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Taking Legal Argument Seriously: An Introduction

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The phrase "taking legal argument seriously" can be used in a number of different senses. The two that are most relevant for the purposes of this Introduction might be called the "conviction" sense and the "pragmatic-craftsmanship" sense. An individual takes a given culture's legal argument seriously 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). By way of contrast, an individual takes a given society's legal argument seriously in a "pragmatic-craftsmanship" sense if he believes that the effectiveness of any

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1. In my usage, the use of an argument to determine what the law is in a given culture is "morally legitimate" if it is consistent with that society's moral commitments. By way of contrast, the use of an argument to identify some extant legal right in a given culture is "valid" if it is "legally correct." If the constitution of a given society imperfectly instantiates its moral commitments, the use of a textual argument based on a clear, morally-illegitimate provision whose concrete consequences were understood by its ratifiers at the time of ratification would be legally valid even though morally illegitimate. In fact, I believe that in such a situation such a textual argument would trump an argument of moral principle: in such a case, the internally-correct answer to the relevant legal-rights question would be inconsistent with the society's moral commitments. Although this type of outcome was not uncommon before the Reconstruction Amendments prohibited slavery and imposed various negative and positive obligations on the states, I do not think it is a significant possibility in the United States today. In my book, RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION (1998) [hereinafter MATTERS OF PRINCIPLE], I avoid using the terms "valid" or "validity" because they are associated with the legal-positivist positions of such legal philosophers as J.L. Austin and H.L.A. Hart. However, Arthur Applbaum's contribution to this symposium—see Arthur Isaak Applbaum, Cultural Convention and Legitimate Law, 74 CHI.-KENT L. REV. 615, 619 (1999)—has convinced me that using the terms "valid" and "validity" would generate more benefits than costs. I hasten to add that Matters of Principle articulates and analyzes the distinction between "morally legitimate" and "legally valid" legal argument: it just does not use the word "valid" or expression "legally valid."
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.2

In my admittedly armchair-empirical judgment, the percentage of law professors who take the general category legal argument substantially seriously in the conviction sense has declined significantly over the past thirty years. Many contemporary law professors seem to think that the concepts "morally-legitimate legal argument" and "valid legal argument" are incoherent or that, in our culture, the list of types of argument that can be legitimately or validly used to determine extant legal rights is open-ended and subject to contemporaneous social negotiation. Not surprisingly, most of these same professors seem to have concluded that there is no internally-right answer to any legal-rights question whose answer is

2. At least three other senses of "taking the general category 'legal argument' seriously" are worth noting. First, an individual may appropriately be said to be taking legal argument seriously as a general category 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: individuals may take legal argument seriously in this "consideration" sense even if, in the end, they conclude that legal argument should not be taken seriously in the "conviction" sense. Second, and least importantly, an individual may appropriately be said to be taking legal argument seriously 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. Third, an individual may take legal argument seriously in a "social importance" sense if he believes that the concepts or phenomena "morally legitimate and valid legal argument" are socially important—for example, because he believes that legal argument influences the decisions of judges directly, because he thinks that belief in the coherence of the concept legal argument or that belief in the moral legitimacy of the activity of engaging in legal argument retards social reform by concealing what is really going on in the "law-discovering" process, because he believes that a culture's legal argument affects its members' conception of their culture or of themselves, because he believes that legal argument affects the culture's judicial, legislative, and executive decisions and its members' conduct by influencing their perceptions of their and their governments' obligations and the personal ultimate values to which they subscribe, or because he believes that members of our culture pay a lot of attention to legal argument (regardless of whether it affects legal decisions, social reform, or individual conduct). As I indicated at the beginning of this footnote, in each of the five senses of "taking legal argument seriously" just distinguished, what is being taken seriously is the general category "legal argument," not specific legal arguments. Obviously, specific legal arguments can also be taken seriously for a large number of reasons. Students may take a teacher's or court's legal argument seriously to do well in a course, to learn something about morally-legitimate legal argument or the internally-correct answer to some specific legal-rights question, to learn something about the hypocritical ritual through which our society attempts to mask what is really going on when "legal-rights decisions" are being made. Professors may take a student's legal argument seriously to give him a grade or to help him learn something valuable. Anyone may take a court's legal argument seriously to learn the legal truth, to consider whether there is such a thing as "objective legal truth," to evaluate the performances of the relevant judges, etc. However, it is essential to remember that the referent of all these last usages is a specific legal argument or a class of specific legal arguments, not the general category legal argument on which this symposium is focusing.
contestable or perhaps just socially contested. Indeed, some contemporary law professors even claim to believe that there are no internally-right answers to any legal-rights questions.

Admittedly, some who would agree with my characterization of the jurisprudential beliefs of many contemporary law professors would deny that the distribution of jurisprudential positions has changed much from the 1950s until now. They would argue that the relevant sea-change took place much earlier, when Legal Realism gained hold in the legal academy in the thirties, forties, and fifties. I disagree. In my view, many if not most Legal Realists were jurisprudential agnostics (or, perhaps more accurately, had no interest in such jurisprudential issues as the coherence of the concepts "morally-legitimate legal argument" and "valid legal argument" or the existence of internally-right answers to contestable legal-rights questions). Instead, they were interested in analyzing the consequences of particular legal-rights decisions, the desirability of various possible State responses to particular behaviors or problems, and the causes of specific judicial decisions, particularly of judicial decisions in cases that pose questions whose internally-right answers are contestable (regardless of whether the internally-right answers to these questions are "essentially contestable"). The Legal Realists' lack of jurisprudential interest distinguishes them from many of their progeny, whose jurisprudential positions underlie my claim about the change that has taken place in the last thirty years. Many members of the Critical Legal Studies movement, many Critical Race Theorists, many Critical Gender Theorists, and many Feminist Legal Scholars pay a lot of attention to the coherence of the concepts "morally legitimate legal argument" and "valid legal argument" as well as to the existence of internally-right answers to contestable or contested legal-rights questions. Moreover, although the Legal Pragmatists tend not to address such issues explicitly, their opposition to "Grand Theory" and search for approaches that "work" betray their deep-seated skepticism about the coherence of the notion of "justice" or the possibility of operationalizing that concept in a useful way.

Why have most law professors who do not take legal argument very seriously in the conviction sense decided not to do so? The best account I can offer is that (1) they have not noticed that or they reject the claim that members of our culture engage in two, essentially-

3. Obviously, one can take legal argument more or less seriously in each of the senses of the expression.
different types of prescriptive moral discourse—"moral-rights talk" and "moral-ought talk," which are based on different moral norms (which I respectively denominate "moral principles" and "personal ultimate values"); (2) relatedly, they reject the claim that ours is a rights-based culture—i.e., a culture in which moral-rights conclusions trump moral-ought conclusions when the two conflict;\(^4\) (3) they subscribe to the moral relativist or subjectivist position that there are no objectively-right answers to ultimate-value questions; (4) they recognize that in our culture there is no consensus on personal ultimate values—i.e., that in our culture, there is no consensus on any first-order conception of "the good"; and (5) because they have not noticed or because they reject the claim that ours is a rights-based culture, whose members engage in two types of prescriptive moral discourse, they fail to recognize the possibility that or reject the claim that, in our culture, internally-right answers to all moral-rights questions and to many contested legal-rights questions may be derived from the "moral principle" on which we are committed to grounding our moral-rights discourse—may be derived from our commitment to a second-order conception of "the good" that values, inter alia, each individual's making up his own mind about the first-order conception of the good that he wants his life to instantiate.

I should point out that the change that I have asserted has taken place in the distribution of legal academics' jurisprudential views has not, in my judgment, been restricted to members of the groups I previously listed. Many legal academics who consider themselves to be "main-stream" no longer take legal argument particularly seriously in the conviction sense. Moreover, I believe there has been a parallel rise in the past thirty years in the percentage of practicing lawyers, judges, newspersons, and social critics who comment on the work of the courts who assume that "legitimate legal argument" or "valid legal argument" are determined by contemporaneous social negotiation and that internally-right answers cannot be given to contestable or contested legal-rights questions. I suspect that the change in the jurisprudential convictions of these nonacademic law-role players and law-observers partly reflects the change in the law teaching they received as students, partly reflects the change in the ideas they read in law professors' scholarship, op-ed pieces, letters to

the editor, and briefs, partly reflects the continuing tendency of all types of lawyers to draw the wrong lesson from *Lochner*—to conclude that *Lochner* teaches us to avoid using all normative arguments to determine what the law is rather than to avoid using inappropriate or incorrect normative arguments for this purpose—and partly reflects the independent influence of the same ideas that, to my mind, have misled many legal academics.

Before proceeding to describe the issues I hoped this symposium would address and to summarize the papers it actually does contain, I want to emphasize that this jurisprudential debate is not academic in the pejorative sense of that word. To establish this point, I will comment on (more accurately, “speculate about”) the significant and harmful effects that I fear the change in jurisprudential positions just described has had on law school pedagogy, legal scholarship, lawyer ethics, judicial decision-making, and judicial opinions.

I think that the reduction in the percentage of law professors who take legal argument substantially seriously in the conviction sense has had a significant effect on law school pedagogy. Admittedly, the impact of this change on law teaching has been somewhat reduced by the fact that many of the professors who equate morally-legitimate or valid legal argument with socially-accepted legal argument and believe that there are no internally-right answers to many legal-rights questions do take legal argument seriously in the pragmatic-craftsmanship sense. These professors’ belief that the effectiveness of a legal argument depends on its being well crafted and perceived to be valid (as well as the fact that they enjoy and are good at legal argument) leads them to teach their students how to make the various types of arguments that seem to influence judges or show up in judicial opinions. But this concession does not imply that these professors’ teaching is unaffected by their jurisprudential beliefs. At least six such effects are notable. First, these professors’ conclusion that legal argument should not be taken seriously in the “conviction” sense deters them from providing their students with a list of legitimate or valid legal arguments or teaching their students the structure of different types of morally-legitimate or valid legal arguments. Second, these professors’ jurisprudential conclusions lead them to ignore the issue of whether the use of the various types of argument they employ to determine what the law is is morally legitimate or valid. For example, such professors sometimes use

various kinds of "prudential" arguments to determine what the law is without questioning whether doing so is morally legitimate or legally valid. Or, again, such professors also use historical arguments to determine what the law is without asking how broad-gauged such arguments must be for their use to be morally legitimate or legally valid in our society. Third, most such law teachers react to their conclusion that there are no internally-right answers to contestable legal-rights questions by substituting analyses of what the law ought to be from a personal-ultimate-value perspective that they endorse for what the law is without indicating to students that that is what they are doing: they smuggle various kinds of personal values (utilitarian, nonliberal egalitarian, feminist, communitarian, libertarian) and various non-values or proximate goals (allocative efficiency) into their legal analyses without making any effort to explain why these values or goals are inside the law, indeed, without even raising this issue. Fourth, a smaller number of professors react to their conclusion that no substantive norms are inside the law by claiming that the "process" norm of democracy or popular sovereignty, whose moral basis or force they do not bother to examine, requires judges to adopt negative default-rules that imply the constitutionality of any positive State choice that is under consideration and the impropriety of a court's granting any contestable claim that might be made by a plaintiff. Fifth, all such professors' rejection of the claim that, to be morally legitimate, a legal-rights argument must be consistent with our society's moral commitments sends the message that "arguing like a lawyer" is really nothing more than "manipulating like a lawyer." In one of my student's words, we learn that "while there is no such thing as a 'winner' argument, there can always be a winner advocate." And sixth, relatedly, and most insidiously, these teachers' pedagogy implicitly denies that our society can be described as a rights-based society in any meaningful sense.

In my judgment, these features of much contemporary law teaching have had a number of undesirable effects. Before listing them, I should admit both that I have no hard evidence to support my speculations and that many of the consequences I attribute to law school pedagogy have other, more general social causes (some of which led law professors to adopt the positivist jurisprudential positions with which I disagree).

Many law professors would not be much concerned with the first effect I attribute to the increasing failure of law school pedagogy to
take legal argument seriously in the conviction sense: the inability of even the best of our law school graduates\(^6\) to give a presentable abstract account of (1) the morally legitimate or legally valid way to determine what the law is or (2) the relationship between morally- legitimate or legally-valid legal argument and the appropriate way to determine what the law ought to be.\(^7\)

Second, and relatedly, I think that the actual ability of our graduates to make sound legal arguments has been compromised both by the failure of law school education to provide most law students with explicit instruction in morally-legitimate or legally-valid legal argument and by the reduction in the percentage of law school class-time devoted to making and probing legal arguments (as opposed to chatting about policy—I am afraid that the gerund in this parenthetical reflects a considered choice). Although I admit that many people can carry out nonintellectual or intellectual tasks well without being able to explain what those tasks entail and that many law professors and lawyers whose accounts of legitimate or valid legal argument are simplistic actually make extremely sophisticated and subtle legal arguments, I do think that our graduates’ inability to give a theoretical account of various types of legitimate or valid legal argument harms their performance as lawyers: most people perform intellectual tasks better if they have a sound abstract understanding of how to execute those tasks. The associated decline in the quality of legal argument is important not only in the short run (for the percentage of cases that the internally-right party wins in the short run) but also in the long run (for the correctness of the abstract law interpretations judges give).

Third, I fear that the legal positivism that increasingly pervades the law school classroom—the idea that legal education is learning how to manipulate like a lawyer, the denial of the moral grounding of law and what lawyers do—has reduced the ethical quality of our graduates’ professional performance not only by causing them to spend less time on pro bono or public interest work but also by leading them to misbehave when performing the law-tasks they do undertake.

Fourth, and finally, I think that the change in legal pedagogy I have asserted has reduced the extent to which our graduates take

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6. I base this claim on my experiences interviewing candidates for entry-level faculty positions at The University of Texas School of Law.
7. Admittedly, this second inability partly reflects the low quality of the policy analysis that many law professors substitute for morally-legitimate argument about what the law is.
rights seriously when serving as public officials, advisors to public officials, or sources of information to the public at large. In so doing, the change not only encourages specific moral-rights violations directly but also endangers our society’s commitment to rights in general. I do not want to sound apocalyptic: I realize that legal education and lawyer attitudes are not the primary cause of this type of social outcome. But if you listen to many of the lawyers who appear on TV to discuss constitutional cases or, more recently, the impeachment proceedings against President Clinton, you will be concerned by their failure to distinguish between legitimate or valid legal argument and policy argument that ignores even the personal-ultimate-value cost of the State’s not fulfilling its obligations.

The increasing tendency of legal academics not to take legal argument seriously in the conviction sense of that expression has also affected their legal scholarship. Some of the relevant effects are completely unobjectionable—in fact, are desirable. Some law professors have been inspired by their legal positivism to develop real interdisciplinary expertises and to use them to carry out historical studies of what various law-role players did or to execute social science analyses of the causes and consequences of various law-role players’ choices. Others have used such expertise to develop illuminating, sound external-to-law policy analyses of particular legislative or judicial decisions or options—policy analyses that they indicate are not relevant to “internal” analyses of what the law is. However, other law professors have responded to their conclusion that there are no internally-right answers to contestable legal-rights questions by writing articles that substitute external-to-law policy argument for what I would call morally-legitimate or legally-valid legal argument without indicating the jurisprudential premises or problematic character of what they have done. Thus, law-and-economics scholars have written articles that purport to be about the content of extant law that implicitly assume that the analysis of allocative efficiency is an algorithm for the generation of internally-correct answers to the common-law, constitutional-law, or statutory-interpretation question they purport to be addressing. I recognize that

8. I recognize, of course, that policy arguments are sometimes internal to law. Thus, arguments about whether a particular interpretation of an ambiguous or open-textured statutory or constitutional provision will achieve the goals that the relevant document’s overall text, structure, and history imply it was designed to achieve are clearly inside the law. And policy arguments that demonstrate that a State choice that imposes some losses on individuals for whom the State is responsible while generating no benefits that the State is authorized to secure is clearly relevant to that choice’s constitutionality.
such scholarship may provide useful information about what the law ought to be and that some of these studies may even be relevant to the determination of what the law is. My objection is that the authors of these scholarly works do not attempt to establish the internal-to-law relevance of their conclusions, indeed do not even acknowledge the need to do so. Precisely the same objection can be raised to the scholarship of those legal academics who read their neo-republican, communitarian, libertarian, feminist, or nonliberal egalitarian value-preferences into the law without mentioning their implicit assumption that such values are relevant to determining what the law is, much less analyzing the justifiability of that assumption. The scholarship of law professors who try to justify their importation of their favorite values into the law by writing law-office histories that purport to validate the claim that their preferred values are the bedrock of American constitutionalism is less objectionable but still not satisfactory. Although many contemporary law professors would agree with this criticism of the work of some libertarians, neo-republicans, communitarians, Critical Legal Studies adherents, feminists, Critical-Race Theorists, and law-and-economics scholars, few have noticed that the same objections can be made to much of the work of those “main-stream” law professors who are not so open about the role that their personal value preferences are playing in their purportedly morally-legitimate or legally-valid legal analyses.

I also fear that the view that no moral norm (other than the unexamined process value of democracy or popular sovereignty) can be objectively said to be inside the law has distorted judicial decision-making and opinion-writing in the same ways (though in different proportions) that it has distorted academic scholarship. Most of the legal academics who reject the proposition that moral norms other than democracy or popular sovereignty can be objectively said to be inside the law in our culture have reacted to this conclusion by importing their own preferred personal ultimate values into their

9. My objection is not that allocative-efficiency analysis is never relevant to the determination of what the law is. Such analysis clearly is relevant to the interpretation of statutory and constitutional provisions that were designed (perhaps inter alia) to increase allocative efficiency, and (as I have argued elsewhere) I believe that in our liberal, rights-based society a particular version of allocative-efficiency analysis is also relevant to the determination of whether injurers have fulfilled their moral and legal duties in tort-related contexts. See Richard S. Markovits, "You Cannot Be Serious!": A Reply to Professors Balkin and Levinson, 74 CHI.-KENT L. REV. 559, 602 n.80 (1999) [hereinafter "You Cannot Be Serious!"]; 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).
purported analyses of what the law is and have concluded that those values impose positive as well as negative obligations on the State and support the appropriateness of recognizing a wide range of plaintiffs’ rights; a much smaller number of legal academics has concluded that the appropriate response to their belief that no substantive moral norms are inside the law is to conclude that members of our culture have few rights against our governments and that plaintiffs have only those rights that have clearly been recognized in positive law. A far higher percentage of judges has adopted the latter position. Although I suspect that many of these judges’ decisions are actually influenced by their external-to-law personal ultimate values, such judges claim that their decisions are justified by legally-valid legal argument, which in their hands is an arcane activity that is unrelated to any substantive moral commitments and places great weight on the unexamined process-value of democracy or popular sovereignty.

I do not want to leave the wrong impression. I think that, even today, much judicial decision-making continues to be controlled by the judges’ sense of our society’s moral commitments. Even when *Lochner* and moral relativism deter judges from writing opinions that reveal the extent to which their methodological and substantive decisions were affected by their perceptions of our society’s moral commitments, arguments of moral principle substantially influence their choices. Still, I fear that the trends I describe are significant and regrettable.

This symposium was designed to stimulate discussion of (1) the merits of “taking legal argument seriously” in the “conviction” sense articulated above, (2) the history of the jurisprudential debate in question, broadly understood, (3) the accuracy of my hypothesis that over the past thirty years there has been a substantial change in the distribution of the jurisprudential beliefs of American law professors, practicing lawyers, judges, and legal commentators—inter alia, in the extent to which such individuals take legal argument seriously in that phrase’s “conviction” sense, and (4) the consequences this jurisprudential sea-change has had on legal pedagogy, legal scholarship, lawyer ethics, and judicial decision-making and opinion-writing (more particularly, both the existence and the desirability of these consequences). Not surprisingly, given the difficulty of doing rigorous research on any of the empirical issues my speculations raise, the time-constraints under which all contributors to this symposium were operating, and the proclivity of most of the actual participants to do conceptual as opposed to empirical scholarship, no one has
undertaken to test any of the admittedly not very well operationalized hypotheses I offered about the changes in the jurisprudential views or actual performance of various law-role players.

The articles the symposium contains can be placed into six categories. The first category contains two articles that describe debates in which the jurisprudential issues on which this symposium focuses played a significant role. The second category contains two articles that stress the importance of facts to legitimate legal argument. One of these articles stresses the importance of instructing law students on the critical role that facts often play in determining what the law is. The other emphasizes the reality that formally-correct, valid legal argument will not yield internally-correct answers if it is combined with factual errors (or misperceptions of or disregard for the values that underlie, say, a relevant statutory provision). The three articles in the third category comment on various features of morally-legitimate or valid legal argument in our culture or discuss the existence of internally-right answers to legal-rights questions in our culture. The fourth category contains four articles that explicitly or implicitly critique the kind of nonpositivist position on valid legal argument in our culture taken not only by me but also by such others as the Ronald Dworkin of *Taking Rights Seriously* and David A.J. Richards as well as two articles that respond to critiques of this position. The fifth category contains two articles that describe their authors' pedagogic attempts to get their students to take both the general category and specific examples of legal argument seriously. One describes a textbook that is designed to teach students the structure and content of the morally-legitimate and valid approach to interpreting the Uniform Commercial Code. The other describes the way in which its author has structured his lecture courses and seminar to induce his students to engage in sustained, careful consideration of a variety of specific legal and law-related arguments and to critique and defend these arguments to the best of their abilities. The sixth and final category of articles in the symposium contains two examples of legal scholarship that analyze concrete legal issues (the actual and morally-appropriate role of precedent in American law and free-

10. See Matters of Principle, supra note 1; *Legitimate Legal Argument*, supra note 4.


12. In addition, one postscript to *Legitimate Legal Argument* offers my own critique of the various objections that have led many members of the legal community to reject Dworkin's antipositivism, see *Legitimate Legal Argument*, supra note 4, at 475-83, and another analyzes various arguments that purport to demonstrate the inability of legal theory to explain judges' legal-rights conclusions, see id. at 485-88.
speech rights) in a way that takes legal argument seriously in the consideration sense while shedding light on how seriously it should be taken in the conviction and pragmatic-craftsmanship senses. Both of these articles also contain discussions of valid legal argument or the existence of internally-right answers in our culture that this Introduction will summarize under the third heading described above.

I should emphasize at the outset that the following accounts of the articles in this symposium do not do justice to many of them. Because my summaries focus on the relationship between these articles and the central themes of the symposium, they ignore much of the most interesting material in them.

Andy Morriss writes the first article describing a debate in which the issues on which this symposium focuses played a major role. More specifically, Morriss' article rehearses and comments on the late-nineteenth-century debate provoked by David Dudley Field's attempt to codify the common law. According to Morriss, code proponents objected to the common law not only because its content was uncertain and difficult to comprehend but also because "[t]he common law inappropriately made judges into legislators." Code opponents responded not only by questioning whether codification could eliminate uncertainty without sacrificing justice but also by insisting that "‘law not known’ was not the same as ‘law not existing’"—that judges could discover "law not known" by making reference to their society's "standard of justice." As Morriss recognizes, the proper resolution of this debate turns on whether the relevant community's "standards of justice" can be objectively determined and are part of the law. As Morriss also points out, the nineteenth-century participants in the codification debate were much more likely to answer these questions in the affirmative and to appreciate the importance of doing so than are many of their contemporary counterparts.

The second article that describes a debate in which the jurisprudential issues with which this symposium is concerned plays a central role analyzes an historical play rather than a piece of actual history. Jeff Powell's analysis of Robert Bolt's famous play A Man for

14. Id. at 369.
15. Id. at 382.
16. Id. at 377.
17. See id. at 384-89.
All Seasons\(^\text{18}\) argues that the difference between the attitudes toward law taken by the play's characters Thomas More and Thomas Cromwell parallel the difference between those who take law seriously in the conviction sense and those who take it seriously in only the pragmatic-craftsmanship and "social importance" senses. According to Powell, the Thomas More of A Man for All Seasons "does take the law and legal argument seriously"\(^\text{19}\) in my conviction sense. Thus, More rejects Cromwell's view that "law is nothing but an instrument or a weapon"\(^\text{20}\) and that "legal argument . . . [is] hardly . . . more than a grab-bag of conventional linguistic tricks."\(^\text{21}\) Powell makes clear that he sides with More: "Law as doctrine and tradition . . . makes political community possible among people with divergent interests and perspectives who wish to be citizens—not subjects."\(^\text{22}\) "[L]aw . . . [is] a social bond that unites us even when we invoke it to resolve our disputes."\(^\text{23}\) "[S]ociety . . . constitutes itself, in part, in and through the law."\(^\text{24}\)

More dismisses Cromwell as a "pragmatist, the merest plumber,"\(^\text{25}\) as a person who believes that legal argument is just an administrative convenience. In Powell's words, for men like Cromwell, "[t]aking legal argument seriously, other than for purely instrumental purposes [(other than in the pragmatic-craftsmanship sense)], is a superstition, a bizarre fetishism—an intellectual sin."\(^\text{26}\) In my judgment, Cromwell's jurisprudential position captures the beliefs of most Crits, feminists, critical-race theorists, and Chicago-type law-and-economics scholars as well as those neo-republicans, communitarians, and libertarians who make arguments that assume that the Constitution instantiates their value-preferences even though they do not really think that the values they support are the values on which American constitutionalism is based. I also think that those who advocate courts' being guided by prudential argument whose use I consider to be morally illegitimate\(^\text{27}\) have bought into Cromwell's

19. Id. at 407.
20. Id. at 405.
21. Id. at 406.
22. Id. at 408.
23. Id. at 405.
24. Id. at 404.
27. See Legitimate Legal Argument, supra note 4, at 432-33.
position, at least to that extent. So too, have the modern Legal Pragmatists, or at least those members of that group who believe that justice is an undefinable and useless concept and that “what works” should be defined in terms of the evaluator’s personal ultimate values.

In any event, although (by design) several of the other contributors to this symposium would strongly disagree with Powell’s conclusion, I share his evaluation of the Cromwellian position: “Lawyers cynical about their profession and judges willing to reach the ‘right’ result at whatever cost to legal principle aren’t clear-eyed realists but short-sighted adversaries of the common good.”

The second category of articles in this symposium contains contributions that emphasize the important role that factual analysis plays in morally-legitimate legal argument. Jack Getman’s article belongs in this category. Getman begins by making it clear that he takes legal argument seriously in the “social importance” sense of that phrase, though he takes no position on whether legal argument should be taken seriously in my conviction sense. He then proceeds to make three important points: (1) legal arguments that are “best” in the sense of being formally perfect will not produce “just” results or “sound” policy-decisions if they are combined with inaccurate factual assumptions or if they are evaluated by judges who allow their own, extra-legal values or evaluative assumptions (e.g., labor unions are bad) to control their conclusions about what the law is; (2) in practice in the United States, judicial decisions on extant legal rights have been seriously distorted by such factual errors and extra-legal value-views; (3) judicial, administrative, and academic factual ignorance and judicial and administrative bias are not only pervasive but also, in actual practice, irremediable. Getman concludes that the fact that “our system works as well as it does” should be attributed to “the remarkable diversity of the American political system” and that labor (and presumably, more generally, the mistreated) can achieve justice only by becoming “politically powerful.”

28. Powell, supra note 18, at 408.
29. Getman begins by stating: “Legal argument is serious business. Important issues of national policy are regularly determined and large sums of money are allocated by the acceptance or rejection of legal argument.” He then proceeds to point out that “[e]xplaining the significance of legal argument to the public is a major industry.” Julius Getman, A Labor Lawyer’s View of Legal Argument, 74 CHI.-KENT L. REV. 409, 409 (1999).
30. In labor law, Getman bases this conclusion on his own experience. See id. at 409-14. In other fields, he bases it primarily on the reports of respected colleagues. See id. at 414.
31. Id. at 414 & n.20.
I do not doubt that in many instances an accurate understanding of "the facts" is critical to reaching internally-correct legal-rights conclusions. In relation to the labor-law-rights questions Getman specifically considers, the relevant facts include the options available to the parties, the extent to which each option will enable its chooser to secure the advantage he is entitled to achieve, the extent to which each option will disserve the legitimate interests of its chooser's opponents, the ability of the enforcement authorities to prevent the relevant actors from choosing illegal options, and the consequences of the various decisions the judge or NLRB official might make. I have no doubt that wrong facts often lead to wrong legal-rights conclusions. However, I suspect that a second-best analysis would suggest not only that reducing the factual and value (e.g., antiunion bias) imperfections in actual labor-law-rights analyses would make the relevant legal-rights decisions more internally correct but that this result could be secured as well by reducing imperfections in the formal structure of the arguments that lawyers, judges, and NLRB administrators use to argue about or decide the legal-rights questions under consideration.

Dennis Patterson is the author of the second article that emphasizes the importance of factual analysis for legitimate or valid legal argument. More specifically, Patterson points out that one often cannot decide how the Uniform Commercial Code applies to a given case without accurately understanding all aspects of the business transaction in question. Patterson also argues that the Code reflects its creator's (Karl Llewellyn's) belief that "commercial practices" rather than abstract (Langdellian) rules or principles "were the best source for divining the law of a transaction": "When asking whether the parties have an Agreement, and what the intent of that Agreement might be, one looks not to legal norms but to what the Code refers to (without definition) as 'the bargain of the parties in fact.'"  

Part or all of three articles belong in the third category I wish to distinguish: articles that comment on various attributes of "morally-

33. See id. at 630-31.
34. Id. at 626 (quoting U.C.C. § 1-201(3) (1995)). Patterson also points out that one must also understand the "relatively complicated relationships" between the parties to analyze "whether either the parties or their lawyers might have done anything to avoid the problem that produced the legal dispute." Id. at 630.
legitimate" or valid legal argument taken as a category, set forth a
position on morally-legitimate or valid legal argument in our culture,
or analyze the extent to which there are internally-right answers to
legal-rights questions in our culture. Two articles partially fit into this
category and one (my own) belongs in it entirely.

Part of Michael Quinn's contribution to this symposium deals
with the general issues just described. Quinn argues that, although
lawyers and judges are reluctant to make "explicit appeal[s]" to
principles of justice, moral principles are part of the law—in his
words "seep into" the law. Indeed, Quinn seems to believe that "the
Anglo-American legal system ... is shot through with moral
principles." Quinn also recognizes the difference between what I call
"moral-rights" analysis and "moral-ought" analysis (in his terms, the
analysis of "moral rights"—which is "a matter of principle"—and
"policy analysis"—which is not a matter of principle). However, he
may well think that not only those moral norms I denominate "moral
principles" but also those moral norms I denominate "personal
ultimate values" are generically inside the law (though he recognizes
that the public at large would be unwilling to accept as legitimate
decisions using their own values to decide what the law is as opposed to
decisions discovering principles that were imbedded in the law but
never explicitly articulated). Finally, Quinn believes that although
there are internally wrong answers for every legal question and there
are internally right answers for a great many legal questions, there are
no unique internally-right answers for some legal-rights questions.
I would like to think that Quinn's conclusion on the internally-right-
answer issue is really that there is no unequivocally-internally-correct
answer to some legal-rights questions in our culture (a proposition
with which I agree) rather than that, in principle, there is no
internally-right answer to some legal-rights questions in our culture.
However, although there is some evidence to support this

35. See Michael Sean Quinn, Argument and Authority in Common Law Advocacy and
36. See id. at 658.
37. See id. at 660.
38. Id.
39. See id. at 687-88.
40. At least, this may be the implication of Quinn's comment that some of the norms on
which "[c]ourts should rely ... are extra-legal" even though they "are somehow importantly
rooted in community practices" (though the reference to "community practices" leaves his
position somewhat in doubt). See id. at 673; see also id. at 667.
41. See id. at 704.
42. See id. at 666-71.
interpretation, the balance of the evidence points in the other direction. Thus, Quinn suggests that it is inaccurate to say that courts have done no more than discover preexisting law when they decide cases on the basis of legal rules or principles that have not been previously articulated (though, even here, Quinn seems more concerned with whether the public could anticipate these rulings—whether there were sufficient “harbingers” to enable them to do so—than with whether the newly-announced legal norm was implied by previously-announced law). And, most importantly, as his article’s title states and the bulk of his analysis purports to demonstrate, not only is a wide variety of principles of stare decisis supported by “sound and honorable legal practice” in individual jurisdictions, but this “pluralism” of principles is “irreducible.” Thus, although Quinn recognizes that our practice of precedent has a moral foundation, he believes that “there is an irreducible pluralism of competing meta-doctrines of stare decisis,” that “there are no (meta)-meta-principles for deciding when to use which rule of stare decisis,” that the “situation-sensibility” of “experienced lawyers” (whose importance Karl Llewellyn stressed) can also not provide (much less supply an articulate justification for) an internally-right answer to the question which version of the doctrine of precedent is internally correct, and that, consequently, “in the small set of cases” whose resolution turns on the version of stare decisis that is employed, it will be impossible to “find” an internally-right answer to the relevant legal-rights question.

The second article that should be discussed (in part) at this juncture is David Richards’ contribution to this symposium. Richards’ analysis of the principle of free speech and the politics of identity begins with some comments on morally-legitimate, valid legal

43. Thus, his discussion of “justice” deals both with the character of right answers to questions of justice and the difficulties that the blurriness of the concept creates for achieving consensus on those right answers. See id. at 678-80.

44. See id. at 694.

45. See id. at 690. If this is true, his position is the same as that of many Legal Realists, who cared less about whether, in principle, internally-right answers existed to contestable legal-rights questions than about how lawyers should advise clients who need to know what answer the judge who would hear their case would give to the relevant legal-rights question. See MATTERS OF PRINCIPLE, supra note 1, at 150.

46. See Quinn, supra note 35, at 692.

47. See id. at 693-94. Interestingly, Quinn’s argument is a much more detailed (and jurisprudentially self-conscious and sophisticated) version of an argument that Karl Llewellyn made in KARL LLEWELLYN, THE BRAMBLE BUSH 72-76 (1930).

argument in our culture. Negatively, Richards argues that constitutionalism (morally-legitimate legal argument) in our country is not grounded on utilitarianism, perfectionist consequentialism, or a commitment to process democracy. Richards goes on to maintain that those who try to argue from democracy do not seem to recognize that it is "a contestable concept if there ever was one" and do not, therefore, even attempt to give the kind of account of our commitment to democracy from which conclusions about various free speech and other issues could be derived.

In my judgment, our commitment to democracy is a corollary of our more fundamental commitment to the moral norm that Richards claims our Constitution instantiates: in his terms, the value of individuals' making "conscientious" choices about how one should lead one's life—the importance of the interest persons have in "the free exercise of the moral powers of their reason through which persons give enduring value to their lives and communities"—and the correlative duty to show all creatures who can make such choices "equal concern and respect." Richards bolsters this claim with historical evidence of the importance of "the inalienable right to conscience" to Jefferson and Madison, the more contemporaneous doctrinal conclusions of such legal academics as Harry Kalven, Jr., and the basic features of both our historic "free speech" doctrine and recent developments in "free speech" law.

The third article in this third category is my basic contribution to this symposium. *Legitimate Legal Argument* begins by delineating my conclusions about the moral character of our society—viz., that ours is a liberal, rights-based society whose members and governments have a basic duty to show appropriate, equal respect to all creatures for whom they are responsible who have the potential to lead lives of moral integrity as well as a derivative duty to show appropriate, equal concern for such creatures, especially for their actualizing their potential to lead such lives. I then claim that arguments derived from

49. See id. at 780, 789-90 (on utilitarianism), 804 (on perfectionist consequentialism), 791-95 (on democracy).
50. Id. at 782; see id. at 791-95.
51. Id. at 796.
52. Id. at 790. The similarity between Richards' and my formulations of the (liberal) moral principle on which (we both claim) our society is committed to grounding its moral-rights and fundamental-fairness constitutional-rights discourse should be obvious.
53. See id. at 796.
54. See id. at 781.
55. See id. at 820-22.
this duty (denominated "arguments of moral principle") are not only inside the law but are the dominant mode of morally-legitimate legal argument in our culture and that such arguments of moral principle and the other modes of legal argument that can be legitimately used to determine what the law is in our culture can yield internally-right answers to all legal-rights questions in our society. The article also analyzes from my perspective various alternative jurisprudential positions, explores the problematic character of the negative default-rule that many academic lawyers and judges support and invoke, and analyzes the moral importance of there being internally-right answers to all legal-rights questions in our society.

Five contributions to this symposium belong in the fourth category I distinguish—articles that articulate or reply to criticisms of the type of jurisprudential position my article propounds. Robin West begins her article by giving an account of Ronald Dworkin's antipositivism and examining both its relation to his right-answer thesis and its more general social significance. West then proceeds to articulate and explore the errors in or limited force of five objections that, in her judgment, have rendered Ronald Dworkin's antipositivist position (which in its early formulation was similar to mine) unpersuasive to most law professors, practicing lawyers, and judges: the objections that (1) Dworkin's claims for the role that moral principles play in legitimate and valid legal argument are inconsistent with the way in which lawyers and judges talk and write; (2) Dworkin's nonpositivism (and perhaps all liberal types of nonpositivism) are associated with an "understanding of rights as essentially negative claims against certain forms of state action," an understanding that is unappealing to those who "view . . . the highest function of law . . . [to be] not the enforcement of negative rights against the state, but the articulation of communitarian duties, or the processual mediation of conflict, or the guarantee of safety or welfare, or the enforcement of positive rights"; (3) Dworkin's nonpositivism—which, according to these objectors, implies that lawyers should be agents of justice—is inconsistent with the obligations of zealous advocacy we actually impose on our lawyers; (4) Dworkin's nonpositivism is associated (on these objectors' view)

57. See id. at 505-07.
58. Id. at 509.
59. See id. at 502.
60. See id. at 502-03.
with the "overidentification of extant law with ideals of justice"; and (5) Dworkin's antipositivism rejects the kind of moral relativism to which most members of the legal community subscribe. West analyzes these objections and concludes that they do not "constitute sound arguments against the prima facie case for taking Dworkin's antipositivism seriously."

Tony D'Amato's article analyzes the point of legal theory (i.e., the point of accounts of legitimate legal argument). He begins by discussing four arguments that he believes prove that legal theory cannot improve judicial legal-rights decisions, generate internally-right answers to legal-rights questions, or reveal the reasoning that accounts for or rationalizes courts' decisions. The first such argument he borrows from Stanley Fish: "We derive theory from practice; therefore theory cannot constrain (or govern) the practice from which it is derived." The second is that any legal theory that could be imagined can explain all possible judicial resolutions of any case equally satisfactorily—i.e., legal theories cannot be operationalized sufficiently to enable them to generate unique right answers to any legal-rights questions. The third is that different judges support different theories (which would admittedly preclude one from explaining why a multimember court reached its decision in cases in which no majority opinion could be written). D'Amato attributes to Einstein the fourth argument on which he relies (presumably to demonstrate that legal theory cannot generate internally-right or superior answers to legal-rights questions): "[O]ur theories of the world determine the way we see the world."

Having dismissed the possibility of using legal theory to generate superior or internally-right legal-rights answers or to reveal the reasoning that led courts to make the decision they did, D'Amato argues that the teaching of legal theory can still be justified for pragmatic-craftsmanship reasons: since lawyers are supposed to persuade judges and other official decision-makers and each such

61. Id. at 510.
62. See id. at 511-12.
63. Id. at 512. Although I agree with West's conclusion, I would sometimes respond to the objections she lists in additional or somewhat different ways. See Legitimate Legal Argument, supra note 4, at 475-83.
65. See id. at 518-19.
66. See id. at 519-22.
67. Id. at 524.
decision-maker does subscribe to a particular legal theory, the professional training of lawyers should include legal theory to enable them to recognize the legal theory to which the decision-makers they will confront subscribe and to make the kinds of arguments those officials will find persuasive. In other words, after arguing that the general category "legal argument" should not be taken seriously in the conviction sense, D'Amato explains why particular judges' specific legal arguments should be taken seriously in the pragmatic-craftsmanship sense.

Lawrence Friedman begins his essay by indicating that he is a "skeptic" about whether internally-correct answers can be given to "borderline and difficult [legal-rights] questions" and proceeds to make other statements that suggest that he also disagrees with the other defining claims of my jurisprudential position. Thus, in addition to stating that "in practice," "certainly . . . today," the "clear line" that I see between a 'legal' argument and (say) a 'policy' argument "hardly exists," he indicates that Max Weber's distinction between "formal rationality" and "substantive rationality"—which is similar to my distinction between morally-legitimate legal-rights analysis and moral-ought ("policy") analysis—is "somewhat shaky." In a similar vein, he questions whether one should care about the internal correctness of a court's legal-rights decision and expresses doubts about whether "social justice" is likely to be promoted by courts' being helped by morally-legitimate legal argument to reach internally-correct legal-rights conclusions. Both these statements suggest that Friedman rejects my two claims that moral-rights analysis and moral-ought analysis are clearly distinguished in our culture and that arguments of moral principle are the dominant form of morally-

68. See id. at 524-27.
69. For my critique of D'Amato's reasons for claiming that legal theory cannot explain the arguments that led courts to make the decisions they rendered and analysis of the claim that several of the same reasons demonstrate that legal theory cannot generate internally-right answers to legal-rights questions, see Legitimate Legal Argument, supra note 4, at 485-88.
71. Id. at 533. I admit to believing that a clear line exists between morally-legitimate legal argument and "policy" argument (although I agree that "policy arguments"—i.e., personal-ultimate-value arguments—are sometimes inside the law). However, this belief is perfectly consistent with my acknowledging that judges are not paying heed to this distinction in the way they are obligated to do. Indeed, my perception that this is the case partially underlies my proposing this symposium.
72. Id. at 533.
73. See id. at 529-30.
74. Admittedly, this is something of an interpolation of Friedman's remarks, see id. at 542.
legitimate and valid legal argument in our culture. Of course, these remarks might also reflect his doubts about the extent to which legal argument influences judicial decisions or the facts that he defines "social justice" differently from the way in which I define this concept (he uses this term to refer to what he believes we ought to do as opposed to what we are obligated to do) and believes that "moral-ought conclusions" ought to trump "moral-rights" conclusions.

In any event, Friedman's contribution to this symposium demonstrates why law-and-society analyses should be taken seriously by making a number of points that are valuable inter alia because they shed light on intercultural differences in morally-legitimate legal argument, on the extent to which morally-legitimate legal argument should be taken seriously in the pragmatic-craftsmanship and "social importance" senses of the expression, and (relatedly) on the extent to which judges are fulfilling their professional obligations (as construed by me and various others). Thus, Friedman's categorization of legal systems in terms of the character of both the legal arguments made in them and the legal conclusions they reach remind us that not all societies are the kind of liberal, rights-based societies whose morally-legitimate argument Dworkin, I, and most other nonpositivists analyze. Some of the categories Friedman uses for this purpose are ones that Dworkin and I also employ. For example, Friedman's "instrumental" legal systems are legal systems in cultures that we would define to be goal-oriented. And his "closed" legal systems—ones in which "only 'legal' premises can be used to construct an argument"—might correspond to systems that I would call morally legitimate. At least, a rights-based culture would be true to its commitments if it had a "closed" legal system in relation to debates about extant legal rights (regardless of whether they have previously been officially acknowledged or socially recognized) but not in relation to debates about creating new legal rights. And, a goal-based culture would be true to its commitments if it limited argument on all sorts of issues to the following question: which of the various possible decisions would maximize the achievement of the goal or goal-combination to whose realization the culture was committed. Friedman seems to be skeptical about whether "closed" legal systems (in rights-based cultures?) that purport to rule out "the possibility of

75. See id. at 530-31.
76. See id. at 534-39.
77. See id. at 537.
78. Id. at 536.
innovation”—of discovering rights that have not previously been officially recognized or perhaps even socially articulated—can succeed in stifling such innovation.\textsuperscript{79} I would question the moral legitimacy of any attempts such cultures make to deter innovation of this kind (though not of their attempts to prevent judges from legislating).

Friedman also challenges us to reconsider whether legal argument should be taken seriously in the pragmatic-craftsmanship and “social importance” senses by pointing out the distinction between affecting “the result of a case” and affecting the reasons the court gives for its conclusion,\textsuperscript{80} by stressing the difficulty of determining the actual impact of legal (and other types of arguments) on judicial decision-making—given the possibility that judicial opinions may not actually indicate what led the judges to their conclusions,\textsuperscript{81} and by indicating the paucity of empirical evidence on both this issue and the different issue of “[w]hat kinds of arguments get treated with respect” in the sense of having to be treated “with care” even if they do “not actually change the minds of judges.”\textsuperscript{82}

Friedman also challenges the assumption that legal argument is “socially important” in the sense of influencing public opinion by reporting anecdotally that he “saw no evidence that any legal argument—no matter how clever—changed anybody's mind” in the controversy over Clinton's impeachment\textsuperscript{83} and by claiming that, although the public knows “the results of a handful of important cases,” it knows nothing about the arguments that supposedly led the courts to the decisions in these cases:\textsuperscript{84} Friedman’s “hunch is that there is nothing to” the contention that legal argument trickles down to the public.\textsuperscript{85}

Friedman also makes the historical point that the types of argument that are taken seriously in adjudicative contexts vary not

\textsuperscript{79} See id. at 536-37.
\textsuperscript{80} See id. at 532. I should add that even if the arguments that a court's opinion used to justify its conclusion really were the arguments that led it to reach its conclusion, these arguments may not have affected the identity of the winning party or the remedy he obtained since the court might have reached the same conclusion for different reasons if the arguments that led it to reach its conclusion had never been made. Of course, any related difference in the court's ratio decidendi might have a significant impact on that part of "the result of a case" that reflects its precedential impact.
\textsuperscript{81} See id. at 530.
\textsuperscript{82} Id.
\textsuperscript{83} See id.
\textsuperscript{84} See id. at 531.
\textsuperscript{85} See id.
only from society to society but also in the same society from time to time. The latter fact obviously disfavors the account that I have given of our society’s constant moral commitments and their implications for the structure of morally-legitimate legal argument within it, though I do not think that the related non-fits refute my position on these matters.

On the other hand, Friedman’s claim that “styles of reasoning and argument . . . are closely tied to ruling constructs in a society or within a legal culture—particularly concepts of legitimacy” and his assertion that “forms of legitimacy and types of argument are different in legislatures compared to courts” are both consistent with the nonpositivist position that Dworkin, I, and others have taken.

Friedman concludes with some remarks about legal education. He advocates revising the law school curriculum to place more emphasis on interdisciplinary courses that give students a better understanding “of the context in which legal systems operate” and to include more “real skills training . . . in what lawyers actually do” and disagrees with my proposal that more attention be given to teaching students legitimate legal argument. Given Lawrence’s skepticism about how seriously morally-legitimate legal argument should be taken not only in the conviction sense but also in the pragmatic-consideration and “social importance” senses, his pedagogic conclusions are hardly surprising.

Jack Balkin and Sandy Levinson’s article criticizes my usage of “taking legal argument seriously” and offers an armchair-empirical refutation of my conclusions about morally-legitimate legal argument in our culture. They have two objections to my usage of what they refer to as “taking legal reasoning seriously.” Both assume that I equate “taking legal reasoning seriously” with agreeing with my conclusions about morally-legitimate legal argument in our culture. The first is that I fail to appreciate the fact that what constitutes

86. See id.
87. Id. at 537.
88. Id. at 537-38.
89. Id. at 541.
90. Although I agree that more interdisciplinary training should be given to law students in part because I think that such materials can play a role in legitimate legal argument, I am less persuaded of the desirability of giving additional skills training to those students who will practice in high-quality firms that provide their associates with such training on the job.
92. See id. at 543-44.
morally-legitimate legal argument differs for different law-role players. The second is that in denying that people who disagree with my conclusions about morally-legitimate legal argument may be taking legal reasoning seriously in a significant sense, I am not only making a linguistic mistake but making a "disciplining move" designed to exclude from the debate those who disagree with me. Balkin and Levinson's empirical critique of my positions on morally-legitimate legal argument and internally-right answers to legal-rights questions in our culture asserts that my conclusions are refuted by their inconsistency with both the informed beliefs of members of our society about the obligations of various law-role players and the way in which such law-role players actually carry out their duties.

My Reply to Balkin and Levinson contests both the criticism they make of my usage of "taking legal argument seriously" and their empirical critique of my conclusions about "morally-legitimate legal argument" and "internally-right answers to all legal-rights questions" in our culture. My Reply makes two arguments against their linguistic criticism of my usage of "taking legal argument seriously." First, I show that the draft-Introduction to this symposium to which they were responding as well as this published Introduction make it abundantly clear that I do not equate "taking legal argument seriously" in any sense with agreeing with all my basic jurisprudential conclusions. Second, I argue that, although I understand why Balkin and Levinson do not like to be told that those who subscribe to their jurisprudential position are not taking legal argument seriously in at least one important sense of that expression, they will just have to live with that reality. Balkin and Levinson believe that what counts as morally-legitimate legal argument is a matter of contemporaneous social negotiation and that there are no internally-right answers to many important legal-rights questions. My Reply argues that, although people who hold this view may take legal argument seriously in both craftsmanship senses, in the "social importance" sense, and in the consideration sense, it is accurate to say that they do not take legal argument seriously in the conviction sense of that

93. See id. at 544.
94. See id. at 544-48.
95. See "You Cannot Be Serious!", supra note 9.
96. See id. at 564-78.
97. See id. at 578-613.
98. See id. at 564-69.
expression. The truth of that claim does not depend on my motivation for making it (which, I am confident, was just to state the truth).

The second part of my Reply to Balkin and Levinson focuses on their alleged empirical refutation of my basic jurisprudential conclusions. It argues that this part of Balkin and Levinson’s critique fails for four reasons:

1. their argument is partially based on false conclusions they reach about the implications of my jurisprudential position for the obligations of various law-role players;
2. their argument partially relies on inaccurate or contestable empirical assumptions about people’s beliefs about the obligations of these law-role players and the positive law that relates to these law-role players’ legal obligations;
3. their argument partially relies on inaccurate or contestable empirical assumptions about the actual behavior of the relevant law-role players; and
4. their argument ignores the fact that the damage that non-fits do to my position will be reduced if they can be explained in some relevant way and ignores as well the fact that the persuasiveness of my jurisprudential conclusions depends on their discounted-fitting all of our society’s moral-rights practices rather than its legal-rights practices, which are a subset of its moral-rights practices (an error that is a corollary of their mistaken belief that our society’s legal practice is morally self-legitimating).

The last paper that belongs to this category is Arthur Applbaum’s. Applbaum focuses on the jurisprudential argument I made both in Legitimate Legal Argument and in Matters of Principle. Although Applbaum indicates that he generally agrees

99. See id. at 569-72.
100. Somewhat more contentiously, I assert in this Introduction that, empirically, some of those who agree with Balkin and Levinson’s conclusions (though certainly not Balkin and Levinson themselves) have not taken legal argument seriously in the consideration sense. See supra text accompanying note 32. I should add that I also admit that the same may be said for some observers who do take legal argument seriously in the conviction sense.
101. See “You Cannot Be Serious!”, supra note 9, at 580-98.
102. See id. at 598-609.
103. See id.
104. See id. at 609-11.
105. See id. at 611-13.
106. See Applbaum, supra note 1.
107. See supra notes 1, 4.
with my basic moral and jurisprudential conclusions, he makes four different but related objections to either the general type of "conventionalist" argument I made for them or specific features of the actual argument I made.

Applbaum's first objection might be called a "truth" objection to conventionalist moral arguments in general. This "truth" objection is that conventionalist argument cannot justify the universal premise (which I assert) that the use of a legal argument is morally legitimate in a given culture if and only if that use is consistent with that culture's moral commitments. Applbaum thinks that this objection is justified not only because one can imagine cultures (such as his Republic of Razland) whose members are committed to evaluating each other's conduct from a liberal, rights-based perspective but are positivists in law but also because one cannot justify a conclusion that this combination of liberal, rights-based morality and legal positivism is "inconsistent," "coherent," "absurd," or not "moral." In his view, "A culture, whether or not it is a moral rights culture, can be morally committed to a number of coherent views that take a number of different stands on the connection between its morality and its law." Moreover, in Applbaum's opinion, "on the conventionalist view, there is no place to stand and say that it is a mistake" from their own perspective for the members of a culture to reject the claim that it is morally illegitimate for their law to fail to instantiate the moral norms on which they are committed to evaluating their own and each other's behaviors.

Applbaum's second objection to what he takes to be my position is a "consequences" objection. This objection is a corollary of his "truth" objection. Because, in his judgment, "conventionalists" cannot dismiss as inconsistent, incoherent, or nonmoral the Razlanders' disconnect between their nonlegal moral norm and their legal positivism, one cannot justify the conclusion that it is "morally illegitimate" for a society whose members are committed to

108. See Applbaum, supra note 1, at 615.
109. See id. at 615-16, 624.
110. See id. at 620.
111. See id.
112. Id.
113. Id.
114. Id. at 621.
115. Id.
116. Id. at 620.
117. See id.
evaluating each other's conduct and beliefs from a liberal, rights-based perspective to use arguments to determine the relevant parties' legal rights that they were committed to rejecting when determining the relevant parties' moral rights or to reach legal-rights conclusions that do not protect on balance the moral-rights-related interests the society recognizes (or, in a goal-based society, do not promote the ultimate values on which the society is committed to grounding its individual decision-making).

According to Applbaum, both these problems are avoidable. Proper attention to "the foundational questions in moral theory that both [I and Applbaum] have left for another day" would yield the conclusion that there are universally-correct moral principles whose establishment would imply the moral incorrectness of anything but a liberal, rights-based morality and hence the moral illegitimacy of legal positivism (regardless of the moral and legal beliefs of the members of the culture on which one is focusing).

Before proceeding to the final two objections Applbaum makes to my analysis, I should like to point out some of the implications of Applbaum's own foundationalist views. At an abstract level, Applbaum's belief that one can demonstrate the objective moral correctness of rights-oriented liberalism implies that all goal-based societies and all nonliberal, rights-based societies have made an objective moral error. At a more applied level, it should be noted that Applbaum's critique of my position would apply equally forcefully to Dworkin's position to the extent that Dworkin relies on the same criteria of "fit" and "explicability of non-fits" as I do. Admittedly, to the extent that Dworkin's third, "best light" criterion (which I reject) implies that judges are authorized to engage in the kind of foundationalist analysis that Applbaum thinks one must execute, Applbaum's criticism of my approach will not apply to Dworkin's. However, the fact that such a foundationalist analysis would render Dworkin's (and my) "fit" and "explicability-of-non-fits" criteria otiose suggests that Dworkin's "best-light" analysis is not foundationalist in Applbaum's sense but involves (as I have suggested both in this symposium and in Matters of Principle) the use of personal ultimate values. If that is the case, Applbaum will find Dworkin's approach at least as objectionable as mine.

118. Id. at 624.
119. See id.
120. See Legitimate Legal Argument, supra note 4, at 452.
121. See MATTERS OF PRINCIPLE, supra note 1, at 94-95.
Applbaum's third objection to my analysis is also a "consequences" objection. He seems to object to my claim that a legal-rights conclusion that is inconsistent with the moral commitments of the society in which it is reached will be internally correct if it follows from a clear constitutional text or a statute that a clear constitutional text implies is constitutional even if that clear constitutional text is itself inconsistent with the moral commitments of the relevant society so long as the concrete import of the morally-illegitimate constitutional provision in question (though perhaps not its moral illegitimacy) was understood by its ratifiers at the time they ratified it. I hasten to add that this statement of Applbaum's third objection may be incorrect: he may be objecting to any claim that such a legal ruling would be "legitimate" as opposed to internally correct. If that is his objection, I agree with it and regret that my misuse of the word "legitimate" in one footnote of Matters of Principle that he cites may have led him to misapprehend my position (though I do think that the rest of the book and the draft of Legitimate Legal Argument that he saw did accurately articulate my actual views on this issue).

Applbaum's fourth objection to my analysis is that I have not sufficiently clarified how I propose to determine "a culture's moral commitments"—in particular, how I identify the beliefs from which such commitments must be (partially) inferred, that I have not stated "which attributes are necessary for a purported moral value to be a moral value," and that I have not adequately defined "moral legitimacy," "moral rightness or justice," and "validity" or appropriately examined the relationship among them.

Applbaum's objections to my position are obviously important, but this Introduction is not the place for me to address them. Postscript C to Legitimate Legal Argument explains why it may be misleading to describe my position as "conventionalist" and, partly relatedly, why I do not find Applbaum's specific objections to my argument accurate or convincing.

122. See Applbaum, supra note 1, at 618.
123. See MATTERS OF PRINCIPLE, supra note 1, at 389 n.31, as cited by Applbaum, supra note 1, at 620 n.10.
124. The current version of Legitimate Legal Argument, which was expanded in response to Applbaum's critique, makes my position absolutely clear. See Legitimate Legal Argument, supra note 4, at 415 n.1.
125. See Applbaum, supra note 1, at 616-17.
126. Id. at 617.
127. See id. at 623.
The articles in this symposium that belong in my fifth category describe pedagogic attempts to get law students to take the general category legal argument seriously, to dissect and criticize particular legal arguments that others have made, or to create sound legal arguments of their own. I have already reported on one aspect of the first of these articles—Dennis Patterson's.\textsuperscript{128} Patterson comments on the jurisprudential background of the Uniform Commercial Code,\textsuperscript{129} describes the various ways in which commercial law is taught in American law schools,\textsuperscript{130} explains the pedagogic goals he and his co-author Richard Hyland have tried to achieve in writing their new commercial-law textbook,\textsuperscript{131} and provides a sample of the textbook that gives a good sense of their pedagogic aspirations and the technique they use to achieve their goals.\textsuperscript{132} In addition to stressing the importance of facts in legal argument, the Hyland-Patterson textbook emphasizes that the proper interpretation of one provision in a complex set of statutes will often be influenced by other provisions of the statutes in question that relate to the relevant transactions.\textsuperscript{133} Although the book does cover a substantial range of doctrine, it does not emphasize teaching the formulaic standards of commercial law. Students are taught to master "the facts of the case" before doing anything else. These facts include the relationship between the parties and the point of the transaction to its respective participants. After the students have mastered the relevant facts, they are asked to devise an approach to or solution of the problems posed—i.e., to "construct a legal solution."\textsuperscript{134} Only at that point do they look at the opinion of the court in the case in question.\textsuperscript{135} Rather than printing an edited version of the opinion and then appending a series of questions about it, the Hyland-Patterson book places its authors' observations and questions—set off in different typeface—in the midst of the opinion.

Patterson's article and the Hyland-Patterson textbook it describes take legal reasoning seriously in a variety of ways. First, the article explains that a certain conception of legitimate legal argument

\textsuperscript{128} See Patterson, supra note 32.
\textsuperscript{129} See id. at 625-27.
\textsuperscript{130} See id. at 627-29.
\textsuperscript{131} See id. at 629-33. The textbook is RICHARD HYLAND & DENNIS PATTERSON, INTRODUCTION TO COMMERCIAL LAW (1999).
\textsuperscript{132} See Patterson, supra note 32, at 635-45.
\textsuperscript{133} See id. at 630-31.
\textsuperscript{134} Id. at 630.
\textsuperscript{135} See id.
underlies the Uniform Commercial Code—"[T]he Code . . . is the earliest, if not the purest, expression of a [Realist] jurisprudence." Second, the textbook manifests its authors' belief that it is more important for law students to learn about morally-legitimate and valid legal argument than to learn the rules and principles of law: in Patterson's words, "methodology is central." Third, both the article and the casebook manifest Patterson's belief that the best way for students to learn legal methodology is to devise careful legal arguments themselves and to rely on that experience to detect "errors, gaps, or inconsistencies" in judicial opinions on the same issue.

Although Patterson's article does not directly address why legal argument should be taken seriously (aside from saying that a certain view of valid legal argument has had a substantial influence on the substance of the Uniform Commercial Code), it implicitly suggests that legal argument should be taken seriously not only in the "social importance" sense of the expression but also in its pragmatic-craftsmanship, consideration, and conviction senses.

Vince Blasi is the author of the second article on legal pedagogy in this symposium. Blasi does not indicate whether he agrees with my three basic pedagogic claims—that law students are currently given insufficient instruction in morally-legitimate legal argument, that over the past thirty years there has been a substantial decrease in the percentage of law school class-time devoted to such instruction, and that over the past thirty years there has been a substantial increase in the extent to which external-to-law policy analysis has been conflated with morally-legitimate and valid legal argument. Instead, Blasi addresses a different issue. In his judgment (which I share):

Reasoning skills of a certain sort are taught well in the traditional law school curriculum.... Many students learn a lot about linguistic indeterminacy, unintended consequences, the allocation of decision-making responsibility, and how much turns on which questions are asked and how they are framed....

136. Id. at 627.
137. Id. at 629.
138. See id. at 630.
Where legal education falls short . . . is [teaching students] reasoning skills that require patience, attention to detail, selectivity, and a sense of argumentative architecture[,] . . . [teaching them how to] construct[] [and] criticiz[e] complex arguments[,] . . . [how to] construct] [and] criticiz[e] complex arguments[,] . . . [how to engage in] sustained analysis and argumentation.\textsuperscript{140}

Blasi argues that this deficiency of legal education has several causes: large class sizes, coverage pressure (which causes even many seminars to focus on providing students with enough information to be able to do something worthwhile in a specialized area), and an examination system that puts students under pressure that precludes them from “unpack[ing] or evaluat[ing] . . . [the] arguments [they are required to spot] to any great degree”\textsuperscript{141}—a practice that (in my opinion) also reflects the abysmal student/faculty ratios in law schools as well as the fact that law school professors do not have teaching assistants to help them with their grading (a consequence of law schools’ not being academic training grounds).

Having described and explained the world, Blasi proceeds to give an account of his attempt to change it. Blasi has arranged all three of his offerings\textsuperscript{142}—a course on First Amendment doctrine, a course on “the history of ideas relating to religious and political liberty,”\textsuperscript{143} and a seminar on First Amendment Theory—to force the students to engage in a “systematic assessment” of an argument, to read and re-read a substantial argument from a short list he provides of relevant judicial opinions, philosophic essays, and law review articles, and—after much “focused critical reflection”\textsuperscript{144}—to produce a ten-page (3500-word) critique of the argument in question.

In his seminars, Blasi also tries to encourage the students to take reasoning seriously. With this goal in mind, he has made two crucial pedagogic choices. First, he limits the amount of reading students must do each week (usually to under fifty pages) to enable them to become sufficiently conversant with the author’s argument to feel comfortable participating in the discussion. Second, he requires the student who is providing the ten-page critique of the article to be discussed that day to submit it ten days before the seminar meeting, requires all other students in the seminar to read their colleague’s critique, and assigns one of the other students the duty of defending

\textsuperscript{140} Id. at 647.
\textsuperscript{141} Id. at 648.
\textsuperscript{142} See id. at 649-53.
\textsuperscript{143} Id. at 649.
\textsuperscript{144} Id.
the article being criticized (after discussing it with its student-critic).\textsuperscript{145}

In his courses, Blasi also tries to get students to take reasoning seriously both by assigning students unedited opinions or scholarly essays and by requiring each student to write four two-to-three-page papers during the semester that devise and examine the significance of hypotheticals that test the validity or illuminate the implications of a judicial opinion or that respond to a narrowly-defined question Blasi has posed about the article or opinion assigned for that week.\textsuperscript{146}

Blasi uses a variety of other techniques to encourage his students to perform up to their capabilities: he “include[s] in the class materials after each principal essay or opinion one of the best critiques of that work [he has] received in the past”;\textsuperscript{147} he “stress[es] to students the importance of fine tuning their arguments and not overreaching”;\textsuperscript{148} and he tells his students repeatedly “that they will have to push themselves to do their absolute best in terms of both rigor and creativity.”\textsuperscript{149}

I have already summarized the more abstract, jurisprudential portions of the two articles (by Michael Quinn and David Richards) that belong in the sixth category previously distinguished—articles that analyze concrete legal issues in ways that are jurisprudentially illuminating. Quinn’s article analyzes the doctrine of precedent or stare decisis in Texas while advancing ideas on a wide variety of issues that have important jurisprudential and law-and-society implications. Thus, among other subjects, Quinn discusses:

(1) the conceptual ambiguity of the concept of “the holding of a case” and the difficulty of identifying “the holding of a particular case” on several of that concept’s defensible definitions;\textsuperscript{150}

(2) the related difficulty of defining the concept of judicial “dicta,” the variety of types of dicta that members of the legal community distinguish, and the difficulty of operationalizing the definition of several of those types of dicta;\textsuperscript{151}

(3) the six families of “distinct versions (or theories) of stare

\textsuperscript{145} See id. at 652.

\textsuperscript{146} See id. at 651.

\textsuperscript{147} Id.

\textsuperscript{148} Id. at 650.

\textsuperscript{149} Id. In Blasi’s words: “Shameless nagging is underrated as a teaching technique, I have come to believe.” Id.

\textsuperscript{150} See Quinn, supra note 35, 711-12.

\textsuperscript{151} See id. at 712-30.
decisis that Texas courts or lawyers have said were the law of Texas or have applied in actual cases;

(4) the jurisprudential assumptions of various particular theories of stare decisis;

(5) the reasons why people in general find particular theories of stare decisis personally attractive and the law-role-related reasons why lawyers, judges, and law professors favor particular theories of stare decisis;

(6) the advantages and disadvantages of the various theories of stare decisis both from a rights or Rule of Law perspective and from a policy or personal-ultimate-value perspective;

(7) the "irreducible pluralism" of even a single jurisdiction's stare decisis beliefs and practices—irreducible because, even though one can give a moral account of our general practice of precedent, there is no objectively-correct way to choose among various meta-meta-theories of the practice;

(8) the implications of this irreducible pluralism for legal advocacy and

(9) the jurisprudential implications of the irreducible pluralism of our stare decisis theories and practice.

The second article in this last category and the final article in the symposium is David Richards' analysis of the internally-correct answer to various free-speech constitutional-rights issues in the United States. As I have already indicated, Richards approaches these issues on the assumption that our society is a liberal, rights-based society and that the moral norms to which we are committed (and their various "political" corollaries) control the internally-correct resolution of constitutional-law free-speech issues in the United States.

Richards argues that our commitment to respecting the right of individuals to make decisions of conscience for themselves accounts

152. Id. at 694.
153. See id. at 694-98.
154. See id. at 766.
155. See id. at 698-709.
156. See id. at 767-68.
157. See id. at 762-63.
158. See id. at 688-91.
159. See id. at 687-88.
160. See id. at 692-93.
161. See id. at 771-74.
162. See id. at 766-71.
for or justicizes (my word) many features of our positive free-speech law. Thus, the value we are committed to placing on “moral independence,” “liberty of conscience,” and “the inalienable human right[ ] of persons] reasonably to exercise their own moral powers” on religious and moral issues\textsuperscript{165} implies that speech that relates to such issues may be abridged only to prevent an “imminent, nonrebuttable, and very grave secular harm”\textsuperscript{164} and that subversive advocacy and group libel are protected in this way.\textsuperscript{165} According to Richards, our commitment to valuing “the critical discussion and rebuttal central to the conscientious formation, revision, and evaluation of values”\textsuperscript{166} also implies that defamation of individuals, obscene materials, and some types of advertising\textsuperscript{167} are entitled to more protection than could be provided by utilitarian, perfectionist consequentialist, or process-democracy values. In the other direction, Richards points out that his understanding of our commitments implies that we are not constitutionally obligated to protect “communications [that] do not serve ... independent conscientious expression and rebuttal about critical values.”\textsuperscript{168} Richards indicates that he would place in this “unprotected” category communications that

bypass reflective capacities (subliminal advertising); ... [that] do not express sincere evaluative convictions but knowingly make false statements of fact (fraud and knowing or reckless defamation of individuals); ... [or that] state true facts in which there is no ground for a reasonable interest from the perspective of the critical expression and discussion of general values.\textsuperscript{169}

From this perspective, Richards proceeds to characterize and evaluate the German approach to analyzing the constitutionality of “group libel” laws\textsuperscript{170} and the argument made in the United States that holdings that “group libel” law are unconstitutional “cast[] in doubt

\textsuperscript{163.} See Richards, supra note 48, at 794-96.

\textsuperscript{164.} Id. at 798.

\textsuperscript{165.} See id. at 800.

\textsuperscript{166.} Id. at 801-02.

\textsuperscript{167.} See id. at 800.

\textsuperscript{168.} Id. at 802.

\textsuperscript{169.} Id. (footnote omitted). Richards also indicates that he believes that prohibitions of “fighting words” may be unconstitutional. According to Richards, “fighting words” are “ad hominem insulting epithets” that do not communicate “general claims.” Id. at 803 n.71. Since such communications play no constructive role in “the critical discussion and rebuttal central to the conscientious formation, revision, and evaluation of values,” id. at 801-02, their prohibition is constitutional even though the prohibition of equally “offensive” general ideas whose communication is “contextually [as] highly likely [as that of ‘fighting words’] to lead to violence;” id. at 803 n.71, is unconstitutional.

\textsuperscript{170.} See id. at 804-09.
the judicial decisions and laws opposing American apartheid."\(^{171}\) He
concludes that the legitimate State response to the kind of "structural
injustice" that pervades America is not to criminalize group libel but
to take various positive educational steps to combat stereotypical
dehumanization, to pass and enforce antidiscrimination laws that
operate in both public and private spheres, to adopt appropriate
affirmative-action policies, and to take various positive law-
enforcement steps to prevent rights-violating behavior such as racial
harassment.\(^{172}\)

**CONCLUSION**

This symposium contains a wide variety of articles that relate to
"taking legal argument seriously." Two recount historical or
theatrical debates that focus respectively on (1) the difference
between common-law legal argument and statutory interpretation
and (2) the character of legal argument in general. Two analyze the
important role that facts and "transactional understanding" play in
morally-legitimate and valid legal argument. Three present abstract
ideas about morally-legitimate and valid legal argument either in
general or in our culture. Six either criticize nonpositivist jurispruden-
tial conclusions, "conventionalist" moral and jurisprudential
arguments, or the right-answer thesis or reply to these criticisms. Two
describe the ways in which their authors have attempted to induce
their law students to take both specific legal (and law-related)
arguments and the phenomenon "legal argument" seriously. And two
analyze concrete legal-rights or legal-practice issues in ways that take
the relevant specific legal arguments seriously and illuminate the
extent to which the category "legal argument" should be taken
seriously in the various senses of that expression.\(^{173}\)

The contributors to this symposium have a wide variety of views
about whether legal argument should be taken seriously in the
various senses of that expression, about whether or the extent to
which legal argument is taken less seriously now than in the past, and

\(^{171}\) *Id.* at 817.

\(^{172}\) See *id.* at 817-22. For my comments on Richards' general jurisprudential position and
specific free-speech constitutional-law conclusions, see *Legitimate Legal Argument*, supra note
4, at 469 n.85.

\(^{173}\) Although I hope that this symposium is more than the sum of its parts, the actual
number of articles it contains (14) is smaller than the sum (17) that would result from adding the
numbers in the paragraph to which this footnote is attached: three articles have been double-
counted since they contain material that belongs in two of the categories the text describes.
about the consequences of any change that has taken place in the extent to which legal argument is taken seriously. I hope that this diversity in their positions has enabled this symposium to achieve its primary goal: to stimulate constructive debate on each of these issues.