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Comments on the Comments

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Comments on the Comments

ROBERT S. SUMMERS

Abstract. The paper replies to Bix and Soper (Bix 2007; Soper 2007). Bix's paper raises methodological questions, especially whether a form-theorist merely needs to reflect on form from the arm-chair so to speak. A variety of methods is called for, including conceptual analysis, study of usage, "education in the obvious," general reflection on the nature of specific functional legal units, empirical research on their operation and effects, and still more. Further methodological remarks are made in response to Soper's paper. Soper suggests the possibility of substituting "form *v.* substance" of a unit as the central contrast here rather than form *v.* complementary material or other components of a unit. Various reasons are given here for not doing this. Among other things, it is also argued here that form does not, contrary to Soper's suggestion, always follow substance.

1. Comments on Bix's Remarks¹

Bix refers to my plea for a "renewed focus on form." It is true that I seek to clarify what form is in functional legal units; demonstrate how form is an avenue for advancing understanding of such units; identify the credit due to form for ends realized through such units; and sketch models of form in functional legal units.

Bix observes that I reject "formalism" in the sense of "conceptualism" or "mechanical jurisprudence." Of course, such formalism was the enemy of the American realists, and Bix acknowledges that I am "more on the side of realists here." As he notes, my formalism "emphasizes the way form helps achieve policy and other results"—duly designed form serves purposes.

He also says that the "Spirit" of Summers, "if one is to associate it with any American school," is with Lon L. Fuller and the legal process school. I agree with this characterization, but my emphasis on form is certainly more pronounced than Fuller's.

¹ Readers may also be interested in an earlier symposium on this book which appeared in *Rechtsphilosophie und Rechtstheorie* 34, 2005(2): 186–204.

Bix also acknowledges that my focus on form is somewhat distinctive. Here, he alludes to my definition of form as the purposive "structure" or "arrangement" of a functional legal unit such as a rule, or a contract, or an interpretive methodology.

He also uses the expression "possible elements of form for a functional legal unit": Here he has in mind what I call attributes of "make-up, unity, determinateness, continuity of existence, mode of operation, instrumental capacity, intelligibility, distinct identity" and "ordered inter-relation with other units." Actually, I call these "attributes" of a functional legal unit such as a rule, or a contract or an interpretive methodology, or an institution. But, as Bix acknowledges, form figures in these attributes. However, I also stress that complementary material or other components of the unit under study also figure in these attributes. Thus the attributes of a functional legal unit include more than form.

Bix's description of the most basic contrast in my theory is not quite the same as my own description: My basic contrast is between the overall form—the purposive systematic arrangement—of the unit and the constituent features of this form, all in contrast to the material or other components of unit, whereas his contrast is between "the structure or arrangement of a practice or institution" on the one hand, and "the content that fills out or individuates particular instances of the practice or unit," on the other. In the end, our formulations may be the same.

Bix says I treat form-skeptics as theorists who say the credit due to a functional legal unit is not due to its form but to "material choices only." This is just one position among some of the form-skeptics that I criticize. I also view form-skeptics as those who are skeptical about the very possibility of a coherent overall account of form itself in the law, and I seek to refute this.

I now turn to Bix's treatment of alternative theoretical approaches. He agrees that a merely rule-oriented approach has many of the limits I point out in chapter three of my book (Summers 2006). The theories of law of Hart and Kelsen focus primarily on rules. Indeed, these and many other theorists commonly reduce all the units of a legal system to rules of one kind or another. I resist this and offer an overall analysis that focuses on the forms of many other functional legal units as well as rules. These other units include contracts, interpretive and other methodologies, sanctions and remedies, institutions such as courts and legislatures, and more.

Bix agrees, too, that form is also an important avenue for advancing understanding of rules themselves. Indeed, without study of the overall form of rules, including the seven major constituent formal features I treat, we could not adequately understand rules as such. Similarly, as to contracts, he agrees that only when we understand the *form* of a contract can we fully understand the doctrinal rules of contract.

But have I misread Hart and Kelsen? Bix suggests their theories purport to draw lines between law and non-law, and are *not* so much concerned with what a legal system itself is *made up of*, that is, with the nature of the various functional legal units of a legal system other than rules. But my position is that, in drawing lines between law and non-law it is essential to consider, too, what law as a whole is made up—what its functional units are, and how they comprise a system. Hart does consider some non-rule functional units, e.g., courts, though he tends to reduce them to rules, and in this seeks to differentiate law from non-law, e.g., there are no moral courts.

Bix agrees that “conceptual analysis” of the “essentials” of law is not enough, and agrees that much can also be learned through a systematic focus on forms of functional legal units. Indeed, Bix agrees that, and I quote, a “form-centered theory gives a fuller understanding of what law is and does.”

Is it an implication of my position that the scholar should not, or need not, do the philosopher’s conceptual analysis, nor do any empirical field work, but merely needs to study and reflect on form from the armchair, so to speak? No. We need all the help we can get here from all types of inquiry. (Also, I do not assume all units of the same type take exactly the same form.)

Yet if I do not merely embrace dictionaries and analysis of usage as an alternative to conceptual analysis, then what methodology do I use? I reflect on what we already know, and seek “education in the obvious,” as Holmes once put it. Throughout my book, are various methodological maxims I sought to follow.

Certainly I do not embrace a full fledged Poundian sociological approach. Bix suggests that one with my interests might strive to “add an empirical component to discussion of form—rather than just give one’s best guess about” what would be best, as with, for example “the relative benefit of contextual and a-contextual approaches to interpreting statutes.”

But I do not try in the book systematically to present and defend what would be the *best* of any given type of functional legal unit such as, for example, the best overall interpretative methodology for statutes. I claim that we have differences of interpretive methodology, and that these are, among other things, influenced by conceptions of relevant purposes. I welcome Holmes’ “education in the obvious,” as well as thoughtful resort to recognized general usages, conceptual analysis, empirical studies, existing general knowledge of functional legal units, “ideal model” approaches, and still other methods that might also cast light here on what it would generally be best for a legal system to have. Bix does agree that there is room for “important contributions from non-empirical theorists.”

Bix asks if I would side with those Uniform Commercial Code writers who favor more contextualist interpretation of commercial contracts rooted in trade usage, course of dealing and course of performance? All in preference to narrow textualist interpretation of the language? I do stress contextualism in proper cases. Do I agree with the *Nanakuli* case and its *contextual* approach? Yes, in general. But it would be important to treat cases in detail here. There must be limits to any approach, and these can only be adequately perceived in relation to cases and to how representative the cases are.

Bix interestingly explains the general neglect of the subject of form by others on various grounds; including the following:

- (a) It does not seem to yield sufficiently to conceptual analysis.
- (b) It does not seem to be empirical enough.
- (c) It may even look a bit "doctrinal?"
- (d) It does not seem to be as explicitly policy-oriented as it could be.

This last point is a very interesting one, and calls for me to try to articulate my own methodology for the study of form more fully and to differentiate it from other methodologies. I need to stress, too, that much of what I am trying to do does not involve full-scale empirical study. And it goes well beyond conceptual analysis. As I have stressed, it does require focus upon and "elaboration of the obvious." I plan to elaborate further on the methodological maxims I followed in the book, and will soon publish an essay on this subject. For now, see also my remarks in my Comments on Soper's paper.

Some of what I am doing certainly does require more study of general facts. For example, existing *socio-moral norms* seem to shape legal notions of promissory obligation—i.e., contractual form. How? How far? I think some empirical study might help here, and I am not at all sure I would know how to do it. Doubtless our famous Cornell Law School empiricists could provide some help here. And should such empirical study also extend to how *social concepts of rules* shape the form of actual legal rules? Indeed, does each functional legal unit have a "social" counterpart in the background that each such unit could be said to mirror in some way? These are only some of many interesting and difficult questions, partly methodological in nature, that arise here.

2. Comments on Soper's Remarks

Soper generally equates "substance" with "content," or with "material or other components" of a functional legal unit. He notes I do not contrast "form *v.* substance," but instead contrast the form of a functional legal unit with its "complementary material or other components." Soper says he

thinks the terms “material,” and “substance” seem equally apt, and he adopts the “form *v.* substance” contrast. Early on I chose *not* to use the “form *v.* substance contrast.” Rightly or wrongly, I saw this to be an important step in the evolution of my theory. Here are my main reasons for adopting “form *v.* complementary material or other components” rather than “form *v.* substance.” First, why should we not adopt “the form *v.* substance” contrast as central?

(a) Such a form-substance contrast often tempts some readers or listeners to think that, compared to anything as robust as substance, form in this pair must somehow be relatively anemic. On this interpretation, the form versus substance contrast downplays the extent, density, and overall contribution of form, and exalts substance. Yet in my theory, form is not anemic. Rather it is the purposive systematic arrangement of a functional legal unit as a whole. It is definitional, robustly organizational, and duly designed to serve ends, along with complementary material or other components of the unit.

(b) A second reason not to adopt a “form *v.* substance” contrast is that in my experience some readers or listeners tend to assume that in this dichotomy, form and substance are separate worlds with no interactions between them. Indeed, Soper suggests I think the sides of any dichotomy here are “independent.” Yet, in my theory there can be various interactions between form and, what I call, its complementary, material or other components, and I use the word “complementary” partly to underscore this possibility. For example, the form of a rule, with its various possible degrees of the formal feature of definiteness can leave significantly different imprints on complementary content, as in my contrast between a 70 mph speed limit and a “drive reasonably” limit. At the same time, I say I think it remains possible to differentiate, as I say, relatively sharply between such form and complementary material or other components.

(c) A third reason to eschew the formulation “form *v.* substance” and adopt the “form and complementary material or other component” formulation is that the latter, as duly defined, and organized, is more commodious and more felicitously encompasses all that is involved. Form is the purposive systematic arrangement of the whole of the unit, including its imprints and other effects on, the material or other complementary components. In so defining and organizing the whole unit, various choices of form have wide ranging imprints and other effects on the whole. Consider, for example, the effects of choices of constituent features of the overall form of a complex institution such as a legislature. Its formal compositional feature defines and organizes the membership of the body. Its formal jurisdictional feature defines and confers law-making jurisdiction. Its formal structural feature defines and organizes its internal committee system, and the management of the body. Its formal procedural feature defines and organizes the steps by which the body is to adopt

legislation and to conduct related activities. Its formal methodological features define and organize the fact-finding, drafting and other techniques required for the conduct of institutional activities.

(d) A fourth reason to forego the "form *v.* substance" contrast is that "substance" has various meanings in the history of thought that I do not adopt here. I will give one example. One view is that substance actually consists of form combined with matter. Whatever value this way of setting things up may have for others, I have not found it meaningful and clarificatory in my work, and I do not follow this view here.

Soper suggests I say form deserves even *more* credit for ends served than the substance of the unit (in my terms complementary material or other components). I certainly say form deserves *much credit* for ends served, albeit, in conjunction with the material or other components of a unit such as policy content in a rule or personnel in a court. Soper also says I say form is "superior" and the context would indicate to some readers that he is saying I say form is superior in importance to what form is contrasted with, in his terms "substance," in my terms "complementary material or other components." But as I try to make clear in Summers (2006, 74 and 77), I really make a rather different claim. I am saying a form-oriented *mode of analysis* is superior to a rule-oriented *mode of analysis*.

Am I elevating form over substance in a fashion that could be considered formalistic? I don't think so. I claim that if the overall form of a functional legal unit such as a rule is duly defined and organized, the form that figures in this should not be formalistic in any pejorative sense.

Soper says I suggest form and substance are wholly independent. But I at least recognize some interactions. I say, for example, that form shapes and leaves imprints on what would be, in Soper's terms, "substance," and, in my terms, the complementary material or other components of a functional legal unit. For example, the formal feature of definiteness in a rule leaves its imprint on the policy content of the rule.

Soper suggests choice of substance entails choice of form. Certainly substance could be so defined. But if in my speed limit example the substance is specified as speed regulation in the interest of highway safety, I would contend form still has some independent significance in contrast with substance. We may choose "Don't drive over 65" in preference to "Drive reasonably" partly for reasons quite independent of the substance of a reduction in speeding in the interest of safety. That is, we may want this more definite formal feature because of factors I point out in my book, e.g., the more definite feature gives addressees a fairer opportunity to comply, etc. (see Summers 2006, 190–9). So with regard to this, it is not wholly true to say, as Soper does, that "substance carries form in its wake," nor is it true that form follows substance "automatically." Here, choices of relevant formal features introduce considerations of their own, to an extent

independently of the primary substantive policy at stake, such as highway safety regulation.

Soper suggests legal systems have managed to get along relatively well without paying all that much explicit attention to form as such. I would say good designers of rules pay attention to form, though perhaps not explicitly using that word. They know such things as that a more definite speed limit may operate more fairly, even though they may not be *explicit* in naming this a choice of a formal feature. And if we did pay more explicit attention to form, isn't it possible we might get along even better? Should we find out? We might adopt a federal constitutional provision requiring all legal personnel to study my book?!

Also, let's look more closely at this "substance" that form is said (by Soper) to be "following." Suppose we can pose our two possible speed limit rules having differing degrees of the formal feature of definiteness:

- (a) Drive no faster than 65.
- (b) Drive reasonably.

Both alternatives may be said to include substantive content. But the two still differ in a major formal feature. They differ in the formal feature of degree of definiteness. Each would leave a different formal imprint on the substance of the rule. It is true that in Soper's terms, there must first be a "substance" before there can be any scope for such an imprint of form. But I would not say that the imprint or effect of form "follows" the substance. The alternative rules take different degrees of the formal feature of definiteness, and the choice between these may be made at least partly on the basis of considerations independent of the substantive policy of highway safety regulation, such as the fairness of opportunity of drivers to comply that goes with the rule having the more definite formal imprint.

Why have scholars neglected form? Soper considers the three explanations I offer. Yet he says the three I list are not really explanations for neglect but repetitions of the claim of neglect. I do not think this is true. Consider the second. This is the failure to focus separately on form in relation to substance. At least in my experience, substance often tends to hog attention to the relative neglect of form. We say "stop the speeding!," and then we focus on the substance, i.e., cutting down the speeding to increase safety, among other things. But how best to do this? A drive reasonably rule? Or, for example, a rule that says drive no faster than 65? Here a major choice of degree of formal definiteness enters the picture. And as I have suggested, the pros and cons here are not reducible merely to what will reduce speeding more. Among other things, they also include the fairer notice that the formally more definite rule would bring.

I turn to a different question. What is the methodology employed in my book? If it is not exclusively an empirical study, and it plainly is not, and

if it is not an exclusively conceptual analysis, and it plainly is not, then what is it? How might one at least gesture here at describing some of the leading methodological maxims I try to apply? Consider these:

- (a) I trade heavily on general social ordering experience and on facts we already know, e.g., a *clear* and *definite* rule (formal features) is not only likely to be more determinate and followable by addressees, but at the same time more likely to give addressees fairer opportunity to comply.
- (b) I formulate and apply a general definitional account of form based on widely understood knowledge of functional legal units, e.g., rules, interpretive methodologies, institutions such as courts, etc.
- (c) I postulate, for example, the formal features of paradigmatic examples of functional legal units, and these features are, I think, not generally controversial; consider for example, my account of the formal features and content of a paradigmatic rule as set forth in Summers (2006, chap. 5).
- (d) I stipulate widely accepted general purposes such as policies, rule of law values, and fundamental political values, and I conceive functional legal units as *means* to these purposes (ends).
- (e) I rely on rational elaboration of the obvious, e.g., fair notice is dependent on a sufficient degree of definiteness.
- (f) I treat both the form and the non-formal as means.
- (g) I admit, too, that rational legal orderers will often have to find facts.

Soper suggests that form “though present and distinguishable from content” (substance) is “secondary to substance, not primary.” It may seem somewhat easy to say form is secondary if only one feature of the form is compared with the complementary material or other components. But even on Soper's terms, the substance of the functional legal unit still has to be defined, organized, and integrated *within the whole unit*, and in my view, it is through duly designed form that this is done. Without form, a unit could not have its intended identity as defined and organized as a functional legal unit. Form defines and organizes the unit, and in so doing also leaves imprints and other effects on the unit. So, perhaps form is not “secondary”—perhaps form and the rest are “equals?” Consider a rule. It has substantive content. But, as I explain in my book, a rule also has seven formal features, most of which leave imprints or other effects on content, and thus contribute to all attributes of the unit, its make-up, its unity, its determinateness, its instrumental capacity, its distinct identity, and more.

Purposes permeate required form. To define and organize a unit we must postulate purposes. We cannot define and organize a functional legal unit at all without regard to the purposes that are to inform the overall

form, constituent formal features, and complementary material components of the unit. I define form as the purposive systematic arrangement of the unit as a whole. This, of course, does not mean that the whole is reducible to form. The make-up of the unit also includes complementary material or other components, as affected by form.

Soper says “we concentrate on the speed limit,” i.e., “the policy” we want the rule to serve, “and form follows almost automatically.” I say “no.” Again, consider highway speed regulation primarily in the interest of safety. As already explained, there are possible alternative rules here with different substantive contents and different formal features. Again, there will be different trade-offs in the choices. For example, a more definite rule (formal feature) may reduce traffic flow but afford drivers fairer notice of possible violation. A less definite rule (formal feature) may increase traffic flow, but afford drivers less fair notice of possible violation.

Even if the form of a particular rule is secondary *in some way* to substantive content it can still be of high importance. If we step back and view a rule *as a whole*, are we generally to say form is secondary in the construction of the rule? Does not the variety and importance of the seven basic choices of form required for construction of many or perhaps even most rules, as identified and explained in my book, argue for form being at least equal to content—to substance? If not equal, at least of high import?

Soper turns to the “possibility that form may embrace or entail substantive elements of value.” I agree. And I concede form can be good or bad. Well-designed form of a functional legal unit is, as such, good. Ill designed form is bad. It can be bad or insufficiently or inappropriately arranged in several ways, depending on the functional legal unit.

Soper suggests that what he calls my “clean division between the idea of form which can be good, and form which can be bad” is “muddied by refusing to count as form those arrangements that are insufficiently systematic.” But I do count these (up to a point) as form, though as form they be diminished or anemic.

I introduce “evaluative terms” in characterizing the form of a particular functional legal unit. Soper suggests that I if say form is deficient, e.g., the functional unit of a legislature is not sufficiently systemically arranged, I would therefore have to say it takes no form. But this does not, as such, follow. What follows is that it is not sufficiently good form—not well enough arranged purposively and systematically. (I assume that even a relatively unsystematized and thus quite poorly organized legislature could still be said to exist as a legislature.)

Soper suggests I should not view form as “evaluative,” but rather as a “factual” concept. And he says if I treat it as a substance, it becomes not form but substance! But I treat form as susceptible of duly purposive and

systematic arrangement to serve good ends, and I assume form may be arranged well or badly. And I treat well-designed form as serving ends in conjunction with material or other components of a functional legal unit. In my view well-designed form is *thus* value-laden and so is not merely a factual concept.

At one point, Soper says "it is substance, once again, not form *alone* that deserves *part* of the credit for ends achieved." But I do not assert that form *alone* deserves *all* the credit for ends served through a functional legal unit such as a rule, or any other functional legal unit, though I do say form alone may be due some credit for some ends served.

Soper notes that I say "good form can beget good content or substance." He says in later chapters I do not repeat my earlier qualifications that good form only *tends* to beget good content. But I intend my early qualifications to hold. I also later concede that some varieties of good form can be combined with bad policy or content. For example, a rule with evil content can be well stated with high expressional clarity, an otherwise good formal feature.

In regard to form and formalisms consider my Cicero example in Summers (2006, chap. 8) where a court granted salvage rights for "staying" with the ship to a sick sailor who had to remain on board a ship in distress which ultimately floated safely to shore, although the sailor did not contribute at all to saving the ship. Soper agrees with me this is a case of wooden literalism—formalistic interpretation of the statutory phrase "stayed with the ship," which we both reject. Soper conjectures that my position in the Cicero example may be inconsistent with earlier positions I took in my book. Here he suggests that my criticism of the Cicero court as indulging in wooden literalism is inconsistent with my espousal in Summers (2006, 257) of a "language-oriented criterion as the *primary* criterion of interpretive faithfulness." I think it is enough now for me to say that, as I use the phrase, to embrace a "language-oriented" criterion of interpretive faithfulness is not the same as to exclude attention to context and purpose.

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