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Howe: HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935

John C. H. Wu
Seton Hall University

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RECENT BOOKS

This department undertakes to note or review briefly current books on law and materials closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publishers' literature, and the ordinary library sources.

BRIEF REVIEWS

HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935. Edited by *Mark DeWolfe Howe*. Cambridge: Harvard University Press. 1953. Pp. xvi, 1650. 2 volumes. \$12.50.

It is not easy for anyone to review these letters. Obviously they were not meant for publication when they were written. The correspondents were whispering to each other across the Atlantic. The thoughts and sentiments they expressed were genuine, but many of them were only fleeting fancies of a moment. Often you are not quite sure whether they were joking or in earnest. And then the subjects they cover range from Plato to the old poppies, from Confucius to cats, from Jurisprudence to Wodehouse. It is well-nigh impossible to make a synopsis of these letters.

But there is a special reason why I find it hard to review them. As the reader may know, I love Holmes as one of my dearest friends; and yet I disagree with him on many points. It is no less than agonizing for me to criticize my friend when he cannot answer back. Even when he was living, there were fundamental differences between his outlook on life and mine. Since his death, my thoughts have moved more and more toward religion, so that I have come to see and appreciate things which he used to criticize in ignorance. This I want the reader to keep in mind in reading this review.¹

As I cannot organize my thoughts into a well-woven essay, I shall note some of my reflections while reading through the book.

In his Preface, the editor, Mark DeWolfe Howe, makes a most candid observation: "It would be less than honest to pretend that the exuberant, the passionate, and the controversial strains in Laski's character were loved and admired by all who knew him and his work. Among those who did not admire, some will be quick to seek in his letters to Holmes justification for their distrust. There they may find exaggeration, distortion, and falsehood" (p. vi). However, if one reads Laski's letters dispassionately, one will find more instances of exaggeration than of distortion and falsehood. And even the exaggerations are mostly so obvious that they were probably meant more to tickle the palate of Holmes than to injure anybody with malice aforethought. Of President Coolidge, for instance, he said, "But when all my prejudices are taken into account, I don't think any person whose judgment you respect would allow

¹Dr. Wu's own extensive correspondence with Holmes began when Wu was a graduate student at Michigan and lasted for many years. The letters of Holmes to Wu are collected in *Justice Holmes to Dr. Wu, An Intimate Correspondence, 1921-1932*, published by the Central Book Company in New York; some of the Holmes-Wu correspondence may also be found in Dr. Wu's intellectual and spiritual autobiography, *Beyond East and West* (1951) in which he records his conversion to Roman Catholicism.—Ed.

him either real ability or real character. He has, I admit, the gift of silence, but that is simply because he has nothing to say" (p. 678). This kind of thing makes you chuckle, but it can do no harm to anyone except the writer himself, for it tells more of Laski than of Coolidge. Laski is of a romantic nature. His style reminds me of Heinrich Heine, who wrote of Madame de Staël's beauty: "She had very large, beautiful eyes, a dozen amoretts would have found room on her lips, and her smile is said to have been very sweet: therefore she could not have been ugly—no woman is ugly. But I venture to say that had fair Helen of Sparta looked so, the Trojan War would not have occurred, and the strongholds of Priam would not have been burned, and Homer would never have sung the wrath of Pelidean Achilles." Like Heine, Laski is a clever writer, but he is too clever to be wise. In fact, Holmes was aware of this in Laski and warned him against being "too keen after the display of ingenuity" (p. 887). He also warned him against going to extremes: "I think that the wisest men from Confucius and Aristotle to Lincoln (if he is entitled to the superlative) have believed in the *via media*" (p. 1265).

What irritates me in Laski is not his ingenuity but his utterly irreverent attitude toward God and religion and all things which I hold sacred. I do not think that he is an atheist, but evidently he has an infantile conception of God, and when he makes fun of God he only exposes his own superficiality. For instance take this: "I hope Roosevelt is elected and that he makes Felix Solicitor General. Then I shall believe in a divinity which shapes our ends" (p. 1413). I do not know whether he was serious, but this is one of the recurrent notes throughout his letters. Apparently he is dictating terms and conditions to God. His conceit is appalling. Speaking of Pascal, Laski wrote, "He reminds me all the time of Newman, with a greater pungency of diction. Clearly if he had not had the misfortune to find God early he would have been a wonderful person" (p. 703). The fact is that Laski had no idea of the spiritual greatness of men. To him, the humility of St. Francis is "merely egotism in its most supremely subtle form" (p. 1433). Likewise, Gandhi's secret lies in "an incredible egoism . . . sweetened by an indescribable sweetness of temper" (p. 1330). Emerson was like "a general Autolycus whose wares were pleasant and pleasantly displayed, but quite without an original *aperçu*" (p. 471). Newman was "third-rate" (p. 407). St. Augustine seemed "to lack altogether the ability to judge oneself that makes Spinoza so formidable an analyst." Again, Cardozo, who, to my mind, was too wise a man to be merely clever, was "without originality" (p. 447).

I am aware that he revised some of these snap judgments in the course of time, but his fixed hostility toward religion and anything suggesting holiness seems to be pathological and calls for some analysis. His relations with his father were very unpleasant. His father regarded Laski's marriage as a crime and his daughter as an illegitimate child (p. 278), and all for religious reasons (p. 273). Although there was a superficial patch-up, the wound was too deep to be healed. This contributed, I think, to Laski's deadly prejudice against all religion and all authority. *Vindiciae contra tyrannos* became the ruling passion

of his life. In this connection, let me quote some interesting words that Sir Frederick Pollock had said about Bertrand Russell: "His theodicy so far as I make out consists in being angry with the gods for not existing, because if they did he would like to break their windows." (Quoted by Holmes on p. 1075.) Holmes seems to think that these words are applicable to some extent also to Laski.

While both Holmes and Laski were skeptics with regard to religion, there is an essential difference between the two. Holmes was *skeptically* skeptical, while Laski was *dogmatically* skeptical. When Holmes said that he could not believe, he thought that he might be wrong and that others who did believe might be right after all. He was a mystic to whom the Cosmos is too mysterious to have any human predicates, whether positive or negative. Laski's case is a different story. His skepticism toward religion is dogmatic and militant if not militaristic. I again recall certain words that Heine had written concerning the atheists of his time: "We have now bigoted monks of atheism, grand-inquisitors of infidelity, who would have bound Voltaire to the stake because he was at heart an obstinate deist." Laski is one of such bigoted monks, if not of atheism, at least of skepticism.

Holmes might be blind to the Source of all sanctity and great spiritual qualities, but he was not blind or unresponsive to their effects. For instance, he wrote, "Although we are outsiders I think we can agree that perhaps the greatest, most thrilling sentence that comes to us from ancient times is: Father forgive them; for they know not what they do" (p. 197). Another time he wrote, "Does it occur to you that there are more modern things in the *Bible* than in other ancient literature. I think 'Father forgive them—they know not what they do'—beats all the classics. Think of those words being attributed to the supposed author of doctrine absolutely irreconcilable with such skeptical tolerance" (p. 1061). The last sentence tickles me by its *naïveté*. He was apparently creating Christ in his own image as a tolerant skeptic. I wonder if it had ever occurred to Holmes that the spirit of forgiveness might have come from a higher source than mere skepticism. I wonder further if Holmes recalled some other words of Christ: "Either make the tree good, and its fruit good; or make the tree corrupt, and its fruit corrupt" (Matt. 12:33). But it is already something to his credit that he did appreciate the taste of the fruit, which cannot be said of Laski. Holmes had his moments of intense religious yearning. In a speech delivered in 1911 on the occasion of the Fiftieth Anniversary Reunion of the Harvard class of '61, he said:

"When one listens from above to the roar of a great city, there comes to one's ears—almost indistinguishable, but there—the sound of Church bells, chiming the hours, or offering a pause in the rush, a moment for withdrawal and prayer. Commerce has outsoared the steeples that once looked down upon the marts, but still their note makes the music of the din. For those of us who are not churchmen the symbol still lives. Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual note that gives meaning to the whole. It transmutes the dull details into romance. It reminds us that our only but adequate significance is as parts

of the unimaginable whole. It suggests that even while we think that we are egotists we are living to ends outside ourselves."

It was the mystic strain in him more than anything else that drew me to him and made me fall at his feet. In reading through these letters under review I have not come across a passage that seems to touch the height and depth of the above quotation. However, there are some sentences here and there which seem to indicate that the mystic in him is not quite dead. For instance, it is significant that of all Sainte-Beuves' *Causeries du Lundi* he should have been "enchanted with St. Francis de Sale from the quotations" (p. 753). I often wonder how Holmes would have reacted if he had known the works of the truly great mystics of the East and of the West.

As a source book of jurisprudence, the present collection of letters bears no comparison to the *Holmes-Pollock Letters*. As Laski was not, strictly, a jurist, Holmes could not talk shop with him as he could with Pollock. But there are a few passages which may throw light on Holmes' judicial thinking. Here is one I like:

"There was a third, a criminal case about the supposed duty to retreat to the wall (if there is one) before killing the assailant, which I took from the C. J. and which is also assented to by all but Pitney and Clarke. Beale wrote a learned discourse in the *Harvard Law Review* upholding the rule—but I think it an instance of an early statement ossifying by repetition into an absolute principle when rationally it is only one of the circumstances to be considered with the rest in deciding whether the defendant exceeds the reasonable limits." p. 335.

This leads me to the thought that perhaps the greatest contribution of Holmes to the science and art of law is that he was always aware of the fluidity of the judicial process and therefore became a salutary force against the ossification of the law. Stammler would have appreciated this, because Holmes did not confuse *form* with *matter*, as legal technicians like Beale are inclined to do. But Holmes never understood or appreciated Stammler because of terminological difficulties. Indeed, as Holmes himself has put it, "Ideas are not often hard but words are the devil" (p. 542). But the thing is to look behind words, and if we do that, we shall find that Holmes' philosophy of "can't helps" is but a vernacular version of Kantian subjectivism, a doctrine which I never accepted in spite of my association with Stammler.

Another passage, which reveals the hidden affinity between Brandeis and Holmes in their views of the living law, is to be found in the letter of March 1, 1923, on page 485. This passage shows Holmes at his best and reveals the strength of his legal philosophy together with its limitations. Besides, it is beautifully written. It is worth quoting at some length:

"February behaved like a naughty boy—overcast and ominous—but one knew that the spring had him by the slack of his breeches and that he soon would be dragged out. The tops of the elms begin to thicken with swelling buds—and there was a hint of sunshine today. Brandeis and I felicitate ourselves that the spring is drawing near. I am glad at what you say he wrote because he is a great comfort and help to me—and the way in which that cuss is loaded with facts on all manner of subjects leaves me gawping.

We get a short talk together almost everyday on the way homeward. . . . Upon rather urgent solicitation I looked in at a meeting of illustrious lawyers the other day. They are bent on a 'restatement of the law.' I just came in while Root was flamboyant, took a back seat, wagged my head at Learned Hand and one or two others and slid out for Court. I suppose my name will go in as also present—which I take it is what was wanted—but I don't care much for the business. As Brandeis said 'I am restating the law everyday. It's my job.' You don't get originality or genius by saying that you want to do something particular—and I don't quite see where the desired restatement is to come from, unless from the fresh minds that from time to time sing their song."

Here Brandeis and Holmes meet. Brandeis was a naive realist, whose motto was *ex facto jus oritur*. He smuggled his value-judgments into the realm of facts without being aware of it himself. Holmes was a poet turned jurist, and a romantic poet at that. He believed in spontaneity and in following the inspiration of the moment. Basically he was more a Bergsonian intuitionist than anything else. He distrusted all logical concepts and intellectualistic systems. "General propositions do not decide concrete cases." Of course, they do not; but that does not mean that they can be dispensed with any more than insight and intuition in the decision of concrete cases. Holmes never reached a synthesis between intellect and intuition, with the result that he wobbled between sentiment and reason, between the exaltation of the inarticulate and the idolization of the quantitative. I think Cardozo comes nearer to a synthesis than either Holmes or Brandeis—Cardozo who said, in *MacPherson v. Buick Motor Co.*, "Precedents drawn from the days of travel by stage-coach do not fit the conditions of travel today. The principle that danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be." Holmes probably would have said that this is obvious; but it is better to stress the obvious and remain in the *via media* than to try to be original and go off at a tangent.

For a student of jurisprudence it is of paramount importance to know that the mutability of the subject matter with which the law has to deal does not affect the immutability of the fundamental principles of law. Perhaps Holmes would not have written about Natural Law the way he did if he had studied the works of St. Thomas Aquinas and Suarez. Some of his contemporaries naively identified the contingent with the necessary; but Holmes, with almost equal *naïveté*, took their version of the Natural Law for the Natural Law itself or at least for its only version, and came to deny it altogether. Thus, he threw out the baby with the bath water. Space does not allow me to go into this problem at length; so I shall content myself with a quotation from Suarez in order to show that the scholastic concept of Natural Law is not only compatible with the sociological jurisprudence but rather anticipated it by many centuries:

"For the natural law discerns the mutability of the subject matter itself, and adapts its own precepts to this mutability, prescribing in regard to such subject matter a certain sort of conduct for one condition, and another sort of conduct for another condition; so that the law in itself remains at all times unchanged, although, according to our manner of speaking and by an

extrinsic attribution, it would seem, after a fashion, to undergo change." (*Selections From Three Works of Suarez*, S.J., Vol. II, p. 264).

Although Holmes was skeptical of the natural law, which really was the foundation of the American Constitution, he had nevertheless the greatest respect for the Constitution and especially for the Bill of Rights. When Laski spoke disparagingly of the Constitution, Holmes answered back with a fine irony: "I wish you would develop more at length your grounds for disliking our constitution. Of course it has the 18th century emphasis and Bagehot criticised forcibly the division of powers—but I suspect that you don't like the bill of rights of former days—whereas I have been rather led to the belief that we have grown so accustomed to the enjoyment of those rights that we forget that they had to be fought for and may have to be fought for again" (pp. 529-530). Holmes was sounder in his instincts than in his conscious philosophy. He had a greater respect for human dignity and human rights than he professed to have. After reading Hindus' *Humanity Uprooted*, he wrote to Laski on October 24, 1930, "I gather from the book and more from other sources that the Communists have killed so far as they could those who did not agree with them and want to kill the rest. They present a case where I fail to see that war is absurd" (p. 1291). The profound sense of justice, which he had imbibed from his life-long apprenticeship in the common law, redeemed him from the shallow philosophy which he acquired accidentally from an age of positivism and materialism. Although he said, "I naturally shrink from the moral tone," yet his life was highly moral. He was a Stoic posing as an Epicurean. His heart was far better than his head. The secret of his charm lies in the fact that he was a much better man than he professed to be. Thus, he is just the reverse of the hypocrite, whose actions are worse than his words. When you read such words as these: "I see no reason to believe that a shudder could go through the sky if the whole ant heap were kerosened" (p. 351), or "if my fellow citizens want to go to Hell I will help them" (p. 249), you would probably exclaim, "What a hard-hearted man!" But when one of his friends was silent for half a year, he left no stone unturned to find out whether he was still living. The saving grace of Holmes is that he did not live *down* to his beliefs, just as the curse of many Christians is that they do not live *up* to their beliefs. But I do not say that Holmes was right in conceiving the Cosmos as heartless, because man is, even according to his own philosophy, an integral part of the Cosmos, and if man has a heart the Cosmos is not without one.

Mark Howe observes that "the two men are larger than their failings." This is decidedly true of Holmes. As to Laski, whom I did not know personally, I have to exercise "the virtue of suspended judgment." But whatever one may say of Laski, his friendship for Holmes is a thing of beauty.

John C. H. Wu*

* Professor of Law, Seton Hall University. Dr. Wu has studied at Soochow, Michigan, the Sorbonne, Berlin, and Harvard Universities. He taught at Soochow University where he was Dean of the Law School from 1928-1938.—Ed.