Preface

General Introduction

1. Introductory Case
   Village of Skokie v. National Socialist Party of America

2. Sample Analysis with Annotations

3. General Education and the Law
   A. Bartlett Giamatti, The Law and the Public

4. Pedagogic Notes
   A. Themes This Book Seeks to Develop
   B. Methods This Book Seeks to Employ

Part One

THE MEANS OF LAW

Introductory Note to Part One

Chapter 1

Law as an Instrument for Remedying Wrongs

1. Introduction to the Remedial Instrument
2. Remedial Methods
   A. Historical Background of Damages
   B. Award of Damages Today

3. Making Remedial Law
   A. Origin of a Doctrine
      Butterfield v. Forrester
      Davies v. Mann
      Stare Decisis
         Arthur J. Goldberg, Equal Justice
         Karl N. Llewellyn, The Bramble Bush
         The English Common Law and Its Reception in the United States
      British Columbia Electric Railway v. Loach
      Comparative Negligence
   B. Reform of the Doctrine
      Legislatures
      Courts
      Institutional Considerations in Tort Reform
5. Roles of Private Citizens and Their Lawyers
   A. Attorney’s Zealousness
      Joint Conference on Professional Responsibility, Report
      Jerome Frank, Courts on Trial
      Alvin B. Lebar, Shadows in the Courtroom
   B. Attorney’s Competence
      Adverse Fact and Law
      Reizakis v. Loy

6. Improving the Remedial Instrument
   A. Improving Adversarial Adjudication
      Hans Zeisel, Harry Kalven, Jr. & Bernard Buchholz, Delay in the Court
      Richard A. Posner, An Economic Approach to Legal Procedure
         and Judicial Administration
   B. Abandonment of Adversariness
   C. Abandonment of Adjudication

7. Limitations of Law as a Remedial Instrument
   Roscoe Pound, The Limits of Effective Legal Action
   A. Illustration: Liability
      Hurley v. Eddingfield
   B. Illustration: Damages
      Cockrum v. Baumgartner

8. Summary

Chapter 2
Law as an Instrument for Punishing Wrongs

1. Introduction to the Penal Instrument
   A. Retributivism
      Determining the Severity of a Crime
      Two Problems with Retributivism’s Assumptions
   B. Utilitarianism
      Justifications of Utilitarianism
      Problems with Utilitarianism
   C. Looking Backward and Forward

2. Penal Methods
   A. Necessity
      Regina v. Dudley & Stephens
   B. Insanity
      Randy Borum & Solomon M. Fulero, Empirical Research on the
         Insanity Defense and Attempted Reforms: Evidence Toward
         Informed Policy
   C. Mistake of Law
      Rex v. Esop

3. Making Penal Law
   United States v. Wiltberger
   Punishment by Analogy
   Keeler v. Superior Court
2. Administrative Methods
   A. Setting Substantive Regulatory Standards
   B. Licensing
   C. Investigating
   D. Publicizing
   E. Resorting to Informal Proceedings to Secure Compliance
   F. Resorting to Full-Scale Proceedings with Sanctions
   G. Encouraging Self-Regulation in Light of Published Standards
   H. Resorting to Courts for Appropriate Enforcement

Division of Labor

3. Making Administrative Law
   A. The Legislature’s Role: Delegation of Power to Administrative Agencies
      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
      Rulemaking
      United States Code, Title 5
      Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm” 244
      Adjudication
      Rulemaking or Adjudication? 247
   C. The Court’s Role: Judicial Review of Agency Action
      Northern Spotted Owl v. Hodel 250
      Another Illustration of Judicial Review 254
      Cost-Benefit Analysis of Environmental Issues 255

4. Applying Administrative Law
   United States Code, Title 47 256

5. Roles of Private Citizens and Their Lawyers
   Lujan v. Defenders of Wildlife 258
   Massachusetts v. EPA 266

6. Improving the Administrative Instrument
   Edward Rubin, It’s Time to Make the Administrative Procedure Act Administrative 273
   Financing the Participation of Private Parties 274
   An e-Rulemaking Initiative 279

7. Limitations of Law as an Administrative Instrument
   A. Introduction
   B. Brief History of a Failed Regulatory Doctrine: The Fairness Doctrine 282
   C. The Supreme Court Considers the Fairness Doctrine
      The Facts
      Red Lion Broadcasting Co. v. FCC 285
      Another View of Red Lion and the Fairness Doctrine 290
## Chapter 4

**Law as an Instrument for Conferring Public Benefits**

1. **Introduction to the Public-Benefit Instrument** 299
2. **Public-Benefit Methods** 301
   - Benefit Characteristics 301
   - Concomitant Burdens 306
   - An Initial Illustration of Conferral Program: Public Art 308
     - Douglas Stalker & Clark Glymour, *The Malignant Object: Thoughts on Public Sculpture* 309
     - *Tilted Arc* 310
3. **Making Public-Benefit Law** 311
   - Legislatures 311
   - Legislative Delegatees 312
   - Courts 313
     - *Grove City College v. Bell* 314
   - Street-Level Providers 316
     - Michael Lipsky, *Street-Level Bureaucracy* 316
   - Illustration of Program Development: Public Education 318
     - Benefits (with a Focus on Equality)
       - **Lawmakers** 319
         - *Equality* 322
         - *Brown v. Board of Education* 323
         - *Parents Involved in Community Schools v. Seattle School District No. 1* 326
     - Burdens (with the Focus Still on Equality)
       - **Judicial Input** 332
       - Basics of Equal Protection 336
       - **Legislative Input** 336
         - New Direction 338
4. **Applying Public-Benefit Law** 339
   - Nature of Legal Ordering in Program Administration 339
   - Illustration of Program Administration: Public Education 340
     - **Goss v. Lopez** 342
     - **Rose v. Nashua Board of Education** 346
     - Basics of Due Process 347
5. **Roles of Private Citizens and Their Lawyers** 349
   - Program Development 349
   - Program Administration 351
     - Julius Cohen, Some Observations on Advocacy: Judicial and Legislative 352
   - Illustration of Private Involvement: Public Education 353
     - Instructional Content 353
6. Improving the Public-Benefit Instrument

A. Improvements at the Top
   - Theodore J. Lowi, The End of Liberalism
   - Jeffrey L. Pressman & Aaron Wildavsky, Implementation

B. Improvements at the Bottom
   - “Vouchers”
   - “Standards”

7. Limitations of Law as a Public-Benefit Instrument

A. The Big Picture
   - Herbert Spencer, Over-Legislation

B. A Final Illustration of Conferral Program: Public Education, Yet Again
   - Possible Goals
      - Skipworth v. Board of Education
      - Michael B. Katz, The Present Moment in Educational Reform
   - Appropriate Goals

8. Summary

---

**Chapter 5**

**Law as an Instrument for Facilitating Private Arrangements**

1. Introduction to the Private-Arrangement Instrument

2. Private-Arrangement Methods

   A. Types of Private Arrangements
      - Private Associations
      - Corporations
      - Wills
      - Contracts
      - The Importance of Private Arrangements
         - Elizabeth S. Scott & Robert E. Scott, Marriage as Relational Contract

   B. Rules of Validation
      - Contracts
         - Rule #1: An Enforceable Contract Requires an Agreement
            - Lucy v. Zehmer
         - Rule #2: An Enforceable Contract Requires a Bargained-For Exchange
            - Chitchat Among Friends May Not Create a Contract
            - Lefkowitz v. Great Minneapolis Surplus Store, Inc.
## Contents

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dougherty v. Salt</td>
<td>399</td>
</tr>
<tr>
<td>An Exception to the Requirement of Consideration: Promissory Estoppel</td>
<td>400</td>
</tr>
<tr>
<td>Elvin Associates v. Franklin</td>
<td>401</td>
</tr>
<tr>
<td>Corporations</td>
<td>402</td>
</tr>
<tr>
<td>Oregon Revised Statutes</td>
<td>403</td>
</tr>
<tr>
<td>Additional Perspectives on Why the Law Facilitates Private Arrangements</td>
<td>404</td>
</tr>
<tr>
<td>C. Legal Remedies</td>
<td>405</td>
</tr>
<tr>
<td>Contracts</td>
<td>406</td>
</tr>
<tr>
<td>Money Damages</td>
<td>406</td>
</tr>
<tr>
<td>Cooper v. Clute</td>
<td>406</td>
</tr>
<tr>
<td>Hadley v. Baxendale</td>
<td>407</td>
</tr>
<tr>
<td>Specific Performance</td>
<td>410</td>
</tr>
<tr>
<td>Wilson v. Sandstrom</td>
<td>411</td>
</tr>
<tr>
<td>Corporations</td>
<td>413</td>
</tr>
<tr>
<td>Cranson v. IBM</td>
<td>413</td>
</tr>
<tr>
<td>D. Secondary Methods for Facilitating Private Arrangements</td>
<td>415</td>
</tr>
<tr>
<td>3. Making Private-Arrangement Law</td>
<td>416</td>
</tr>
<tr>
<td>A. Private Citizens</td>
<td>416</td>
</tr>
<tr>
<td>Agreement as to Supply of Water</td>
<td>416</td>
</tr>
<tr>
<td>B. Legislatures</td>
<td>418</td>
</tr>
<tr>
<td>North Dakota Century Code</td>
<td>418</td>
</tr>
<tr>
<td>C. Courts</td>
<td>419</td>
</tr>
<tr>
<td>Riggs v. Palmer</td>
<td>419</td>
</tr>
<tr>
<td>Riggs Today</td>
<td>421</td>
</tr>
<tr>
<td>Ermolieff v. RKO Radio Pictures, Inc.</td>
<td>422</td>
</tr>
<tr>
<td>Similarities and Differences in Interpreting Statutes and Agreements</td>
<td>423</td>
</tr>
<tr>
<td>4. Applying Private-Arrangement Law</td>
<td>424</td>
</tr>
<tr>
<td>Jack M. Sabatino, ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution</td>
<td>424</td>
</tr>
<tr>
<td>Arbitration</td>
<td>425</td>
</tr>
<tr>
<td>Katherine Van Wezel Stone, Rustic Justice: Community and Coercion Under the Federal Arbitration Act</td>
<td>426</td>
</tr>
<tr>
<td>5. Roles of Private Citizens and Their Lawyers</td>
<td>427</td>
</tr>
<tr>
<td>White v. Benkowski</td>
<td>428</td>
</tr>
<tr>
<td>Harry T. Edwards &amp; James J. White, The Lawyer as a Negotiator Letter</td>
<td>431</td>
</tr>
<tr>
<td>More on the Role of Private-Arrangement Lawyers in Society</td>
<td>432</td>
</tr>
<tr>
<td>Stewart Macaulay, The Use and Non-Use of Contract in the Manufacturing Industry</td>
<td>434</td>
</tr>
<tr>
<td>David Charny, Nonlegal Sanctions in Commercial Relationships</td>
<td>435</td>
</tr>
<tr>
<td>6. Improving the Private-Arrangement Instrument</td>
<td>437</td>
</tr>
<tr>
<td>Uniform Commercial Code</td>
<td>438</td>
</tr>
</tbody>
</table>
Part Two

THE ENDS OF LAW

Introductory Note to Part Two

Chapter 6
Law Can Help Promote Safety

1. Introduction

  Richard A. Epstein, Modern Products Liability Law
  Marshall Shapo, A Nation of Guinea Pigs
  Law and Social Change

2. Product Safety and the Private-Arrangement Instrument

  Webster v. Blue Chip Tea Room
  Remedies for Breach of Warranty
  Clarifying and Improving Warranty Protection

3. Product Safety and the Remedial Instrument

  Greenman v. Yuba Power Products, Inc.
  Thomas L. Dalrymple, Brief Opposing Strict Liability in Tort
  William L. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer)
  Restatement (Second) of Torts (1965)
  Restatement (Third) of Torts: Products Liability (1998)
  Comparing Strict Tort and Implied Warranty Law
  Denny v. Ford Motor Co.
  Class Actions in Mass Tort Cases
  Spencer Williams, Mass Tort Class Actions: Going, Going, Gone?
  Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action

4. Product Safety and the Administrative Instrument

  James A. Henderson, Jr., Judicial Review of Manufacturers’ Conscious Design Choices: The Limits of Adjudication
Chapter 7

Law Can Help Promote Equality

1. Introduction

2. Racial Equality and the Penal Instrument

A. Equality as a Limit
   - *Korematsu v. United States*
   - *American Concentration Camps*
   - Racial Profiling
     - *Barry D. Friedman, Policy Point-Counterpoint: Profiling at Airports*
     - *Herbert London, Profiling as Needed*
     - *American Civil Liberties Union, Sanctioned Bias: Racial Profiling Since 9/11*
   - B. Equality as the Goal
      - Anti-Miscegenation Statutes
      - Advocacy of Illegal Action
        - *Brandenburg v. Ohio*
      - Fighting Words
        - *R.A.V. v. City of St. Paul*
      - Group Libel

3. Racial Equality and the Remedial Instrument

A. Equality as a Limit
   - *Edmonson v. Leesville Concrete Co.*