

Series Foreword

# LAW FOR SOCIETY

Volume 1: Foundations and Methods



Edited by  
**W. H. H. H. H.**

Edited by  
**W. H. H. H.**

Edited by  
**W. H. H. H.**

Edited by  
**W. H. H. H.**



**H. H. H. H.**  
H. H. H. H.

ASPEN PUBLISHERS

# LAW FOR SOCIETY

NATURE, FUNCTIONS, AND LIMITS

KEVIN M. CLERMONT

*Ziff Professor of Law  
Cornell University*

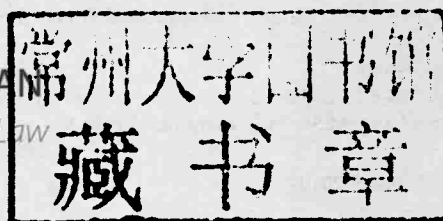
ROBERT A. HILLMAN

*Woodruff Professor of Law  
Cornell University*

SHERI LYNN JOHNSON

ROBERT S. SUMMERS

*McRoberts Research Professor of Law  
Cornell University*



Wolters Kluwer  
Law & Business

AUSTIN

BOSTON

CHICAGO

NEW YORK

THE NETHERLANDS

© 2010 Aspen Publishers. All Rights Reserved.  
<http://lawschool.aspenpublishers.com>

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers  
Attn: Permissions Department  
76 Ninth Avenue, 7th Floor  
New York, NY 10011-5201

To contact Customer Care, e-mail [customer.care@aspenpublishers.com](mailto:customer.care@aspenpublishers.com), call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Aspen Publishers  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-6853-2

#### Library of Congress Cataloging-in-Publication Data

Law for society : nature, functions, and limits / Kevin M. Clermont ... [et al].  
p. cm.

Includes index.

ISBN 978-0-7355-6853-2

1. Law—United States. I. Clermont, Kevin M.

KF385.A4L39 2010  
349.73—dc22

2009054119

# **LAW FOR SOCIETY**

**NATURE, FUNCTIONS, AND LIMITS**

---

## About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

**CCH** was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

**Aspen Publishers** is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

**Kluwer Law International** supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

**Loislaw** is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

---

Looking at the longish list of authors of this book should suggest to the college or university teacher that a number of law teachers share a firm conviction that law is an unjustly neglected part of general education—and that these new teaching materials fill a true need.

Indeed we have long found it striking that most of even the best-educated students leave college in unblemished ignorance of the concept of law and with little idea of the legal system under which they have lived and will live. The would-be educated citizen, and surely the graduate beginning any of many specialized disciplines, cannot justify such ignorance. A survey course on introduction to law provides a ready cure, while not only enriching the mind but also usually providing a lot of fascinating fun. But we are getting ahead of ourselves by addressing this question of why even a generalist should take a survey course on law. Section Three of the General Introduction, which begins the book, makes, to the students, what turns out to be the easy case for including law in the program of general education.

The harder question is how a teacher should try to introduce law. Certainly a survey of the contents of law, studying contracts in a nutshell and then torts and so on, makes little educational sense. Leaping instead to the abstract level of legal philosophy, without first providing students with sufficient concrete information, results in conveying little. Worse yet and perhaps even detrimental is the popular but ineffective approach of reprinting selected interdisciplinary readings that deliver strong opinions about particular aspects of law to an audience of novices who know too little about the subject to engage it. In brief, the shortcomings of all three of these approaches reflect the oft-noted difficulty of trying to teach anything about law without somehow managing to teach all of law.

The correct approach must be more analytic, breaking law down into a manageable number of comprehensible units that students can assemble into a coherent concept of law. This approach would put natural bounds on and give a sense of direction to an introductory book and course, affording students a perceptible sense of concrete but significant learning. However, the most common analytic approach divides law into its principal institutions of the judiciary, legislature, executive, and administrative agency. This parochial division distorts the operation of law. Law actually performs its social tasks by collaborative effort, with roles for private persons as well as for players such as courts, legislators, and other official actors.

A sounder and more comprehensive breakdown, we think, would look at the means and ends of social ordering through law. We therefore try to get at what law is by examining, first, how law does what it does and, second, what it can and cannot do. We present law as a set of five basic techniques for addressing many problems of any society. That is to say, the essential *nature* of law lies for us in its problem-solving *functions*, subject to the critical concession that law has

very real and serious *limits* on what it can accomplish. We believe this approach is the most productive and accurate way to learn and think about law. But again we are getting ahead of ourselves. Section Four of the General Introduction further outlines this instrumentalist conception of law.

As to the book's structure, the focus will fall first on the variety of law's available techniques and their limits. See especially the Introductory Note to Part One. The focus will then shift to the subsidiary matter regarding the basic social functions on which the law's techniques are commonly put to work. See especially the Introductory Note to Part Two.

Both of these two major parts of the book subdivide into chapters. Part One comprises Chapters 1 through 5. These chapters respectively treat the five basic legal instruments for social ordering by studying how law acts through remedying grievances, imposing punishment, regulating administratively, conferring public benefits, and facilitating private arrangements. The first of these chapters is by far the longest, because it provides the background invoked in the subsequent chapters. Each of the chapters contains eight sections that flesh out the particular instrument in a logical and comprehensive manner, encouraging comparative analysis along those lines of the instruments' principal differentiating characteristics. Together these five chapters offer an overview of the means at law's disposal.

After Part One so treats the instruments of law in order to show how law does what it does, Part Two applies them to a few selected social tasks. Sketching the law in action there elaborates what the law can do and cannot do. Although we divide the book into Part One on the means of law and Part Two on the ends of law, our hope throughout is to convey a sense of the nature, functions, and limits of law.

Thus, our analytic approach dictates a highly structured book. Its parts, chapters, and sections follow a pattern. For the most part they need not be taught in the order they appear, but conveying the pattern will remove much of the confusion from whatever route is taken through the book.

Our approach is not untried. In 1965 Charles G. Howard & Robert S. Summers produced *Law: Its Nature, Functions, and Limits*. In 1972 Professor Summers revamped the book into its successful second edition. In 1986, Doris Marie Provine, John J. Barceló III, Sheri Lynn Johnson, Robert A. Hillman, and Kevin M. Clermont turned out its third and final edition. Years of teaching experience with it only heightened our appreciation of that book and our resolve to sustain it. We therefore produced this revamped set of materials. We built on the 1986 book, including the excellent contributions to Chapters 3 and 4 by Marie Provine and Jack Barceló, who were unable to continue on the project. Our aim was to turn out an even more provocative, readable, and teachable book.

Robert S. Summers is a distinguished senior professor at Cornell Law School. Among his areas of great strength is jurisprudence, where he has carefully developed the framework of his ideas by a prodigious flow of books and articles. We owe the conceptual structure of this book to him. See, e.g., Robert S. Summers, *The Technique Element in Law*, 59 Cal. L. Rev. 733 (1971); cf.

Kevin M. Clermont & Robert A. Hillman, *Why Law Teachers Should Teach Undergraduates*, 41 J. Legal Educ. 289 (1991). Unfortunately, his heavy research commitments precluded active participation in the new book. The traditional acknowledgment accordingly is particularly appropriate here: he deserves much of the credit for this book but absolutely none of the blame for those passages where we wandered from the path. We collaborated on much of the work, but the following paragraphs describe the allocation of ultimate responsibility.

Sheri Lynn Johnson has a B.A. from the University of Minnesota and a J.D. from Yale Law School. After a practice in criminal law, she turned to teaching and writing in both criminal and constitutional law. She prepared Chapters 2 and 7.

Robert A. Hillman, with a B.A. from the University of Rochester and a J.D. from Cornell Law School, followed a federal clerkship with New York City practice and then a teaching career. He specializes in contracts and commercial law, and he has written extensively in those fields. He prepared Chapters 3, 5, and 6.

Kevin M. Clermont, with an A.B. from Princeton University and a J.D. from Harvard Law School, also followed a federal clerkship with New York City practice and then a teaching career. He specializes and writes in civil procedure. He acted as coordinating author, and he also prepared the General Introduction, Chapters 1 and 4, and the book's connective materials.

We three would like to take this opportunity to thank our students Emily Derr, Mark Grube, Meli Maccurdy, Kelly Mellecker, Matthew O'Connor, and Dana Westberg for their excellent research assistance—and indeed to thank generations of undergraduate students and teaching assistants for their reactions to our previous materials. In the publication phase, Susan Boulanger's editing and Troy Froebe's production skills proved invaluable.

Finally, as to conventions in preparing this book, note that we used the original numbers for footnotes by judges in judicial opinions and by authors in quoted materials, when we retained their footnotes. We omitted other such footnotes without any indication. We lettered rather than numbered our own footnotes. We also omitted many case and statutory citations by courts and commentators without so indicating. On those mundane notes we close, but with the grand hope that teachers and their students will come to agree that this book usefully fills a gap in general education.

Kevin M. Clermont  
Robert A. Hillman  
Sheri Lynn Johnson

January 2010

# **LAW FOR SOCIETY**

NATURE, FUNCTIONS, AND LIMITS

# Summary of Contents

## *Contents* *Preface*

xi  
xxiii

<b>General Introduction</b>	1
1. Introductory Case	2
2. Sample Analysis with Annotations	7
3. General Education and the Law	18
4. Pedagogic Notes	23

## **Part One**

### **THE MEANS OF LAW**

<i>Introductory Note to Part One</i>	26
--------------------------------------	----

#### **Chapter 1**

<b>Law as an Instrument for Remedying Wrongs</b>	29
1. Introduction to the Remedial Instrument	29
2. Remedial Methods	30
3. Making Remedial Law	33
4. Applying Remedial Law	64
5. Roles of Private Citizens and Their Lawyers	113
6. Improving the Remedial Instrument	127
7. Limitations of Law as a Remedial Instrument	138
8. Summary	147

#### **Chapter 2**

<b>Law as an Instrument for Punishing Wrongs</b>	151
1. Introduction to the Penal Instrument	151
2. Penal Methods	157
3. Making Penal Law	170
4. Applying Penal Law	176
5. Roles of Private Citizens and Their Lawyers	193
6. Improving the Penal Instrument	198
7. Limitations of Law as a Penal Instrument	206
8. Summary	223

### Chapter 3

<b>Law as an Instrument for Administering the Regulatory State</b>	<b>225</b>
1. Introduction to the Administrative Instrument	225
2. Administrative Methods	232
3. Making Administrative Law	237
4. Applying Administrative Law	255
5. Roles of Private Citizens and Their Lawyers	257
6. Improving the Administrative Instrument	273
7. Limitations of Law as an Administrative Instrument	280
8. Summary	295

### Chapter 4

<b>Law as an Instrument for Conferring Public Benefits</b>	<b>299</b>
1. Introduction to the Public-Benefit Instrument	299
2. Public-Benefit Methods	301
3. Making Public-Benefit Law	311
4. Applying Public-Benefit Law	339
5. Roles of Private Citizens and Their Lawyers	349
6. Improving the Public-Benefit Instrument	364
7. Limitations of Law as a Public-Benefit Instrument	374
8. Summary	380

### Chapter 5

<b>Law as an Instrument for Facilitating Private Arrangements</b>	<b>383</b>
1. Introduction to the Private-Arrangement Instrument	383
2. Private-Arrangement Methods	385
3. Making Private-Arrangement Law	416
4. Applying Private-Arrangement Law	424
5. Roles of Private Citizens and Their Lawyers	427
6. Improving the Private-Arrangement Instrument	437
7. Limitations of Law as a Private-Arrangement Instrument	449
8. Summary	454

## Part Two

# THE ENDS OF LAW

<i>Introductory Note to Part Two</i>	458
--------------------------------------	-----

### Chapter 6

<b>Law Can Help Promote Safety</b>	<b>461</b>
1. Introduction	461
2. Product Safety and the Private-Arrangement Instrument	465
3. Product Safety and the Remedial Instrument	471

4. Product Safety and the Administrative Instrument	486
5. Product Safety and the Penal Instrument	493
6. Product Safety and the Public-Benefit Instrument	511
7. Summary	512
<b>Chapter 7</b>	
<b>Law Can Help Promote Equality</b>	<b>515</b>
1. Introduction	515
2. Racial Equality and the Penal Instrument	516
3. Racial Equality and the Remedial Instrument	536
4. Racial Equality and the Private-Arrangement Instrument	545
5. Racial Equality and the Administrative Instrument	555
6. Racial Equality and the Public-Benefit Instrument	566
7. Summary	588
<i>Appendix</i>	591
The Constitution of the United States of America	591
<i>Table of Cases</i>	605
<i>Index</i>	609

<i>Preface</i>	xxiii
----------------	-------

<b>General Introduction</b>	1
1. Introductory Case	2
<i>Village of Skokie v. National Socialist Party of America</i>	2
2. Sample Analysis with Annotations	7
3. General Education and the Law	18
<i>A. Bartlett Giamatti, The Law and the Public</i>	20
4. Pedagogic Notes	23
A. Themes This Book Seeks to Develop	23
B. Methods This Book Seeks to Employ	24

## Part One

### THE MEANS OF LAW

<i>Introductory Note to Part One</i>	26
--------------------------------------	----

## Chapter 1

<b>Law as an Instrument for Remedying Wrongs</b>	29
1. Introduction to the Remedial Instrument	29
2. Remedial Methods	30
A. Historical Background of Damages	31
Charles T. McCormick, <i>Handbook on the Law of Damages</i>	31
B. Award of Damages Today	32
3. Making Remedial Law	33
A. Origin of a Doctrine	33
<i>Butterfield v. Forrester</i>	34
<i>Davies v. Mann</i>	35
Stare Decisis	38
<i>Arthur J. Goldberg, Equal Justice</i>	39
<i>Karl N. Llewellyn, The Bramble Bush</i>	39
<i>The English Common Law and Its Reception in the United States</i>	41
<i>British Columbia Electric Railway v. Loach</i>	42
Comparative Negligence	45
B. Reform of the Doctrine	47
Legislatures	47
Courts	48
Institutional Considerations in Tort Reform	49

<i>Maki v. Frelk</i>	50
Judicial Reaction to Legislative Reform	52
<i>Alvis v. Ribar</i>	54
Legislative Reaction to Judicial Reform	63
<b>4. Applying Remedial Law</b>	64
A. Occurrence of Injury	66
B. Retaining a Lawyer	67
C. Lawyer's Preliminary Determinations of Relevant Facts and Law	68
D. Efforts at Private Settlement	69
E. Commencing Legal Proceedings	70
Summons	70
F. Pretrial	70
Defining and Separating Disputed Issues of Fact and Law	71
Complaint	71
Demurrer	76
Answer	77
Reply	78
Preparing for Trial (and Seeking Settlement or Other Disposition Without Trial)	79
Discovery	79
Motion for Summary Judgment	81
Pretrial Conference	82
Ms. Brown's Pretrial Experience	83
G. Trial	83
Ms. Brown's Trial Begins	85
Plaintiff's Case in Chief	85
Defendant's Case in Defense	92
Rebuttal	93
Motion	93
Arguments	93
Instructions	94
The Trial Stage Ends	97
Verdict	97
Motion for Judgment	97
Truth and Justice	100
H. Post-Trial	102
Enforcement of Judgments	102
Appellate Review	103
Ms. Brown's Appeal	105
Extracts from Plaintiff's Brief	106
Extracts from Defendant's Brief	106
Extracts from Plaintiff's Reply Brief	107
Brown v. Hayden Island Amusement Co.	109
Fact and Law	112

5. Roles of Private Citizens and Their Lawyers	113
A. Attorney's Zealousness	114
Joint Conference on Professional Responsibility, Report	115
Jerome Frank, Courts on Trial	116
Alvin B. Lebar, Shadows in the Courtroom	119
B. Attorney's Competence	120
Adverse Fact and Law	121
<i>Reizakis v. Loy</i>	122
6. Improving the Remedial Instrument	127
A. Improving Adversarial Adjudication	127
Hans Zeisel, Harry Kalven, Jr. & Bernard Buchholz, Delay in the Court	128
Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration	129
B. Abandonment of Adversariness	130
C. Abandonment of Adjudication	136
7. Limitations of Law as a Remedial Instrument	138
Roscoe Pound, The Limits of Effective Legal Action	138
A. Illustration: Liability	140
<i>Hurley v. Eddingfield</i>	140
B. Illustration: Damages	142
<i>Cockrum v. Baumgartner</i>	142
8. Summary	147

## Chapter 2

<b>Law as an Instrument for Punishing Wrongs</b>	151
1. Introduction to the Penal Instrument	151
A. Retributivism	151
Determining the Severity of a Crime	152
Two Problems with Retributivism's Assumptions	153
B. Utilitarianism	154
Justifications of Utilitarianism	154
Problems with Utilitarianism	155
C. Looking Backward and Forward	157
2. Penal Methods	157
A. Necessity	158
<i>Regina v. Dudley &amp; Stephens</i>	158
B. Insanity	163
Randy Borum & Solomon M. Fulero, Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy	166
C. Mistake of Law	167
<i>Rex v. Esop</i>	167
3. Making Penal Law	170
<i>United States v. Wiltberger</i>	170
Punishment by Analogy	171
<i>Keeler v. Superior Court</i>	171

4. Applying Penal Law	176
A. The Police	178
Arrest	178
<i>David H. Bayley, Police for the Future</i>	178
Interrogation	180
<i>Brown v. Mississippi</i>	180
<i>Torture and Terrorism</i>	183
B. The Prosecutor	185
Prosecutors and the Adversary System	186
C. The Jury	187
D. The Judge	188
<i>United States v. Booker</i>	189
5. Roles of Private Citizens and Their Lawyers	193
A. Ethical Issues Concerning Defense Counsel's Role	193
Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions	194
B. Effect of Counsel's Advice on Criminal Liability	196
<i>Hopkins v. State</i>	196
The Right to Counsel and Ineffective Assistance of Counsel	198
6. Improving the Penal Instrument	198
James Mills, On the Edge	198
7. Limitations of Law as a Penal Instrument	206
A. Limitations on Its Subjects	206
John Stuart Mill, On Liberty	207
<i>Lawrence v. Texas</i>	208
Arnold H. Loewy, Morals Legislation and the Establishment Clause	215
B. Limitations on Its Methods	220
Death Row Exonerations	221
Theoretical and Practical Views on the Death Penalty	221
8. Summary	223
 Chapter 3	
<b>Law as an Instrument for Administering the Regulatory State</b>	225
1. Introduction to the Administrative Instrument	225
A. Reasons for Government Intervention	226
Market Failure	226
Inadequate Information	226
Natural Monopoly	227
Common Pool	227
External Costs	227
B. Reasons for Resort to the Administrative Instrument	228
Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies	228
C. A Recurring Illustration: The Endangered Species Act	231

2. Administrative Methods	232
A. Setting Substantive Regulatory Standards	232
B. Licensing	232
C. Investigating	233
D. Publicizing	234
E. Resorting to Informal Proceedings to Secure Compliance	234
F. Resorting to Full-Scale Proceedings with Sanctions	235
G. Encouraging Self-Regulation in Light of Published Standards	236
H. Resorting to Courts for Appropriate Enforcement	236
Division of Labor	237
3. Making Administrative Law	237
A. The Legislature's Role: Delegation of Power to Administrative Agencies	238
Reginald Parker, Why Do Administrative Agencies Exist?	238
A Closer Look at Delegation to the Federal Trade Commission	240
Richard B. Stewart, The Reformation of American Administrative Law	240
B. The Agency's Role: Rulemaking and Adjudication	242
Rulemaking	242
<i>United States Code, Title 5</i>	243
<i>Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm"</i>	244
Adjudication	246
Rulemaking or Adjudication?	247
C. The Court's Role: Judicial Review of Agency Action	249
<i>Northern Spotted Owl v. Hodel</i>	250
Another Illustration of Judicial Review	254
Cost-Benefit Analysis of Environmental Issues	255
4. Applying Administrative Law	255
United States Code, Title 47	256
5. Roles of Private Citizens and Their Lawyers	257
<i>Lujan v. Defenders of Wildlife</i>	258
<i>Massachusetts v. EPA</i>	266
6. Improving the Administrative Instrument	273
Edward Rubin, It's Time to Make the Administrative Procedure Act Administrative	273
Financing the Participation of Private Parties	274
Cary Coglianese, e-Rulemaking: Information Technology and the Regulatory Process	277
An e-Rulemaking Initiative	279
7. Limitations of Law as an Administrative Instrument	280
A. Introduction	280
A Reprieve for Regulation	281
B. Brief History of a Failed Regulatory Doctrine: The Fairness Doctrine	282
C. The Supreme Court Considers the Fairness Doctrine	283
The Facts	283
<i>Red Lion Broadcasting Co. v. FCC</i>	285
Another View of <i>Red Lion</i> and the Fairness Doctrine	290