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Getting Serious about Taking Legal Reasoning Seriously

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GETTING SERIOUS ABOUT "TAKING LEGAL REASONING SERIOUSLY"

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INTRODUCTION

The motivation for this symposium is Professor Markovits's accusation—or at very least his genuine concern—that some American legal academics these days no longer "take legal reasoning seriously." This is no mere intellectual concern on his part, for he also suggests that this failure has genuine consequences for the practice of law and, ultimately, the quality of American life insofar as it is structured by law.[1] If this be so, it is a grievous fault, and grievously must these academics answer it. But we think that the charge itself needs to be inspected carefully, not merely for what it says, but for what it does.

In this essay we are interested both in Professor Markovits's specific views about "seriousness" and the more general question of what it means to take legal reasoning seriously. The two are not identical. Professor Markovits believes that taking legal reasoning seriously requires a commitment to belief in objectively right answers to questions of law that people can arrive at by reasoning about and through certain rights and principles.[2] This theory of "serious" legal reasoning is inspired in large part by Ronald Dworkin's early work, although Professor Markovits apparently now believes that even Dworkin does not take legal reasoning sufficiently seriously.[3]

Nevertheless, one suspects that not everyone worried about the current state of legal academic writing (or reasoning) will sign on to Professor Markovits's views about the requirements of a "serious" commitment to law and legal reasoning. Many people may insist that

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1. *See* Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHI.-KENT L. REV. 415 (1999).

2. *See id.* at 415.

3. *See id.* at 451-53.

they believe in the relative autonomy of legal discourse from politics—or from other academic disciplines—but still fight shy of Professor Markovits's particular theories about rights and right answers. These legal thinkers might well worry that other scholars do not take legal reasoning sufficiently seriously; yet, from Professor Markovits's perspective, they too are culpable examples of legal apostasy.[4] If Professor Markovits is to be believed, not many members of the current legal academy really do take legal reasoning seriously these days.

Indeed, as we will shortly discover, Professor Markovits's theory of "serious" commitment to law has the unfortunate consequence that very few of the people who actually practice law in the world outside the academy take legal reasoning "seriously" as he defines the term. Practicing lawyers are devoted to promoting their clients' interests. They are paid good money not to produce right answers rightly reasoned but answers that benefit their clients. Hence, they will normally make whatever grammatically permissible legal arguments will best achieve this goal, whether or not they seem the most sound to them. These lawyers are neither Dworkinian nor Markovitsian in their attitude toward law. Nor is the inferior court judge, whose work consists largely in the interstitial readings of higher court precedents, whether she regards these precedents as well or poorly reasoned. One has to wonder whether a theory of serious legal reasoning so disconfirmed by the actual social practices it purports to describe and regulate can be taken, well, seriously.

Beyond Professor Markovits's particular theory, however, is the larger question of what is at stake in the charge that someone "doesn't take legal reasoning seriously." We think that such accusations are usually disciplining moves by persons involved in a struggle over the direction and future of a practice. They are symptoms of an interpretive dispute over whose vision of the practice shall prevail. Often both the accuser and the accused will insist that the other is misunderstanding the practice. When this happens, probably the last thing one can say about the participants in such a struggle is that they do not take the practice seriously. Each side is usually quite serious about the practice and about the direction in which they want it to go—that is the reason why the struggle between

4. *See, e.g., id.* at 440-60 (finding the views of Legal Realists, members of the Critical Legal Studies Movement, Legal Pragmatists, Philip Bobbitt and Dennis Patterson, Judge Learned Hand, John Hart Ely, unnamed "Strict Constructionists," Ronald Dworkin, communitarian and libertarian legal scholars, and Bruce Ackerman wanting).

them is so determined and fierce. And that is yet another reason why the charge that someone is not "serious" about the practice should itself be taken with a grain of salt.

I. DO PRACTICING LAWYERS "TAKE LEGAL REASONING SERIOUSLY"?

Professor Markovits's complaint against the contemporary legal academy is surely heartfelt. Yet it raises the interesting question whether there is in fact anyone who takes legal reasoning seriously in the way that he thinks they should, aside from himself and (possibly) an earlier incarnation of Ronald Dworkin.

Markovits's argument vacillates over whether "taking legal reasoning seriously" is a matter of internal states of mind or external performance. To "take legal reasoning seriously," does one actually have to believe in objectively right legal answers arrived at through rights discourse, or is it sufficient that one simply talks as if one does? In religious terms, must one have faith or is it sufficient to engage in the rituals that faith prescribes? Perhaps the post-structuralist writer of academic screeds and the lawyer-economist may be condemned for flunking both requirements. But when we turn to the practicing lawyer or judge, the distinction becomes quite important.

The reasoning practices of lawyers are, in most cases, grammatically acceptable versions of what we call "lawtalk."[5] Lawyers cite cases and statutes, they offer legislative histories and principled justifications. Yet the internal beliefs and motivations of practicing attorneys differ markedly from the dogmas of rights and right answers that Markovits presses upon us. Lawyers defending their clients do not want to make "the" objectively correct legal argument. Nor is it clear that they even believe such a thing exists. Rather, they want to make the most plausible argument that will substantially advance their clients' interests. To be sure, psychological pressures to reduce cognitive dissonance may lead some lawyers to believe that the arguments they make on behalf of their clients are actually the best legal position. But this change in beliefs—whether labeled "the getting of wisdom" or "self-deception"—does not occur in every case. Moreover, even when a lawyer convinces herself that the truth is on her side, it is not the pursuit of objectively correct right

5. On the notion of "lawtalk," see J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1774-78 (1994).

answers that motivates the lawyer's argument, but the desire to win the case. If the lawyer were to discover that her client's interests (or desires) had changed in the interim, she would be duty bound to argue for still another legal position with equal zeal and forcefulness.[6]

These facts about the legal profession make Professor Markovits's theory deeply ironic. Lawyers not only are required to make arguments they do not personally believe,[7] but also are required to make them in a rhetorical form that *appears* to take law very seriously indeed and that insists that the positions they espouse *are the objectively correct answers*. Indeed, most briefs we have read state emphatically that there are right answers to legal questions and, not surprisingly, that these answers demonstrate conclusively why the client deserves to win. Thus, the irony of Markovits's theory of law is that it describes what lawyers must *simulate* rather than what they must *believe* in order to fulfill their professional obligations to their clients.

Professor Markovits's view also seems to be largely irrelevant to the practices of the vast majority of the judiciary. Most judges in the

6. As an example, consider the change in position taken by the Solicitor General of the United States in *United States v. Fordice*, 505 U.S. 717 (1992), a case that considered the desegregation obligations of state-run colleges and universities. After the Solicitor General filed a brief on behalf of the United States, President Bush indicated his disagreement with the position. The Solicitor General's office then filed a new brief taking a contrary position. *See* Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, N.Y. TIMES, Oct. 22, 1991, at B6. As Greenhouse wrote, "[a] virtually unheard-of footnote" in the new brief explained, "Suggestions to the contrary in our opening brief no longer reflect the position of the United States." *Id.* (internal quotation marks and footnote omitted). There was no suggestion that the change in position was the result of further legal analysis that persuaded the highly professional lawyers in the Solicitor General's Office that their earlier position had been mistaken. Rather, their boss, the President of the United States, ordered them to take the different position, and they did so. Although the abrupt reversal in positions was no doubt embarrassing to the lawyers concerned, no one at the time suggested that the Solicitor General, sometimes dubbed "the tenth justice," *see* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987), had behaved unethically or unprofessionally in crafting his arguments to the Court to fit the demands of his client. What is unusual about the episode was not the shaping of argument to client interest but its overtly public character. It is as if the curtain had come up too quickly in a play or opera, so that the audience could see the actors still putting on their makeup or otherwise performing "out of role." Most lawyerly submission to the commands of their clients takes place "backstage," as it were, rather than before the watchful eye of the *New York Times* dramatic (or legal) critic. *See* J.M. Balkin & Sanford Levinson, *Law as Performance*, *in* LAW AND LITERATURE 729 (Michael Freeman & Andrew Lewis eds., 1999).

7. Although Professor Markovits seems to identify the "serious" lawyer with the practitioner of a certain theory of legal philosophy, actual lawyers are much closer to the rhetor of ancient Greece. In Plato's *Gorgias*, Socrates subjects the rhetor to withering criticism precisely because the rhetor is willing to use all of his art and oratorical wiles to make the worse argument appear the better. *See* PLATO, GORGIAS, *in* THE COLLECTED DIALOGUES OF PLATO 229 (Edith Hamilton & Huntington Cairns eds., W.D. Woodhead trans., 1961). On the comparison of lawyers and rhetors, see JAMES BOYD WHITE, HERACLES' BOW 215 (1985).

United States are "inferior" judges whose decisions are reviewed by some higher court. As a result, much of their work requires them to follow the precedents of these higher courts, even if they believe these precedents to be wrongly decided and objectively incorrect. Do these judges "take legal reasoning seriously" if they write opinions to justify these legal rulings?

Consider, for example, whether a federal district court judge is free to reject a preposterous opinion issued by the circuit court within which her court is located. Suppose that the judge further believes that the decision pays too much attention to previous Supreme Court decisions that are themselves highly dubious and that wholly ignore the approved Markovitsian forms of rights-based legal reasoning. Even so, a district judge would be hard-pressed to ignore a "binding" decision of a higher court merely because it does not meet the judge's own adequacy conditions for serious legal reasoning.

To be sure, one might argue that once a higher court has created a precedent, "the" correct legal solution always requires a strict adherence to it, whether or not the original precedent was correctly decided. But we are unsure that Professor Markovits actually holds this view, largely because he does not seem to have considered the institutional situation of inferior courts at all. His examples of "serious" legal reasoning seem to apply best to courts like the Supreme Court of the United States, which may follow their own previous precedents but are by no means required to. Indeed, Professor Markovits's vision of legal reasoning seems to be one that assumes that the standards of legal reasoning are the same for the legal academic and the "judge"—i.e., a Justice of the Supreme Court. Yet only a passing acquaintance with the legal system of the United States (or almost any other country for that matter) suggests that institutional differences between different positions in the legal system matter greatly to how one reasons about and with the law.

The institutional demands of legal reasoning may differ depending upon one's position in this complex web of institutional structures. The kind of "legal reasoning" required to present an argument before the United States Supreme Court may draw on talents different from those required of the Justice writing the opinion in the case. If we move our attention from the Supreme Court to what the Constitution labels "inferior" courts, or from appellate courts to trial courts, or from courts to legislative debate (as in the recent Clinton impeachment), to the drafting of rules and regulations, or even to the composition of op-ed pieces or letters to the editor, the

definition of appropriate legal reasoning may shift as well.

It is a strange legal philosophy that would take Supreme Court Justices as models of "serious" legal reasoning. We have already noted that they inhabit a very particular institutional position not shared by most of the legal system. Moreover, even that exalted position makes a sort of Markovitsian view of legal reasoning hopelessly naive and impractical. The institutional demands of achieving majority opinions, the institutional obligations of collegiality in an ongoing enterprise, the need to write opinions that will constrain and structure the behavior of potentially recalcitrant executive and administrative officials, the need to send appropriate signals to inferior court judges, and the need to communicate to the public in a way that will maintain the legitimacy and dignity of the Court: each or all of these may lead Justices to sign opinions that do not reflect their considered views or even their preferred methods of constitutional argument.[8] There is perhaps no better example than the Court's opinion in *Brown v. Board of Education*.[9] If the opinion in *Brown* has often been regarded as inadequate, those inadequacies stem in part from Chief Justice Warren's desire to achieve a unanimous opinion that would send a clear message to the South that the Court spoke with one voice on this issue and Warren's desire to produce an opinion that would be "'readable by the lay public.'"[10] Moreover, to achieve this unanimity, Justice Stanley Reed had to agree not to publicly reveal that he disagreed with the opinion because he felt that segregated schools were constitutional. Should Justice Reed be condemned because he did not "take legal reasoning seriously"?[11]

8. *See* Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 187, 196-200 (Peter Brooks & Paul Gewirtz eds., 1996).

9. 347 U.S. 483 (1954).

10. *See* Levinson, *supra* note 8, at 198 (quoting JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 58 (1992) (quoting a memorandum from Warren to his fellow Justices)).

11. Robert Post, who is currently writing a history of the Taft Court for the Holmes Devise series on the history of the Supreme Court, informs us that the unanimous opinions of that Court did not necessarily reflect the actual legal views of the Justices in conference, which were often divided. Apparently, it was the custom that Justices indicated their dissent only when they felt deeply about the matter and that, otherwise, they would be expected simply to acquiesce in the views of the majority of their colleagues. Conversation between Sanford Levinson and Robert Post (Mar. 5, 1999). Of course today's Court has adopted a very different practice, although a similar push towards unanimity is not uncommon on circuit courts. One wonders, nevertheless, whether the current Court, with its proclivity for dissents and partial concurrences, manifests a greater respect for legal reasoning than did the Taft Court that included, among others, Holmes, Brandeis, Sutherland, Taft, and Stone.

II. SHOULD TEACHERS OF LAW "TAKE LEGAL REASONING SERIOUSLY"?

Markovits suggests that law professors who reject his argument that there are objectively correct answers to questions of legal rights disserve our culture by inculcating a false view of the law in our students.[12] Presumably this means that professors who agree with him will teach in importantly different ways from professors who continue to be misled by American Legal Realism or other jurisprudential theories that reject the "right answer" thesis. We are unconvinced that this is true, unless perhaps the Markovitsian professor adamantly refuses to teach anything but a certain approved form of rights-based legal argument. Yet if there are any significant differences in teaching style, we think the Markovitsian teacher is more likely to create a kind of schizophrenia in his charges and more likely to disserve their legal education than a thoroughly Realist instructor. The reason is simple: As we have seen, even if one fully accepts Markovits's theories about right answers and legitimate forms of legal argument, these views are not particularly relevant to the work of practicing lawyers, and that is the sort of work that most law students are presumably being trained to perform. The students we law professors prepare for practice will often have to profess positions they do not necessarily believe. They will also be expected to express those positions using a variety of conventionally accepted forms of legal argument, many of which are irrelevant or illegitimate given Professor Markovits's theory of rights-based reasoning.

Thus, a Markovitsian legal education is more likely to disserve the student and produce professional schizophrenia because lawyers have no professional duty to make only "true" legal arguments. Quite the contrary, lawyers owe a duty to their clients to make whatever conventionally acceptable arguments are likely to persuade the decision-maker before whom they appear. If these arguments are "right answers" in Markovits's sense, so much the better, but lawyers' failure to meet this standard is entirely irrelevant, at least as long as their arguments are not deemed so inadequate as to be deemed "frivolous" by conventional standards.[13] Indeed, we venture to claim that a lawyer who insisted on making *only* arguments that would satisfy the strictures of Professor Markovits's theory would be

12. *See* Markovits, *supra* note 1, at 461-63.

13. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

committing professional malpractice.

This point applies both at the level of the correctness of the positions taken and the forms of argument used to establish them. Lawyers must be prepared not only to argue for positions they do not believe, but also to argue for these positions using conventional forms of legal argument that do not persuade them but are likely to persuade their audience. These forms of argument include arguments of prudence, social policy, or economic efficiency that deviate from Professor Markovits's notion of "serious" legal argument. To fail to make the argument most likely to persuade one's audience simply because it is not a "serious" form of legal reasoning according to one's own philosophical standards is to betray one's client and, arguably, to violate canons of professional responsibility.[14]

Just as lawyers must be willing to make conventional arguments that persuade, so too law professors must be willing to teach their students how to make the kinds of arguments that will be useful to them in representing future clients. To refuse to teach these forms of argument out of a misguided sense of philosophical purity disserves the student. A law professor committed to a theory of originalism and jurisprudentially repulsed by appeals to "fundamental rights" would nonetheless have a duty to teach her students how to make and respond to nonoriginalist arguments about equality and fundamental rights for the simple reason that these arguments are part of contemporary legal vocabulary. She obviously does not have to approve of them, and she may criticize them severely, both in the classroom and in her scholarly writing. But she must acknowledge their existence and their importance as part of conventional legal discourse. In the same way, a law professor who thought that originalism was a worthless approach to constitutional interpretation would not be justified in refusing to teach her students how to make and respond to appeals to history and original intention. Even if she thinks originalism baseless, her students may someday practice before

14. *See id.* Rule 1.3, cmt. 1 (duty of zealous advocacy); *see also id.* Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."). The comment to Rule 3.1 explicitly notes that an "action is not frivolous even though the lawyer believes that the client's position ultimately will not [or, presumably, *should* not] prevail," so long as there is a "good faith" argument available. *See id.* cmt. 3; REGULATION OF LAWYERS: STATUTES AND STANDARDS 204 (Stephen Gillers & Roy D. Simon eds., 1998); *see also* Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 358-62 (1986) (discussing frivolous legal arguments under Rule 11 of the United States Rules of Civil Procedure and the duty of lawyers, as officers of the court, to present fairly arguable points).

a judge who accepts this form of argument. Just as it would be professional malpractice for a lawyer to refuse to make nonfrivolous but incorrect arguments if it would help her client, a law professor would fail in her obligations to her students if she refused to teach them generally accepted forms of legal argument.[15]

In short, we think that Professor Markovits offers an unrealistic vision of what people who "take legal reasoning seriously" might be doing. This may not be enough to invalidate his jurisprudential theory but, at the least, it calls into question its relevance to the existing social practices of law. A jurisprudential theory that bears such little connection to the work of those actually involved in the practice of law, whether as teachers, attorneys, or adjudicators, is too solipsistic for us to credit.

III. WHAT IS AT STAKE IN A DEBATE ABOUT "TAKING LEGAL REASONING SERIOUSLY"?

Our criticisms of Professor Markovits's particular version of serious legal reasoning do not mean that we think that the notion of "taking legal reasoning seriously" is unimportant. To the contrary, the question of what "serious" performance of law and legal reasoning involves is one of the most important questions of jurisprudence, which we have tried to address in numerous—if unconventional—ways.[16] However, we believe that debates about who is and who is not taking legal reasoning seriously must be approached sociologically as well as philosophically. A charge like this one is as

15. Doug Laycock informs us that when he took Philip Kurland's course on criminal procedure in 1972 at the University of Chicago, Kurland refused to teach the Warren Court's constitutional decisions in the field. *See* E-mail from Douglas Laycock to E-mail Listserv: Law and Religion Issues for Law Academics (Mar. 11, 1999) (on file with authors). Assuming that Laycock's reminiscences are accurate, we still do not know why Kurland refused to teach these cases. Perhaps he thought that all the important principles of criminal procedure were outlined in pre-1960 constitutional opinions and that later cases simply offered new permutations on old debates. Perhaps he thought that cases like *Miranda v. Arizona*, 384 U.S. 436 (1966), were not really central to the basic issues in criminal procedure or were too detailed for an introductory course. Or perhaps he omitted these cases because he genuinely thought they would soon be overruled and so would be worthless to students practicing law in a few years. However, if Kurland refused to teach these cases because he thought they were wrongly decided, his decision seems at best idiosyncratic and self-indulgent; we think it would have been far better to show his students why these cases were illegitimate than to pretend that they did not exist in positive law.

16. *See, e.g.*, Balkin & Levinson, *supra* note 5, at 1771; J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 843 (1996); J.M. Balkin & Sanford Levinson, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991); Jordan Steiker et al., *Taking Text, Structure and Intentions Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995).

important for what it does as what it says. We think that the accusation that one's opponent "doesn't take legal reasoning seriously" is usually a kind of disciplining move. It attempts to fix the boundaries of the social practice by an interpretation that leaves one's opponent outside of the practice (and, therefore, an apostate or imposter), unless he or she conforms to one's favored interpretation.

Thus, whether a person "takes legal reasoning seriously" is not merely a matter of discovering a correspondence between what a certain legal thinker endorses and what actually constitutes the practice of legal reasoning. The practice of legal reasoning is a socially constructed enterprise whose boundaries and conventions are constantly under negotiation by its participants and, therefore, tend to change over time. Furthermore, legal reasoning may not be a single, unitary practice with a single purpose or point but a series of interrelated practices by persons in different social positions with different tasks and considerations.[17] Making accusations concerning who is serious and who is not serious about law or legal reasoning is itself a maneuver within the practice of legal reasoning. It is a move or stratagem in an ongoing struggle over what the practice of legal reasoning is and should become, a struggle over which forms and practices of legal reasoning shall be considered to be primary, central, ordinary, or orthodox and which forms and practices shall be considered secondary, peripheral, abnormal, or deviant. Professor Markovits is engaged in promoting a particular, rather narrow version of this orthodoxy, but that in itself does not make him particularly special. The lawyer-economist, the feminist scholar, as well as the traditional doctrinalist all struggle over the boundaries of "legal reasoning," albeit with different concerns, perspectives, and attitudes about this practice.

As these remarks indicate, our own views of "good" or "serious" legal reasoning are largely sociological and historicist. We do not think that there is a single form of proper legal reasoning that transcends times and cultures, nor are we sure that there is one and only one way to take legal reasoning seriously, even within a single time and culture. This is not the first time that the issue of "who really believes in law" has been raised, even within the relatively brief life of the American legal academy.[18] In fact, law professors, judges, and

17. *See* J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 139-43 (1993).

18. Legal Realism and Critical Legal Studies, especially, have been traditional targets, though Law and Economics has also come under attack even from some conservatives who are

captains of the legal profession seem to spend an awful lot of time worrying about whether their colleagues are reasoning in an appropriate manner or have decayed into some unspeakable form of apostasy.

We think that recurrent disputes over whether people are "taking legal reasoning seriously" are forms of *Kulturkampf*—they are struggles over whose form of reasoning shall bear the title of "legal reasoning" and whose shall be regarded as juridical heresy. Indeed, our experience as teachers of the history of constitutional law strongly suggests to us that the criteria for "good" or "serious" legal reasoning have changed markedly over time, especially as the participants in the practice and their respective social positions have changed. Moreover, even in our own age, we believe that there are in fact many different forms of "legal reasoning" practiced by people with different roles and perspectives within the legal system, so that the category of "serious" legal reasoning is a moving target.[19]

In particular, we want to emphasize the possible differences among the reasoning practices of academics, lawyers, judges, and others in the legal system. We want to resist the seemingly natural assumption that some group of legal academics, along with judges and lawyers, takes legal reasoning seriously while some other misbegotten group of legal academics does not. This assumption seems natural because many legal academics take the practicing bar (and the practicing bench) as standard examples of "real law"; they tend to identify themselves with the work of lawyers and particularly the work of judges.[20] Yet although legal academics often identify strongly with the work of lawyers and judges, and some academics may even practice law themselves, their work as academics differs importantly from the work of judges and especially from the work of practicing

critical of its disdain of traditional doctrinal analysis. *See* LON FULLER, THE LAW IN QUEST OF ITSELF (1940); MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994) (attack on both Critical Legal Studies and Law and Economics); Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984) (attack on Critical Legal Studies); Sanford Levinson, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society—Mary Ann Glendon*, 45 J. LEGAL EDUC. 143 (1995) (book review); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); *see also* SANFORD LEVINSON, CONSTITUTIONAL FAITH 157-62 (1988) [hereinafter LEVINSON, CONSTITUTIONAL FAITH] (discussion of Carrington and the broader issue of what beliefs should be a precondition for joining the legal academy).

19. *See* Balkin, *supra* note 17, at 140.

20. *See* Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2055-57 (1993). *See generally* ROGER B. COTTERRELL, THE POLITICS OF JURISPRUDENCE (1989) (criticizing theories of legal reasoning that identify law with what judges do).

lawyers. The different social positions of these three groups produce different versions of legal reasoning with different purposes and motivations. These forms of reasoning surely overlap in many important respects and they consider many of the same materials. However, because the practicing bench and bar exist in a different community and a different social setting with different responsibilities, their tools and devices of legal understanding may sometimes differ considerably from those of relatively cloistered legal academics.

Attacks on interdisciplinary interventions in the name of "legal reasoning" tend to collapse the work of academics with those of lawyers—and particularly judges. This identification has strong elements of wishful thinking and even fantasy.[21] Legal academics do not have clients for whom arguments must be tailored, and they are not bound by precedents in the same way as most judges are bound. Indeed, to take legal reasoning seriously in the way that academics sometimes do means not to take it seriously in the way that practicing lawyers and judges must, and vice versa. What we have, in short, is not a single example of "serious legal reasoning" from which a few misguided heretics and malcontents stray, but a whole set of related but competing versions of legal reasoning that appear and thrive in different social settings, that occasionally conflict and compete with each other for dominance and influence, and that, over time, may become quite differentiated from each other because of the expectations and responsibilities of the persons and communities that employ them.

IV. INTERPRETIVE DISPUTES ABOUT "SERIOUS" LEGAL REASONING

In short, charges that someone is not "taking legal reasoning seriously" usually disguise an interpretive dispute about the boundaries and conventions of the practice of legal reasoning. Here are three alternative versions of such a dispute, in which *A* and *B* might charge each other with "not taking legal reasoning seriously":

(1) Contrary to *B*, *A* does not think that there is, strictly speaking, a distinct set of arguments and forms of reasoning that are "legal," although there may be arguments that are not legal. *A* sees legal reasoning as continuous with, and informed by many other different varieties of, practical reasoning. Hence, unlike *B*, *A* does not

21. *See* Schlag, *supra* note 20, at 2055-57.

take seriously a categorical distinction between purely legal and other forms of reasoning. *A* does not contest that what people call "legal reasoning" is efficacious or authoritative, but *A* does not believe that the category is a fixed set. *A* takes legal reasoning seriously, but *A* does not take the *category* of "legal reasoning" seriously.

(2) *A* might think that there are many different forms of legal reasoning but that one particular version (or group of versions) is distinctively better than the others. Among these other deficient forms of legal reasoning is *B*'s preferred version. As a result, *A* does not take these other forms of legal reasoning seriously, or as seriously as *B* does. In fact, *A* may even doubt that these other forms are really "legal" at all. So while *B* insists that *A* does not take "legal reasoning" seriously, from *A*'s perspective *B*'s interpretation of "legal reasoning" is not the best interpretation and may not even qualify as "legal reasoning." In this case, taking one form of legal reasoning seriously means taking competing forms less seriously or not at all.

(3) *A* thinks that more than one form of legal reasoning is efficacious and authoritative. Put another way, *A* takes *too many* different possible forms of legal reasoning seriously as potentially efficacious or authoritative. Perhaps *A* believes that given the multiplicity of different forms of legal argument, there is no hierarchy among them; there are no decision procedures that conclusively explain when an historical argument trumps a doctrinal argument, or when an efficiency argument trumps a corrective justice argument.[22] *B*, on the other hand, has a single, preferred form of reasoning, or *B* believes that there is a hierarchy of forms of argument. As a result, *A* does not take some particular form of legal reasoning as seriously as the adherents of that form prefer. From *B*'s standpoint, *A* is not taking "legal reasoning" seriously because *A* does not give *B*'s preferred form of legal reasoning the same authority, weight, and status that *B* expects.

Note that these debates about "taking legal reasoning seriously" do not involve fights between people who are clearly "insiders" and "outsiders" or "believers" and "nonbelievers"; rather, they are fights about who is an insider and who is an outsider. They all involve disputes internal to the practice of legal reasoning in the sense that each of the participants believes that he or she is operating within the

22. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-13, 31-33 (1992) (offering an account of the various "modalities" of constitutional discourse and arguing that there is no hierarchy or rank order that allows a principled choice when these modalities conflict).

practice. To be sure, some participants may insist that because others hold certain views they are necessarily outside the practice of legal reasoning, so they cannot by definition take legal reasoning seriously; but of course the definition of "legal reasoning" is the very question at issue.

We have used the language of "believers" and "nonbelievers" advisedly, for there are strong analogies between disputes over legal culture and disputes over religious belief.[23] Consider, for example, two different forms of a given religion. Adherents in one group are syncretic: they believe that it is perfectly appropriate to draw on or incorporate other philosophical or religious traditions, perhaps even going so far as to recognize deities from other faiths. Their opponents, who are not syncretic, oppose all hint of "foreign" or "alien" influence; indeed, they define their religion precisely in terms of the heresies that it resists. The second group will insist that the first does not take the religion seriously because they dilute and debauch it; the first will insist that the second group wrongfully cuts itself off from important sources of spiritual enlightenment. Both the syncretist and the reactive versions of the religion may believe that they are taking the religion seriously and that the other side is not.

This sort of dispute is quite familiar in the history of many religions. Consider the strident anathemae visited on non-Orthodox rabbis by many Orthodox rabbis in the United States and Israel. Because the non-Orthodox rabbis are viewed as not taking traditional norms of Jewish law with sufficient seriousness, their Orthodox counterparts refuse to recognize non-Orthodox rabbis as legitimate members of the community who are authorized to perform such basic rites as weddings or conversions.[24] From the perspective of the Orthodox rabbis, *no* Conservative or Reform Jew could possibly be taking Jewish law seriously, whatever contrary claims might be asserted. But, obviously, this is not the perspective of Conservative or Reform Jews themselves, who insist that they are "modernizing" Jewish law in an effort to maintain it as a living presence—which is to take it very seriously indeed—while their reactionary opponents are

23. *See generally* LEVINSON, CONSTITUTIONAL FAITH, *supra* note 18.

24. *See, e.g.*, Samuel C. Heilman, *Orthodoxy*, *in* THE OXFORD DICTIONARY OF THE JEWISH RELIGION 516, 516 (R.J. Zwi Werblowsky & Geoffrey Wigoder eds., 1997) ("[R]elations between Orthodox and non-Orthodox are especially troubled by Orthodox refusal to recognize the marriages, divorces, and conversions carried out by rabbis who do not submit to the authority of traditional Jewish law."). Anyone familiar with the contemporary Jewish communities in the United States and Israel is aware that the disputes between Orthodox and non-Orthodox Jews are becoming ever more bitter.

stunting and rejecting Judaism's long and rich historical tradition of religious innovation.[25] And, of course, even as the three branches of Judaism contend among themselves, all three would join in delegitimizing the claims of a "Jew for Jesus"; asserting that no one who believes in the divinity of Jesus could take Judaism seriously.

In the same fashion, we can imagine two different views about legal reasoning: One approach thinks it perfectly appropriate to make arguments from efficiency in addition to or in place of precedential arguments; the other approach does not. People adhering to the second view may deny that the lawyer-economist takes legal reasoning seriously because the lawyer-economist does not attempt to give reasons in terms of existing doctrinal categories and existing precedents. But the lawyer-economist might respond that legal reasoning includes arguments about efficiency as well as arguments about precedent and that the "arid" doctrinalist simply has too pinched and narrow a conception of legal reasoning. From the lawyer-economist's perspective, the doctrinalist conceals from herself some of the most important and enlightening features of the practice in which she claims to believe.

Indeed, when we see these forms of *Kulturkampf* at work, there is something quite misleading about the claim that one side or the other does not take the practice "seriously." Usually both sides take their vision of the practice quite seriously indeed; so seriously, in fact, that they interpret the other side's equal seriousness as the ultimate proof of their apostasy. One might think that a person who does not take a practice seriously regards the practice as unworthy, lacks loyalty to the practice, makes fun of the practice, or views the practice skeptically or condescendingly. But when people fight over the meaning of a practice and accuse each other of failing to take the practice seriously, none of this may be the case. *All* of the combatants may have considerable loyalties to the practice; that is why they are fighting over it so fiercely. What is at stake in these disputes is not who is really serious about the practice and who is merely mocking it,

25. *See* Elliot Nelson Dorff, *Conservative Judaism*, *in* THE OXFORD DICTIONARY OF THE JEWISH RELIGION, *supra* note 24, at 172, 172 (Conservative Judaism sought "to conserve tradition in the modern setting"); Kerry M. Olitzky, *Reform Judaism*, *in* THE OXFORD DICTIONARY OF THE JEWISH RELIGION, *supra* note 24, at 577, 577 (defining Reform Judaism as "a religious movement advocating the modification of Orthodox tradition in conforming with the exigencies of contemporary life and thought"); *see also* MICHAEL A. MEYER, RESPONSE TO MODERNITY: A HISTORY OF THE REFORM MOVEMENT IN JUDAISM vii (1988) (describing Reform Judaism as "that branch of Judaism which has been most hospitable to the modern critical temper while still endeavoring to maintain continuity of faith and practice with Jewish religious tradition").

parodying it, or disparaging it from the outside. What is at stake is whose vision of the practice shall prevail and whether one or many different interpretations of the practice shall survive and flourish.

Like other professional and academic disciplines, the practice and study of law will always generate self-appointed guardians who will seek to police the boundaries of acceptable practice by denominating what counts as "serious" or "acceptable" modes of legal discourse. At the same time, everyone within the practice will have an intuitive sense that there *are* boundaries, though, for better and worse, there will usually be substantial disagreement about where the lines are drawn. In short, perhaps the only thing one can be sure of in disputes about who is taking legal reasoning seriously is that the disputes will be never ending as long as the practice endures.