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EMMETT MATTHEW HALL: THE ACTIVIST AS JUSTICE

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I was tempted to write exclusively on Mr. Justice Hall's judicial activism, but, as the title is intended to suggest, one cannot speak of his judicial activism without noting that it is a function of his broader social activism.[1] Accordingly, as a prelude to a discussion of the judicial form of his activism, I shall focus on the scope and main background forces of Justice Hall's social activism.[2] I shall conclude this section with a few observations on the content of his social philosophy and the impact it has had on the formation of his judicial values and attitudes. It is my hope that such preliminary remarks will not only provide the necessary background to the more important subject of Justice Hall's judicial activism, but that it will also guide us in understanding that aspect of his activism more fully.

My main objective is to provide the reader with the material for a deeper insight into the character of the man regarded today as Canada's leading civil libertarian on the bench.

Health Services and Education

The breadth of Justice Hall's involvement in the social problems of our times continues to amaze people. It not only encompasses the legal and social aspects of law reform, but such pressing problems as education, and medical care for the needy, including Canada's native peoples. Nor does his involvement diminish as he progresses up the judicial order. In fact, if there is a pattern it appears to be that the higher he goes, the more involved he becomes. Few Canadians are unaware of Justice Hall's part in the Royal Commission on Health Services which resulted in a national medical care scheme;[3]

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[1] This is, of course, not unique to Justice Hall; the late Justice Hugo Black's activism can be understood in light of his political involvement; so too can Justice Murphy's, see W. Howard, *Mr. Justice Murphy* (Princeton University Press, 1968). See also J. D. Weaver, *Warren: The Man, The Court, The Era* (Boston: Little, Brown, 1967).

[2] Justice Hall's direct political activism has been minimal. He was a political candidate twice (once municipally and once provincially), but was unsuccessful both times. He was elected to the Saskatoon Separate School Board from 1949-1957. I make no pretence to deny or obscure the fact that Justice Hall had been active (behind the scenes) in the Progressive Conservative Party before being appointed to the bench. Nor am I ignorant of the fact that he was appointed to the Supreme Court of Saskatchewan and the Supreme Court of Canada by John Diefenbaker, an old personal friend and law school classmate. Despite this, however, there is no evidence to suggest that his political and social values have been influenced by this association or experience. There can be no doubt about it, however, that John Diefenbaker appointed him to the bench because Justice Hall shared his passion for criminal justice and the rights of the individual.

[3] Justice Hall considers this to be his most important non-judicial achievement.

or his contribution to the reform of education in Ontario through the proposals embodied in "Living and Learning", the so-called Hall-Dennis Report. These are only two of his more recent and more important contributions. The excellence of the former led the Public Health Association of the United States to present him with its highest award for achievement in public health, the Bronfman Medal.[4] The latter report has resulted in nation-wide debate on the nature of the reforms required in elementary and secondary education.

The speeches which Justice Hall gave in defence of the report of the Royal Commission on Health Services contain an account of the depth of his personal commitment to the cause of national health standards. He remains to this day firmly convinced that the Charter for a national health program was an essential contribution to national unity — incomplete as yet because, despite the acceptance of medicare by the provinces, the native peoples of Canada have yet to feel the benefit of the Commission's recommendations. Until they do Justice Hall sees his work as only partially implemented.

Beneath his concern for adequate health and education standards and facilities rests his fixed commitment to broad social values. One of the most fundamental is the fear that the economic or materialistic criteria will dominate thinking and work to the destruction of "genuine human values". Ours is an era, he warns, where "material abundance and ample leisure seems a distinct possibility ... such an era could result in an increasing degree of dehumanization unless our basic human values and institutions are strengthened to withstand this onslaught."[5] Permeating all his writings and speeches is the dual concern for those forces which tend to dehumanize men as well as the need to embody in legislation the basic humanitarian values which he believes are proper to civilized men.

It becomes clear after a review of Justice Hall's papers that his vision and intensity of energy are the product of his passion for "social justice" which he conceives as social welfare in action. "We seem, in a sense, to have become 'social minded' in that we now believe than an individual or an individual family should not have to bear alone the full costs of risks that could happen to any one of us. Accordingly, we now believe that if the resources of the whole can be used to strengthen the ability of families and individuals to manage and plan for themselves, then they should be so used. There is evident today a ground surge very wide in scope that seeks to aid in freeing the world of hunger, poverty and intolerance and war; a movement that seeks justice and particularly social justice and it is making progress on many fronts."[6]

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[4] Presented at San Francisco, Thursday, November 3, 1966. The citation accompanying the award reads in part: "The Hall Report will stand as one of the major, influential documents in the history of world health, an enduring monument to the judgment and helmsmanship of Mr. Justice Emmett Hall."

[5] "Implications of a Health Charter for Canadians," keynote address, prepared for delivery to the National Conference on Health Services, at Ottawa, November 28, 1965, at 11. (Note: all references to unpublished speeches and addresses are to the Hall Papers in the author's possession).

[6] "Social Justice — Safeguard of Human Rights," an address to the Women's Canadian Club of Ottawa, January 15, 1969, at 12.

Justice Hall is an egalitarian who believes that society should provide access to medical and educational facilities for all its peoples. Accordingly, the Health Services Commission took its bearings from the World Health Organization Charter which proclaimed that

> The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without discrimination of race, religion, political belief, economic or social condition. The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest cooperation of individuals and states.[7]

Before specifying in detail the recommendations of the report, Justice Hall paused to assert that the fundamental feature of the Charter is that of freedom: "services are to be rendered by free and independent, self-governing professions, and those seeking health services are to be as free to choose as they have always been."[8] And so, while government is to be involved, doctors are not to be employees of the state — i.e. while the scheme involves government it is not socialistic.

Long before he became involved in the Ontario Royal Commission on Education, Justice Hall expressed the conviction that education and health are partners, the one aiding the other. His goal in health is to raise access to adequate health services to the level of that available to all Canadians in education. "The right to education is one now universally recognized in Canada. It is an entrenched right which no one would dare to challenge. It is now beyond question that all our young people must be better educated and more competently trained if Canada is to survive in this highly competitive age of specialization and automation. It is equally true that health services are as much as investment as education. Health services and education must now be regarded as twin endeavours, advancing mankind."[9]

The concern for Canada's native peoples permeates all Justice Hall's non-judicial writings and not a few of his judicial judgments. He has been loud in his denunciation of the neglect of Canadian Indians and Eskimos. "We, as a nation," he once proclaimed, "have failed our Indians and Metis."[10] He never tired of relating the depth of degredation into which the Canadian nation has permitted Indians and Eskimos to remain. Armed with the statistics of the Commission of the Northwest Territories report, the Royal Commission on Health Services recommended an imaginative plan for organized flying health service circuits, not unlike judicial circuits. "It would bring regular visits several times a year, by health personnel to the scattered communities and the Yukon and the Northwest Territories."[11] Not blind to the fact that adequate health services are not in themselves the answer to the problems of the North, the Hall Commission went beyond the question of

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[7] Canada. *Royal Commission on Health Services,* (Ottawa: The Queen's Printer 1964-65) Vol. 1, at 6. [Hereinafter Royal Commission on Health].

[8] "Implications of a Health Charter for Canadians," at 16.

[9] *Royal Commission on Health,* Vol. II, at 18.

[10] "Dr. Donald Thomas Fraser Memorial Lecture," prepared for delivery at Edmonton, June 1, 1965 at the meeting of the Canadian Public Health Association at 11.

[11] *Id.,* at 13.

health and concluded that the "eventual solution must result in employment opportunities for the people of the North if the region is to become more than merely a base for weather stations, scientific outposts, or defence installations manned by personnel on a temporary basis."[12]

Due to the close liaison between health and education, it is no surprise that many of the same themes emerge in Justice Hall's explanation and justification for the recommendations contained in *Living and Learning,* the report of the Ontario Royal Commission on Education. At every opportunity, Justice Hall reiterates his belief that the educational process is in danger of being programmed in terms of economic efficiency. "Unless a people is on its guard, the economic demands of society can be made to determine what is done in education. The society whose educational system gives priority to the economic over the spiritual and emotional needs of man, defines its citizens in terms of economic units and in so doing debases them. There is a dignity and nobility of man that has nothing to do with economic considerations. The development of this dignity and nobility is one of education's tasks."[13] Indeed, the entire concept of "marketable skills" is loaded with fallacies in his view. Education has one major aim: the development of manhood, i.e. the intellectual discipline which will provide children with the means by which they will become morally conscious and responsible adults. All levels of the educational process must be designed to provide the maximum flexibility commensurate with the varied native capacities and interests of all students. A clear egalitarian tone pervades *Living and Learning.* As in the case of access to the best health services, the best education must be made available to all Canadians and not just a privileged portion. Yet there is an equally firm commitment to the belief that the kind of education favored by the Hall-Dennis commission will maximize responsibility and serve as a rebuff to the trends towards mass tastes and mass conformity. Underlying his convictions in both health and education is the clear commitment to individualism — an individualism which is not in any way to be confused with the rugged individualism of nineteenth century economic thought. The brand of individualism espoused by Justice Hall comprises the individual acceptance of a social commitment along with the recognition of what kind of responsibility is attached to the freedom he is proclaiming. "Responsibility is the keynote of the new day we see in education — responsibility linked with freedom; for freedom with responsibility imposes greater limitations on man's predatory inclinations and arbitrary actions than shackles of steel or fear of punishment; for they are limitations imposed by the intellect, limitations voluntarily accepted in recognition of man's responsibility to his fellow man and not as a license to ride roughshod over the rights of others, or in a violation of them."[14]

The above citation makes it clear that Justice Hall has a clear view of the social nature and responsibility of man. What should also be clear is

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[12] *Id.,* at 14.

[13] An address to the National Conference on Medical Action for Mental Health, 1970, at 5.

[14] *Id.,* at 22.

that he is no unqualified modern liberal. Despite the fact that he must be categorized as a liberal because of his overriding emphasis on freedom, his commitment to a brand of individualism which emphasizes social duty rather than rights flowing from freedom marks him as conservative. Furthermore, Justice Hall's liberalism does not permit him to discard the great heritage of the past; the great institutions and customs of history are dear to him. For this reason he cannot countenance the efforts of the radical cause bent on destruction in the name of a utopian order. But, then, neither does he acquiesce in the prevailing injustices. This is why he keeps in touch with the activist literature of the times — see for example the indirect reference to *The Greening of America* in his speech to the John White Society published in this issue of the Supreme Court Review.

Justice Hall is deeply concerned about the modern trends, such as automation, which impersonalize and dehumanize modern lives. In an effort to prevent the modern trends from engulfing men, he urges politicians in particular to become conscious of the corrosive effects many current trends have and to become fully aware of the fundamental values and principles upon which the just political order must be erected.

When one distills the non-judicial writings of Justice Hall, one finds a clearly conscious view of the nature of the individual as well as a concept of the state which flows from that view. In this connection there can be little doubt that Justice Hall's personal values, in particular his strong Catholicism, have had an impact. It is always dangerous to attempt to explain an intelligent adult's behaviour in terms of early formal and informal influences; one can only speculate on the extent to which Justice Hall's early religious education played a part in shaping his basic values. Nevertheless, in the present instance one can find very clear similarity of views expressed by Justice Hall and the great social encyclicals of the Catholic church — i.e. *Rerum Novarum, Quodragesimo Anno* and above all, Pope John's major social pronouncement, *Pacem in Terris.* Justice Hall has never disguised his open and active membership in the Roman Catholic Church — he was a Grand Knight of Columbus at a time in Saskatchewan when the Ku Klux Klan was making an appearance on the scene. He even had the dubious honor of being burned in effigy by the Ku Klux Klan.

Perhaps these fundamental values provide a partial key to Justice Hall's actions on and off the bench, but most people are more complex. And Justice Hall is no exception. As Schmidhauser says: "It is not at all clear that the social and political background factors in themselves may serve as reliable indicators of precise patterns of judicial behaviour ... Complete dependence upon background factors would also ignore the complexity and subtlety of intellect and motivation."[15] The fact that he was able to depart from his family's longstanding political preference for the Liberal Party and

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[15] J. Schmidhauser, *The Supreme Court: Its Politics, Personalities and Procedures,* (New York: Holt, Rinehart and Winston, 1960) at 57. See also, J. Grossman, *Social Backgrounds and Judicial Decision-Making* (1965-66), 79 Harv. L. Rev. 1551. A good example of where Justice Hall's non-judicial involvement did not interfere with his judgment can be seen in *Ares* v. *Venner,* [1970] S.C.R. 608.

actively support the Progressive Conservatives in Saskatchewan attests to his independence.

Background factors do, nevertheless, provide some guidance. There can be no doubt, for example, that his having been born in Quebec has had a profound influence on his sympathetic attitude to French Canadian aspirations. A clear commitment to the family, to orthodox Christian morality and a legal order directed towards justice pervades all Justice Hall's nonjudicial writings and emerges frequently in his judicial writings as we shall see later.

Justice Hall's view of the role of government and the extent of its social obligations also provides us with insights into his basic scheme of values. A brief glance at the recommendations of the monumental report of the Royal Commission on Health is sufficient to conclude that Justice Hall considers it proper and necessary for the government to assume an active role in formulating and implementing social policy. Indeed the main instrument of achieving social justice in his view is government. The first and most important of the Royal Commission recommendations is a directive addressed to the Federal Government to "enter into agreements with the provinces to provide grants on a fiscal need formula to assist the provinces to introduce and operate comprehensive, universal, provincial programs of personal health services, with similar arrangements for the Yukon and the Northwest Territories."[16]

But he was not content with merely recommending. After the Report was formally presented to Prime Minister Pearson, Justice Hall never lost an opportunity to urge in public the recommendations of the Commission. This outspoken support for the recommendations caused many in official government quarters to question whether such activity was proper to a justice of the highest court in the land. Judy LaMarsh, at the time Minister of National Health and Welfare, openly resented this manner of lobbying and, true to her fashion, said so in no uncertain terms.[17]

The fact of the matter is, however, that Justice Hall saw little difficulty with publicly advocating the reforms recommended by the Royal Commission. The fact that he was a high court judge did not detract from the fact that he had been a party to a study which uncovered a widespread public deficiency and had recommended that it be remedied "with urgency". It would have been foreign to his character to submit such a report and then forget about it. When one comes to know the man one soon realizes that once his attention has been directed to a social ill, nothing will contain his Irish passion for a solution. In the matter of health care Justice Hall had been a party to recommending the solution and so it was natural that he wanted it implemented as soon as possible. It is clearly impossible for him to sort his actions into role categories, now acting as a judge, now as a royal commissioner. He viewed his obligations as a Royal Commissioner to include the implementation of his recommendations. Furthermore, how could he

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[16] *Royal Commission on Health* Vol. 1, 19.

[17] *Memoirs of a Bird in a Gilded Cage,* (Toronto: McClelland and Stewart, 1968) at 120.

be urging the law schools and lawyers to assume a more active role in social reform and not be involved himself?

Lawyers as Activists

Most people assume that lawyers will be conservative — not merely in the sense that they will be dedicated to preserving the accumulation of justice over many centuries, but that they will tend to resist fundamental political and social change. It is only in recent years that the law schools have begun to question this general past trend. The younger law professor (many of whom have been educated at Yale under McDougal and Lasswell) have begun to view this tradition as a form of complicity in injustice. As a result they have begun to turn out young lawyers more determined to work for the rights on the inner-city poor, for environmental and consumer causes, rather than for a shingle on the most prestigious corporate law firm.

But this new trend is not going unchallenged either in Canada or the United States (which must be acknowledged as the chief incubator for the new brand of legal activism). U.S. Attorney General John N. Mitchell recently castigated those "young people... going into law because they anticipate using the courts to effect social change."[18] Mr. Mitchell reminded young law students that it was the duty of the legislative process to effect basic changes. In place of a misguided ambition to effect change through law, Mitchell counselled judicial self-restraint. History will testify, he continued, "that such 'judicial self-restraint' — the refusal to substitute will for judgment — is precisely the quality that most distinguishes a great judge."[19] Addressing himself to those who aspired to judicial office, Mitchell warned that the courts "are not intended to initiate but only to respond."[20]

It would be difficult to find a view of the lawyer's and the judge's role more at variance with that espoused by Justice Hall. When a case comes before him his first question is not whether the court has jurisdiction, but whether an injustice has been committed. If so, he then looks to see whether the court can properly entertain the case.

Unlike Attorney-General Mitchell, Justice Hall believes that law schools must, as of duty, play a strong role in law reform. "They must be the initiators of research into legal anachronisms and of desirable changes; they must form the judges and magistrates who will deal mainly with people as people and not as incidentals to legal problems. Beside making our lawyers and judges learned in the law, and that is necessary, we must school them in psychology, in human relations, in the elements of natural justice. These are the stuff of justice-in-action attainable principally by your concentrated efforts."[21] His concern for educating judges is never far below the surface of his writings on legal education. Justice Hall believes that the law schools

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[18] John N. Mitchell, *Not Will, but Judgment* (1971), 57 A.B.A.J. 1185.

[19] *Id.*, at 1186.

[20] *Id.*, at 1187.

[21] An Address to the Association of Canadian Law Teachers, Ottawa, June 9, 1967, at 8.

have a lot to learn from the medical schools. "It is my view that the reforms of the future will be incubated in and emerge from the law schools as is now the case in the medical sciences both at the graduate and undergraduate levels. It is in the law school that the ideal of justice must remain forever untarnished; to be carried thence to Parliament and the legislative bodies and administered in courts by judges formed in those law schools; the whole in an unbroken chain."[22]

A passion for the cause of natural justice leads him to scorn the efforts of those who attempt to discredit the notion and reduce it to an empty phrase.

In addition to this kind of judicial reform, Justice Hall sees lawyers becoming more involved in permanent or standing committees such as law reform commissions. Above all, he sees the need for small expert bodies to be continuously alert to reforms in the law.

Let us turn now to Justice Hall's basic jurisprudential principles. This will not only cast general light on his activism but should be specifically helpful for the later discussion of his performance on the Supreme Court of Canada. Justice Hall makes no pretense to be a formal student of jurisprudence; his formal legal education or study did not go beyond the basic law degree from the University of Saskatchewan which he completed in 1919. Nevertheless, his years as a practitioner and as a judge of the Saskatchewan courts and the Supreme Court of Canada provided him with more than sufficient opportunity to reflect on the fundamental principles of the law. Since, however, his main area of professional interest has been the criminal law it will be no surprise to find that his reflections focus on that branch of the law. In other words, Justice Hall's reflections on constitutional jurisprudence are less complete than his reflections on the criminal law. It is not unusual to find, therefore, that his judgments in constitutional questions tend to defer to the reasons of his brother judges.[23]

Justice Hall's general jurisprudence stands in stark contrast to the body of jurisprudence propounded by such as Hans Kelsen. Justice Hall could never acquiesce in the proposition that there exists an autonomous legal order, or that the judge's duty is to elicit and apply neutral principles after the manner proposed by Herbert Weschler. For, while never denying that the law is an instrument for social control, Justice Hall is emphatic in the claim that the law has a precise and clear social function. It is "an agency for achieving a more decent and human society."[24] In a recent address to the Law Faculty at the University of Toronto, Justice Hall summarized his views regarding the function of law and the role of lawyers. He spoke of the lawyer's role in seeking "social progress", i.e. of the lawyer's "special and

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[22] *Id.*, at 3, 4.

[23] For an indication of Justice Hall's overall voting patern, see, S. R. Peck, *The Supreme Court of Canada, 1958-66: A Search for Policy through Scalogram Analysis,* (1967), 45 Can. Bar Rev. 666, especially at 713-722 where Peck discusses "The Criminal Law Scale."

[24] *Lawyers and Canadian Criminal Law in the Seventies,* The Law Society of Upper Canada *Gazette,* Vol. V. No. 1, March 1971, at 25.

unique responsibility to be in the vanguard of social change."[25] Justice Hall urged his audience to assume an activist role towards "all problems of our society, social or economic, *even though they do not have a strictly legal base.*"[26] Arguing that because most of the problems confronting society are not legal problems he concluded that "we lawyers cannot restrict our horizons to traditional legal problems and we *as lawyers* must be willing to assume responsibility not only for the machinery of justice but as well for other social, economic and political institutions."[27] The young lawyers, in particular, must become fully conscious of the deep social ills or injustices and work to eliminate them. His invitation is constantly to shed the traditional role of the lawyer as simply an agent of a narrow legal order. He must be more than that. He must seek out the prevailing causes of social and political unrest, such as poverty, and seek to eliminate them. "If we want freedom under law we must seek out and eradicate injustice. Injustice condoned will lead to revolution or anarchy and the suppression of anarchy leads to the police state."[28] The lawyer's first duty must be to ferret out the inequities in the civil and criminal law and procedure. That is his minimum legal obligation. In addition, he must work to eliminate poverty but since the law can do little here the lawyer must become involved in those movements which are bent on removing hunger and want. "The law cannot help the poor until a decent standard of living is seen as a legal right."[29]

The law schools must begin, therefore, to place greater emphasis on the social and political causes of poverty. Justice Hall is saying, in effect, that the law schools must begin to assist young lawyers form a strong social conscience as a prelude to technical legal training. One would be overly optimistic if one were to expect that the law schools would follow this advice, contrary as it is to the thinking of those law professors who claim that law is a technical value free craft and the further removed from value judgments the better. Justice Hall is fully conscious of this trend and that is why he rarely refuses the opportunity to expound the opposing view in law schools. The learned judge is in many respects repeating the thoughts of Julius Stone who wrote that "Fact-gathering, and even 'scientific' generalization about facts gathered . . . [can] not give more than a foundation for the central questions of the democratic legal order. These central questions [are] concerned with what *should be done* about the facts; they [are] questions of ethics, social policy, and justice."[30]

Justice Hall makes no pretense to offer a complete jurisprudence; he merely wishes to redirect the attention of those who teach and practise the law away from a sterile formalism or the so-called scientific law. He would have agreed with Arthur Vanderbilt who wrote that no matter how vast

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[25] *Id.*

[26] *Id.* Italics added.

[27] *Id.*

[28] *Id.*, at 27.

[29] *Id.*

[30] Julius Stone, *Law and The Social Sciences* (Minneapolis: University of Minnesota Press, 1966) at 18, 19.

and complex modern law has become, it can stay "vital in content, efficient in operation and accurate in aim," by borrowing truths "from the political, social and economic sciences." and "from philosophy."[31] It is not sufficient in Justice Hall's view that the law adopt the mechanical techniques of the social sciences (including statistics) but that it revive the philosophical approach to the study of "first principles" in the interest of achieving clarity on the great and far more important social questions or aims which the legal order must attempt to implement and preserve.

The most obvious or pervading concern of Justice Hall's jurisprudence is the cause of the individual. This stands in contrast to those who view the prime role of the courts as the preservation of the legal order and the authority of legitimate government. For Justice Hall the criminal law and those (all too few) devoted to its practice is directed "to answer social needs."[32] He castigates criminal lawyers for their lack of wider concern. "[We] have often become so engrossed with the manipulation of procedure and technique that we have sometimes tended to lose sight of the major goal of the whole system, which is the control of crime — the elimination of crime."[33] The lawyer's traditional role has been to become involved after the fact — i.e. he appears as defence counsel after a crime has been committed. Justice Hall is urging lawyers and the legal profession to begin to play a larger prior role, i.e. with the *causes* of crime.[34]

The focus is always on the active duty of the courts and law enforcement agencies to serve the interests of the individual. "There may be much the courts can do to ensure that the police respect the rights of an accused, and this is undoubtedly a task for the courts — to protect citizens from excess of authority, not only police authority, but all authority under its inherent power to prevent abuse or misuse of its process whether by the prosecution or by militant defendants or on their behalf."[35] But even here his emphasis is on the need for better trained and more professionalized police rather than "reliance on confessions and on evidence illegally obtained and a new role for the police in the community."[36] As with lawyers, police must become involved before the fact by assuming a new role in the community less associated with their traditional punitive role.

Much of Justice Hall's public non-judicial statements could be subsumed under the title of "Addresses to Lawyers to Awaken to the True Scope of Their Profession." According to Justice Hall, lawyers are social activists by virtue of their calling to the law. No other group shares the intimate contact with our social problems as do lawyers, no other group has the opportunity to see the diverse issues and problems of humanity so clearly.

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[31] *The Law Center* (1946), 32 A.B.A.J. 569.

[32] For a similar lament, read the 1966 presidential address of J. T. Weir, Q.C., LL.D., delivered to the Canadian Bar Association 48th annual meeting in Winnipeg, Monday 29 August, 1966.

[33] See, *supra*, note 24 at 29.

[34] *Id.*, at 31.

[35] *Id.*, at 29.

[36] *Id.*, at 30.

"I am suggesting to you," he said to students and faculty at the University of Toronto Law School, "that we as lawyers have a responsibility to see that . . . needed reforms are brought about even though they do not concern us directly in that part of other criminal justice system we have traditionally thought our own."[37] Louis Brandeis warned, Justice Hall reminded his audience, that "the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[38] The lawyer's education should provide him with the understanding by which to effect the necessary social and political reforms. Without his assistance the reformer becomes frustrated and seeks extra-judicial or revolutionary means of bringing about reforms. Justice Hall pleads for lawyers to shed the image, all too frequently attributed to them, of being agents of an unjust social and political order. Lawyers must take the initiative and take their place at the forefront of reform. "We must use our skill to act as lobbyists, drafting legislation and pressing for its enactment."[39]

The Activist as Judge

David J. Danelski has written that "when Supreme Court Justices dissent by themselves, the cases are likely to involve their top values."[40] Justice Hall's lone dissent in The *Truscott* case[41] bears witness to Danelski's statement. For, despite the fact that Justice Hall had good reason to believe that at least two of his brother justices would join him in dissent, he found himself in lone dissent on the question of evidence. Perhaps some will say that he was able to be so irate (and he made no attempt to conceal his irritation) because he alone of the Court was not present when the case came on appeal from the Court of Appeal for Ontario on February 24, 1960. Justice Hall was fully aware that the Governor in Council was in essence asking the Court to reconsider its previous judgment and even run the risk of admitting that it had erred in not accepting the appeal in 1960. But the facts were so clearly contrary to a fair trial in Justice Hall's view that no alternative presented itself but to demand a new trial. It was a moment of great anguish to him when he found himself standing alone in dissent. He had studied the case meticulously and had considered every nuance before concluding that the "conviction should be quashed and a new trial directed."[42] With biting directness, he stated in terms not to be mistaken: "I take the view that the trial was not conducted according to law. Even the guiltiest criminal must be tried according to law."[43] The Truscott conviction was based exclusively on circumstantial evidence. While admitting that circum-

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[37] *Id.*

[38] *Id.*

[39] *Id.*, at 33.

[40] Cited by S. Ulmer, *Political Decision-Making* (New York: Van Nostrand Reinhold, 1970) at 126. See also, Danelski, *Values as Variables in Judicial Decision-Making* (1966), 19 Vand. L. Rev. at 721.

[41] *In the Matter of a Reference re: Steven Murray Truscott,* [1967] S.C.R. 309 at 382.

[42] *Id.*, at 383.

[43] *Id.*

stantial evidence can at times be sufficient to convict an accused, Justice Hall concluded in the instant case that there were grave errors in the trial brought about principally by "Crown Counsel's method in trying to establish guilt and by the learned Trial Judge's failure to appreciate that the course being followed by the Crown would necessarily involve the jury being led away from objective appraisal by the evidence for and against the prisoner."[44] No matter how he looked at it, the original conviction was the product of a bad trial and, he insisted, "A bad trial remains a bad trial. The only remedy for a bad trial is a new trial."[45]

There are few dissents on record in which a Justice of the Supreme Court castigates more roundly Crown Counsel, the Trial Judge or the opinion of his brother judges. The Hall dissent in the Truscott case must go down as one of the great dissents in Canadian judicial history. But it was not written with that possibility in mind. To this day Justice Hall remains angry at the failure of the Supreme Court of Canada to see what was so patently clear to him — Steven Murray Truscott received a bad trial and that the court ought to have admitted that it erred in not accepting the appeal seven years earlier.

The Truscott case leaves little doubt that Justice Hall has firm convictions on the question of evidence and the criminal law in general and that he is prepared to stand alone, if necessary, in defence of those convictions. And while one can say that he failed to convince the court in *Truscott* of his strict view of evidence, no one can say that he has not made an important contribution in removing the confusion surrounding *exculpatory* and *inculpatory* statements in evidence. Writing for the Court in *Piché* v. *The Queen*,[46] Justice Hall wrote that it was high time the Supreme Court cleared up the confusion in this matter and thereby alleviate matters for the lower courts. "In my view the time is opportune for this Court to say that the admission in evidence of all statements made by an accused to persons in authority, whether inculpatory or exculpatory, is governed by the same rule and thus put to an end the continuing controversy and necessary evaluation by trial judges of every such statement which the Crown proposes to use in chief or on cross-examination as either being inculpatory or exculpatory."[47] After reviewing the relevant precedents, Justice Hall concluded for the court that there "is no distinction to be drawn between inculpatory and exculpatory statements as such in so far as their admissibility in evidence when tendered by the Crown."[48] If the statement was given voluntarily it may be admitted in evidence; if not given voluntarily and the trial judge so rules, then it will not be admitted.

Justice Hall has taken a clear stand that the evidence against alleged habitual criminals must be so clear as to eliminate any doubt that the accused

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[44] *Id.*, at 384.
[45] *Id.*, at 390.
[46] [1971] S.C.R. 23.
[47] *Id.*, at 36.
[48] *Id.*, at 40.

is likely to commit a further offence. He dissented with Cartwright J., in *Klippert* v. *The Queen*[49] because the evidence did not warrant him to conclude that Klippert was likely to commit further crimes. Two years later in *Mendick* v. *The Queen*,[50] Justice Hall was with the majority in a 5-4 decision which ruled that the appellant was indeed judged correctly to be an habitual criminal but that it was not shown beyond a reasonable doubt that it was necessary for the protection of the public that the accused be sentenced to preventive detention.

If Justice Hall can be said to have a judicial preoccupation it is with ensuring that the *Bill of Rights*[51] will become the firm foundation of the Canadian protection of individual rights and liberties. This applies with special reference to Canada's native peoples. For this reason Justice Hall relished the opportunity for the Court to pronounce judgment on the conflict between the provisions of the *Indian Act*[52] and the *Bill of Rights*. The opportunity came on appeal from the Territorial Court of Appeal in the case of Joseph Drybones.[53] In a short concurring opinion Justice Hall began by equating the British Columbia precedent, *Regina* v. *Gonzales*[54] with the famous U.S. case of *Plessy* v. *Ferguson*,[55] a case in which the Court held the "separate but equal" doctrine as consistent with the "equal protections of the laws" clause of the Fourteenth Amendment. To affirm the lower court conviction of Joseph Drybones would be tantamount, he asserted, to placing the development of civil rights of Canadian Indians at the level enjoyed by American blacks in 1896. The Court must do no less than the Warren Court had done in *Brown* v. *The Board of Education*.[56] "The social situations in *Brown* v. *The Board of Education* and in the instant case are, of course, very different, but the basic philosophic concept is the same. The *Canadian Bill of Rights* is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when, subject to the single exception set out in S. 2, it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, color, religion or sex in respect of the human rights and fundamental freedoms set out in S.1 in whatever way that discrimination may manifest itself not only as between Indians and Indians but as between all Canadians whether Indian or non-Indian."[57]

As we saw in the matter of exculpatory and inculpatory statements, Justice Hall believes that one of the major duties of the Supreme Court is to remove ambiguity in those areas where continuing confusion can and frequently does lead to error and injustice. Justice Hall has no narrow view of

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[49] [1967] S.C.R. 822.

[50] [1969] S.C.R. 865.

[51] *The Canadian Bill of Rights* S.C. 1960, c. 44 [Hereinafter *The Bill of Rights*].

[52] R.S.C. 1952, c. 149.

[53] [1970] S.C.R. 282; (1970), 71 W.W.R. 171.

[54] (1962), 37 W.W.R. (N.S.) 257 (B.C.C.A.)

[55] (1896), 153 U.S. 537.

[56] (1954), 347 U.S. 483; 98 L. Ed. 873; 74 S. Ct. 686.

[57] [1970] S.C.R. 282 at 300.

his function or duty in those problems which many judges feel ought to be solved by the legislature and not the courts. In *Ares* v. *Venner*,[58] Justice Hall, speaking for a unanimous five-man court, argued that the Court ought to make a restatement of the hearsay rule. After acknowledging that there were two schools of thought among judges — the one claiming that it was the proper duty of the legislature to make such a clarifying restatement and the other which says that it is the responsibility of the Court to do so — Justice Hall came out in favor of the minority in the Privy Council precedent of *Myers* v. *The Director of Public Prosecutions*.[59] "Although the views of Lords Donovan and Pearce are those of the minority in Myers, I am of the opinion that this Court should adopt and follow the minority view rather than resort to saying in effect: 'This judge-made law needs to be restated to meet modern conditions but we must leave it to Parliament and the ten provincial legislatures to do the job.' "[60] The inconsistencies in judge-made law must be rectified by judges. To defer to the legislatures in such matters is for the court to default in its responsibilities.

This is not to say, however, that Justice Hall is prepared to enter that part of law reform and law-making formally reserved for the legislative branch of government, as his judgment in the breathalizer reference makes clear.[61] Concurring with the majority, Justice Hall said: "notwithstanding that in my view the Order in Council proclaiming parts only of S. 16 of the *Criminal Law Amendment Act*, 1968-69, c. 38, may indicate on the part of the executive a failure to live up to the spirit of what was intended by Parliament, I am nevertheless bound to hold that the remedy does not lie with the Courts."[62] A mild rebuke for the failure of the Executive to live up to the spirit of the Act was all he felt he could do to remind the Canadian Government that it had erred in this matter. "Under our system of parliamentary responsible government, the Executive is answerable to Parliament, and when Parliament, by enacting S. 120, gave the Executive a free hand to proclaim "any" of the provisions of the *Act* ... the responsibility for the result rests with Parliament which has the power to remedy the situation."[63]

For those who believed, as indeed Justice Ritchie did, that the *Canadian Bill of Rights* ought to have been brought to bear in the case, Justice Hall's opinion was a disappointment. Of the nine justices who sat on this case (as they all must for cases referred under S. 55 of the *Supreme Court Act*), Justice Ritchie alone applied and construed the *Bill of Rights* so as to conclude that the *Criminal Law Amendment Act* as proclaimed violated the fundamental right of an accused to make a full defence.[64] The main majority

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[58] [1970] S.C.R. 608.

[59] [1965] A.C. 1001.

[60] [1970] S.C.R. 608 at 625-26.

[61] *In the Matter of a Reference by the Governor General in Council concerning the Proclamation of Section 16 of the Criminal Law Amendment Act, 1968-69*, [1970] S.C.R. 777. [Hereinafter Breathalizer Reference].

[62] *Id.*, at 785.

[63] *Id.*

[64] *Id.*, at 798-799.

judgment, that of Justice Judson, made no reference to the *Bill of Rights.* Justice Laskin, speaking in his first Supreme Court judgment, dismissed the appeal to the Bill of Rights as having been insufficiently elaborated.[65] Few recent Supreme Court of Canada judgments come as near to the Frankfurter brand of judicial self-restraint (not to say legislative deference) as Justice Laskin's judgment in this case. It was no surprise to Court watchers to see Justice Laskin dismiss the *Bill of Rights* as easily as he did here. After what he had written as a law professor, it came as no surprise. The surprise seems to be the unofficial alliance on constitutional matters which tends to emerge between Justice Hall and Justice Laskin since the latter's elevation to the Supreme Court.[66] Few would have predicted a more unlikely alliance, but such an alliance emerges when one notes the fact that Justice Hall never dissents from Justice Laskin's view in constitutional matters. In the so-called "chicken and egg" case,[67] the opinion of Justice Hall and Justice Laskin was written by the latter who joined the unanimous Court with the claim that the Manitiba regulation was an invasion of federal power in relation to S. 91 (2) of the BNA Act.

There is no intention of suggesting that Justice Hall is subservient to the views of Justice Laskin. It is merely intended to note that Justice Hall's judicial activism as it relates to restraint on government activity is clearly influenced by the presence of the junior member of the Court. There can be no disputing the fact that Justice Hall has great respect for the constitutional opinions of Justice Laskin. The point being made here is that when Hall and Laskin sit together on a constitutional question, Justice Hall is likely to defer to the judgment of Justice Laskin. However legitimate and justifiable this may be, it was a disappointment to some to see Justice Hall draw back from applying the *Bill of Rights* in the breathalizer case. That reference case was a far greater importance than was readily apparent for the following reasons. First, because the reference obscured the fact that a judgment had been handed down in the British Columbia Supreme Court in which the Court ruled the Breathalizer amendment inoperative on the basis of the *Bill of Rights.* Second, the Minister of Justice, Mr. John Turner, failed to ask the Supreme Court specifically whether the *Criminal Law Amendment Act* as promulgated violated the *Canadian Bill of Rights.* And, third, the Supreme Court of Canada failed to raise on its own initiative whether the Act violated the *Canadian Bill of Rights.* There are only two references in the Supreme Court judgments to the *Bill of Rights,* one by Justice Ritchie, as we have seen, and another by Justice Laskin who dismissed it without substantive comment.

The Minister of Justice and the Supreme Court believed that (to quote Justice Laskin) "the single issue in this case is the scope of the authority con-

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[65] *Id.,* at 802.

[66] See, for example, the following cases: *Breathalizer Reference,* [1970] S.C.R. 777; *A.-G. for Manitoba* v. *Manitoba Egg and Poultry Assoc. et al.,* [1971] S.C.R. 689; *Bell* v. *Ontario Human Rights Commission,* [1971] S.C.R. 780 (in which Justice Hall concurs in Justice Laskin's Ontario Court of Appeal judgment). See also, *Government of The Democratic Republic of The Congo* v. *Venne* (1972), 22 D.L.R. (3d) 669 at 679, a case involving international law.

[67] *A.-G. for Manitoba* v. *Manitoba Egg & Poultry Association,* [1971] S.C.R. at 704.

ferred by S. 120."[68] Put in these narrow terms the Court's task was to pass judgment on the scope and exercise of the Executive powers of discretion which the Court wisely claimed was beyond its powers to do. But was the case as simple as the Court and the Minister of Justice asserted?

The Court's response was in the tradition of strict construction — even the dissents of Justices Martland and Ritchie were mainly based on the proper construction of the term "provision."[69]

It is the contention of some that the Minister of Justice and the Supreme Court of Canada were duty bound to ask whether the *Criminal Law Amendment Act* as proclaimed violated the *Canadian Bill of Rights.* For Professor Laskin, as he then was, wrote that the *Canadian Bill of Rights* "is addressed to Parliament itself and to the Courts, admonishing the former not to enact, and the latter not to construe, federal legislation in derogation of the declared rights."[70] Section 3 of the *Bill of Rights* specifically enjoins the Minister of Justice to "examine every proposed regulations submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every Bill introduced in or presented to the House of Commons, in order to ascertain whether *any of the provisions* thereof are inconsistent with the purposes and provisions of this Part."[71] Professor Laskin predicted that this section may turn out to be "the strongest feature of the *Canadian Bill of Rights.*"[72] A reasonable extension of this provision would seem to suggest that the Minister of Justice is obliged to ask the Court whether the *Criminal Law Amendment Act* as proclaimed did in fact constitute in its application an abridgment or infringement of the rights and freedoms recognized and declared in the *Canadian Bill of Rights.* This the Minister of Justice failed to do even though Justice Monroe of the British Columbia Supreme Court had agreed that the Act as proclaimed denied an accused adequate counsel as assured by the *Bill of Rights.*

The Court felt obliged to restrict itself to the questions posed by the Governor in Council and did not appear to give much weight to counsel's arguments based on the *Bill of Rights.* Had the Court done so it would have removed a problem that continues to confront the lower courts of the country. Justice Hall was clearly in a quandary in this case but drew back from construing the *Bill of Rights* as Justice Ritchie did because he feared that the attempt to use it where it was not explicitly aplicable would hurt the cause of those, such as himself, who wished to see it used effectively. He fears the efforts of those (both in and out of the judiciary) who would rush in to apply it at the least provocation.[73]

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[68] [1970] S.C.R. 800.

[69] *Id.*, at 785-799.

[70] Bora Laskin, *Canadian Constitutional Law,* 3rd ed., (Toronto: Carswell Co., 1966) at 976. [Hereinafter Laskin].

[71] 8 - 9 Elizabeth II, The Bill of Rights, Ch. 44, (1960) s. 3. (Italics added).

[72] Laskin, at 976.

[73] See, *Smythe* v. *The Queen,* [1971] S.C.R. 680; also *Regina* v. *Veins* (1970), 10 C.R.N.S. 363, (Ont. Prov. Ct.).

For those who view the presence of Justice Hall as an assurance that the *Bill of Rights* would become an important judicial instrument guaranteeing protection of civil liberties throughout Canada, the emergence of Justice Laskin as a strong influential force on the Court is a diasppointment. Justice Laskin has made his views clear on the subject of the *Bill of Rights* and just how much power it accords to the Courts. As far back as 1962 Justice Laskin wrote that "the *Canadian Bill of Rights* steers a middle course between a mere innocuous statement or declaration of principle on the one hand and an affirmative, enforceable set of directives on the other. Although it has a little of the former, it has none of the latter."[74] It is his firm conviction that the "generalities of the *Bill of Rights,* unsupported by any enforcement provisions to give it an independent validity, cannot be relied upon to open a new chapter in judicial law-making."[75] This view stands in sharp contrast with the view of Justice Hall who as Chief Justice of Saskatchewan, said that "The Courts ... must be vigilant in seeing that the provisions of the *Canadian Bill of Rights* are not breached, ignored or whittled away."[76] For Justice Hall the *Bill of Rights* is a wedge which invites judges to enter into the area of judicial activism. It puts onus on courts to identify and protect fundamental rights. Justice Hall is in the great tradition of Blackstone who believed it to be the proper function of the Courts to define fundamental rights and assure their protection.[77]

It should be clear by this point that Justice Hall has a clear view of the Court's place in policy-making. In this respect he has been in the vanguard of a new movement among some Canadian lawyers calling for a more active judiciary even though this implies a challenge to the traditional rigid Canadian understanding of Parliamentary supremacy.[78] This traditional Canadian approach is reinforced by "the dominant legal philosophy of the Canadian judiciary" which is "English positivism."[79] It is not surprising, therefore, to find the new movement attempting to articulate a jurisprudence more in keeping with the objectives of the new policy-oriented judicial activism.

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[74] *Canada's Bill of Rights: A Dilemma for the Courts?* (1962), 2 International and Comparative Law Quarterly 519 at 527. See also W. Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell Co., 1966) at 93.

[75] Laskin at 533.

[76] *Shumiatcher* v. *A.-G. for Saskatchewan* (1962), 133 C.C.C. 69 (Sask. C.A.).

[77] See Blackstone, *Commentaries on the Laws of England,* (1778) ed. II at 3, 8, 9 and passim.

[78] See, M. Cohen, *The Judicial Process and National Policy — A Problem for Canadian Federalism* (1970), 16 McGill L. J. 297. Also P. Weiler, *Legal Values and Judicial Decision-Making* (1970), 48 Can. Bar Rev. 1. B. Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968). For an account of the reservations some scholars feel in this matter, see, S. Peck, "The Supreme Court's New Supremacy", *Toronto Globe and Mail, March* 14, 1970; J. Sinclair, *The Queen v. Drybones: The Supreme Court of Canada and The Canadian Bill of Rights* (1970), 8 Osgoode Hall Law Journal 599. The strongest recent case against the judicial protection of civil liberties can be found in P. Russell's, *A Democratic Approach to Civil Liberties* (1969), 19 U. of T. L. J. 109.

[79] J. Wood, *Statutory Interpretation: Tupper and The Queen* (1968), 6 Osgoode Hall Law Journal 92.

Conclusion

The future direction of Canadian jurisprudence and judicial behaviour is clearly at stake in this relatively quiet but enormously important contest. Justice Hall's role has been an important one because he has brought it to the High Court. What remains now is for jurisprudents to provide the necessary theoretical basis for the new Canadian judicial activism. The recent writings of Professor Paul Weiler of Osgoode Hall Law School of York University gives one reason to believe that the day is fast approaching when that new jurisprudence will appear.[80]

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[80] See P. Weiler, *Two Models of Judicial Decision-Making* (1968), 46 Can. Bar Rev. 406; also, *Legal Values and Judicial Decision-Making* (1970), 48 Can. Bar Rev. 1; also, *Groping Towards A Canadian Tort Law: The Role of the Supreme Court of Canada* (1971), 21 U. of T. L.J. 267.