

Chicago-Kent Law Review

Volume 74
Issue 2 *Symposium on Taking Legal Argument
Seriously*

Article 1

April 1999

Table of Contents - Issue 2

Chicago-Kent Law Review

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Recommended Citation

Chicago-Kent Law Review, *Table of Contents - Issue 2*, 74 Chi.-Kent L. Rev. i (1999).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol74/iss2/1>

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CHICAGO-KENT LAW REVIEW

VOLUME 74

1999

NUMBER 2

CONTENTS

SYMPOSIUM ON TAKING LEGAL ARGUMENT SERIOUSLY

SYMPOSIUM EDITOR
RICHARD S. MARKOVITS

- TAKING LEGAL ARGUMENT SERIOUSLY: AN INTRODUCTION
Richard S. Markovits 317
- CODIFICATION AND RIGHT ANSWERS *Andrew P. Morriss* 355

Throughout the nineteenth century, several American states debated whether they should compile their common law into written codes. One hotly debated point was which system, written code or common law, could best provide the right answers to legal questions in an ever-changing society. While today we still have only a few systematic codes, we do face a great deal of written statutory law. Professor Morriss examines the nineteenth-century debates and finds that they have much to tell us about how to take legal argument seriously, about how written law differs from common law, and about how a free society should discuss matters of legal principle.

- WHO'S AFRAID OF THOMAS CROMWELL?
H. Jefferson Powell 393

The main antagonists of Robert Bolt's play *A Man for All Seasons*, Thomas More and Thomas Cromwell, embody different visions of what it is to be a lawyer. Professor Powell argues that Cromwell's instrumentalism is directly related to his moral failure and suggests that the connection Bolt portrays is relevant to contemporary American debates over the purpose of legal argument.

- A LABOR LAWYER'S VIEW OF LEGAL ARGUMENT
Julius Getman 409

If expert legal argument could lead to a just legal system, labor should be a model of sound rules and decisions. In fact, however, our labor law system is in shambles, marked by harmful, confusing, and technical rules. The system is shaped by political bias and ignorance. The likelihood for significant improvement is, unfortunately, small.

LEGITIMATE LEGAL ARGUMENT AND INTERNALLY-RIGHT
ANSWERS TO LEGAL-RIGHTS QUESTIONS

Richard S. Markovits 415

This article sets out a position on morally-legitimate and valid legal argument in our culture. That position is based on (1) the axiom that, to be morally legitimate, a legal-rights argument must be consistent with the moral commitments of the society in which it is made and (2) a conventionalist empirical finding that ours is a liberal, rights-based culture. The article explains why this position favors the conclusion that there are internally-right answers to all legal-rights questions in our culture. After comparing the jurisprudential position it expounds with various salient alternatives, it explains the social importance of both its internally-right-answer thesis and its accounts of morally-legitimate and valid legal argument in our culture. The article also contains three postscripts that respectively elaborate on Professor Robin West's critique of the arguments made against its kind of nonpositivism, critique the arguments that Professor Anthony D'Amato made against the kind of internally-right-answer thesis it propounds, and respond to Professor Arthur Appbaum's critique of the type of conventionalist argument it makes.

TAKING MORAL ARGUMENT SERIOUSLY

Robin West 499

Taking Moral Argument Seriously suggests that lawyers should take more seriously Ronald Dworkin's claim that rights are both derived from moral truths and constrain legal outcomes. We could do so without accepting either the particular understanding of the content of rights that Dworkin put forward, or the strong determinism with which Dworkin's anti-positivism has come to be associated. Doing so would, among other things, prompt the legal academy to undertake a sustained inquiry into the requirements of legal justice, a task it has to date neglected.

THE EFFECT OF LEGAL THEORIES ON JUDICIAL DECISIONS

Anthony D'Amato 517

Stanley Fish has argued that legal theory cannot constrain judicial practice: indeed, Professor D'Amato has extended that argument to claim that any legal theory can explain *both* the result reached in a case *and the exact opposite result*. However, law professors today are teaching more theory than ever before. Is teaching legal theory a monumental waste of time? In this article, Professor D'Amato argues "No": paradoxically, Stanley Fish is completely correct *and* teaching legal theory is not a waste of time. D'Amato explains that even though theory cannot constrain practice, as long as a judge thinks that it can, a lawyer can only effectively persuade that judge by presenting his case within the framework of the judge's favorite theory. Therefore, a firm grasp of the various legal theories dominant today is a practical necessity for the working lawyer.

This article expresses skepticism about whether the structure of legal argument makes much of a difference to the actual impact of a case on society. Moreover, whether an argument is good or bad, strong or weak, is socially determined; different kinds of society accept or reject different kinds of argument. The article disagrees with the idea that legal education should pay greater attention to the structure of legal argument; instead, more skills training and more attention to law-and-society issues is suggested.

GETTING SERIOUS ABOUT “TAKING LEGAL REASONING
SERIOUSLY”

J.M. Balkin & Sanford Levinson 543

Professors Balkin and Levinson argue that it follows from Professor Markovits's theory of serious legal reasoning that few practicing judges and lawyers take legal reasoning seriously. As a result, it is by no means clear that law professors who train future lawyers for practice should adopt Professor Markovits's views. Professors Balkin and Levinson also note that arguments about who is taking legal reasoning seriously are hardly new to the history of American legal education and usually represent a cultural struggle over a contested social practice of legal argument. What is at stake in such a struggle is not who is really serious about law and who is merely mocking it from the outside, but whose vision of the practice shall prevail and whether one or many different interpretations of the practice will survive and flourish.

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

Richard S. Markovits 559

This Reply explains why I reject Balkin and Levinson's critique of my positions on “taking legal argument seriously” and “morally-legitimate legal argument in our culture.” It begins by delineating the various senses in which (I believe) one can take legal argument seriously and by refuting Balkin and Levinson's claim that I equate taking legal reasoning (argument) seriously in any sense of that expression with agreeing with my conclusions about morally-legitimate legal argument in our culture. It then argues that Balkin and Levinson have misunderstood the implications of my conclusions about morally-legitimate legal argument in our culture for the argumentational obligations of lawyers, law teachers, legislators, judges, and public discussants of legal rights and institutions. Next, it argues that Balkin and Levinson have exaggerated the extent to which legal scholarship and legal practice is divorced from morally-legitimate legal argument. Finally, it maintains that Balkin and Levinson ignore three facts that reduce the extent to which my jurisprudential position is undercut by the actual non-fits between legal practice and my claims about legitimate legal argument in our culture: (1) the fact that some of the relevant non-fits are explicable in ways that justify discounting their significance for my claims, (2) the fact that to be persuasive my position must “discounted-fit” the relevant reality better than any alternative rather than perfectly, and (3) the fact that the fit that

is relevant for the persuasiveness of my position is not to our society's legal practice in isolation but to the broader set of our society's prescriptive moral conduct and beliefs (of which our legal practice and beliefs form only a small subset).

CULTURAL CONVENTION AND LEGITIMATE LAW

Arthur Isak Applbaum 615

It has been claimed that legal arguments are morally legitimate in a given culture if and only if they are consistent with that culture's moral commitments. But this claim does not follow from the view that morality is a matter of cultural convention, for then the connection between a culture's moral commitments and legitimate law is also a matter of convention. And if morality is *not* a matter of convention, then the legitimacy of law depends, not on a connection to a culture's moral principles, but to the *correct* moral principles.

TAKING COMMERCIAL LAW SERIOUSLY: FROM JURISPRUDENCE TO PEDAGOGY

Dennis Patterson 625

Can the teaching of commercial law be improved? Is it possible to convey to students the depth and breadth of commercial law in a single course? In this article, Professor Patterson answers these questions in the course of describing his new introductory casebook in commercial law. Weaving theory together with pedagogy in an effort to reach students with both specialist and non-specialist aspirations, Patterson explains why the teaching of commercial law needs improvement and how his casebook contributes to this effort.

TEACHING REASONING

Vincent Blasi 647

In this article, the author describes how he designs each of his courses and seminars so as to give students the experience of writing a succinct, narrowly-focused, closely-reasoned, intensively-rewritten critique of a single case or essay they will have spent much of the semester engaging.

ARGUMENT AND AUTHORITY IN COMMON LAW ADVOCACY AND ADJUDICATION: AN IRREDUCIBLE PLURALISM OF PRINCIPLES

Michael Sean Quinn 655

The law is about argument. Hence, legal argument must be taken seriously. Many serious argumentative strategies coexist in the law, and this fact characterizes both theory and practice. This paper illustrates that point by articulating a new classification of irreducibly independent approaches to the pivotal idea of precedent. The alternative approaches are placed in the perspective of various general jurisprudential systems. The paper also explores the approaches' implications for advocacy, especially appellate and appellate-like advocacy.

The article challenges the scholarly view as well as the dominant legal view outside the United States that the right of free speech may be reasonably traded off in pursuit of justice to stigmatized minorities. These views appeal to an allegedly reasonable balance between two basic human rights: the right of free speech and the right against unjust discrimination. Compelling arguments of normative political theory and interpretive history show, however, that these rights are structurally linked: the abridgement of one compromises the other. The analytic focus of the argument is on the role played by members of subordinated groups in the protest of the terms of structural injustice (the politics of identity), advancing constitutional justice under law.

STUDENT NOTE

Several Federal Courts of Appeal have considered the question of whether an authorized disclosure of tax information that subsequently becomes part of a public record loses its protection under Internal Revenue Code § 6103. Unfortunately, they have been unable to agree upon a resolution to this question. This note explores each circuit's approach to the public records problem and its possible effect on taxpayer compliance. It concludes that the "source" approach of the Fifth and Seventh Circuits is the best approach because it effectuates the purpose behind § 6103 without imposing a judicially created exception on § 6103.

CHICAGO-KENT LAW REVIEW

Chicago-Kent College of Law
Illinois Institute of Technology

Published by the Chicago-Kent College of Law
Illinois Institute of Technology
565 West Adams Street, Chicago, Illinois 60661

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