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Collected Legal Papers

James Parker Hall  
*University of Chicago Law School*

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BOOK REVIEWS


Of the twenty-six papers that make up this interesting collection eight are of substantial length, including three historical essays on Early English Equity, Agency, and Executors; two addresses on what may be called the philosophy of legal development (The Path of the Law; Law in Science and Science in Law); one on The Use of Law Schools; the well-known article analyzing the conceptions of Privilege, Malice, and Intent in Torts; and a delightful sketch of Montesquieu to accompany a reprint of the Esprit des Lois. Of the lesser papers but one, The Theory of Legal Interpretation, is of a technical legal character. There are reviews of Woodbine's "Bracton", and Holdsworth's "History of English Law", an Introduction to the "Continental Legal Historical Series", and brief estimates of Marshall and Maitland. The remainder are short addresses or written fragments prepared for or inspired by special occasions, often public dinners. They are, as the author says in his preface: "... little fragments of my fleece that I have left upon the hedges of life. ... I am glad to see them put together in a book, as they offer some views of law and life that I have not expressed elsewhere so fully."

Many of them reflect from various angles the legal and social philosophy which informs some of the writer's best-known judicial opinions. His personal belief in the social utility of the prevailing ideas of private property; his tolerance of legislative experimentation by those of opposing views; his conception of the judicial function; his conviction of the non-logical character of much that passes for purely deductive legal reasoning, and of the provisional nature of most legal postulates—are all abundantly illustrated, and expressed with the same distinction in style and vivacity of statement that so happily mark his utterances as a judge. The wide-spread professional discussion of these views that has taken place from time to time during the last twenty years renders it a work of supererogation to rehearse them for the readers of a law
review. Instead, one may quote a number of his brilliant sentences for the sheer pleasure of their pungent thought and delightful English.

"If a man has the soul of Sancho Panza, the world to him will be Sancho Panza’s world; but if he has the soul of an idealist, he will make—I do not say find—his world ideal." (p. 29)

"The business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers." (p. 37)

"The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society seeking to determine its own destinies." (pp. 129-30)

"The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. ... But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity. ... And so the eternal procession moves on, we in the front for the moment; and, stretching away against the unattainable sky, the black spearheads of the army that has been passing in unbroken line already for near a thousand years.'" (pp. 138-40)

"I should say that one of the good things about the law is that it does not pursue money directly. When you sell goods the price which you get and your own interests are what you think about in the affair. When you try a case you think about the ways to win it and the interests of your client. In the long run this affects one's whole habit of mind, as anyone will notice if he talks much with men.'" (p. 153)

"The difference between gossip and philosophy lies only in one's way of taking a fact." (p. 159)

"A university is a place from which men start for the Eternal City. In the university are pictured the ideals which abide in the City of God: Many roads lead to that haven, and those who are here have traveled by different paths towards the goal." (p. 164)

"When we study law we are not studying a mystery but a well-known profession. ... The means of the study are a body of reports, of treatises, and of statutes ... extending back for six hundred years. ... In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. ... The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." (pp. 167-73)
"The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty is generally illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. . . . Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind." (p. 181)

"Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think. . . . At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. . . . Somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. . . . For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." (pp. 185-87)

"I venerate the law, and especially our system of law, as one of the vastest products of the human mind. . . . It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men. But one may criticise even what one reveres. . . . I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." (pp. 194-95)

"The advice of the elders to young men is very apt to be as unreal as a list of the hundred best books . . . and high among the unrealities I place the recommendation to study the Roman Law. . . . No. The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself." (pp. 197-8)

"Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed
and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.” (pp. 199-200)

"I heard a story, the other day, of a man who had a valet to whom he paid high wages, subject to deduction for faults. One of his deductions was, 'For lack of imagination, five dollars.' The lack is not confined to valets. The object of ambition, power, generally presents itself nowadays in the form of money alone. . . . To an imagination of any scope the most far-reaching form of power is not money, it is command of ideas. . . . We all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success.” (pp. 201-2)

"It is perfectly proper to regard and study the law simply as a great anthropological document.” (p. 212)

[Referring to legal history] "From a practical point of view . . . its use is mainly negative and skeptical. It may help us to know the true limit of a doctrine, but its chief good is to burst inflated explanations. . . . History is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.” (p. 225)

"Precisely because that I believe that the world would be just as well off if it lived under laws that differed from ours in many ways, and because I believe that the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed, and not that it represents an eternal principle, I am slow to consent to the overruling of a precedent. . . . But I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. The social question is which desire is stronger at the point of conflict. . . . Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice.” (p. 239)

"A man is bound to be parochial in his practice—to give his life, and if necessary his death, for the place where he has his roots. But his thinking should be cosmopolitan and
detached. He should be able to criticise what he reveres and loves.’’ (p. 269)

‘‘The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind.’’ (p. 269)

‘‘One of the grounds of aesthetic pleasure is waste.’’ (p. 273)

‘‘Wherever we turn we find that what are called good laws are apt to be called so because men see that they promote a result that they fancy desirable, and do not see the bill that has to be paid in reactions that are relatively obscure.’’ (p. 289)

‘‘Imitation of the past, until we have a clear reason for change, no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different thing we want.’’ (p. 290)

‘‘It seems to me that at this time we need education in the obvious more than investigation of the obscure.’’ (pp. 292-93)

‘‘For most of the things that properly can be called evils in the present state of the law I think the main remedy, as for the evils of public opinion, is for us to grow more civilized.’’ (p. 296)

‘‘The real problem is not who owns, but who consumes, the annual product. The identification of these two very different questions is the source of many fallacies. . . . [Henry George] thinks he has finished the discussion when he shows the tendency of wealth to be owned by the landlords. He does not consider what the landlords do with it. I conceive that economically it does not matter whether you call Rockefeller or the United States owner of all the wheat in the United States, if that wheat is annually consumed by the body of the people; except that Rockefeller, under the illusion of self-seeking or in the conscious pursuit of power, will be likely to bring to bear a more poignant scrutiny of the future in order to get a greater return for the next year. . . . I have vainly urged our various statisticians to exhibit in the well-known form the proportions of the products consumed by the many and those consumed by the few, expressed in labor hours or in any other convenient way. This would show whether private ownership was abused for the production of an undue proportion of luxuries for the few. I do not believe the luxuries would be one per cent.’’ (pp. 279-80)

‘‘The mode in which the inevitable comes to pass is through effort.’’ (p. 305)

‘‘I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, coordinated, human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race. That would be my starting point for an ideal for the law. The notion that with
socialized property we should have women free and a piano for everybody seems to me an empty humbug.” (p. 306)

“To have doubted one’s own first principles is the mark of a civilized man.” (p. 307)

“It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk.” (p. 310)

“Certitude is not the test of certainty. We have been cocksure of many things that were not so. . . . Property, friendship, and truth have a common root in time. One cannot be wrenched from the rocky crevices into which one has grown for many years without feeling that one is attacked in one’s life. What we most love and revere generally is determined by early associations. . . . But while one’s experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism. Not that one’s belief or love does not remain. Not that we would not fight and die for it if important . . . but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief. Deep-seated preferences can not be argued about, and therefore, when differences are sufficiently far-reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.” (pp. 311-12)

“To those who agree with me I am uttering commonplaces, and to those who disagree I am ignoring necessary foundations of thought.” (p. 314)

“Philosophy does not furnish motives, but it shows men that they are not fools for doing what they already want to do. It opens to the forlorn hopes, on which we throw ourselves away, the vista of the farthest stretch of human thought, the chords of a harmony that breathes from the unknown.” (p. 316)

The above quotations sufficiently show what uncomfortable regular company Mr. Justice Holmes would be for either the “New Republic” or the “New York Times”, and what a delight he is to those who love to see a play of thought even over the eternal verities. The appendix containing a bibliography of the author’s constitutional opinions, advertised by the publishers, is regrettably omitted.

—James Parker Hall

University of Chicago Law School.