1986 Gerber Lecture: From Doctor Johnson to Justice Holmes to Professor Laski

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FROM DOCTOR JOHNSON TO JUSTICE HOLMES TO PROFESSOR LASKI

JEFFREY O'CONNELL AND THOMAS E. O'CONNELL*

Doctor Johnson, Justice Holmes, and Professor Laski: What do they have in common? Tracing the thought of these three striking men on matters of religion, economics, government, and law we follow much of the mainstream of Western thought, religious and temporal, from antiquity until today. In addition, by studying the way each of these men veered away from the thought of his contemporaries, we sense the sweep of much of the Western intellectual tradition.

Samuel Johnson, who lived from 1709 to 1784, represents the transition from the world of religious faith to the world of temporal reason. In him we find traditional Christian religion almost literally a burning issue. Yet Johnson, an extremely rational, analytical man, intellectually sturdy and independent, represents and portends much Western thought that is assumed to have undermined and indeed cast aside religion. Justice Oliver Wendell Holmes, who lived from 1841 to 1935, represents our agnostic—indeed atheistic—age, inclined to dismiss all religions. Harold Laski, who lived from 1893 to 1950, in his turn embraced and embodied the secular religion of Marxism and redistribution of wealth.

I.

As the subject of the best and best-known biography in English,¹ Johnson is familiar to most people as a talker, an epigrammist,

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a colorful personality. But to retain our interest after two centuries, Johnson must have been more than a colorful personality. Indeed he was more. He was a profound moralist, a great writer, and the man who through his dictionary brought order to the English language. He was also a lifelong student of the law.

Johnson was born and raised in Lichfield, England, spent a bit more than a year studying at Oxford, and lived most of his long life in London. His childhood and youth were troubled. He had serious health problems all his life. Large and ugly, he had great difficulty finding his place either socially or in his work. After leaving Oxford because of financial difficulties, he went into a profound depression which lasted for many months. He once said that as a young man he never tried to please because he thought the task impossible. His marriage to an older woman, a widow, was an important turning point for him. Someone, after all, could care about him. After losing her money starting a school that failed, Johnson went to London to try a career of writing to support them both. Few writers have had a more difficult time than Johnson in his early effort to earn a living by his pen. Yet with perseverance and with the opportunities for writing of all sorts in the bustling London of the mid-eighteenth century, he gradually began to make a mark, and a living.

The death of his wife Tetty was a great loss to Johnson, but he rose above his sorrow, made new friends, and continued to build his reputation. The receipt of a small pension from the Crown freed him at last from the crushing obligation of supporting himself by hack writing. Finally he became the lion of London, a much sought-after guest whose reputation for integrity and intellectual pugnacity made him one of the most renowned men of his time. His poetry, essays, and literary criticisms, as well as his dictionary, were widely read and acclaimed. He became, in short, the Johnson of The Age of Johnson.

Samuel Johnson is a timeless figure, possibly more so than any other person in the English-speaking world except Shakespeare. But for our present purposes Dr. Johnson represents a historical age, a pivotal transition from the ancient to the modern world, from the world of religion to the world of reason.

Throughout his life Johnson was deeply religious—religious, a modern might conclude, to the point of neurosis. For Johnson, the wrath of God was a literal threat, often crippling him psychologically. His fear of God's wrath amounted to terror:

Johnson: "[A]s I cannot be sure that I have fulfilled the conditions on which salvation is granted, I am afraid I may
be one of those who shall be damned,” (looking dismally). Dr. Adams. “What do you mean by damned?” Johnson. (passionately and loudly) “Sent to Hell, Sir, and punished everlastingly!”

To exist in pain, after death, was the most Johnson contemplated. Punishment was what Johnson expected to receive for what he considered his many sins. These sins included, he believed, sloth, gluttony, intemperance, lust, pride, loss of temper, and selfishness, as manifested by his neglect of his mother.

A highly sexed individual, Johnson was celibate before marriage to his wife Tetty, during most of the marriage when he was separated from her, and after her death (the marriage lasted from 1735 to 1752). It was religious scruple that kept him so. David Hume told Boswell that Dr. Johnson liked to frequent the lounge of the theater of his boyhood friend, David Garrick, delighting in the chitchat of theatrical figures and hangers-on. Eventually, though, Johnson gave up this amusement for reasons of what Hume called “rigid virtue.” “I’ll come no more behind your scenes, David,” he told Garrick, “for the silk stockings and white bosoms of your actresses excite my amorous propensities.”

Asked once what were life’s greatest pleasures, Johnson replied, “f—g and . . . drinking.” For most of his adult life, though, he indulged in neither, with all the strains that such abnegation can lead to.

Religion became, in Johnson’s view, the only true means of lasting human happiness. As W. Jackson Bate puts it, Johnson came to believe in “the complete inability of the world and the worldly life to offer genuine or permanent satisfaction, and our need to turn from this world in order to seek safety and joy in religious faith and in another world.” Yet for Johnson religion was always a highly rational affair. Consequently, for Johnson, one of the most analytical men of any age, the mysteries of religion represented a particular frustration. In Bate’s words:

More than most people, he found it difficult to accept calmly Elihu’s answer to Job’s protest—that the wisdom and justice of God are unsearchable to the human mind; that we must accept the fact of evil as a “mystery.” Not that

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5. W.J. BATE, supra note 1, at 279.
Johnson did not try . . . But the language [of his efforts] is always restive and seethes with inner protest.\(^6\)

Resisting, as Johnson was prone to do, any notion of the unknowable, he seized on the idea of afterlife as almost the only possible means of justifying human fate: Afterlife alone could justify, as Johnson put it, that "the only thinking being of this globe is doomed to think merely to be wretched, and to pass his time from youth to age in fearing or suffering calamities":

It is scarcely to be imagined that Infinite Benevolence would create a being capable of enjoying so much more than is here to be enjoyed, and qualified by nature to prolong pain by remembrance and anticipate it by terror, if he was not designed for something nobler and better than a state in which many of his faculties can serve only for his torment. . . .\(^7\)

Prior to the nineteenth century, the primacy of religion was such that for many centuries religion had used up most of humanity's available intellectual energy. Professor M. M. Poston, a distinguished economic historian and medievalist, has pointed out the cause of the absence in medieval life of scientific incentives:

The Middle Ages were the age of faith, and to that extent they were unfashionable to scientific speculation . . . This does not mean that there were not intellectual giants. All it means is that in an age of faith, men of intellectual spirit found the calls of faith itself—its elucidation, its controversies, and its conquests—a task sufficient to absorb them; to put it simply, there was no time for an occupation like science.\(^8\)

The story of human life in the Western world from Johnson's life until today has in large measure been the story of the decline of religious belief and the rise of rationalism. The spread of rationalism, according to Professor A. R. Hall, occurred during the period 1500-1800, a period described by him as "The Formation of the Modern Scientific Attitude."\(^9\) It culminated in the mid-to-late eighteenth century, the period during which the term "scientist" was

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6. Id. at 450.
7. Id. at 450-51.
coined by William Whewell and, in the words of A. N. Whitehead, "the greatest invention . . . was the invention of the method of invention." In place of religion as the touchstone of thought came thought itself in the form of conceptualism and the scientific ordering of knowledge.

Johnson's life largely coincided with the last century of this period between 1500 and 1800. In Johnson we see a dynamic interaction between worship and skepticism, between piety—rarely has there been a more pious man—and rationalism. This brings us to Johnson's great capacity as a rationalist in an age flowering into rationalism—flowering, indeed, into the Age of Reason. In all the English-speaking world no one epitomized more than Johnson the rise of rationalism, so much so that the Age of Reason in England came to be known as the Age of Johnson.

As to the range of Johnson's learning, William Adams, who was his tutor during Johnson's brief stay at Oxford, mentioned to Boswell about fifty years later (in 1776), "I was his nominal tutor; but he was above my mark." Boswell relates that Adams told Johnson that Johnson was the best qualified scholar he ever knew come to Oxford. Adam Smith, a grudging critic who did not like Johnson, and no mean authority, opined that "Johnson knew more books than any man alive."

Johnson's dictionary stands as an almost incredible tribute to the exhaustive range of his learning. The dictionary is an awesome compendium of knowledge of all kinds, literary and scientific, greater than any other ever assembled by one person in all the history of the world. Bate tells us that for over a century after its publication it was without a rival. It set the pattern for all subsequent dictionaries, with its pertinent and often piquant examples of the use of a word in literature, a technique never tried before and never abandoned since.

Only a person with an incredible range of knowledge would have undertaken—not to speak of completed—such a herculean task. Johnson indeed stands alone, or perhaps is joined only by Thomas Jefferson, for intense application of sheer brainpower across the spectrum of human experience. Much more than Jeffer-

12. Id. at 35.
13. Id. at 251-52; see R. DEMARIA, JOHNSON'S DICTIONARY AND THE LANGUAGE OF LEARNING (1986).
son, though, did Johnson seek to understand the emotions, his own as well as others. Even today, in an age of Freudian psychology, when we are emotionally troubled we will find Johnson has much to teach us. But withal, for all his rationalism, Johnson remained deeply religious.

From early on until the end of his life Johnson was fascinated by the law and perceived its rich interaction with religion. Late in his life this interest in the law provoked one of his friends to remark that had he pursued the law he might well have become Lord Chancellor. Barked Johnson, "Why will you vex me by suggesting this, when it is too late?"

Recent years have revealed Johnson’s authorship in the 1760s of much of the Vinerian lectures in law by Robert Chambers. Chambers was a young friend of Johnson’s when Chambers was appointed Blackstone’s successor at Oxford. Blackstone had made his Oxford lectures the basis for his enormously important Commentaries on the Laws of England, first published in 1765. Chambers was understandably diffident at the prospect of having his lectures compared to Blackstone’s, and he became totally blocked, unable even to start the preparation of his own series of lectures. Johnson, hearing of his friend’s dilemma, offered to help—anonymously of course, since knowledge of Chambers’ need for such help, particularly from a nonlawyer, would have been an additional humiliation. Johnson proceeded to write a great share of Chambers’ lectures. That share shows an uncanny grasp of the subtleties as well as the fundamentals of the law as it had developed up to the 1760s in England.

By the eighteenth century the law, like other aspects and disciplines of human life, had undergone secularization. Initially, law had been shrouded in religion. Indeed, in Johnson’s portion of the Vinerian lectures he traces the rise of law directly from religion. Wild, savage warlords emerged as leaders in primitive societies in which brute strength was everything—except to one class: priests. The clergy, with no strength of arms, were able to wrest respect for themselves from even the most powerful by evoking fear of the only force bigger than warrior lords: fear of the Divine and of the afterlife. Thus, the one civilizing force, the one force able to rise without the use of physical strength and aggressiveness, was the clergy. As the clergy’s civilizing influence slowly and torturously grew, the lib-

14. W. J. Bate, supra note 1, at 84-85.
15. For the remarkable story of Johnson’s role in Chambers’ Vinerian lectures, see E. McAdam, Dr. Johnson and the English Law 65-122 (1951). For another view, see A. McNair, Dr. Johnson and the Law 76-80 (1948).
erating amenities of art and music began to spread in order to serve religious purposes. As men took the first steps toward civilization, with concomitant needs for writing and reading and recordkeeping and, ultimately, for more advanced administration, the tools to accomplish these subtle, unsoldierly tasks were held by clergy. With further advances in civilization came the need for regulation other than by direct application of force and fear, namely law. This too evolved under the clergy, the only bookish people, the only ones capable of writing and administering law. 16

Johnson was of that first generation to see law not as divinely inspired or mystically revealed but rather as reflecting the society it tried to regulate. That generation's thinking with respect to the law was dominated by Blackstone, who in the Commentaries went a long way to demystify the law and create a theory of the Common Law as a rational system. It was a generation that looked at law with the cool analytical eye of the Age of Reason. 17

Johnson was also of the generation, dominated in economics by Adam Smith, that developed an acute appreciation of the strength of the market. Johnson too perceived the liberating, if sometimes anarchic, fruits of a market economy. Unlike many intellectuals of his day and ours, Johnson was fascinated by the world of business, a fascination more consistent with being a Whig than a Tory. But for all his humble beginnings and compassion for the downtrodden, Johnson remained throughout his life a Tory, conservative in politics and in his general social beliefs. A deep commitment to order and hierarchy dominated his life; he was, for example, a bitter and outspoken opponent of the American Revolution.

In short, Johnson was Janus: with his conservative religious beliefs he looked back into history from the eighteenth century; with his rationalism and cool analysis of any and all concepts and ideas he looked forward into the swiftly changing world of the nineteenth and twentieth centuries.

II.

Fifty-seven years after Johnson's death in 1784, Oliver Wendell Holmes, Jr., was born in Boston. 18

It would be hard to imagine an early life more different from

17. See infra note 30 and accompanying text.
18. For the life of Holmes, see 1 M. Howe, Justice Oliver Wendell Holmes (1957); 2 M. Howe, Justice Oliver Wendell Holmes (1963). For the correspondence between Holmes and Laski, see Holmes-Laski Letters (M. Howe ed. 1953, 2 vols.)
Johnson's than Holmes'. As a boy, Holmes was healthy, robust and happy. The son of the famous Autocrat of the Breakfast Table and author of *Old Ironsides*, descended from generations of ministers from New England's earliest time, Holmes had early good fortune in all respects. He grew up comfortably surrounded by stimulating relatives and friends. While the impoverished Johnson had to leave Oxford early, Holmes sailed through Harvard and capped his college years as Class Poet at his graduation in 1861. How quickly, though, came his own period of trial, comparable to Johnson's early poverty and physical and mental anguish: His searing service in the Union Army.

After the Civil War, Holmes went on to the Harvard Law School, travelled in Europe, tried—unsuccessfully, on the whole—practicing law. He was, his friend William James thought, too ambitious, too coldly intellectual. He did indeed hunger for professional success and acclaim but, as with Johnson, these did not come easily or early. Only as he was turning forty was *The Common Law* published, the book that made his reputation. Soon after the publication of *The Common Law* Holmes was appointed to the Massachusetts Supreme Judicial Court. The rest of his long and useful life he served on the bench, following up nearly twenty years of Massachusetts service with more than thirty years on the United States Supreme Court. He became the most widely known American judge. Like Johnson, he became an intellectual giant of his age. Like Johnson, all of his long life Holmes dearly loved to think, and to talk and to read.

Holmes married a childhood friend. It was on the whole a long and happy marriage, but Holmes, again like Johnson, had no children.

Although born not so long after Johnson's death, Holmes' religious beliefs (or lack of them) represent a world apart from Johnson's. Religion for Holmes was sheerest fantasy, ludicrous in its pretension. Humans and their world had no more ultimate significance than ants and their hill. To imagine that humans and their foolish, petty, trifling concerns were distinguished by Divine interest, not to speak of guidance, was to make a mockery of serious thought. Wrote Holmes to Laski in 1929:

[I] see no reason for attributing cosmic importance to man

... I regard him as I do the other species (except that my

private interests are with his) having for his main business to live and propagate, and for his main interest food and sex. A few get a little further along and get pleasure in it, but are fools if they are proud [because of it].

Holmes was, of course, part of a generation that more and more rejected religion—part of the nineteenth century that turned to knowledge and, even more particularly, to science in place of God. As Professor G. E. White puts it: “Religious and spiritual principles appeared to [the late nineteenth century intelligentsia in America] to have been made obsolete by more measurable rules of science. The universe, they had discovered, could be explained in terms of recurrent, predictable phenomena such as evolution and competition.”

Not only religion but morality, or moral beliefs, were transient and meaningless in Holmes’ eyes. No system of thought, no moral code, had any meaning except that the crowd—the mob—found it convenient to follow it. The mob or the mob’s offspring might shortly or ultimately abandon such a code. It was, said Holmes, convenient to live in a world in which honesty, trust, intellect, beauty, democracy, and free speech were honored, but one would have little cause for complaint if such codes were swept away tomorrow. Had not one or more been absent in most societies throughout history?

In a letter to Laski Holmes wrote:

You respect the rights of man—I don’t, except those things a given crowd will fight for—which vary from religion to the price of a glass of beer. I also would fight for some things—but instead of saying that they ought to be I merely say they are part of the kind of world that I like—or should like. You put your ideals or prophecies with the slight superior smile of a man who is sure that he has the future—(I have seen it before in the past from the abolitionists to Christian Science) and it may be so. I can only say that the reasoning seems to me inadequate and if it comes to force I should put my [illegible] on the other side.

The depth of Holmes’ bleak view of life is perhaps best revealed by his attitude toward having children. According to his old friend Learned Hand:

19. 2 LETTERS, supra note 18, at 1125.
21. 2 LETTERS, supra note 18, at 948.
We were sitting together in the library sometime after his wife's death. I do not know how I ventured on so intimate a subject, but in some way the question did come up and I said to him: "Mr. Justice have you ever been sorry that you never had children?" He said nothing; he did not look at me, he waited for a perceptible time and then said very quietly (still not looking at me): "This is not the kind of world I want to bring anyone else into."22

For Holmes a dominant influence was Darwin. In Holmes' view the law of human existence was the struggle for survival and advantage. And Holmes echoed Adam Smith in seeing the pursuit of self-interest as a fundamental animating force in society for both economic and other ends. The struggle for life against the organic and inorganic forces seeking its destruction, wrote Holmes in 1873, "does not stop in the ascending scale with the monkeys, but is equally the law of human existence.... It is mitigated by sympathy, prudence, and all the social and moral qualities. But in the last resort a man rightly prefers his own interest to that of his neighbors."23 In 1915 Holmes wrote to Dean John Wigmore that "the squashy sentimentalism of a big minority of our people about human life" made him "puke." He was talking about those "who believe in the upward and onward—who talk of uplift, who think that something particular has happened and that the universe is no longer predatory."24

So Holmes dismissed the thought that history meant some inevitable progress toward higher standards of human behavior. As for economics, he found the "do goodism" of his close friend Harold Laski "drool." Redistribution of wealth to the poor from the rich was futile and wrongheaded, although the pressure for it was understandable given the inevitable envy of the poor for the rich. Redistribution was futile because the few rich never have enough to provide for the many poor. It was wrongheaded because there was no inherent reason to disrupt the status quo by taking from one to give to another. But if the "mob," either by bullets or ballots, was determined to redistribute wealth, one could only fight or shrug. One could not insist one was wronged in any ultimate sense.

Over all hung Malthus:

[T]o my mind [he wrote Laski on May 24, 1919] the notion

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22. 2 M. Howe, supra note 18, at 8 n.17. Later, Holmes said that he didn't have children because it would have interfered with his career. Id.
23. The Early Writings of O. W. Holmes, Jr., 44 Harv. L. Rev. 717, 795 (1931).
24. 1 M. Howe, supra note 18, at 25.
that any rearrangement of property, while any part of the world propagates freely, will prevent civilization from killing its weaker members, is absurd. I think the crowd now has substantially all there is—and that every mitigation of the lot of any body of men has to be paid for by some other or the same body of men—and I don't think that cutting off the luxuries of the few would make an appreciable difference in the situation.25

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I think the courageous thing to say to the crowd, [he wrote Laski on January 8, 1917] though perhaps the Brandeis School don't [sic] believe it, is, you now have all there is—and you'd better face it instead of trying to lift yourselves by the slack of your own breeches. But all our present teaching is hate and envy for those who have any luxury, as social wrongdoers.26

For Holmes the central event in his life was the Civil War. His striking military mustaches were carefully tended throughout his adult life; his erect soldier's posture remained until ancient age bent him; he never stopped memorializing the dates of great battles in which he had fought—especially those in which he had been wounded—on his correspondence, even when writing to those with whom he was not intimate. In Maryland, it is especially pertinent to cite the following from his letters: "31 years and one day after Antietam," he would write, or "Antietam was 65 years ago yesterday," "We are celebrating Antietam, where had a bullet gone one-eighth of an inch differently the chances are that I should not be writing to you."27 It was no coincidence that having been wounded in the neck "the instinct for the jugular" became one of his favorite phrases.28

He had marched off as a twenty year old lieutenant a few weeks after his graduation from Harvard College, full of Boston's idealism and enthusiasm for abolition. He was wounded seriously three times. Once he was left for dead. He saw his friends killed and maimed in the terrible carnage of that first modern war. He came to feel that nothing, no creed or abstraction, was worth the slaughter he saw. The only thing that justified it was man's incredibly heroic willingness to undergo it, but that was as true for one side as for the other, as true for those who would retain slavery as for those who

25. I Letters, supra note 18, at 207.
26. Id. at 52.
27. E. Wilson, supra note 18, at 743, 758.
28. Id. at 760.
would abolish it. Those who were indifferent to the great causes but were simply doing their duty were for Holmes the most heroic of all. So Holmes became the ultimate skeptic, distrusting all “dogmas” or “systems,” including not only old religions but new ones, such as socialism.

Whence Holmes’ great reputation as a liberal, then? It stemmed from two things: First as a judge he was often willing to let the legislature experiment as it would with social reform, little as he personally believed in reform. This was in contrast to the narrow views of his contemporaries on the bench who were often ready to strike down social legislation on constitutional grounds. Second, the constitutional principle he came to defend most aggressively was that of Free Speech, believing as he did in the “marketplace of ideas.” Better to let an idea, however pernicious, be born to live or die in battle with other ideas than to abort it by censorship or other suppression.

Holmes’ seminal book *The Common Law* was a key event in the transformation of law from oracle to echo. True, the rationalism that led to Blackstone’s *Commentaries* had demystified the law somewhat, but Blackstone had replaced one dogma (a religious one) with another (a rational one). Blackstone’s law still came from on high, but it came from the Common Law as a perfect system, slowly and wondrously revealing itself case by case—by an “invisible hand,” as it were, similar to that which guided Adam Smith’s marketplace.


30. On the interconnection between the lawyer’s reasonable man and the economist’s economic man in the eighteenth century, Paul Carrington has perceptively pointed out that each stems from the same mode. Both Blackstone and Adam Smith were determined to pluck “reason” from that nettle “life.” According to Carrington, the extensive economic analysis of law by lawyer-economist Richard Posner can be viewed as reuniting two divergent strands of rational intellectual tradition, the classic economic rationalism sired by Adam Smith and the common law rationalism which can be said to date from William Blackstone.

... Blackstone and Smith each wrote with an extraordinarily lucid, if somewhat oracular, style. ... While Smith analyzed markets and Blackstone analyzed court decisions, both proceeded from the assumption that human behavior is essentially, if not completely, rational. ... Both Blackstone and Smith were prone to attribute to human rationality a commanding force over social institutions and relationships.

It is not hard to find a cause of the similarity between Blackstone and Smith. Smith was born in the early summer of 1723 in Scotland, Blackstone a month later in London. Blackstone studied at Oxford from 1738 to 1746; Smith was at Oxford from 1740 to 1748. Smith began lecturing in Glasgow in 1751, Blackstone at Oxford in 1753. Blackstone’s great work was completed in 1769, Smith’s in 1776. Smith was the more creative of the two and had much
Principles revealed in earlier cases could be perceived and applied in later ones by well-trained lawyers and judges. It was Holmes more than anyone else who overturned the concept of law as a transcendentally rational set of principles ineluctably revealed as case followed case. Consider the very first words of The Common Law: "The life of the law has not been logic; it has been experience . . . ." Holmes went on to use his deep legal learning with brilliant virtuosity to show the law to be an adaptive, swirling kaleidoscope, reflecting today's needs along with bits and pieces of prior law, in turn reflecting prior days. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law," said Holmes. The law is not "some brooding omnipresence in the sky," but the command of a sovereign triggered by a court's decree. Thus was born legal realism, a view cynical in the eyes of many, asserting that the law is a reflection of the prejudices and predilections of the dominant forces in society, usually articulated by middle-aged, upper-class males in ceremonial black robes which suggest the sacred. Holmes was, ironically, proud to number himself among that group.

Holmes' concept of the law was sharply divided. If he was the first legal realist who saw the law as simply the command of the sovereign, in turn dependent on society's acceptance of the sovereign's authority and thus ultimately subject to all the vicissitudes of the public's views and tastes, he also saw the law as a highly complex, intricate set of rules, awesome in their variety and particularity. Surely the mob couldn't care about those. Surely such rules of property or contract or tort law were not known to the mob or the subject of their passionate concern.

No, for Holmes the law ultimately depended on the willingness of the sovereign to enforce the law and society's agreement that the law should be enforced. But in the great mass of legal disputes, the specific matter was of no concern to the mob. What did the mob care whether common law marriage required an actual agreement to be explicitly married at some precise moment in time or might be

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31. O.W. Holmes, supra note 29, at 1.
affected by general submission to the marital state over time—a perfect example of a technical legal issue. 34 Within such interstices of the law, lawyers—and judges—had wide discretion in formulating technical rules that would simply "work."

Law for Holmes was ultimately no more sacred than matters of garbage disposal. Law was simply an instrument by which life was made more amenable. But if law were simply the command of a sovereign, a cruel and brutal sovereign could just as readily and validly command obedience to law as a more benign ruler. So bleak was Holmes' theory as to the ultimate validity of the law that during World War II his thinking was bitterly attacked by Jesuit scholars as endorsing (by implication) Nazi rule and Nazi law: 35 Who could doubt that Hitler was the sovereign? According to Holmes' "cynical" view, there seemed no basis in law for the Germans to oppose Hitler. Their only alternative was revolution.

How to defend Holmes from such assaults? Paul Freund of the Harvard Law School, replying to such broadsides, took refuge in asserting that "such critics are surely lacking in humor no less than in perception, for no one could associate a totalitarian outlook with Holmes' dedication to the preservation of the free market in ideas and the even-handed administration of justice." 36 That will strike some as a rather thin defense, even if one perceives it as a valid one.

III.

If Holmes represents the rejection of Johnson's religion and a much more exclusive commitment to rationalism and realism, Harold Laski 37 represents what is tantamount to a rebirth of religion. But it is a very different kind of religion from Johnson's. Laski's Marxism, in which he believed with a faith that was religious in its intensity, combined the rationalism of science, in the sense that Marx believed his theories were scientific, with the emotional and romantic theory of creating a "new Jerusalem in England's green and lovely land."

Though junior by fifty years, Laski became Holmes' great friend. Their friendship, indeed, had many of the characteristics of Johnson's lovely friendship with his own much younger intimate,

34. Travers v. Reinhardt, 205 U.S. 423, 443 (1906) (dissenting opinion).
35. See White, supra note 20, at 65-68.
James Boswell. Like Boswell, Laski was an outcast of sorts: Laski
the Jew, Boswell the Scot. Each befriended an Olympian figure, the
great figure of his age, and carried on for twenty years a warm,
symbiotic relationship that was partly junior to mentor, partly son to
father, partly stimulating mind to stimulating mind. Laski was
quintessentially the intellect. Of astonishing precociousness when
Holmes first met him when he was twenty-three, Laski became a
marvelous teacher and prolific writer at the London School of Eco-
nomics where he passed most of his professional life.

Laski was born in Liverpool, went to Oxford, and during World
War I found himself in America as a teacher at Harvard, the protegé
of Felix Frankfurter, who first brought Laski and Holmes together.
The son of a well-to-do Orthodox Jewish merchant family, Laski had
married a gentile woman eight years his senior while he was a stu-
dent at Oxford. He had thus defied his conservative family, who
retaliated fiercely, cutting him off financially and emotionally. Thus
Laski too faced a cruel crisis in his early manhood. He was ulti-
mately reconciled with his family, but was never a practicing Jew,
and until the Nazi persecution of Jews in World War II never felt
identity as a Jew.

A man of great generosity and enormous intellectual energy,
Laski had a penchant for exaggeration. This limited his effective-
ness as a man of affairs which a side of him wanted very much to be.
Like Boswell, and in marked contrast to their two older friends,
Laski burned himself out and died at the relatively young age of
fifty-six.

As for Johnson’s religious belief, or indeed any form of obei-
sance to a Supreme Being, Laski loathed it even more than Holmes
did. For Laski religion was a sham, a corrupting, corrupted whore,
more responsible than anything else for man’s degradation and ac-
quiescence in that degradation. Religion was hypocritical in pur-
porting to reach for the sky while in fact it was buried in the coarsest
and often most materialistic self-interest. But, as is true of many
intellectuals, Laski longed for the sacred, for the purest, ideal goal.
He found it in Marxism. For Laski, it was clear that the day would
come, whether peacefully or by violence, when the laborer would
gain ascendancy; when that day came, beauty and trust and compas-
sion—and even individualism—would flourish in a new world of
economic egalitarianism. Laski had originally hoped the aristocracy
and the bourgeoisie would assent to the displacement of their au-
thority and power, but if not, the displacement would be won by
blood.
Early on Laski had a passionate commitment to political freedom. He was deeply hostile to governmental power. On occasion he gave voice to deep reservations about Stalinist totalitarianism. But he saw it as an understandable blemish in society's first experiment with a new order, a blemish that ought not dissuade more advanced countries—especially the United Kingdom with its deep tradition of civility—from embracing socialism and rejecting capitalistic values.

In his earlier period right after World War I Laski wrote what has been termed his "Big Four": *Studies in the Problem of Sovereignty* (1917), *Authority in the Modern State* (1919), *The Foundations of Sovereignty* (1921), and *A Grammar of Politics* (1925). At that point in his development Laski distrusted political power and politicians who wielded that power. He came later to feel that egalitarianism was more important than political pluralism. If centralized governmental control was necessary for a fairer distribution of goods, so be it.

Increasingly Laski felt that citizens as consumers were slighted by the existing systems of government in the Western world and that the structures of government were in effect rigged against change in the distribution of economic means. In part it was his involvement in the affairs of the early British Labour Party that prompted him to change his mind about what was most important in British governmental structures. The accession to power of the MacDonald Labour government in 1929 was the cause of great hope for Laski and his fellow party supporters. His later disillusionment with the MacDonald government dashed Laski's hopes of a ready solution to the dilemma of bringing about egalitarian democracy.

The obstacle was the enormous power of what Laski perceived as the aristocratic political parties, parties that in Laski's view were anachronistic. George Feaver points out that

the general success of representative government in the nineteenth century, Laski believes, was the result of an underlying agreement between the parties on fundamental principles. All concerned accepted without question the premise of an unequal society, a state of affairs which [Laski] argues is no longer tenable [since] one of the parties to the contemporary debate rejects the premise out of hand.38

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38. G. Feaver, Intellectuals and Politics: Harold Laski Revisited, A Paper Prepared for Delivery at the Forty-Sixth Annual Meeting of the Canadian Political Science Association, University of Toronto, June 3-6, 1974, at 41.
It was a great setback, in Laski's view, that McDonald's Labour government would agree to be a mere foundation block for a more general national government composed of all factions. The result in Laski's thinking was a swing away from pluralism to Laski's own particular brand of Marxism. This swing represents the final phase of his political development. Feaver writes that "Laski was certain the capitalists had sabotaged the 1929 Labour government and would do so again."³⁹

Laski's point of view led him to entertain serious doubts about the very continuation of democratic government in Britain. From then on, Laski's books took on an increasingly Marxist tendency, and in The Crisis and the Constitution (1931), Democracy in Crisis (1933), and Parliamentary Government in England (1938) we discern a growing conviction that the state "is in practice...a thinly disguised mechanism for maintaining a given system of class relations."⁴⁰ After that, we see a conviction on Laski's part that Marxism is the answer to all problems related to governmental structure. Neither social reform nor fair economic distribution, in his view, could be effected as long as the ruling classes in England have in effect a veto power over change.

As Laski's conviction grew that Marxism was the answer, we see in him an increasing religious fervor concerning the need for Marxist change and the panacea that would result from such a change. He had earlier written:

The compelling strength of communism is that it has a faith as vigorous, as fanatic, and compelling as any in the history of religions. It offers dogmas to those whom skepticism troubles; it brings to its believers the certitude which all great religions have conferred; above all, perhaps, it implants in its adherents the belief in their ultimate redemption.⁴¹

Laski's 1944 book Faith, Reason and Civilization was his most explicitly religious book. At the time the book was written Laski was engaged in a political tussle with Churchill and others with respect to the degree to which labor support of the war effort should or should not include commitments to radical change in the post-war world. Laski felt that the fervor engendered by the war effort against a common foe should be used as a springboard to bring

³⁹. Id.
⁴⁰. Id. at 42.
⁴¹. H. LASKI, COMMUNISM 246 (1927).
about essential change in social structures immediately after the war. And, in Laski's fervently held view, the commitment to those changes should be made before the war ended.

*Faith, Reason and Civilization* develops the theme of early Christian fervor as not only analogous to the fervor for defeating a common foe during the war but also as analogous to the fervor for revolution in the Western world as epitomized by the Russian Revolution. Laski wrote:

Faith in the revolution possesses for its devotees the same kind of magic hold as Christianity exercised over its first followers. It is a call to what is highest in man, and a call to the fulfillment of what is highest not merely as an offering upon an altar of self, as the promotion of a private interest, but as a contribution to a fellowship in which selfhood is fulfilled in the context of a greater purpose by which it is absorbed.42

At the time of Laski’s death, Max Beloff referred to “The Age of Laski.”43 Daniel Patrick Moynihan in a seminal article has pointed out that Laski’s influence on the Third World remains primary and persuasive.44 England’s former colonies are governed by former Laski pupils, or pupils of those pupils. These Laski disciples profess determination to bring “Jerusalem” to their often barren lands by Laski’s version of socialism. They are Marxist but many are nonetheless nervous in the shadow of Russia (and one could add, since Laski’s death, many are also nervous about China).

Like Johnson, Laski was not a lawyer. But also like Johnson, Laski thought and wrote a great deal about the law. Laski was for a long time the leading Englishman in understanding and advocating the use of legal realism. He was unusual in recognizing the importance of understanding the political, economic, social, and even personal bases of British legal decisions, and how much such nonlegal factors influence and even dominate decisions of courts of law. Laski was often a voice crying in the wilderness for the reform of English legal education and legal thinking. But at least some of the changes he advocated have gradually taken place in England.45

42. H. LASKI, FAITH, REASON AND CIVILIZATION 53 (1944).
44. Moynihan, The United States in Opposition, Commentary, Mar. 1975, at 31, 44.
45. Compare, e.g., 1 LETTERS, supra note 18, at 547 (Laski deprecating one Lord Atkin’s “curious legal conservatism which regards principles as eternal instead of approximations to . . . the truth”) with P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 660-71 (1979) (decrying the mechanistic formalism of English law during the period 1870-1970).
If Laski rejected both Johnson's religion and Holmes' skepticism, Holmes in return, as we have seen, rejected both Johnson's and Laski's faiths. Indeed, Holmes represents another great strain that has dominated so much thought in the twentieth century: Existentialism. For all his skepticism and cynicism about the purpose of life or of the cosmos, Holmes deeply believed in living life intensely. He relished into ancient age, his work, his pleasures, including his reading, his friendships, his memories. He loved his wife deeply and their life together was zestful and intensely close. If nothing was of lasting importance, living as though things were was man's glory. How else explain his struggling with Greek texts into his nineties in order to improve his mind? He gloried in understanding deeply and experiencing fully all facets of life from the trivial to the weighty, from the physical to the ethereal. To grow, to live, to love, to laugh, to fight, to think, to be were all in and of themselves glories, no matter how little they might ultimately lead to. If ultimately all was to be ashes, the fire was nonetheless warming while it lasted.

With such a bleak, yet paradoxically uplifting philosophy, Holmes anticipated Camus and other Existentialists. Indeed such a philosophy may be the real religion of most sophisticated modern men and women. But the religions of Johnson and Laski are, if wounded, by no means dead. For many all over the world they remain as vibrant as ever. Doctor Johnson, Justice Holmes, and Professor Laski continue to live among us yet.