

BOOK REVIEWS

THE HOLMES-LASKI LETTERS. Edited by Mark DeWolfe Howe with a Foreword by Felix Frankfurter. Cambridge, Mass.: Harvard University Press, 1953. Two Vols. Pp. viii, 813; 814-1650. \$12.50.

One usually opens a secret diary or a volume of correspondence between the distinguished dead with an attitude of ghoulish anticipation, carefully disguised as scholarly interest, and my approach to this correspondence was no exception. Will the letters throw open some locked historical closets? Will they reveal anything about Oliver Wendell Holmes' relationships with his fellow judges? Will they throw new insight upon the operation of the law? of the Supreme Court? These were some of the questions which I, at least, had in mind on beginning this massive correspondence between Professor Harold J. Laski, an erratic genius who was yet one of the intellectual luminaries of our epoch, and Justice Holmes, who ranks with Marshall, Kent, Taney, and Story in the hagiology of American law.

The combination was a strange one: Holmes the sceptic, the Malthusian, the Civil War veteran and prophet of force as the basic rationale of community; Laski the idealist, the enthusiast attempting rhetorically to exorcise force from civil relations, the socialist. From the point of view of political and social theory, these two men were miles apart, but despite this bi-polarity they conducted a warm correspondence over almost twenty years. In terms of age, they were still further separated, for Laski was 23 when he wrote his first tentative note to the Justice, who was then 75!

In this sense, there is in the Holmes-Laski correspondence a certain unique quality, but, in my judgment, the collection has little substantive merit. This is not to suggest that the letters should not have been published, for their standing as an intellectual curiosity is unchallengable. Nor is it to deprecate the work of the editor, Professor Mark DeWolfe Howe of Harvard, who has done a brilliant job of annotation and detective work in identifying the numerous references to people and books which punctuate the texts of the letters. What I am suggesting is that while the letters often contain piercing insights and sharp comments on the passing scene, they add little to the sum total of human knowledge and, indeed, less to the reputations of the writers. When compared, for example, with the Holmes-Pollock letters, the correspondence between Holmes and Laski is trivial almost to the point of banality. It almost seems as though Holmes brought out the worst in Laski, and Laski the worst in Holmes.

Harold J. Laski was an enigmatic character. A brilliant political theorist, a warm and stimulating teacher, and a devoted friend, he also was

the proprietor of a dream world in which, like Walter Mitty in James Thurber's story, he fulfilled his secret ego. In this last capacity, he was a celebrity collector and a name-dropper *par excellence*, and unfortunately it is this last characteristic which emerges dominant in the correspondence with Holmes. Laski's letters are littered with casual phrases such as "the Prime Minister observed to me last night," "they want me to take a ministry," "the Foreign Secretary told me in confidence." Apparently under the illusion that his reputation could not stand alone, Laski was constantly identifying himself as the intimate confidant of the great and "romanticising"—to use a kind word—his position in British political circles.¹ Not that this was pure fiction; Laski did have an enormous circle of friends many of whom were active in Labor politics. But the picture of himself which he presented to Holmes as the Grey Eminence of the Labor Party was a vast exaggeration.

The sections of Laski's letters which are not concerned with ego aggrandisement or with trivial personal matters, are almost entirely bibliographical. He was a fantastically rapid and retentive reader, and in each letter he suggested to Holmes selections from his latest reading which he thought the Justice would enjoy or commented on some recent acquisitions to his rare book collection. Occasionally here a rapid reader may suspect Laski of cheating, of passing on comments purloined from a book review rather than from personal reading, but let he who has not sinned in this regard cast the first stone.

The Holmes who emerges from this correspondence is an aged giant, most of whose friends and contemporaries have long since departed, who tries desperately to put up a good intellectual front for the benefit of his young, eager and faithful correspondent. He writes of little but books, trying to keep abreast of the flood of references which flow from Laski's pen, and tries to match his friend's erudition by an occasional Greek quotation. Every so often, more frequently in the early years, he thunders against Laski's pluralistic heresy or asserts his famous view that rights are anything "the mob will fight for." But he writes little of the law and, with the exception of some slight passing comments, nothing of importance on the work of the Supreme Court.

In short, two mountains labored and exchanged mice. The exchange has some value as an intellectual curiosity, but it is of little use in attaining an evaluation of the characters and contributions of the two participants.

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1. For an excessively friendly but still useful analysis of Harold Laski's character, see Kingsley Martin, *HAROLD LASKI* (London, 1953). A balanced biography is badly needed.

ADMINISTRATIVE LAW: CASES AND COMMENTS. By Walter Gellhorn and Clark Byse. New York: Foundation Press, 1954. Pp. 1232, \$9.00.

Here is a classroom book that will be found even more useful than its predecessor, *Gellhorn, Administrative Law: Cases and Comments* (2d ed. 1947). The editors have placed increasing emphasis upon administrative procedure at the expense of doctrinal treatment of the separation of powers. The new heading for Chapter II, "Legislative and Executive Control of Administrative Action," reflects the inclusion of a penetrating essay by the editors on the President as administrative head of the federal executive hierarchy. This chapter, in addition to surveying constitutional doctrine, calls attention to the significance of appropriations, the increasing use of investigation and consultation by legislative committees, and procedural controls of the legislature over rules formulated by the agency. Administrative law is less and less conceived as a branch of constitutional law and now appears to be primarily a study of the law of governmental practice and procedure whereby executive officers and agencies receive their powers, exercise them, and are controlled in the exercise of them.

The editors express in the preface their strong preference for taking up judicial control after legislative and executive control instead of leaving it to the chronological position following agency procedure. Hence, in Chapter III it is assumed that the statute has endowed the agency with its powers and that the agency has acted, is acting, or is refusing or threatening to act. The questions then are how to obtain a judicial remedy and how far the court will re-examine the decisions of the agency. Considerable state material is used here as elsewhere, but some teachers may wish to emphasize the problem of fashioning a judicial remedy where none is given by statute in terms of the practice of a particular state. Moreover, the interest attracted by controversy over federal agencies may have unduly distracted the attention of the profession from old-line executive officers, so that students are not getting sufficient explicit introduction to how to get into court, for example, when the action or determination does not have any degree of conclusive effect except to the extent of shifting the burden of initiating litigation.

"The Requirement that Findings Accompany the Final Action" is a subject that it seems should have accompanied the transfer of judicial review to the front of the book. However, it was left in the chapter on the process of agency decision in trial hearings. While the decider is concerned with the requirement as a requirement, and while findings should affect the course of decision, I believe that their aspect as a device of judicial control is more important. So arranged, the requirement of findings could be considered at large without restriction to findings based on a trial hearing.

The expression "trial hearing" helps to distinguish other types of administrative hearings, and the arrangement of the materials in the book lends clarity to this distinction. Two chapters intervene between judicial

control and the formal adjudication procedures. One deals with the collection of information by the agency and the powers of investigation. The other then takes up informal dispositions by negotiation and settlement or advice. Only thereafter comes the study of the right of a regulated party to know the case against him and be heard in opposition to it, followed by examination of procedural incidents analogous to court trials and appeals.

The chapter on "The Informal Administrative Process" is new, by comparison with the predecessor volume. It is valuable, and its significance for students with a background of judicial administration will be enhanced by using comparative material dealing with traditional executive officers like the prosecuting attorney and the health officer.

Although the book is 162 pages longer than its predecessor volume it is characterized by an increase in editorial comment that is incisive, easily read, and should prove to be of great help to the student who is being introduced to the subject. The first chapter of 61 pages, for example, contains no cases, and comprises a collection of readings that should produce substantial economies in classroom time later in the course. The richness of case matter collected makes the work of standard reference quality for the practitioner. But since it is essentially a teaching tool most of the cases are digested and many of the others are heavily edited. The use of digests to such a degree is justified for the advanced students who will be taking the course and the digesting is carefully done for the purpose in view. In addition to excerpts from books, periodicals and governmental reports, the editors have mined from such candid records as transcripts of hearings before Congressional committees and the Congressional Record. It may be that the space devoted to bias of the decision-maker (41 pages), though less than that in the predecessor book, could yet stand some shrinkage. The book is bulky, but there are few places where materials could be sacrificed without mutilation.

It is gratifying to see problems posed that are not merely hypothetical situations calling for a judicial pronouncement. For example, at page 579 a subpoena is reproduced along with the statement of enough facts to generate problems for the application of the following 31 pages of cases and statutes in a context of representation and advocacy.

I look forward with relish to the use of this improved tool, which appears to have all the virtues of its predecessors.

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THE DYNAMICS OF DEMOCRATIC GOVERNMENT. By John P. Roche and Murray S. Stedman, Jr. New York: McGraw-Hill, 1954. Pp. ix, 418. \$5.00.

This latest volume in the McGraw-Hill Series in Political Science serves many valuable functions. It was designed to provide the beginning student of political science with an over-all comparative picture of the opera-

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tions and structures of three "democratic" governments: the United States, Britain, and France. This it does admirably. The book can also be read with profit and pleasure (a rare by-product of text books) by the general public. The future historian of mid-twentieth century philosophy and politics will find it a treasure house. For the older person this book provides in the area of government what Frederick Lewis Allen's *The Big Change* did in the field of social mores, namely, the startling picture of a present which has come upon us quite unheralded. Professors Roche and Stedman write with a similar delightful breezy wit and sharp perception.

They are keen observers of present day America who view the scene from the vantage point of the informed liberal. The book is an affirmation of that viewpoint. Consequently it has the strengths and weaknesses of the American liberal's philosophy. At this time of perpetual crisis, when many find democratic government lacking in the ability to cope with foreign, domestic, and individual problems, it is reassuring, however, to have Jeffersonian democracy rephrased in contemporary terms.

The authors have drawn heavily upon the social sciences—sociology, economics, psychology, and anthropology. Their thinking and conclusions bear the imprint of these disciplines. Fortunately, their writing is devoid of that special circumlocutive, sesquipedalian jargon of many social scientists.

The lawyer will find, rather to his dismay, that the law and the legal profession are relegated to a position of neglect and obscurity. Government is viewed as a struggle of competing special interest groups. The entire section on the problems of administering government, which the attorney views as the drafting and passage of legislation and the administration and enforcement of law, is discussed in terms of personnel management. There is a section on "The Training of Administrators." The authors believe that in staffing government agencies, "majors in any of the social sciences, but especially in political science and in economics, may with aptitude qualify for such beginning administrative positions."¹ But where are the lawyers who have traditionally staffed the agencies of government?

Similarly, the administrative process is viewed in non-legal terms. The entire problem of administrative law—jurisdiction, procedure, separation of powers, and judicial review—is summed up as follows: "These organizations [administrative tribunals] cannot be given a niche in the rational administrative universe no matter how much intellectual effort is put into the job; they remain administrative freaks."²

The whole chapter on the judiciary reflects a view of the courts based upon realpolitik. The authors have taken at face value Gray's famous apothegm that "Law is what the judges declare." They have clearly been influenced by Jerome Frank's picture of the subconscious human prejudices and predilections which motivate judges. The lawyer, however, knows

1. Page 233.

2. Page 256.

that these observations are refreshing confessions of human fallibility in a system of administration of justice which transcends the individual. The social scientist might well revise his analysis of the judicial power of legislation, which even the pithy Holmes declared was only interstitial, in the light of Cardozo's conclusion that "insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules which hedge him on every side."³

Aside from the rather astringent measure of considering the processes of government logically and intelligently without regard to the issues which the lawyer deems vital, the chief value of the book for the legal profession is its splendid bibliography. Here are listed in analytical groupings the significant works of original thought and research in the many fields covered by this volume.

In a work of such ambitious scope, the authors have wisely limited themselves to a brief survey, referring the more scholarly reader to the bibliography. The theme of the book and the authors' position is well stated in the first section, *The Basis of Democratic Government*. It could well stand alone as a splendid example of the contemporary essay. It bears little relation to Agnes Repplier other than the fact that it is written in lucid, graceful and even witty prose. Nearer kinship is perhaps to be found in the modern classic, *A Free Man's Worship*.⁴ This section might be subtitled "A Free Man's Critical Belief in Democracy."

The second part of the book deals with the public as the source of governmental power, officially through political parties and the ballot, unofficially as and through pressure groups and that elusive imponderable "public opinion." Part Three discusses the formal organization and structure of government. And the concluding section notes the difficulties of formulating and executing economic and foreign policy. In these three sections the American system and practice is compared with the British and French. Occasionally there are tantalizing allusions to the governmental procedures of Paraguay, Australia, and Sweden.

In such a rapid skimming across continents, the authors can merely raise or often at best allude to some of the major problems which beset the United States in 1954. Their examples are drawn largely from the past ten years with heavy emphasis upon events from 1950 to the present. Although most chapters in this inclusive book have a subsection entitled "Conclusions," no positive proposals are made. The authors suggest no panacea; they present no original theories. Their contribution is one of synthesis and comparison.

In discussing such matters as the proper function of, and limitations upon, pressure groups and lobbies, freedom versus security, the scope of authority and powers of the presidency, they reaffirm an eighteenth century belief in the rationality of man. They champion his right to freedom

3. CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 136 (1921).

4. RUSSELL, *A Free Man's Worship* in *MYSTICISM AND LOGIC AND OTHER ESSAYS* (1923).

of thought, speech, and association. But they mitigate such statements by an almost embarrassed acknowledgment of the external and internal perils which beset America today. The answers which they provide to the current challenges to democracy are those of the "liberal." Indeed, they are almost liberal clichés.

For example, the chapter on public opinion refers to the problem of newspaper influence. The authors state, "As long as editorializing stays securely on the editorial page, the reader can pass it by, but when it turns up in the 'straight' news story, the reader begins to drink from a poisoned well."⁵ They do not penetrate the issue of responsibility on the part of the newspaper for presenting a truthful and balanced picture of events. It is news when Senator X makes a speech. The newspaper duly and properly reprints the speech. Has it not also a responsibility to point out on the newspaper any gross inaccuracies or distortions of Senator X? In a recent popular volume, which at times does not in turn escape its liberal stereotypes, Elmer Davis,⁶ for instance, questions such newspaper responsibility. Another example of a "liberal cliché" is the solution proposed for the problem of the conflict between individual liberty and national security. The authors suggest that if the gemini of loyalty and security are only confided to the FBI as opposed to the "amateur" congressional investigators, this problem will disappear, it being entirely a question of methods.

The captious critic could take issue on every page with the superficiality of the analysis, the failure to grapple with the underlying problems of contemporary America. To meet these objections the authors would have to write not one but scores of books. Recognizing the limitations of space and of time of authors and readers, one must be grateful for the excellence and inclusiveness of *The Dynamics of Democratic Government*.

Lois G. Forer †

5. Page 103.

6. DAVIS, BUT WE WERE BORN FREE (1954).

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