Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions

Richard S. Markovits
LEGITIMATE LEGAL ARGUMENT AND INTERNALLY-RIGHT ANSWERS TO LEGAL-RIGHTS QUESTIONS

© 1999 RICHARD S. MARKOVITS*

This article delineates my position on morally-legitimate and valid legal argument in our culture, compares my position with several of its more prominent alternatives, and explores some of its more important implications. The article has three parts. Part I sets out my jurisprudential position—analyzes the moral character of the United States, the relationship between our culture’s moral commitments and the arguments that it is morally legitimate to use to discover the content of its existing law, the relationship between “morally-legitimate” and “(legally) valid” legal argument in the United States, the structure of morally-legitimate and legally-valid legal argument in our culture, and (relatedly) the extent to which there are internally-right answers to legal-rights questions in our culture. More specifically, Part I argues that in our culture “arguments of moral principle”—arguments that derive from our society’s commitment to ground its moral-rights discourse and conduct on a liberal norm—dominate legitimate argument and all or virtually all valid argument about the content of extant law and that, in part for this reason, there are “internally-right” answers to all legal-rights questions that may arise in our society. Part II delineates various alternative jurispruden-
tial positions to my own, analyzes them from my moral and jurisprudential perspective, and examines their implications for the existence of internally-right answers to legal-rights questions in our culture. And Part III explains the social importance of there being internally-right answers to all legal-rights questions in our society as well as the social importance of my accounts of legitimate and valid legal argument in our culture.

The article also has three postscripts, which respond either to criticisms of the kind of jurisprudential position I take or to criticisms of various features of my jurisprudential argument in particular. Postscript A analyzes the five reasons why, according to Professor Robin West, those who have focused on the concept "valid legal argument" have not taken Dworkin's antipositivism more seriously. This reaction concerns me because the position Dworkin took in his earlier works such as Taking Rights Seriously is similar to mine. Postscript B analyzes the four arguments that lead Professor Anthony D'Amato to conclude that legal theory (i.e., analyses of the structure and content of morally-legitimate or valid legal argument) cannot provide internally-right answers to legal-rights questions. Postscript C replies to four criticisms that Professor Arthur Applbaum makes either to the general type of "conventionalist" argument I have used to establish my jurisprudential conclusions or to certain features of the particular argument I actually make. (A separate article replies to Professor Jack Balkin and Professor Sandy Levinson's account and critique of my usage of "taking legal argument seriously" as well as to their attempted empirical refutation of my position on "morally-

2. Robin West, Taking Moral Argument Seriously, 74 CHI.-KENT L. REV. 499 (1999). I hasten to add that West also criticizes these reasons. Her own conclusion is that "we should be taking Dworkin's antipositivism much more seriously than we do and his claims regarding law's determinism—the 'right answer' thesis—considerably less seriously." Id. at 501. Postscript A explains some objections to the five reasons why, according to West, many reject Dworkin's antipositivism that she did not mention and points out that several of these reasons are less applicable to my antipositivist position than to Dworkin's.


4. For a detailed analysis of the relationship between Dworkin's early jurisprudential position and the jurisprudential position he takes in such later works as RONALD DWORIN, LAW'S EMPIRE (1986), see MATTERS OF PRINCIPLE, supra note 1, at 91-109.


legitimate” legal argument in our culture.8)

I. MY POSITION ON LEGAL ARGUMENT AND INTERNALLY-RIGHT
ANSWERS TO LEGAL-RIGHTS QUESTIONS IN THE UNITED STATES

A. The Basic Position

My basic jurisprudential position can be summarized in the following way:

(1) Using a particular type of argument to determine the content of existing law is morally legitimate in a given culture if and only if doing so is consistent with that culture’s moral commitments.

(2) Cultures that have moral commitments can be either rights-based or goal-based. The statement that a given culture is rights-based has two predicates. First, members of a rights-based culture engage in two kinds of prescriptive moral discourse—moral-ought discourse about what an individual or the State *ought to do* and moral-rights discourse about what an individual or the State is *obligated to do*. Second, in a rights-based culture, an individual cannot excuse or justicize (demonstrate the justness of) a choice that violates someone’s moral rights by demonstrating that it was consistent with the personal ultimate values to which the individual subscribed, and the State cannot excuse or justicize a choice that violates someone’s moral rights by demonstrating that it helped the State achieve one or more goals the State is authorized to pursue. In other words, in a rights-based culture, moral-rights claims are distinguished from moral-ought claims, and moral-rights conclusions (and the moral norms on which they are based—hereinafter “moral principles”) trump (are lexically prior to) moral-ought conclusions (and the moral norms from which they are derived—hereinafter “personal ultimate values”).

(3) Conclusions about the abstract moral norm (moral-norm combination) on which a particular rights-based society is committed to grounding its moral-rights discourse and conduct (its basic moral principle) should be based on the application of two criteria. The first relevant criterion is how closely the postdictions and predictions of various “candidates” for the “basic moral principle” title fit the following facts: (A) the moral-rights claims that were

---

made and not made, (B) the arguments that were made and not made in support of the claims in question by both the claimants and those who evaluated their claims, (C) the conclusions that were reached about the claims in question, (D) how close the cases in question were perceived to be, and (E) how certain people were about the proper resolution of the claims in question. The second relevant criterion is how explicable the non-fits associated with each candidate were—to what extent could the non-fits be explained by (A) the greater power of the non-fits’ beneficiaries, (B) the presence of mechanical transaction costs or other types of costs that make it unattractive for parties to pursue justified claims or attractive for parties to pursue unjustified claims, (C) the fact that the relevant individuals did not adequately consider the beliefs they expressed or the conduct in which they engaged, (D) conceptual intellectual errors that the relevant actors might very well have made, or (E) other sorts of errors made by moral-rights holders or obligors or prospective errors by deciders of moral-rights or moral-rights-related legal-rights disputes.

(4) An acceptably-thorough analysis of the prescriptive moral discourse and conduct of members of our culture would reveal that ours is a liberal, rights-based culture. More specifically, such an investigation would yield the conclusion that ours is a liberal, rights-based culture whose members and State are obligated to show appropriate, equal respect and concern for all moral-rights holders for whom they are responsible (inter alia, concern for these creatures’ actualizing their potential to become and remain persons of moral integrity by taking their obligations seriously and striving to establish a reflective equilibrium between their personal value-convictions and their conduct). Although the required “empirical investigation” would take into account official acts by government employees and political acts by private members of our culture when performing political roles, it would primarily focus on the prescriptive moral discourse and conduct in which members of our culture engage when not acting in political roles.

(5) An appropriate empirical analysis would reveal that, in addition to arguments of moral principle, members of our culture use textual, historical, structural, precedential/legal-practice-based, and prudential arguments of different sorts to determine the content of pre-existing law.

(6) The preceding conclusions imply that in our liberal, rights-based
culture the use of a particular type of argument to determine what the law is will be morally legitimate if and only if it is consistent with our society's liberal basic moral principle. This implies not only that arguments based on this moral principle (hereinafter “arguments of moral principle”) are internal to law but that they are the dominant mode of legitimate legal argument in our rights-based culture. More specifically, arguments of moral principle dominate legitimate legal argument in our rights-based culture in two ways: (A) they operate directly to determine the morally- legitimate response to legal-rights claims that are based on moral rights and (B) they operate indirectly in all cases to determine the legitimacy of using the other general modes of argument that members of our culture have used or may use to establish what the law is, the legitimacy of using various specific variants of these general types of argument to discover the law, and the legitimate relationship between each sub-type of argument that can be legitimately used to discover what the law is and the internally-right answer to the relevant legal-rights question.

(7) Cultures that are not amoral or immoral (that have moral integrity) may have constitutions that instantiate their moral commitments less than perfectly. In such cultures, “morally- legitimate” legal argument may diverge from “legally valid” legal argument. In particular, if such a culture’s constitution contains one or more provisions whose text is clearly inconsistent with its moral commitments and whose concrete implications were understood by their ratifiers at the time of ratification, textual argument based on such texts will be legally valid. Indeed, it will be legally valid though morally illegitimate for such textual arguments to trump arguments of moral principle even though this implies that the internally-correct answer to the relevant legal-rights question is inconsistent with the relevant society’s moral commitments. Two points should be made about this unpleasant conclusion. First, there are limits to the extent to which a society of integrity’s constitutional law can be morally illegitimate. Beyond some point, a society’s failure to eliminate morally-illegitimate provisions in its constitution will require one to conclude that it is not a society of moral integrity. Second, in my judgment, although the pre-Reconstruction United States Constitution contained slavery clauses that were morally illegitimate and failed to impose constitutional obligations on the states to
fulfill their moral commitments, the current United States Constitution does not include any morally-illegitimate provisions, though it does include many "stupidities." 9

(8) Were it not for the possible existence of one or more morally-illegitimate constitutional provisions, the fact that arguments of moral principle dominate morally-legitimate legal discourse in our culture would imply the existence of internally-right answers to all legal-rights questions. Absent any morally-illegitimate constitutional provisions, the dominance of arguments of moral principle would produce this result (A) by rendering legally irrelevant (because morally illegitimate) some prudential arguments that favor a different conclusion from the one supported by the other, legitimate modes of legal argument and (B) by co-opting the other modes of legal argument (textual, historical, structural, and precedential/practice-based legal argument) that might otherwise favor different conclusions or a conclusion that is inconsistent with our basic moral principle.

(9) In fact, the presence of morally-illegitimate constitutional provisions does not defeat the conclusion that there are internally-right answers to all legal-rights questions in our culture. More particularly, the fact that textual argument based on morally-illegitimate constitutional provisions would dominate arguments of moral principle in some constitutional cases does not undermine the internally-right-answer thesis because in these cases there would still be an internally-right answer (the morally-illegitimate answer favored by the relevant textual argument).

B. Some Elaborations

1. The Distinction Between Moral-Rights Discourse and Moral-Ought Discourse

Members of our culture engage in two types of prescriptive

9. This may be an overstatement. Unless one believes that the provision of the Constitution giving each state two Senators continues to be justicized by the need to prevent large states from pursuing their interests over the different interests of small states or, more plausibly, by the historic fact that the Union was created by the individual former colonies (the states) and not by the People of the United States, it is difficult to avoid the conclusion that the associated failure of the Constitution to give each competent citizen something like equal political power violates the State's duty of appropriate, equal respect. See William N. Eskridge, Jr., The One Senator, One Vote Clauses, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 35 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); Suzanna Sherry, Our Unconstitutional Senate, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, supra, at 95.
moral discourse: moral-rights discourse about what someone or the State is obligated to do and moral-ought discourse about what someone or the State ought to do. These two types of discourse employ different moral norms. Further, the two types of prescriptive moral discourse frequently yield “different” conclusions: in a given situation, a moral agent may have no obligation to do something that from various legitimate personal-ultimate-value perspectives he or she ought to do or, less often, a moral agent may have an obligation to do something that from some personal-ultimate-value perspective that is legitimate within its appropriate domain he or she ought not to do. Moreover, although most individual or State choices are neither required by nor prohibited by the rights of any rights-bearing entity, virtually all choices do implicate personal ultimate values. Finally, as the conclusion that ours is a rights-based culture implies, “moral-rights” conclusions and the moral principles from which they are derived are lexically prior to (take precedence over or trump) conflicting “moral-ought” conclusions and the personal ultimate values they reflect. Thus, the fact that a person of moral integrity sincerely believes that, from his personal-ultimate-value perspective, he ought not fulfill his moral obligation does not relieve him of his moral duty and does not exempt him from a special and weighty type of moral criticism for failing to fulfill his obligation (though individuals who violate their obligations out of personal moral conviction are clearly regarded differently from those who do so thoughtlessly and carelessly or out of unreflective and crass self-interest).

10. Moral and political philosophers such as John Rawls distinguish between “the right” and “the good.” See John Rawls, A Theory of Justice 31-32, 395-99, 433-39, 446-91 (1971). In their conceptual systems, “the right” trumps “the good” in the same sense that in my conceptual system moral principles (moral-rights conclusions) trump personal ultimate values (moral-ought conclusions) when they conflict in rights-based societies, whose prescriptive moral practice draws a strong distinction between these two types of moral norms and prescriptive moral conclusions. Many political philosophers who distinguish between “the right” and “the good” argue that the priority of the right over the good can be established by philosophical argument and applies to all forms of political society (or, at least, that it is more than just a societal norm). For me, both the relevance of the distinction between moral-rights discourse and moral-ought discourse and, more specifically, the lexical priority of moral-rights conclusions over moral-ought conclusions are matters of social practice—though, admittedly, a kind of social practice whose description involves certain key concepts (“moral norm” and “moral position”) whose essential attributes are not determined by any given society’s practice or usage. In brief, for many moral philosophers, the priority of “the right” over “the good” follows from the philosophical nature of “the right” and “the good.” For me, “the right” is prior to “the good” only in some societies—viz., in rights-based societies. In goal-based societies, personal ultimate values (which play a similar role in my analysis to the role “the good” plays in standard philosophical analyses) trump “moral principles” (which play a similar role in my analysis to the role that “the right” plays in standard philosophical analyses).
An illustration may be useful. Assume that I ask someone (call her Jill) to read and comment on a paper I have written before I present it to a Learned Society. We can ask two different prescriptive moral questions about Jill's position: whether Jill has an obligation to help me in this way and whether she ought to do so. Different issues and moral norms are germane to the answering of these two questions, and different answers may be given to them. In particular, because, in our culture, Jill would not have a moral obligation to provide me with such assistance unless she (1) had promised to do so, (2) had a special status relationship to me (perhaps was a relative, friend, or colleague in the sense of being a fellow-member of a given department), (3) was a culpable cause-in-fact of my requiring assistance (had carelessly or willfully misinformed me of the date on which I was supposed to give the paper or delayed and handicapped my preparation by failing to return overdue books I had requested at the library), and possibly though dubiously (4) was a non-culpable cause-in-fact of my requiring assistance (had not returned library books she knew I had requested in circumstances in which she had a perfect right to keep them), one could not answer the obligation question without investigating these promissory, status, culpable-cause-in-fact, and, perhaps, non-culpable-cause-in-fact issues.

However, these issues (and the liberal moral principle that explains their relevance\(^{11}\)) might not be decisive—indeed, might not be

---

\(^{11}\) The relevance of all these issues can be traced to our commitment to the liberal moral principle of appropriate, equal respect and concern. In particular, at least on my account, liberalism recognizes promissory obligations because, in fulfilling promises, the promisor shows respect for the promisee. Similarly, liberalism recognizes that any individual who was a culpable cause-in-fact of another's predicament has a special duty to render assistance to his victim because the liberal duty of respect imposes both a duty not to wrong others and a duty to mitigate in any reasonable available way the consequences of any wrong one has committed.

Liberalism also can explain the role that status relationships play in the relevant analyses. In particular, liberalism recognizes that status relationships can impose duties because non-voluntary status relationships can promote intimacy, voluntary status relationships often involve intimacy, intimate relationships enable individuals to discover what they value (who they are, morally), and this kind of self-discovery is an important part of the process of becoming and remaining the kind of moral agent (a person of moral integrity) that liberalism values.

Admittedly, however, liberalism cannot justicize a conclusion that Jill would be obligated to me if she were merely a non-culpable cause-in-fact of my predicament—a conclusion that I therefore doubt would be justified. The opposite conclusion would have to rest on the almost-certainly-mistaken notion that we wrong someone when we do not compensate him for a loss we imposed on him by pursuing our own interests even when our action was not wrong in itself (even when its \textit{ex ante} profitability was not critically affected by our not having to compensate anyone we injure for his loss). This notion is "almost-certainly-mistaken" because it ignores the fact that, just as a non-negligent injurer would for his own benefit be imposing losses on his victim if compensation were not required, the non-contributorily-negligent victim would for his own benefit be imposing losses on the injurer if compensation were required. This argument
relevant at all—to the determination of what Jill ought to do from one or more defensible personal-ultimate-value perspectives. Thus, the fact that Jill clearly does not have an obligation to help me with my work—had made no relevant promise, had no prior relationship with or connection to me, and was not a cause-in-fact of my need for help—leaves open the question of what she ought to do in the situation in question. For example, an unconventional utilitarian who accepted my distinction between moral-rights claims and moral-ought claims would still conclude that Jill ought to help me if he concluded that the all-things-considered utility-cost to Jill of supplying the relevant help was lower than the all-things-considered net utility-benefits to me and others of her doing so. Similarly, an unconventional utilitarian who recognized that Jill had an obligation to help me because she had promised to do so, had a relevant status relationship to me, or was a culpable cause in fact of my needing help might still conclude that she ought not do so if her helping me reduced total utility.

2. Arguments of Moral Principle: An Elaboration

Arguments of moral principle focus on the moral-rights-related interests of moral-rights holders for whom the alleged obligor is responsible. In the United States, those interests derive from the abstract right that all moral-rights holders have to equal, appropriate respect and equal, appropriate concern for their actualizing their potential to lead lives of moral integrity by taking their moral obligations seriously and establishing a reflective equilibrium between their choices and their personal-ultimate-value convictions. Put crudely, this conclusion reflects the fact that the United States is a liberal society, which values individuals' engagement in the dynamic process of choosing what they value and bringing their lives into conformity with from symmetry will fail only when it clearly would be morally impermissible to require the victim to make the avoidance-move he would have to make to prevent the losses for which his strictly-liable potential injurer would otherwise be liable. Thus, if the victim is a rights-bearing foetus that can free its “gestator” from liability for injuring it only by doing away with itself, we would be unwilling to conclude that its responsibility for harming its gestator in a regime that would require the gestator to compensate the foetus for any harm she inflicted on it was equivalent to the gestator’s responsibility for harming the foetus if the gestator did not have to compensate the foetus for any harm that gestator caused it. The same argument would presumably apply to non-foetal potential victims who could reduce the certainty-equivalent losses others should be held to impose on them only by doing away with themselves. In my judgment, strict liability can be justified in moral-rights terms only as a response to imperfect information—i.e., only by arguing that (1) courts are often unable to assess the negligence of injurers and victims and (2) strict liability will allocate losses according to fault in cases in which negligence has not been proved better than either a no-liability or a negligence regime.
their choices; although in the United States there is a dissensus on the first-order good, this fact manifests our commitment to a particular second-order good (becoming a person of moral integrity) rather than demonstrating the absence of any societal substantive-value commitments.

Three further clarifications need to be made. The first relates to the relevant "boundary condition"—to the attributes of creatures that make them moral-rights holders in the United States. In my judgment, the "closeness-of-fit" criterion and "explicability-of-not-fit" criterion previously explained jointly imply that the set of moral-rights holders in the United States contains all creatures and only those creatures who have the neurological prerequisites to become and remain individuals of moral integrity. Thus, the "boundary condition" just delineated fits our conclusions that non-human animals and "humans" in irreversible comas are not moral-rights holders as well as our conclusions that non-adult humans (including new-borns and small children) and humans that are asleep, unconscious, or in reversible comas are moral-rights holders. Admittedly, the basic moral principle's boundary condition appears to be inconsistent with the probable consensus view that severely-retarded humans who do not have the neurological prerequisites to become and remain individuals of moral integrity are moral-rights holders and provides what would undoubtedly be a hotly-contested conclusion about the rights-bearing status of foetuses—viz., that foetuses are moral-rights holders when and only when they possess the neurological prerequisites for taking their lives morally seriously (say, at thirty weeks). However, these apparent non-fits either can be shown not to deserve that characterization or can be explained in ways that make them less damaging to my boundary-condition conclusion. In particular, I suspect that the view that the relevantly-handicapped have rights partly reflects our concern for the rights-related interests of their relatives and friends, our reluctance to authorize any person or institution to decide whether given individuals' handicaps result in their not being moral-rights holders, and the failure of some to distinguish moral-rights con-

12. For a detailed examination of this boundary condition, see MATTERS OF PRINCIPLE, supra note 1, at 35-39. Although some may find the following analogy unconvincing or even offensive, the "neurological prerequisites" boundary condition is favored by the fact that a person who has dug up an acorn buried in moist, fertile ground that would have developed into an oak tree had nothing untoward occurred would not be held to have violated an ordinance prohibiting the destruction of any oak tree.
clusions from strongly-held moral-ought convictions. Similarly, I sus-
tpect that those who reject the implication of my boundary condition
that foetuses under the age of, say, thirty weeks are not moral-rights
holders also do so because they would oppose such foetuses' being
treated in ways that this status would permit for reasons that do not
presuppose our secular practices' implying that these foetuses are
moral-rights holders—for example, out of religious conviction, be-
cause they fear that rules that permit abortions of such foetuses in
normal-pregnancy situations will undermine our rights-commitments
in general, or for other secular personal-ultimate-value-related rea-
sons. In the other direction, I suspect that those who reject the impli-
cation of my boundary condition that foetuses over the age of thirty
weeks with normal neurological development are entitled to all the
protection that is owed moral-rights holders in general tend to do so
because their personal-ultimate-value-related convictions make it dif-
ficult for them to accept a boundary condition that cuts against their
conclusion that women ought to be allowed to make all choices re-
lated to the continuation or termination of their pregnancies. To the
extent that the preceding explanations of these conclusions capture
the conclusion-holders' views, their doing so reduces or eliminates the
damage that the popularity of these views does to my boundary-
condition hypothesis.

The second clarification that is relevant at this juncture is that
arguments of moral principle proceed by balancing the effects of the
choice under consideration on the rights-related interests of all rele-
vant moral-rights holders. In this respect, arguments of moral princi-
ple differ from the types of balancing arguments that some courts
have employed in that the courts in question have engaged either in
utilitarian balancing or in some other non-liberal type of balancing.

Finally, it is worth noting that although the moral-rights argu-
ments made by members of our culture (and a fortiori made in judi-
cial opinions in the United States) do not refer to the abstract interest
of moral-rights holders to appropriate, equal respect and concern,
they do refer to more concrete interests that actually are corollaries of
the abstract interests to which the liberal basic moral principle refers.
Not surprisingly, both the proper definition and the weighting of
these concrete interests in particular contexts are facilitated by an
awareness of the abstract interest from which they derive. In any
event, in my judgment, the relevant moral-rights holders' interest in
being shown appropriate, equal respect is (in the constitutional con-
text) manifest in a liberal, rights-based State's duties:
(1) not to impose a loss on a moral-rights holder for no reason at all or for an illegitimate reason (such as promoting a particular view of the first-order good);
(2) to subject its decisions to appropriate quality-control;
(3) not to discriminate in the pejorative sense of that word;
(4) to combat prejudice and the commission of impermissible prejudiced acts by private actors in all ways that protect rights-related interests on balance;
(5) to prevent all types of moral-rights violations in all ways that protect rights-related interests on balance;
(6) to redress the consequences of moral-rights violations in all ways that protect rights-related interests on balance;
(7) to give all its competent moral rights-holders something like the same, appropriate opportunity to be an author of the laws that govern them; and
(8) to give its competent moral-rights holders appropriate opportunities to participate in judicial and administrative proceedings that affect their rights or welfare.

Relatedly, in my judgment, the relevant moral-rights holders' interest in being shown appropriate, equal concern is manifest in a liberal, rights-based State's duties to put such individuals in a position to make an autonomous choice about what they value and to enable them to effectuate the values they have chosen within limits set by other persons' interests in choosing and living according to their respective conceptions of the good. I believe that these abstract duties can provide the basis for generating admittedly-contestable conclusions about the concrete obligations of our State.

More specifically, and negatively, these duties imply that a liberal, rights-based State may not endorse any particular view of the first-order good, though it may (indeed, is obligated to) advocate the second-order good of leading a life of moral integrity. Again, more specifically, and positively, the abstract duties imply that such a State has inter alia the following, more concrete, concern-related duties:

(1) to fulfill all the respect-related duties previously listed (because self-respect is a prerequisite to taking one's life morally seriously);
(2) to provide a sufficient minimum real income to give each individual both self-respect (in our materialist society) and a meaningful opportunity to take his life morally seriously;
(3) to provide a liberal education that gives the individual the inde-
pendence of mind, analytic skills, information (including inform-

ation about alternative values, life-styles, etc.), and experiences

ecessary to make meaningful life-choices;

(4) to prevent private parties from depriving moral-rights holders of

their autonomy in all ways that protect rights-related interests on

balance;

(5) to secure the privacy interests of moral-rights holders in all ways

that protect rights-related interests on balance because the ano-
nymity, secrecy, and solitude that privacy provides\(^3\) play an im-

portant role in individuals’ discovering what they value (who

they are, morally) by enabling them to form intimate relation-

ships, to engage in contemplation, and to experiment with vari-

ous life-choices at lower cost;

(6) to protect and promote the ability of its moral-rights holders to

engage in intimate relationships, which are valuable both be-

cause they lead to self-discovery and because it is through them

that many individuals instantiate their value-choices; and

(7) to allow the moral-rights holders for whom it is responsible to

exercise various liberties, properly so called in a liberal society—
i.e., to commit those acts or engage in those activities or relation-

ships that play an important role in their discovering their moral

identity or in instantiating the values they have chosen when

their doing so does not sacrifice weightier rights-related interests

of others.

To repeat: I do not consider this list to be exhaustive and ac-

knowledge that some of its members are contestable. I include it to

suggest how internally-right answers to legal-rights questions may be

derived from the abstract conclusions previously articulated.

3. The Fact That Arguments of Moral Principle Dominate Legitimate

Legal Argument in Our Culture: The Why and How

To be legitimate, the use of a particular type of legal argument

must be consistent with the moral commitments of the culture in

which it is made. In a goal-based culture, the use of the relevant type

of argument must promote the goals the society is committed to

achieving. In a rights-based culture, the use of the relevant type of le-

gal argument must enable the State to secure rights-related interests

\(^3\) This breakdown is taken from Ruth Gavison’s excellent moral and legal analysis of pri-

on balance. In the United States, this latter conclusion implies that arguments that focus on the liberal moral principle on which we are committed to basing our moral-rights discourse are not only legitimate legal arguments but are the dominant form of both legitimate and (with one exception already noted) of valid legal argument. In general terms, in our culture, arguments of moral principle control legitimate argument in three ways:

1. by determining the legitimacy of the other types of argument that have sometimes been used to discover extant law;

2. by determining the variants of the various general types of legitimate legal argument that it is legitimate to use to determine what the law is; and

3. by determining the legitimate legal force of those legal arguments that are legitimate.

I hasten to add, however, that even if unambiguous constitutional text that was properly understood by its ratifiers did not dominate moral principle, moral rights and legal rights would not be co-extensive in a rights-based culture. Thus, a moral right may not be a legal right in a rights-based State because such a State is not obligated to enforce a moral right if (for reasons that it is legitimate for the State to take into consideration) State enforcement would sacrifice sufficiently weighty rights-related interests of third parties for enforcement to sacrifice rights-related interests on balance. Indeed, in this case, it would not be morally permissible for a rights-based State to enforce the moral right in question. Moreover, many legal rights in a rights-based State have no moral-rights counterparts. In the United States, some constitutional rights—e.g., the Third Amendment right of a homeowner not to have a soldier quartered in his house in time of peace without his consent even if just compensation would be paid for such quartering—fall into this category. And most statutory rights—viz., those that were created by statutes that were enacted to further their supporters' personal ultimate values or more crass self-interest—also have no moral-rights counterparts.

14. For example, if one assumes that a spouse who is more sinned-against than sinning has a tort-type or contract-type moral right to compensation from her (his) comparatively more at fault spouse, the government of a liberal, rights-based society would have no duty to enforce that right if doing so would sacrifice sufficiently weighty rights-related interests of the children of the marriage because litigation of the fault issue would increase the antagonism the parents feel toward each other and, thereby, reduce the probability that they would engage in the kind of effective post-divorce joint parenting in which the children have entitlement interests.
I will now individually examine the ways in which arguments of moral principle control the use of the other five general types of legal argument made in our culture—textual, historical, structural, precedential, and prudential argument.15 Because my relevant expertise is in Constitutional Law, I will draw my examples from this legal field.

Arguments of moral principle control legitimate textual argument most obviously when the text in question contains ambiguous, vague, or open-textured moral language. The Constitution of the United States contains many examples of such language. At the extreme, there is the Ninth Amendment’s reference to “rights ... retained by the people” even though they were not enumerated and the Fourteenth Amendment’s reference to “the privileges or immunities of citizens of the United States.” However, the Constitution also contains many other provisions that are less obviously, but in actuality equally, open-textured.

Arguments of moral principle imply that all such language should be interpreted to refer to the basic moral principle I believe we are committed to using in moral-rights discourse, the more concrete corollaries of that principle, or the constitutional-rights conclusions to which that principle would lead. This conclusion is not banal or unimportant. It implies, for example, that it is not appropriate to make arguments from such texts that rely exclusively on the dictionary meanings of the words it contains. More ambitiously, it implies that, at least in principle, judges can interpret the vague or open-textured moral language the Constitution contains without imposing their own personal ultimate values—that the constitutional texts in question point to moral principles that can be objectively inferred from our culture’s rights-and-obligations practices.

Arguments of moral principle also control the legitimate way to use historical argument. Thus, an understanding of our moral practices implies that historical evidence about ratifier intent is not so important as many (Strict Constructionist) academics and judges claim—that the interpretation of a moral concept referred to by a constitutional or statutory text should not be controlled by its draft-

15. The list is taken from PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982). Bobbitt’s list includes “ethical” argument (arguments that focus on the ethos of our system of government) and excludes my category “arguments of moral principle.” See id. at 8. Space-constraints preclude me from elaborating on the five types of legal argument listed in the text. For detailed accounts of them, see MATTERS OF PRINCIPLE, supra note 1, at 57-64.
ers’ or ratifiers’ conception of that concept or expectation about the way in which it would be interpreted. Thus, while ratifier conceptions and expectations are relevant to the determination of the conception of the relevant concept to which the society is committed, they are not decisive. If an analysis of our society’s relevant commitments suggests that the ratifiers misunderstood the concept in question, the legitimate and valid interpretation of that concept will diverge from the ratifiers’ narrowly-defined “intent.”

Arguments of moral principle also control the content of historical arguments that try to establish what the law is by inference from historical evidence about the events that led to the adoption of a particular constitutional text. More specifically, the fact that the basic moral principle to which we are committed is an abstract principle that has broad implications implies that the events that led to the passage of a constitutional or statutory provision should be interpreted broadly when used to illuminate its meaning. For example, arguments of moral principle imply that when using the events that led to the adoption of the Reconstruction Amendments to interpret their texts one should not characterize these events narrowly to be something like “the enslavement of some individuals of African descent” but should characterize them more broadly to be “State and private acts that failed to manifest appropriate respect and concern for some moral-rights holders by depriving them of their freedom.”

Arguments of moral principle also determine the kinds of historical evidence one should ideally use to establish the meaning of any moral language the law contains. This point has both positive and negative implications. Positively, it suggests that, to be complete, a historical argument of this type should be based on all facts of all the types listed in the protocol for identifying our basic moral principle and its more concrete corollaries. Negatively, it implies that the internally-correct interpretation of constitutional or statutory texts ratified or enacted on a particular date is not necessarily the interpretation that is consistent with the most obviously relevant choices made by the ratifying institution or other governmental institutions on or near the date in question. This conclusion reflects the fact that the relevant historical analysis should consider not just government decisions but

16. Historical research has revealed that the Framers’ specific intent was that interpreters of the Constitution would not be bound by their specific intent. See H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 924-47 (1985).
private choices, not just decisions made contemporaneous to the ratification or enactment of the text to be interpreted but decisions made throughout the history of the Republic, and not just choices that relate to the specific conduct whose regulation is under review but all choices that relate to the values implicated by the State decisions in question. For example, when deciding whether laws that disadvantage homosexuals violate the Fourteenth Amendment's Privileges or Immunities or Equal Protection Clauses, we should not restrict our historical research to determining the percentage of states that had criminalized homosexuality or disadvantaged homosexuals in 1868. Rather, we should cast our historical net more widely to include all private and State choices throughout the history of the Republic that relate to sexual conduct in general, intimate relationships that lead to self-discovery, behaviors or institutions that promote such intimate relationships, and the exercise of autonomy in general. To repeat: this conclusion is a corollary of the positive conclusion that the set of historical arguments that are legitimate to use to discover the law includes all the "moral anthropological" research that is relevant to the identification of the basic moral principle we are committed to using in moral-rights discourse.

Structural arguments focus on the ends that our polity is designed to secure and the various institutional and substantive-rights provisions of the Constitution that are designed, inter alia, to increase the likelihood that our State will strive to secure those ends. My analysis of our society's moral identity yields the conclusion that ours is a rights-based society, designed to foster individuals' leading lives of moral integrity. This moral understanding of our society significantly affects the proper way to interpret balance-of-powers clauses, federalism clauses, the Press Clause, and the Right to Bear Arms.17

Arguments from judicial precedent or practice focus on the conclusions or holdings of previous cases, the doctrines announced in previous cases, and the canons of interpretation courts have employed. Arguments of moral principle control the legitimate use of arguments from judicial precedent and practice. More specifically, arguments of moral principle reveal that our practice of giving judicial precedent and practice weight in themselves is an outgrowth of our duty to show respect for all moral-rights holders by giving them fair

17. See MATTERS OF PRINCIPLE, supra note 1, at 67-69, 392 n.45, 393 n.49.
18. See id. at 69-70, 396 n.54.
notice (by making our conclusions about their legal rights and obligations consistent with their reasonable expectations). Giving weight to precedents is not the only way to provide fair notice. For example, although this technique may be prohibited by the constitutional provision limiting the power of federal judges to cases and controversies, the obligation to provide fair notice might be satisfied by a system that instructed judges or specified others to write frequent reports on the content of the law and bound judges in future cases to give weight to the conclusions of these reports rather than to prior judicial decisions. However, a practice of giving weight to precedent certainly is consistent with—is one way of fulfilling—the obligation to show respect for all moral-rights holders by giving them fair notice (an obligation that also accounts for the rule that criminal laws that are unacceptably vague are unconstitutional—are "void for vagueness").

Arguments of moral principle reveal not only why our practice of precedent is legitimate but also why precedents that were clearly incorrect when decided should not be followed. Certainly, the potential beneficiaries of a clearly-erroneous precedent should know that they cannot rely on its being followed when its victims cannot place themselves out of its harm's way.

Arguments of moral principle also control the legitimate use of the two major types of prudential argument that are sometimes used in American courts. The first is the argument that the government choice under review does or does not promote a legitimate State goal. Considerations of moral principle reveal why the fact that a government choice creates no legitimate benefits favors the conclusion that the choice in question is unconstitutional—viz., because it is insulting to harm someone for illegitimate reasons or for no good reason at all. However, considerations of moral principle also reveal why a demonstration that a particular State choice does further some legitimate goal does not guarantee its constitutionality—the choice may still have been critically influenced by prejudice or made to achieve an illegitimate goal.

The second type of prudential argument is that a State choice that would otherwise be unconstitutional should not be declared unconstitutional by a court if such a decision would disserve rights-

19. Actually, some State choices that do not promote any legitimate goal may nevertheless be constitutional if they slipped through a decision-procedure that contained appropriate quality-control checks. In practice, however, I doubt that this possibility is empirically significant.
related interests on balance because it would not be enforced, would not be obeyed even if it were enforced, would lead to more general lawlessness, or would undermine the political position of the courts in ways that reduced their ability to secure moral rights. Arguments of moral principle reveal that this second type of prudential argument is illegitimate: because a society that is committed to the liberal basic moral principle is obligated to devote the resources and effort necessary to achieve obedience to law by both its citizens and its enforcement officials, such a society cannot justify either making what would otherwise be internally-wrong enforcement-decisions or avoiding decisions on the merits by its inability to secure obedience to law.

4. The Relationship Between the Dominance of Arguments of Moral Principle and the Existence of Internally-Right Answers to All Legal-Rights Questions

The claim that arguments of moral principle dominate legitimate legal argument in our culture favors the conclusion that there are (non-default) internally-right answers to all legal-rights questions in our society in at least seven ways:

(1) by declaring illegitimate specific prudential arguments that disfavor the conclusions favored by the modes of legal argument that are legitimate;

(2) by showing that even the one type of consequentialist prudential argument that is legitimate is not supposed to be decisive when it favors the constitutionality of a choice that moral argument implies is unconstitutional;

(3) by co-opting precedential argument by making the weight attributed to a precedent vary directly with its original soundness (with its conformity to the conclusion favored by the other modes of legitimate legal argument) and by pointing out that, in cases in which initially-wrong precedents should be given a critical weight, that procedure is compatible with our moral principles (that in such cases arguments of moral principle will favor a different conclusion from the conclusion they would have favored had the case arisen as a matter of first impression);

(4) by making less problematic the fact that, at the time at which a constitutional or statutory provision was passed, government officials treated the rights-related interests it implicated in a way that was inconsistent with the society's basic moral principle;
(5) by making less problematic the fact that the society or the relevant government or governments have treated some particular, narrowly-defined type of conduct in a way that contravenes the moral principles to be inferred from our general moral behavior by revealing that the relevant historical research and arguments should not focus exclusively on the way in which individuals and the State have responded to the particular conduct on which the State choice under review focuses but on the way in which individuals and the State have reacted to all conduct that implicates the broadly-defined rights-related interests involved in the private behavior to which the State choice under review relates;

(6) by making less relevant (at a minimum, rendering non-decisive) evidence about the specific expectations of the Framers and ratifiers of a constitutional provision about the way in which it would or should be interpreted; and

(7) by giving a moral account of our government's basic structural features that reduces the likelihood that structural arguments will conflict with arguments of moral principle or historical arguments.

Admittedly, arguments of moral principle may conflict with constitutional textual arguments when a clear constitutional text whose concrete implications were correctly understood by its ratifiers at the time at which it was ratified is inconsistent with a moral principle to which the relevant society is committed. However, this possibility and the fact that in such situations the relevant morally-illegitimate textual argument will not only be valid but will trump the argument of moral principle does not cut against my claim that in our culture there are internally-right answers to all or virtually all legal-rights questions. In such cases, the internally-right answer to the relevant legal-rights question will be the morally-illegitimate answer favored by the argument based on the morally-illegitimate text.

C. Some Concluding Observations

My jurisprudential position draws a fundamental distinction between the moral legitimacy and "social acceptability" of a legal argument—between its consistency with our moral commitments and the extent to which it is considered to be legitimate by lawyers, the courts, and their company. At a minimum, this distinction implies that legal practice is not automatically morally self-legitimating: the fact that a particular type of legal argument or legal interpretive practice is con-
sidered to be morally legitimate or illegitimate by some, some significant percentage of, most, or all lawyers, judges, legal academics, etc. does not in itself render that conclusion correct. In fact, because legal-rights-related behavior is just one, empirically not enormously important, subset of the moral-rights-related conduct from which one must infer our society's moral commitments, it is quite likely that various legal practices will turn out to be morally illegitimate.

Four related implications of the preceding points are worth noting. First, they explicitly deny that legal practice is autonomous in the sense of being self-legitimating. Second, they imply that legal argument is not autonomous in the sense of never incorporating arguments from disciplines that have an independent status because they assert that to discover what the law is one must sometimes make use of arguments of moral philosophy (a field that does have an independent status). Third, they suggest one psychological reason why legal academics may be reluctant to accept the kind of nonpositivist jurisprudential conclusions I and others have reached. Academics in any field like to think that their somewhat arcane expertise is all that is necessary to analyze the questions with which they are professionally concerned. The conclusions that legal practice is not morally self-legitimating and that legal argument sometimes incorporates philosophical argument may be threatening to individuals who like to feel that they are in exclusive control of their subject-matter—who want to be able to dismiss the (supposed) expertise of those not trained exclusively as they are. Fourth, they imply that my conclusions about legitimate legal argument cannot be defeated by presenting evidence that they do not fit actual legal practice as well as would some set of alternative conclusions. The relevant fit is to our overall moral-rights-related practices, not to our legal-rights practices in isolation.

II. JURISPRUDENTIAL ALTERNATIVES AND THEIR IMPLICATIONS FOR THE INTERNALLY-RIGHT-ANSWER THESIS

Very few contemporary legal academics believe that there are internally-right answers to all moral-rights questions. The majority, who reject my strong distinction between moral-rights discourse and moral-ought discourse, claim that there are no internally-right answers to any moral-rights questions. Indeed, even the few who agree that our culture makes this distinction argue that there are no internally-right answers to moral-rights questions whose answers are socially contested. In fact, however, the moral skepticism and subjectiv-
ism to which these academics subscribe do not imply that there are no internally-right answers to moral-rights questions and, even if they did, they might not imply that there are no internally-right answers to moral-rights-related legal-rights questions. Thus, even if (as the moral skeptics and subjectivists claim) there are no objectively-right answers to moral-ought questions, there may be internally-right answers to moral-rights questions in a given moral-rights-based culture. And even if there is no determinate, internally-right answer to a moral-rights question in a given moral-rights-based culture, there may be legal conventions that yield internally-right answers to associated moral-rights-related legal-rights questions. For example, many legal academics and judges seem to believe that our culture's conviction that it is illegitimate for judges to read their own values into the law implies the negative default-rule that no positive legal right can be derived from a purported moral right whose existence is in fact indeterminate. This Part delineates and criticizes the positions of different groups of legal academics on the existence of internally-right answers to moral-rights and legal-rights questions.

However, before proceeding to this task, I want to analyze the negative-default-rule argument just delineated. The premise of this argument is that in our culture it is impermissible for judges to use their own values when deciding what the law is—that judges are not authorized to exercise strong discretion when discovering the law. I agree with this premise. In a liberal, rights-based society such as ours, the duty of appropriate, equal respect requires the State to enable all competent moral-rights holders to be the authors of the laws that constrain them. Although this obligation of a liberal State is extremely difficult to operationalize, it seems to imply that those individuals to whom the People delegate legislative power may not redelegate that power unless the People have authorized them to do so. I do not think that our Constitution directly authorizes judges to create the law: it is "the province and duty of the judicial department to say what the law is,"20 not to create it. Nor do I think that the Constitution authorizes the Congress to delegate authority to legislate on legal rights to the courts (or, for that matter, to administrative agencies21), even in limited circumstances. Admittedly, such redelegations

21. One might argue that ex post the People have authorized administrative agencies to exercise legislative power by issuing regulations in the public interest by reelecting legislators who had granted the agencies such powers and by electing new legislators who have expressed
of legislative authority are not inherently inconsistent with liberalism. I just do not think that the Constitution or the People have ever authorized judges to create new law (as opposed to discovering "new law"—law that was already there but not previously articulated). However, I doubt that this conclusion implies the internal correctness of judges' denying legal-rights claims that are based on alleged moral rights whose existence turns out to be indeterminate.

There are at least six reasons why my claim that in our culture all moral-rights questions and all legal-rights questions have determinate answers may be wrong—why the existence of a particular moral right may be indeterminate. First, the moral character of our society may be indeterminate because the criteria for determining whether a given society is rights-based or goal-based are essentially contestable in some ways that the relevant facts make critical.

Second, the existence of a particular moral right and, hence, of a moral-right-related legal right may be indeterminate because the identity of the basic moral principle on which our society is committed to basing its moral-rights discourse may be critically indeterminate—i.e., two or more of the various candidates for the basic-moral-principle title that cannot be said to be worse than best may produce different conclusions to the relevant moral-rights question. This conclusion may reflect the fact that one cannot infer how to fill in a gap in the protocol for identifying a rights-based society's basic moral principle22 from an understanding of the defining characteristics of "moral norms" or "rights-based societies"—i.e., may reflect the impossibility of filling in one or more of these gaps without making an arbitrary choice that affects one's conclusions about the identity of a society's basic moral principle in a way that critically affects one or more concrete-rights conclusions. I should note, however, that the impossibility of filling in such a gap non-arbitrarily will be critical only if the arbitrary choice among the various permissible alternative specifications of the relevant protocol would alter one's conclusions about the identity of the society's basic moral principle in a way that would critically affect that principle's implications for the concrete...
decision that would maximize rights-related interests on balance.

Third, the internally-right answer to a given moral-rights ques-
tion and, hence, to a related legal-rights question may also be inde-
terminate if (1) gaps in the protocols for identifying the more con-
crete corollaries of the basic moral principle and assessing their
relative weights in the relevant case cannot be filled in non-arbitrarily
and (2) the arbitrary choice among alternative gap-fillers critically af-
fects the relevant moral-rights conclusion.

Fourth, the right answer to a moral-rights question and, hence, to
a related legal-rights question may be indeterminate if the alleged
obligor's fulfillment of his alleged moral obligation would have the
same effect on rights-related interests on balance as his non-
fulfillment of his alleged obligation—because the critical rights-
related-interest calculation is in equipoise.

This fourth possibility suggests a fifth reason why a legal right
may be indeterminate. Even if a moral right can be established, State
enforcement of that right may have no net effect on rights-related in-
terests.

Sixth, the answer to a non-moral-rights-related legal-rights ques-
tion may be indeterminate because it turns on an arbitrary choice
among a number of morally-legitimate variants of a relevant legal
practice—e.g., among conflicting canons of statutory construction. Of
course, this situation will arise only if there is no internally-right an-
swer to the question which canons of construction do our moral
commitments obligate us to employ.

Supporters of the negative default-rule believe that in each of
these cases a judicial decision not to enforce the alleged legal right in
question does not involve a judicial imposition of values while a judi-
cial decision to enforce the alleged legal right in question would in-
volve the judges' imposing their own values. I fail to see why in these
cases judges would have to impose their own values to support the
plaintiffs' claims but not to deny them. Supporters of the negative de-
fault-rule seem to be assuming that, absent legislation to the contrary,
moral-rights holders have a moral right to do anything that does not
violate the determinate legal right of another. However, this value-
premise seems to me to pay insufficient attention to the distinction
between situations in which the proposed behavior would determin-
ately violate no one's legal rights and situations in which the legal-
rights-violating character of the behavior in question is indeterminate.
Is a situation in which the "victim's" legal-rights claim is wrong really
no different from a situation in which one cannot in principle determine whether the alleged victim has a legal right that would be violated by the injurer’s proposed action?

It seems to me that the internally-right response to some of these cases of legal indeterminacy would be a compromise verdict—e.g., a decision allowing an injurer to engage in the relevant behavior but requiring him to share his associated gains with the victim. Admittedly, however, such compromise verdicts will sometimes generate incentives or have psychological effects that cause them to disserve rights-related interests on balance relative to a one-sided verdict for either the plaintiff or the defendant. Hence, although I would not be deterred from advocating compromise verdicts by the fact that our system formally rules them out, there will be cases in which our rights-commitments would be violated by responding to legal indeterminacy with a compromise verdict. However, even in these cases, I do not see why the impermissibility of judges’ reading their personal ultimate values into the law implies that they are morally obligated to rule for the defendant. When rights considerations are a wash (as opposed to being awash) and compromise verdicts disserve rights-related interests on balance, judicial decisions for defendants will be as influenced by the judges’ personal ultimate values as are judicial decisions for plaintiffs.

Moreover, for two reasons, the negative default-rule also cannot be justified by our commitment to popular sovereignty or democracy. First, in my judgment, in our society that commitment is not fundamental: it is a corollary of our basic commitment to treating all rights-bearers for whom we are responsible with appropriate, equal respect and concern. This “fact” implies that if the alleged legal right of the plaintiff would be established by a statute or administrative regulation were these State acts constitutional but the constitutionality of the statute or administrative regulation is indeterminate (because its compatibility with our basic duty of appropriate, equal concern and respect is indeterminate), the “value” of popular sovereignty or democracy cannot eliminate the critical indeterminacy. Second, many legal rights (many common-law and positive constitutional rights) are not based on specific law-creating acts of the State—instead, they are created by all the behaviors of the People that underlie or determine the moral-rights commitments and moral-rights-related legal-rights

23. In practice, of course, juries often reach compromise verdicts.
commitments of members of our society and our State. When the legal right at issue has this type of source, "popular sovereignty" is either irrelevant (if the notion is confined to popular control of discrete State law-creating acts) or unhelpful (because it has been "exercised" through everyday, "non-political" behaviors whose implications for the relevant legal right are *ex hypoth"\(\text{e} \)sis* indeterminate).

Indeed, the only way to decide indeterminacy cases that would be value-neutral in the relevant sense would be to flip a coin or adopt some other random decision-procedure. Although a procedure through which judges referred cases of legal indeterminacy to a legislative council for resolution would not be inconsistent with the norm that judges should not employ their own values when deciding what the law is, the decisions of such a council in this sort of case would still violate a liberal State's duty of appropriate, equal respect by subjecting the losing party to *ex post facto* legislation. So, too, would a procedure in which judges decided such cases of legal indeterminacy after being authorized to do so by a constitutional amendment.

Now that I have explained why I am not persuaded that the moral impermissibility of judges' reading their personal ultimate values into the law implies the internal correctness of decisions for defendants in cases of legal indeterminacy, I can delineate and state my objections to the positions that other legal academics have taken on the internally-right-answer issues on which this article focuses: In our culture, are there internally-right answers to moral-rights questions and to legal-rights questions? A warning is in order. The accounts of the various scholarly positions this Part analyzes are partial and selective. Although I believe they are accurate, they do not convey the richness and subtlety of the positions surveyed.\textsuperscript{24}

\textbf{A. Legal Realism}\textsuperscript{25}

Although Legal Realists give the impression that they believe that there are no internally-right answers to many legal-rights questions, they never developed a jurisprudential position that justified this conclusion, and many were in fact more interested in analyzing

\textsuperscript{24} For a more complete description and critique of most of the positions discussed in this Part and of several positions this article does not address (such as Rawls' conception of justice as fairness), see \textit{Matters of Principle}, \textit{supra} note 1, at 90-194.

\textsuperscript{25} Two famous, early Legal Realist publications are \textit{Jerome Frank, Law and the Modern Mind} (1930) and K.N. Llewellyn, \textit{The Bramble Bush: On Our Law and Its Study} (1930).
various external-to-law issues related to situations in which the internally-right answer to a legal-rights question is contestable than in deciding whether in principle the relevant questions had an internal-to-law right answer. In general, Legal Realists tend to link the contestability or indeterminacy of the answer to some legal-rights questions to legal practice—e.g., to the fact that the legal system contains inconsistent canons of statutory construction and the fact that some courts interpret precedent broadly and some, narrowly. In any event, whenever the internally-right answer is contestable, Legal Realists direct their attention to (1) analyzing how lawyers should advise their client if their goal is to benefit their client in a narrowly-defined way—i.e., analyzing the psychological or political causes of the decisions that are made—and (2) evaluating the various decisions that could be made from some personal-ultimate-value perspective (determining how the issues in question ought to be resolved). Although I agree that legal practice is often inconsistent, I believe that there is an internally-correct way to interpret precedent and construe statutes and, hence, disagree with the view of at least those Legal Realists who claim that the extant legal-practice inconsistencies undermine the internally-right-answer thesis.

B. Critical Legal Studies ("CLS")

CLS adherents extended or universalized the Legal Realists' supposed conclusion that law is sometimes indeterminate by arguing that there is no internally-right answer to many if not most (or, in the case of a few CLS members, any) legal-rights questions. Indeed, CLS scholars tend to argue that the claim that there are internally-right answers to legal-rights questions is not only wrong but duplicitous—that it is made to mask the reality that the politically powerful control decisions on what the law is in just the same way as they control legislative decisions.

The CLS arguments for legal indeterminacy are different from

26. In fact, there is good reason to believe that some Legal Realists who asserted that law is often indeterminate actually did not believe this to be the case. See Neil MacCormick & Zipparah Batshaw Wiseman, Llewellyn Revisited, 70 TEXAS L. REV. 771, 775-76 (1992) (book review).

the legal-practice-imbedded arguments that led some Legal Realists to their more modest conclusion on this issue. Early on, CLS members largely supported their claim that there can be no internally-right interpretation of a legal text (verbal formulation) by arguing that legal texts—like all texts—have no meaning in themselves, that all the meaning of all texts (verbal utterances) is provided by the interpreter, not by the writer or the words. Although from the beginning, some CLS scholars recognized the existence of binding practices of interpretation that reduce the discretion of the interpreter, virtually all members of the Critical Legal Studies movement have always insisted that in the end the existing conventions are insufficiently dense and detailed to eliminate the strong discretion of the interpreter in at least many important instances. I disagree. In my judgment, our practices of moral-rights discourse and legal-rights discourse are sufficiently rich to eliminate the strong discretion of a legal interpreter.

Some members of the Critical Legal Studies movement also try to justify their conclusion that there are no internally-right answers to legal-rights questions by arguing that the usefulness of liberal liberalism—the philosophical tradition that I claim can supply such answers—is destroyed by its internal contradictions (antinomies). The relevant CLS members claim that the “internal inconsistency” of liberalism is manifested by two facts: (1) that one or more liberal principles that are decisive in one case are not in another and (2) that a set of liberal principles that outweigh another set of liberal principles in one case may be outweighed by the latter set of liberal principles in another case. However, rather than manifesting the internal inconsistency of legal liberalism, these facts manifest the following unproblematic realities:

(1) unlike rules, principles have a dimension of weight;
(2) liberal principles can conflict (favor different outcomes) in particular situations;
(3) not all liberal principles are relevant to all cases; and
(4) the relative weights to be given to two or more liberal principles that are implicated in various cases will in general vary from case to case.

28. See UNGER, KNOWLEDGE AND POLITICS, supra note 27, at 63-104. Admittedly, Unger has subsequently renounced the conclusion that law is indeterminate, though his grounds for doing so seem to be at least as much political as intellectual. See ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 122 (1996).
Finally, some CLS adherents try to justify their no-internally-right-answer conclusion by arguing that the various approaches to legal interpretation that others maintain can yield internally-right answers cannot do so because those who use each of these individual approaches reach different conclusions on given questions. This argument is not persuasive. Neither the fact that an approach's users reach different conclusions because some of them misapply the approach nor, indeed, the fact that they reach different conclusions on individual issues or cases because they reach different conclusions about contestable theoretical issues related to the proper implementation of the approach or about contestable factual issues the approach deems relevant would be inconsistent with the approach's yielding internally-right answers to the legal-rights questions.

In short, for both positive and negative reasons, I reject the Critical Legal Studies movement's claim that legal interpretation is and must be political in many important (or, according to some, virtually all) cases: positively, because I do think that our binding practices of moral argument and legal interpretation are sufficiently consistent, dense, and detailed to deprive judges who are trying to interpret the law of discretion in the strong sense of being authorized to impose their own values and, negatively, because I reject the CLS arguments against the kind of liberal model of legitimate legal argument I have proposed.

C. Legal Pragmatists

Just as CLS scholars followed up on and extended some Legal Realists' conclusion that there are no internally-right answers to at least some significant legal-rights questions, Legal Pragmatists followed up on the Legal Realists' interest in determining what legal decisions would be most desirable, everything considered. More specifically, Legal Pragmatists are interested in analyzing the following instrumental issue: How should judges approach cases if the criterion for assessing their performance is whether their decisions "really work"—i.e., produce results that are "desirable?" Although this focus

29. Although Legal Pragmatism is connected to philosophical pragmatism, which is itself a somewhat diffuse body of thought, it is not a mere corollary of it. The textual account of Legal Pragmatism is clearly only a partial account that captures no more than one strain in this body of thought. For several useful discussions of Legal Pragmatism, see Symposium, The Revival of Pragmatism, 18 CARDOZO L. REV. 1 (1996). See, in particular, Thomas C. Grey, Freestanding Legal Pragmatism, 18 CARDOZO L. REV. 21 (1996).
does not logically preclude Legal Pragmatists from concluding that judges should pay attention to the kinds of jurisprudential issues with which this article is concerned, empirically virtually all Legal Pragmatists have concluded that, to be successful in the above sense, judges should eschew grand theory and the associated goal of making all legal interpretations consistent, should focus instead on the particulars of concrete cases, should articulate narrowly-defined, concrete holdings rather than broad, abstract principles of law, and should make decisions from whose consequences one can learn.

This type of instrumental, atheoretical, incremental, experimental tinkering\(^3\) may work in some contexts, but it cannot work when there is disagreement or uncertainty about what counts as “desirable.” Thus, even if the approach Legal Pragmatists recommend would be a satisfactory way to interpret statutes designed to achieve a well-understood set of goals, it will not be much use when the “goal” to be achieved is securing justice, fairness, or the moral and constitutional rights of rights-bearing entities (equivalent concepts in my usage) and the content of these concepts is contestable and contested.\(^3\) In these circumstances, the criteria of success (the definition of “what works”) are themselves at issue, and one cannot operationalize these criteria without doing the kind of “grand” moral and jurisprudential theory that Legal Pragmatists tend to disvalue. In fact, a similar point may also be relevant when moral-rights commitments are not decisive if there is no consensus on or agreement on the operational meaning of the relevant “personal ultimate value” or social goal. I should add that even when “what works” is understood, there are many situations in which one cannot discover what works best without making incremental changes for whose identification something like “grand theory” may be necessary.

30. For a discussion of a similar approach taken by some legislatures, see CHARLES E. LINDBLOOM, THE INTELLIGENCE OF DEMOCRACY: DECISION MAKING THROUGH MUTUAL ADJUSTMENT 137-52 (1965). In Lindbloom’s terminology, the expression “synoptic problem solving” is the counterpart to “grand theorizing” and “disjointed and incremental problem solving” is the counterpart to the kind of close observation of the consequences of small decisions that Legal Pragmatists advocate. In conversation, Lindbloom sometimes refers to disjointed and incremental problem-solving as “muddling through.”

31. Even if it is not essentially contestable.
Bobbitt's conclusion about internally-right answers to legal-rights questions follows from his general jurisprudential position. In particular, Bobbitt argues that:

1. legal practice is self-legitimating,
2. in our culture, six types of legal argument are made—the same six I distinguish (indeed, I take my list from him) except that his list substitutes "ethical arguments" related to the ethos of our government for my "arguments of moral principle," and
3. none of the types of legal argument that is made in practice dominates the others, and no variant of any given type of legal argument that is made requisitely often in practice dominates the other variants of that type that one can observe being used.

This analysis implies that there will be an internally-right answer to a legal-rights question if and only if all of the general modes of legal argument used in practice and all variants of each of those modes that is used to the unspecified, requisite extent in practice favor the same answer. I reject this conclusion because I do not think that legal practice is morally self-legitimating and do think that arguments of moral principle are morally supposed to dominate the other types of legal argument one observes being made in practice.

Bobbitt contends that when there is no internally-right answer to a legal-rights question—when all the various modes or mode-variants of legal argument he asserts are legitimate do not favor the same conclusion—the judge must use his conscience to decide the relevant case. If I am correct in concluding that Bobbitt rejects my claim that our culture distinguishes between moral-ought and moral-rights analyses, this conclusion implies, in my terms, that Bobbitt thinks that judges should decide these cases in the way that their personal ultimate values imply is most desirable.

Although Dennis Patterson shares Bobbitt's underlying philosophical beliefs and agrees with Bobbitt's definition of legitimacy, account of the modes of legitimate legal argument, and claim that none

33. See DENNIS PATTERSON, LAW AND TRUTH 3-22 (1996). In addition to amending Bobbitt's argument in the way discussed in the text, Patterson presents a lucid account of the philosophical position on which Bobbitt's jurisprudence is based, a clear description of the philosophical debate that underlies many jurisprudential controversies, and convincing critiques of a variety of jurisprudential positions that Patterson opposes.
of these modes is dominant, Patterson disagrees with Bobbitt's conclusion about the way in which judges should respond to cases in which the mode-variants they both consider to be legitimate favor different conclusions. According to Patterson, in such cases the judge should not be guided by his conscience but should make the decision that "clash[es] least" or "best hangs together" "with everything else we take to be true" about law in our society.\textsuperscript{34} I reject this proposal because, on Patterson's (and Bobbitt's) assumptions, there is no way to operationalize this "consistency" approach—i.e., this approach's content is essentially indeterminate. Unless there is some internally-right way to determine the accuracy of a given legal proposition, there is no way to identify the conclusion that "clashes least" or "best hangs together" with our other beliefs about law. And if there is an internally-right way to determine the accuracy of a given legal proposition—a right approach that does not involve default-rules and always yields determinate conclusions, outcomes will never be indeterminate—i.e., the situation on which we are currently focusing will never arise.

Patterson's kind of Quinian\textsuperscript{35} field-approach may on first sight seem similar to the "fit" part of my approach to identifying a rights-based society's basic moral principle. However, it is important to emphasize how different Patterson's recommendation is from mine (indeed, how different it would be even if we assume, \textit{ad arguendo}, that Patterson would be willing to combine his "fit" criterion with an "explicability-of-[non-fit]" criterion).

Four differences are most salient. First, Patterson is using his approach to identify the legal conclusion that best fits the rest of our law while my approach is designed to identify the best candidate for our society's "basic moral principle" title—a candidate that will then be used both directly and indirectly to generate internally-right answers to various legal-rights questions.

Second, the data that Patterson's legal-rights or doctrinal conclusion is supposed to fit are exclusively legal data (data that relate to propositions of law) while such data constitute only a small percentage of the data my "basic moral principle" candidates are supposed to fit. This difference reflects the fact that I reject Patterson's and Bobbitt's assumption that legal practice is autonomous in the sense of

\textsuperscript{34.} \textit{Id.} at 172.
\textsuperscript{35.} \textit{See} WILLARD VAN ORMAN QUINE, \textit{FROM A LOGICAL POINT OF VIEW} 20-46 (1953).
being self-legitimating.

Third, Patterson is seeking the legal conclusion that best fits all propositions of law—both those propositions that relate to legal rights that are moral-rights-related in my sense and those propositions that relate to legal rights that reflect the polity’s personal-ultimate-value choices. I am seeking the moral principle that best fits the moral-rights-related acts, discourse, and claim-resolutions of members of our culture: the basic moral principle is not supposed to fit the personal-ultimate-value arguments, claims, and decisions made by members of our society. This difference reflects the fact that, unlike Bobbitt and Patterson, I believe that members of our culture engage in two distinct types of prescriptive moral discourse. This difference is important because it is far more likely that (1) our society’s members’ relevant behaviors are sufficiently consistent with a commitment to a single basic moral principle (or a combination of such principles) for it to be possible to identify that principle by applying a best-fit criterion than that (2) our States’ law-creating acts and arguments fit a given, official personal-ultimate-value conviction sufficiently well for Patterson to be willing to use that value to generate the internally-right answer to the question to which he is seeking to respond or even to generate an answer to that question that is not internally wrong. In my judgment, given the variety of things Patterson wants his answer to fit, the best fit he can discover will not be a particularly good fit. I return to this issue when discussing Dworkin’s concept of societal integrity in the next section.

Fourth, Patterson’s approach to resolving cases that Bobbitt believes cannot be resolved through legitimate legal argument is far less-well-operationalized than my approach to identifying a moral-rights-based society’s basic moral principle. He has not provided anything like the protocol I articulate for applying the “fit” and “explicability-of-(non-fit)” criteria. Indeed, I am not even sure that, on Patterson’s premises, it will be possible to specify a metric for determining the relative consistency of the various possible resolutions of any legal issue with our other legal beliefs. Clearly, the relevant metric cannot be the number of beliefs with which a particular conclusion would be inconsistent (both because that number will depend on the arbitrary way in which one articulates our legal beliefs and because this metric ignores differences in the importance of different legal beliefs). Nor, for similar reasons, can the relevant metric be the number of cases whose resolution will be inconsistent with the relevant alternative conclusions. The relevant metric also cannot fo-
cus on the "importance" of the beliefs or case-outcomes with which the alternative conclusions would be inconsistent. Thus, there is no non-arbitrary metric for the concept of "importance"—no way to decide whether it relates to the size of the social losses a particular conclusion implies were generated by the inconsistent beliefs or case-outcomes or the seriousness of the intellectual errors the relevant conclusion implies these erroneous beliefs and case-outcomes manifested. More concretely, there is also no way to decide in any event what values one should employ to assess the size of the social losses in question or the seriousness of the intellectual errors involved. Of course, even if Patterson could operationalize his approach to best-fit analysis sufficiently to permit him to identify the legal conclusion that "clashes least" or "best hangs together" with everything else he takes to be true about law, I would not be persuaded that his legally-best-fitting conclusion would on that account be internally correct.

E. Constitutional-Law Theorists Who Are Interested in the Existence of Internally-Right Answers to Fundamental-Fairness-Related Constitutional-Rights Questions

Much of the literature on legitimate legal interpretation is written by Constitutional-Law theorists. This section deals with four such theorists or groups of theorists who have specifically addressed the issue: Are there internally-right answers to fairness-related constitutional-rights questions?

In the 1950s, Judge Learned Hand wrote two books that argued or assumed that internally-right interpretations can be given to the Constitution's power-allocating clauses but not to the Constitution's "fundamental fairness" clauses. Hand justified this conclusion by asserting that the interpretation of the Constitution's power-allocating clauses is perfectly analogous to the interpretation of similar clauses in trust agreements or incorporation agreements (which, he assumed, can be interpreted objectively) but that conclusions about fairness are purely a matter of "opinion" or perhaps, in my terms, a matter of personal-ultimate-value conviction. I reject this latter conclusion because it ignores both (1) the distinction between the kind of moral-rights analysis that must be undertaken to answer "fundamental fairness"

questions and the kind of moral-ought analysis that is relevant when rights or justice are not being considered and (2) the related possibility that there may be internally-right answers to moral-rights questions. However, for current purposes, the crucial fact is that, in combination with the negative default-rule that Hand implicitly supported, his moral-philosophical position yields internally-right answers to fundamental-fairness-related constitutional-rights questions—viz., yields the answer that individuals have no fundamental-fairness-related constitutional rights. Obviously, I reject this conclusion because I think that the moral norms that are relevant to moral-rights analysis and fundamental-fairness-related constitutional-rights analysis can be objectively determined. Moreover, I also doubt that our conviction that judges are not authorized to exercise strong discretion when interpreting the law justifies the negative default-rule Hand implicitly assumed it did.

In Democracy and Distrust, John Hart Ely argued that there are internally-right answers to all fairness-related constitutional-rights questions. More specifically, according to Ely, relevant moral-rights holders have those fairness-related constitutional rights that are based on values the Constitution somehow reveals to be fundamental—in his judgment, the right to fair judicial process, the right to fair political representation, and the right of minorities not be disadvantaged because they do not have a fair share of political power. On the other hand, according to Ely, relevant moral-rights holders have no other constitutional rights. Ely’s conclusion that no one has constitutional rights that are not constitutionally fundamental is generated by the same negative default-rule that Hand employed—the rule that both believe is warranted by the premise that it is illegitimate for judges to impose their own values when deciding what the law is.

I reject Ely’s position for two reasons: primarily, because I think that judges can discover a far broader range of fairness-related rights held by relevant rights-bearing entities without imposing their own values (because the method Ely seems to be using or should use to determine which constitutional values are fundamental—the kind of “anthropological” moral investigation I outlined in Part I—would reveal the existence of a wider set of fairness-related constitutional

rights)\textsuperscript{38} and, secondarily, because I doubt that the negative default-rule is a corollary of judges' not having strong discretion.

Although, unlike Hand and Ely, Strict Constructionists tend to be politically conservative, their interpretive position is, from another perspective, just a more extreme version of the Hand and Ely positions just discussed.\textsuperscript{39} All these positions are based on two premises: (1) it is illegitimate for judges to read their own values into the law and (2) in all or many situations in which fundamental-fairness rights are at issue, judges cannot conclude that the relevant right exists without violating this prohibition. Hand believes that no fundamental-fairness rights can be objectively established. Ely believes that only those rights that the Constitution's text reveals to be "fundamental" can be objectively established. The Strict Constructionists believe that the only fundamental-fairness rights that can be objectively established are those that can be derived mechanically from the text of the Constitution or those that a constitutional provision's ratifiers (drafters) expected would be enforced by the courts. Because the Strict Constructionists correctly perceive that none of the moral language in the Constitution can be interpreted mechanically and that little extrinsic evidence about the specific expectations of the Constitution's ratifiers (or drafters) is available, they conclude that individuals have few constitutional rights against the State.

Although I share the Strict Constructionists' conclusion that it is illegitimate for judges to exercise strong discretion when interpreting the law, I disagree with their claim that, absent extrinsic evidence about ratifier expectations, judges cannot, in principle, interpret moral-rights-related language without imposing their own values. Moreover, I doubt that texts of any kind can ever be interpreted mechanically in the sense that the Strict Constructionists appear to believe is required in adjudicatory contexts and do not think that the specific-intent evidence that they value is as decisive as they believe. Although the ratifiers' specific expectations may tell us something about not only their but also their society's conception of the concepts the Constitution enumerates, both history (the Founding Fathers' expectations on this issue)\textsuperscript{40} and related social practice\textsuperscript{41} imply

\textsuperscript{38} Thus, I believe that Ely's list of fundamental rights is very partial.
\textsuperscript{39} It would appear that jurisprudence makes strange bed-fellows.
\textsuperscript{40} See Powell, supra note 16.
\textsuperscript{41} Thus, when Polonius instructs Laertes "to thine own self be true," he does not expect Laertes to be bound by Polonius' own understanding of Laertes' essential nature or Polonius'
that if a constitutional text's ratifiers' conception of a concept to which the Constitution refers is incorrect—i.e., does not capture the concept to which their society is committed—the interpreter's obligation is to base his decision on the societally-correct understanding of the relevant concept rather than on the ratifiers' incorrect conception of it.

Ronald Dworkin claims to believe in internally-right answers to all legal-rights questions, not just to all fundamental-fairness-related constitutional-rights questions. However, his use of a "best-light" criterion to identify the moral principles or values to which our society is committed calls into question his belief in internally-right answers, at least in those instances in which the best-light criterion critically affects the answer to the relevant legal-rights question. Thus, Dworkin claims that the persuasiveness of a particular "interpretation" will depend on whether it offers "the best interpretation" of a practice, contributes to "the correct or best theory of moral and political rights"—a question, he says, that an individual cannot answer without making reference to "his own personal convictions," offers the best justification of "past decisions," "helps show [the relevant practices] in a better light," and "shows the community's structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality," a determination, he once more indicates, that the interpreter cannot make without "directly engag[ing]" "[h]is own moral and political convictions." Although these quotations are taken from passages in which Dworkin is doing different things (sometimes offering an account of "justice," sometimes offering an account of "integrity," and sometimes offering an account of particular judicial or legislative decisions), they and many other statements Dworkin makes both in Taking Rights Seriously and in Law's Empire lead me to conclude that Dworkin is ar-

conception of the meaning of "being true to yourself." He is instructing Laertes to decide these issues for himself in a serious, responsible way. See WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act. 1, sc. 3, line 78 (Cyrus Hoy ed., Norton 1963) (1601).

42. See, e.g., DWORKIN, LAW'S EMPIRE, supra note 4, at 87-114; DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 3, at 131-50.
43. DWORKIN, supra note 4, at 94.
44. Id. at 97.
45. Id.
46. Id. at 120.
47. Id. at 215.
48. Id. at 256.
guing that the relative strengths of the cases for candidates for the "basic moral principle" title that clearly are moral principles depend on their relative intuitive moral appeal. If Dworkin is making this argument, his use of this "best light" criterion obliterates the distinction I draw between moral principles and personal ultimate values and precludes him from making my argument for the existence of internally-right answers to both moral-rights questions and moral-rights-related legal-rights questions.

Of course, the fact that Dworkin cannot establish the existence of internally-right answers to all legal-rights questions in my way does not preclude him from doing so in a different way. In fact, Dworkin's later work does contain the elements of an alternative argument that implies the existence of internally-right answers not only to all legal-rights questions but to all non-moral-rights-related policy questions as well. The concept that is crucial in this context is Dworkin's concept of "societal integrity." Dworkin seems to be arguing that just as all of the choices of an ideal "person of principle" (an ideal person of moral integrity) would consistently further the morally-defensible values to which he subscribes, the governmental decisions of an ideal community of principle (a community that has moral integrity) would consistently effectuate a defensible value-conviction. Obviously, this position implies that in any community of principle there will be internally-right answers to each moral-rights, legal-rights, and non-rights-related policy question—viz., the answer that is most consistent with the other choices the relevant State has made (that most furthers the State's official values or goals).

For two reasons, I would not be persuaded by this argument from integrity even if one could identify the official values or goals to which a given community was committed without employing a best-

49. Admittedly, in a recent article, Dworkin seems to reject this interpretation of his "best light" criterion: "[T]he model of interpretation that . . . I favor is frequently criticized by those who charge that interpretation should aim at showing its objects as they really are, not in their best light. It is important to be able to answer, to this charge, that there is no difference." Ronald Dworkin, Reflections on Fidelity, 65 FORDHAM L. REV. 1799, 1800 (1997). I cannot reconcile this claim either with Dworkin's listing the "best light" criterion as a separate criterion or with the following statement he made in another contribution to the same volume:

We argue for our constitutional interpretations by offering the best and most honest case we can for their superiority to rival interpretations, knowing that others will inevitably reject our arguments and that we cannot appeal to shared principles of either political morality or constitutional method to demonstrate that we are right.


50. See DWORKIN, supra note 4, at 382.
light criterion. First, in relation to some kinds of States, Dworkin's analogy between individuals of integrity and communities of integrity is inapposite—at least if the required consistency relates to a first-order theory of the good. Thus, because a liberal, rights-based State is committed to valuing individuals' making up their own minds about the content of "the first-order good," liberal, rights-based States would not be acting in an unprincipled way if their choices did not consistently reflect a given conception of the first-order good. To be communities of principle, such societies need only develop political institutions and processes that give their individual members the political influence to which their right to appropriate, equal respect entitles them.

Second, for public-choice reasons, Dworkin's definition of a community of principle (a society with moral integrity) might well produce the conclusion that a society lacked moral integrity even though each of its official's formal choices consistently supported a defensible value or set of values and the society adopted voting procedures that were designed to prevent outcomes that were inconsistent (when evaluated from any particular first-order value-perspective). Societies that are not dictatorships cannot realistically prevent such outcomes, though they can adopt voting procedures that are consistent with the values they are committed to effectuating.\footnote{For a more detailed discussion of Dworkin's analysis of the concept of societal integrity, see MATTERS OF PRINCIPLE, supra note 1, at 100-05.}

\textit{F. Law-Office Historians of Ideology: Communitarians and Libertarians}

A substantial number of contemporary Constitutional-Law professors have argued that the Constitution should be interpreted to instantiate communitarian\footnote{See, e.g., CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).} or libertarian\footnote{See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 3-35 (1985).} values. Most of these authorities have tried to support this conclusion by arguing that the Constitution adopted these values. Many simply assert or implicitly assume this fact. Others cite historical evidence that the Founding Fathers were Civic Republicans (who believed in "community") or subscribed to Lockean libertarianism (which these authorities dubiously assume amounts to a political philosophy of possessive individualism,
whose governmental instantiation would be a Nozickian minimal watchdog State). Some communitarians and libertarians also try to support their conclusions with more recent historical and contemporary evidence suggesting that our culture is committed to communitarian or libertarian values as opposed to what I mean by liberal norms.

My own admittedly-nonexpert reading of the relevant eighteenth-century evidence leaves me unconvinced by the Civic-Republican and libertarian accounts of that period. To my mind, the evidence suggests that late-eighteenth-century Americans subscribed to a variety of often-poorly-formulated ideologies; that many individuals asserted values that were inconsistent with each other; that different groups held different views; and that, if anything, as the eighteenth century came to a close, something like nascent liberalism became the most influential if not the dominant ideological persuasion in the country.\(^{54}\)

I am also not convinced by the more contemporary evidence that some communitarians and libertarians use to support their Constitutional-Law claims. Communitarians often argue that our commitment to communitarian as opposed to liberal values is manifest in the importance that members of our culture place on affective relationships in general and intimate relationships in particular. However, these facts do not justify the inference the communitarians draw from them: the communitarian belief to the contrary notwithstanding, the liberalism to which I think we are committed does not view man as an isolated, atomistic creature. Not only does liberalism as I understand it recognize that our moral identities are socially embedded, it stresses the importance of intimate relationships—recognizes the critical role they often play in individuals' discovering what they value and instantiating their values. (I should add that Lockean libertarianism also recognizes the importance of affective relationships.)

Admittedly, liberalism and communitarianism do differ in important ways. However, to my mind, the available evidence suggests that ours is a liberal as opposed to a communitarian culture. Thus, liberals reject the communitarian view that our self-conception turns on our political and community roles and the related claim that, by their very nature, humans obtain the most fulfilling kind of satisfaction from participating in a virtuous community. Liberals also reject the com-

---

54. See MATTERS OF PRINCIPLE, supra note 1, at 161-69.
munitarian view that members of a community are morally bound to obey whatever laws the community promulgates or "non-legal" norms it thinks bind its members (a view from which many communitarian law professors try to distance themselves). This view is anathema to liberals, who are definitionally committed to the second-order good of individuals' choosing for themselves what to value. Like the political liberals, the communitarians mistakenly believe that the impermissibility of a liberal State's endorsing any particular view of the first-order good implies that liberalism has no view of the good at all whereas in fact it manifests liberalism's commitment to the second-order good of individuals' choosing the first-order good for themselves as part of the process of leading lives of moral integrity. In any event, contemporaneous evidence seems to me to favor the conclusion that ours is a liberal, not a communitarian, culture.

Libertarians also sometimes cite particular contemporary practices to justify their conclusion that our society is committed to libertarian values. However, although libertarianism does fit many of our important practices (e.g., those related to personal privacy), it does not fit them better than does liberalism, and it fits our general redistributive behaviors far less well than does liberalism.

For present purposes, the jurisprudential assumptions on which these communitarian and libertarian analyses are based are as important as the soundness of their arguments and conclusions. Unfortunately, I am uncertain about the answers that communitarians or libertarians would give to the relevant jurisprudential questions. In part, my uncertainty reflects the relevant scholars' failure to address these issues explicitly, and in part it reflects my suspicion that different members of these groups would give different answers to the relevant questions.

Thus, some of these scholars may believe that ours is a moral-rights-based society, that arguments of moral principle dominate legitimate legal argument in our culture, and that the dominance of these arguments of principle implies that there are internally-right answers to all legal-rights questions in our culture. Their only disagreement with me relates to the basic moral principle on which members

55. See id. at 134-37, 188-93.
57. For an analysis of the libertarian position on redistributing income, see MATTERS OF PRINCIPLE, supra note 1, at 50-52.
of our culture are committed to grounding our moral-rights and legal-rights discourse: they think that the principle is a communitarian or libertarian principle rather than the liberal principle I have articulated.

However, other scholars in these groups almost certainly reject (1) my distinction between moral-rights and moral-ought discourse (believe either that it does not hold up as a conceptual matter or that, empirically, it does not play a meaningful role in our society’s prescriptive moral discourse), (2) my claim that there are internally-right answers to prescriptive moral questions, and (3) the argument that no morality-related legal-rights claim can be based on a common-law principle or an unenumerated constitutional right—reject either or both the premise that in our culture it is permissible for judges to exercise strong discretion when interpreting the law or the conclusion that this norm implies the impermissibility of judges’ rendering verdicts that at least partially favor parties whose asserted moral right is deemed to be indeterminate.

In fact, a few members of these groups might conceivably subscribe to a third position—might acknowledge the correctness of all parts of my jurisprudential analysis and hence agree that judges in our culture are obligated to interpret our laws to instantiate liberal values—but adopt the revolutionary position that judges ought to violate their obligations and interpret the law to adopt communitarian or libertarian values (even given the negative consequences from a communitarian or libertarian perspective of the judges’ violating their professional obligations).

In any event, although only the first of the three groups of communitarians and libertarians just described could in good faith argue that judges are obligated to read communitarian or libertarian values into the law, members of all three groups could argue that judges ought to interpret the law in this way.

G. Liberal Social Justice, Constitutional Moments, and Constitutional Rights: Bruce Ackerman

Bruce Ackerman’s distinctive contribution to American jurisprudence is the argument that our Constitution can be legitimately amended not only through one of the formal Article V procedures but also by “reformers” who “carry their initiative repeatedly in de-
liberative assemblies and popular elections. . . ."58 According to Ackerman, for an elected politician (or, presumably, any other type of reformer) to amend the Constitution without going through an Article V procedure, he "must return to the People and gain . . . deep, broad, and decisive popular support"59 for the value or institutional arrangement in question. For the People to have authorized the amendment, they must engage in a "sustained and mobilized political debate"60 of a kind in which they participate only intermittently61 and must vote decisively for the reformers and their program in several elections over a significant period of time.62 Ackerman argues that the contention that the People have ratified a particular amendment outside the Article V process is strengthened when the reformers have published related congressional committee reports, presidential proclamations, and party campaign platforms63 and the reformist position has been subjected to "sustained," "withering criticism" by political opponents64 because in these circumstances the People will be more likely to have given the necessary consideration to the change in question. Indeed, according to Ackerman, the required deliberation might be best secured if re-elected Presidents were authorized to propose constitutional amendments in the name of the American People, amendments that would then be placed on the next two presidential ballots and would be considered ratified if they gained "popular approval" in those elections.65

Ackerman argues that his conclusion that the People can amend the United States Constitution outside the formal Article V process is consistent with our actual practice of constitutional amendment,66 the text of Article V,67 the understanding that the Founding Fathers and their contemporaries had of the amendment process,68 and the

59.  Id. at 5.
60.  Id. at 384.
61.  See id. at 5.
62.  See id. at 384, 390-400.
63.  See id. at 17.
64.  Id. at 21.
65.  Id. at 410. Ackerman recognizes that this proposal needs further specification—might best be altered to require a super-majority or approval by some minimum number or percentage of eligible voters. See id. He also acknowledges that it might be desirable to alter the number or timing of the relevant electoral tests. See id.
67.  See ACKERMAN, FOUNDATIONS, supra note 66, at 15-17, 71-75.
68.  See id. at 72-73; ACKERMAN, TRANSFORMATIONS, supra note 58, at 66-68, 75-88.
American commitment to popular sovereignty and democracy.\textsuperscript{69}

For present purposes, I am less concerned with the particulars of this constitutional argument than with Ackerman's underlying assumptions about the existence of internally-right answers to moral-rights and legal-rights questions. Although Ackerman does not address these issues explicitly, it seems to me that he has implicitly endorsed the following positions:

(1) conceptually, one can distinguish between moral-rights talk (in his terms, talk about social justice) and moral-ought talk;

(2) in a liberal, rights-based society (in which, inter alia, the above distinction is recognized), there are internally-right answers to moral-rights (social justice) questions;\textsuperscript{70}

(3) the United States has not always been and is not now a liberal, rights-based State;\textsuperscript{71}

(4) the American Constitution does not entrench any foundationalist set of moral values (if we exclude from this category values related to popular sovereignty);\textsuperscript{72}

(5) nevertheless, if one takes legal argument seriously inter alia by paying attention to the values and institutions the People have constitutionally endorsed at particular Constitutional Moments through their higher-law-relevant political behaviors, one will be able to discover answers to virtually all or all constitutional-rights questions that are internally correct at the time in question (though the answer that is internally correct may vary and empirically has varied at different times).\textsuperscript{73}

I have no quarrel with Ackerman's reports of the "straightforward" historical facts (which is just as well because I do not have his expertise and critical colleagues who are experts tell me that much of

\textsuperscript{69} See ACKERMAN, FOUNDATIONS, supra note 66, at 16.

\textsuperscript{70} I infer Ackerman's support of both this proposition and its predecessor from BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

\textsuperscript{71} See ACKERMAN, FOUNDATIONS, supra note 66, at 318; ACKERMAN, TRANSFORMATIONS, supra note 58, at 419.

\textsuperscript{72} See ACKERMAN, TRANSFORMATIONS, supra note 58, at 13-14.

\textsuperscript{73} This proposition is implicit in Ackerman's critiques of Legal Realism; his complaint that political legal interpretation—i.e., legal interpretation that is influenced by the interpreter's personal ultimate values—would deprive the People of their sovereignty, see id. at 418; his fear that the view that in principle legal interpretations must be political in the above sense (because there are no internally-right answers to legal-rights questions) may be a self-confirming mistake, see id.; and his recognition of the importance of defining operational protocols for determining (1) when a Constitutional Moment has occurred (when an amendment has been passed without using an Article V procedure) and (2) the content of non-Article V amendments, see id. at 416.
Ackerman's history is superb). Our conclusions differ for four inter-related reasons.

First, and perhaps most basically, I disagree with Ackerman's assumption that the political behavior of members of our culture provides the primary evidence for conclusions about constitutional values. Although, in my view, constitutional-value conclusions should ideally fit the relevant political conduct, it is empirically more important that they fit conduct related to the horizontal moral-rights claims that members of our culture make or would be entitled to make against each other.

Second, and somewhat relatedly, Ackerman's and my interpretation of the relevant history sometimes differ in ways that are jurisprudentially critical. For example, Ackerman contends that the contemporaneous supporters of *Lochner* were committed to a kind of libertarian possessive individualism whose governmental instantiation would be a Nozickian minimal watchdog State and that the Great Depression changed our culture's value-commitments. I disagree. In my judgment, the Great Depression did not cause Americans to change their values: instead, by changing their minds about the facts, it led them to conclude that laissez faire policies would not promote the kind of liberal autonomy to which they were always committed and that they previously believed would be furthered by "market freedom."

Third, I disagree with Ackerman because, to my mind, our commitment to popular sovereignty and democracy is not fundamental—is a corollary of our "fundamental" commitment to showing appropriate, equal respect and concern for all creatures with the neurological prerequisites for leading lives of moral integrity.

Fourth, and finally, I disagree with Ackerman's assumption that political practice in general and de facto constitutional amendment practice in particular are self-legitimating.

I do not deny that many institutional developments have taken place in the United States outside the Article V amendment procedure that almost certainly should be classified as involving a constitutional change. The creation of administrative agencies with rule-making authority almost certainly falls into this category. However, I do not think that our society has experienced a change in constitu-

74. See id. at 283.
75. See id. at 401.
tional values as opposed to constitutional legal practice since its inception. In my friend Bruce Ackerman’s terms, this makes me one of the lawyers who “have let their fellow citizens down” by denying fundamental changes that historical research can demonstrate have taken place.76 I disagree, though I certainly would concede that skilled, assiduous analysts can reach defensible, critically-divergent conclusions about both our past and our present.

* * *

Part I argues that (1) in a moral-rights-based culture there are internally-right answers to all or virtually all moral-rights questions and to all moral-rights-related legal-rights questions and (2) moral-rights holders have a wide range of individually and socially important constitutional rights against the State. Part II’s partial sampling of the moral-philosophical and jurisprudential positions taken by American law professors reveals (1) that most of those sampled do not believe that there are internally-right answers to moral-rights questions in our culture and (2) that many believe that legal analysis is substantially divorced from moral analysis in any event. Indeed, most American law professors who believe that there are internally-right answers to moral-rights-related legal-rights questions believe that those answers are supplied by a negative default-rule that proclaims the impermissibility of judges’ ruling for plaintiffs who do not have the relevant moral right. As already indicated, I find this rule as indefensible as the conclusions that there are no internally-right answers to moral-rights questions in our culture and that legal-rights analysis does not incorporate moral-rights analysis.

III. THE IMPORTANCE OF INTERNALLY-RIGHT ANSWERS TO LEGAL-RIGHTS QUESTIONS AND MY ACCOUNT OF LEGITIMATE LEGAL ARGUMENT

Part III’s analysis of the importance of the internally-right-answer thesis and of my jurisprudential position in general begins by focusing on the various undesirable consequences that the Introduction to this symposium attributes to the belief that there are no internally-right answers to contestable or socially contested moral-rights and legal-rights questions—viz., this belief’s undesirable impact on

76. See id. at 8.
legal pedagogy, legal scholarship, judicial decision-making, judicial opinion-writing, the professional ethical behavior of lawyers, and our society's moral self-perception. It then proceeds by examining or exemplifying three of the more concrete types of benefits that my jurisprudential position generates—viz., avoiding the "ex post facto legislation" problem posed by the no-internally-right-answer thesis, revealing the morally-legitimate way to approach various legal-rights questions as well as the internally-correct answers to these questions, and revealing the erroneous character of particular legal doctrines, judicial arguments, and academic arguments. Because my most relevant expertise is in Constitutional Law, all of this Part's illustrations will be drawn from this field.

A. Preventing the Undesirable Consequences That the Introduction to This Symposium Attributed to the No-Internally-Right-Answer Thesis

Most contemporary law professors do not take legal-rights argument seriously in the "conviction" sense of believing in both (1) the determinacy of the moral legitimacy and legal validity of all legal arguments in our culture and (2) the determinacy of the internally-right answers to all legal-rights questions in our society. In my judgment, this fact has a number of direct and indirect undesirable consequences. The most important direct consequences are pedagogic and scholarly. Pedagogically, these professors' failure to take legal argument seriously in the "conviction" sense has led them to reduce the amount of class-time they devote to teaching legitimate legal argument, to downplay or ignore in their teaching the distinction between internal-to-law analyses of what the law is and external-to-law analyses of what they think the law ought to be, and, relatedly, to fail to discuss both what they mean by "policy argument" and the circumstances in which "policy argument" is and is not relevant to internal-to-law legal analysis (analysis of what the law is). In terms of scholarship, the epistemological position of these law professors has had similar effects: it has reduced the extent to which their scholarship attempts to articulate legitimate legal arguments, and it has increased the frequency with which these professors import their own (to my mind, usually external-to-law) value-preferences into analyses that purportedly seek to discover what the law is. I should add that these professors' doubts about the existence of internally-right answers to contested constitutional-rights issues may also have contributed to their increasing tendency to take public positions on what the law is.
that they imply reflect their expertise as law professors but are in fact based on their external-to-law value-preferences.

In my judgment, the failure of law professors to take legal argument seriously in the "conviction" sense has also had a number of socially undesirable consequences. First, it has increased the extent to which judges reach wrong legal conclusions as well as the extent to which private parties base their behavior on wrong conclusions about what the law is by reducing the ability of lawyers to make legitimate legal arguments, by convincing lawyers and judges that these professors' internally-incorrect answers to various legal-rights questions are internally correct, and by inducing some judges who are convinced by these law professors' moral skepticism and relativism to reach a different but equally-wrong jurisprudential conclusion from the one that most of these professors advocate—viz., that, to be valid, legal argument must be disconnected from moral analysis.

Second, even when the judges' disbelief in internally-right answers to moral-rights questions does not lead them to reach internally-wrong legal conclusions, it tends to cause them to write legal opinions that offer far less persuasive rationales for their conclusions than they would otherwise supply. The inadequacy of judicial opinions makes it more difficult for losing parties to accept their loss, makes it more likely that such parties will respond undesirably to the court's ruling, distorts the precedential significance of the judges' decisions, and (to the limited extent that judicial opinions have any more general effects at all) tends to weaken the rights-convictions of members of the society while undermining the moral identity of the society taken as a whole.

Third, by implying that—even at its best—legal argument deserves to be characterized as "manipulating like a lawyer" rather than "thinking like a lawyer" in the traditional, positive sense of the latter expression, the teaching and scholarship of these professors may change the way in which lawyers conceive of their profession, and, as a result, may increase the extent to which they behave unethically in their professional lives (coach witnesses, misconstrue precedents, cook empirical evidence) while decreasing the extent to which they choose practices with higher "social products," do pro bono work, or enter into public service.

And fourth, as I have already suggested, the failure of law professors to take legal argument seriously in the sense of believing that it can generate internally-right answers to all legal-rights questions may—by affecting the quality of lawyer behavior, judicial conclusions,
and judicial opinions—reinforce the other social developments that are currently undermining the rights-based character of our culture. Although I would not claim that the behavior of lawyers and judges is the most important source of the undermining of our culture’s moral identity, I do think that the conduct of the legal profession does have a significant effect on our culture’s moral self-perception.

Obviously, if my jurisprudential position were not only correct but effective—if my arguments convinced law professors to take legal argument seriously in the “conviction” sense of that expression in their teaching and writing and convinced judges to substitute legitimate legal argument for external-to-law policy reasoning or morally-disconnected, arcane legal analysis, its acceptance would prevent these undesirable consequences of the belief that there are no internally-right answers to moral-rights or legal-rights questions whose answers are contestable or socially contested.

B. Avoiding the “Ex Post Facto Legislation” Problem Posed by the “No-Internally-Right-Answer” Thesis

My jurisprudential position implies that even when the internally-right answer to a legal-rights question is contestable, even when the judicial opinion that answers a particular legal-rights question “makes new law” in the sense of articulating a proposition of law that no court or legislature had previously announced or promulgated, indeed even when the newly-announced proposition of law is surprising to those to whom it applies or to their legal counsel, the judge who renders the decision in question will have discovered rather than created the law (will not have promulgated the equivalent of ex post facto legislation) if he operated within the scope of his authority.

The view that there are no internally-right answers to at least some legal-rights questions seems to imply that parties to cases whose outcomes turn on the answers given to questions whose answers are contestable have been subjected to ex post facto legislation: if no internally-right answer to an outcome-determinative question existed at the time at which the parties engaged in the conduct that gave rise to the dispute or prosecution, those who were held civilly or criminally liable must have been found liable for or guilty of contravening a legal standard that did not exist at the time at which they engaged in the allegedly-violative conduct. At least on first reading, that account seems to imply that such decisions constitute ex post facto legislation. Because our Constitution prohibits ex post facto legislation and be-
cause most of us believe that it is morally appropriate for it to do so, the fact that my jurisprudential position does not have this implication (because it implies that there are internally-right answers to all legal-rights questions, including those whose answers are contestable) should make it more morally attractive (if not more intellectually persuasive).

Admittedly, however, first reactions are sometimes unjustified. To determine whether the no-right-answer position really does have an "ex post facto legislation" problem, one must unpack the various objections to ex post facto legislation and determine whether they apply at all or to the same extent when the allegedly-offending decision is a ruling by a judge in a case whose resolution turns on the answer to a legal-rights question to which, for alleged epistemological reasons, there is no internally-right answer.

The first objection to ex post facto legislation is that it lacks the consent of the governed. In the United States, the People have not consented to judges’ legislating in cases in which there are no internally-right answers. The Constitution grants all legislative power to the legislature: it was "the province and duty of the judicial department to say what the law is," not to create the law. The Constitution has not been amended through any Article V procedure to authorize judges to legislate in these cases, and, even if à la Ackerman the People can legitimately amend the Constitution without using any Article V procedure by acting in an appropriate way, the People have never come close to meeting the requirements for such an extra-Article-V amendment in relation to judges’ being authorized to legislate in no-internally-right-answer cases. Indeed, I doubt that most of "the People" have even adverted to the possibility that there may be legal-rights questions to which there are no internally-right answers. Hence, to the extent that we oppose ex post facto legislation because the People have not consented to it, the no-right-answer thesis does pose an ex post facto problem.

The second objection to ex post facto legislation is notice. In a rights-based State, the addressees of the law are supposed to be informed of the legal process to which they will be subjected and the substantive legal standards that will be applied to them. As I asserted in the preceding paragraph, I do not think that the People realize that in some (no-right-answer) cases, they will be subjected to judicial legislation. Nor do I think that the addressees of such legislation have adequate notice of the standards by which their conduct will be judged. Admittedly, in some instances, court-watchers might be able
to predict how judicial legislators would resolve some no-right-answer cases just as legislature-watchers might be able to predict the content of the ex post facto laws the legislature might pass. Indeed, one could even imagine situations in which the relevant judges and legislators might announce in advance the decisions they would reach in the relevant cases or the content of the backward-applying rulings they would make or statutes they would pass. But just as (I suppose) we would be unwilling to accept that such predictability justicizes legislators’ promulgating ex post facto legislation, we would be unwilling to conclude that such predictability justicizes judges’ making such rulings. Indeed, I suspect that the greater unpredictability of judge behavior would make this counter to the notice-objection to ex post facto legislation less effective when the legislation is “enacted” by a court rather than a legislature. To the extent, then, that our objection to ex post facto legislation relates to notice, it would apply to judicial ex post facto legislation at least as much as to legislative ex post facto legislation.

The third objection to ex post facto legislation is the possibility that it might be corrupt—that it might be passed to silence political opponents, to obtain monetary remuneration, or to satisfy spiteful desires. Admittedly, my account of legitimate legal argument (which acknowledges that the identity of the internally-right answer to many legal-rights questions is contestable) implies that decision-makers who must decide questions for which there are contestable internally-right answers will be able to conceal their corrupt decision-making. But, surely, it will be somewhat easier for judges to camouflage their motives if there is no internally-right answer to the legal-rights question under consideration than if the answer to that question is merely contestable. I see little reason to believe that, in the United States, judges are significantly less likely than legislators to let corrupt motives influence their decisions. Hence, to the extent that fear of corruption underlies our opposition to ex post facto legislation, ex post facto legislation by judges should be equally offensive as ex post facto legislation by legislators. Indeed, even if judges are less corrupt than legislators, so long as judges may be corrupt at all, that possibility provides a basis for opposing judicial ex post facto legislation.

The fourth objection to ex post facto legislation is procedural fairness: the victims of such legislation may have less of an opportunity to protect themselves against such legislation than against forward-looking legislation by participating in normal political processes. When the ex post facto legislation in question has been passed by a
legislature, this objection primarily reflects the greater ability of a legislature to tailor backward-applying legislation to apply only to its targets. When the ex post facto legislation in question has been passed by a judge, this "tailoring" problem is equally present and is compounded by the fact that the "legislation's" victims may not have anticipated the need to guard against its "passage"—may not have realized that judges would be in a position to "enact" such legislation against them. (This argument is obviously connected to the consent argument previously addressed.)

A fifth objection to ex post facto legislation focuses on its substantive unfairness. In part, this objection simply reprises the corruption and notice objections previously discussed. But two additional points need to be made in this connection: (1) because findings of civil liability and criminal guilt imply that the losing party has violated a moral obligation (the moral obligation the law supposedly enforces or the moral obligation to obey the law), findings that the defendant has violated ex post facto legislation will incorrectly declare him to have acted immorally—a result that is particularly offensive when the legislation is criminal (compare, the requirement that criminal guilt be established beyond a reasonable doubt)—and (2) in no-internally-right-answer civil cases, all-or-nothing decisions for one party or the other based on ex post facto legislation would be less equitable than compromise verdicts. Once more, I see no reason why this fifth objection to ex post facto legislation should be less forceful when the legislation is promulgated by a judge than when it is promulgated by a legislator.

All told, then, the position that there are no internally-right answers to some legal-rights questions does seem to me to create an "ex post facto legislation" problem. One advantage of my position is that it creates no such problem.

C. Revealing the Legitimate Approach and Internally-Right Answers to Legal-Rights Questions

My account of legitimate legal argument also has the advantage of explaining how judges are obligated to decide the issues that confront them and revealing the internally-right answers to various legal-rights questions. At the most abstract level, my approach implies that judges should decide cases by balancing the rights-related interests of those whose interests their decisions will affect. More concretely, my approach implies, for example, that the State can justicize restrictions
on liberty properly so called only if they protect rights-related interests on balance. More concretely still, this approach implies that when a court determines whether a liberal, rights-based State such as ours may prohibit or inhibit relationships of real emotional intimacy (including emotionally-intimate homosexual relationships), it must consider the extent to which the relevant relationships enable their participants to discover or instantiate their values.

My approach to identifying the moral character and commitments of a given society also has implications for the proper resolution of the boundary condition in our culture—i.e., for the proper way to determine the internally-right answer to the question “what creatures are moral-rights holders?” in our culture. In particular, my approach implies that this issue should be resolved by applying a combination of the criterion of “fit” (both to our society’s concrete conclusions about who is a moral-rights holder and to its conclusions about the moral rights of moral-rights holders) and a criterion of the “explicability of non-fit.” As I have already suggested, I believe that this approach yields the conclusion that in our culture all creatures and only those creatures that have the neurological prerequisites for leading lives of moral integrity are moral-rights holders (inter alia, that foetuses below the age of thirty weeks are not moral-rights holders and that foetuses above thirty weeks old that are not relevantly neurologically handicapped are moral-rights holders).

Relationally, my approach implies that in a liberal, rights-based State such as ours (except in very unusual circumstances) no government can justicize restrictions on aborting foetuses below, say, twenty-six weeks (given the possibility of error) by citing the foetus’ right to life or the State’s “interest in the potentiality of human life.” In the other direction, my approach implies that our states have a positive duty to prohibit abortions of foetuses whose age is twenty-six weeks or older even if they will be significantly or severely handicapped so long as they would not lead a wrongful life (be better off had they never been born) or lack the neurological prerequisites for leading a life of moral integrity and the abortion would not enable the

---

77. See MATTERS OF PRINCIPLE, supra note 1, at 278-85 for a detailed analysis of the appropriate general approach to liberty analysis in a liberal, rights-based State. See id. at 297-323 for a critique of some of the case-law on a number of liberty issues.
78. For a detailed analysis of sexual liberties and the rights to marry, divorce, and live together, see id. at 298-306.
79. For a detailed analysis of the boundary-condition issue, see id. at 35-39.
pregnant woman to avoid a serious risk of death or substantial bodily harm.\textsuperscript{80}

My jurisprudential position also implies that parents do not have the right to control the education or restrict the experiences of their children in ways that significantly reduce the children's ability to make meaningful life-choices.\textsuperscript{81} Relatedly, it implies as well that in our society the State has positive obligations to provide children (and adults) with the resources, experiences, and opportunities that make an important contribution to their ability to choose and instantiate their values.\textsuperscript{82}

In addition, my approach reveals why, perhaps paradoxically, moral-rights holders have an autonomy interest in controlling when and how they die—viz., because the timing and method of a person's death can either increase or decrease the integrity of his or her life. On the other hand, my approach suggests as well the various concerns that may legitimate a liberal, rights-based State's restricting an individual's ability to control when and how he dies or intervening in a way that is designed to increase the probability that a person's choice to die was well-informed and, in the appropriate sense, his own.\textsuperscript{83}

Obviously, the foregoing list is very partial and the foregoing discussions, extremely preliminary. I have included them not to convince you of the correctness of my general jurisprudential position or the specific conclusions it generates but to give you some sense of the way in which my approach structures moral-rights and legal-rights analyses.

\textit{D. Revealing the Erroneous Character of Particular Legal Doctrines and Judicial and Academic Arguments}

I have already noted that my approach reveals that the State Action Doctrine is mistaken as a matter of law. In fact, that doctrine is

\textsuperscript{80} For a detailed analysis of the liberal approach to abortion, see \textit{id.} at 344-72. For a detailed critique of the State Action Doctrine, which asserts that the Fourteenth Amendment does not impose any positive duties on the states, see \textit{id.} at 221-24. See also H. Jefferson Powell, \textit{The Lawfulness of Romer v. Evans}, 77 N.C. L. REV. 241, 243-49 (1998), confirming my argument by citations to \textit{Marbury v. Madison}, Blackstone, early Fourteenth Amendment Supreme Court cases, and the legislative history of the drafting and adoption of the Fourteenth Amendment.

\textsuperscript{81} \textit{See MATTERS OF PRINCIPLE, supra note 1, at 292-96 and 317-21 respectively for a more general analysis of the implications of liberalism for parenting rights and the adequacy of the case-law on these issues.}

\textsuperscript{82} \textit{See id.} at 285-96.

\textsuperscript{83} For a detailed analysis of the right to determine when and how to die, see \textit{id.} at 324-44.
disfavored by textual, historical, structural, and much precedential argument as well as by moral argument. My approach also reveals the incorrectness of the Supreme Court's general doctrinal approach to liberty and equal protection issues—the so-called three-tiered scrutiny approach. In brief, this approach is incorrect because it

(1) trichotomizes various parameters that actually vary continuously in a situation in which no bright-line justification can be given for doing so (the factors are the suspectness of the classification, the importance of the liberty interest that is disserved, the importance of the goal the State is pursuing, the connection between the State choice and its securing the goal whose pursuit allegedly justicizes it);

(2) ignores the extent to which the choice under review disserves the liberty interests of those whose liberty it restricts, harms the members of the class whose treatment is suspect, or furthers the goal whose pursuit allegedly justicizes it; and, most fundamentally,

(3) fails to lead the courts to consider appropriately the various reasons why the State choices under review may have been disrespectful or insufficiently concerned with the interest that the moral-rights holders it harms have in choosing and instantiating their values.

My analysis also has implications for positions others have taken on the appropriate way to approach various specific issues. For ex-

84. The name of this doctrine is somewhat misleading in that it implies that the carefulness of the Court's scrutiny rather than the strictness of its test of constitutionality is varying across the categories of cases in question. See id. at 265. In fact, what does vary across the categories of cases in question is an unfortunate mixture of "the test of constitutionality" and the conclusion about the appropriate degree of deference the Court should give to the decision-makers whose choice it is reviewing. See id. at 210-18, 224-27, 297-98.

85. In his contribution to this symposium—Constitutional Legitimacy, the Principle of Free Speech, and the Politics of Identity, 74 CHI.-KENT L. REV. 779 (1999), David A.J. Richards adopts a position on legitimate legal argument in our culture that is similar to my own and examines its implications for a variety of free-speech constitutional-law issues in the United States. Richards' jurisprudential position resembles mine in that he believes that our basic constitutional commitment is to respecting the right of individuals to make decisions of conscience for themselves. His article examines the implications for the internally-right answer (my words, not his) to various free-speech constitutional-law issues of this commitment to respecting each person's "moral independence," "liberty of conscience," and "inalienable human right[] reasonably to exercise [his] own moral powers," see id. at 794-96. Richards concludes that even subversive advocacy and group libel that does not entail the communication of knowingly false statements may be restricted only to prevent an "imminent, nonrebuttable, and very grave secular harm." Id. at 798. In addition, Richards argues that our commitment to valuing "the critical discussion and rebuttal central to the conscientious formation, revision, and evaluation of values," id. at 801, has various other positive and negative constitutional-law implications. Positively, it implies
that defamation of individuals that does not involve knowing, false communications, obscene materials, and some types of advertising, id. at 800, are entitled to more protection than could be provided by utilitarian, perfectionist-consequentialist, or process-democracy values. Negatively, it implies that we are not constitutionally obligated to protect subliminal advertising, knowingly false statements of fact (fraud or knowing or reckless defamation of individuals), or statements of true fact that "do not serve ... independent conscientious expression and rebuttal about critical values." Id. at 802. Richards goes on to note that, in his judgment, the constitutionality of a group-libel law that was limited to making a "knowingly false statement of facts about groups" "would be a closer case." Id. at 805 n.78. Although Richards is concerned that such libels might create or entrench the kinds of "dehumanizing stereotypes" that play an important role in the "structural injustice" that he believes has pervaded American history, see id. at 783, he believes that the appropriate way for the State to respond to this problem is to adopt a variety of educational, antidiscrimination, and affirmative-action programs to deter the formation and practice of prejudice and to help its targets to overcome the consequences of discrimination.

I have four points to make about Richards' general jurisprudential position and specific free-speech constitutional-law conclusions. First, although Richards' positions on the basic moral commitment of our culture and its implications for legitimate (and valid) legal argument are similar to my own, my free-speech constitutional-law analyses would take into consideration the role that free speech can play in helping individuals instantiate their values as well as the role it can play in helping individuals to choose their values and the society to make political choices. This wider conception of our free-speech commitments might affect the protected status of a variety of scientific and artistic communications. I should add that Richards may well consider this suggestion to be a friendly amendment to his position.

Second, my analysis provides a legitimating account of one feature of extant free-speech doctrine with which Richards agrees—a restrictive "clear and present danger test" for the constitutionality of "abridgments" of free speech that may prevent various social harms. In particular, my own analysis of the illegitimacy of certain types of prudential argument suggests why a severe constraint of this kind on government's restricting free speech may be required by our moral commitments. In my judgment, a rights-based State has an obligation to take positive steps to protect the moral rights of those for whom it is responsible, and this obligation implies that such a State cannot usually justicize denying somebody what would otherwise be his rights by claiming that his exercising those rights would cause others to commit moral-rights violations. In almost all cases, the proper response of a rights-based State to the possibility that an otherwise permissible act might cause others to commit rights-violations is to prevent these violations. Indeed, when the violations are too imminent to be prevented and the rights-related interests that they would destroy are weightier than the rights-related interest of the speaker and his audience, a rights-based State that has improperly allowed matters to come to this pass may be obligated to compensate individuals whose choices it restricts for this reason for the loss they sustained on that account.

Third, my analysis—which implies that both our state governments and our central government have an affirmative constitutional duty to protect the moral rights of those for whom they are responsible—opens up the possibility that this duty constitutionally obligates our governments to take many of the steps that Richards wants them to take to prevent the development and practice of prejudice and to help its targets overcome its consequences.

Fourth and finally, although I agree with most of Richards' conclusions about the protected and unprotected character of different kinds of speech, I am more inclined than he to conclude that it would be morally legitimate and hence constitutional for a liberal, rights-based State to criminalize group libel when the speaker knew that the factual allegations he was communicating were false or, perhaps, showed reckless disregard for the truth. "Group libel" laws are normally defined to include criminal statutes that prohibit statements that tend to bring a group into disrepute, regardless of whether the factual allegations they contain are true or whether the communicator has exercised due care in researching and expressing them. I concede that—from a liberal perspective—group libel laws that condemn all such statements are illegitimate. Adequately-researched and carefully-expressed statements about the behaviors of the members of some group must be protected because they play an important role in both the
ample, my approach discredits the claim of many analysts that right-to-die cases involve a trade-off between "autonomy" and "the sanctity of human life." Thus, my approach implies that because, in a liberal, rights-based society, human life is made sacred by the capacity of normal humans to exercise autonomy (to lead lives of moral integrity), the trade-off account is unsatisfactory in that the trade-off on which it suggests one should focus—between protecting the sanctity of human life and protecting autonomy—does not exist. I should add that my approach would reveal the inadequacy of the trade-off account even if the relevant trade-off did exist because it would make apparent the failure of trade-off proponents adequately to operationalize the concept of autonomy—e.g., to provide an analysis that is equivalent to my claim that this concept relates to making choices that involve becoming and remaining an individual of moral integrity.

My jurisprudential position has implications as well for some more specific conclusions others have reached about particular right-to-die-related issues. For example, my analysis of our society's moral identity calls into question Mr. Justice Scalia's claim that the decision made by a guardian ad litem to allow a "person" in an irreversible vegetative state to die amounts to a decision to allow that person speaker's and his audience's discovering what they value and achieving their legitimate goal of convincing others to adopt their values. But just as knowing or reckless defamation of individuals does not merit protection (as Richards admits, see id. at 802), knowing or reckless defamation of groups has no intrinsic merit.

Richards admits that a group libel law that was limited to making a "knowingly false statement of facts about groups" "would be a closer case," See id. at 805 n.78. In my judgment, the only justification for holding such a law unconstitutional would be the argument that such a law's chilling effect would cause it to deserve rights-related interests on balance. Although I find this contention plausible in relation to a group-libel statute that criminalized making "inadequately researched" defamatory statements about groups, I doubt that this type of argument can justify holding unconstitutional a statute that criminalizes the knowing communication of false, defamatory statements about groups. In fact, my doubts extend to statutes that criminalize defamatory statements that show a reckless disregard for the truth In part, my skepticism reflects the difficulty of detecting or redressing the rights-violations to which such communications may lead as well as the difficulty of overcoming the tendency of such statements to lead their audience and others to disfavor those the statements defame when making decisions on benefits or opportunities to which the latter are not positively entitled. I am not persuaded by the argument Richards makes to distinguish knowing, false defamatory statements of facts about groups from knowing, false defamatory statements about individuals. See id. I suspect that Richards underestimates the harm that such statements can do to members of defamed groups and overestimates the ability of many such groups to protect themselves by engaging in rebuttal.

86. See RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 179-218 (1993). For a detailed analysis of the liberal approach to right-to-die issues, see MATTERS OF PRINCIPLE, supra note 1, at 324-44.

to commit suicide. In particular, my position implies that this suicide characterization is incorrect because, from a liberal perspective, the person in question died on the night that she entered an irreversible vegetative state—the night that she lost the neurological prerequisites to be a person of moral integrity. According to my position, then, the question at issue in the relevant case was not whether the relevant accident victim had a right to commit suicide but rather whether anyone had a constitutional right that what was left of the body that used to belong to the person who had died in the relevant accident be put to death or allowed to die in various circumstances.

Finally, my account of legitimate legal argument in our culture delegitimates proposals to conceal the difficulty of hard moral choices in which at least one moral value must be sacrificed by shifting among solutions that favor first one "value," then another. In particular, my account delegitimates this approach by rejecting its proponents' claim that in these cases choices must be made among incommensurable values and by insisting that, even if this description of the situation were accurate, moral integrity requires choosers to face up to the value-choices they confront. Although, in our culture, moral-ought questions may involve incommensurable values, moral-rights questions do not, and individuals of moral integrity must reformulate or choose among cherished personal ultimate values when, on their original definition, they conflict (must do the hard work of establishing a reflective equilibrium between their value-convictions and choices).

CONCLUSION

The moral identity of the United States is defined by its standard for living not by its standard of living. Americans are committed to respecting lives of moral integrity and those who have the potential to lead them. The moral identity of our country is currently threatened by a kind of moral skepticism and subjectivism that both reflects and encourages the view that there are no internally-right answers to moral-rights questions. This view has in turn led many academic lawyers and judges (1) to reject the claim that legal-rights analysis incorporates moral-rights analysis, (2) to conclude that individuals have few moral-rights-related legal rights against the State, and (3) to con-

88. See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 4-10 (1980).
tend either that legal interpretation is an arcane activity that is un-
connected to moral analysis or that legal interpretation is inevitably
political or subjective.

This article rejects all these positions. It argues that in our cul-
ture:
(1) moral-rights analysis and moral-ought analysis are distinct;
(2) moral-rights conclusions are derived from a liberal basic moral
obligation to show appropriate, equal respect for all creatures
that have the potential to lead lives of moral integrity and appro-
priate, equal concern for their actualizing that potential;
(3) there are internally-right answers to all moral-rights questions;
(4) moral-rights conclusions trump moral-ought conclusions when
the two conflict;
(5) to be morally legitimate, our legal practice must be consistent
with our moral-rights commitments;
(6) "arguments of moral principle" dominate legitimate legal argu-
ment; and
(7) in part because of this dominance, there are internally-right an-
wers to all legal-rights questions—i.e., either legitimate legal ar-
ument or illegitimate textual argument based on clear, morally-
illegitimate constitutional provisions whose concrete implications
were recognized by their ratifiers yields internally-right answers
to all legal-rights questions.

Admittedly, there are a number of possible grounds for rejecting
my position. In particular, even if one accepts the kind of "conven-
tionalist" approach I take to determining a given culture's moral
commitments,\textsuperscript{89} one could object that
(1) my distinction between moral-rights discourse and moral-ought
discourse is not intellectually coherent;
(2) the lexical priority of moral-rights conclusions over moral-ought
conclusions must be but cannot be justified or justicized (demo-
strated to be just);
(3) members of our culture do not draw the strict distinction be-
tween moral-rights discourse and moral-ought discourse I have

\textsuperscript{89} For an argument that the "conventionalist" approach I adopt cannot justify the juris-
prudential conclusions I reach because it cannot justify my universal premise that, to be morally
legitimate, the use of a legal argument must be consistent with the moral commitments of the
society in question, see Applbaum, supra note 1, at 616, 620-23. For my reply to Applbaum, see
Postscript C infra.
drawn—e.g., empirically, in our culture, moral-rights claims are simply strong or fervently-supported moral-ought claims;

(4) my protocol for identifying the moral norms on which members of our culture base their moral-rights discourse is incorrect or contains critical gaps that cannot be filled in non-arbitrarily;

(5) members of our culture do not base their moral-rights arguments on the liberal “appropriate, equal respect and concern” norm articulated above—e.g., Americans base their moral-rights arguments on some other egalitarian or libertarian norm (or, in our culture, moral-rights arguments are based on too diverse a set of norms for any one of them to be deemed fundamental);

(6) to be morally legitimate, legal argument need not be consistent with the moral commitments of the society in which it takes place (in particular, legal practice is autonomous in the sense of being self-legitimating) so that even if the “arguments of moral principle” that a given, rights-based society is committed to making and accepting in its moral-rights discourse could be identified, such arguments would not dominate legitimate legal argument in that culture; and

(7) even if arguments of moral principle do dominate morally-legitimate legal argument in our culture, there will not be internally-right answers to one or more legal-rights questions in our society.

I hope to have persuaded you that my jurisprudential conclusions are correct. But even if readers remain unconvinced, this article will have generated important benefits if—by increasing the extent to which moral principles, moral rights, legal argument, and legal rights are taken seriously—it counters recent trends in legal pedagogy, academic scholarship, judicial decision-making, and judicial opinion-writing that undercut our rights both directly by leading to incorrect legal conclusions and, more insidiously, by undermining our culture’s moral identity.
POSTSCRIPT A

THE REASONS WHY, ACCORDING TO PROFESSOR WEST,
DWORKIN'S ANTIPOSITIVISM IS NOT TAKEN MORE SERIOUSLY: A
CRITIQUE AND EXAMINATION OF THEIR APPLICABILITY TO MY
POSITION

Professor Robin West lists and discusses five reasons why
Dworkin's antipositivism is not taken more seriously. The first is that
many critics reject Dworkin's related claim that moral argument plays
a substantial role in contemporary legal-rights discourse. West ap-
ppears to agree with Dworkin's critics that he vastly exaggerates the
role that moral argument plays in legal-rights discourse. However, she
claims that this empirical error is irrelevant to the persuasiveness of
Dworkin's antipositivism. On West's interpretation, Dworkin's an-
tipositivism is a prescriptive rather than a descriptive claim and "the
strength of the claim that we ought to construct legal argument in a
nonpositivist way is surely unaffected by the [correctness of the] claim
that we presently do so."90

Unfortunately, I believe that Dworkin (and I) cannot escape this
empirical attack quite so easily. The reason is that both of us are ar-
guing not that judges and other legal actors ought to adopt a non-
positivist approach to legal argument but that they are obligated to do
so by our society's moral commitments, which can be inferred from its
relevant prescriptive moral conduct. Hence, the argument that we are
making would be disfavored by proof that moral-rights discourse
played a much smaller role in legal-rights discourse than Dworkin's
and my positions suggest would be appropriate.

Nevertheless, evidence that moral-rights talk plays a smaller role
in legal-rights talk than Dworkin and I think appropriate is less dam-
aging to Dworkin's and a fortiori to my position than the positivists
seem to suppose. In part, this reflects the fact that legal-argument-
related behavior comprises a small percentage of the behaviors that at
least the early Dworkin's and my accounts of legitimate legal argu-
ment are supposed to fit: if the relevant factual domain is all prescrip-

90. West, supra note 2, at 507.
tive moral behavior, non-fitting legal-rights discourse causes less of a problem. (In my judgment, this defense applies less forcefully to the later Dworkin of *Law's Empire* than to the earlier Dworkin of *Taking Rights Seriously* because the later book's analysis of societal integrity seems to assume that a society's commitments must be inferred primarily or exclusively from the official acts of State officials.\(^9\)) In part, legal-rights discourse's not fitting our accounts would (if true) be less damaging than many suppose to Dworkin's and my antipositivist jurisprudential conclusions because this feature of contemporary legal-rights discourse is explicable. Ever since the New Deal gave *Lochner* a bad name, lawyers have hesitated to make explicit reference to moral values in their legal arguments. Obviously, antipositivists like me would have to argue that lawyers and others have drawn the wrong inference from *Lochner* and its progeny: the Court's error in *Lochner* was not its conclusion that the Constitution constitutionalizes a societal value-commitment but rather its conclusion that the value the Constitution embodies is *laissez faire* libertarianism rather than liberalism in my sense.

I hasten to add that, in my judgment, contemporary legal-rights discourse incorporates far more moral-rights discourse than these critics of Dworkin seem to suppose. Thus, the tort-law concepts of negligence, contributory negligence, and comparative negligence are all moral concepts: at least if the Hand formula for negligence is revised to take the effect of avoidance on victims' risk costs into account, the negligence concept it would operationalize would be consistent with the claim that tort law enforces the liberal moral obligation to treat the equivalent-dollar effects of our choices on others who are not our related contractual partners as if they were effects on us. (The relevant duty relates to monetized effects rather than units of utility because, individually, we are not morally responsible for wealth and taste differences that affect the marginal utility of money to others; it is defined in terms of private costs and benefits rather than allocative costs and benefits because it is usually not reasonable to expect the relevant actors to understand the way in which Pareto imperfections distort the private figures in question.) I also think that most contract-law and commercial-law doctrines (including those that are operationalized by trade practice) reflect our liberal

---

\(^9\) For a discussion of the shift in Dworkin's position, see *Matters of Principle*, *supra* note 1, at 100-06.
rights-commitments. I am reminded of the first law-school class I attended as a student. My contracts professor, Fritz Kessler, told us: “You will learn a lot of doctrine here. But if the result you reach by manipulating the doctrine strikes you as unfair, trust your intuitive sense of fairness. You have probably misunderstood the doctrine, which is there to structure your consideration of the relevant moral issues.” In my judgment, all equity doctrines and many of the legal arguments made about fundamental-fairness constitutional-rights questions are essentially moral-rights arguments, too. Scalia notwithstanding, moral-rights considerations are often cited explicitly when interpreting vague or open-textured constitutional fundamental-fairness provisions and are clearly at work as well in many lawyers’ and judges’ handling of structural arguments, choice of the breadth of relevant historical investigations, determination of the weight to be given to precedent, etc. 92

Hence, although I admit that any non-fits between legal-rights discourse and Dworkin’s and my antipositivism do count against our positions, I do not think that such non-fits are either so damaging or so prevalent as some positivists seem to suppose.

The second reason West lists for critics’ rejecting Dworkin’s antipositivism relates to Dworkin’s understanding of the rights that people have against the State. According to West, Dworkin believes that in our culture individual rights are “essentially negative claims against certain forms of state action” 93—a belief that conflicts with the “view that the highest function of law is 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.” 94 In essence, these critics of Dworkin’s position do not disagree with Dworkin’s rejection of positivism: they think that his antipositivism does not go far enough.

West seems to think that Dworkin’s alleged focus on negative claim-rights is a corollary of his conclusion that ours is a liberal, rights-based society. If that were true, I would be no more able than Dworkin to eliminate this barrier to persuading some others of the soundness of our position. In fact, even if (as I doubt) these critics

92. For a detailed discussion of the way in which “arguments of principle” affect the legitimate way to use other modes of legal argument, see id. at 61-74.
93. West, supra note 2, at 509.
94. Id.
have correctly described Dworkin's position on the rights that members of our culture have against our governments, their conclusions would not apply to my position. On my understanding, a liberal State has many positive obligations to the moral-rights holders for whom it is responsible—duties to educate its citizens, residents, and visitors, to reduce the probability that they will violate each other's rights, to punish those who do violate rights, to secure compensation for or compensate those who have been wronged, to secure the safety of those for whom it is responsible, to ensure that they have the material resources necessary for self-respect, to provide them with the education necessary for taking their lives morally seriously, to secure for them privacy and the opportunity to engage in intimate relationships that lead to moral self-discovery, to enable them to exercise those liberties that lead to self-discovery or enable them to instantiate their values, etc.

The antipositivism to which I think our liberal, rights-based culture is committed not only does not preclude me from but requires me to reach conclusions about individual rights that should satisfy most of those who believe in positive rights against the State. However, it is not clear that my position will be acceptable to communitarians.

Some communitarians no doubt believe that ours is a communitarian rather than a liberal society. These individuals will also reach antipositivist conclusions, but the concrete implications of their antipositivism will be different from the implications of mine. The only way for me to persuade such communitarians that I am correct is to convince them

1. of the correctness of my protocols for determining whether a society is rights-based or goal-based and for identifying the moral principle on which a rights-based society is committed to grounding its rights discourse and
2. that the relevant data reveal that ours is a liberal, rights-based society.

Other communitarians will agree that ours is a liberal, rights-based culture. They acknowledge this reality but don't like it. Their values lead them to support communitarian over liberal, rights-based cultures—more particularly, the high value they place on community leads them to approve communities' establishing and enforcing conformity to a view of the first-order good. Dworkin and I may be able to persuade such communitarians that we have correctly analyzed le-
legitimate legal argument in our liberal, rights-based State, but this internal concession will not lead them to abandon their external objection to such a society and its internally-legitimate legal practices.

Of course, Dworkin and I could try to persuade such communitarians of the preferability of liberalism. We could point out for starters that liberalism is not wedded to the silly views that an individual’s values are not socially embodied or that humans are best analyzed as atomized creatures. We also could insist that many of the advantages of community could also be generated by liberal communities, which define themselves by their commitment to the second-order good of respecting all individuals’ right to make up their own minds about the first-order good. But that is not my project, nor is it Dworkin’s when he is doing jurisprudence rather than pure political philosophy.

According to West, the third reason why critics reject Dworkin’s antipositivism is that it does not fit the command of various legal-ethics codes that lawyers be zealous advocates of their clients’ interests or the actual practice of lawyers to this effect. According to some, if Dworkin (and I) are correct, lawyers should be zealous advocates of justice, not of their clients’ interests.95

I have two responses to this criticism. First, as a logical matter, the conclusion that the legal system should be evaluated by the extent to which it secures justice does not imply that all actors within the system must make only those arguments and professional choices that, taken by themselves, would be most likely to promote justice. Indeed, one of the (supposed) justifications for the ethics of zealous advocacy is that the attempts of two or more advocates to pursue their opposed clients’ interests zealously are more likely to lead to the discovery of legal truth (and hence justice) than any other conduct imaginable or securable. I am not convinced by this argument for zealous advocacy and would support a change in the relevant professional canons, increased efforts by judges to insure that lawyers act more as officers of the court, and a more active role for judges in general, but, logically, Dworkin’s and my antipositivism does not imply that we are obligated to require lawyers to be zealous advocates of justice.

Admittedly, the previous sentence does contain an admission that contemporary codes of lawyer ethics and lawyer and judge conduct cannot be reconciled with Dworkin’s and my conclusions about morally-legitimate legal practice. However, one should not think that

95. See id. at 501.
our positive law currently requires lawyers to engage in pure zealous advocacy. Lawyers are prohibited from doing many things (e.g., mis-citing cases, concealing clearly adverse precedent, manufacturing evidence, suborning perjury) that would benefit their clients. Still, I concede that some features of both the extant codes of ethics and of our wider adjudicative practice are non-fits that cut against Dworkin's and my moral characterizations of our society and related jurisprudential conclusions. However, these non-fits are certainly not decisive. For my account to be persuasive, it must fit all the relevant facts better than any alternative account and well enough to justify the conclusion that we are not a society with no moral commitments (or be associated with explications of non-fits that make it both adequately persuasive and more persuasive than any alternative). The "zealous advocacy" and adjudicative process non-fits are not sufficiently substantial to raise significant doubts in my mind on these accounts.

According to West, the fourth reason for some critics' finding Dworkin's antipositivism unattractive is their perception that it is best understood as rationalizing the status quo. In West's words: "Dworkin's antipositivism is widely regarded by at least some of his critics as having a conservative and even Burkean flavor that renders it unacceptable, at least in times of law's manifest imperfection."96 West goes on to question whether this attribution is justified. In her opinion, Dworkin could just as easily be read to be attempting "to enlist the legal profession . . . in the cause of achieving justice through law, in part through the hermeneutic practice of interpreting it as generously and justly as possible."97 According to West, the interpretation one gives Dworkin "is largely a matter of attitude, not logic"—more particularly, a matter of the attitude of the interpreter.98

In fact, I think that Dworkin is partly responsible for his readers' disagreement on this point. In the one direction, his use of a "best light" criterion for evaluating the candidacy of particular moral norms for the title "moral norm to which our society is committed" certainly favors a more activist if not revolutionary interpretation, as does his failure to accede to narrowly-defined social practices of discrimination against members of particular races, religions, or ethnicities.

96. Id. at 511.
97. Id.
98. Id.
against females, and against homosexuals. In the other direction, a more conservative interpretation is favored by the fact that his notion of societal integrity focuses on the official decisions of public officials and ignores the arguably-relevant moral-rights-claiming activities of individual members of the society acting in their non-political roles and by his apparent acceptance of the State Action Doctrine and related tendency to concentrate on negative as opposed to positive claim-rights.

Although the evidence is mixed, I believe that Dworkin should not be interpreted to be a “supporter of the status quo” if that concept is meant to refer to the actual practices of our society in more narrowly-defined spheres of conduct as opposed to the moral commitments our society has made. Dworkin is well aware that, in practice, our society has failed to live up to many of its commitments. And his use of a “best light” criterion suggests a willingness to push for expansions of our society’s more abstract moral commitments.

In any event, even if (contrary to my belief) Dworkin is more conservative than some of his critics find attractive, my position is probably less vulnerable than his to this kind of objection. Although I reject the use of a “best light” criterion to determine either the basic moral principle that we are committed to instantiating in our rights-discourse or the more concrete corollaries of that principle, I do emphasize the positive obligations of a liberal, rights-based State, obligations that our current governments are farther from fulfilling than they are their negative obligations. My antipositivism therefore certainly does not attempt to legitimate the status quo in a way that most advocates of social change would find objectionable. Of course, some opponents of the status quo are personally committed to non-liberal values (for example, equal-resource egalitarianism) that lead them to support policies that I do not think our society’s liberal commitments obligate us to adopt. However, if I am correct about our commitments, their objection to my position is an external objection, which does not presuppose my having mischaracterized our society’s moral character or that character’s implications for legitimate legal argument. Although I could try to persuade such non-liberals of the ultimate superiority of a liberal, rights-based society, that task does not belong to the agenda I have set for myself.

For a discussion of my reasons for rejecting this doctrine, see MATTERS OF PRINCIPLE, supra note 1, at 222-24.
The fifth and final reason that West claims leads many members of the legal profession to reject Dworkin's antipositivism is their belief in moral relativism.100 "Moral relativism" could entail no more than the view that (in my terms) there is no "objective" way to demonstrate the superiority of any alleged norm that deserves to be called a "personal ultimate value" over its alternatives. In that sense, moral relativism does not undercut the cases for antipositivism that Dworkin and I propound. But many who consider themselves to be moral relativists understand that expression to cover a more expansive view that combines the position just articulated with a conclusion that, as a matter of logic, there can be only one kind of prescriptive moral discourse—what I term "moral-ought discourse." This rejection of the possibility of the distinct form of prescriptive moral discourse I term "moral-rights discourse" does undercut the antipositivist argument I have made as well as the antipositivist argument that I always thought the Dworkin of Taking Rights Seriously was making. Perhaps one could generate a somewhat different argument for antipositivism in the name of popular sovereignty in a culture in which there was a dominant view of the first-order good, but it would not be the argument that I and (I believe) Dworkin are making.

My only response to this objection is to repeat my formal analysis of the distinction between moral-rights discourse and moral-ought discourse (to show that the relevant distinction is coherent) and to set forth the empirical observations that lead me to conclude that members of our culture do engage in these two types of prescriptive moral discourse. If my distinction is incoherent or inapplicable to our cultural practices, my argument that legitimate legal argument in our culture is antipositivist must fail.

I can add one further reason why some have rejected Dworkin's antipositivism: his use of a "best light" criterion to identify the moral norms to which our society is committed. As I have said, the use of a "best light" criterion takes you outside of practice, even broadly understood, and thereby obliterates the distinction between legal argument (which is societally embedded) and pure political philosophy.

100. See West, supra note 2, at 511.
101. Some moral relativists seem to think that personal-ultimate-value commitments are no different from preferences for the taste of vanilla ice cream, preferences for which no good reason can be given. I am not a moral relativist in that extreme sense though I have yet to be convinced that one can "prove" the objective superiority of one personal ultimate value over another.
(which is not). Some members of the legal community may sense this fact and reject Dworkin's position on that account. Admittedly, this explanation for the reluctance of some to accept Dworkin's argument for antipositivism may have about it too much of the smell of the lamp and may be disqualifyingly self-serving to boot: because I have rejected the use of the "best light" criterion, this objection to Dworkin's position does not apply to mine.

Professor West's account of the various reasons for others' not "taking Dworkin's antipositivism seriously"—reasons that, in her view, do not "constitute sound arguments against" his position—have provided me with an opportunity to explore the critical elements in Dworkin's and my positions as well as the essential character of various types of objections that may be made to them. For this and much else, I am indebted to her for the contribution she makes to Taking Legal Argument Seriously.

102. West, supra note 2, at 512.
POSTSCRIPT B
PROFESSOR D'AMATO'S CRITIQUE OF "LEGAL THEORY": A REPLY

In his contribution to this symposium, Professor Anthony D'Amato acknowledges that, for pragmatic-craftsmanship reasons, lawyers need to know the "legal theory" to which the individual judges before whom they are arguing subscribe. However, D'Amato denies that legal theory can improve judicial legal-rights decisions, reveal the reasoning that accounts for the legal-rights decisions that courts make, or generate unique, internally-right answers to legal-rights questions. Obviously, if D'Amato is right, the claims I make for my jurisprudential position (for my "legal theory") must be wrong. This postscript explains why I do not think that the four arguments that Professor D'Amato cites to support one or more of his contentions undermine my project.

Stanley Fish provides the grounding of the first argument D'Amato uses to support his position. According to D'Amato, legal theory cannot yield superior answers to legal-rights questions because, as Fish says, "We derive theory from practice; therefore, theory cannot constrain (or govern) the practice from which it is derived." This argument is contestable or wrong for three reasons. First, if, as some scholars such as Arthur Applbaum believe, legal theory should not be conventionalist in the way in which Fish (practice) and I (fit) suppose—if, as such scholars claim, there is an "objectively-correct" moral norm (not derived from practice) to which morally-legitimate legal practice must be properly connected, then legal theory will be able to "constrain practice" in the sense in which D'Amato is using that expression because legal theory will not be derived from practice but from the foundationalist argument that reveals the "universally correct" moral norm. Second, if, as some "conventionalists" like me believe, legal practice is not self-legitimating—in particular, if a legal practice will be morally legitimate only if it is

103. See D'Amato, supra note 5. In Professor D'Amato's usage, "legal theory" seems to stand for "an account of valid legal argument in our culture."
104. Id. at 517-18.
105. See Applbaum, supra note 1.
106. See, e.g., id. at 615.
consistent with the relevant society's moral commitments, which must be inferred from the totality of its members' prescriptive moral behaviors and beliefs (of which its members' legal conduct and beliefs from only a small part)—and if most of the legal practices in a society of moral integrity will be valid only if they are morally legitimate, a society's moral commitments—and hence "legal theory"—will be able to constrain legal practice in D'Amato's sense of "constrain." Third, if, as some conventionalists such as Philip Bobbitt believe, some parts of legal practice are self-legitimating—viz., if all consistent parts of legal practice and all dominant parts of an inconsistent legal practice or all parts of an inconsistent legal practice that some requisite number or percentage of practitioners follow are legitimate, legal theory (more specifically, the dominant practice or the set of practices that are followed by the requisite number or percentage of law-role players) will "constrain" legitimate or valid legal practice. Thus, the Fish argument with which D'Amato begins would demonstrate that legal theory cannot "constrain practice" only if conventionalism were correct, legal practice were self-legitimating, and legal practice were internally consistent or contained only strains that were sufficiently common to be legitimate on that account. Because I doubt that these three conditions are fulfilled, I do not think that the Fish argument justifies D'Amato's conclusions or undermines my project.

The second "argument" D'Amato cites is relevant to his conclusion that "legal theory" cannot yield unique, internally-rights answers to legal-rights questions, superior answers to legal-rights questions, or persuasive accounts of the argumentational basis of any court's legal-rights conclusion. This "argument" is really just an empirical claim: all legal theories can be used to "justify or explain" both the actual result in any case and its opposite. I simply deny this empirical proposition. I have no doubt that any legal theory that is plausible will imply that, in many cases, individual, plausible, morally-legitimate or legally-valid arguments will be available to both sides of a controversy.

107. For a discussion of the relationship between the moral legitimacy and validity of a legal practice, see supra note 1 and supra text accompanying note 9. See also infra Postscript C at 493-95.

108. D'Amato, supra note 5, at 519. There is some evidence that many law professors agree with this empirical claim. Thus, one of my students at Texas (David R. Cooper) recently made the following statements about his legal education in a final paper written in a course I teach on Legal Scholarship: "We have learned ... [that] there is virtually no argument to which there is not an equal and equally viable counterargument." And again, we have learned that "while there is no such thing as a 'winner' argument, there can always be a winner advocate."
However, this admission does not imply that, in all cases or indeed even in most or a substantial percentage of cases, any plausible legal theory could succeed in justifying any decision. In my judgment, in the vast majority of cases, the correct application of any plausible legal theory will result in one side's winning and the other's losing. In other words, I believe that plausible theories will not generally (1) contain "essentially contestable" concepts whose arbitrary definition is critical to their implications for the correct resolution of most cases or (2) make critical factual issues whose resolution is "essentially contestable." But perhaps I am exaggerating the ambitiousness of D'Amato's second "argument." Perhaps he is making the following more modest point: even if no critical feature of any legal theory and no critical factual finding is "essentially contestable," some critical feature or critical factual finding will always or usually be sufficiently contestable or socially contested to give judges enough maneuvering room to enable them to get away with any conclusion they wish to reach. I also disagree with this, more modest claim, but, even if I did not, I would not find it jurisprudentially problematic or even relevant—i.e., it would not call into question my "right-answer" claim.

D'Amato's third argument has three premises: (1) different judges subscribe to different legal theories, (2) some legal-rights decisions are made by multi-member courts, and (3) in part because different judges subscribe to different legal theories, such multi-member courts sometimes are unable to issue a majority opinion. I agree with D'Amato that, in such cases, no argument will capture "the court's" reasoning (because in such cases no majority supports any ratio decidendi), but once again that fact has little or no bearing on my jurisprudential claims—e.g., on whether correct legal theory can generate internally-right answers to the legal-rights questions on which the relevant cases turn.

D'Amato credits Einstein with the fourth argument that D'Amato thinks prevents legal theory from "constraining practice"—i.e., from generating internally-right answers to legal-rights questions: "[O]ur theories of the world determine the way we see the world." 110 I

109. Indeed, because I think that the internally-right answers to many moral-rights and legal-rights questions are highly contestable, I would think that the fact that a moral or legal theory yields clear right answers to all questions to which it relates would count against it rather than for it.

110. See D'Amato, supra note 5, at 519-22.

111. Id. at 524.
have two responses to this observation. First, Einstein's point may not prevent "foundationalist" legal theory from constraining practice because it may not affect either (1) the ability of foundationalists to derive "objectively correct" moral norms from the very nature of the concept "moral norm" or from the exercise of "pure reason" or (2) the ability of foundationalists to demonstrate that one can derive a "correct" legal theory from a correct conclusion about the identity of the true moral norm. Second, although Einstein's point clearly is troublesome to conventionalists such as me, I do not find it dispositive. Admittedly, because conventionalists purport to be basing their conclusions about the moral norm to which any given society is committed (the moral norm that I claim dominates morally-legitimate legal argument in that society and the "overwhelming majority" of valid legal arguments in any society of moral integrity) on observations of the society's members' prescriptive moral conduct and (worse yet) on observations of their considered beliefs, Einstein's skepticism about the possibility of carrying out the relevant "anthropological" research objectively does call the conventionalist approach into question. However, I believe that my sensitivity to this problem and the detailed protocol I developed for the relevant anthropological inquiry will enable me to execute the relevant empirical investigation sufficiently objectively for my approach to be acceptable.

I therefore do not believe that any of the arguments Professor D'Amato discusses in his contribution to this symposium demonstrate that my "legal theorizing" cannot generate the benefits that Part III of this article claims it could yield.

112. Admittedly, Einstein's point might create difficulties for foundationalists if our perception of the concept "moral norm" was affected by our personal "theory of the world."

113. See MATTERS OF PRINCIPLE, supra note 1, at 23-34.
Postscript C
Defending My “Conventionalist” Jurisprudence: A Reply to Professor Applbaum

Professor Arthur Applbaum’s stimulating contribution to this symposium argues that the “conventionalist” approach I take to moral analysis and jurisprudence cannot justify my conclusions. Applbaum also makes some additional criticisms of the particular “conventionalist” argument I make in Matters of Principle. After explaining why it may be misleading to label my argument “conventionalist,” this Postscript responds to Applbaum’s three criticisms of Matters of Principle.

A. The Possibly Misleading Character of the Label “Conventionalist”

In Matters of Principle, I did not use the label “conventionalist” to describe my approach to moral and jurisprudential analysis because I feared that, in four respects, the “conventionalist” label might be misleading. First, the label “conventionalist” may mislead some to think that I equate “the prescriptive moral beliefs of members of any culture” with the responses those individuals would give to “appropriate” questions that might be posed in a Gallup-type poll. In fact, however, the beliefs that my conclusions are supposed to fit are the considered beliefs of members of the relevant culture, and the required empirical inquiry would therefore resemble a series of Socratic dialogues more than a Gallup poll.

Second, the label “conventionalist” may also mislead some into ignoring the fact that, on my understanding, the concept of a “moral

114. Applbaum, supra note 1.
115. I acknowledge that this feature of my “methodology” gives rise to an observer-observed problem—that my attempts to discover the “considered beliefs” of members of any culture might affect their reported beliefs. As I indicate in my reply to Professor D’Amato, I realize as well that my methodology also is problematic for a somewhat-related reason: the tendency for an observer to interpret the beliefs and conduct of the observed to be what the observer wants them to be. I have two responses to these problems: first, that I have done my best to combat them (for example, by establishing a detailed protocol for the relevant anthropological inquiry) and believe that they can be overcome sufficiently well to render “conventionalism” acceptable and, second, that the latter of the two problems listed above is at least as much a problem for legal positivists as for legal nonpositivists who are conventionalists.
norm” or the concept of “operating from a moral position” is not “subjective”—that “moral norms” and “moral positions” have by their very nature certain essential formal and substantive characteristics. The formal characteristics are such things as “coherence” and “consistency.” I can best communicate something about the defining substantive attributes of moral norms through example. As G.E.M. Anscombe has indicated, even if one could identify a “pin people” who considered themselves to be committed to the purported moral value of carrying a pin around in one’s pocket, one would have to conclude that this alleged “value” was not a moral value but a preference. In a similar vein, I argue in Matters of Principle that certain libertarian distributional “moral values” do not deserve to be called even “personal ultimate values” because the account of desert on which they are based does not establish a sufficient nexus between an individual’s deserts and choices he made for which he can be held morally responsible and that certain supposed justifications for restricting liberty properly so-called are not justifications at all.

Third, and relatedly, the label “conventionalist” may be misleading to some because it may suggest to them that each of a culture’s consensus, concrete moral-rights conclusions is rendered morally legitimate by virtue of the very fact that it is a consensus moral-rights conclusion. For three reasons, I believe no such thing:

(1) consensus moral-rights conclusions may not be “considered” conclusions;

(2) consensus moral-rights conclusion may be disqualified by their alleged justification—e.g., a particular group’s conclusion that it is morally permissible to disadvantage homosexuals in general may be disqualified by the fact that its members claim that it is justified by homosexuality’s disgusting them, by the (insufficiently-grounded and incorrect) factual allegation that all homosexuals commit sexual assaults on unwilling sex partners, or by the alleged fact that homosexuals are not “real human beings” (not moral-rights holders); and

(3) even if “considered” and not obviously disqualified, consensus conclusions on particular moral-rights issues may be inconsistent with the moral principles that a broad-gauged analysis demonstrates are binding on the members of the culture in question.

116. See Matters of Principle, supra note 1, at 52.
117. See id. at 280-85.
Fourth, and again relatedly, the label "conventionalist" may mislead some into incorrectly assuming that I think that each subset of a society's prescriptive moral practices is self-legitimating—e.g., that a society's legal-rights practices need not be consistent with its moral-rights commitments. I reject this conclusion on the formal grounds of inconsistency: those who value morality must value moral integrity, and a society cannot have moral integrity if its legal practices do not overwhelmingly instantiate the moral norms on which it is committed to basing its evaluation of its members' moral conduct.

B. Professor Applbaum's Objections to "Conventionalist" Moral and Jurisprudential Analyses in General and to My Conventionalist Analysis in Particular: A Reply

1. The Objection That I Inadequately Specify Various Key Terms in My Argument

Applbaum claims that *Matters of Principle* does not adequately operationalize three concepts or sets of concepts that play an important role in the argument it makes. The first such concept is "the prescriptive moral beliefs of the members of a society,"\(^\text{118}\) which ideally my account of any society's moral commitments should perfectly fit. The first section of this Postscript indicates that the relevant set of beliefs and conduct contains all the considered prescriptive moral beliefs of all members of the society and all the prescriptive moral conduct in which they engage—that the "fit" analysis on which conventionalism relies does not focus separately on subsets of such beliefs and conduct but focuses instead on all of the relevant individuals' considered prescriptive moral beliefs and all of their prescriptive moral conduct.

Applbaum also indicates that I have not said enough about "which attributes are necessary for a purported moral value to be a moral value."\(^\text{119}\) Admittedly, partly because such a discussion is less relevant to the "conventionalist" analysis I executed and partly because I realize that the deficiencies of my philosophical training leave me inadequately prepared to make any contribution on this issue, I say relatively little about this issue either in *Matters of Principle* or here. However, both *Matters of Principle* and this article do manifest

\(^{118}\) See Applbaum, *supra* note 1, at 616-18.

\(^{119}\) *Id.* at 617.
my belief that the concept "moral value" is not "subjective," that certain purported "moral norms" do not merit that designation, and that some purported "moral positions" do not deserve that status. More specifically, I do recognize that some alleged moral norms may fail to have the attributes that something must have to be a "moral value" and that some alleged moral positions may be disqualified either for "substantive" reasons (related to the purported moral norms on which they are based) or for "formal reasons" such as "incoherence" or inconsistency."

Finally, Applbaum complains that I have neither adequately defined (legal) "validity," "moral legitimacy," or "moral rightness or justice" nor explained the relationship among them. For reasons I have already noted, I did not use the word "validity" or the expression "legal validity" in Matters of Principle. In this article, I do use this language. In my usage, a legal argument is "valid" if it affects the "internally-right" answer to a legal-rights question.

Both Matters of Principle and this article do implicitly define the concept of "moral legitimacy" through use. Thus, the claim that "[u]sing a particular type of argument to determine the content of existing law is morally legitimate in a given culture if and only if doing so is consistent with that culture's moral commitments" implicitly equates "moral legitimacy" with "consistency with the relevant culture's moral commitments." This usage is related to but somewhat different from Applbaum's, but it seems clear enough to me.

Applbaum also wants me to say more about my definition of "moral rightness or justice." In my usage, only those choices that affect someone's moral rights can be "just" or "unjust." More particularly, in my usage an act or decision that affects someone's moral rights is "just" if it is consistent with the moral-rights commitments of the rights-based society in question. I do not use the expression "moral rightness."

---

120. See supra text accompanying notes 116-17.  
121. See Applbaum, supra note 1, at 623.  
122. See supra note 1.  
123. See supra p. 417; see also MATTERS OF PRINCIPLE, supra note 1, at 12: "To be legitimate, an argument about the internal-to-law right answer to a legal-rights question must be consistent with our culture's moral commitments."  
124. According to Applbaum, "The concept of moral legitimacy, roughly, is morally justified authorship." Applbaum, supra note 1, at 622.  
125. I do use the expression "moral desirability, rights-considerations aside" to refer to the desirability of some choice from a specified personal-ultimate-value perspective.
Finally, three observations about the relationship between various pairs of these concepts. First, the correct use of morally-legitimate legal argument will, by definition, be "just" (though in a few instances—viz., when a rights-based State's attempt to enforce the moral right of a particular moral-rights holder will disserve moral-rights-related interests on balance for reasons that a rights-based State can legitimately take into consideration—the correct use of a morally-legitimate legal argument may generate the morally-legitimate conclusion that a moral-rights holder does not have a moral right to have his moral right be legally enforceable). Second, in a rights-based State whose constitution is perfectly consistent with its moral-rights commitments, all valid legal arguments will be morally legitimate, and the answer to any legal-rights question that is "internally correct" will be consistent with the relevant society's moral commitments (will also be morally legitimate and just). Third, because societies whose constitutions do not perfectly instantiate their moral commitments may still deserve to be called "societies of moral integrity" if the imperfections in question (or the morally-illegitimate legal-rights conclusions to which they lead) are not "too significant," legal arguments that focus on the text of morally-illegitimate constitutional provisions may be valid even though they are morally illegitimate, and the legal-rights conclusions such arguments favor may be "internally correct" even though they are morally illegitimate and unjust.

2. The Objection That Conventionalist Arguments Cannot Justify My Universal Definition of "Moral Legitimacy"

Applbaum's most important objection to my argument is that the kind of "conventionalist" approach I have taken to moral and jurisprudential analysis precludes me from justifying my universal premise that, to be morally legitimate, the use of a legal argument (or a legal-rights conclusion) must be consistent with the relevant society's moral commitments. Applbaum's argument to this effect has three premises:

(1) anthropologically, there is no reason why a given society whose members consider themselves to be bound by liberal rights when evaluating their own and each other's conduct cannot empirically subscribe to legal positivism.

(2) "the view that a moral right does not entail a moral duty to enact

126. See Applbaum, supra note 1, at 621.
a corresponding legal right is not incoherent,"127 and

(3) it is not inconsistent for someone who agrees that his society is a
rights-based society that is committed to basing its moral-rights conduct and discourse on a liberal moral norm to be a legal positivist.128

I agree with Applbaum’s anthropological claim: there is no reason why the type of society he hypothesizes and calls Razland could not exist. I also agree with the variant of his second premise that he actually needs to produce his conclusion—i.e., I agree that it is not “incoherent” for someone to take a liberal, rights-based position on morality and a positivist position on law.129 However, I disagree with Applbaum’s third premise: I do think that it is “inconsistent” for someone to admit that his culture commits its members to taking a liberal, rights-based approach to the prescriptive moral evaluation of each other’s conduct but does not commit them to taking the same approach to their State’s behavior. In other words, although I agree with Applbaum that one can take a number of “coherent” views on “the connection between [a society’s] morality and its law,”130 I disagree with his belief that one can take more than one “consistent” view on this issue. That is why I reject Applbaum’s claim that my kind of conventionalism precludes me from concluding that the legal positivism of his Razlanders is morally illegitimate.

In one sense, of course, Applbaum is correct in asserting that “[m]orality, for a conventionalist, is a matter of convention.”131 But if he is claiming that a “conventionalist” must agree that the fact that a society’s moral practices are “inconsistent” in the sense that his Razlanders’ society’s moral practices are inconsistent is irrelevant to whether it deserves to be called “a society of moral integrity,” he is either implicitly adopting a definition of “conventionalist approach”

127. Id. at 620.
128. See id. at 621.
129. This Razlander position is “coherent” because each of its elements is meaningful. This position is different from the Applbaum premise I quoted because, as I indicate in the text two sentences after the sentence in which footnote number 125 appears, it will sometimes be morally legitimate as well as internally correct for a rights-based society whose moral-rights commitments are imperfectly instantiated by its constitution to conclude that a moral right is not legally enforceable: in particular, the conclusion that “a moral right does not entail a moral duty to enact a corresponding legal right” reflects the fact that the legal enforcement of a moral right may disserve rights-related interests on balance. For an example that illustrates this point, see supra note 14.
130. Applbaum, supra note 1, at 620.
131. Id. at 621.
with which I disagree or being misled by the word "conventionalist" in one of the ways that led me to write the first section of this Postscript.

3. The Objection That I Have Misanalyzed the Legal-Rights Implications of a Society's Constitution's Imperfectly Instantiating Its Moral Commitments

Applbaum’s final objection to my analysis relates to my treatment of the case in which the constitution of a society that deserves to be called a society of moral integrity imperfectly instantiates its moral commitments. Applbaum may be making either of two objections to my handling of this situation. First, he may be disagreeing with my conclusion that, in this case, textual argument based on a clear, morally-illegitimate constitutional provision whose concrete implications were understood by its ratifiers trumps arguments of moral principle and that, as a result, the internally-correct answer to a legal-rights question to which the relevant provision relates may be morally illegitimate. If this is his objection, we simply disagree. I believe that, in this type of situation, a legal argument will be "valid" even though it is "morally illegitimate," and the legal-rights conclusion to which it leads may be "internally correct" even though it is "morally illegitimate" and "unjust."

However, it is also possible that Applbaum is disagreeing with a conclusion to which I do not subscribe—viz., that in this case the internally-correct answer to the legal-rights question is "morally legitimate" even though it is inconsistent with the relevant society’s moral commitments. If that is his point, 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.

CONCLUSION

Although Arthur Applbaum agrees with my conclusions about the moral commitments of our culture and agrees with all or all but one of my conclusions about their jurisprudential implications, he believes that my conventionalist argument for some of these conclusions is wrong and that my conventionalist argument for other conclusions

132. See id. at 619-20.
133. See MATTERS OF PRINCIPLE, supra note 1, at 380 n.31, cited by Applbaum, supra note 1, at 620 n.10.
is unnecessarily anthropologically contingent. According to Applbaum, foundationalist arguments can prove that the kind of liberal, rights-based position to which I claim our culture is committed is the objectively-correct or true moral view. Presumably, Applbaum thinks that one can derive the requisite universal moral truths from the attributes of the concept of a moral norm (moral position) or by the exercise of pure reason.\textsuperscript{134} I do not deny the possibility that he may be able to succeed in discovering the kind of foundationalist argument that he criticizes me for eschewing. However, I have yet to encounter a convincing argument of this kind. Moreover, even if Applbaum could establish the objective, universal moral truth through a foundationalist argument, "valid" legal argument might still diverge from "morally-correct" legal argument (internally-right answers to legal-rights questions might still diverge from morally-correct answers to legal-rights questions) in societies whose constitutions are morally imperfect. Indeed, more generally, if I am justified in concluding that it is disqualifyingly inconsistent for someone to take a liberal, rights-based approach to prescriptive moral analysis and a positivist approach to legitimate legal analysis, Applbaum's criticisms of my approach to moral analysis (even if correct) would not bear on my analyses of

(1) the connection between legitimate moral-rights argument and legitimate legal-rights argument in any society of moral integrity,

(2) the ways in which the moral commitments of a society of integrity affect the substance of all the variants of the other types of argument that it is morally legitimate to use to determine what the law is and nearly all the other arguments that it is valid to use to determine what the law is,

(3) the relationship between such a society's moral commitments and the morally-legitimate force of the arguments that it can legitimately use to discover what its law is, or

(4) the morally-legitimate and valid answers to give to the huge number of concrete United States Constitutional-rights issues \textit{Matters of Principle} investigated.

In any event, I am indebted to Applbaum for inducing me to clarify why I hesitate to call my position "conventionalist," to explain what I take "conventionalism" to entail, to use the expression "legal

\textsuperscript{134} I speculate because, like me, Applbaum leaves the relevant foundationalist argument for another day.
validity," and to explain the relationships among "legal validity," "moral legitimacy," and "just-ness." Arthur Applbaum is a professional philosopher, and his contribution shows why it pays to take philosophical argument seriously.