

The Anti-Formalist

David A. Strauss[†]

“Well, what if anything can we judges do about this mess?” Judge Richard Posner asked that question midway through his opinion in *United States v Marshall*.¹ The question, and the fact that he asked it, tell you as much about Posner as any answer he might give. If the law is a mess, then that is something judges should notice. They should not pretend that there is no mess, or that the mess is always someone else’s (such as the legislature’s) problem. And, if possible, they should try to improve the situation.

The issue in *Marshall* was whether blotter paper impregnated with the illegal drug LSD counts as a “mixture or substance containing” LSD.² The question matters because the weight of the “mixture or substance” generally determines the offender’s sentence. A dose of LSD weighs almost nothing compared to blotter paper or anything else that might be used in a similar way (such as gelatin or sugar cubes). If the weight of the medium counts, a person who sold an enormous amount of pure LSD might receive a much lighter sentence than a person who sold a single dose contained in a medium. Also, the per-dose sentences for sales of LSD would bear an arbitrary relationship to the per-dose sentences for sales of other drugs, because the LSD sentences would be, for all practical purposes, a function of the weight of the medium.

The en banc Seventh Circuit, in an opinion by Judge Easterbrook, held that the blotter paper was a “mixture or substance containing” LSD, and further ruled that the statute, so interpreted, was constitutional.³ Judge Posner’s dissent argued that the “mixture or substance” language should be interpreted not to include the medium, because the majority’s conclusion led to irrational results—indeed results so irrational that they would be unconstitutional if the statute were not

[†] Harry N. Wyatt Professor of Law, The University of Chicago. I am grateful to Thomas Miles for very helpful discussions, and to the Sonnenschein Fund at The University of Chicago Law School for financial support.

¹ 908 F2d 1312, 1334 (7th Cir 1990) (en banc) (Posner dissenting), *affd* as *Chapman v United States*, 500 US 453 (1991).

² *Marshall*, 908 F2d at 1315 (majority).

³ See *id* at 1314–26.

construed differently.⁴ The Supreme Court, rejecting Posner's position, affirmed the decision of the Seventh Circuit.⁵

Judge Posner said, in his dissenting opinion in *Marshall*, that the answer to his question about the mess "lies in the shadow of a jurisprudential disagreement" between "the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures" and "the natural lawyer's or legal pragmatist's view that the practice of interpretation . . . authorize[s] judges to enrich positive law with the moral values and practical concerns of civilized society."⁶ I am not sure that it is necessary to be quite so highfalutin', to use a favorite Posner adjective. You do not have to be a natural lawyer or a legal pragmatist (there is not widespread agreement on what those things are, in any event⁷) to reach the conclusion that Posner reached in *Marshall*. You just have to be able and willing to recognize a mess when you see one, and to admit that you might have some responsibility to do something about it instead of treating it as a matter for the legislature or someone else to fix.

Candor and the willingness to take on that kind of responsibility are characteristic of Judge Posner. One might define formalism as the view that legal problems can be solved in a quasi-mathematical way—that, when it comes to resolving legal issues, there are no really bad messes—and that the judge's role is to implement solutions that were encoded in the legal materials by someone else, for example by the legislature when it drafted the statute. The legislature, not the judge, is responsible for the decision.⁸ But Judge Posner has never allowed what then-Judge Cardozo called "the demon of formalism" to "tempt[] the intellect with the lure of scientific order."⁹ In a way this is a little surprising, because some might say that Posner's economic analysis of legal issues does sometimes succumb to the "lure of scientific order," simplifying problems excessively so that they can be analyzed with the tools of economics. However true that may be, Posner, as a judge, is one of the great anti-formalists of our time.

⁴ See *id.* at 1331–38 (Posner dissenting).

⁵ See *Chapman*, 500 US at 455–68.

⁶ *Marshall*, 908 F2d at 1334–35.

⁷ See, for example, Michael Sullivan and Daniel J. Solove, Book Review, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 Yale L J 687, 689 (2003) (asserting that Judge Posner's version of pragmatism differs from the traditional understanding of pragmatism).

⁸ See Robert Cover, *Justice Accused: Antislavery and the Judicial Process* 232–377 (Yale 1975) (discussing the "[a]scription of [r]esponsibility [e]lsewhere" as one of the defining characteristics of formalism).

⁹ Benjamin N. Cardozo, *The Nature of the Judicial Process* 66 (Yale 1922).

I

Under 21 USC § 841(a), the possession of LSD with the intent to distribute it is a felony.¹⁰ Federal statutes further provide that a violation of § 841(a) “involving . . . 1 gram or more of a mixture or substance containing a detectable amount” of LSD is subject to a mandatory minimum term of five years’ imprisonment.¹¹ The mandatory minimum for a violation involving more than ten grams of such a “mixture or substance” is ten years’ imprisonment.¹² When *Marshall* was decided, the Sentencing Guidelines used the same “mixture or substance” formulation.¹³ The Guidelines determine offenders’ sentences if the mandatory minimums do not apply or are satisfied.

The average dose of LSD is only 0.05 milligrams,¹⁴ so someone would have to possess 200,000 doses of pure LSD in order to receive the mandatory ten-year sentence. But precisely because the standard dose is so small, LSD is distributed to users by being joined with some medium, such as blotter paper, gelatin, sugar cubes, or orange juice. (To impregnate LSD in paper, one dissolves the drug in alcohol or another solvent and then applies the solvent to the paper; the solvent evaporates and the LSD remains in the fibers of the paper. The LSD can be consumed by ingesting the paper, by placing it in a liquid and drinking the liquid, or by licking the paper.)¹⁵ Those media, of course, vary widely in weight, and all of them will be much heavier than the LSD contained in them. The defendants in *Marshall* had sold blotter paper impregnated with LSD. If the weight of the blotter paper counted, they were subject to the mandatory minimums. If the weight of only the LSD counted, none of the defendants had sold an amount even close to one gram.¹⁶

Treating the blotter paper as a “mixture or substance containing” LSD produces results that are, according to Judge Posner and Justice Stevens, who dissented in *Chapman*, “bizarre,” “crazy,” and “loony.”¹⁷ Selling five doses of LSD impregnated in sugar cubes would subject a person to the ten-year mandatory minimum sentence; selling 199,999 doses in pure form would not.¹⁸ The defendant *Marshall* was sentenced to twenty

¹⁰ 21 USC § 841(a)–(b) (2000).

¹¹ 21 USC § 841(b)(1)(B)(v).

¹² 21 USC § 841(b)(1)(A)(v).

¹³ See United States Sentencing Commission, Federal Sentencing Guidelines § 2D1.1(c) (1991), quoted in *Chapman*, 500 US at 457.

¹⁴ *Chapman*, 500 US at 457.

¹⁵ See *Marshall*, 908 F2d at 1315 (Easterbrook). See also *Chapman*, 500 US at 457.

¹⁶ *Marshall*, 908 F2d at 1315.

¹⁷ See *Chapman*, 500 US at 468, 475 (Stevens dissenting), quoting Judge Posner. See also *Marshall*, 908 F2d at 1332 (“loony”), 1333 (“crazy”), 1337 (“bizarre”) (Posner dissenting).

¹⁸ *Marshall*, 908 F2d at 1332–33.

years in prison for selling roughly 12,000 doses of LSD. Posner commented: “Twelve thousand doses sounds like a lot, but to receive a comparable sentence for selling heroin Marshall would have had to sell ten kilograms, which would yield between one and two million doses.”¹⁹

The en banc Seventh Circuit and the Supreme Court nonetheless held that the blotter paper was a “mixture” containing LSD, so its weight counted in determining the sentence. Both courts said they were relying on the “ordinary meaning” of the word “mixture.”²⁰ The Seventh Circuit explained: “Because the fibers absorb the alcohol, the LSD solidifies inside the paper rather than on it. You cannot pick a grain of LSD off the surface of the paper. Ordinary parlance calls the paper containing tiny crystals of LSD a mixture.”²¹ The Supreme Court in *Chapman* relied on dictionaries to reach the similar conclusion that “a ‘mixture’ may . . . consist of two substances blended together so that the particles of one are diffused among the particles of the other.”²²

Judge Posner, in the passage of his opinion about the “shadow of a jurisprudential disagreement,” seemed to be saying that *Marshall* was a case in which the majority took a “severely positivistic” approach and refused to look beyond the “clear, explicit, and definite enactments” of the legislature, while he was willing to “enrich positive law with the moral values and practical concerns of civilized society.”²³ But perhaps the most puzzling thing about *Marshall* is that the approach of the Seventh Circuit’s majority and the Supreme Court was not “severely positivistic” at all, at least if that means following the ordinary meaning of the language of the statute.

The principal conclusion reached by both the Seventh Circuit majority and the Supreme Court—that ordinary usage would treat the blotter paper as a “mixture containing” LSD—is surely wrong. Paper soaked with a substance is just not ordinarily referred to as a “mixture containing” that substance.²⁴ No ordinary English speaker would refer to a wet piece of cardboard as a “mixture containing water.” That usage might be accurate for certain purposes, perhaps in a chemistry class to illustrate the difference between a mixture and a compound. But it would be hopelessly eccentric in ordinary speech. The same is true of *Marshall*’s blotter paper. (To make the parallel exact, one

¹⁹ *Id.* at 1334.

²⁰ *Chapman*, 500 US at 462 (Rehnquist) (“ordinary meaning”); *Marshall*, 908 F2d at 1317 (Easterbrook) (“ordinary usage”; “[o]rdinary parlance”).

²¹ *Marshall*, 908 F2d at 1317.

²² *Chapman*, 500 US at 462.

²³ *Marshall*, 908 F2d at 1334–35 (Posner dissenting).

²⁴ See *Chapman*, 500 US at 470 (Stevens dissenting) (“I would not describe a used blotter as a ‘mixture’ of ink and paper.”).

would have to imagine referring to a piece of cardboard that fell into the ocean and then dried out as a “mixture containing salt.”) Just as a chemistry teacher, making a point, might call the cardboard a mixture, so might there have been good reasons to stretch the language of the statute in order to conclude that the weight of the blotter paper should count as part of the “mixture” for sentencing purposes. But how could the Seventh Circuit, and the Supreme Court, endorse such a strange use of language as “ordinary,” as if the words themselves decided the case?

The answer, I think, lies with Cardozo’s demon of formalism. The situation that the courts confronted in *Marshall* really is a mess. To resolve it you cannot just invoke the language of the statute. You have to consider, in Posner’s words, the “practical concerns” of society. That means you have to take some responsibility for solving the problem, instead of pretending that you are just doing what Congress told you to do. The conclusion reached by the Supreme Court and the Seventh Circuit may have been defensible. But the judges in the majority in the Seventh Circuit and on the Supreme Court did not want to acknowledge that the issue was a difficult one, that Congress’s instructions were not clear, and that they were working out the best solution they could. In fairness, both courts did acknowledge some of the anomalies that troubled Judge Posner, and they did give some explanations of why their resolution of the case was preferable. But in the end they ascribed responsibility to the legislature and pretended that the word “mixture” provided the answer. Judge Posner’s approach would not have made the mess go away, but it would have produced a sensible result in cases involving LSD, and it would have opened the door to a more general solution of the problem.²⁵ The formalistic approach taken by the majority in the Seventh Circuit and the Supreme Court made the mess worse.

II

The basic problem in *Marshall* can be simply stated. Congress did not intend punishments for dealing drugs to be determined solely by the amount of illegal substances involved. But Congress did not specify with precision what else should count, and there does not seem to be any easy way to specify this. Heroin and cocaine are typically mixed with, or “cut” by, inactive substances, and sold in that diluted form. Congress intended the punishments for dealers of those substances to be a function of the amount of the entire mixture, including

²⁵ See text accompanying notes 27–32.

the dilutant, not just the amount of illicit drug in the mixture. This is clear from both the statute and the legislative history, as both the Seventh Circuit's majority and the Supreme Court explained.²⁶ Congress's concern was that so-called street-level dealers might receive insufficiently severe sentences if only the pure drug counted.

Judge Posner ultimately concluded that LSD should be treated differently from other drugs. Sentences for possession of LSD with intent to distribute, he thought, should depend just on the amount of LSD involved; the medium should be disregarded. Posner argued, persuasively, that that would bring per-dose sentences for LSD roughly in line with per-dose sentences for other drugs. But that conclusion is difficult to reconcile with the statute. As Posner said in *Marshall*, Congress appears not to have understood that LSD, unlike other drugs, is not diluted and is sold by the dose, not by weight. As a result, the statutory provisions dealing with LSD use the same "mixture or substance" language as the provisions dealing with heroin and cocaine. Posner's approach would make the sentence entirely dependent on the "detectable amount" of LSD that was involved in the offense, thus essentially reading the "mixture or substance" language out of the statute. Moreover, the statutory provisions dealing with another drug—PCP—did make the kind of distinction that Posner wanted to make in the case of LSD, a distinction between the pure form of the drug and the "mixture." That made it even more difficult to argue that LSD should be treated differently from heroin and cocaine. Posner essentially acknowledged all of this; his argument was that LSD had to be treated differently or the statutory scheme would be so irrational as to be unconstitutional.²⁷

Judge Posner's approach at least might have solved the problem, in an acceptable fashion, for LSD. The best solution, though, was probably something along the lines of what the United States Sentencing Commission did in the wake of *Chapman*. The Sentencing Commission, which promulgates the Sentencing Guidelines, responded to *Chapman* by amending the Guidelines to provide that when LSD is contained in a carrier medium, the weight of the medium is to be disregarded and each dose of LSD should be given a constructive weight of 0.4 milligrams.²⁸ The average actual weight of a dose is about one-tenth of that; the Sentencing Commission's approach was designed to implement Congress's policies about low-level drug dealers without introducing the anomalies that Posner and others had identified. The Sentencing Commission's

²⁶ See *Chapman*, 500 US at 460–61 (Rehnquist); *Marshall*, 908 F2d at 1317 (Easterbrook).

²⁷ See *Marshall*, 908 F2d at 1336–38 (Posner dissenting).

²⁸ United States Sentencing Commission, Federal Sentencing Guidelines § 2D1.1(c), n H (1995), quoted in *Neal v United States*, 516 US 284, 293 (1996).

quasi-legislative solution to the problem was not the kind of thing that the courts can easily provide.

The Sentencing Commission's sensible revision of the Guidelines governed any sentence that was determined by the Guidelines alone. But in *Neal v United States*,²⁹ the Supreme Court ruled that *Marshall* and *Chapman*, not the Commission's interpretation, still controlled the meaning of the statutes imposing mandatory minimum sentences.³⁰ The Commission seemed not even to claim the authority to affect the interpretation of the statute.³¹ But in any event, the Supreme Court in *Chapman*, like the Seventh Circuit majority, had ruled that the plain meaning of "mixture" required that the weight of the medium be counted for purposes of the mandatory minimum. An agency interpretation cannot change the plain meaning of a statute.³² Although the blame cannot be laid entirely at the door of the *Marshall* majority and the *Chapman* Court, those courts' formalism precluded what was probably the best solution: to allow an agency with expertise to design a rule that would eliminate some of the gross anomalies in the LSD sentencing scheme.

The problems did not end there. The *Marshall* issue has arisen in many other settings, involving not just LSD but other drugs. What all of these instances have in common is the utter inadequacy of the *Marshall* and *Chapman* linguistic approach, based on the meaning of "mixture," to solve the problem. Instead, each of them required a judgment, like the one Posner made in *Marshall*, about what resolution would make the most sense.

For example, what if a drug is combined with another substance—perhaps in order to make the drug easier to transport, or to prevent the drug from decomposing, or to try to prevent the drug from being detected—but must be separated from that substance before it is marketed? The *Marshall* and *Chapman* majority opinions—preoccupied with the meaning of the word "mixture"—actually seem to say that in such cases the question is whether the drug is diffused

²⁹ 516 US 284 (1996).

³⁰ *Id.* at 296.

³¹ See *id.* at 293–94.

³² In *National Cable & Telecommunications Association v Brand X Internet Services*, 545 US 967, 982–85 (2005), the Supreme Court ruled that if an agency's interpretation of a statute is entitled to deference under the rule of *Chevron, U.S.A. Inc v NRDC*, 467 US 837 (1984), that interpretation can sometimes displace a contrary earlier interpretation of the statute by the Supreme Court—but only if the statutory provision in question was ambiguous, leaving room for agency discretion to act. Since *Chapman* held that the blotter paper was a "mixture" within the meaning of the statute as a matter of ordinary language, the Sentencing Commission's revision could not change the interpretation of the statute, even assuming that *Brand X* was applicable, that the Sentencing Commission intended to change the meaning of the statute, and that the Commission was entitled to *Chevron* deference.

within the other material or is “immiscible” and therefore doesn’t “mix” with the other material.³³ That cannot possibly be the right way to think about the problem. The courts of appeals generally conclude that the weight of the other substance does not count in determining the sentence; they reason that Congress was concerned with the drug as it was marketed.³⁴ But one cannot derive that far more plausible conclusion from the language of the statute alone.

Or what about the individual who is interrupted by the police while he is in the process of manufacturing an illegal drug, so that he is found in possession of a “mixture” of the drug and various precursors and catalysts. Would the entire mixture count? What if some of the other chemicals are toxic, and would never be sold to or ingested by a user? Would it matter if the “mixture” might in principle be sold to another manufacturer who could continue the process? Some courts of appeals have ruled that “only usable or consumable mixtures or substances can be used in determining drug quantity”³⁵ for sentencing purposes.³⁶ That approach again essentially looks past the language of the statute and relies on Congress’s concern with the marketing of the drug. But other courts of appeals have tried to follow what they characterized as the “plain language” approach of *Marshall* and *Chapman* and have concluded that the entire package, including the precursors and catalysts, is the “mixture” for sentencing purposes.³⁷ On linguistic grounds, that view is hard to resist. But then an offender’s sentence might vary by decades depending on whether the police interrupted him before or after he took the chemicals off the shelf and combined them.

What if the materials in the “mixture” are not precursors or catalysts, but are waste products of the manufacturing process that contain traces of the illegal drug?³⁸ The Seventh Circuit, in a case that arose after *Marshall* and *Chapman*, ruled that the waste products should not

³³ See *Marshall*, 908 F2d at 1317 (“The possibility most favorable to defendants is that LSD sits on blotter paper as oil floats on water. Immiscible substances may fall outside the statutory definition of ‘mixture.’”); *Chapman*, 500 US at 462–63 (“The drug is clearly not mixed with a glass vial or automobile; nor has the drug chemically bonded with the vial or car.”).

³⁴ See, for example, *United States v Robins*, 967 F2d 1387, 1389 (9th Cir 1992) (cornmeal combined with cocaine); *United States v Acosta*, 963 F2d 551, 553–54 (2d Cir 1992) (creme liqueur combined with cocaine); *United States v Rolande-Gabriel*, 938 F2d 1231, 1237–38 (11th Cir 1991) (“unusable liquid waste” combined with cocaine).

³⁵ *United States v Stewart*, 361 F3d 373, 382 (7th Cir 2004).

³⁶ See, for example, *id* (describing a “market-oriented” approach; half-processed methamphetamine); *United States v Rodriguez*, 975 F2d 999, 1007 (3d Cir 1992) (adopting the “usable/unusable differentiation” as the best fit for *Chapman*; cocaine cut with boric acid).

³⁷ See, for example, *United States v Richards*, 87 F3d 1152, 1157 (10th Cir 1996) (methamphetamine in a liquid solution); *United States v Mahecha-Onofre*, 936 F2d 623, 625–26 (1st Cir 1991) (cocaine chemically bonded with acrylic suitcase material); *United States v Beltran-Felix*, 934 F2d 1075, 1076 (9th Cir 1991) (methamphetamine in a liquid solution).

³⁸ See *United States v Johnson*, 999 F2d 1192, 1194–96 (7th Cir 1993).

count for sentencing purposes, because they were “not marketable and could not in any way be used as a drug”³⁹ — a conclusion that again is not supported by the language of the statute, although it seems sensible. Should the prison sentence of a marijuana dealer be increased because he left some of his cargo in a place where it became damp, thus significantly increasing its weight?⁴⁰ What about the trafficker who managed to impregnate cocaine into a fiberglass suitcase?⁴¹ (The court’s solution was to count the fiberglass, but not the metal portions of the suitcase, as part of the “mixture.”⁴²) What about (this is the only hypothetical in this list), a dealer who dumps his cache into his swimming pool when the police close in?

These are genuinely difficult problems—some of them, anyway—given Congress’s desire that sentences not be a function simply of the amount of pure drugs involved. Judge Posner’s approach in *Marshall* may not provide an obvious solution in all of these cases. But it is abundantly clear that a linguistic exercise—trying to decide, as a matter of English usage, which of these is a “mixture” and which is not—is no way to address these issues. The courts have tried to work their way through them in the typical common law trial-and-error fashion, elaborating standards tentatively and then modifying them as new cases arise. Judge Posner might call this pragmatism, and it is pragmatic in the sense that it pays attention to the practical realities of the problem rather than trying to derive the answers from the words of the statute alone. But in the end it is just traditional judging and a rejection of formalism.

III

Formalism has its virtues, and it has able defenders.⁴³ It would not be surprising if some of the lawyers and lower court judges who have to work with Judge Posner’s opinions wished he were a little more formalistic, following the law as everyone understood it instead of trying out ideas for how it might be improved. Posner’s opinion in *Marshall* itself noted the risks of “uncertainty and, not infrequently, judicial willfulness” that accompany a rejection of formalism.⁴⁴

³⁹ Id at 1194.

⁴⁰ See *United States v Garcia*, 925 F2d 170, 172–73 (7th Cir 1991).

⁴¹ See *United States v Lopez-Gil*, 965 F2d 1124, 1125 (1st Cir 1992).

⁴² See id at 1126–29.

⁴³ For examples of two different kinds of defenses, see generally Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard 2006) (arguing for a formalism founded upon the relative institutional capacities of the judiciary and legislatures); John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U Chi L Rev 685 (1999) (defending formalism as a matter of constitutional structure).

⁴⁴ 908 F2d at 1335 (Posner dissenting).

Marshall shows, though, that formalism creates the same risks, in potentially a worse form. The assertion that blotter paper impregnated with LSD is a “mixture” was as willful as anything an anti-formalist might do. The cases that followed showed that the *Marshall* and *Chapman* emphasis on plain language, far from alleviating uncertainty, left courts with no guidance on how to resolve a series of difficult issues. Anomalies and complexities like those in *Marshall* will not go away just because a court, even the Supreme Court, declares the matter resolved according to the plain meaning of the text. They may resurface in a different form, in the way that the *Marshall* blotter paper problem reappeared as a number of different but related problems. Or judges may just continue to be troubled by anomalous or inequitable results.

Whether formalism or anti-formalism creates the greater risks of willfulness and uncertainty is a difficult question, and the answer probably varies with the issue. The difference is, though, that the formalist, in contrast to a judge like Posner, can tell himself that he is just following rules laid down by someone else, indeed can congratulate himself on his disciplined refusal to allow his moral or political views to affect his legal judgment. That, ultimately, is the way in which Posner’s approach is better. It forces the judge to acknowledge the problem, to recognize that he or she is playing a role in trying to solve it, and to defend that proposed resolution on the merits, instead of claiming that it’s just Congress’s resolution. Candor is a signal virtue of Posner’s *Marshall* opinion, as it is, in many ways, of Posner’s judicial career.