and thus change the law) is strong. The adjudicatory view implies that the norms we do or should accept are those that would properly be announced by a highest court even in cases where we have little reason to expect that a highest court will address the issue and every reason to expect that lower courts will, in conscientiously carrying out their professional roles, recognize different norms (see Waluchow 1994, 31–79 for relevant discussion).

This brings out that the very issue of the grounds of law, as opposed to the theory of adjudication, has clear significance for those who reject the adjudicatory view of law, but unclear significance for those who accept it. Another way to bring this out, in terms of Dworkin's theory, is as follows. For Dworkin, when an individual is trying to determine the law for his own case, his process of deliberation should be exactly the same as a judge's. Each of us has the responsibility to interpret the legal materials to show them in their best light. We do not defer to authority on the content of law – thus the characterization of the theory as "protestant" (1986, 190). What this means, again, is that what individuals need to know is precisely what judges need to know if they are conscientiously to discharge their obligations when resolving disputes. It is therefore not surprising that Dworkin's (2011, 404–5) latest view identifies the legal with

[11] We can leave aside cases where the law is so bad that the judge has moral reason to abandon her professional obligation to reach a decision in accordance with law.

the justiciable, holding that legal rights and obligations just are political rights and obligations that "are enforceable on demand in an adjudicative political institution such as a court."

But all that is impossible to accept if there can be a difference between good interpretation of the law and good adjudication, since if that is so judges must be recognized as having law-making power that individuals of course do not have. An individual must figure out what the law is, not pretend he is a judge. In many cases, for those who reject the adjudicatory view, a conscientious individual and a conscientious judge can and should reach different conclusions.

The upshot, as with just about every other issue that connects to that of the grounds of law, is that the question of eliminativism looks different depending on what theory of law we are inclined to accept. Perhaps the adjudicatory view of law is correct, in which case we could greet the eliminativist proposal with shrug. But for those who reject that view, the eliminativist invitation to replace acceptance of law with acceptance of the outputs of good adjudication must be rejected too.

Let us turn next to the kind of legal subject much less often discussed by legal philosophers – states.[12] As I argue in the next chapter, states or governments are the morally most important subjects of law, in the sense that the normative significance of law is clearest for them. For now, however, the issue is how the eliminativist challenge looks when applied to the case of states as legal subjects.

Law that applies to states rather than individuals includes international law, constitutional law, and ordinary domestic law such as legislation that applies to the executive branch of government. As Chapter 8 is devoted to the additional issues raised by international law, I restrict myself here to domestic law.

A government may ignore the law, and (we hope) concern itself with good governance alone. But a government, or its officials, may also accept

[12] See Goldsmith and Levinson (2009) for closely related discussion. I am grateful to David Golove in this and the next few paragraphs.

the law. Would they do as well accepting the outputs of ideal adjudication? In some cases, with the details depending on the legal system in question, the situation of a branch of government subject to law is similar to the situation of individuals subject to law. Courts or other adjudicatory bodies may be available to review, to a greater or lesser extent, executive and legislative interpretation of applicable law. However, in all legal systems there will be limits to the justiciability of legal questions that relate to government action. Even in a legal system with liberal rules of standing and a willingness by courts to consider "political questions," institutional factors – such as the ability to collect the relevant information – inevitably limit the kinds of legal issues that courts can competently address. And even apart from legal doctrine that limits courts' adjudicatory role, there is the simple fact that a legal issue may not end up in court, for all kinds of extralegal pragmatic reasons. So the question arises of how nonjudicial branches of government should approach the matter of determining the content of the law that applies to them. The implication of the eliminativist suggestion to drop law and make do with a theory of adjudication is that the legislative and executive branches should deliberate about their legal own situation as if they were adjudicating disputes.

Once again, if we accept the adjudicatory view of law, the question will not arise. There is only one interpretive task to be found, and that is the same whether the interpreter is making a decision about the law for someone else's case or for her own case; and if making a decision for her own case, it makes no difference whether the subject of law is a private individual or an official of the state acting in a professional capacity.

By contrast, if we reject the adjudicatory view of law, a number of interesting political questions must be confronted. Should the legislature, when attempting to confine its law-making activity to the constraints of a constitution, reason about what is and is not permitted in exactly the same way as a court charged with constitutional review of legislation? There is a current discussion in the United States about extrajudicial constitutional interpretation. One issue is whether judicial interpretation, where present, should govern (Alexander and Schauer 1997; Whittington 2009).

Along the way, several questions arise about the differences between the two kinds of interpretation such as whether legislatures need give no weight to their own precedent – prior legislative interpretations of the constitution.

Similar questions arise for the executive branch deciding whether the Constitution allows, for example, a certain military action. Suppose that this is not considered a justiciable issue and that a plain reading of the constitutional and legislative materials leaves the question unsettled within a certain range, in the manner of a Kelsenian frame (1967, 350–1). Should past constitutional understanding by officials of the executive branch carry weight? Must the government attempt to settle the issue by carrying forward the principles that it can uncover in the Constitution and relevant legislation (as interpreted by courts?), or should it treat the Kelsenian frame that the texts provide as a space for entirely free choice so far as the Constitution is concerned?

And if the courts give deference to statutory interpretation by an administrative agency, should the agency see its interpretive task as the same that a court would have if it were not deferring?

In every one of these three cases, it is just as implausible to suggest that the legal interpreter has the authority to change the law as it is for the case of the individual subject. This is because of the obvious difference between determining the law of one's own situation and resolving a legal dispute between third parties.

Another important general point is that whether or not there is a doctrine of stare decisis, courts are thought to declare the law at least for the particular case. This is a precondition of taking precedent seriously. It also supports the thought that indeterminacy left by a plain reading of the legal materials should be resolved by courts in a way that is true to discernible underlying principles – in the manner of Dworkin's theory of interpretation – rather than by way of legally unconstrained choice. It is obvious that the conclusions of private individuals about their own legal situation should not be treated as declarations of what the law is that has weight for others. For the case of governmental legal subjects this is

not obvious. It is an open normative question whether the conclusions of the executive and/or the legislature about the law that applies to them should be treated as authoritative declarations about the content of law as applied to the particular case, or instead as good faith attempts by these branches to comply with the law as they see it.

In a recent study of the role of precedent in the executive branch in the United States, Trevor Morrison concludes that the Justice Department's Office of Legal Counsel does to a large extent follow its own precedent. More important for current purposes, however, is his normative analysis. Morrison argues that precedent should have weight for the executive branch, but a different weight than it should have for courts. On the one hand, decisions concerning executive power should have greater precedential weight, especially when in line with past executive practice; on the other hand, the views of the Office of the President about the content of current law should have special precedent-trumping weight. "The argument here rests on the President's democratic accountability and his ultimate responsibility for the actions of the Executive Branch" (2010, 1511).

But perhaps the most telling difference between judicial and executive legal interpretation in Morrison's analysis is his understanding of the president's responsibility in the face of a controversial legal issue.

> Although his oath of office obliges him to uphold the Constitution, it is not obvious he would violate that oath by pursuing policies that he thinks are plausibly constitutional even if he has not concluded they fit his best view of the law. It is not clear, in other words, that the President's oath commits him to seeking and adhering to a single best view of the law, as opposed to any reasonable or plausible view held in good faith. (2010, 1466)

This does amount to the view that the executive can choose within a Kelsenian frame, so long as the borders of that frame are set by plausible interpretation of the content of current law.

The issues raised here are obviously very complex, and their detail depends on the content of constitutional law and institutional

arrangements in a particular jurisdiction. My point is the very general one that eliminativism would make it impossible to discuss what appear at first glance to be significant political/legal questions. The fact that they make no sense on the adjudicatory view of law would seem to impugn that view rather than the questions.

As a final point, it should be noted that my discussion thus far of "theories of adjudication" has been too simple. As Lewis Kornhauser (unpublished manuscript) convincingly argues, we tend to think about adjudication on the model of an appellate judge sitting alone, whereas in fact what we need are theories of adjudication appropriate for trial judges sitting alone, on the one hand, and appellate judges sitting on collegial courts, on the other. Moreover, different actual collegial courts have different practices for announcing decisions – thus English collegial courts issue opinions of individual judges seriatim, while U.S. collegial courts offer a majority opinion, together with possible concurrences and dissents. Which kind of collegial court a judge sits on will affect what will need to be taken into account in reaching a decision. If differently positioned judges need different theories of adjudication, the eliminativist suggestion is underspecified: Which kind of judge are we all supposed to be imitating when we try to figure out the content of the law?

In light of all these points, an eliminativist could concede that we need more than a single theory of adjudication, a theory of legal counsel, and a theory of good governance. We will need multiple theories of adjudication for different kinds of courts. We may also need a variety of theories of proper legal interpretation; these theories will set out how different kinds of legal subjects (private individual, legislator, executive official, and so on) should figure out what rights and obligations they have in virtue of extant legal materials. Conceding all that is consistent with the position that no one needs to know what the law is. Just as judges don't need a theory of the law to resolve disputes, but rather a theory of factors to take into account when discharging their obligation to resolve disputes, other legal subjects need only an account of how legal materials that apply to them affect their moral rights and duties. If each of us is

equipped with an account of the moral significance (for someone in our position) of statutes, constitutions, and so on, there is simply no need to answer the further question of what the law is.

But by now the whole thing is starting to seem implausibly artificial. The natural thing to say about the range of nonadjudicatory contexts I have discussed is that different legal subjects may stand in different relationships to the law that is in force, both in terms of the normative implications of the law for them, and in terms of the effects of their decisions about how to behave on the further development of the law. For judges too, the most natural way to express the various theories of adjudication that the variously positioned judges will need will be in terms of their different relationships to the law that is in force.

Perhaps the most compelling way to bring this out is to consider the position of lawmakers, legislators and judges alike.[13] If no one ever needs to reason from beliefs about the content of the law in force, lawmakers should no longer think that what they are creating are legal directives or facilitating legal rules. Rather, the materials lawmakers create are the grounds of moral arguments for individuals and officeholders about their rights and duties as partially determined by legal materials, where, moreover, those arguments take a different form in each case – individual, executive official, adjudicator, legislator. It's not clear exactly what the lawmaker should have in mind when thinking about how to improve the legal materials.

To put the eliminativist proposal in perspective, it may be helpful to compare the case of law to something else that philosophers have generally thought plays an essential role in moral argument – the idea of a person's overall welfare (or well-being). Utilitarianism holds that we ought always act so as to promote overall welfare. And any plausible moral theory will tell us that we are sometimes required to make people's lives go better (some people's lives, to some extent, and so on). It would seem, then, that any plausible moral theory requires a freestanding

[13] These thoughts were prompted by Smith 2011.

theory of welfare. There is a considerable literature addressing the question of what the best theory of welfare is. The familiar options include experiential, desire, and substantive good theories (Parfit 1984, 493–502; Scanlon 1998, 113–26). Experiential theories tie welfare to having subjective experiences we prefer (pleasure and freedom from pain), desire theories to the satisfaction of actual desires, and substantive good theories to the achievement of certain goods that would include pleasure and the absence of pain but also such things as close relationships, success in our rational aims, appreciation of art and nature, intellectual development, and so on – where some of these things may be taken to be good for us whether or not we desire them. It would seem that figuring out the right account of welfare is essential if we want to know how to live well, either morally or prudentially.

However, Scanlon (1998, 108–43) has raised a kind of eliminativist argument about welfare. Just as our eliminativist argument about law argues that we don't need a freestanding theory of the content of law to figure out the obligations that are in part determined by legal materials, Scanlon argues that we don't need a freestanding theory of welfare to figure out our moral responsibility to promote the interests of others or to figure out how to act in ways that are good for ourselves. The argument is complex, but the gist of it is that while we can invoke a notion of welfare in our practical reasoning, it is typically neither necessary nor the most direct way to proceed. When it comes to our own case, we do just as well, or better – since the contours of welfare are not clear – reasoning directly about the various factors that constitute welfare; we don't pursue our rational aims, for example, because they contribute to our welfare, though they perhaps do that. Similarly, from the third-person perspective, if we have reason, moral or not, to be concerned with the welfare of others, it is plausible that not all aspects of what makes a person's life go better according to the best theory of welfare are our responsibility. In either case, it seems that a theory of welfare need not play any role in our reasoning.

I believe that Scanlon approaches the issue in exactly the right way. The issue is whether there is a significant practical role for the theory of

welfare. If there is not, there may be such a thing as a person's welfare, but we need not trouble ourselves trying to get it right. As it happens, I think that Scanlon underestimates the practical role of judgments of welfare in a number of ways. To give just one example, it seems that though parents should be concerned with the aims and aspirations of their children even beyond any contribution to their welfare, parents ought nonetheless to think that their primary responsibility is to do what they can to promote all aspects of their children's welfare. Figuring that out requires thinking about what really does make a person's life go better overall. This applies at the political level as well. A department of child welfare is aptly named. And when a family court judge decides a custody dispute according to the welfare or best interests of the child, she does need a notion of what exactly that amounts to. So though not all third-personal responsibility for the interests of others encompasses the whole of the welfare of others, some instances of that responsibility do.

I might be wrong about whether practical deliberation would be impoverished without the idea of welfare; Scanlon may be right that it would not be. I mention welfare as a comparison case because it does help bring into focus what is at stake in the issue of whether we need a theory of law in our practical deliberations, or whether, by contrast, law is an abstraction that we can bypass by going directly to the moral significance for people in particular positions of certain political facts, such as that a legislature has passed a certain directive.

As I have said, there seem to be two main reasons why we continue to need a theory of law. First, debates about how different legal subjects – individuals, legislators, executive officials, (differently positioned) judges – should respond to legal materials are most naturally understood as debates about how people in these positions may stand in different relationships to the law that is in force, both in terms of the normative implications of the law for them, and in terms of the effects of their decisions about how to behave on the further development of the law. Second, and perhaps more important, is the fact that lawmakers cannot plausibly be thinking that what they create are political facts

that have a variety of implications for a variety of different kinds of legal subjects. For there to be any coherent and manageable structure to the thoughts of those who create law, they must be thinking that they are creating directives to be presented to all relevant subjects as legitimate demands on their conduct.

A Problem?

So we seem to face a problem. We cannot give up on the idea that it matters what the law is, but disagreement about the grounds of law runs so deep and is so tenacious that we frequently have no option but to say that on one not unreasonable understanding of the nature of law, the content of law is such and such, but that on another, it is something else. Though this situation may not be terribly troubling in other areas of inquiry, where we might just cheerfully accept that there is much disagreement abroad, the role of law in social life makes it troubling for this case in particular. It is especially troubling that the persistent disagreement does not come from case-by-case differences in judgments about how to apply various generally accepted criteria to particular cases, but rather from disagreement about what those criteria are. Disagreement about the very grounds of law, stemming from profoundly different views about the kind of thing law is, seems incompatible with the role of law in structuring the relationship of subjects to the state and through it, to each other.

Of course, I haven't proved that this standoff is permanent; there's no claim that greater convergence is impossible. The most promising general strategy would be to continue to search for agreement about the relation between law and something else where reflection of the nature of that something else might provide reason to embrace either positivism or nonpositivism about law. Though I have said that the versions of this approach offered by Raz (law and authority) and Dworkin (law and legality) are unsuccessful, I certainly haven't shown that no version of this approach will succeed. Nonetheless, I am in the end inclined to think that our two camps are unlikely ever to be moved by argument – no other