

Book Review

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Book Review, 89 Cornell L. Rev. 263 (2003)

Available at: <http://scholarship.law.cornell.edu/clr/vol89/iss1/5>

This Book Review is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

BOOK REVIEW

FORM, SUBSTANCE AND LEGAL THEORY

William B. Ewald†

ESSAYS IN LEGAL THEORY. By *Robert S. Summers*.†† Dordrecht: Kluwer Academic Publishers, 2000. Pp. 441. \$206.00.

The essays collected in this volume bring together sixteen of Professor Robert S. Summers's essays in legal theory.¹ Fourteen of the essays have been previously published over a period of eighteen years, from 1981 to 1999; this volume adds two new essays (one on comparative statutory interpretation, and another on substantive justification in contract cases).² During that eighteen year period, Summers, the McRoberts Research Professor of Law at Cornell Law School, has been a familiar and indefatigable figure at European legal theory conferences; he spent time not only at Oxford and Cambridge, but, more unusually for an American contracts scholar, he also made energetic forays into the world of Continental legal theory. The breadth of his interests, and the energy he has vested in them, is impressive: this volume is the third of his collected essays in legal theory. The other two deal with legal reasoning and with form and substance in the law, a field he has been tilling virtually alone. In addition there are studies in comparative law, in the history of American jurisprudence, and of Lon Fuller—all this in addition to a substantial body of writing on the law of contract, the four volumes and multiple editions of the monumental *Uniform Commercial Code*, co-authored by James J. White,³ and a shelf full of edited volumes and casebooks. This work has brought him conspicuous recognition in the form of honorary degrees from Helsinki and Göttingen. His sheer productivity is exhausting to contemplate.⁴ Although they represent only a part of his *oeuvre*, the essays in this volume explore a wide territory. They are grouped into five

† Professor of Law and Philosophy, University of Pennsylvania Law School.

†† William G. McRoberts Research Professor of Law, Cornell Law School, and Arthur L. Goodhart Visiting Professor of Legal Science, Cambridge University, 1991-92. B.S. 1955, U. of Oregon; LL.B. 1959, Harvard Law School; Doctor of Laws, *Honoris Causa*, U. of Helsinki, 1990; Doctor of Laws, *Honoris Causa*, U. of Göttingen, 1994.

¹ ROBERT S. SUMMERS, *ESSAYS IN LEGAL THEORY* xiii (2000).

² *Id.*

³ ROBERT S. SUMMERS & JAMES J. WHITE, *UNIFORM COMMERCIAL CODE* (5th ed. 2000).

⁴ How he found time for all this writing while raising five children is something of a mystery; it is no surprise that this volume is dedicated to his wife, Dorothy Summers. See SUMMERS, *supra* note 1, at v.

categories. First are the essays on general theories of law, dealing with Herbert Hart, Rudolph von Jhering, and the movement in American legal theory Summers terms "pragmatic instrumentalism"⁵—a descriptively more exact, but less widely used term than the more commonly used "legal realism." Next there is a section of three essays on form in law, a topic that has been his principal preoccupation in recent years.⁶ This is followed by a section on legal reasoning and statutory interpretation.⁷ A section on contract theory and an essay developing his influential ideas on good faith follows.⁸ The volume concludes with two chapters examining and criticizing the economic analysis of law.⁹

Legal philosophers can be roughly divided into two groups: those who come to the field primarily from law, and those who come to it primarily from philosophy. The motivating interests and questions asked by these two groups diverge. Although a few scholars manage to be equally at home both in law and in philosophy, most fall on one side of the divide or the other. In recent decades, the philosophical side has dominated the philosophy of law, which has seen the growth of an impressive and sophisticated body of literature incorporating the insights of modern analytical philosophy—not just those of moral and political philosophy, but also insights of philosophy of language, epistemology, and even logic. It was not always so. Prior to the 1961 publication of Hart's *The Concept of Law*,¹⁰ the legal side, at least in the English speaking world, dominated the field: one thinks of Salmond in England, or of Pound, Llewellyn, or Fuller in America. Summers, it is fair to say, belongs more to this latter, lawyerly tradition. His essays, although informed by the classical jurisprudential writings (especially those of Bentham, Holmes, Fuller, and Hart), are largely free of reference to the more recent technical philosophical literature; Pound gets a dozen references in the volume's index, while Rawls gets only one.¹¹

This tendency is both a weakness and a strength. It is a weakness because it creates the risk of failure to incorporate some of the significant results of recent philosophical discussions. This risk is realized in Summers's volume. He has written at length about instrumentalism in legal thought. This is a theme that runs throughout his theoretical writings. He also, in numerous places, criticizes the law and economics movement. For example, in this volume, he distinguishes "goal reasons" from "rightness reasons" and argues that classical economic

⁵ *Id.* at 55; *see id.* at Part I.

⁶ *See id.* at Part II.

⁷ *See id.* at Part III.

⁸ *See id.* at Part IV.

⁹ *See id.* at Part V.

¹⁰ H. L. A. HART, *THE CONCEPT OF LAW* (1st ed. 1961).

¹¹ *See* SUMMERS, *supra* note 1, at 434.

analysis is unable to account for rightness reasons.¹² He further argues that economic analysis tries unsuccessfully to collapse the myriad goals of the legal system into the single goal of attaining economic efficiency,¹³ and that this goal of economic efficiency is not even morally compelling.¹⁴ Although these are plausible and important objections, they are well known in the philosophical literature on the foundations of utilitarianism. A central preoccupation of moral philosophy in recent decades is the philosophical learning, found in the work of Thomas Nagel, Bernard Williams, Derek Parfit, Amartya Sen, and many others, on the general topic of consequential reasoning. The literature is now vast and far more sophisticated than the discussion offered in this volume, but that literature is nowhere referenced or mentioned.¹⁵

However there are also compensating strengths. By setting aside much of the work of the philosophical side of the field, by maintaining a strong practical interest in the concrete details of commercial law, and by ranging so widely and eclectically in his enthusiasms, Summers has spotted connections and started a large number of jurisprudential hares, some of which still deserve chasing. The chief merit of this volume lies in the possibilities for further development. Consider, for example, the section dealing with form and substance in the law.¹⁶ Summers came to this topic via his reading of the first edition of Hart's *The Concept of Law*.¹⁷ In Professor Summers's review of this book, published in 1963, he pointed out that there is something unsatisfying about the effort to reduce all legal phenomena to a single category of rules.¹⁸ It may be useful to think of the criminal code or even the law of contract in this way, but the law also contains institutions—trial courts, legislatures, even attorneys—that it is not useful to think of as bundles of rules. This is a perceptive criticism, and Summers builds upon it by trying to develop a more general analysis of legal *form*, which will broaden and deepen the rule-based analysis, and will be more faithful to the legal phenomena.¹⁹ Summers adds to the observation that it is not possible to reduce all legal phenomena to a single category of rules an important comparative dimension. The book he co-authored with Patrick Atiyah, *Form and Substance in Anglo-*

¹² See *id.* at 367–371.

¹³ See *id.* at 364–65.

¹⁴ See *id.* at 381–85.

¹⁵ For an overview and bibliography of the literature on consequential reasoning, see CONSEQUENTIALISM AND ITS CRITICS (Samuel Scheffler ed., 1988).

¹⁶ See *supra* note 6 and accompanying text.

¹⁷ See source cited *supra* note 10.

¹⁸ See Robert S. Summers, *H.L.A. Hart's Concept of Law*, 1963 DUKE L.J. 629, 643–45.

¹⁹ See SUMMERS, *supra* note 1, at 165–82.

American Law,²⁰ broadly argued that the English legal system is *more formal* in its modes of reasoning than the American legal system. Where the American system will leave a matter to the discretion of the judge, to the application of a balancing test, or to a consideration of competing substantive principles and policies, the English system will often look for a clear, precise rule. Similarly, where American courts are free to overturn acts of the legislature on broad and often imprecise constitutional grounds, English courts are bound both by a more rigid doctrine of stare decisis and by parliamentary sovereignty. Summers is wise to notice: (1) that this matter of formality is a pervasive difference between English and American law; (2) that at least in certain areas of private law, American practice is arguably too informal and could learn much from the English approach; and (3) that jurisprudential scholarship has almost entirely neglected the issue of law's formality, treating it only in passing if indeed it considered formality at all. It is the resulting combination of these observations—pursuit of an important, neglected notion, with ramifications both for lawyerly practice (as his essays on contract law make clear²¹) and for high theory (as his essays on legal reasoning make clear²²), by contrasting different legal systems (as his essays on comparative law make clear)—that is susceptible of further development. Summers's own work in this area, as he states repeatedly and honestly,²³ is very much a work in progress. In that spirit, some critical observations may be in order. The claims, which are presented as "main theses," that the various basic types of legal phenomena, and indeed the legal system viewed as a whole, contain an array of formal characteristics are certainly true, but hardly surprising.²⁴ The same claims can be made regarding virtually any other human endeavor. Rules are by their very nature formal, and even chefs and mountain climbers have rules. Summers of course recognizes this basic fact, but fails to address it by providing an account of formality in the law sufficiently precise to be illuminating. It is at this point that his analysis, at least as it stands in these preliminary studies, is unsatisfying.

Summers offers a number of particular instances of legal formality, but a rigorous and exact general definition is still lacking. The problem arises even in the simplest cases. Consider the following proposition:

The speed limit is fifty miles per hour.

²⁰ ROBERT S. SUMMERS & PATRICK S. ATIYAH, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987).

²¹ See SUMMERS, *supra* note 1, at 299.

²² See *id.* at 195.

²³ See *id.* at 95.

²⁴ See *id.* at 153-55.

What is form here, and what substance? Is the rule as a whole to be conceived as a formal requirement (on a par with the formal requirement that a valid will must be signed by two witnesses)? Or is it a mixture of a formal speed limit and a substantive fifty mile per hour specification? Or is the form a general prohibition, ("Do not do X"), and the content the substantive description of the forbidden activity (here, driving over fifty miles per hour)? Summers's discussion of form does not appear to me to resolve these questions.²⁵ He appears to want his distinction between form and substance to be absolute, but even in this simple case it looks as though what counts as formal depends on what is being treated as constant and what is being allowed to vary. This also occurs in mathematics; a function may under certain circumstances be treated as a constant, and in others as a variable.

Indeed, the same phenomenon occurs in elementary logic. The expression, "Peter is the friend of Mary," can be analyzed in several different ways. On one analysis the form is: "x is the friend of Mary," and the content, which is then substituted for the variable x, is "Peter." However, one can equally well analyze the expression into different forms (and correspondingly different contents). For example: Peter is the friend of y, x is the friend of y, Peter is the R of Mary, or even, xRy. Here, an element that belongs to the content in one analysis can belong to the form in another analysis. In other words, what is form and what is substance depends on the analysis.

The point can be demonstrated another way. The strength of Hart's analysis was in (1) giving a clear and precise analysis of the concept of *rule*, and (2) showing how the concept of *rule* can be used to elucidate a wide range of legal phenomena.²⁶ Summers's proposal that a great deal of legal variety is lost in the analysis is correct, but what should follow that proposal is a rival analysis that incorporates descriptive accuracy without sacrificing analytical illumination. Thus far, Summers's project has not achieved the analog to (1) and (2) above for the concept of legal *form*.

On another matter, Summers notes that the German legal thinkers (the most suggestive for Summers being Rudolph von Jhering) have written about form in the law, and he states that this is a matter he wishes to study further.²⁷ It is often said that American legal thinkers like Pound and Holmes reacted against something termed formalism, but it is extraordinarily difficult to find any consequential, American-born school of legal thought that styled itself as formalistic. The same is not true for early nineteenth century Continental legal theory, which was strongly influenced by its understanding (or misun-

²⁵ See *id.* at 147-53.

²⁶ See generally HART, *supra* note 10.

²⁷ See SUMMERS, *supra* note 1, at 97, 154.

derstanding) of Kant's views on the formal character of morality and law. In fact, I suspect that the very term formalism comes into American legal thought via Jhering, in his denunciations of the earlier German formalists. If this is so, then there is an important historical link between the pragmatic instrumentalists and the concept of legal form; indeed, there is a rich mine of material in this area awaiting exploration.

These remarks are of course far from exhaustive, and merely meant to indicate a few of the ways in which the important ideas broached by Summers can be developed further. Summers takes exception to the fact that Bentham "thought that 'thank you' just means 'more, please.'"²⁸ However, the reader's reaction on reaching the end of this suggestive and independent-minded volume is likely to be gratitude of a strongly Benthamite sort.

²⁸ See, *eg.*, *id.* at 325, 372.