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Judge Richard Posner's Jurisprudence

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JUDGE RICHARD POSNER'S JURISPRUDENCE

*Robert S. Summers**

THE PROBLEMS OF JURISPRUDENCE. By *Richard A. Posner*. Cambridge: Harvard University Press. 1990. Pp. xiv, 485. \$29.95.

I. INTRODUCTION

Judge Posner is justly famous for his work on the economic analysis of law (and for many fine judicial opinions). He has also immersed himself in jurisprudential, philosophical, moral, scientific, and other literature, and has in *The Problems of Jurisprudence* now worked out and published his views on many of the traditional problems of jurisprudence. In some instances, he adopts the general jurisprudential positions of earlier thinkers. In other instances, his views are more his own creation.

I will only treat Judge Posner's general views (although not comprehensively) on the nature of law and legal validity, on formality and the formalistic in law, on statutory interpretation, on precedent, on law's autonomy, and, very briefly, on legal education. I have had to be selective. These topics comprise no more than half of those Judge Posner addresses.

II. THE NATURE OF LAW AND LEGAL VALIDITY

Judge Posner adopts a predictivist and behaviorist theory of law. He also indicates, correctly, that I will "disagree" with his theory (p. 26 n.41). Here are his core ideas:

Although unlikely to posit the existence of so abstract an entity as "the law," Holmes realized that since law affected behavior it was "real" in some sense. The solution to the dilemma was to ask *how* law affects behavior. The state has coercive power, and people want to know how to keep out of the way of that power. So they go to lawyers for advice. All they want to know is whether the power of the state will come down on them if they engage in a particular course of action. To advise them the lawyer must predict how the judges, who decide when the state's

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coercive power may be applied to a person, will act if his client engages in the proposed course of action and is sued. Law is thus simply a prediction of how state power will be deployed in particular circumstances. Law, an abstract entity, is dissolved into physical force, also an abstract entity but one that has a more solid ring and, more important, can be interpreted in behavioral terms: if I do X, the sheriff will eventually seize and sell property of mine worth \$Y. The prediction theory conceives the law as disposition rather than as object. To say of an act that it is unlawful is to predict certain consequences if the act is performed, just as to say that an object is heavy is to predict certain consequences if it is dropped or thrown.

This conception overlooks the people who obey the law *because* it is the law, and so it has come to be called the "bad man" theory of law. But the oversight may not be critical. There may not be many "good men" in the specific sense of people who comply with laws merely out of respect for law, a felt moral obligation to obey it. [p. 223]

. . . .

We can if we like say that the judges, in acting — that is, in deciding cases — "make law," and so the law is what judges do as well as predictions of what they will do. There is no contradiction once the prediction theory is subsumed under a broader activity theory of law. The important thing is that law is something that licensed persons, mainly judges, lawyers, and legislators, do [p. 225]

It is evident from the foregoing key passages that Judge Posner, in addressing the question: "What is law?," does not, in more traditional fashion, construe this question to require a jurisprudential analysis of the general nature of a system of law as a whole.¹ Thus, he displays little interest in such issues as the foundations of a legal order, or the structure and unity of a legal system, or the nature and varieties of rules in a legal system, or the essential techniques used to secure law's goals. Rather, although he does not put it this way, Judge Posner is here mainly interested in what legal theorists refer to as the theory of legal validity, that is, a theory of what criteria putative law must satisfy to be valid. His focus is on "law as a source of rights, duties, and powers," and still more narrowly, on law so conceived from the vantage point of a judge in the American system.²

The theories, above, that Judge Posner adopts on the subject of legal validity were made famous by Holmes — predictivism³ — and Llewellyn — behaviorism.⁴ Judge Posner is aware that these theories have been subjected to what are now rather standard objections. Yet

1. Cf., e.g., H. HART, *THE CONCEPT OF LAW* (1961).

2. P. 221. At several places, he articulates the view that law really dissolves entirely into physical force. See pp. 223, 296, 455. He seems unaware of the vast literature highly critical of the "force" conception, and he makes no attempt to address any of the now standard objections to that position. For a summary of these objections, see Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 445-46 (1978).

3. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459, 460-61 (1897).

4. K. LLEWELLYN, *THE BRAMBLE BUSH* 3 (1930) ("What these officials do about disputes

he offers little argument in response to these objections. It would be tedious to rehearse here all of these objections, and in any case I have already set them out elsewhere.⁵ I will restrict myself largely to some points that I consider to be most telling. I will stress that what Judge Posner offers cannot, conceptually, qualify as a theory of legal validity, and whether or not I am right about this, I will show that what he offers is simply not the theory of validity prevalent in our legal system.

There is, of course, tension between the two basic notions Judge Posner stresses here: valid law as a *prediction* of judicial action, and valid law as what judges *do*. Although these often overlap, they sometimes diverge, and then one rather than the other must prevail. Judge Posner apparently believes that what the judges *do* is the law, even if this turns out not to be the predictable outcome (p. 225).

The fundamental flaw in any predictive-behavioral conceptualization of legal validity is precisely that the ultimate "criterion" of valid law is simply what the judges do. In such a conceptualization, the highest judges simply cannot make mistakes of law. If whatever they ultimately do is ipso facto valid, they cannot be mistaken. This, as H.L.A. Hart stressed many years ago, confuses judicial finality with infallibility and immunizes judges' behavior from criticism for non-conformity with law.⁶ Contrary to Judge Posner's position, a legal system must have legal standards for identifying valid law (and for interpreting and applying it in particular cases). Insofar as judges identify and apply law at variance with these standards, they make legal mistakes, and are accordingly subject to criticism on precisely this ground.⁷ Such criticism, along with the potential for it in particular cases, forms one of the major avenues through which the rule of law is sustained in our society. At one point, Judge Posner manifests some awareness of this kind of objection to his theory:

We think of law not only as what judges do but also as the criterion for evaluating what they do. The activity [behavioral] theory is incomplete. Its critics are right that it is an impoverished theory of law. But it is only mildly impoverished. When slightly enriched with a weak sense of natural law, it becomes the best positive theory of law that we have. [p. 228]

Even if Judge Posner patches up his theory with a bit of natural law (in his terms, "ethical" and "policy" considerations), this cannot remedy the foregoing basic flaw. For that flaw differs from the one Judge Posner seeks to correct. The basic flaw in his theory is its fail-

is, to my mind, the law itself."). See Llewellyn's own retraction in K. LLEWELLYN, *THE BRAMBLE BUSH* 8-10 (1960).

5. See generally R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* chs. 4-5 (1982).

6. H. HART, *supra* note 1, at 138-44.

7. Of course, where a court is acting to change the law, this action is not to be characterized as a mistake, although it may be criticized on other grounds. See R. SUMMERS, *supra* note 5, at 114.

ure to make an appropriate place for the possibility of mistaken identifications of valid law. This failure, in turn, leaves no place for that social practice so essential to maintenance of the rule of law, namely, criticism of judicial behavior precisely on the ground that it fails to conform to accepted *legal* standards for identifying valid law.

In sum, behavioral "criteria" of valid law simply cannot constitute criteria of valid law *independent* of what judges actually do. Thus, a behavioral theory cannot qualify as a theory of legal validity in the first place. Such a theory necessarily requires independent legal criteria of validity.

Judge Posner, nevertheless, does not lack the courage of his convictions. His predictivist-behavioral theory leads him to view precedents, and, presumably, statutes and other forms of law, merely as "essential inputs into the predictive process" (p. 227). Thus, he says, precedents "are not 'the law' itself" (p. 227). These are merely behavioral inputs. (A fortiori, rules and principles governing the techniques accepted within the system for interpreting and applying valid law are also in no sense law.) Yet he suggests from time to time that it is at least a criticism of a legal theory that it is quite at variance with normal legal usage (p. 228). Certainly our normal legal usage is to regard as law, even for the highest judges, those precedents and statutes that are valid under the criteria of validity prevalent in our system.

If I am correct that Judge Posner's theory of legal validity is conceptually incapable of serving as a theory of legal validity, it follows that his theory cannot be the theory of legal validity that prevails in our system. Our overall theory of validity is highly complex, as the admirable writing of Professor Greenawalt attests.⁸ The theory that prevails in our system includes (1) an independent and largely antecedent set of source-oriented standards for determining valid law, and (2) various content-oriented standards.⁹ What I call source-oriented standards include due enactment by a duly authorized legislature in the case of statutes, and proper adoption by appropriate courts in the case of precedents. Content-oriented standards include various substantive requirements of constitutions. Only a small book or an extended essay could provide a comprehensive account. What the law is on a given point is determined by reference to these independent criteria, and lawyers advise clients in light of the substantive or procedural law so identified (and in light of techniques of interpretation and application prevalent within our system).¹⁰ Thus, valid precedents and

8. Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987); see also R. SUMMERS, *supra* note 5, at 101-35; Summers, *Toward a Better General Theory of Legal Validity*, 16 RECHTSSTHEORIE 65 (1985).

9. See *infra* section III.B.

10. Of course, Judge Posner understands these things. What he does not grasp so clearly is how they embarrass his general theory. Sometimes it seems that by a "prediction" theory, Judge Posner might only be referring to the necessarily future-regarding processes whereby a lawyer or

valid statutes are considered valid law as such, and not mere "inputs" in processes of prediction. It is a very great virtue of our system that citizens generally need not wait until a court acts before they can know their legal rights (and in many cases they can know those rights with great certainty). Of course, unclear cases arise in which there are no determinate answers, but Judge Posner concedes that predictivism itself is "unusable in areas of profound legal uncertainty" (p. 224).

Judge Posner wants, for present purposes, to conceptualize precedents, statutes, and presumably other forms of law merely as "inputs" into judicial behavior (pp. 227, 239). A mere "input" is not as such a norm, yet precedents and statutes are, properly conceived, normative phenomena under which legal *reasons* for action arise — reasons which are *binding* on citizens and officials, including judges. Indeed, judicial behavior becomes open to criticism when it disregards such binding reasons. Precedents and statutes have normative significance in still other ways, too. For example, they serve as bases for claims of right. Predictivism and behaviorism, however empiricist they may be, are also doctrines that cannot yield, let alone do justice to, the normative character of law. Rather, they obscure it.¹¹

III. FORMALITY AND THE "FORMALISTIC" IN LAW

Judge Posner is primarily interested in the substance of the law, not its form. He therefore shares the preoccupation of most American legal theorists with substantive "policy" and "principle" to the neglect of legal formality in all its varieties. Relatedly, his favorite critical epithet appears to be "formalistic," a term of legal criticism in America the precise meaning of which is often left unspecified.¹² Judge Posner rarely addresses frontally any of the general varieties of legal formality to be found in law, nor does he systematically consider the general rationales for their existence.¹³ Indeed, he usually does not even recognize legal formality in the law for what it is. He proclaims, rather, that "I am not a formalist" (pp. 33), as if it were possible for a careful theorist to be a nonformalist. To Judge Posner, and to count-

lower court judge identifies, interprets, and applies law in accord with applicable legal standards. I have argued elsewhere that this is not really a predictivist theory at all. R. SUMMERS, *supra* note 5, at 118.

11. Again, Judge Posner knows that law is, somehow, normative. What he does not grasp is how his theory obscures and distorts this fact. (I, of course, do not claim that from the normativity of law it follows that all law is good. This is a complex matter that I cannot go into here.)

12. Professor Brian Simpson has observed that the term "formalism" in legal criticism is the "most ill defined of legal ailments". Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 534 (1979).

13. For a preliminary effort in this vein, see Summers, *Theory, Formality, and Practical Legal Criticism*, 106 LAW Q. REV. 407 (1990) [hereinafter Summers, *Theory*]. See also P. ATIYAH & R. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987); Summers, *Statutes and Contracts as Founts of Formal Reasoning* in *ESSAYS FOR PATRICK ATIYAH* (forthcoming 1991).

less American legal theorists and other academics, formality simply has no appropriate place in law — law is all substance and no form. Were Judge Posner to address himself more frontally to the nature, varieties, and roles of formality in law, he would come to see that the law is shot through with formality, that nearly all the varieties of formality found in law are in varying degrees essential to law, and that legal formality is not without its own distinctive substantive justifications. He would also come to see that more precise meanings for “formalistic” can be specified, and that law can be criticized not merely for being overformal, or “formalistic,”¹⁴ but also for being underformal, or “substantivistic.”¹⁵

Judge Posner criticizes as “formalistic” both the actual phenomena of our law and the theories of legal theorists about these phenomena. I think he is correct to suggest that we can get a sense of what is meant by “formalistic” if we bring a “form versus substance” contrast into play and then seek to unpack criticism for overformality in light of this contrast (p. 40). But he does not see the numerous “form versus substance” contrasts at work in law and legal criticism. There is not just one possibly “useful” sense of “formalistic,” but many.¹⁶ And nowhere does Judge Posner identify even a single basic variety of legal formality and treat it for what it is, namely, one of various essentially formal elements of law itself, with its own special set of rationales. Of course, these background rationales are themselves substantive, and may even be thought of as the substance of legal formality. Still, as we will see, this leaves intact the more specific form-substance contrasts in the foreground.

I will examine a limited number of form-substance contrasts in the law, identify essential varieties of formality involved, and clarify the more specific senses of the overformal (the “formalistic”) parasitic on these contrasts. This approach also enables me to suggest something of the range and variety of types of justified formality in the law and the varied rationales for them. Despite sixty or seventy years of unrelenting academic and other criticism asserting that nearly everything wrong with the law is “formalistic,” American law has not yet today ended up as “all substance and no form.” Nor could it.

Law must be analyzed in terms of complex fusions and interactions of various types of formality with relevant substance. Instead of proclaiming “I am not a formalist,” Judge Posner should recognize and embrace necessary and justified formality in the law, and, only in regard to the overformal, proclaim that he is not “formalistic.” Thus, he should say that he *is* a “formalist” as well as a “substantivist,” each

14. Judge Posner does not always use “formalistic” pejoratively, but he usually does.

15. See generally Summers, *Theory*, *supra* note 13, at 408-09.

16. See generally Summers *Theory*, *supra* note 13; K. ENGISCH, BEITRÄGE ZUR RECHTSSTHEORIE 251-85 (1984).

in the measure appropriate to the relevant form-substance fusion under analysis. This fundamental jurisprudential truth is not at all well understood in America today, at least not in these terms.

In the following sections, I seek to demonstrate the foregoing in a general way (although without continuously revisiting Judge Posner's own particular views). In each topic, I introduce a basic variety of formality, identify some of the justifications for its existence in law, and suggest how it may go awry as "formalistic." Here I can only identify several of the varieties of formality in the law, and I cannot subject each to the detailed analysis it merits. Nor can I explore the conceptual necessity of each, let alone the nature and bearing of the various underlying rationales that (with problem-specific considerations) determine the appropriate levels or degrees of the varieties of formality as they appear in the law. Yet the varieties I take up are sufficient to indicate the rich and multifaceted nature of legal formality, phenomena more often known in our system by other nomenclature.

A. *Systems of Law*

A legal system is, in the most general terms, a complex fusion of form and substance. It is substantive in that it must, to exist in the first place, contain a certain minimum substantive content. Thus, without rules restricting the free use of force, rules protecting at least some types of private property, and rules enforcing certain types of promises, a legal system would lack the substance required to secure the popular cooperation necessary for official uses of coercion against malefactors. Without this cooperation the system could not be viable.¹⁷

On the other hand, even at this very general level of analysis, the legal system has a contrasting side that may be characterized as formal. Thus, among other things, a legal system must have rules and other preceptual forms to "house" this minimum substantive content; these preceptual forms must be brought into being authoritatively, and there must be authoritative processes for identifying such precepts and for interpreting and applying them in contested cases. These preceptual forms and these processes are all content-independent, and thus in this sense formal. We can readily see that powerful substantive rationales justify this formal side of the law, including a concern for legitimacy, for rationality, for orderliness, and for definitive resolution of substantive disputes in the making and application of law.¹⁸ Surely, then, with regard to the constitutive structure and content of a legal system, the theorist would not want to say, with Judge Posner, "I am

17. See H. HART, *supra* note 1, at 189-95.

18. There are other rationales, but there is no need to go into them.

not a formalist." The foregoing general variety of formality in a legal system is a necessity, and even a high level of it is justified in light of the above rationales.

Now, this general contrast between form and substance, as well as the fusion of form and substance I have described, provides the basis for analyzing appropriate levels of a basic variety of formality — "constitutive formality" — and for specifying the meaning here of the critical expression "formalistic." The appropriately formal analysis honors the requisite fusion of form and substance in light of the above rationales for constitutive formality. The "formalistic" does not. It is overformal, and thus neglects requisite substance in some way. For example, the theory of a positivist who contends that a legal system can have "just any substantive content" and still remain a legal system may be justly criticized as formalistic — as neglecting the requisite minimum substantive content of law.

B. *Legal Validity*

In a legal system such as ours, the criteria for identifying valid law may be considered a complex unity of form and substance. Within this system, some types of putative law cannot qualify as valid law unless they satisfy not merely formal, "source-oriented" criteria of validity but also substantive, "content-oriented" criteria (which may themselves derive from authoritative sources). For example, to be valid, it may be that a putative law must not only be duly adopted by an authorized legal source such as a legislature, but also must not offend the substantive, content-oriented requirements of a constitution. Again, powerful rationales support such "source-oriented" (and therefore formal) criteria of validity. These include legitimacy, legislative autonomy, representative democracy, and the minimum definitiveness required of enacted law. It is difficult to imagine a theorist addressing such formal criteria of validity who would want to say here: "I am not a formalist." A source-oriented and therefore content-independent criterion of valid law is an essential element in this complex fusion of form and substance, an element that may be called "validity" formality.

It is now possible to see readily how a theorist could go astray here and, in regard to a particular system, present a purportedly descriptive theory of validity that merits criticism as "formalistic." Suppose, for example, that such a theorist advances a descriptive theory that, in our own system, only formal, source-oriented criteria determine the validity of precedent. That is, precedent only needs to be laid down by an appropriate court to be valid. Such a theory would be mistaken because our system also generally requires that a precedent survive some period of evaluation or testing for minimum substantive rationality if that precedent is to take its place as "settled" and therefore as valid

law within our system.¹⁹ Here, we would say that the theory is formalistically inaccurate and thus undersubstantive. That is, the theory acknowledges only the formal, source-oriented criterion of validity and entirely neglects the content-oriented, substantive criterion that in fact also applies to determine the validity of precedent in our system. (Of course, a prescriptive theory might be formalistic, too.)

C. *Continuity and Change in Law*

Many features of legal institutions and processes and many legal devices and techniques may operate, by design or otherwise, to inhibit change in the substantive content of law. At least insofar as this is by design, so that these features, devices, and techniques secure some continuity of the law's content independently of the quality of its substance, we may view these features, devices, and techniques together as exhibiting and securing a general kind of formality — call it “continuity formality,” a variety of formality that is frequently not recognized for what it is. Plainly, some legal systems exhibit very high continuity formality.

To be more specific, the formal features of legal institutions and processes that secure continuity include those that operate in legislatures to inhibit the adoption of new substantive law. These features consist of formal procedural requirements — not only for amending old statutes, but for passing new ones. There are functionally similar formal features of adjudicative processes, including provision for dismissal of claims on the ground that they are not yet recognized in law, as well as various doctrines such as standing and ripeness that limit the justiciability of issues at the trial court level. Similarly, various content-independent norms limit the power to overrule precedent at the appellate level.

Still other legal devices and techniques secure continuity of law regardless of the quality of its substantive content. For example, case law may be transformed into formal statute law, which is generally rather less changeable than case law. Also, the power of courts to exercise discretion may be transformed into relatively hard and fast rules.

Various powerful rationales justify a significant general level of what I here call continuity formality, and thus justify the features of institutions and processes, and other devices and techniques, that secure it. Continuity of substantive content in law avoids the confusions of excessive legal change, facilitates planning, protects citizen reliance,

19. See R. SUMMERS, LON L. FULLER 50 (1984); Summers, *Summers's Primer on Fuller's Jurisprudence — A Wholly Disinterested Assessment of the Reviews by Professors Wueste and LeBel*, 71 CORNELL L. REV. 1231, 1247-48 (1986); see also Hart, *Holmes' Positivism — An Addendum*, 64 HARV. L. REV. 929, 936 n.21 (1951).

and more. Given the force of these rationales, few theorists should want to say: "I am not a formalist."

On the other hand, when the various features of lawmaking processes and other formal devices and techniques of the law function in ways that secure continuity at the expense of needed substantive change and growth in the law's content, this level of continuity formality may be appropriately criticized as overformal, that is, formalistic. Indeed a whole system might ossify. A theory that embraces legal continuity excessively is formalistic. Such a theory unduly privileges the content-independent (formal) features of the system favoring continuity.²⁰ In a relatively "closed" system, excessive continuity formality may drive change underground, so that change occurs mainly through legal fictions and the like, rather than out in the open. It should hardly be surprising that judicial resort to legal fictions is sometimes criticized as formalistic, too.

D. *Particular Laws and Legal Doctrines*

Particular laws and legal doctrines can themselves also be analyzed as complex fusions of form and substance in which several varieties of formality commonly play appropriate roles. Among the varieties of formality that play roles in the creation and application of valid law and legal doctrine are:

- (1) the formality of arbitrary yet justified fiat in the material content of a law or doctrine
- (2) the formality of modes of expressing the law (for example, the canonical form of a statute)
- (3) the formality of the preceptual design of a law or doctrine — its "close-endedness" (as in the case of a narrow rule)

Each of these types of formality (and there are others) involves a somewhat different form-substance contrast, and the various rationales behind each are not identical (although they overlap). At the same time, each may go awry and be subject to criticism as overformal and thus "formalistic." A theorist might grasp the essence of these points without realizing how the phenomena may be appropriately conceptualized, as above, in terms of legal formality, and without realizing how varying levels of such formality in the law are justified in terms of the applicable rationales behind them. Such a theorist might still have a nose for the overformal here, and thus be ready to condemn the "formalistic."

One general example, what I call "close-ended formality," will suffice.²¹ Close-ended formality is rather special. It is an attribute of the

20. On the importance of "rules of change" in a legal system, see H. HART, *supra* note 1, at 93-96.

21. For more on close-ended formality, see generally Summers, *Theory*, *supra* note 13, at 419-25.

preceptual form of official commands, statutes, regulations, common law doctrines, or other species of law. Many different preceptual forms are known to the law, including general orders, specific orders, hard and fast rules, flexible rules, principles (of several varieties), general maxims, specific maxims, narrow grants of discretion, broad grants of discretion, and more. These preceptual forms vary greatly in the degree to which they are complete as law at inception. The more complete, the more close-ended. Thus, for example, an enacted precept that takes the form of a hard and fast rule without exceptions is complete in content at inception, totally close-ended, and thus does not require an infusion of substantive reasoning to fill it out when it is applied. On the other hand, broad grants of discretion depend for essential content on infusions of substance by a court (or other body) when they are applied, and thus display low close-endedness. All types of law have some degree of close-endedness. The degree of close-endedness may be justifiably high or low, depending upon applicable rationales (and their interaction with problem-specific considerations).

Close-endedness is formal because it indicates how far a law is closed to further authoritative infusion of substantive legal content at the point of application. Thus, the form-substance contrast here is between (1) nondependence of the law upon further infusion of substantive content at point of application (formal), on the one hand, and (2) dependence upon such infusion (substantive), on the other.

Even quite high close-ended formality may be justified. Among the general justifications for high levels are certainty, predictability, facilitation of citizen planning, equality before the law, ease of administration, and minimization of disputes. Again here, it will not do for the theorist to say: "I am not a formalist." Formality is, in varying degrees, essential to law, and even high levels of it may be justified in some areas.²²

As with all varieties of legal formality, close-endedness may go awry. For example, a hard and fast and thus formally complete rule may be overformal because it forecloses desirable (all things considered) judicial infusion of substantive content when the rule is applied. Yet again, it hardly follows from the "formalistic" character of this rule that close-ended formality is entirely unjustifiable in the law.

E. *Particular Legal Facts*

Law must be applied to legal facts, and formality plays a large role in regard to legal facts. Legal facts may be one thing and actual facts another. The *substance* here consists of all possible evidence relevant

22. Judge Posner is, of course, aware of the phenomenon here, although he does not recognize it for what it is — a type of formality. Compare p. 48 ("it would be a mistake to denounce rules *tout court*") with p. 445 (legal prudentialism is a cautionary against formalism).

to the facts in issue before a court (or before another tribunal, or even before a lawyer advising a client). Yet the law may not require that the ultimate finding of fact or verdict be based on all the relevant evidence. Indeed, the law may explicitly preclude consideration of all relevant evidence. In such cases, the finding of fact (or verdict) will still count as fact for the law's purposes. Insofar as ultimate legal facts need not be based on all relevant evidence, they reflect a formal theory of legal truth. Of course, a substantive theory of truth will also be concurrently at work, for ultimate legal facts must usually rest on *some* relevant evidence. Thus again, we have a complex fusion of form and substance.

To the extent an ultimate finding or verdict contains a formal element, this may be justified by reference to various general rationales, as well as to various problem-specific considerations that may point in the same way as the rationales in the circumstances (such as a policy favoring safety that excludes evidence of repairs subsequent to an accident). The general rationales that operate to justify findings not based on all the evidence are familiar. They include the efficiency of running a factfinding process (such as adjudication), not intermittently over a long period but continuously within a brief period, even though this means the factfinder cannot hear some witnesses. There is also the general undesirability of requiring any and all witnesses, no matter what the circumstances, to attend a factfinding proceeding, and there is the general importance of finality in factfinding even in the face of the discovery of further relevant evidence after the proceeding ends. Because of the force of such rationales (and of any concurrently applicable problem-specific considerations), a legal factfinding may even be untrue or at least contrary to the probabilities, yet still be accepted as legally binding on the parties. Here, too, no theorist should, in the face of this, proclaim: "I am not a formalist," and thus repudiate all formality in legal factfinding. Instead, the theorist should embrace some element of "truth formality," as justified, in a system of law.

Of course, processes of factfinding might be overformal, and thus the system, and also the theory of legal truth for the system, might be subject to criticism as formalistic.²³ Yet it would hardly follow from the existence of excessive truth formality in a given factfinding process that such a process can contain no trace of truth formality not itself subject to condemnation as formalistic.²⁴

23. A critique addressed partly to this general type of overformality is Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906) (asserting that cases should generally be decided on their substantive merits rather than on merely formal points of pleading).

24. Judge Posner is, of course, cognizant of my basic point here, but again does not conceptualize the phenomena as formal. See pp. 205-06.

F. *Legal Reasoning*

Here I will take up several varieties of the formal and the formalistic in legal reasoning. I must open with some preliminary distinctions. Legal reasons may empower or require judges, other officials, and private citizens and entities to decide or act in indicated ways. Legal reasons may be deployed to guide, to justify, to criticize, and more. Such guidance, justification, and criticism typically involve complex fusions of form and substance within what I call formal reasons, and as between formal and substantive reasons.

Formal legal reasons must be differentiated from substantive reasons. Formal legal reasons arise under statutes, precedents, and other species of valid law, and their legal authoritativeness and content are in various ways traceable to the valid law under which they arise. Of course, valid law also has material content, *i.e.*, it is informed by substantive considerations, which in turn inform the content of the formal legal reasons arising under valid law.²⁵ As we have seen, authoritativeness might be exclusively formal, as when the validity of the law under which the reason arises is attributable solely to the operation of source-oriented (content-independent) standards of validity, such as due adoption by a legislative body. But even when legal validity is also attributable to putative law's conformity with substantive standards of legal validity, the authoritativeness of the law so validated remains partly attributable to source-oriented, and so formal, standards too. (Many provisions of our federal constitution embody such substantive standards.²⁶)

Merely substantive reasons are those a judge or other official or party concerned with the law invokes in light of applicable moral norms or policy analysis. Substantive reasons are moral, economic, political, or other social considerations that do not derive from valid law, and so lack authoritative formality at the time they are invoked. Hence they are not as such authoritative, and so are not formal legal reasons at all.

"Validity formality" — that variety of formality that derives from compliance of putative law with merely source-oriented standards of validity — necessarily pervades the law. The rationales justifying this kind of formality are among the most fundamental of all, and include the very legitimacy of the law, freedom and autonomy of lawmakers, considerations ranging from democracy to institutional competence, and various "rule of law" values. Again, it will not do here to proclaim: "I am not a formalist," as if the law could dispense with such formal authoritativeness.

Of course, the material content of putative law so validated and the

25. See generally P. ATIYAH & R. SUMMERS, *supra* note 13, at 1-41.

26. See, e.g., U.S. CONST. amend I.

legal reasons arising under it may not be substantively very good. Thus, the reasoning of a higher court adhering to substantively objectionable common law on the ground of its formal authoritativeness may, at least if the case is extreme enough, be criticized as formalistic, given that such a court has power to overrule. Similarly, a normative legal theory requiring such adherence may be criticized as formalistic. In effect, the critic here would be urging that the fusion of authoritative formality with substance in the existing law is so objectionable that the court should invoke its power to overrule. Once again, a type of formality is at work here — the authoritativeness of precedent combined with the formal principle of *stare decisis* — that in appropriate circumstances generates legally compelling formal reasons.²⁷

Overformality in the form of excessive regard for the formal authoritativeness of substantively bad case law is hardly the only variety of the formalistic in legal reasoning. Another species is excessive regard for coherence, consistency, and congruence of decision with antecedent case law, where that law is not really very closely analogous. Here the variety of formality in the background that has gone awry is, of course, coherence, consistency, and congruence itself. But simply because it goes awry in some instances does not justify proclaiming "I am not a formalist" and dispensing in legal reasoning with coherence, consistency, and congruence. Powerful substantive rationales lie behind consistency of decision with antecedent case law.²⁸

Many theorists view "conceptualism" as the most common formalistic vice in legal reasoning. Judge Posner characterizes this vice as the practice of reasoning to and from concepts merely as a "system of relations among ideas" without regard to "consequences in the world of fact" (p. 16). An example might be Langdell's refusal to find a contract where the party claiming an offered reward did the acts contemplated by the offer (for example, turning over lost goods) without knowledge of the offer. Langdell argued there was no contract because the party claiming the reward could not have "accepted," in that an acceptance conceptually requires conscious action (p. 250). A nonformalistic judge, Judge Posner tells us, would look to the consequences of liability — for example, whether more lost goods would be found — and decide accordingly (pp. 251-52). Whether or not this is an apt example of the overconceptual, and thus of the formalistic, it certainly implicates an appropriate variety of formality, namely the conceptual component of the particular doctrine. Again, we could not dispense with this type of formality. Here the rationales for formality are rock bottom. If we were to "cleanse" our law of all concepts, there

27. Judge Posner at times appears to reject this. At the very least, he is ambivalent. See pp. 135, 139, 140, 142, 249; see also *infra* Part IV.

28. Judge Posner would certainly agree, though he does not so conceptualize matters. See, e.g., p. 249.

could be no law. Here, to assert "I am not a formalist," yet affirm the existence of law, would literally make no sense.²⁹

* * *

For every true version of the "formalistic," there must be a correspondingly appropriate version of legal formality; the appropriate level of justified legal formality is determined by various general rationales in interaction with problem-specific considerations. Yet appropriate formality in the law, in its numerous varieties, does not get due credit in American jurisprudence. Usually, formality is not recognized for what it is. Instead, preoccupied with the substantive side of the law, American theorists neglect the varieties of appropriate formality and their rationales, and overuse the epithets "formalistic" and "formalism." They are also insufficiently sensitive to the underformal — that is, to the "oversubstantive" in our law. Indeed, the vocabulary of American theorists does not yet even include the term precisely parallel to "formalistic" for use in criticizing the oversubstantive in our law: "substantivistic." Yet if our system tends to err more heavily on one side than on the other, it probably tends to be oversubstantive, rather than overformal.³⁰ If I am right, Judge Posner's own theories of statutory interpretation and precedent might be criticized as "substantivistic." I will, among other things, explain how so in the next two sections.

IV. STATUTORY INTERPRETATION

Judge Posner does not have a comprehensive general theory of statutory interpretation, positive or normative.³¹ He does not even ad-

29. Judge Posner, of course, makes room for concepts. What he does not acknowledge is their formal character.

30. See Summers, *Theory*, *supra* note 13, at 408-09.

31. The main questions in such a normative theory include: (1) Why have a normative theory in the first place? (2) From what sources do issues of interpretation arise? (3) What are the leading types of interpretive arguments? (4) How are such arguments to be differentiated? (5) What is the nature and force of each type of argument? (6) What further is to be learned by subclassifying the various types of arguments under a more limited set of general categories, e.g., linguistic, systemic, teleological-evaluative, intentional? (7) Which types of arguments are most likely to produce the same decisional outcomes under the same statute at the hands of different interpreters? (8) Which arguments are formal and which not? (9) How are conflicts between such arguments generally to be resolved, and why? (10) In addition to "weighing and balancing," what other basic modes of resolving conflicts between arguments are there? (11) What is the relative overall role of each leading type of argument within the system, considering the extent of its availability and its relative decisiveness? (12) How far is it possible to construct useful general models of the best possible overall justifications for the resolution of relatively discrete and basic interpretational problems such as ambiguity, vagueness, overgenerality, undergenerality, gaps, conflicts between statutes, obsolescence, and legislative mistakes? How do any resulting models differ and why? (13) How far *can* law govern the nature and force of interpretive arguments and the resolution of conflicts between them? How far *does* law govern them? (14) What is the appropriate style and structure of judicial opinions in statutory interpretation cases? (15) How far is interpretation a matter of factual inquiry and how far is it a matter of evaluation? See generally D. MACCORMICK & R. SUMMERS, INTERPRETING STATUTES — A COMPARATIVE STUDY (forthcoming 1991).

dress all of the leading types of arguments that figure in statutory interpretation. Nor does he single out any one leading type of argument and systematically treat its various facets. And he does not explore the various ways courts resolve conflicts between arguments. In all this, perhaps he is hardly to be faulted. The theory of the entire subject is still in its infancy (despite much promising literature of late).

Judge Posner vigorously attacks the linguistic "plain-meaning" argument (although without defining it very closely) (pp. 262-302). Here, too, he joins most American academics and many judges. On the other hand, he admits that communication through the written word is often successful (p. 295). He also indicates that in his view the plain meaning argument has a "valid core," and he enjoins judges not to "be too quick to override the apparent meaning" (p. 280). But he does not develop these points, and one is left with the overall impression that he has relatively little faith in argumentation that is largely linguistic, and thus in this sense formal. While he is willing to turn to purposive arguments (pp. 267, 274), to arguments from intention rooted in legislative history (pp. 104, 262), and to interpretive arguments of still other types, his heart is not in these specific types of arguments, either.

While his overall normative approach cannot be reduced to a single argument, he does try to encapsulate his approach in this sentence: "Maybe the best thing to do when a statute is invoked is to examine the consequences of giving the invoker what he wants and then estimate whether those consequences will on the whole be good ones" (p. 300). He qualifies this, and stresses that judges should not ignore the formal language of the statute; but he does not develop this approach systematically, either.³² He prefers "the interpretation that has, all things considered, the better consequences," which "may by virtue of that fact be the 'correct' interpretation" (p. 105). For Judge Posner, the "better consequences" to be considered certainly include the substantively best result on the merits. Judge Posner's overall approach downplays the formal language of the statute. It is not merely substantive. It may even be oversubstantive, *i.e.*, "substantivistic," for while Judge Posner does not ignore the formally authoritative text, he strongly embraces a substantive and consequentialist justificatory ethic. This priority comes out not only in his emphasis on the substantive consequences of alternative interpretations but also in his vigorous

32. The fullest general statement appears at p. 300 and is as follows:

This approach, which is pragmatic, does not justify, much less entail, ignoring the text. Not only is the text a source of information about the consequences of alternative "interpretations," but among the consequences to be considered is the impact that unpredictable statutory applications will have on communication between legislature and court. Normally, indeed, if communicative intent or legislative purpose can be discerned — in other words, if imaginative reconstruction works — that will be the end of the case.

rejection of "plain meaning" argumentation.³³

Statutes are generally formulated in words: ordinary, technical, or both. Ordinary words may have ordinary meanings or technical meanings (legal or nonlegal) or special meanings. Technical words may have technical meanings (legal or nonlegal) or special meanings. A court's ultimate interpretive conclusion, then, may look to (1) ordinary meaning, or (2) technical meaning, or (3) special meaning,³⁴ or may take the form of (4) a decision in which the court assigns a clarified meaning to the statute (as, for example, where a statute is elliptical), or (5) simply a decision in which the court makes it all up largely from scratch. The fourth of these qualifies to some extent as a genuine interpretive conclusion; the fifth hardly qualifies at all. The line between (1), (2), and (3) on the one hand, and (4) on the other, may not be sharp. The line between (4) and (5) definitely is not sharp.

The above five interpretive conclusions might be supported by linguistic, systemic, teleological, intentional, and evaluative arguments.³⁵ My primary interest here is in the linguistic, though, as we will see, the materials out of which such arguments are appropriately constructed are not confined to the bare text alone.

At least three types of linguistic arguments should be distinguished: the first is the argument from an ordinary meaning of ordinary words; the second is the argument from a technical meaning of ordinary or technical words; and the third is the argument from a special meaning of ordinary or technical words based not only on the words in question but on how they are used in other parts of the section of the statute involved, in other sections of the statute, and in closely related statutes. One may call this third type a coherence or harmonization argument. A *prima facie* forceful argument from ordinary meaning might be canceled or displaced by evidence of a technical meaning (which might include, for example, resort to history of the term in the law), or might be canceled or displaced by a special meaning deriving from harmonization with the rest of the statute. On the other hand, this third type of argument might also reinforce the interpretive conclusion supported by an argument from an ordinary meaning or an argument from a technical meaning.

Judge Posner sometimes uses the phrase, "plain meaning," not so much to designate one (or more) types of meaning in the senses above as to refer to a kind of judgment in the particular instance that the meaning of the statute is plain. Now, the interpretive conclusion that

33. Judge Posner's criticisms are hardly idiosyncratic. The American academic literature on statutory interpretation is replete with them.

34. By special meaning, I mean either (1) a meaning different from an ordinary meaning of an ordinary word, and at the same time a meaning that is not yet an established technical meaning of that ordinary word, or (2) a meaning of a technical word that is not the technical meaning of that technical word.

35. See generally D. MACCORMICK & R. SUMMERS, *supra* note 31, at 512-25.

is thus "plain" could be an ordinary meaning, or a technical meaning (legal or nonlegal), or a special meaning, or perhaps even a "clarified" meaning, as above. When the interpretive conclusion is an ordinary meaning of ordinary words, the interpreter will usually seek to support this conclusion by an appeal to ordinary language. Of course, other types of argument might be invoked to support this conclusion, too, including the argument from coherence with other parts of the statute, and the argument from ultimate statutory purpose. Again, other types of arguments might conflict with the argument from ordinary meaning, as well. Most of Judge Posner's assault is addressed, directly or indirectly, to what I call the argument from ordinary meaning, and does not apply to what I call the argument from technical meaning or to the argument from statutory harmonization in support of a special meaning.

The argument from ordinary meaning is exceedingly complex, and Judge Posner is correct to say that its deployment is not merely a matter of knowing how to use a dictionary or how to consult a grammar book. The argument takes some account of context and postulates a competent and informed user of ordinary language. It also acknowledges the legislative purposes. That is, it takes account of the purposes that a competent and informed user of those words could be said to have had in using them in the general circumstances involved. The argument does not, however, simply collapse into the independent argument from that interpretation which would best serve the ultimate statutory purpose. I will not now, however, attempt to develop and characterize the entire positive structure and content of the argument from ordinary meaning, or attempt to differentiate it from other nonlinguistic types of arguments. Instead, I turn to the Posnerian assaults on the argument from ordinary meaning — assaults that, I may add, occur against a background of increasing resort to the argument by the Supreme Court.³⁶

Judge Posner does not flatly affirm that the argument from ordinary meaning cannot consistently serve values appropriate to statutory interpretation. Yet at numerous points he appears highly skeptical (pp. 262-302). In my view, the argument from ordinary meaning, when appropriately in play, serves relevant interpretational values, and thus has general justificatory force of its own. I have already indicated that the argument from ordinary meaning may be viewed largely as textual and therefore formal, especially when contrasted with Judge Posner's substantive consequentialism. The values that the ordinary meaning argument serves might also be conceptualized as rationales for interpretive formality.

36. See, e.g., *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989); *Commissioner v. Asphalt Prods. Co.*, 482 U.S. 117, 120 (1987); *United States v. Locke*, 471 U.S. 84, 93 (1985); *Griffen v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

Perhaps most obvious, the argument from ordinary meaning serves the values of legitimacy in lawmaking, and of representative democracy. As the Supreme Court has stressed, "Congressmen typically vote on the language of a bill,"³⁷ and that language is often ordinary language. Certainly the members of the legislature and the legislative drafters can be assumed to know and understand the English language and the ordinary usage of English words. Relatedly, the argument from ordinary meaning is hardly in itself purposeless or intentless. A proposition the Supreme Court frequently cites is this: "[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."³⁸

At the same time, judicial adherence to the ordinary meaning of ordinary words in the statute may encourage the legislature to legislate more explicitly and thereby discourage "legislation" hidden in mere committee reports and the like, "legislation" which may well not have gained true democratic assent and legitimacy if more explicit language had been used in the statutory text.³⁹ Such "hidden legislation" is all the more objectionable because most members of Congress do not see committee reports and the like, and because it excludes or diminishes the role of the executive in the lawmaking process. The President signs only the bill that Congress presents to the President.⁴⁰

Judicial adherence to the relevant ordinary meanings of ordinary words can also operate to encourage careful drafting and thus serve not only legitimacy and democracy but also the values specific to the rule of law. Among other things, the legislative drafter will know that any intended departures from what would otherwise be the ordinary meaning must be made clear in the final draft of the statute.⁴¹

Furthermore, the institutional competence of courts to make full-scale legislative judgments about ends and means is itself limited. In following the dictates of the argument from the ordinary meaning of the statutory words, the court may avoid the necessity of making complex legislative judgments about the reasonableness of ultimate purposes and about the suitability of means.⁴² At the same time, judicial adherence to the ordinary meaning of ordinary words in the statute restricts the opportunity for strong-willed judges to substitute their own personal political views for those of the legislature with respect to ends and means.⁴³ This value is relatively neutral. A wilful judge may

37. *United States v. Locke*, 471 U.S. 84, 95 (1985).

38. *Richards v. United States*, 369 U.S. 1, 9 (1962).

39. *See United States v. Taylor*, 487 U.S. 326, 345 (1988) (Scalia, J., concurring).

40. *See Taylor*, 487 U.S. at 345; *Wallace v. Christenson*, 802 F.2d 1539, 1559-60 (9th Cir. 1986).

41. *See Watt v. Alaska*, 451 U.S. 259, 285 n.10 (1981) (Stewart, J., dissenting).

42. *See TVA. v. Hill*, 437 U.S. 153, 187 (1978).

43. *See Commissioner v. Asphalt Prods., Inc.*, 482 U.S. 117, 121 (1987).

be of virtually any political hue: left, right, or other.

One further value (of many) that adherence to ordinary meaning can serve is the protection of reliance on published law, and thus, again, the rule of law itself. In following ordinary meaning, the court may be (and often will be) protecting the interests of those citizens who appropriately relied on such meaning. To subject them to a special meaning based on unenacted legislative history may be to jerk the rug from beneath them. This is not only unfair, but disserves the rule of law as well.⁴⁴

According to a second species of skepticism about the argument from ordinary meaning, the argument is inherently (or at least typically) question-begging.⁴⁵ If true, the argument from ordinary meaning could not have general justificatory force. In my view, the charge is false. The charge may arise because of the way the argument is presented. Judges often make the argument in highly abbreviated terms without offering any grounds or subsidiary argumentation that the words really do have the ordinary meaning that the interpreter attributes to them. Yet, there is plainly much scope for subsidiary argumentation in support of (or opposed to) a conclusion that the statute has a given ordinary meaning. The overall process of marshaling subsidiary argumentation to support such an interpretive conclusion can be quite multifaceted.

The subsidiary argumentation to which I refer consists of arguments that may support a given ordinary meaning not merely over a competing ordinary meaning (as where the word has several ordinary meanings) but also over a possible technical meaning, or over a possible special meaning, or indeed, over no general type of meaning at all but merely over a decision as to the application of the statute. The interpreter may begin with a list of possible ordinary meanings that the word or words in issue might have. Is the claimed ordinary meaning one of those? Is it recognized in a good dictionary? Is the claimed ordinary meaning as used in the statute consistent with applicable rules of grammar? If the answers here are "yes," they obviously provide *some* subsidiary argumentation supporting the claimed interpretive conclusion that the statutory meaning is this ordinary meaning.

The general context of use also generates subsidiary argumentation that rules out some of the many meanings of a word. For example, the word "draw" has many dictionary meanings, but where the word appears in a statute dealing with the drawing of checks the general context of use makes obvious that other meanings are irrelevant.

Would a competent ordinary user of the words in circumstances parallel to those of the statutory draftsman mean the ordinary mean-

44. See *Bankamerica Corp. v. United States*, 462 U.S. 122, 131-33 (1983).

45. Judge Posner attacks the ordinary meaning argument on this general ground. See p. 263. There are several ways to interpret "question-begging" here. I consider only two in the text.

ing of the words? If so, this too would provide a subsidiary argument. An ordinary meaning presupposes standard circumstances of use recognizable by the competent user of the language. One has to be able to say to oneself: "In circumstances *X*, if I wish to convey ordinary meaning *A*, then I should use form of words *M*." When those circumstances are present, then ordinary meaning *A* of the words *M* would, without more, be appropriately attributed to the legislative drafter. The circumstances appropriate to use of the word in issue may or may not be present. Thus, a supporting subsidiary argument may or may not be generated, depending on the circumstances. This mode of subsidiary argumentation might be recast in terms of standard purposes of language users. Ordinary meanings of words presuppose standard purposes to convey just those meanings, and these purposes can be defined in terms of appropriate circumstances of usage.

A further variety of subsidiary argumentation in support of attributing a given ordinary meaning to statutory words is simply that this meaning is the one that best coheres substantively with the apparent meanings of the rest of the words in the statutory phrase, sentence, or paragraph, considered as a linguistic unit within ordinary language. Still another type of subsidiary argument takes the specific form of ruling out competing technical or special meanings for an ordinary word in light of special knowledge of facts about the matters in question that make it appropriate to rule those meanings out.

The foregoing analysis is hardly exhaustive, yet it demonstrates that the argument from ordinary meaning is not inherently question-begging or "conclusory." When the general argument from ordinary meaning is in play, subsidiary arguments can usually be given to support a conclusion that the appropriate interpretation consists of a given ordinary meaning.

Nevertheless, the charge that the argument from ordinary meaning is, if not inherently, then at least not infrequently question-begging may still survive. Construed differently, the charge might be that the interpreter, by ignoring any sources of unclarity *external* to the language of the statute, begs the question as to any issue of meaning that arises only if these external sources of unclarity are taken into account. One of Judge Posner's examples here is well known:

The statute said that a bequest in a will complying with specified formalities was enforceable. There was no ambiguity until one brought in from outside the fact that the person named in the bequest had murdered the author of the will. . . . [The] plain-meaning approach rules out arguments of external ambiguity, and by doing so artificially truncates the interpretive process.⁴⁶

46. P. 264. This "old jurisprudential chestnut" is also discussed at pp. 105-06. For another example, see p. 269 (a military radio message, technically incomplete, with clear implicit meaning).

But in my view, the argument from ordinary meaning presupposes that the interpreter knows and appropriately takes into account at least the essential facts of the case giving rise to the question whether the statutory language applies. Further, the interpreter should recognize the limits to human foresight, and also recognize that some things may be taken for granted in communicating through ordinary language.⁴⁷ Indeed, if nothing could ever be taken for granted in the use of ordinary language, that language would lose much of its utility. These points are relevant to Judge Posner's example, in which the issue of interpretation cannot even be seen for what it is unless the facts of the case — the legatee murdered the testator — are taken into account. The case is precisely one raising a question of possible statutory overgenerality in which the court, in the absence of anything more specific, must reason about what a legislature in using ordinary language may reasonably be considered to have taken for granted. One line of reasoning would be that, in light of widely accepted moral principles, the legislature took it for granted that a court would assume the legislature did not mean to reward murderers. Perhaps Judge Posner himself adopts truncated conceptions of ordinary language and of the process of communication through ordinary language when he says the argument from ordinary meaning cannot itself take account of such an "external" fact as that the legatee murdered the testator.⁴⁸

Those skeptical about the ordinary meaning argument might raise yet a third basic question: Because of change, obsolescence, ambiguity (both internal and external), vagueness, ellipses, the plurality of linguistic communities, and other possible sources of linguistic unclarity, are the conditions required by the argument from ordinary meaning so rare that this mode of argument can be at best only a minor justificatory resource in the interpretation of statutes? Judge Posner seems to assume as much.⁴⁹ Yet he also concedes that communication through ordinary language is often successful (pp. 293-96). Perhaps he thinks that when a *legislative drafter* picks up a pen, clear communication through ordinary language tends more often than not to stop. It is true that appellate judges have a steady diet of cases in which sources of unclarity in statutes do materialize. Yet appellate judges frequently rely on the argument from ordinary meaning, the Supreme Court in-

47. I do not see why Judge Posner should disagree with this. See his emphasis on "unspoken understandings" at p. 294.

48. Even if Judge Posner is not unduly truncating the argument from ordinary meaning (and I believe he is), it still would not necessarily follow that his example demonstrates that an argument from the language alone would be question-begging. So long as reasons with *some* force could be given for having the interpreter focus solely on the authoritative language, the question would not be begged.

49. See chs. 9-10. Judge Posner gives special emphasis to change and obsolescence, and in my view greatly overemphasizes these. I believe ambiguity and vagueness are more common.

creasingly so.⁵⁰ Additionally, in many statutes, language and communicative assumptions pose few or no issues of interpretation. These statutes are cast largely in ordinary language. I am prepared to assume that one reason these statutes pose few or no issues is simply that judges, practicing lawyers, and others accept the argument from ordinary meaning as determinative under such statutes. If I am correct, the argument is a major rather than a minor justificatory resource in statutory interpretation, outside and inside courts.

Fourth, Judge Posner sometimes appears to assume that, to be a significant or truly viable general mode of interpretive argument, the argument from ordinary meaning must always prevail over competing arguments (p. 264). Without doubt, the argument from ordinary meaning may be canceled by a competing argument from technical meaning, or by an argument from harmonization with other parts of the statute. Also, the argument from ordinary meaning may be overridden by the argument from ultimate statutory purpose, or by still other competing interpretive arguments.⁵¹ Moreover, the argument from ordinary meaning is subject to limiting exceptions. For example, it generally loses its force when it generates a manifestly absurd or manifestly unjust result. Or, to cite a second example, where the ordinary meaning of implementing language is overgeneral in relation to its facial statutory purpose, the ordinary meaning will often be cut back to fit that purpose. Points of this nature, however, also apply to all the other leading types of interpretational arguments. If, to qualify as an important mode of argumentation, an argument must always prevail when appropriately in play, no type of interpretive argument would be important. No single type of interpretive argument, when appropriately in play, always prevails.

Furthermore, we must be wary of minimizing the true place of the argument from ordinary meaning by exaggerating the size of the category of cases in which it fails to prevail. Cases in which the conditions for the availability of the argument are not present in the first place should not be included in this category. These conditions are not really present when, for example, the statute is poorly drafted, or the statute is plainly obsolete or outmoded, or the language is highly vague.⁵²

In my view, Judge Posner does not give the argument from ordinary meaning its just due. If I am right, this argument is the primary justificatory resource in statutory interpretation. There is much about

50. See cases cited *supra* note 36.

51. See D. MACCORMICK & R. SUMMERS, *supra* note 31, at 479-86. In this forthcoming book, we also develop the argument that American theorists much overdo "weighing and balancing" as a mode of settling conflicts between interpretational arguments. Judges invoke other important modes, too, including cancelation and priorital overriding.

52. *But see* pp. 267-69 (discussing *United States v. Locke*, 471 U.S. 84 (1985)).

the argument that we do not yet fully understand, but this state of affairs is likely to be remedied in the next decade.

V. PRECEDENT

Again, Judge Posner does not seek to provide a comprehensive general theory of precedent, either positive or normative.⁵³ Indeed, it is difficult to know exactly what Judge Posner's theory is. His approach to precedent, like his theory of statutory interpretation, is fragmentary and unsystematic. And there is deep tension between various positions he takes. In very general terms, perhaps the most fundamental choice here is whether (1) the judge is to follow precedent in rule-like fashion, or (2) the judge is to determine on a case-by-case basis whether to follow any given precedent, almost as if every case were one of first impression, with precedent only a "factor to be weighed" in the overall decisional process. Judge Posner says several things that point toward the former. From time to time he acknowledges that binding precedents squarely on point really do exist (pp. 94-95, 132-33, 455-56). Moreover, he acknowledges that following precedent is a content-independent principle (and thus, in my terms, a formal principle) that generates a "reason apart from its [substantive] soundness. . . ."⁵⁴ In turn, Judge Posner identifies a variety of rationales that justify the general practice of following precedent, including, of course, "stability" (pp. 94, 98, 118, 119, 260). He also refers to the "limited license" of judges to change the rules in mid-course (p. 50).

Yet, at other moments, he sounds very different, and seems even to embrace a kind of ad hoc approach in which the judge (at least the higher appellate judge) is, in every case, to weigh and balance whether to follow precedent, viewing precedent as merely one "factor" in the overall decisional process:

Admittedly it is a legal convention — though one not fully shared by the rest of the community or even by the entire legal profession — that a decision foursquare in accord with a recent decision by the highest court of the jurisdiction is "correct" by virtue of its conformity to authority. But it is a weak convention. [p. 80]

53. The questions in a general normative theory of precedent include the following: (1) Why should we have such a normative theory in the first place? (2) How is the principle of stare decisis to be formulated, and in what sense is it a formal principle? (3) What are the rationales behind the formal principle of stare decisis? (4) When is a precedent to be considered settled law? What factors rationally figure in this judgment? (5) What factors may rationally undermine a once-settled precedent? (6) Within a precedent, what is holding and what is dictum? (7) On what courts is a precedent binding? (8) What court can overrule a precedent? What norms govern the exercise of a power to overrule, and how are they to be formulated? (9) What are the appropriate interactions between statutes and precedents? Contract terms and precedents? Constitutions and precedents?

54. P. 260. Posner adds that there is "no social interest in continuity or a smooth fit, as such, between successive cases." P. 260. *But cf.* p. 81 (discussing "the political foundations of precedent").

....

.... The later court decides whether to read the earlier decision broadly or narrowly and, if it cannot be narrowed sufficiently to distinguish the present case, whether to overrule it. That court has the power, and it also has more information, just by virtue of coming later. The decision of how much weight to give the earlier precedent — whether to apply it at all, and if so how broadly — is a pragmatic decision in which the uncertainty that will be created by a too casual attitude toward past decisions — and the additional work that such an attitude will create for the courts both by requiring more time on each case and, as a result of the greater uncertainty, engendering more cases — are compared with the increased risk of error that an uncritical view of past decisions will create. [p. 98]

....

.... Fidelity to precedent is just another consideration — another policy or principle — to be placed in the balance in deciding whether a particular outcome would be a suitable means to the judicial end. So far, so good. [p.107; footnote omitted]

....

.... The order in law is of decisions by lawyers' committees that we call appellate courts, and these decisions frequently are ill informed, outmoded, or ignoble. The obeisance that judges owe them depends on the intrinsic merit of the previous decisions, which is variable, and on the balance between the claims of stability and of substantive justice. [p.261]

From these and still other passages,⁵⁵ it would appear that Judge Posner believes a judge (at least of a higher appellate court) should be free to determine on a case-by-case basis whether to depart from any and all precedents. Judge Posner does not even appear to require a strong *prima facie* showing that the precedent is itself substantively unsound to trigger the full-scale inquiry into whether the precedent should be overruled. If this is his view, then every precedent becomes a candidate for overruling, and every case becomes a kind of case of first impression. And instead of precedent generating a genuine formal reason for decision (p. 260), it simply becomes a factor to be weighed (p. 107). *Stare decisis* is at most a "tug" at the judge's elbow (p. 90). The distinction between holding and dictum, then, is not at all hard and fast; rather, it is made largely on the basis of "policy" (pp. 96-97).

Judge Posner believes that most American judges are preoccupied with precedent as formal authority for decisions (p. 97). At the same time, he frequently approaches the other extreme. His own normative theory of precedent, like his normative theory of statutory interpretation, is highly substantive. Indeed, it may even be substantivistic. That is, it may be underformal in the respect that it fails to accord

55. See, e.g., p. 455 ("judges are compelled to fall back on the grab bag of informal methods of reasoning that I call 'practical reason'").

sufficient force to the formal principle of stare decisis and thus to the various rationales behind that principle.⁵⁶ In nearly all of the above passages, Judge Posner even appears to accord relatively little weight to the efficiency that goes with regarding most precedents as settled law rather than as decisions always subject to full reexamination. He also fails to acknowledge that on many legal questions on which there is precedent, the force of substantive reason on each side is more or less in equipoise or at least not clearly in favor of one outcome, so that the "resolutive" function of precedent in such cases accordingly takes on special significance.⁵⁷

VI. LAW'S AUTONOMY

One of Judge Posner's most general theses is that law has relatively little autonomy.⁵⁸ I have deferred this topic until now because my commentary on this thesis must inevitably draw on what I have discussed above. Judge Posner really has a dual thesis. First, he thinks that law, as a social phenomenon, is highly dependent on other, nonlegal, sources for its substantive content and, presumably, for its required social acceptance and for its modes of applicational analysis. Second, he thinks that law, as an academic discipline, is highly dependent on other disciplines for facts and values relevant to law's evaluation and improvement, for models of legal reasoning, and for ways of studying law and its workings.

Neither branch of this dual thesis is new. Oliver Wendell Holmes, Jr., Roscoe Pound, and numerous others subscribed to such views long ago. What is perhaps most notable in recent times is the acceptance in the law schools of economics as a discipline of relevance to law, a development in which Judge Posner himself has had a very large hand. Still, I cannot agree with Judge Posner that even economics has "ravished" law or legal education.⁵⁹ Indeed, the actual impact of economics on the positive content of specific legal doctrines has, on the whole, not been very great. At the same time, in the law schools today, scholars and students are also more receptive than ever before to instruction

56. Perhaps one factor driving his overall view is his low estimate of the substantive quality of precedent in our system. Evidence of such an estimate appears at pp. 94, 240, 261 & 445.

57. Judge Posner omits in his book any reference to several of the standard rationales for precedent other than "stability" and the like. For example, he does not take up Professor Fuller's point that precedent, as a form of antecedent law, serves as a major source of those standards on which truly effective adjudication is dependent. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372-81 (1978).

58. Yet at one point he does write of the "essential characteristics of the legal enterprise." P. 455.

59. P. 442. For a systematic evaluation, see Summers & Kelley, *'Economists' Reasons' for Common Law Decisions — A Preliminary Inquiry*, 1 OXFORD J. LEGAL STUD. 213 (1981). (This article, alas, was never indexed in the *Index to Legal Periodicals*. Nor were any articles in the first few issues of this journal.)

from all academic fields that bear on law — philosophy, history, sociology, political science, literature, and more.

Judge Posner sees several implications of the “new” dependence of law on other disciplines. I will confine myself to two of those. First, he occasionally suggests that this dependency signifies that both law as a social phenomenon and law as a traditional academic discipline are in pretty bad shape. He implies that we really cannot have a “thrilling vision” of law, given its dependent, parasitic, and servile status (p. 460). In the same vein, he suggests that, given the dependency of academic law on other disciplines, traditional academic lawyers could be thought of as “mere water bearers and hod carriers of theorists from other disciplines” (p. 437). The second, and the most obvious practical implication for Judge Posner, is simply that law, and so academic lawyers, must turn to other sources and disciplines for the facts and values relevant to the content of law, and even for appropriate models of applicational legal reasoning.

In response, one may say that, if law as a social phenomenon and academic law are in pretty bad shape because of this dependency, then so too are the economy as a social phenomenon and academic economics. Nearly everything Judge Posner says about law and academic law is also true of the economy, and of academic economics (at least in its normative facets). Indeed, matters are even worse. The economy as a social phenomenon is deeply and in manifold ways dependent on the social phenomenon of law. Normative economics, as an academic discipline, is dependent on a theory of value deriving from philosophy. And the policy prescriptions generated by normative economics and philosophy must inevitably undergo significant transformation on the anvil of law prior to any legal implementation.⁶⁰ Indeed, a “raw” policy prescription, even though otherwise sound, may not even be susceptible of reliable legal implementation and thus may have to be abandoned altogether. What an unthrilling vision all this must be for champions of the autonomy of the economy and the autonomy of normative economics!

Obviously, lawyers must learn from economics (and other disciplines) in making and applying law, and in studying and teaching law. But this state of dependency can be overstated, too, and I believe Judge Posner is guilty of overstatement.⁶¹

The relative autonomy of law and academic law can be easily illustrated. First, law is not, in large measure, dependent on other phenomena, or on other fields of academic study for answers to the

60. See generally Summers, *Some Considerations Which May Lead Law Makers to Modify a Policy When Adopting It as Law*, 141 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 41-42 (1985) (discussing various desiderata, including having law take the form of rules and be intelligible, “factually” administrable,” and “appropriately prospective”).

61. Judge Posner occasionally offers a qualification, but one wonders whether he is really serious. See p. 434 (“No field is completely autonomous . . .”)

question: What are the essential elements of a system of law? Answers to this basic defining question are to be found emergent in the subject matter of law itself, and these answers have an integrity and complexity of their own. Second, once the elements of a legal system are in place, the law of that system, and not other things, regulates the creation of statutes, precedents, custom, and other forms of law. As Hans Kelsen emphasized, law largely regulates its own creation.⁶²

Third, not every statute, precedent, or other species of law is significantly dependent for its rational substantive content on the findings and teachings of other disciplines such as economics or sociology. Much of our law does not require or presuppose values or empirically verified generalizations beyond the resources of intelligent common sense, the humanist tradition, and the requisites of legal implementation. This is true, for example, of that core of the criminal law and of those parts of civil law that track widely accepted moral norms. To cite only one more example, most written law consists not of statutes but of contracts, and most contracts are not dependent in a substantive way on the resources of other disciplines.

Fourth, with regard to the content of all statutes, all precedents, and all species of law, formal considerations of a distinctively legal kind play a major role. Constitutive formality, validity formality, continuity formality, close-ended formality, expressional formality, and fiat formality⁶³ are, in light of their various rationales, fused with the substance of particular statutes, precedents, and other law. These (and still other) varieties of formality, all of which derive from "inside the law," shape the contours of law's material content and also render it fit for legal implementation.

Fifth, the methods that lawyers and judges apply in interpreting statutes and in following precedent are more distinctive than Judge Posner allows. For example, arguments from the ordinary or technical meaning of statutory words, from harmonization with the rest of the statute and with related statutes, and from ultimate statutory purpose often involve systematic analysis and sophistication more or less special to law. The same is true of much reasoning about binding precedent. We must be wary of the exceptionally able ex-law professor who is disposed to take much for granted here. One hardly knows where to begin. The skills of sound distinguishing, reconciling, and synthesizing of precedents are highly refined in the law. The differentiation of settled precedent from that which is not yet settled is no simple matter in our system, and has little by way of counterpart outside the law. Nor is the identification of what is authoritative in a

62. H. KELSEN, *GENERAL THEORY OF LAW AND THE STATE* (A. Wedberg trans. 1943).

63. See *supra* text accompanying notes 17-30.

precedent a simple matter with no distinctive complexities.⁶⁴ Identifying what is authoritative in a precedent may even require sophisticated doctrinal history (including inquiry into the sequence in which cases have arisen). What existing precedents “stand for” is in part a matter of how they have come to be. An ahistoric discipline such as economics can tell us almost nothing about this.⁶⁵

Of course, the scope for all this technique is partly determined by what the judges of the system collectively permit. If judges were to choose, as a normative matter, to play fast and loose with precedents (or statutes), the law would be far less determinative, and judges would be forced to fall back on what Judge Posner refers to as the “grab bag” of informal methods of “practical reason” when applying law (p. 455), methods not relatively distinctive and in no sense autonomous. This, however, would be because the judges had given up on law-like methods and not because of anything inherent in applicational legal reasoning.

Finally, law has, or seems to have, a kind of specialized value theory of its own. At the least, some categories of values are more or less inherently implicated in law, in tolerably well-ordered societies anyhow. To the extent that these values are in some sense legal, we have here another dimension of law’s relative autonomy, although law remains, of course, heavily dependent on still other categories of values, too.

Legal institutions such as adjudication depend for their moral force and for the acceptability of their outcomes on the realization of special participatory values. Accordingly, adjudication pointedly provides for various participating roles.⁶⁶ Also, as noted above,⁶⁷ a wide range of values — rationales — lies behind the basic varieties of formality in the law, rationales that leave their imprint on the material content of statutes, precedents, and other species of law. Many of these rationales are so intimately legal that they are often characterized as “rule of law” values. Similarly, I have identified a category of values that figures in the justificatory force of certain standard argu-

64. The topic has even engaged our very best theorists. See, e.g., Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431 (1989).

65. I have elsewhere argued in quite specific terms that law, legal analysis, and legal theory are not reducible to economics. See Summers, *Economics and the Autonomy of Law, Legal Analysis, and Legal Theory*, in VERNUNFT UND ERFAHRUNG IM RECHTSDENKEN DER GEGENWART 395-408 (T. Eckhoff, L. Friedman & J. Uusitalo eds. 1986); Summers, *The Future of Economics in Legal Education: Limits and Constraints*, 33 J. LEGAL EDUC. 337, 344-48 (1983).

66. See generally L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 705-08, 712-14, 727-29 (temp. ed. 1949) (moral force of adjudication is at its maximum where certain conditions, such as participation by disputants, are met); Summers, *Evaluating and Improving Legal Processes — A Plea for Process Values*, 60 CORNELL L. REV. 1 (1974) (participatory governance and procedural rationality are important to determining the quality of a legal process).

67. See *supra* text accompanying notes 17-30.

ments in statutory interpretation⁶⁸ and in reasoning from precedent.⁶⁹ Then, too, legal values include a whole class of substantive reasons — elsewhere I have called these “rightness” reasons — which are non-consequentialist and yet dominate much of the common law.⁷⁰ Important past-regarding values are implicated in these reasons, including justified reliance, good faith, fair notice, just desert, and more. We do not yet fully understand how and why rightness reasons and their concomitant values are so prominent in the common law, but I will not be surprised if the values that figure in these reasons are ultimately found to be somehow distinctively congenial to the concerns of the common law and its methodology. Certain implementational values — values having to do with the efficacy of factfinding, with the measurability of harms, and the like — relate to the ultimate limits of law itself. To my knowledge, no one has drawn all of the various categories of values I have listed here together (and there may be more) and subjected them to systematic analysis.⁷¹ To the extent that the very nature of law and of social ordering through law presupposes, draws upon, or implicates such values in ways that give them special definition, content, and meaning, these values are uniquely legal or intimately related to law — and, perhaps, they comprise a significant domain of law's relative autonomy.

VII. LEGAL EDUCATION AND THE ACADEMY

Of course, Judge Posner is also ex-Professor Posner of the University of Chicago. In various places he expresses opinions on legal education and on his days as a student at the Harvard Law School. He concedes that the case method and the Socratic method remain “invaluable” methods that provide “essential preparation for the practice of law” (p. 3). Yet he also expresses grave doubt whether the Socratic method really “teaches reasoning at all, beyond honing the students' skills in identifying contradictions” (p. 98). Moreover, he suggests that the system of “legal education” turns out lawyers who are uninterested in “legislative” facts — in the causes and consequences of social ills and in the social effects of legal doctrines generally (p. 468). Indeed, he closes this work with a plea for much more science, especially social science, in law.

I have no quarrel with Judge Posner's plea for more science, although I have less faith than he that science can so readily provide

68. See *supra* text accompanying notes 31-52.

69. See *supra* text accompanying notes 53-57.

70. See generally Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707, 752-74 (1978).

71. For a valuable treatment of several aspects of this subject, see P. STEIN & J. SHAND, *LEGAL VALUES IN WESTERN SOCIETY* 1-113 (1974).

answers for law.⁷² I also doubt that Judge Posner could marshal much evidence to support his conclusion that lawyers generally are uninterested in "legislative facts," and I think even less evidence supports his suggestion that the Socratic method explains any aversion lawyers may have to legislative factfinding. Certainly Judge Posner leaves these matters unsupported.

But what I most wish to do is respond briefly to Judge Posner's remarks on Socratic teaching and the case method. Although time-honored, Socratic teaching is now in decline in the American law school, and it badly needs defenders. In my view its virtues are legion, and go well beyond what Judge Posner at one point credits it with — sharpening student sensitivity to "contradictions." I believe it fitting, in this jurisprudential essay, to address the aspects of Socratic teaching and the case method that relate to the very nature of law itself. Of course, I can do so here only in suggestive terms.

The Socratic method is more faithful to the very nature of law than other methods. Law is not like a temperature gauge from which one merely reads off information. Law is inherently dialectical, in its creation and especially in its application. Much didactic teaching tends to falsify this reality. Socratic teaching, which is dialectical, does not.

Socratic teaching is distinctively appropriate to American law. Our law is vast and fast-moving. Even assuming that it would otherwise be desirable to teach, in didactic fashion, *all* the basic law of our system, this could not be done in three years, and much of what was "learned" in this fashion would be obsolete before long anyway. Socratic teaching necessarily requires limited focus on particular areas of law, but the skills, attitudes of mind, and other qualities so imparted are transferable to other areas.

Law is inherently applicative, and it purports to apply to reality largely through the medium of language. Yet to a considerable extent law's very meaning resides in how it applies to concrete fact. Dialectical teaching through the medium of case materials, with all their concrete factual richness, can provide a more authentic experience of the reality of law for the participants than can didactic teaching. (This may be different in "code" systems where law has a more abstract and less applicative quality.)

The best Socratic teaching dwells more intimately than can didactic teaching upon the required qualities of reasons, and of rules, if these qualities are to figure appropriately in legal analysis and justification. In this regard, law just is a kind of process of thought (having positive as well as normative relevance). Consider, for example,

72. Cohen and Fuller also were skeptical about this. See Cohen, *The Social Sciences and the Natural Sciences*, in *THE SOCIAL SCIENCES AND THEIR INTERRELATIONS* 437 (W. Ogburn & A. Goldenweiser eds. 1927), and see my summary of Fuller's views in Summers, *supra* note 2, at 442-44.

thought about substantive reasons in the justification of judicial decisions. Some substantive reasons are much more appropriate than others. Indeed, no fewer than ten major criteria may be relevant to evaluating the appropriateness of a given type of substantive reason for use in the law, criteria that must be explored to some extent in any Socratic instruction worthy of the name.⁷³ Consider, as a second example, the process of thought that goes into the extraction and formulation of legal rules, the hypothetical testing of proposed formulations of rules including the resort to limiting cases, the rational drawing of lines in determining the contours of rules, and the determination of whether facts relevant to the assessment of proposed formulations of rules are available and what bearing their availability should have.

VIII. CONCLUSION

Judge Posner suggests that jurisprudence should not be the exclusive province of specialists (p. xiii). He means by this rather more than that lawyers, law students, and others should take some interest in the subject. He believes nonspecialists can also contribute solutions to the problems of jurisprudence. But in such matters the proof is in the pudding. Judge Posner has made a major and lasting contribution in mediating between the disciplines of economics and law. In my opinion, his attempt at jurisprudence is not quite so successful. This should hardly be surprising, especially to followers of Adam Smith, given that Judge Posner could not have put as much by way of resources into jurisprudence as he has put, over many years, and with so much profit, into the economic analysis of law.

73. See Summers & Kelley, *supra* note 59, at 235-55; Summers, *Why Common Law Courts Seldom Need to Assess Closely the Comparative Force of Conflicting Substantive Reasons*, in 1 REASON IN LAW 207 (E. Pattaro ed. 1987). These criteria are: (1) intrinsic justificatory force, (2) conventional justificatory force, (3) commensurability with other reasons, (4) intelligibility and persuasiveness, (5) transmutability into stable rule, (6) "guidesomeness," (7) efficient constructability, (8) possible arbitrariness of "boundary conditions," (9) general "range" of the reason, and (10) suitability for court use.