

JURIDICAL ESSAYS
AND STUDIES

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BY

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DEDICATION

I

How wonderful thou art as a man and as a friend,
O King of Jurists!
Language is powerless to depict.
May these little fragments of my fleece,
Ephemeral though they be,
Serve yet as a sign of my everlasting love for thee!

II

Conjointly with the great Holmes,
And no less heartily is this first fruit of my life offered to thee,
Representative of our race, and brave soldier of the Truth!
Socrates-like, adversity has only strengthened thy character,
Unpopularity has but deepened thy convictions,
Nothing, I believe, will dim the fire thou bearest in thy belly.

III

But shall I forget thee, Brother dear?
Reciprocate thy tender love I hardly could,
O Child of Nature!
Thou hast remained pure in this dirty world,
High-minded in the midst of Philistines,
Epic-writer, thou, of our childhood pleasures,
Reminder of the golden age of our life!

PREFACE, BY WAY OF CRITICISM, AND SUPPLEMENTATION

1

To be entitled to have one's published essays appear in a collected volume, one needs to be either dead or very old. I confess that I have neither of these qualifications. But when I was called, on the first of January, 1927, to the Bench of the Shanghai Provisional Court, some of my students began to be afraid that my activity as a legal writer was to come to an end, or, at least, going to be suspended for some time. At any rate, the first cycle of my legal career, so they thought, was already completed; and a collection of my little essays might serve very well as a landmark to my juridical pilgrimage. I approved of their idea, my only ground for hesitation being that these "little fragments of my fleece" which I all but unconsciously "left upon the hedges of life" are not worth collecting. All these essays and studies are, to say the least, immature and unsystematic, and the views embodied in them are often inconsistent with each other. My only consolation is that a living person can never be fully mature, and a free spirit would not like to be encaged in a ready-made system. As to inconsistency, I hope it will be taken rather as a sign of intellectual honesty. For, as Fournoy, in his brilliant monograph on *The Philosophy of William James*, so keenly observes, "The things themselves are so transitory, chaotic, and difficult to comprehend in one view, save at the cost of arbitrary simplification, that the more penetrating and sincere the onlooker is, the more he is struck by the complication of the spectacle, and the less likely he is to arrive at a truly synthetic vision of reality." And certainly nothing is more complicated than the law; for, is law not the meeting point of the real and the ideal?

2

Speaking of *l'emphase romantique*, or romantic fustian, which he defines as "the enormous disproportion between

emotion and the outer object or incident on which it expends itself," Professor Babbitt found a good example of musical fustian in Richard Strauss's *Domestic Symphony*. "I read," he says, "in one of the accounts of this composition that there are required for its performance, in addition to the usual strings, 'two harps, four flutes, two oboes, one oboe d'amore, four clarinets, one bass clarinet, four bassoons, one double bassoon, four saxophones, eight horns, four trumpets, three trombones, one bass tuba, four kettledrums, triangle, tambourine, glockenspiel, cymbals and big drum,'—and all to describe the incidents of baby's bath!"

Ridiculous as it may appear to the classical spirits, my way of approaching the law, my passion for the Juridical Muse, I confess, savors very much of *l'emphase romantique*. I can only see legal problems *sub specie eternitatis*. In addition to great masters of the law, I have called to aid one Lao-tzse, one Shakespeare, one Spinoza, one Goethe, one Whitman, one William James, and many other laymen like Confucius, Kant, and John Dewey. It must be due to my lack of analytical power that somehow I have seen a close affinity even between such different things as law and music. Consciousness of the mystery of life always haunts me like a spirit, even when I am deciding a trifle case. My little universe is bathed in the mellow light of cosmic emotion. In this I am much influenced by my great friend. In a letter he wrote: "A man's spiritual life is best told in what he does in his chosen line. Life having thrown me into the law, I must try to put my feeling of the infinite into that, to exhibit the detail with such hint of a vista as I can, to show in it the great line of the universal. This sounds pompous, but it truly expresses my desire and the way I feel, when called on perhaps only to construe some temporary statutes, so that untying little knots never seems drudgery." Who else could have written these words than the noble Holmes?

The essay on *The Logic of "Would-Be" in Judicial Decisions* has attracted a great deal of attention among my students. As a result of our mutual discussions, we have discovered that there are two classes of fallacies in connection

with this form of reasoning. The first is the fallacy of over-apprehension, and the second, the fallacy of overvaluation. The first exists when the would-be consequences will not happen or are not likely to happen; the second, when the consequences, even if they actually take place, are not serious enough to be taken cognisance of by the law, or are not so bad as those of the decision which one seeks to justify. Examples of the former: "The Aztecs held that it was a duty to sacrifice and eat enemies captured in war, since otherwise the light of the sun *would* go out." "The Book of Leviticus enjoins that when a married man dies without children his brother shall marry the widow, and the first son born shall count as the dead man's son. The Romans, the Chinese, and many other nations secured a similar result by adoption. This custom originated in ancestor worship; it was thought that the ghost *would* make himself a nuisance unless he had descendants (real or putative) to worship him." (Both these examples are taken from Bertrand Russell's essay on *Styles in Ethics*.) As illustration of the latter fallacy, let me give a case which recently came before me. The defendant undertook by a contract to repair the plaintiff's boat. The contract provided that the work should be done to the satisfaction of the plaintiff. After the work was done, it did not satisfy the plaintiff. The latter brought an action for breach of contract. During the trial it was found that the work was duly performed, and was such as could reasonably be required under the circumstances of the case. Counsel for plaintiff argued that since the contract expressly provided that the work should prove to the satisfaction of the plaintiff and since the plaintiff has never expressed his satisfaction, therefore the defendant cannot be held to have performed his contract. To hold otherwise would run counter to the terms of the contract. I held, however, that to adhere strictly to the terms of the contract would mean the subjection of the will of one party to the arbitrary will of another. In other words, it would be a fallacy of overvaluation, inasmuch as an excessive emphasis is thereby laid on the will of an individual party, to the utter disregard of one of the fundamental principles of justice. (Professor Stammer calls it the principle of respect.)

We have also come to the conclusion that the logic of "would-be" is a more fundamental form of judicial thinking than the

philosophy of "as if." Fictions are often created and resorted to because otherwise there *would be* a miscarriage of justice. Birkenhead, in his essay on Sir Matthew Hale, says, "At that age [the seventeenth century] the law abounded in legal fictions, partly allowed to enable a court to encroach upon the jurisdiction of the other courts, partly to enable justice to be done in cases where the forms of action and the rules of procedure, if strictly adhered to, would defeat the ends of justice." (See Birkenhead, *Fourteen English Judges*, pp. 53, 54.) This illustrates my meaning.

4

In the essay *On Some of the Juridical Monisms*, I observed that Sir Henry Maine subscribed to the "potentiality theory of legal evolution." No better illustration could be found than his account of how all the later laws of procedure were descended from the *Legis Actio Sacramenti* of the early Roman law. He says:

"Almost every gesture and almost every set of formal words in the *Legis Actio Sacramenti* symbolize something which, in some part of the world or another, in some Aryan society or another, has developed into an important institution. The claimant places his hand on the slave or other subject of dispute, and this grasp of the thing claimed, which is reproduced in the corresponding procedure of the ancient Germans and which, from them, continued in various modified forms far down into the Middle Ages, is an early example of that demand before action on which all civilized systems of law insist. The wand, which the claimant held in his hand, is stated by Gaius to have represented a spear, and the spear, the emblem of the strong man armed, served as the symbol of property held absolutely and against the world, not only in the Roman but in several other Western societies. The proceedings included a series of assertions and reassertions of right by the parties, and this formal dialogue was the parent of the Art of Pleading. The quarrel between plaintiff and defendant, which was a mere pretense among the Romans, long remained a reality in other societies, and, though its theory was altered, it survived in the Wager of Battle, which, as an English institution, was only finally abolished in our fathers' day. The interposition of the Prætor and the acceptance of his mediation expanded into the Administration of

Justice in the Roman State, one of the most powerful of instrumentalities in the historical transformation of the civilized world. The disputants staked a sum of money—the *Sacramentum*, from which the proceedings took their name—on the merits of their quarrel, and the stake went into the public exchequer. The money thus wagered, which appears in a singularly large member of archaic legal systems, is the earliest representative of those court fees which have been a more considerable power in legal history than historians of law are altogether inclined to admit.”—*Maine, “Lectures on the Early History of Institutions,” New York, 1875, pp. 254, 255.*

It is submitted that, while this tracing of the pedigree of legal institutions is very interesting, it hardly explains anything. The growth of legal institutions can only be accounted for by factors external to the law, but not by its development from within. Instead of deducing the growth of law from the origins of the law itself, it would be a more profitable undertaking to relate the growth of the law to the growth of the human mind. In this connection I want to refer the reader to my essay on *Problem and Method of Psychological Jurisprudence.*

5

My sojourn in Germany during 1922 and 1923 is full of sweet reminiscences. It was then that I acquired the friendship of two great souls, Stammler and Eucken. Both of them read over my essay on “*Das Erkenntnisproblem in der Rechtsphilosophie*,” which, with a few alterations, is but a translation of *The Juristic Philosophy of Mr. Justice Holmes*; and both of them reacted very favorably toward it. Professor Stammler wrote an elaborate discussion on it (see his article on *The Question and Method of Juristic Philosophy*, published in the *Michigan Law Review*, and reproduced in this volume). And as for Professor Eucken, in whose lamented death two years ago Germany lost the last of her great idealists, he wrote me a letter (dated February 22, 1923, from Jena), which I take liberty to reproduce here, in order that its invaluable contents may be preserved in a permanent form:

Herr Dr. John C. H. Wu
Berlin — Grunewald
Karlsbader Str. 16
bei Honigmann.

Jena 22/2/23
Lentzstr. 5

Hochgeehrter Herr Doctor!

Es war mir eine rechte Freude, Ihre wertvollen Sendungen zu empfangen, und ich brauche Ihnen nicht zu versichern, dass ich die Manuskripte mit grösstem Interesse gelesen und durchdacht habe. Sie verfügen über eine so umfassende Kenntnis jener Wissensgebiete, und Sie besitzen eine so selbstständige Denkweise, dass es mir eine aufrichtige Freude war, mich in Ihre Gedankengänge zu vertiefen. Es ist mir besonders bemerkenswert zu sehen, wie Sie einmal eine enge Fühlung mit der kantischen Denkweise festhalten, und wie Sie andererseits über Kant hinausstreben. Damit werden alle Hauptbegriffe eigentümlich ausgeprägt; über den Begriff des "Ding an sich" würde ich mich besonders gern mit Ihnen unterhalten. Auch den Begriff der "Form" und seiner Bedeutung für das Erkenntnisproblem würde uns lebhaft anziehen. Jedenfalls sind wir beide in dem Grundgedanken eines selbstwertigen Rechtes vollauf einig; wir müssen den Pragmatismus und die biologische Deutung des Rechtes aufs entschiedenste verwerfen. Es war schade, dass der geistvolle Ihering, der ursprünglich mehr zu Hegel neigte, schliesslich zu einem flachen Empirismus gelangte. Und dass bei Kohler alle Tiefe des Rechtes aufgegeben wurde, das unterliegt nach meiner Überzeugung keinem Zweifel. So ist es ein entschiedenes Verdienst von Ihnen, dass Sie sich mutig durch alle Irrwege und Abwege durchschlagen und fest Ihr eigenes Ziel im Auge behalten. Ich finde es am zweckmässigsten, dass wir mündlich und persönlich jene grossen Fragen durchsprechen; ich bin voraussichtlich den ganzen März ruhig in Jena; und Sie werden mir jeden Tag willkommen sein. Auch meine Frau wird sich freuen, Ihre persönliche Bekanntschaft zu machen. Es ist uns beiden eine aufrichtige Freude in Ihnen einen Freund unseres Freundes Prof. Carsun Chang begrüssen zu dürfen. Wir beide schätzen Herrn Carsun Chang ausserordentlich, wir betrachten ihn als unseren persönlichen Freund. Hoffentlich gelingt es ihm vollauf seine schönen wissenschaftlichen Pläne für China auszuführen.

Es wäre mir auch sehr lieb, mit Ihnen die Zukunftspläne für China durchzusprechen. Ich erwarte von Ihrem Lande eine grosse Bedeutung für das ganze der Menschheit; schliesslich müssen wir hoffen, dass der Osten und der Westen sich zu einer gemeinsamen Geisteskultur zusammenfinden. Ich habe eben in diesem Interesse das eben erschienene Werk "Das Licht des Ostens" gründlich studiert und dadurch manche Erweiterungen und Anregungen empfangen.

Einstweilen erlauben Sie noch, dass ich die übersandten Schriftstücke so lange hier behalte, bis wir jene Probleme gemeinsam erörtern, ich freue mich sehr darauf.

In der Hoffnung einer solchen baldigen persönlichen Begegnung bin ich in aufrichtiger Hochachtung und mit freundlichen Grüssen.

Ihr Rudolf Eucken.

6

As a legal philosopher I would like to be judged by the two essays, namely, *The Juristic Philosophy of Justice Holmes and Stammler and His Critics*. My whole philosophy may be looked upon as an attempt to reconcile the Holmesian with the Stammlerian in legal thinking, the perceptual with the conceptual, the becoming with the become, the matter with the form, the theory of interests with the theory of justice, the empirical with the rational. This point may be illustrated by the following parable of the pot and the beer.

In a letter (dated September 2, 1923) Holmes wrote: "Just after sending my last letter to you a further thought occurred to me with regard to the forms of thought. Whatever the value of the notion of forms, the only use of the forms is to present their contents, just as the only use of the pint pot is to present the beer (or whatever lawful liquid it may contain), and infinite meditation upon the pot never will give you the beer." Stammler, on the other hand, would say, in a characteristic way, that beer without the pot could hardly be preserved in a permanent form, and it is the part of philosophy to furnish the permanent forms. Thus, for the former, the subject matter of philosophy is primarily the beer, and for the latter it is primarily the pot. I would say, however, that the subject matter of philosophy is neither the beer alone, nor the pot alone, nor yet the beer and the pot added together, but the beer-in-the-pot.

The essay on *The Juristic Philosophy of Justice Holmes* deals only with one of his great discoveries, namely, the prediction theory of the law. Holmes is such an inexhaustible mine of juridical wisdom that one can always find something new every time one rereads his writings. Indeed, he is the greatest of jurists ever born into the world. "No," said Frankfurter, in a letter to me, "'jurist' is too crippling a word. His personality, so perfect a fusion of mind and spirit, broods over all that vitally touches man's nature." Some day I hope I shall be able to coöperate with Frankfurter in producing a whole book, with many volumes, on our great master.

In hours of despondency, I often try to console myself by reading over the letters of Holmes. What a joy when I reflect that although we are separated from each other by almost two generations, yet we agree on so many things! The following are some of the significant passages from his letters which bear witness to his hearty approval of some of my philosophical apperceptions:

"It is odd that you should mention Spinoza as an influence upon me, because I have just taken up his *Ethics* to reread and was writing to some one within a day or two that his view of the world, leaving his logic chopping, etc., on one side, commanded my sympathy more than any other in the past. Goethe outside of Faust I know but little. We are influenced by the past, however, in many ways that we don't know ourselves. Spinoza has had no conscious influence upon me. I have not known him well enough; but when I find myself sympathizing with him, the probability of an influence, even if indirect, is great." (From a letter dated Feb. 5, 1923.)

"I like your rapture over the law. I only fear that it may be dimmed as you get into the actualities (in the sense of the hard side) of life. But if, as I hope and as what you write indicates, you bear the fire in your belly, it will survive and transfigure the hard facts." (From the same letter.)

"I am glad to see you on the side of the *Ding An Sich*, which seems to me to follow, the moment that we admit that the world is not our dream." (From the same letter.)

"I like your 'Santayana is melodious but Dewey is symphonic.' I used to say that Walt Whitman was symphonic." (From a letter dated Nov. 23, 1926.)

"Pursuant to your recommendation I sent for Dewey's *Experience and Nature*, and am reading it. It makes in me

an impression like Walt Whitman, of being symphonic, of having more life and experience in his head than most writers, philosophers, or others. He writes badly and creates more difficulties by his style than by his thought. I couldn't give a synopsis of what I have read, yet I have felt agreement and delight even when I got only an impression that I could not express. I agree with you that he is a big fellow, and I expect to believe when I have finished it as I do now that the book is a great book." (From a letter dated Dec. 5, 1926.)

"I doubt if I have heard from you since you recommended to me John Dewey's book *Experience and Nature*. I read it twice, and although I could not give a summary of a chapter or a page in it, I thought it great. It seemed to me to *feel* the universe more inwardly and profoundly than any book I know, at least any book of philosophy. That was at the beginning of last year and the end of the year before. I have read nothing since that has so impressed me, although last summer going through Spinoza's *Ethics* I was deeply struck with the fact that, while I didn't believe his premises and didn't even yield to his logic, his attitude to the universe and man commanded my profound respect." (From a letter dated January 30, 1928.)

"Since I last wrote, I think, I have read Stammler's book [*The Theory of Justice*]. I don't want to run the risk of repeating what I may have said before, and therefore will only say a word. I did not find it instructive. I liked your appendix better than anything else in it." (From a letter dated August 26, 1926.)

8

In the essay on *The Philosophy of Roscoe Pound*, I called that great genius a propounder of *juridical activism*. That was, of course, based upon his writings in general, but particularly upon a letter I had written me when I was in Germany. The following passage is significant, as it discloses both his point of departure and point of arrival:

"I am glad that you are becoming interested in William James, but I think a caution will gradually suggest itself to you as you study him. Is pragmatism after all anything more than a method, and is it not compatible with a good many different ultimate metaphysical theories? What I should like to see in Jurisprudence is some reasonably assured

methods on which we can agree in the immediate future as men were agreed in the classical period in the nineteenth century and in the classical period in the seventeenth and eighteenth centuries, and yet hold many different philosophical creeds. In the nineteenth century Hegelian and utilitarian and positivist when they got over into jurisprudence were thoroughly in accord in everything except with respect to the way that they got there. So it was in the great days of natural law. There were many ways of arriving at natural law, but the general attitude toward juristic problems was the same. We need a general accord as to the efficacy of juristic effort to improve the law, a general recognition of the problems of jurisprudence in a new period of growth, and a consensus as to the main features of the juristic apparatus with which they must be met. Such an agreement is perfectly compatible with many different ultimate philosophical systems. For instance, you will note an activist element in every type of philosophy to-day as distinctly as an aversion to activity was manifest in every type of nineteenth-century philosophy."

9

The essay on *The Juristic Philosophy of Judge Cardozo* is incomplete. Some day when I shall have plenty of leisure I shall try to continue it. In the meantime I have come across some of his decisions, which may be described as "profound thoughts embodied in beautiful words." In his *Growth of the Law*, he expresses his agreement with the remark of Graham Wallas, that in some of the judges of our highest court there should be a touch of the qualities which make the poet. No man exemplifies this better than Chief Judge Cardozo himself. Let me refer the reader to two of his decisions: *De Cicco v. Schweizer*, 221 *New York*, 431; and *Techt v. Hughes*, 229 *New York*, 222.

10

Readings from Ancient Chinese Codes and other Sources of Chinese Law and Legal Ideas is an immature piece of work, although the three stages presented therein of development of the Chinese law may serve as a guide to students of Chinese legal history.

Sources of Chinese Civil Law, which I wrote in conjunction with my friends, Mr. C. H. Chang and Mr. Y. L. Liang, is a useful guide to students of modern Chinese civil law, although it is much too brief and stands in need of expansion.

11

With the exception of the French essays, which were written in the spring of 1922, *Casual Remarks on Reading Cardozo's Growth of the Law*, written in 1924, and the essay *On Some of the Juridical Monisms*, written in 1926, all the other essays have been published before this. Chronologically arranged, they present themselves in the following order:

1. *Readings from Ancient Chinese Codes and Other Sources of Chinese Law and Legal Ideas*, Michigan Law Review, 1921.
2. *The Juristic Philosophy of Justice Holmes*, Michigan Law Review, 1923.
3. *Das Erkenntnisproblem in der Rechtsphilosophie*, Archiv für die systematische Philosophie, 1924.
4. *The Juristic Philosophy of Roscoe Pound*, Illinois Law Review, 1924.
5. *Stammler and His Critics*, written in 1924; published as an Appendix to Stammler, *The Theory of Justice*, of the *Modern Legal Philosophy Series*, 1925.
6. *The Juristic Philosophy of Judge Cardozo*, China Law Review, 1924.
7. *The Legal Theories of James Wilson*, China Law Review, 1925.
8. *Sources of Chinese Civil Law*, China Law Review, 1925.
9. *Problem and Method of Psychological Jurisprudence*, China Law Review, 1925.
10. *The Logic of "Would-Be" in Judicial Decisions*, China Law Review, 1926.
11. *Scientific Method in Judicial Process*, China Law Review, 1926.
12. *The Province of Jurisprudence Redetermined*, China Law Review, 1926.
13. *The Three Dimensions of Law*, China Law Review, 1927.

Two of my former students, Mr. Henry P. Chiu and Mr. William Timothy Kao, have helped the editing of this book, for which I wish to express my indebtedness to them.

JOHN C. H. WU.

SHANGHAI, APRIL, 1928

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