This book addresses three major questions about law and legal systems: (1) What are the defining and organizing forms of legal institutions, legal rules, interpretive methodologies, and other legal phenomena? (2) How does frontal and systematic focus on these forms advance understanding of such phenomena? (3) What credit should the functions of forms have when such phenomena serve policy and related purposes, rule of law values, and fundamental political values, such as democracy, liberty, and justice? This is the first book that seeks to offer general answers to these questions and thus give form in the law its due. The answers not only provide articulate conversancy with the subject, but also reveal insights into the nature of law itself, the oldest and foremost problem in legal theory and allied subjects.

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FORM AND FUNCTION IN A LEGAL SYSTEM – A GENERAL STUDY

ROBERT S. SUMMERS

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〜 For Dorothy
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PREFACE

I first lectured on themes here while I was the Arthur L. Goodhart Visiting Professor of Legal Science at Cambridge University in 1991–2, and began the book a number of years later. I have written it not only for those with academic interests in law and legal systems, such as law students, professors of law, legal theorists, and other scholars, but for lawyers and judges as well. The scope of the book is not confined to Anglo-American systems. It is addressed more generally to the forms and functions of legal phenomena in developed Western societies, and its central themes apply still more widely. I now offer the book as an ambitious yet unhurried attempt to develop systematic ways of giving form in law its due, both as an avenue of understanding and as a means of serving a variety of purposes: policy and related ends, rule of law values, and fundamental political values.

I focus here on paradigms of the forms of a varied selection of functional legal units: legislatures and courts; statutory and other rules; species of law besides rules, such as contracts and property interests; legal methodologies, such as those for interpreting statutes; and enforcive devices, such as sanctions and remedies. In addressing the make-up, unity, instrumental capacity, distinct identity, and other attributes of these functional legal units with focus on their forms, the book provides a new way of viewing the familiar. These functional units, and the system as a whole, are subjected to a special mode of analysis that I introduce here and call “form-oriented.” It is so named because it focuses frontally, systematically, and holistically on how paradigms of the overall forms of such units are generally defined and organized, and also on how a paradigmatic version of the overall form of a developed Western legal system is generally defined and organized, all to serve

2 Many American lawyers and judges will recognize this work as highly compatible with a treatise that I coauthored: J. White and R. Summers, The Uniform Commercial Code, 4 vols. (4th ed., West Group, St. Paul, Minn. 1995, with annual supplements). Indeed, Chapter Seven of the present book applies the theory of form set forth here to the fields of contract and commercial law.
purposes. Readers so disposed can make this form-oriented mode of analysis part of their own general intellectual equipment and will find they can apply it to any functional legal unit and not merely to those selected for analysis here. Form-oriented analysis goes beyond analysis of functional legal units in terms of the contents of those legal rules that are reinforcive or constitutive of such units, analysis prominent in the works of major legal thinkers, such as H. L. A. Hart and Hans Kelsen.

Here, each paradigm of an overall form of a functional legal unit is defined and differentiated from the complementary material and other components of the unit. These overall forms and their constituent features are then analyzed to advance understanding of the whole. In this way, we can see that well-designed forms of functional legal units are not formalistic or bare and thin; instead, they are intrinsically purposive and value-laden and can, along with the complementary material and other components of such units, even be highly efficacious. We can also see how formal devices systematize the various functional legal units into a coherent and effective operational system.

This study also enables the reader to see how well-designed form can merit much credit for purposes served through the functioning of the various legal units within an operational system. Indeed, it is a central thesis of this book that significant credit for purposes served through deployment of functional legal units should go to well-designed form and not merely to the material or other components of these units, such as physical facilities and trained personnel. The frontal and systematic study of form is important, as well, for those who would construct functional legal units anew or improve upon existing units within particular systems, all the better to serve various ends.

There are still further reasons to study legal form. The subject itself is conceptually rich, wide-ranging, and absorbing. Also, because law is of great social importance, and form is intrinsic to law, legal form, too, is of great importance. Yet the subject has been neglected. Indeed, the subject has not yet been fully recognized as a discrete subject, let alone one for systematic study. Some American legal scholars and theorists have even treated aspects of form in law in unqualifiedly pejorative and dismissive terms. If I am right, this makes the need for such a book as this all the more pressing, although it is certain to be controversial in those quarters.

Robert S. Summers
February 17, 2005
I wish to thank first my diligent research assistants, and the students in my annual seminars on American Legal Theory at Cornell Law School. All of these have contributed in various ways to the final version of this book.

I owe a deep debt of gratitude to my former administrative assistant, Mrs. Pamela F. Finnigan who has worked with me on this book from the beginning. Without her dedicated and highly effective assistance, it is certain the book would not yet be completed. I also wish to thank my current administrative assistant, Anne Cahanin.

I wish to record a special debt to an earlier coauthor, Professor Patrick S. Atiyah with whom, in the 1980s, I had many productive discussions of the related subject “form and substance” in law and legal reasoning. The present book is a very different book from the one we coauthored; however, it is unlikely that I would have written the present one had the earlier one not preceded it.

Of my former teachers, I single out two for their tutelage, insight, and inspiration: the late H. L. A. Hart of Oxford University and the late Lon L. Fuller of Harvard University. Only the work of the great nineteenth-century German jurist, Rudolf von Jhering, has been more of a source of inspiration in the writing of this book.

I wish to thank numerous colleagues and friends who read part or all of the manuscript and made numerous helpful comments: Professor Okko Behrends of the University of Göttingen, Professor D. Neil MacCormick of the University of Edinburgh, Professor Philip Soper of the University of Michigan, Professor William Ewald of the University of Pennsylvania, the late Dr. Geoffrey Marshall formerly Provost of the Queen’s College, Oxford University, Professor Pedro Alemán Lain of the University Complutense in Madrid, Professor Manuel Atienza of the University of Alicante, Professor Glenn Altschuler of Cornell

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I am also grateful to several deans of the Cornell Law School: Russell Osgood, the late Lee Teitelbaum, and Stewart Schwab, for research and other support.

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