



# ON LAW IN COURTS

An Introduction to Judicial Development  
of Case and Statute Law

By

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CLARENCE MORRIS

Professors of Law

in the

University of Pennsylvania

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Athenian Stranger: "Your laws being wisely framed, one of the best of your laws is that which enjoins that none of the youth shall inquire which laws are wrong and which right, but all shall declare in unison, with one mouth and one voice, that all are rightly established . . .

"Well, there are no young people with us now; so we may be permitted by the law giver, old as we are, to discuss these matters among ourselves privately without offense."

—Plato, *Laws*, Book I

The art of free society consists first in the maintenance of the symbolic code; and secondly in fearlessness of revision, to secure that the code serves those purposes which satisfy an enlightened reason. Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows.

—Whitehead, *Symbolism,  
Its Meaning and Effect*  
p. 88 (1927)

## PREFACE

"Legal Realism's" major battle has been won. Nowadays only the most professionally naive believe that courts mechanically apply prefixed law to simon-pure facts. Judges are men, and men who both wield power and exercise discretion; and many beginning law students are apparently aware of these "facts of life" even before they start law study.

Unfortunately, the lesson taught by the realists is sometimes over-learned. The recognition of judges' humanness and the rejection of mechanical theories of the judicial process is then seen as implying that judicial choice ranges entirely free and that courts are seldom, if ever, hampered in doing just precisely as they wish. Moreover, this view is often coupled with the implicit assumption that this is as things must be—that there can be no effective limits on the power of judges. From such a position, the question of proper limits of course becomes irrelevant.

We think these latter inferences wrong. We believe that judicial action functions within limits of both power and propriety—limits that are rarely narrow or rigid, but important limits nonetheless. These bounds are found in the judicial institution and its processes, in the conception of the judge's task and how it is properly done. In these materials we examine that institution and try to develop a "model" of its proper operation, range and limits. Our principal grist for this study consists of problems of law—generally in actual cases—whose proper solution demands analysis of the judicial function. In background notes, we have tried to suggest possible lines for this analysis, and at times to relate it to wider jurisprudential thinking.

We teach this entire book in a two-hour course, though in a somewhat unorthodox arrangement: the first chapter is covered in eight meetings, immediately preceding and concurrent with the beginning of all other first-year courses; the remainder is taught in the second semester of the first year. Though we prefer this pattern of scheduling, we do not think that the materials require it. Several professors at other schools have used successive mimeographed predecessors of this book in more conventionally scheduled courses, and apparently find such an arrangement workable.

## PREFACE

We gladly acknowledge the editorial assistance of Mrs. Alice H. Frey, who prepared the manuscript for press and made the index.

We cannot possibly acknowledge all of our intellectual debts. The text includes many references but countless unmentioned scholars have helped us in their writings and in personal discourse. One debt, however, must be specially acknowledged. While we were preparing these materials, we were afforded opportunity to see a tentative edition of Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*. Our explicit references to Professors Hart and Sacks' book fall far short of indicating how much we learned from them. Indeed we are no longer sure where our obligation begins and ends; having once traveled over much ground with them as guides, we can no longer see the landscape free from their influence.

PAUL J. MISHKIN

CLARENCE MORRIS

Philadelphia, Pennsylvania  
December, 1964

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