

April 1999

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Recommended Citation

Richard S. Markovits, *You Cannot Be Serious: A Reply to Professors Balkin and Levinson*, 74 Chi.-Kent L. Rev. 559 (1999).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol74/iss2/11>

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“YOU CANNOT BE SERIOUS!”: A REPLY TO PROFESSORS BALKIN AND LEVINSON

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In their contribution to this symposium—*Getting Serious About Taking Legal Reasoning Seriously*,” Professors Balkin and Levinson provide an account of my understanding of “taking legal reasoning seriously” and argue that my positions on both this concept and the concept “morally-legitimate legal argument in our culture” are called into question if not refuted by two alleged facts:

- (1) “aside from [Markovits] and (possibly) an earlier incarnation of Ronald Dworkin,” no one thinks that various actors in the legal system are supposed to “take[] legal reasoning seriously in the way that [Markovits] thinks they should”¹ and
- (2) in our culture, law-role players generally do not act in the way that Markovits’ conclusions about legitimate legal argument imply they are obligated to behave.

This *Reply* responds to these contentions. Part I analyzes Balkin and Levinson’s critique of my understanding of “taking legal argument seriously” and comments on their own use of this expression. Part I begins by articulating my conclusions about the various senses in which someone can appropriately be said to be “taking legal argument seriously.” It then refutes Balkin and Levinson’s claim that I equate “taking legal reasoning seriously” (in my words, “taking legal argument seriously”) with agreeing with my conclusions about morally-legitimate legal argument in our culture. Next, Part I argues that the preceding error led Balkin and Levinson to mischaracterize my position on the work of various jurisprudential scholars with whom I disagree. After that, Part I illustrates the difference between the ways in which I and Balkin and Levinson use

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The author would like to thank John McEnroe for the title and Daniel S. Markovits, Inga Markovits, and Michael Sean Quinn for their comments and suggestions.

1. J.M. Balkin & Sanford Levinson, *Getting Serious About “Taking Legal Reasoning Seriously”*, 74 CHI.-KENT L. REV. 543, 545 (1999).

“taking legal reasoning seriously” by examining their assertions about how the participants in three hypothetical legal debates they describe would characterize each other’s positions in “taking legal reasoning seriously” terms. Finally, Part I responds to Balkin and Levinson’s criticism that my usage of “taking legal reasoning seriously” does not reflect the difference in the legal arguments that different legal-role players are obligated to make or heed.

Part II argues that Balkin and Levinson’s supposed empirical refutation of my conclusions about morally-legitimate argument in our culture is not persuasive. Before outlining the four basic deficiencies of Balkin and Levinson’s empirical critique of my jurisprudential position, I will outline my position on morally-legitimate legal argument in our culture:

- (1) Using a particular type of argument to determine the content of existing law is morally legitimate in a given culture if and only if doing so is consistent with that culture’s moral commitments.
- (2) Ours is a liberal, rights-based culture:
 - (A) members of our culture engage in two kinds of prescriptive moral discourse—“moral-ought talk” (which is based on personally-chosen moral norms that I denominate “personal ultimate values”) and “moral-rights talk” (which is grounded on moral norms that I denominate “moral principles” that individuals do not choose for themselves but are obligated by their membership in our culture to use when making and assessing moral-rights claims);
 - (B) in our culture, an individual cannot excuse or justify (demonstrate the justness of) a choice that violates someone’s moral rights by demonstrating that it is consistent with the personal ultimate values to which the individual subscribed, and the State cannot excuse or justify a choice that violates someone’s moral rights by demonstrating that it helps the State achieve one or more goals it is authorized to pursue; and
 - (C) members of our culture and our State are committed to grounding their moral-rights decisions on the liberal duty to show appropriate, equal respect and concern for all moral-rights holders for whom they are or it is responsible (inter alia, concern for these creatures’ actualizing their potential to become and remain persons of moral integrity by taking their obligations seriously and striving to establish a

reflective equilibrium between their personal value-convictions and their conduct).

- (3) In our culture, arguments derived from this liberal duty (which I denominate "arguments of moral principle") dominate morally-legitimate legal argument and (with one exception) valid legal argument in our culture. Arguments of moral principle control legitimate legal argument in two ways: (A) they apply directly in all cases in which the asserted legal right derives from a purported moral right and (B) they apply indirectly in all cases to determine the legitimacy and (with that exception) the validity of using the other general modes of argument members of our culture have used or may use to establish what the law is, the variants of each general type of argument that can be legitimately or (with that exception) validly used to discover the law, and the correct relationship between each valid subtype of legal argument and the internally-right answer to the relevant legal-rights question.²
- (4) The fact that arguments of moral principle dominate morally-legitimate legal discourse and (with one exception) valid legal discourse in our culture implies the existence of internally-right answers to all legal-rights questions. The dominance of arguments of moral principle produces this result both by rendering legally irrelevant (because morally illegitimate) some prudential arguments that favor a different conclusion from the one supported by the other, legitimate modes of legal argument and by co-opting the other modes of legitimate legal argument (textual, historical, structural, and precedential/practice-based

2. The exception is that textual argument based on a clear constitutional text whose concrete consequences were understood by its ratifiers at the time of the ratification (though they may not have grasped the moral illegitimacy of the provision in question) trumps arguments of moral principle. In other words, in this case, an argument may be legally "valid" (i.e., its use to determine extant legal rights may be correct) even though its use is morally illegitimate, and the legal-rights conclusion to which it leads may be internally correct even though it is inconsistent with the moral commitments of the society in question. For a more detailed summary of my position on morally-legitimate legal argument in our culture, see section I.A of Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHI.-KENT L. REV. 415 (1999) [hereinafter *Legitimate Legal Argument*]. I readily acknowledge that in our culture the morally-legitimate way to determine the internally-correct answer to a legal-rights question may depend on whether the relevant legal right is a fundamental-fairness-related constitutional right, derives from an institutional arrangement that the Constitution creates that was not required by our society's moral commitments, is a common-law right, or derives from a statute that was not passed to secure anyone's moral rights. For a more detailed discussion of these distinctions, see Richard S. Markovits, *Legitimate Legal Interpretation, Moral Principles, and Internally-Right Answers to Legal-Rights Questions*, in 6 GRAVEN IMAGES (forthcoming 1999).

legal argument) that might otherwise favor different conclusions or a conclusion that is inconsistent with our basic moral principle. The fact that textual arguments based on morally-illegitimate constitutional texts may sometimes be legally valid does not undermine the conclusion that there are internally-right answers to all legal-rights questions in our culture: when such morally-illegitimate textual arguments are valid, there will still be internally-right answers to the legal-rights questions posed—the morally-illegitimate answer favored by the morally-illegitimate though legally-valid textual argument in question.

Balkin and Levinson claim that my jurisprudential position is refuted by its inconsistency with both the actual conduct of various law-role players in our culture and the informed beliefs of members of our culture about the obligations of these law-role players. Part II argues that for the following four reasons Balkin and Levinson's empirical attack on my position fails.

First, Balkin and Levinson to the contrary notwithstanding, my conclusions about morally-legitimate legal argument in our culture do not imply that lawyers should make only those arguments they believe to be correct, that law-teachers should teach only those legal arguments whose use they think would be morally legitimate in our culture (or *a fortiori*, only those arguments that I believe can be legitimately used in our culture to discover what the law is), that drafters or enactors of new legislation or regulations have the same obligations as judges who are supposed to be discovering what the law is rather than creating new law in the sense of legislating, or that judges should ignore precedent whenever they conclude that the opinion in which it was set was wrong as a matter of first impression.

Second, Balkin and Levinson's empirical critique of my position is undermined by the inaccuracy or contestability of some of their empirical claims. Neither legal scholarship nor legal practice is as divorced from morally-legitimate legal argument as they assert, and the percentage of informed members of the community who find it appropriate to use arguments of moral principle to discover what the law is is far higher than Balkin and Levinson appear to suppose.

Third, the strength of Balkin and Levinson's empirical critique of my conclusions about morally-legitimate legal argument in our culture is vitiated by the existence of persuasive explanations of some of the facts that are not consistent with my claims. More specifically, the failure of various parts of the legal community to accept that my type of antipositivism captures our society's moral commitments and

the reluctance of judges and scholars to own up to the extent to which they are being influenced by arguments of moral principle or their understanding of the substance and adjudicatory relevance of our society's moral commitments can at least partially be explained by their never having had instruction in the methodology of their discipline, by their failure to distinguish between what I call "personal ultimate values" and "moral principles," and by the bad name that *Lochner*³ and its progeny gave to all moral-norm-oriented legal arguments.

Fourth and finally, Balkin and Levinson's empirical critique is undermined by the fact that even if the inconsistencies on which it focuses were present and unsatisfactorily explicable they would be far less damaging to my position than Balkin and Levinson suppose. Balkin and Levinson's mistaken belief that legal practice is morally self-legitimizing and their related conflation of "socially-accepted" legal argument and morally-legitimate legal argument causes them to overestimate the extent to which the allegedly-unsatisfactorily-explicable non-fits on which they focus would undermine my position. I claim that (1) a legal practice is morally legitimate in a rights-based culture such as ours only if it is consistent with that culture's moral-rights commitments and (2) the moral-rights commitments of such a culture must be inferred from its members' moral-rights-related behaviors and beliefs, of which its members' legal-rights-related behaviors and beliefs form only a small part. If I am right as a matter of philosophy, the non-fits whose existence Balkin and Levinson assert would be less harmful to my position than they claim. Thus, even if Balkin and Levinson could come up with an alternative account of our society's moral character and commitments that "discounted-fit" its members' legal-rights-related conduct and beliefs better than does my account (i.e., fit such conduct and beliefs better, taking into consideration the explicability of the relevant non-fits), my account would rank higher on the relevant combination of fit and "explicability of non-fit" criteria if (as I am supposing) its "discounted fit" to the relevant individuals' *moral-rights*-related conduct and beliefs was superior. And even if my accounts of our society's prescriptive moral commitments and their jurisprudential implications "discounted fit" its members' law-role conduct and law-role beliefs so poorly that one would have to conclude that ours was an amoral culture if the facts that the relevant account was supposed

3. *Lochner v. New York*, 198 U.S. 45 (1905).

to fit were all law-role-related facts, my account's "discounted fit" to the broader set of all prescriptive moral conduct and beliefs might be good enough to defeat such a conclusion.

I. "TAKING LEGAL REASONING (ARGUMENT) SERIOUSLY"

A. *My Understanding and Usage of This Concept*

Balkin and Levinson's analysis of my usage of "taking legal argument seriously" is partly influenced by the first sentence of the draft of my *Introduction* to this symposium that I sent them when soliciting their participation in this project. Since the counterpart passage in this symposium's actual *Introduction* is far more elaborate, fairness requires me to begin this section by quoting the never-published sentence to which they are responding:

There are at least two senses in which one can take legal argument seriously: one can believe that in principle legal argument can generate internally-right answers to legal-rights questions, and one can value legal craftsmanship for either aesthetic or pragmatic reasons.

The draft that Balkin and Levinson saw also contained a footnote to the quoted passage that indicated that "taking legal argument seriously" is not an all-or-nothing matter, that one can take legal argument more or less seriously.

The text of the published *Introduction* is perfectly consistent with the draft that Balkin and Levinson saw. It simply elaborates on the two (actually three) senses of "taking legal argument seriously" mentioned in the draft—which I will henceforth denominate the "conviction," "pragmatic-craftsmanship," and "aesthetic-craftsmanship" senses—, delineates two additional senses of the expression that the draft-*Introduction* did not mention (though its statement that there are "at least two senses" of the relevant expression does allude to their possible existence)—a "thoughtful consideration" or "consideration" sense and a "social importance" sense, and reiterates the fact that one can take legal argument more or less seriously.

More specifically, the published *Introduction* indicates that an individual "takes a given culture's legal argument seriously"

- (1) "in the 'conviction' sense if he believes in the determinacy of both the moral legitimacy and validity of each argument that might be employed to determine what the law is in that culture and in the internal correctness of all answers that might be given to all legal-rights questions that may arise in that culture (if he

believes that objectively-determinable, valid legal argument can generate internally-correct answers to all legal-rights questions in the culture in question),”⁴

- (2) “in a ‘pragmatic-craftsmanship’ sense if he believes that the effectiveness of any argument that might be used to determine what the law is in that culture will be increased if the argument is well crafted and perceived to be a valid legal argument,”⁵
- (3) “in a ‘thoughtful consideration’ or ‘consideration’ sense if he carefully considers the possibility that the legitimacy and validity of all arguments that might be used to determine what the law is in a given culture may be determinate and that, in the culture in question, there may be internally-correct answers to all legal-rights questions,”⁶
- (4) “in an ‘aesthetic-craftsmanship’ sense if he values well-crafted legal arguments for aesthetic reasons, which he may do even if he does not think that well-crafted legal arguments are more effective on that account,”⁷ and
- (5) “in a ‘social importance’ sense if he believes that the concepts or phenomena ‘morally legitimate and valid legal argument’ are socially important” for any of a number of possible reasons.⁸

The published *Introduction* also repeats the draft’s statement that one can take legal argument more or less seriously in each of the above senses.⁹

Now that I have quoted both the draft discussion of “taking legal argument seriously” to which Balkin and Levinson were responding and the more elaborate discussion of this concept my published *Introduction* contains, I can proceed to analyze Balkin and Levinson’s critique of my usage.

B. Balkin and Levinson’s Conflation of My Position on “Taking Legal Reasoning (Argument) Seriously” and My Position on “Legitimate Legal Argument in Our Culture”

According to Balkin and Levinson, I claim “that taking legal

4. Richard S. Markovits, *Taking Legal Argument Seriously: An Introduction*, 74 CHI.-KENT L. REV. 317, 317 (1999) (footnote omitted).

5. *Id.* at 317-18.

6. *Id.* at 318 n.2.

7. *Id.*

8. *Id.*

9. *See id.* at 319 n.3.

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”¹⁰ and that even those who “believe in the relative autonomy of legal discourse from politics—or from other academic disciplines . . . do not take legal reasoning sufficiently seriously” (deserve to be called “culpable examples of legal apostasy”) if they “fight shy of Professor Markovits’s particular theories about rights and right answers.”¹¹ In fact, although I do think that (1) in all cultures the use of a legal argument cannot be morally legitimate unless it is consistent with the relevant society’s moral commitments and (2) in our culture to be morally legitimate the analysis of some types of legal rights must turn on the liberal norm on which we are committed to grounding our moral-rights discourse, I do not think that, in our culture, the morally-legitimate analysis of all sorts of legal rights must be dominated by the liberal principle in question, and I do not equate “taking legal reasoning (argument) seriously” in our culture with agreeing with my conclusions about morally-legitimate legal argument in our culture.

Nothing I wrote in the draft-*Introduction* Balkin and Levinson saw or the *Introduction* to this symposium I actually published supports Balkin and Levinson’s account of my understanding of “taking legal reasoning seriously.” Thus, nothing suggests that I fail to realize that an advocate can take legal argument seriously for pragmatic, craftsmanship reasons—can recognize and respond to the fact that advocacy about what the law is will often be more effective if it employs the modes of argument whose use judges and their company find “socially acceptable” (i.e., believe to be valid in this context)—without subscribing to my position on morally-legitimate legal argument in our culture or, indeed, without agreeing with the judges’ views on this issue either. Similarly, nothing suggests that I fail to realize that someone can take legal argument seriously for aesthetic, craftsmanship reasons without subscribing to my position on morally-legitimate legal argument in our culture or, indeed, to the position that there are internally-right answers to all, most, or any legal-rights questions in our culture.

Of course, Balkin and Levinson would be correct in responding that, in relation to our disagreement, these craftsmanship senses of

10. Balkin & Levinson, *supra* note 1, at 543.

11. *Id.* at 544. This implies that I claim that everyone with whom I disagree is not taking legal argument seriously.

"taking legal argument seriously" are not so important as the "conviction" sense of this expression. However, Balkin and Levinson's claim that I equate "taking legal reasoning seriously" in the conviction sense of that expression with "agreeing with my conclusions about morally-legitimate legal argument in our culture" is equally unsupportable. More specifically, for two reasons, one must reject Balkin and Levinson's claim that, on my construction, one cannot be taking legal argument seriously in the conviction sense of that expression unless one agrees with my (alleged) conclusion that internally-right answers to all legal-rights questions can be derived from the basic, liberal moral principle to which I conclude our culture is committed. First, Balkin and Levinson are wrong because I do not claim that the internally-correct answers to all legal-rights questions can be derived from our society's basic moral principle—i.e., because I recognize both that the moral principles to which we are committed cannot be used to establish the existence of many of our legal rights (e.g., the existence of those legal rights that derive from constitutional¹² or statutory provisions that our moral-rights commitments do not obligate us to adopt or enact) and that legal rights may be inconsistent with principle when constitutional provisions are inconsistent with our moral-rights commitments.¹³ Second, Balkin and Levinson are wrong because I recognize (indeed, emphasize) that many cultures are not "rights-based" or "liberal" in my sense of these concepts, that morally-legitimate legal argument in cultures that are not rights-based or liberal would be different from its counterpart in our culture, and that (perhaps most importantly in this context) individuals who honestly believe that internally-right answers to all (or any number of) legal-rights questions in our culture can be derived from a principle that is different from the liberal principle to which I think our culture is committed are also taking legal argument seriously.¹⁴ Thus, in my usage, individuals who think

12. For a partial list of constitutional rights that our culture's liberal moral commitments do not require us to secure, see RICHARD S. MARKOVITS, *MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION* 77-78 (1998) [hereinafter *MATTERS OF PRINCIPLE*].

13. See *Legitimate Legal Argument*, *supra* note 2, at 415 n.1. In other words, I recognize that in a society whose constitution imperfectly instantiates its moral commitments, there will be a difference between morally-legitimate legal argument and valid legal argument.

14. Balkin and Levinson also misrepresent my operationalization of the "conviction" sense of the expression "taking legal argument seriously" (and, by implication, of the "consideration" sense of the expression as well). In particular, Balkin and Levinson leave the impression that I measure the extent to which someone "takes legal argument seriously" in the conviction sense in a dichotomized fashion, that I draw a strong distinction between taking legal argument "sufficiently seriously" and "insufficiently seriously." More specifically, they write as if I

that ours is a goal-based society that is committed to instantiating a particular personal ultimate value as well as individuals who think that ours is a rights-based society that is committed to grounding its moral-rights discourse on a non-liberal moral norm such as utilitarianism would also be said to be “taking legal argument 100% seriously” in the “conviction” sense if they think that internally-right answers can be generated to all legal-rights questions by using, *inter alia*, the non-liberal moral norm to whose use they think our society is committed.

Balkin and Levinson’s claim that I equate “taking legal reasoning seriously” with agreeing with my conclusions about morally-legitimate legal argument in our culture is also inconsistent with the fact that, in my usage, someone has taken legal reasoning seriously in the consideration sense of that expression even if, after serious consideration, he rejects my conclusions that in our culture (1) the moral legitimacy and validity of the use of each argument that might be employed to determine what the law is is determinate and (2) all answers that might be given to any legal-rights question are either internally correct or internally incorrect—indeed, even if in the end he concludes that the concepts morally-legitimate legal argument, valid legal argument, and internally-correct answers to legal-rights questions are incoherent or have no referent in our culture. To be fair, I should acknowledge that my failure to refer to the consideration sense of “taking legal argument seriously” in the draft of the *Introduction* to which Balkin and Levinson were responding made it more difficult for Balkin and Levinson to anticipate that I would say that such a person took legal argument seriously in the consideration sense of that expression even though he did not take legal argument seriously in the conviction sense of that concept.¹⁵

maintain that to be taking legal argument “sufficiently seriously” in this sense one must believe in the existence of objective, internally-right answers to all legal-rights questions—that those who believe that there may not be or are not such internally-right answers to even one legal-rights question do not take legal argument “sufficiently seriously” in my “conviction” sense. In fact, as both the draft-*Introduction* Balkin and Levinson saw and the published *Introduction* indicate, I would not draw a sharp line between taking legal argument sufficiently and insufficiently seriously in the conviction (or any other) sense. I would simply say that the extent to which someone takes legal argument seriously in the conviction sense increases with the importance of the arguments whose moral legitimacy or legal validity he believes are determinate as well as with the importance of the legal-rights questions to which he believes internally-right answers can in principle be found. Of course, I recognize the difficulty of operationalizing this concept of “importance.” For a discussion of this problem (in the context of developing a metric for the importance of a non-fit), see MATTERS OF PRINCIPLE, *supra* note 12, at 25-27.

15. Indeed, that is precisely how I would characterize Lawrence Friedman’s handling of

Finally, Balkin and Levinson's claim that I equate "taking legal argument seriously" with "agreeing with my conclusions about morally-legitimate legal argument in our culture" is also inconsistent with my acknowledgment in this *Reply* that "taking legal argument seriously" has a "social importance" sense as well as "conviction," "craftsmanship," and "consideration" senses. Obviously, I recognize that someone who does not agree with my position on morally-legitimate legal argument in our culture may still believe that legal reasoning (argument) is a socially-important phenomenon.

Admittedly, the draft of my *Introduction* to this symposium to which Balkin and Levinson were responding did not mention the "consideration" and "social importance" senses of "taking legal argument seriously." However, its reference to the "conviction" and two "craftsmanship" senses of "taking legal argument seriously" should have made clear what this *Reply's* articulation of the "consideration" and "social importance" senses of this expression confirms: I do not equate "taking legal reasoning (argument) seriously" with "agreeing with my conclusions about morally-legitimate legal argument in our culture."

C. Balkin and Levinson's Misdescription of My Characterization of Most Legal Theorists with Whom I Disagree

Not surprisingly, Balkin and Levinson's erroneous conclusion that I equate "taking legal argument seriously" with "agreeing with my conclusions about morally-legitimate legal argument in our culture" has led them to mischaracterize my attitude toward the work of many of the scholars who write about valid or legitimate legal argument in our culture with whom I disagree. Space limitations and considerations of reader patience preclude me from commenting on the scholarship of most of these experts. However, the issue is sufficiently important to warrant my characterizing the positions of a few of the legal theorists Balkin and Levinson list.

I will begin with Ronald Dworkin. I certainly would not say that Ronald Dworkin fails to take legal reasoning "sufficiently seriously." In the consideration sense, Dworkin takes legal reasoning very seriously indeed. He also seems to think that his account of valid legal argument implies the existence of internally-right answers to all legal-

rights questions. Although I reject this understanding of his position,¹⁶ there can be no doubt that he takes legal argument almost as seriously as I in the conviction sense of this expression. True, in my judgment, the account of valid legal discourse that Dworkin provides in *Law's Empire*¹⁷ and his more recent books and articles gives moral-rights discourse too little a role, implicitly overestimates the frequency with which internal evidence will be unable to reveal the concrete moral-rights commitments of our culture, (relatedly) explicitly exaggerates the frequency with which an evaluator will have to make use of a "best light" criterion to reach conclusions about the moral norms that are inside the law, misleadingly claims that the use of a "best light" criterion does not involve the application of "personal ultimate values" (my expression), naively assumes that one will be able to infer our culture's official personal-ultimate-value consensus or commitments from its governmental officials' official acts, and incorrectly asserts that such personal-ultimate-value commitments have gravitational force in legal argument. These are serious disagreements, but they do not lead me to assert that Dworkin does not take legal argument seriously in any sense of that expression.

I also do not think that Philip Bobbitt fails to take "legal argument" "sufficiently seriously" in any sense of either of these enquoted expressions. Bobbitt clearly takes legal argument seriously in the consideration sense. Moreover, although he concludes that there is no internally-right answer to many legal-rights questions—*viz.*, to those to which different answers are favored by different modes of legal argument or by different variants of a given mode of legal argument that are utilized or perceived to be valid by some (unspecified) requisite portion of the legal community, his conclusions that it would be invalid to use some types of argument to discover what the law is in our culture, that there are internally-right answers to many legal-rights questions, and that there are some internally-wrong answers to many of the legal-rights questions in our culture for which there is no unique, internally-right answer in our culture certainly would justify the conclusion that he takes legal argument seriously in the conviction sense of that expression.

As I have indicated in both *Legitimate Legal Argument* and *Matters of Principle*,¹⁸ I do have several important disagreements with

16. See *Legitimate Legal Argument*, *supra* note 2, at 451 n.43.

17. RONALD DWORKIN, *LAW'S EMPIRE* (1986).

18. See *MATTERS OF PRINCIPLE*, *supra* note 12, at 184-88; *Legitimate Legal Argument*, *supra* note 2, at 445-48.

Bobbitt. Most basically, I think that he incorrectly assumes that legal practice is self-legitimizing, relatedly that he incorrectly rejects the claim that the principles on which our society's moral-rights commitments are grounded are inside the law (that he rejects this claim to the extent that these principles are not captured by what he calls "ethical" and "structural" argument), that he incorrectly rejects *a fortiori* the claim that these principles form the basis of a mode of legal argument (which I call "argument of moral principle") that dominates morally-legitimate legal argument and (with one exception) valid legal argument in our culture, and relatedly that he incorrectly rejects my conclusion that there are internally-right answers to all legal-rights questions in our culture. However, although these disagreements are serious, they would never lead me to say that Philip Bobbitt does not take legal argument seriously or "sufficiently seriously" in any sense of those expressions.

As I have indicated as well both in *Legitimate Legal Argument* and at much greater length in *Matters of Principle*,¹⁹ I also disagree with the Strict Constructionists. However, although they clearly take legal argument seriously in the conviction sense of that expression in that they think that there are internally-right answers to all legal-rights questions (many of which are generated by the kind of negative-default rule discussed in the introduction to Part II of *Legitimate Legal Argument*), I have some doubts about whether at least some Strict Constructionists really should be said to be taking legal argument seriously in the consideration sense of that expression. My doubts about this reflect my suspicion that the jurisprudential position of some Strict Constructionists is motivated by their desire to produce conclusions they favor for extra-legal reasons. Admittedly, to achieve reflective equilibrium on legal-rights matters one can legitimately make adjustments in one's position on morally-legitimate legal argument in one's culture as well as in one's conclusions about the internally-right answers to various legal-rights questions in one's culture. However, it appears to me that at least some Strict Constructionists are not arguing or reasoning in good faith. Thus, in my judgment, all Strict Constructionists have a view of the appropriate weight to be given to original intent in constitutional interpretation that is hard to support in good faith (since it was not shared by the Founding Fathers and is inconsistent with the relevant

19. See MATTERS OF PRINCIPLE, *supra* note 12, at 170-83; *Legitimate Legal Argument*, *supra* note 2, at 448-53.

social interpretive practice); some alter the variant of the approach that they employ and the breadth of the historical analyses they undertake to reach conclusions they personally prefer; some clearly misanalyze the historical data they do consider or ignore information that establishes the meaning of critical words in constitutional texts at the time at which the relevant provisions were adopted to enable themselves to reach personally-preferred legal-rights conclusions; and some make claims about the self-declaring meaning of constitutional texts and the content of that meaning (*viz.*, that the Constitution's text establishes very few rights against the State) that are not just wrong but hard to endorse unblushingly.²⁰

Just to provide some evidence to support my claim that my doubts about whether some Strict Constructionists should be said to have taken legal argument seriously in the consideration sense of that expression do not stem in some simple, unacceptable way from my admitted rejection of many of their "moral-ought views," I should point out that I also question whether *some* Legal Realists and *some* members of the Critical Legal Studies movement—individuals whose "ought views" are much closer to my own—are really taking legal argument seriously in the consideration sense of that expression. Thus, although some members of these groups base their conclusion that no internally-right answer can be given to at least many important legal-rights questions on epistemological views and empirical conclusions about our moral and legal practices that are defensibly grounded (both in effort and in substance), others do not.

D. A Comparison of Balkin and Levinson's and My Usage of "Taking Legal Reasoning Seriously": A Review of Their Three Examples

Balkin and Levinson develop and discuss three examples of disputes about legal reasoning whose participants might accuse each other of "not taking legal reasoning seriously." In the first, one participant (*A*) disagrees with the other's (*B*'s) claim that "there is, strictly speaking, a distinct set of arguments and forms of reasoning that are 'legal'" although *A* agrees with *B* that "there may be

20. My suspicions about the good faith of some Strict Constructionists and my doubts about the soundness of many of their premises and the validity of many of their arguments lies behind my use of strong language to describe the behavior of judges who have abandoned legitimate legal argument on my understanding for what I describe as arcane analyses that deny the connection between legitimate legal argument and the commitments of our society. See MATTERS OF PRINCIPLE, *supra* note 12, at 8-11.

arguments that are not legal."²¹ According to Balkin and Levinson, in this example, "A takes legal reasoning seriously, but A does not take the *category* of 'legal reasoning' seriously."²² This usage is obviously different from my own. In my usage, both A and B might or might not be taking legal reasoning seriously in the consideration sense, the extent to which B is taking legal reasoning seriously in the conviction sense will depend on the extent to which the fixed set of arguments B recognizes as "legal" are capable of producing right answers to all legal-rights questions, and whether and the extent to which A is taking legal argument more or less seriously than B in the conviction sense will depend on whether the unidentified and perhaps incompletely identifiable set of additional arguments A would classify as "legal" (would claim can be legitimately used to determine what the law is) and B would classify as "not legal" increase or decrease the ability of "legal argument" as A understands that concept to generate internally-right answers to legal-rights questions.

Balkin and Levinson elaborate on their descriptions of both A's and B's positions in this example by indicating that, unlike B, A rejects "a categorical distinction between purely legal and other forms of reasoning"—"sees legal reasoning as continuous with, and informed by many other different varieties of, practical reasoning."²³ I hasten to add that, like A, I do not think that legal argument is autonomous in the sense of never encompassing arguments from disciplines that have an independent status. Indeed, the mode of argument that I think dominates legitimate legal argument in our culture—arguments of moral principle—is a philosophical mode of argument. I also readily acknowledge that, in a variety of contexts, economic, historical, psychological, and sociological arguments (to name but a few) are also inside the law.

In Balkin and Levinson's second example, A acknowledges that "many different forms of legal reasoning" are used in practice but claims that one such form or some subset of these forms is or are superior, thereby designating as "deficient" B's preferred form of legal reasoning.²⁴ According to Balkin and Levinson, in this case, B would say that A was not taking legal reasoning seriously, while A would say that B's understanding of legal reasoning was not "best"

21. Balkin & Levinson, *supra* note 1, at 554.

22. *Id.* at 555.

23. *Id.* at 554.

24. *See id.* at 555.

and might “not even qualify as ‘legal reasoning.’”²⁵

I have two points to make about Balkin and Levinson’s account of this second case. First, although Balkin and Levinson appear to be suggesting that *A* does not think that legal practice is self-legitimizing while *B* does, they do not indicate the criterion by which either is evaluating the use of any particular “form of legal reasoning”—i.e., they do not specify whether *A*’s and *B*’s preference for one over other forms of legal reasoning reflects mere whim, its consistency with their understanding of our culture’s moral-rights commitments, its tendency to promote their personal ultimate values, its aesthetic attractiveness to them, or its tendency to benefit them in a narrowly-defined, parochial way. Second, once again, the usages that Balkin and Levinson attribute to *A* and *B* are not my own. In this scenario, I would need to know more about the bases of *A*’s and *B*’s legal-reasoning preferences to decide whether they are taking legal argument seriously in the consideration sense of that expression or whether they were recommending approaches to answering legal-rights questions that do not even “qualify as ‘legal reasoning.’” I would also need to know the extent to which their preferred “forms of legal reasoning” or “modes of legal argument” would yield unique answers to legal-rights questions to determine whether they were taking legal argument seriously in the conviction sense of that expression.

In Balkin and Levinson’s third example, *A* believes that there are many forms of legitimate legal argument, that “there is no hierarchy among them,” and that different forms of legitimate legal argument may favor different legal outcomes, while *B* has a preferred form (which he presumably believes either is the only legitimate form of legal argument or is hierarchically superior to the other legitimate forms). According to Balkin and Levinson, in this case, *B* would say that “*A* is not taking ‘legal reasoning’ seriously” or that *A* is not taking *B*’s preferred form of “legal reasoning as seriously as” *A* would like (read: “thinks is appropriate” or “believes one should”).²⁶ In this case as well, Balkin and Levinson are putting words into *B*’s mouth that I would never utter. This third example covers my disagreement with Philip Bobbitt: he is *A* and I am *B*. Not only do I not characterize Bobbitt’s position in the way Balkin and Levinson state *B* would characterize *A*’s position, but in this *Reply* I have explained

25. *Id.*

26. *Id.*

why such a characterization would be unjustified on my understanding of "taking legal argument seriously."

One final point. After explaining their three examples in the terms I have described, Balkin and Levinson admit that they have put words into *A*'s and *B*'s mouths that are misleading: "when people fight over the meaning of a practice," "there is something quite misleading about the claim that one side or the other does not take the practice 'seriously.'"²⁷ Although I agree that this conclusion is correct if one is using "taking legal reasoning seriously" in the sense of "recognizing the social importance of the phenomenon or concept," it may not be correct in the consideration or conviction senses of that expression. A Liberal Legalist (such as myself) believes that legitimate legal argument helps us to achieve justice. Many Critics believe that legitimate legal argument is an opiate of the masses—i.e., conceals the unjust realities of our culture and retards its reformation. Hence, both groups take "legitimate legal argument" seriously in the "social importance" sense in which Balkin and Levinson are using this expression in the passage just quoted. However, as I have already indicated, no member of the Critical Legal Studies movement takes legal argument seriously in the conviction sense, and at least some members of this group do not take it seriously in the consideration sense of that expression.

*E. Balkin and Levinson's Complaint That My Usage of "Taking Legal Reasoning Seriously" Ignores the Fact That an Individual's Legal-Reasoning Obligations Vary with His Law-Role*²⁸

I have two responses to this criticism. First, as Part II of this *Reply* makes clear, I do not think that some of the institutional role-differences or political considerations that Balkin and Levinson claim affect the relevant law-role players' legal-reasoning obligations in fact do so. Second, and more importantly, to the extent that they do, that fact has no bearing on my usages of the expression "taking legal

27. *Id.* at 557.

28. In Balkin and Levinson's words, I ignore the fact that "institutional differences between different positions in the legal system matter greatly to how one reasons about and with the law." *Id.* at 547. Balkin and Levinson illustrate this point by arguing that the ways in which lower-court and higher-court judges are obligated to treat precedent differ, *see id.* at 544, that "political" considerations within their courts as well as in the society as a whole may affect the legal-reasoning obligations of judges, *see id.* at 547, that lawyers are obligated to make arguments in whose validity or alleged force they do not believe, *see id.* at 545-48, and that law teachers are obligated to teach arguments they consider to be illegitimate or invalid, *see id.* at 549-51.

argument (legal reasoning) seriously.” The fact that different law-role players are obligated to make or heed different legal arguments is irrelevant to whether they or anyone else are “taking legal reasoning seriously” in any sense of that expression I have distinguished. Admittedly, however, it would be possible to add a sixth, “obligational” sense of that expression in which someone could be said to be “taking legal reasoning seriously” if he fulfilled his “legal reasoning” obligations. Obviously, determinations of whether a given individual was “taking legal reasoning seriously” in this sixth sense would have to be sensitive to differences in the legal-reasoning obligations of different law-role players.

* * *

I understand why Balkin and Levinson so dislike the conviction sense of “taking legal argument seriously” I set forth in the *Introduction* to this symposium. They are sympathetic toward or agree with the Critical Legal Studies view that what counts as morally-legitimate or valid legal argument in a given culture at a given time is determined by contemporaneous social negotiation in that culture. In their words: “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.”²⁹ Since Balkin and Levinson believe that legal practice is morally self-legitimizing³⁰ (to the extent that they believe that anything can be said to be morally legitimate in any objective sense), they would no doubt also agree with the proposition that “‘morally-legitimate legal argument’ is a socially constructed concept whose boundaries and conventions are constantly under negotiation by its participants and therefore tend to change over time.” Although I would agree that the kinds of legal argument that are “socially accepted” as morally legitimate or valid are constantly under negotiation and change over time, I disagree with the claim that contemporaneous social acceptance is a sufficient condition for moral legitimacy or validity: the morally-illegitimate or invalid use of a particular kind of argument to determine what the law is may be

29. *Id.* at 552.

30. I should note that at no point in their manuscript do Balkin and Levinson articulate their premise that legal practice is morally self-legitimizing, much less acknowledge its contestability. This omission is telling in that it suggests that they believe that this proposition is self-evidently correct.

socially accepted in a given culture at a given time because at that time a majority of, a winning political coalition in, or all members of that culture may incorrectly perceive or choose to ignore their moral commitments or those commitments' implications for morally-legitimate and valid legal argument. Hence, although I acknowledge that "socially accepted" legal argument is constantly negotiated and changes over time, I disagree that the same can be said for "morally-legitimate or valid legal argument."³¹

Relatedly, Balkin and Levinson write that "debates about who is and who is not taking legal reasoning seriously must be approached sociologically as well as philosophically."³² In fact, I think this understates their actual view: they really believe that debates about such topics must be approached solely sociologically and historically. Their equation of morally-legitimate and valid legal argument with socially-accepted legal argument underlies not only our methodological disagreement but also their (to my mind) mistaken belief that my conclusions about morally-legitimate and valid legal argument in our culture are defeated by the following two facts:

- (1) "the criteria for 'good' or 'serious' legal reasoning have changed markedly over time, especially as the participants in the practice and their social positions have changed" and
- (2) "even in our own age . . . people with different . . . perspectives" have different views about what "forms of 'legal reasoning'" are useful, socially acceptable, morally legitimate, or valid (the adjectives are mine).³³

In my judgment, the fact that the legal community's perception of legitimate or valid legal argument changes over time, the fact that the individuals who people our society at any given time may disagree about the legal arguments whose use is morally legitimate or valid in our culture, as well as the fact that these individuals try to persuade each other that their conception of legitimate legal argument is correct or to induce each other to accept the use of particular conceptions of legitimate legal argument are irrelevant to whether, at

31. I should add that, although my position on morally-legitimate legal argument is a "conventionalist" position, I would not agree that this concept is a "social construct" in the sense in which Balkin and Levinson claim it is "socially constructed." For an analysis of the various ways in which the label "conventionalist" may be misleading, see Postscript C to *Legitimate Legal Argument*, *supra* note 2, at 489-91.

32. Balkin & Levinson, *supra* note 1, at 551.

33. See *id.* at 553. For a brilliant analysis of the intellectual dynamics behind our culture's shifting from emphasizing one mode of legal argument to emphasizing another such mode, see PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982).

any given time, there is a unique, morally-legitimate or valid way to discover what the law is, or whether, in our culture, the morally-legitimate or valid approach to this task has not changed over time.

Of course, I was aware of Jack Balkin and Sandy Levinson's jurisprudential views when I invited them to participate in this symposium. Indeed, I asked them to contribute an article precisely because their views are so opposed to mine. I am therefore not the least bit surprised that they think that my conviction usage of "taking legal argument seriously" is "misleading"³⁴ in that it fails to acknowledge that people who subscribe to their views may take legal reasoning or argument very seriously in various other senses of this expression—*viz.*, not only in the "legal craftsmanship" senses to which the draft-*Introduction* they saw did refer but in the "consideration" and "social importance" senses,³⁵ which that draft did not mention. Perhaps this *Reply* has assuaged them by recognizing the appropriateness of these latter two senses of the expression "taking legal reasoning (argument) seriously." However, contrary to Balkin and Levinson, I do think that people who subscribe to their views do "lack[] loyalty to the practice" in one sense—the conviction sense—of the expression and that at least some of those who subscribe to their views "make[] fun of the practice, or view[] the practice skeptically or condescendingly."³⁶ Balkin and Levinson may be justified in demanding that these accusations be clarified (the quoted material is their language, not mine) and may be willing to demur to them as clarified, but they cannot realistically deny them once they have been clarified.

II. BALKIN AND LEVINSON'S EMPIRICAL REFUTATION OF MY CONCLUSIONS ABOUT LEGITIMATE LEGAL ARGUMENT IN OUR CULTURE

Balkin and Levinson argue that my conclusions about morally-legitimate legal argument in our culture are refuted³⁷ by their

34. Balkin & Levinson, *supra* note 1, at 557.

35. *See id.*

36. *Id.* I hasten to add that some observers who believe that the use of each imaginable kind of argument that could be used to determine what the law is is either morally legitimate or morally illegitimate and that there are internally-right answers to all legal-rights questions also have not taken legal argument as seriously as they should have done in the consideration sense of that expression.

37. Balkin and Levinson point out one additional fact not related to fit that others or they may believe also undercuts my conclusion that there is a unique, morally-legitimate way to ascertain what the law is in our culture—*viz.*, the fact that even those experts who believe in the

inconsistency with our society's or various well-informed individuals' beliefs about the obligations of high-court judges, lower-court judges, drafters and enactors of new legislation or regulations, lawyers, and law teachers as well as by the failure of these actors to fulfill the obligations Balkin and Levinson claim my position on morally-legitimate legal argument implies they have.³⁸ Part II argues that, for a variety of reasons, my conclusions fit the relevant beliefs and behaviors far better than Balkin and Levinson suppose and that the non-fits that are present are far less damaging to my position than Balkin and Levinson would in any event claim. To ease the exposition, Part II assumes that in our culture morally-legitimate legal argument coincides with valid legal argument—i.e., that no clear

existence of a unique morally-legitimate approach to determining what the law is disagree significantly about its content. It seems clear to me that the existence of such disagreement is not dispositive. Nor, I admit, is the fact (recognized by Balkin and Levinson) that each of the participants in this debate believes that he has uncovered the correct, morally-legitimate approach. *See id.* at 544.

38. A number of the other contributors to this symposium have pointed out two additional facts that some (not necessarily they) may believe count against or refute my conclusions about morally-legitimate legal argument in our culture. First, both Jack Getman and Dennis Patterson emphasize the important role that different kinds of factual analysis play in (morally-legitimate) legal argument. *See* Julius Getman, *A Labor Lawyer's View of Legal Argument*, 74 CHI.-KENT L. REV. 409 (1999); Dennis Patterson, *Taking Commercial Law Seriously: From Jurisprudence to Pedagogy*, 74 CHI.-KENT L. REV. 625 (1999). Of course, my view of legitimate legal argument in our culture is perfectly compatible with various kinds of factual analyses' playing a critical role in the determination of what the law is.

Second, both Lawrence Friedman and Michael Sean Quinn call attention to the reality and importance of legal change. *See* Friedman, *supra* note 15, at 536; Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 740 (1999). However, the fact that our law has changed—indeed, the fact that it has changed substantially or enormously—is not incompatible with my conclusions about the morally-legitimate way to determine what the law is in our culture. Much of the change in our law has resulted from new legislation or administrative regulations: my account of the morally-legitimate way to determine what the law is has little relevance to such changes in the law. Admittedly, however, a considerable amount of legal change has resulted from judges' revising their conclusions about common-law rights, constitutional rights, the correct interpretation of extant statutes or regulations, or the deference they should give to administrative interpreters. It is therefore important to emphasize that such changes in judicially-announced law may also be compatible with my position on morally-legitimate legal argument: some such changes may reflect changes in social realities that alter the internally-right answer to a formally-unchanged legal-rights question; some may reflect changes in statutory law that alter the consequences of particular common-law doctrines and arguably the internally-right answer to the legal-rights question to which those doctrines relate (for example, the passage of antidiscrimination statutes and whistleblower-protection statutes may alter the consequences and hence internal correctness of the employment-at-will doctrine); and some may reflect changes in the judges' understanding of the rights-related concepts that are relevant to the legal-rights question under consideration, changes in their appreciation of the relevant facts, or changes in their conception of morally-legitimate legal argument in our culture (judges' making new mistakes or correcting old ones). My conclusions about morally-legitimate legal argument in our culture do not imply that the law will not in practice change for these reasons. (Nor do my conclusions deny that judges' perceptions of the facts and moral norms that are relevant to determining what the law is are historically embedded.)

constitutional context that, in the relevant sense, was properly understood by its ratifiers renders valid an argument whose use is morally illegitimate or renders internally correct an answer to a legal-rights question that is inconsistent with our society's moral commitments.

A. The Implications of My Conclusions About Legitimate Legal Argument for the Law-Role Obligations of Various Law-Role Players: My Understanding and Balkin and Levinson's Claims

1. High-Court Judges and Lower-Court Judges

According to my accounts of the moral commitments of our society and their implications for morally-legitimate legal practice in our culture, individual judges are obligated to adopt the morally-legitimate approach to analyzing legal-rights issues and to reach those legal-rights conclusions that that approach implies are internally correct. Moreover, judges who write individual opinions in cases are obligated to report the morally-legitimate (valid) reasoning that renders internally correct the legal conclusions they deemed essential to the resolution of the case in hand (and any other legal conclusions they offered in the way of dicta). To fulfill these obligations perfectly, a judge would have to have a correct, considered opinion about morally-legitimate legal argument in our culture and to apply this approach carefully and correctly to the cases he or she was required to decide. Such a judge's votes would be determined by his morally-legitimate (valid) legal analysis, and his opinions would articulate his legal reasoning.

Obviously, when combined with my conclusions about morally-legitimate legal argument in our culture, this abstract position has implications for the internally-correct way to resolve many concrete methodological (as well as specific legal-rights) issues. I will analyze the implications of my general position for the appropriate resolution of the three methodological issues on which Balkin and Levinson specifically comment.³⁹

39. Of course, I realize that some judges (like some lawyers, law professors, and law students) are much better at "intuiting" the internally-right answer to legal-rights questions than at explaining the basis of these "intuitions." I also realize that being better at explaining the basis of one's legal-rights conclusions does not guarantee being better at discovering the internally-right answer to legal-rights questions (though I believe that sophistication about the concept of legitimate legal argument will help one discover the internally-right answers to legal-rights questions).

a. Precedent

I believe that high-court judges are not morally or legally obligated to follow precedent slavishly. Admittedly, if my conclusions about morally-legitimate legal argument in our culture are correct, high-court judges will sometimes be obligated to give mistaken precedents some weight (since not doing so will frustrate the reasonable expectations of—fail to show appropriate respect for—moral-rights holders who are entitled to reasonably rely on the prior decisions in question). More specifically, I think that the reliance-related weight that an incorrect precedent should be given will vary with such factors as the status of the court that and judge(s) who made the original mistake, the extent to which the relevant issue was carefully briefed or argued to the court, and the extent to which the court discussed the issue in its opinion, etc. However, high-court judges will not be obligated to give weight to (indeed, will be obligated not to give weight to) a precedent when it was so obviously incorrect at the time at which it was decided that reliance on it would not be reasonable, when information about its consequences or factual predicates that became available after it was set makes it sufficiently clear that it was wrongly decided to render reliance on it unreasonable, when the party with the alleged reliance interest culpably caused the original judicial error, or when the party with the alleged reliance interest is not a moral-rights holder (e.g., is the government in circumstances in which it is not standing in the shoes of one or more individual moral-rights holders).⁴⁰

As Balkin and Levinson indicate,⁴¹ I have not previously written about the possibility that it might be morally legitimate in our culture to require lower-court judges to follow precedent to a greater extent than high-court judges are obligated to do. I can think of two moral-rights-related rationales for such an arrangement.

First, one might argue that lower-court judges are sufficiently likely to be wrong when they want to depart from precedent that the rights of the parties involved in the disputes directly involved would be better protected by a rule that allowed only high-court judges to

40. This list assumes that various utilitarian considerations that may favor a strict rule of following precedent (e.g., the mechanical-transaction-cost and certainty advantages of preventing relitigation) cannot in fact justify it. For a discussion of the argument that transaction-cost savings can justify failing to enforce moral rights, see *MATTERS OF PRINCIPLE*, *supra* note 12, at 20-21. For a discussion of the morally-legitimate approach to take to precedent, see *id.* at 60, 72-74.

41. See Balkin & Levinson, *supra* note 1, at 546-47.

overrule precedent. However, this argument is empirically dubious and is weakened further by the private cost of appealing all the way to the high court as well as by the possibility that a lower court may be able to secure more careful review of a wrong precedent by refusing to follow it than by expressing doubts about it and encouraging litigants to challenge it on high.

Second, one might argue that lower courts should not be authorized to overrule precedent because not following precedent disserves moral-rights-related interests by undermining faith in the rule of law. A similar lack of confidence in “the People” deterred any judge from publishing a dissent for over twenty years in post-World War II West Germany. I do not find this argument persuasive. In my judgment, our system is premised on the People’s ability to exercise moral and political responsibility, our People’s commitment to the rule of law is less fragile than this argument’s proponents seem to believe, and in any event both the principled and the more efficacious way to instill respect for the rule of law is to provide an accurate account of what “analyzing what the law is” entails, despite the fact that (or perhaps precisely because) that account will reveal that many legal-rights issues can be properly resolved only through a nonmechanical approach that cannot be uncontestably operationalized in a way that will prevent its good-faith execution by different, assiduous experts from yielding different legal conclusions.

As the preceding paragraph implies, I am somewhat skeptical of the possibility of justicizing a requirement that lower-court judges be absolutely bound by higher-court precedents. However, I would not rule out the possibility that such an arrangement might be morally legitimate—i.e., consistent with our society’s moral commitments.

Admittedly, these initial efforts to redeem my failure to “consider[] the institutional situation of inferior courts”⁴² have not enabled me to generate a clear-cut conclusion about whether it is morally legitimate in our culture to bind “inferior” judges to follow the precedents of their superiors in the way that Balkin and Levinson assume our current practice requires them to do.⁴³ However, I can answer one of the questions to which Balkin and Levinson invite me to respond in relation to this issue: if it is morally legitimate for “inferior” judges to be required to follow precedent and our empirical practice is to bind them in this way, then an “inferior” judge who

42. *Id.* at 547.

43. *See id.*

followed precedent would have fulfilled his professional obligations even if his reasoning were different from the reasoning on which a high-court judge would be obligated to base both his legal conclusions and his opinion.⁴⁴ Indeed, such an "inferior" judge would be fulfilling his obligations by taking "legal argument seriously" even if he ended up reaching a legal-rights conclusion that the high-court judge who reviewed his decision was obligated to overrule.

Balkin and Levinson also seem to believe that my position on morally-legitimate legal argument in our culture implies that judges in "courts like the Supreme Court of the United States" are relatively free to follow or reject their own precedents—in Balkin and Levinson's words, "may follow their own previous precedents but are by no means required to."⁴⁵ In fact, as I have just indicated, I think that high-court judges are always obligated either to follow or to overrule each of the specific precedents that relates to the cases they must decide.

b. Prudential Argument

By "prudential argument," I mean argument that relates to the consequences of a choice that are not valued because they relate directly⁴⁶ to the moral rights of those the choice affects. In actual practice, an individual judge's decision on whether to reach the merits of a case, how to vote on a particular issue, whether to join a majority opinion, concur, or dissent, and what rationale to provide for his vote are sometimes influenced by a wide variety of prudential considerations. Admittedly, prudential analyses are relevant to the proper interpretation of statutes or constitutional provisions that were designed to instantiate a particular personal ultimate value, to achieve a personal-ultimate-value-related goal, or to benefit their

44. Balkin and Levinson actually ask whether in such a case the "inferior" judges would be "taking legal reasoning seriously" if they followed precedents slavishly. *See id.* I would also answer "yes" to this somewhat different question. *See supra* Part I.E for a related, general discussion of the "obligational" sense of "taking legal argument seriously"—i.e., of the meaning of taking legal-argument obligations seriously.

45. Balkin & Levinson, *supra* note 1, at 547.

46. Of course, inasmuch as moral-rights holders have a moral right that the State secure those of their legal rights that do not derive from their independent moral rights (e.g., legal rights that are created by statutes or constitutional provisions that are designed to further personal ultimate values, personal-ultimate-value-related goals, or the parochial interests of their supporters), moral-rights holders will have a moral right that the statute or constitutional provision be interpreted to maximize the extent to which it promotes the personal ultimate values, goals, or private benefits it was designed to secure (i.e., will have a moral right that the relevant legal interpretation reflect the relevant consequences). To this extent, it is morally legitimate to use prudential argument to determine what the law is in our culture.

supporters for nondefensible reasons. Prudential analysis also has a legitimate role to play in constitutional analysis in general since the fact that a government choice does not further any goal the State can legitimately pursue calls its constitutionality into question. Thus, most choices of this sort are unconstitutional because they were made to achieve results the State may not seek to achieve. And some such choices are unconstitutional because they violate their victims' right to appropriate concern by harming them for no reason at all. I should add that the fact that a choice "generates a legitimate benefit" is neither a necessary nor a sufficient condition for its constitutionality. Thus, the fact that a State choice produces no legitimate benefit does not guarantee its unconstitutionality since harmful, pointless State choices may be constitutional if they were produced by a decision-procedure that allocated an appropriate amount of resources to filtering out such lemons. And the fact that a State choice produces some legitimate benefits does not establish its constitutionality since State choices that further legitimate goals will be unconstitutional, for example, if the decision to make them was critically affected by some of their supporters' impermissible motivations.

In any event, my conclusions about our society's moral commitments do imply that it is morally illegitimate for judges to be influenced by many other types of prudential considerations—*viz.*, by the effect of their decision on the political viability of the courts, by the likely willingness of lower courts and police to enforce the legal rights the judge would otherwise conclude the relevant moral-rights holders have, by the likely willingness of the population at large to behave consistently with what the court would otherwise conclude was the internally-right answer to the relevant legal-rights question, or by the possibility that the announcement of that otherwise-internally-right answer would lead to more general lawlessness. On my understanding, judges are obligated to ignore such prudential considerations when deciding how their court should resolve legal-rights issues and when deciding whether to vote with the majority or to dissent. My conclusions about morally-legitimate legal argument also imply that any opinion a judge writes should indicate the morally-legitimate legal argument that provides the internal justification for his legal-rights conclusion even if doing so will incite disobedience to his ruling or more general lawlessness. In fact, although I am not sure about this, I am inclined to conclude that it is improper for judges to try to make their conclusions more palatable to the public by explaining why they are more attractive than some

might suppose in various legally-irrelevant personal-ultimate-value terms (though it clearly would be appropriate for a judge to explain why people who have various conceptions of morally-legitimate legal argument that differ from his would reach the same conclusion that he reached). All this reflects my conclusion that judges are obligated to be 100% principled 100% of the time when they are deciding legal-rights questions.⁴⁷

Balkin and Levinson attack my evaluation of the moral legitimacy of prudential legal argument *inter alia* by rejecting its implications for the evaluation of the performance of various Supreme Court Justices in *Brown v. Board of Education* ("*Brown I*").⁴⁸ Thus, Balkin and Levinson ask (rhetorically): "Should Justice Reed be condemned because he did not 'take legal reasoning seriously'" when, against conviction, he joined the majority in *Brown I*—i.e., when he "agree[d] not to publicly reveal that he disagreed with the opinion because he felt that segregated schools were constitutional?"⁴⁹ I would say that Justice Reed should be condemned on this account: his conduct violated his professional obligation in that he did not vote in the way that his (incorrect) view of morally-legitimate or valid legal reasoning implied was internally correct. From the perspective of Justice Reed's obligations, his two wrongs did not make a right even though they did result in his voting for the internally-correct resolution of the case.

47. This conclusion may seem to be inconsistent with my acceptance of the moral legitimacy in our culture of the constitutional provision authorizing the President to declare martial law in emergency situations and thereby to abrogate what in normal times would be various moral and constitutional rights of individuals for whom our State is responsible. See U.S. CONST. art. II, § 2, cl. 1; *id.* art. I, § 9, cl. 2. In MATTERS OF PRINCIPLE, *supra* note 12, at 18-19, I argue that, if appropriate procedural and institutional safeguards are instituted to prevent its misuse or abuse, this authorization will be rendered morally legitimate by its use's ability to protect rights-related interests on balance by preventing otherwise-unpreventable horizontal-rights violations by private actors or by reducing the risk that our State will be supplanted by a non-rights-based State or (perhaps) a State committed to the protection of a different set of rights. It seems to me that three facts render this position consistent with my conclusion that it is internally incorrect for judges to make their legal-rights conclusions or judicial opinions depend on similar prudential considerations: (1) the Constitution contains no text authorizing judges to take such considerations into account; (2) since in the relevant sense judges have the final word on what the law means and since the relevant prudential considerations will normally involve acceding to the unprincipled desires of a politically-influential group, it may be more difficult to provide procedural and institutional protections against judicial abuses or misuses of such an authorization than to provide such safeguards against Presidential abuses of this power in times of real emergency; and (3) there is less reason to trust the accuracy of judges' "political judgments" or predictions about the way in which people will react to particular legal rulings or rationales than to trust the accuracy of the conclusions of a politician such as the President on such issues.

48. 347 U.S. 483 (1954). I refer to this case as *Brown I*.

49. Balkin & Levinson, *supra* note 1, at 548.

Balkin and Levinson also seem to praise the Court's *opinion* in *Brown I*⁵⁰—i.e., to approve of Chief Justice Warren's decision not to write an opinion that reflected his and several other Justices' "considered views or even their preferred methods of constitutional argument"⁵¹ to secure the unanimity that he thought was needed to "send a clear message to the South"⁵² and to enable himself to write an opinion "that would be 'readable by the lay public.'"⁵³ More specifically, to secure Justice Reed's vote and appease the South, Warren wrote an opinion in *Brown I* that did not condemn the segregationists and, relatedly, omitted any discussion of the constitutional-law relevance of the fact that segregation violated the moral rights of many members of our society by insulting them. In my judgment, the Chief Justice's choice—though, no doubt well-motivated—violated his judicial obligations. It also did not further the entirely laudable prudential aims that motivated the Chief Justice and laid the groundwork for a number of other important errors that his Court and its successors subsequently made (though I realize that statements like these that attribute causal power to doctrinal conclusions cause the eyes of many law-and-society people to roll in their heads).

Let me be more specific.⁵⁴ Warren's prudentialist *Brown I* opinion did not appease the South. It also did not convince Southerners of the soundness of the Court's constitutional conclusion. Perhaps no opinion could have done so, but Warren's decision to omit the internally-right reason for concluding that school segregation was unconstitutional (*viz.*, that it violated moral rights by insulting the targets of the moral discrimination it entailed) certainly did not increase his opinion's persuasiveness. Southern editorial writers and opinion-makers had a field-day criticizing the poor argumentation and dubious factual bases of the opinion. Warren's opinion failed to provide its readers with the information that would have indicated whether State segregation of facilities other than public schools was

50. In his contribution to this symposium, Lawrence Friedman in essence supports Balkin and Levinson's approval of the Court's performance in *Brown I*. See Friedman, *supra* note 15, at 531-32.

51. Balkin & Levinson, *supra* note 1, at 548.

52. *Id.*

53. *Id.* (quoting JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* 58 (1992), itself quoting a memorandum from Chief Justice Warren to his fellow Justices to this effect).

54. For a fuller account of all the points made in the next two paragraphs of the text, see *MATTERS OF PRINCIPLE*, *supra* note 12, at 234-48; for a discussion of the courts' use of misleading stipulative definitions of various key concepts in the cases in question, see *id.* at 266-70.

unconstitutional. And, most important, *Brown I* and its progeny did not induce the South to desegregate its public schools: ten years after *Brown I*, only one percent of those children in the deep South classified as being of African descent who attended a public school were enrolled in a school that contained even one Caucasian child.⁵⁵

In my judgment, *Brown I* also contributed to the courts' making a large number of other substantive-law and remedial errors. In particular, *Brown I*'s failure to focus on the moral wrong of segregation and its concomitant failure to identify the full set of moral-rights holders who were victims of that wrong (a set that includes not just the segregated school children but all those who had the attribute that led to these children's segregation) led subsequent courts to misidentify what counts as segregation (both when deciding whether segregation had taken place and when deciding whether the impact of school segregation on school-attendance patterns had been removed) as well as when identifying the harms that school segregation generated and hence the steps that a previously-segregating authority might legitimately be required to take to remedy its wrongs (e.g., when deciding whether it would be appropriate for courts to require such authorities to take steps to overcome the prejudice segregation caused (as well as manifested) or to increase the self-respect of those who were denigrated by the segregation). Less directly, I also think that *Brown I*'s failure to focus on the relevant moral-rights issue also contributed to the Court's failure to assess correctly the constitutionality of various affirmative action programs (caused the Court to analyze the relevant issues in a wooden, arcane way that does not consider whether the programs under review were insulting to either those they immediately harmed or those they immediately benefited).⁵⁶

I think that as a matter of principle the Court's opinion in *Brown I* was wrong. But I would also say that a careful analysis of the consequences of the Justices' choices in *Brown* should give considerable pause to those who "in 'principle'" are willing to approve of judges' being influenced by prudential considerations.⁵⁷

55. The approach that the authorities took to classifying children racially reveals a great deal about the nature of segregation.

56. For a detailed analysis of the constitutionality of various affirmative action programs, see MATTERS OF PRINCIPLE, *supra* note 12, at 249-62. For a discussion of the courts' misdefinition of "discrimination" in the relevant context, see *id.* at 266-68.

57. In his contribution to this symposium, Lawrence Friedman, *supra* note 15, also expresses his disagreement with those who disapprove of the *Brown* decision and opinion. Of course, the relevant question from his perspective is: "compared to what?" *Brown v. Board of*

2. Impeachment Triers, Drafters and Enactors of Legislation and Law-Creating Administrative Regulations, and Authors of Op-Ed Pieces and Editorial Letters

Balkin and Levinson claim that “the definition of appropriate legal reasoning may shift” when the actor is not a judge and the task is not identifying extant legal rights but the actor is a legislator engaging in “legislative debate (as in the recent Clinton impeachment),” when the actor is unspecified (presumably a legislative assistant, administrative-agency employee, or anyone else) and the task is “the drafting of rules and regulations,” or the actor is anyone and the task is “the composition of op-ed pieces or letters to the editor.”⁵⁸ They seem to be suggesting not only that my contribution to this symposium and my book ignore these possibilities but that my “vision of legal reasoning” is the same not only “for the legal academic and the ‘judge’—i.e., a Justice of the Supreme Court”⁵⁹—but also for the actors listed in the heading of this subsection. Although I acknowledge that I have never addressed the obligations of these latter actors explicitly, what I have written on other issues should have made clear that I would not be insensitive to such variations in law-related roles (though, as we shall see, I would not agree that the “appropriate definition of legal reasoning” for all such law-role players would be different from my conclusions about the modes and structure of reasoning that judges are morally obligated to use to discover what the law is in our culture).

Let me be specific. I begin with debates about impeachment—a type of debate in which our Constitution obligates the Congress to engage though it is not in essence “legislative.” In my judgment, there is an internally-right answer to the question: What counts as “Treason, Bribery, or other high Crimes and Misdemeanors”⁶⁰ in the context of impeachment? For this reason, I would say that the morally-legitimate way for legislators to debate this issue is no different from the approach that would be morally legitimate for

Education was clearly better in all senses than a decision to confirm the constitutionality of school segregation and may have been the best decision one could have hoped for at the time. But both the “all deliberate speed” remedial conclusion of *Brown II*, 349 U.S. 294, 301 (1955), and the *Brown I* opinion were far less than ideal (from either my internally-right-answer, morally-legitimate-legal-argument perspective or from any defensible personal-ultimate-value perspective). I may be seeing the pitcher as half-empty, while Friedman is responding to the fact that it is half-full.

58. Balkin & Levinson, *supra* note 1, at 547-48.

59. *Id.* at 547.

60. U.S. CONST. art. II, § 4.

judges to use to resolve this issue if that task were assigned to them. Thus, I agree wholeheartedly with those legislators who claimed that their vote on the Clinton impeachment was not supposed to be influenced by what the People wanted even though I disagree with the conclusions that many of them reached about the meaning of "high Crimes and Misdemeanors" in this context, the facts of the case, and whether the submitted evidence met the appropriate standard for conviction.

Next, what does my position imply for the kind of reasoning that should be employed by those who are creating new legislation or "legislative" regulations? Obviously, I do not believe that the type of "legal reasoning" that judges are obligated to employ when deciding "what the law is" is the same as the kind of "reasoning" that it is appropriate to use when drafting most "rules and regulations" since virtually all legitimate new rules and regulations are passed to instantiate some personal ultimate values or personal-ultimate-value-related goals rather than to fulfill the "legislator's" obligation to secure relevant moral rights.

Finally, what does my understanding of our society's moral commitments imply about the kind of reasoning that "should be" employed by authors of op-ed pieces or letters to the editor? I should point out at the outset that I have used the hedge-word "should" because I am uncertain about the obligations that membership in a rights-based polity imposes on such participants in public debates. I am therefore uncertain about whether some of my conclusions reflect my personal ultimate values (are "ought" views as opposed to obligation conclusions). I will proceed, nevertheless, because some of the points that need to be made are not affected by this distinction and because some of my conclusions bear a striking resemblance to the conclusions our society seems to have reached about some of the obligations that lawyers have to their clients (to the norms associated with the ethics of constrained zealous advocacy).

As a general matter, I would say that the kind of reasoning that authors of op-ed pieces or letters to the editor should use depends primarily on the issues they are addressing and secondarily on the other roles that they occupy. If the relevant op-ed piece or letter to the editor is urging the courts to interpret the law in a particular way (or an administrative agency to make an internally-correct interpretation of its mandate or of a particular regulation it has issued), the writer should base his conclusions on the same kinds of argument that judges are bound to use, with one clarification and one

exception. The clarification is that, if lower-court judges are more strongly bound by precedent than are high-court judges, an op-ed-piece or editorial-letter writer should point out the difference and make his recommendations reflect it. The exception is that it may not be appropriate for op-ed and editorial-letter writers to show any or the same degree of deference to non-judicial actors' conclusions about the meaning of some constitutional or statutory text as judges may be bound to do.⁶¹

By way of contrast, if the relevant op-ed piece or editorial letter is advocating the passage of some new legislation or "law-creating" administrative regulation that is not required by our moral-rights commitments, its writer clearly should not argue for it in the way that judges should argue about the internally-right answer to a question about preexisting legal rights.

Three additional issues about the moral position of op-ed-piece and editorial-letter writers need to be addressed. First, is it morally legitimate for such a writer to try to persuade his readers to support some conclusion about existing legal rights by making what I have been calling a legal argument that he does not believe to be correct or as forceful as he is alleging, by pointing out certain personal-ultimate-value-related advantages of his preferred conclusion that he knows are irrelevant to its internal correctness, by misrepresenting the facts that are relevant to the internally-correct resolution of the issue in question, or by appealing to his audience's prejudices? We are entering deep waters. My suspicion is that the answers to these questions turn in part on the obligations that one has as a member of a liberal, rights-based polity and in part on personal judgments about what individuals who take positions on public issues in such a society ought to do. My inclination is to conclude that it is legitimate and acceptable for a writer to provide readers with all arguments for his legal-rights conclusion that are plausibly morally legitimate, including arguments that the writer does not himself believe are correct. Indeed, I might even say that the respect we owe others implies not

61. Admittedly, this exception may not be appropriate if the reason that it is morally legitimate for judges to show such deference is their inability to prevent or remedy all moral-rights violations and concomitant need to provide government officials in general with encouragement and inducements both to avoid violating moral rights themselves and to prevent others from doing so. For an operational definition of the amount of deference that judges may be obligated to show other governmental officials, an explanation of why judges in a liberal, rights-based State may be morally obligated to show such governmental officials deference, and an analysis of the factors that should influence the amount of deference judges may be obligated to give such officials, see *MATTERS OF PRINCIPLE*, *supra* note 12, at 210, 214-15, and 216-18 respectively.

just the permissibility but the positive appropriateness of doing so. However, I think that it would be inappropriate for such a writer to make allegedly "legal arguments" that he was certain were in fact incorrect or morally illegitimate, to represent as legally relevant extra-legal arguments he knew to be legally irrelevant, to misrepresent various facts (regardless of their actual relevance), or to appeal to his audience's prejudices. I would also say that, although such a writer should point out the legal irrelevance of various legally-irrelevant personal-ultimate-value consequences of the choice under consideration, it would be perfectly appropriate for him to point out those consequences, regardless of whether he subscribed to the personal ultimate values in question: in essence, this conclusion rests on the contestable assumption that it is not improper for someone to try to induce those of his readers who are more interested in the instantiation of legally-irrelevant personal ultimate values than in the protection of the relevant legal rights to pay attention to his legal-rights argument and to provide public support for it or the conclusion for which he is arguing. Once more, however, I would say that such a writer ought not make arguments he knew were false, ought not assert the legal relevance of arguments he knows to be legally irrelevant, ought not misrepresent various facts or the quality of various relevant pieces of empirical research, and ought not appeal to prejudices, though I am not sure whether he would be violating any obligations by doing so.

Second, should the writer of an op-ed piece or editorial letter about an action he wants taken for reasons that are unrelated to anyone's extant legal right argue that the relevant decision is required by current law when he knows that it is not or believes on balance that it is not though an argument that is not clearly wrong could be made to the contrary? In this case as well, I would say that it was not only permissible but positively appropriate for such a writer to make all legal-rights arguments that he believes might be correct but not those he is certain are wrong. Obviously, no valid objection could be made to such an author's demonstrating the desirability of the choice he is advocating from value-perspectives he does not personally endorse. However, the author of such an op-ed piece or letter to the editor should not misrepresent the facts or the quality of empirical studies of the relevant facts and should not appeal to his readers' prejudices.

The third and last issue that needs to be addressed in this context is the special obligations that law teachers and perhaps lawyers may

have when writing op-ed pieces or editorial letters that relate to topics on which they are generally perceived to have expertise. Even if membership in a liberal, rights-based polity creates no obligations in this context, law professors and lawyers may be operating under special obligation-constraints in such situations. Readers may have reasonable expectations that what law professors write about extant legal rights or about the most desirable way for the State to respond to certain problems or issues reflects their technical or "scientific" expertise rather than their personal value preferences or parochial interests. And the same may be true for practicing lawyers, at least when they have not indicated that they are writing as counsels for interested clients or that they have a parochial personal interest of their own in the matter in question. At a minimum, therefore, law professors and lawyers are more likely to be obligated than other members of our culture to indicate any parochial interest they have in any matter on which they write an op-ed piece or editorial letter to which their professional expertise relates and to indicate the fact that and the extent to which their preference for the conclusion for which they are arguing does not reflect their professional expertise. I also think that law professors and lawyers have special obligations

- (1) to reveal their actual evaluations of any legal arguments they delineate in such writings (inter alia, to articulate and honestly evaluate the arguments that can be made against the conclusion for which they are arguing);
- (2) either to avoid making personal-ultimate-value-related arguments that are irrelevant to any extant-legal-rights question on which they are writing or to indicate that such arguments are in fact irrelevant to the proper resolution of the issue at hand (though, for the reasons indicated above, this claim does not imply that such an author should not point out the personal-ultimate-value-related desirability of the decision he is advocating);
- (3) not to conceal the weaknesses of any empirical analyses on whose findings they wish to rely, not to exaggerate the weaknesses of any empirical analyses whose findings cut against their conclusions, and not to exaggerate their confidence in the empirical assumptions on which they rely (inter alia, not to consciously misrepresent the facts); and
- (4) not to appeal to the prejudices of their audience.

Obviously, I recognize that the space-limitations under which op-ed-

piece and editorial-letter writers operate will have to be considered when deciding whether a law professor or lawyer (or, for that matter, anyone else) has fulfilled his relevant obligations, but the existence of these constraints does not simply eliminate obligations that such writers would otherwise have: if such a writer does not have space to express his doubts about the legitimacy of a legal argument that he is not convinced is wrong or to explain or at least to refer to the weaknesses of an empirical study on whose findings he would like to rely, he may be obligated not to make use of the argument or study at all. But my basic point is that law professors and lawyers are probably more constrained by obligations when they write op-ed pieces or editorial letters on topics to which their expertise relates than are those on whose expertise the public does not expect to be able to rely.

3. Lawyers When Arguing in Court for Their Clients' Rights

Balkin and Levinson's section on "Do Practicing Lawyers 'Take Legal Reasoning Seriously'?" makes one and possibly two criticisms of my argument. The definite criticism is one of clarity: "Markovits's argument vacillates over whether 'taking legal reasoning seriously' is a matter of internal states of mind or external performance."⁶² The criticism they *may* be making is one of substance: they may be claiming that the fact that our society imposes a duty of zealous advocacy on its lawyers undermines my conclusions about morally-legitimate legal argument in our culture. I will now address each of these criticisms in turn.

In Balkin and Levinson's usage, the "external performance" dimension of a lawyer's relevant conduct refers to the lawyer's efforts to make it appear that he is making morally-legitimate (valid) legal arguments and that he honestly believes that the answer to the relevant legal-rights question that favors his client is the internally-correct answer to that question.⁶³ By way of contrast, Balkin and Levinson's "internal" sense of taking legal reasoning seriously refers to the actual beliefs of the relevant lawyer—whether he honestly believes that his argument is morally legitimate and the conclusion for which he is arguing is internally correct. To Balkin and Levinson, this distinction is important because, in our culture, a lawyer is not required to take legal reasoning seriously in their internal sense. Indeed, according to Balkin and Levinson:

62. Balkin & Levinson, *supra* note 1, at 545.

63. *See id.* at 545-46.

Lawyers not only are required to make arguments they do not personally believe, 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*.⁶⁴

Now, what of Balkin and Levinson's claim that I "vacillate[]" over whether 'taking legal reasoning seriously' is a matter of internal states of mind or external performance"? My previous writings certainly did not "vacillate" about this issue because they never addressed it. However, I will address it here. I will not vacillate, but I will say that whether a lawyer who is "simulating" rather than stating what he actually believes should be said to be "taking legal reasoning or argument seriously" depends on the sense in which the latter expression is being used. In my usage, a lawyer who believes that his advocacy will be more effective if he makes socially-accepted legal arguments will be taking legal argument seriously in the craftsmanship sense regardless of whether he believes that his arguments are correct. Similarly, the fact that such a lawyer is simulating his belief in arguments with which he disagrees is also irrelevant to whether he takes legal argument seriously in either my conviction sense or my consideration sense. To see why, note that whether or not a lawyer is simulating his belief in his argument for pragmatic reasons says absolutely nothing about whether he believes or takes seriously the possibility that all (most, some) possible arguments that might be made to determine what the law is are either morally legitimate or morally illegitimate (valid or invalid) or believes or takes seriously the possibility that all (most, some) possible answers that might be given to any legal-rights question are either internally-correct or internally-incorrect. When the lawyer is simulating his belief in an argument for pragmatic reasons, he is doing something that is unconnected with "taking legal argument seriously" in the "conviction" and "consideration" senses I distinguish. To be honest, I find the linguistic issue on which I am accused of vacillating uninteresting.

The important issue is whether my position on morally-legitimate legal argument in our culture has implications for the propriety of lawyers' simulating their belief in arguments in which they do not believe. Perhaps Balkin and Levinson conflate this "obligation" issue with the language issue just analyzed because they generally conflate my position on morally-legitimate argument in our culture (and its

64. *Id.* at 546 (footnote omitted).

obligation-implications) with the issue of my understanding of "taking legal argument seriously." Previously, I said that Mr. Justice Reed's decision to join the majority in *Brown I* in the face of his conviction that public school segregation was not unconstitutional violated his obligations as a judge. On my understanding, judges are obligated to vote the way that their conception of morally-legitimate (valid) legal argument implies is internally correct and to articulate the valid legal argument that they think supports their conclusion in any opinion they write. For at least two reasons, lawyers may not be under a similar obligation to make only those arguments (or factual allegations) in which the lawyers believe.

First, at least in many situations, a procedure in which the legal representatives of all sides of a dispute make all the arguments for the parties they represent that they think may be morally legitimate and will inure to their clients' interests may be more likely to enable judges to reach internally-correct legal conclusions than any other system of legal-dispute processing (or at least may be sufficiently likely to produce "legal truth" for the adoption of a system of zealous advocacy to be consistent with our moral commitments). On my account, the tendency of a particular legal-rights-dispute-processing system to increase the probability that internally-correct legal-rights conclusions will be reached favors its adoption because moral-rights holders have a strong moral-rights-related interest in having their legal rights enforced. And second, truth-considerations aside, a rule allowing such zealous advocacy may be rendered morally legitimate in our culture by the respect this aspect of the process manifests for the parties to the legal-rights dispute. Thus, on my account, moral-rights holders have a moral-rights-related interest (associated with our duty of respect) in having the law-dispute-resolving process arranged in a way that enables them to have every plausible argument made that favors their legal-rights position and that recognizes their ability to counter plausible legal-rights arguments made against them. Overall, then, our society's general moral-rights commitments obligate it to resolve legal-rights disputes through processes that strike the internally-right balance between moral-rights holders' "legal-product" and "pure-legal-process" interests. Our society's decision to impose a duty of constrained zealous advocacy on its lawyers⁶⁵ may be consistent with its law-dispute-process-related

65. See Part II.B.3, *infra*, for a partial description of how the duty of zealous advocacy is constrained.

obligations.

I am therefore not troubled by the fact that lawyers are obligated to behave in one sense “hypocritically.” I do not know whether Balkin and Levinson think that such authorized hypocrisy does undermine my position. Their only statement that relates to this possibility is cryptic: “Markovits’s theory of law . . . describes what lawyers must *simulate* rather than what they must *believe* in order to fulfill their professional obligations to their clients.”⁶⁶ I should add that even if Balkin and Levinson were right that our society’s approval of zealous advocacy is inconsistent with my conclusions about morally-legitimate legal argument in our culture, this would damage my position only if they could do one of two things that they have not done:

- (1) devise an alternative account of our society’s moral commitments or their relationship to morally-legitimate legal argument that discounted-fits its support of zealous advocacy better than my accounts of these matters do; or
- (2) show that the combination of this discounted non-fit and all other discounted non-fits to my position is sufficiently serious to justify the conclusions that—if my account is the best that one can provide—our society is amoral and legal-rights conclusions are up for negotiation in Balkin and Levinson’s amoral sense of that expression.

4. Law Teacher Pedagogy

Although Balkin and Levinson seem to acknowledge their uncertainty on this issue, they give the impression that I believe that law professors ought to or are obligated to refuse to teach any kind of argument other than those arguments that I believe are morally legitimate to use to discover what the law is in our culture.⁶⁷ Of course, I believe no such thing.

When I teach courses about what the law is,⁶⁸ I teach not only my own position on morally-legitimate legal argument in our culture but

66. Balkin & Levinson, *supra* note 1, at 546.

67. See *id.* at 549-51 and, especially, the reference to “a Markovitsian legal education” at 549.

68. I also teach one course on the economics of the common law and another on the economics of environmental law, tax law, antitrust law, and public-utility regulation that are partially concerned with what the law ought to be as opposed to what the law is. Obviously, in such courses, I teach many kinds of argument that are not relevant to determining what the law is. The same conclusion applies to those portions of the course that I used to teach on professional responsibility that dealt with various “ought” issues.

a wide variety of alternative positions on this issue. I then analyze various concrete legal-rights issues not only from my position on morally-legitimate legal argument but from a number of other jurisprudential perspectives. I proceed in this way for a variety of reasons: in part because I recognize that my position may be wrong; in part because I realize that, even if I am right, law students need to be taught arguments that are wrong to enable them to counter such arguments effectively; and in part because I acknowledge the legitimacy of our current practice of obligating lawyers to make all arguments whose use may be legitimate that will improve their clients' certainty-equivalent trial outcomes.

However, although I agree with much of what Balkin and Levinson say about the duty of law teachers to teach a wide variety of allegedly morally-legitimate types of legal argument, I disagree with two other points they may be making (and I emphasize "may") in their section on legal pedagogy. First, at least unless these statements are significantly qualified, I disagree with Balkin and Levinson's claim that "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"⁶⁹ and that law pedagogy must not "disserve the student."⁷⁰ I think that the obligations of a law teacher are to his society and not to his students. This distinction will be critical when, in one sense, the "interests" of the society and those of the professor's students conflict. If I thought, for example, that teaching students how statistical evidence can be "cooked" would produce more harm by causing them to misuse statistical evidence than good by enabling them to detect the misfeasance of others, I would at least seriously consider the possibility that I was obligated not to teach the relevant material.

Second, Balkin and Levinson apparently to the contrary notwithstanding, I do not think that teaching students (1) that the use of a particular argument to determine what the law is in our culture will be morally legitimate if and only if it is consistent with the moral commitments of our society and (2) how to trace through the concrete implications of that "fact" is likely to "create a kind of schizophrenia" in the students that "disserve[s] their legal education."⁷¹ There is considerable evidence that lawyers suffer greatly from having to

69. Balkin & Levinson, *supra* note 1, at 550.

70. *Id.* at 549.

71. *Id.*

make arguments on behalf of their clients in which or in whose alleged force the lawyers do not believe.⁷² I do not think that our students' interests are disserved by increasing their intellectual sophistication about this issue—by enabling them better to grasp the roots of the problem and the possible justifications for their being put in this position.

B. Our Society's or Its Informed Members' Beliefs About the Obligations of Various Law-Role Players and the Actual Conduct of the Role-Players in Question

1. High-Court Judges and Lower-Court Judges

a. Precedent

Balkin and Levinson assert that in the United States “inferior judges”—judges “whose decisions are reviewed by some higher court”—are required “to follow the precedents of these higher courts, even if they believe these precedents to be wrongly decided and objectively incorrect.”⁷³ More specifically and somewhat enigmatically, Balkin and Levinson assert that “a [federal] 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” and might even not be “free to reject a preposterous opinion issued by the circuit court within which her court is located.”⁷⁴

I think that these statements give a misleading impression: the various doctrines of precedent that a significant number of judges support are not, taken together, so constraining as these sentences suggest, and judges in the United States do not in practice follow precedents with which they disagree to the extent that Balkin and Levinson seem to be claiming they do. As Michael Sean Quinn demonstrates in his contribution to this symposium,⁷⁵ among the wide variety of theories of precedent that receive considerable support from judges and courts within even a single American jurisdiction, there are several that define the category of “binding precedent” quite narrowly or hold that various categories of judges are not

72. For a useful summary of this evidence and discussion of its pedagogic implications, see Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524 (1998).

73. Balkin & Levinson, *supra* note 1, at 547.

74. *Id.*

75. See Quinn, *supra* note 38.

absolutely bound to follow precedents that do have some binding force. Moreover, as Quinn also recognizes, the binding force of precedent under theories that assert that judges are bound to follow only the "holdings" of specified types of prior decisions is significantly undercut by both the difficulty of defining the concept of "a holding" (e.g., when a given legal conclusion could have been based on a variety of possibly-sound rationales) and the difficulty of identifying the law-propositions on which a past court actually based its decision.

I hasten to add that my point is not that our "doctrine" of precedent and our practice of precedent (about neither of which do I possess systematic, reliable information) are perfectly consistent with my position on our society's moral commitments. However, I do think that, at both the doctrinal level and the practice level, the fit is better than Balkin and Levinson's brief comments seem to suggest. Thus, although the list of factors that various Supreme Court Justices in *Casey*⁷⁶ indicate influence the weight that is given to precedent in the federal courts does contain two prudential factors whose consideration I find illegitimate, the eight other factors the Justices list are all factors whose consideration I would say is morally legitimate in our culture.

b. Prudential Argument

I do not deny that American courts have given weight to prudential considerations in ways that I think is inconsistent with our culture's moral commitments. Indeed, the United States Supreme Court has done so not only when reaching conclusions on legal-rights issues but also when deciding whether to reach the merits of the case before it. In fact, I fear that the current Court has let its decisions be illegitimately influenced by prudential considerations to an unusually great extent.⁷⁷

76. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The practice of precedent in the federal courts was discussed in this case in a joint opinion written by Justice O'Connor and joined by Justices Kennedy and Souter announcing the judgment of the Supreme Court as well as in separate partially-concurring and partially-dissenting opinions written by Chief Justice Rehnquist and Justice Scalia. The statements made about these discussions in the text do not distinguish among the points made in these various opinions. For a more detailed account and assessment of this aspect of the various opinions in *Casey*, see MATTERS OF PRINCIPLE, *supra* note 12, at 73-74, 396 n.55, 397 n.56.

77. In particular, in my judgment, the argument that the case against the constitutionality of affirmative action programs is strengthened by their (alleged) tendencies to increase the politics of racial hostility and deter their supposed beneficiaries from developing their own capacities is morally illegitimate (though it would clearly be legitimate for a legislator to consider such possible tendencies when deciding whether a particular affirmative action program was desirable, all things considered). For a critical discussion of the Supreme Court's

I also do not deny that many legal scholars—in fact, as I indicated in the *Introduction* to this symposium, I fear an increasing percentage of legal scholars—regard such practices to be not only legitimate but also desirable. Some of these scholars (such as Philip Bobbitt) accept the use of what I would call morally-illegitimate prudential argument because they note that such arguments have been given weight in practice and believe that legal practice is self-legitimizing. Others including various members of the Critical Legal Studies movement, some Legal Realists, and some Legal Pragmatists accept such argument when it favors decisions they like because they question the coherence of the concept of moral legitimacy or believe that the kind of legitimacy that our culture's version of Liberal Legalism supplies is undesirable. And still others (such as Alex Bickel and his progeny) accept the legitimacy of a court's taking prudential considerations into account when deciding whether to reach the merits of a case in which, in their judgment, prudential considerations make it unwise for the court to make an internally-correct decision: to their mind, in such situations, it is preferable for a court not to reach the merits than to make an internally-wrong decision for prudential reasons or to make an internally-correct decision that would have various undesirable political or social repercussions. Relatedly, some, including Balkin and Levinson, believe that it is proper for judges to be influenced by prudential considerations when deciding how to explain their legal-rights conclusions—i.e., whether to write an opinion that honestly reports the morally-legitimate argument that justicizes their internally-correct legal-rights conclusion.

However, I am far from certain that most current law professors accept the legitimacy of what I would regard as the illegitimate use of prudential arguments to determine what the law is. Opposition to prudentialism is manifest not only in the generally-positive reaction legal academics gave to Gerald Gunther's quip that Bickel's position amounts to "100% insistence on principle, 20% of the time"⁷⁸ but also in the writings of those scholars who have challenged the proposition that there are no internally-right answers to any legal-rights questions whose answer is contestable or who have articulated or applied Liberal Legalist or other types of moral-rights-oriented approaches to legitimate legal argument. Believers in internally-right answers to

affirmative action cases, see *MATTERS OF PRINCIPLE*, *supra* note 12, at 259-62.

78. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1, 3 (1964).

legal-rights questions are necessarily opposed to the use of those prudential arguments that focus on the desirability of the effects of a legal ruling from a personal-ultimate-value perspective that cannot be said to underlie the statutory or constitutional provision being interpreted since there is no internally-right way to choose the personal-ultimate-value perspective to be applied in such cases. I have already explained why those who believe that arguments of moral principle dominate morally-legitimate legal argument will find the use of many prudential arguments to discover what the law is morally illegitimate. Nor should one assume that scholars who sometimes consider the utilitarian or allocative-efficiency consequences of particular legal conclusions when deciding what the law is accept the moral legitimacy of using all types of prudential arguments to discover what the law is in all cases. Even on my view, utilitarian and allocative-efficiency considerations are relevant to the interpretation of statutes or constitutional provisions adopted to secure (perhaps, inter alia) utilitarian or allocative-efficiency-related goals. Moreover, since I believe that in some contexts (e.g., in many tort-law contexts) the conclusion that an actor should have been able to reach about the allocative efficiency of his choice is often relevant to whether his choice violated someone's moral rights,⁷⁹ my position also does not imply the illegitimacy of using a certain kind of allocative-efficiency analysis to resolve many moral-rights-related legal-rights disputes.

To be honest, I do not know what the considered view of the average lawyer or average American would be about the moral legitimacy of using prudential arguments to determine what the law is. Since most of the relevant individuals have not thought the issue through in anything like a thorough fashion, one cannot ascertain useful information on their considered conclusions by taking a simple Gallup-type poll. Respondents will not provide the information one is seeking until they had been informed about and deliberated on the issue. However, I would not be surprised to discover that the considered conclusion of many if not most lawyers or members of the general community would be, in essence, that it is the province of judges to discover the law rather than to create it and that the kinds of prudential considerations whose influence I find morally

79. See Richard S. Markovits, *The Allocative Efficiency and Distributional Desirability of Comparative Negligence: Some Partial and Preliminary Third-Best Analyses* (1998) (unpublished manuscript, on file with author).

illegitimate therefore should not play a role in the law-discovering process.

c. Arguments of Moral Principle

(1) Beliefs

Balkin and Levinson contend that no or virtually no law professor or legal philosopher agrees with my claim that in our culture morally-legitimate legal argument is dominated by arguments of moral principle.⁸⁰ Although Professor Robin West is personally favorably disposed to the kind of antipositivism that Dworkin and I espouse, her contribution to this symposium⁸¹ is premised on an only slightly weaker variant of the assumption that Balkin and Levinson make in this regard—*viz.*, is premised on the assumption that this kind of antipositivism has been largely unpersuasive not only to legal academics but also to lawyers, judges, and others who have a position on this issue.

I reject this assumption. In my admittedly-armchair empirical judgment, many law professors do subscribe to a position on morally-legitimate legal argument that is at least very similar to mine. Their antipositivism is manifest in the behaviors that I previously indicated revealed their opposition to what I take to be the illegitimate use of prudential arguments to discover what the law is: their agreement with Gerald Gunther's criticism⁸² of Alexander Bickel's proposal that the Supreme Court not reach the merits of cases when it would be imprudent to do so,⁸³ their opposition to the illegitimate use of prudential arguments to decide cases on the merits, their insistence that there are internally-right answers to legal-rights questions, their concern about the implications of the claim that no such right answers exist, and their use of arguments of moral principle to determine what the law is. Some of these scholars argue for the relevance of arguments of moral principle explicitly in abstract terms,⁸⁴ while

80. See Balkin & Levinson, *supra* note 1, at 543-44. Although Balkin and Levinson's comments to this effect relate to my position on taking legal reasoning seriously, their conflation of this position with my position on morally-legitimate legal argument in our culture justifies the second part of the text's claims.

81. See Robin West, *Taking Moral Argument Seriously*, 74 CHI.-KENT L. REV. 499 (1999).

82. See Gunther, *supra* note 78, at 3.

83. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

84. See, e.g., Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); David A.J. Richards, *Constitutional Legitimacy, the Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT L. REV. 779 (1999).

others reveal their belief that arguments of moral principle are relevant to determining what the law is by using such arguments to analyze concrete legal-rights issues. I hasten to add that academics use arguments of moral principle not only when analyzing "fundamental fairness" constitution-law issues but also when analyzing common-law torts, contracts, and property cases—indeed, even when analyzing legal-rights claims that do not derive from independent moral rights. Thus, legal scholars are actually using arguments of moral principle whenever they make reference to an equitable principle in either a common-law or a statutory case—for example, when they make use of the doctrine of laches, equitable estoppel, or the principle that "no man shall profit from his own wrongdoing." Indeed, judges and legal academics have argued that this last principle renders internally correct the legal conclusion that a beneficiary's having murdered his testator precludes him from inheriting under the will of his victim either through disqualification or through forfeiture despite the fact that the text of the controlling statute makes no reference to this possibility.⁸⁵ In fact, even some of the law professors who claim to disagree with my conclusions about the relevance of arguments of moral principle to the determination of legal rights give arguments of moral principle the role I claim is legitimate when performing legal-rights analyses themselves.⁸⁶

(2) Judicial Practice

Although Balkin and Levinson do not make this point explicitly, they clearly believe that my conclusions about morally-legitimate legal argument in our culture are undermined by the "fact" that few, if any, judges give what I call arguments of moral principle the dominant role in determining what the law is that I claim our society's moral commitments obligate them to do. I agree that many judges do not give arguments of moral principle sufficient weight when determining extant legal rights: indeed, in the *Introduction* to this symposium, I asserted and lamented what I take to be a rise in the percentage of Supreme Court Justices and other federal judges who

85. The issue in question arose in *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889). The relevant statute is New York State's Statute of Wills. For a discussion of the case, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 23 (1977). In essence, the majority in *Riggs v. Palmer* and Dworkin are arguing that the relevant equitable principle limits the domain of the statute in question.

86. For a detailed description of what I take to be an example of this phenomenon, see *MATTERS OF PRINCIPLE*, *supra* note 12, at 143-49.

operate on the assumption that the morally-legitimate analysis of what the law is is an arcane activity that ignores the moral rights at stake in the cases to be decided. Nevertheless, I think that the fit between my position on the legal relevance of arguments of moral principle and actual judicial practice is far better than Balkin and Levinson suppose.

Thus, explicit references to moral principles appear far more often in judicial opinions than Balkin and Levinson's comments imply. During many periods of American history prior to the New Deal, both state-court judges and federal judges often cited the moral principles at stake not only in the constitutional cases they considered but also in various common-law and statutory cases. In my judgment, at least a great deal of our common-law doctrine and virtually all of our principles of equity directly reflect our society's moral-rights commitments. The conduct of the federal courts during the *Lochner* era is just one example of this phenomenon. Admittedly, many post-New-Deal judges reacted to *Lochner* and its progeny by avoiding references to moral principles in their constitutional-law opinions. However, others did not. Such references abound in many Warren Court opinions, in the more recent opinions of various Supreme Court Justices such as Thurgood Marshall, in state-court constitutional-law opinions, in common-law tort, contract, and property opinions, and in all kinds of cases in which equitable principles have been brought to bear.

Moreover, even when judges do not make explicit reference to the moral principles that are relevant to the internally-correct resolution of the cases they are deciding, arguments of moral principle or an understanding of the implications of our moral-rights commitments for the proper way to analyze what the law is have had a substantial impact both on the approach they have taken to determining what the law is and on the legal-rights conclusions they have reached. Thus, even when judges do not make explicit reference to the jurisprudential relevance of the moral commitments of our society, they often interpret legal texts, evaluate the relevance of "original intent," decide how broad to make their historical inquiries, construe structural arguments, interpret and weigh precedent and other types of judicial practice, and respond to various kinds of prudential arguments in ways that are consistent with my understanding of our society's moral commitments and their implications for legitimate legal argument. I also think that the decisions that American courts have made in both constitutional-law

cases and common-law cases are far more compatible with my jurisprudential position than Balkin and Levinson suppose—indeed, may fit my position better than any of its plausible alternatives.⁸⁷

* * *

Although Balkin and Levinson do not make this claim, others might argue that Balkin and Levinson's contention that neither legal academics nor judges believe that arguments of moral principle play the role in morally-legitimate legal argument that I ascribe to them is confirmed by the fact—pointed out by several contributors to this symposium—that “policy considerations” (by which I think they mean utilitarian or allocative-efficiency considerations) often play a substantial role in determining what the law is as well as by the fact that academic commentators consider this practice to be perfectly legitimate. I do not think that these facts disfavor my conclusion that arguments of moral principle dominate morally-legitimate legal argument. Since many statutes were passed to secure non-rights-related utilitarian goals, my account of morally-legitimate legal argument in our culture implies that their interpretation should be influenced by the utilitarian consequences of the various statutory interpretations under consideration. And since, at least in some (say, torts) contexts, moral-rights holders may be obligated (in effect) to make the choices that they should conclude would be allocatively efficient in the monetized sense of that term,⁸⁸ my conclusions about legitimate legal argument will often imply that judges are obligated to base their conclusions about the relevant parties' torts obligations on appropriately constrained allocative-efficiency analyses (which would

87. For some accounts of the common law that appear to agree with this proposition (though they disagree with each other and, to some extent, with my position on our society's moral commitments), see JULES L. COLEMAN, *RISKS AND WRONGS* (1992); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); and Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449 (1992). For my own explanation of the moral basis of a Hand-type formula for tort liability, see Markovits, *supra* note 79. In essence, I argue (1) that each member of a liberal, rights-based society has an obligation to treat the *ex ante* equivalent-dollar losses his possibly tortious conduct imposes on his potential “victims” as if these losses were his own and (2) that this obligation implies that an injurer (victim) is at fault if the kind of allocative-efficiency analysis that would be third-best-allocatively-efficient for him to execute (given the cost to him of executing theoretical analyses of varying degrees of complexity and accuracy and of collecting data of varying degrees of accuracy) would yield the conclusion that his failure to avoid was *ex ante* allocatively inefficient. For a somewhat different view of the moral basis of tort law, see John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 *U. PA. L. REV.* 1733 (1998); and Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 *FORDHAM L. REV.* 649 (1998).

88. See Markovits, *supra* note 79.

sometimes produce a decision-standard that closely resembles the Hand formula for negligence). Moreover, my account of morally-legitimate legal argument implies as well that judges are obligated to interpret ambiguous or open-textured language in any statutes that were passed to maximize allocative efficiency in the way that would result in their implementation's maximizing allocative efficiency.⁸⁹ Indeed, my jurisprudential position implies as well that allocative-efficiency analysis is relevant to legal interpretation when the "law" in question was designed both to increase allocative efficiency and to promote one or more other goals. Admittedly, some academics who reject my claim that arguments of moral principle dominate morally-legitimate legal argument do so because they think that "policy considerations" are relevant and have been given weight by judges in all contestable cases (not just in the subset of such cases to which I have just referred) and that policy argument and legal argument are indistinguishable.⁹⁰ However, I do not think that these academics' opinions and the cases in which (on my account) policy arguments have been given an inappropriate role constitute sufficiently serious non-fits to defeat my position.

2. Impeachment Triers, Drafters and Enactors of Legislation and Law-Creating Administrative Regulations, and Authors of Op-Ed Pieces and Editorial Letters

Balkin and Levinson seem to be implying that members of the legal community or of the society in general would reject the implications of my conclusions about our society's moral commitments for the obligations of these law-role players. I suspect that any such misgivings they have reflect their misunderstanding of the implications of my jurisprudential position for the obligations of these role-players. My guess is that most law professors and lawyers would agree with the conclusions I reach about these obligations and that most members of the general public would do so as well if they were given the opportunity to think through the relevant issues. For example, I believe that the public at large understood that the decision on whether to impeach or convict Clinton was not supposed to be determined by whether the People or the members of the relevant House wanted him to continue as President. Admittedly,

89. I think that fewer laws were designed solely to increase allocative efficiency than do most of my law-and-economics colleagues.

90. See Friedman, *supra* note 15, at 533.

however, I have no more evidence on our society's law-role beliefs in general than do Balkin and Levinson.

3. Lawyers When Arguing in Court for Their Clients' Rights: The Duty of Constrained Zealous Advocacy and Our General System of Adjudication

Balkin and Levinson seem to believe that our society's belief in the legitimacy of zealous advocacy and its lawyers' practice of zealous advocacy do not fit my conclusions about morally-legitimate legal argument in our culture. This claim is incorrect for several reasons. First, it reflects their misunderstanding of the implications of my position for the relevant duties of lawyers and the moral legitimacy of our general system of adjudication. As I have already argued, my position is basically compatible with lawyers' being obligated to make all arguments that a reasonable jurist could possibly find morally legitimate (or, perhaps, just socially acceptable) that would in practice improve his client's legal prospects. I also acknowledge that in deciding which arguments meet this test the lawyer is obligated to recognize that his own views on morally-legitimate legal argument may be different from his colleagues' (indeed, may even be wrong). Balkin and Levinson's claim is also undermined by their exaggeration of the extent to which the positive law of our culture "legally obligates" lawyers to represent their clients zealously. Our positive law provides only a limited authorization to lawyers to pursue their clients' interests zealously when representing them in court: lawyers may not mis-cite cases, have a duty to inform the court of precedents that disfavor their legal position (or at least of precedents that clearly cut against them), may not manufacture evidence, and may not suborn perjury. Indeed, although this proposition is contestable, a lawyer may also be obligated to withdraw from a case or notify the judge when he knows that a witness has perjured himself in a way that favors the lawyer's client.

Nevertheless, I must admit that in several respects our system of adjudication fails to fulfill our society's moral commitments as I understand them. More specifically, in my judgment, both the kind of constrained zealous advocacy we regard as obligatory and the ability of "the haves" to pick better lawyers and to devote more resources to a case than the "have nots" are able to do often distort the adjudicative process if the criterion for its assessment is its ability to generate internally-correct legal rulings and accurate factual findings.

Moreover, trial lawyers have told me that, at least in state courts, the “search for legal truth” is also hindered by the tendency of lawyers to argue for extreme legal conclusions in cases in which more moderate conclusions are almost certainly internally correct. The fact that this practice often does not serve the interests of such lawyers’ clients (is not required by the ethics of zealous advocacy) does not eliminate this problem. The facts that lawyers are somewhat constrained by codes of ethics, that a lawyer who makes a weak or illegitimate legal argument in a case will find that his judges tend to undervalue the good legal arguments he makes in the same case, that judges tend not to pay attention in general to the legal arguments of lawyers who develop a reputation for misrepresenting the law (and that such reputations can be made far more quickly than they can be unmade), and that juries tend to react hostilely to lawyers who play fast and loose with the facts all improve the performance of our adjudicative process. But even when these ameliorative features of our system are taken into consideration, I have no doubt that our society has failed to fulfill its adjudicative-process obligations. In particular, I think that our society’s moral commitments obligate us to provide far more judges, to supply far more legal aid to needful potential litigants, to require our judges to be much more forceful in policing lawyer conduct that does not promote the truth (not only misrepresenting the law and the facts but also requesting improper trial delays or changes in venue, taking unnecessarily long depositions, etc.), and to permit and encourage our judges to take a more active role in questioning witnesses and requesting evidence to be produced in cases in which a party has inadequate legal counsel or is much worse represented than is his opponent. However, although I regard such non-fits as serious, I do not think that they defeat my conclusion that ours is a liberal, rights-based society or my derivative conclusions about morally-legitimate legal argument in our culture either by themselves or in combination with all other extant non-fits.

4. Law-Teacher Pedagogy

I have already argued that Balkin and Levinson’s apparent claim that my conclusions about the moral character of our society and morally-legitimate legal argument in our culture are undermined by their alleged inconsistency with the realities of law-school teaching reflects their misanalysis of the pedagogic implications of my position.

Of course, the fact that my position does not imply the

impropriety of law-school teachers' giving instruction in arguments that I consider to be illegitimate or invalid leaves open the possibility that much law teaching may be inconsistent with the pedagogic implications of my understanding of morally-legitimate legal argument in our culture. In fact, not only do I agree that much law-school pedagogy does not fit my account of morally-legitimate legal argument in our culture, that is one of the main facts I lamented in my *Introduction* to this symposium. The problem is not that some or many law-school teachers teach students approaches to analyzing "what the law is" that I think are morally illegitimate in our culture, it is that a significant and increasing percentage of law teachers deny either or both the coherence of the concept of morally-legitimate legal argument or the proposition that in our culture legal arguments can be meaningfully characterized as being morally legitimate or morally illegitimate.

This clear non-fit is one of the realities that led me to propose this symposium. I would be the last to deny its existence or the existence of analogous non-fits in legal scholarship.

C. The Explicability of Some of the Non-Fits That Tend to Undermine My Conclusions About Legitimate Legal Argument in Our Culture

I believe that Balkin and Levinson exaggerate the extent to which my jurisprudential position would be rejected by those who have considered the role that arguments of moral principle play in morally-legitimate legal argument in our culture as well as the extent to which judges behave in ways that are inconsistent with my claims. However, I have no doubt that many would reject my position even after giving it some consideration, that many judicial decisions both about methodology and about the right answer to particular legal-rights questions are inconsistent with it, and that many judges and legal scholars whose analyses and conclusions do conform with my jurisprudential conclusions reject my abstract position in favor of alternatives that fit their behavior less well than does mine. Quite clearly, I have a lot to explain.

I can offer two kinds of explanations for these non-fits that, I hope, reduce the damage that they do to my position. The first is "sociological." Law-school professors, lawyers, and judges are much better at doing law than at describing what "doing law" entails. This fact partly reflects the intellectual orientations of people who become law professors, lawyers, and judges and partly reflects the fact that,

unlike specialists in most academic fields, lawyers are not required to and usually do not take courses in the “methodology” of their “discipline.” I have heard many law professors and several lawyers and judges who carry out sophisticated legal analyses of the kind that I think our society’s moral commitments require give mechanical accounts of what “doing law” entails that do not capture what they do. In fact, these lawyers often bridle at my redescription of what they are doing when they are “doing law.”

The second explanation I would give of some non-fits is historical. Law professors, judges, and lawyers are reluctant to acknowledge the role that certain kinds of moral norms play in their analyses of what the law is because they have drawn the wrong lesson from *Lochner* and its progeny. Rather than concluding that courts must not misidentify the moral norms to which our society is committed when making use of them to discover what the law is (must not conclude that ours is a *laissez-faire* libertarian, rights-based society rather than a liberal, rights-based society), they concluded that *Lochner* proves that judges should not use moral norms to determine what the law is at all. In fact, this error partly reflects the fact that lawyers are not trained in moral and political philosophy or jurisprudence. This deficiency leaves them unable to distinguish the kind of moral-rights-related moral norms I denominate “moral principles” from the kind of moral-ought-related moral norms I denominate “personal ultimate values.” This error in turn leads them to conclude incorrectly that the fact that personal ultimate values are outside the law (except when the task is interpreting a statutory or constitutional provision designed to effectuate them) implies that all varieties of moral norms (moral principles as well as personal ultimate values) are generally irrelevant to the determination of legal rights.

I do think that the preceding explanations account for a considerable amount of what I take to be the mistakes that those trained in the law make about the abstract issue: what is the valid role for arguments of moral principle to play in the process of identifying extant legal rights. I also think that these explanations account for the fact that, in practice, many law professors give arguments of moral principle a far greater role in their scholarship than they are willing to acknowledge, that many lawyers give more weight to arguments of moral principle in their advice-giving, legal planning, and brief-writing than they admit, and that many judges are far more influenced by arguments of moral principle than they concede. In my judgment,

these explanations of such non-fits reduce the damage they do to my claim that arguments of moral principle dominate morally-legitimate legal argument in our culture.

D. The Importance of the Non-Fits Between My Conclusions on the One Hand and Actual Legal Practice and Others' Considered Beliefs About Morally-Legitimate Legal Practice on the Other

Balkin and Levinson's critique of my position on morally-legitimate legal argument is an armchair-empirical critique that focuses on what they believe to be manifold non-fits between my conclusions on the one hand and the considered beliefs of others about morally-legitimate legal practice and actual legal practice on the other. Parts II.A and II.B respectively argue that Balkin and Levinson overestimate the extent of the relevant non-fits because they misunderstand some of the implications of my position for the obligations of various law-role players and because they operate on (A) contestable assumptions about the considered judgments that members of our society do or would have about these issues and (B) contestable descriptions or characterizations of much of the law-role-player conduct in question. Part II.C then argues that the damage to my position done by the various non-fits that actually do exist is reduced by my ability to give plausible accounts of why people might make the "mistakes" I believe these non-fits represent. This Part argues that Balkin and Levinson exaggerate the extent to which my position is undermined by evidence of non-fitting legal-role-obligation beliefs and non-fitting legal-role performances that cannot be fully explained away.

My argument for the proposition that arguments of moral principle dominate morally-legitimate legal argument is basically conventionalist—i.e., is based on the assumption that moral legitimacy is (within certain conceptual constraints) a question of fit. But the fit that I think is relevant to the determination of morally-legitimate legal argument in a culture is a fit with all the prescriptive moral beliefs and behaviors of that culture's members. This set of beliefs and behaviors is far more extensive than the society members' beliefs about law-role-player obligations and the conduct of the society's law-role players. These facts imply that my position can be defeated empirically in two ways: (1) by showing that the non-fits between my conclusions about our society's moral commitments and our society's prescriptive moral beliefs and conduct discounted by

their explicability (hereinafter “discounted non-fits”) are weightier than the discounted non-fits associated with an alternative account of our society’s commitments or (2) by showing that, even though my account of our society’s commitments does “discounted fit” our society members’ beliefs and conduct better than does any alternative account, the discounted non-fits to my position are sufficiently serious to justify the conclusion that our society is amoral.

These conclusions weaken Balkin and Levinson’s empirical critique of my position in two ways. First, they create a possibility that my conclusions may be justified even though they “discounted-fit” our society’s law-role beliefs and law-role performances worse than does some alternative set of conclusions because they “discounted-fit” our society’s prescriptive moral beliefs and behaviors as a whole better than does the alternative in question. (I hasten to add that neither Balkin and Levinson nor anyone else has yet devised a specific alternative to my position that “discounted-fits” the relevant legal beliefs and conduct better than does mine.) Second, they weaken Balkin and Levinson’s empirical critique because, by increasing the number of beliefs and behaviors that positions like mine should ideally fit above the number of law-related beliefs and behaviors that such positions should ideally fit, they make it possible to conclude that our society is not amoral in the face of a demonstration that its members’ law-related conduct and beliefs “discounted fit” any conceivable set of moral commitments so poorly that a conclusion of amorality would be justified if the relevant fit were exclusively to law-related beliefs and behaviors.

In essence, Balkin and Levinson have been misled in this regard by their (in my view, incorrect) belief that legal practice is morally self-legitimizing (by their mistaken belief that law is autonomous in this sense). Although I believe that (subject to some difficult-to-define constraints imposed by the very notion of morality) a society’s moral practices are self-legitimizing, I claim that any subset of a society’s moral practices (such as its practice of determining what the law is) is morally legitimate only if it is consistent with the society’s general moral commitments. In other words, in my view, like many other legal scholars, Balkin and Levinson fail to recognize that, although a society’s legal practice is relevant to determining its moral character (i.e., to determining whether it is rights-based, goal-based, or amoral and, in the former two cases, the identity of the moral norm or moral-norm combination it is committed to instantiating in its relevant decisions), using a particular type of legal argument in a

particular way to determine the content of existing law in a given culture will be morally legitimate in that culture if and only if doing so is consistent with that culture's general moral commitments.

I am fully aware that Balkin and Levinson may find this criticism surprising. Both have been sympathetic to the Critical Legal Studies movement, one of whose central tenets is that—in an ultimate-value sense—legal practice does not *justify* itself. Indeed, most Critical Legal Studies members believe that the rhetoric of Liberal Legalism has made it more difficult to secure the reforms that they think *ought* to be made. In fact, however, I am not contending that Balkin and Levinson have advocated inconsistent positions: since "legitimacy" is a matter of consistency with social practice whereas "justified-ness" is a matter of moral desirability from a moral perspective whose appeal does not depend on its fit to the relevant society's moral practice, there is no inconsistency in maintaining that a society's legal practices are self-legitimizing though not self-justifying.

* * *

When I function as an economist or law-and-economics scholar, I sometimes am certain that the conclusions I have reached are "correct." My confidence in my answers to these questions reflects the fact that I generated them through pure *a priori* argument or by relying on empirical assumptions whose accuracy everyone would admit.

I am not so certain that I am right about our society's moral commitments or, therefore, about morally-legitimate legal argument in our culture. Although I believe that my conclusions about these issues are correct, I consider them to be contestable. I have listed seven types of plausible objections to my positions in the Conclusion of my basic contribution to this symposium.⁹¹ Balkin and Levinson's critique of my position seems to be making species of the third or the fifth objection I distinguish: their paper sets forth an empirical argument against either or both my claim that ours is a rights-based society or my claim that our rights-based society is committed to instantiating the liberal principle I have articulated. For the reasons this section has articulated, I do not find their empirical case against me persuasive.

91. See *Legitimate Legal Argument*, *supra* note 2, at 473-74.

CONCLUSION

A scholar can often benefit from criticism even when he concludes that it reflects a misunderstanding of his abstract position or its more concrete implications, the critics' adoption of contestable or inaccurate empirical assumptions, or the critics' misperception of the relevance of certain facts to the scholar's position. I agree neither with Balkin and Levinson's descriptions of my positions on taking legal argument seriously and morally-legitimate legal argument in our culture nor with their alleged empirical refutation of those positions. However, I am indebted to them for providing me with an opportunity to elaborate on and clarify my positions, to comment on their view of various allegedly-relevant facts, and to point out that even if their factual assertions were accurate the non-fits they would have established would be less damaging to my positions than they allege. Both I and this symposium have profited from Balkin and Levinson's *Getting Serious About "Taking Legal Reasoning Seriously."*