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## The Spirit of Liberty: Papers and Addresses of Learned Hand. Collected by Irving Dilliard.

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## BOOK REVIEWS

THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND. Collected, and with an introduction and notes, by Irving Dilliard. New York: Alfred A. Knopf. 1952. Pp. xxvii, 262, \$3.50.

“Civilization implies specialization, specialization is forgetfulness of total values and the establishment of false ones, that is Philistinism . . . We must in practice be specialists; the division of labour ordains us to know something of one subject and little of others; it forces Philistinism down our throats . . . Because a man is an artist is no reason why he is no Philistine, if he is only an artist and has no sympathy with unartistic activity . . . If he will be heard himself, he must listen to others; if he hopes to gain the consideration or respect for his work that he himself feels for it, he must in a measure abrogate its claims to predominance and value the work of others.”

The principal point of these observations, made in his Harvard class-day oration by young Billings Learned Hand, is illustrated in every one of the addresses and papers which Mr. Dilliard has included in this impressive volume. Learned Hand—he dropped the name *Billings* because he thought it pompous—is certainly a specialist, and perhaps he was predestined to be so, for both his father and grandfather were judges before him. He himself was a skilled judge at the age of forty; and from 1909 to 1951 when he retired from the bench he has judged the people nearly all the days of his life; and he has done so in causes of such a technical nature as the Prophet Samuel could never have imagined. As judge, first in the United States District Court for Southern New York, to which he was appointed by President Taft; then in the Court of Appeals for the Second Circuit to which he was appointed by President Coolidge in 1924, he has, all in all, written nearly two thousand opinions; and these, to use Mr. Dilliard’s language, on almost “every conceivable subject from maritime liens to income taxes, from banks and banking to naturalization and citizenship, from labor to trademarks.” A famous technician indeed, Hand could be pardoned if he were only that; and hence a Philistine by his own definition of the term. But Hand does not need to be pardoned because he can never be accused. All these papers and addresses, as well when they deal with courts, judges and the law as when they give advice to the young females of Bryn Mawr at their Commencement exercises, reveal a mind not bounded by the walls of the forum but by those of nature, a mind over which the shades of his old preceptors at Harvard, William James, George Santayana and Josiah Royce must be even now rejoicing in the Elysian Fields.

Hand's humane and liberal disposition appears nowhere more conspicuously than in his several appraisals of the work of his brethren of the bench. Though these appraisals were made directly for experts in the law, the author contrives to avoid shop-talk\* and seeks to find in the labors of the jurist under consideration something significant for the whole community.

Many sophisticated persons not only in law but in other disciplines, and many cynical persons who lay claim to no discipline at all are saying today that detachment is an illusion; that no mere mortal is capable of detachment. Hand, however, in commenting upon his colleague, Judge Thomas Walter Swan, lauds him for this very quality and asserts that the prime condition of a judge's success "will be his capacity for detachment . . . we know," he says, "that men do differ widely in this capacity; and the incredulity which seeks to discredit that knowledge is a part of the crusade against reason from which we have already so bitterly suffered."

In his eulogy upon Mr. Justice Brandeis, Hand makes no direct mention of a single opinion or rule of law or of any other technical matter; but rather he dwells on that curse of bigness which troubled the Justice's spirit; and in Aristotelian vein alludes to his belief that "there could be no true community save that built upon personal acquaintance of each with each; that thus alone could character and ability be rightly gauged" and the "latent richness in all of us come to flower." Conceding with Brandeis that a return to the Greek state is impossible in the present time, he warns that a big state is not necessarily a great one; and he sees Brandeis' peculiar message for his time in the warning that the big state will certainly not be the great state unless it cherish spiritual values: "You may build your Towers of Babel to the clouds . . . it shall avail you nothing . . . Not until you have the courage . . . deeply to believe that each of you is a holy vessel unique and irreplaceable . . . will you have taken the first steps along the path of wisdom."

Two ideas dominate Hand's brief but eloquent eulogy of Mr. Justice Cardozo: "A judge," says he "must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time—at all hazards he must maintain that tolerable continuity without which society dissolves, and men must begin again the weary path up from savagery. This was the problem that

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\*The reviewer is taking into consideration only the form in which these papers appear in this volume. Some of them are here republished from legal journals. Whether there is more technical material in the original form he has not investigated.

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fascinated Cardozo . . . His solution of the contradiction was his great contribution to his time." Hand then returns to the subject of detachment. Cardozo had wisdom. "And what is wisdom . . . ? I do not know; like you, I know it when I see it but I cannot tell of what it is composed. One ingredient I think I do know: the wise man is the detached man;" he is the man who "can weigh the conflicting factors of his problem without always finding himself in one scale or the other. Cardozo was such a man . . ."

Detachment and a respect for the individual soul are themes that appear in these papers again and again. Another is a certain distrust of what pass for the eternal verities. "Have no confidence in principles that come to us in the trappings of the eternal. Meet them with gentle irony, friendly skepticism and an open soul," says Hand; and he affirms, with a graceful gesture of skepticism at his own talent as interpreter, that this is the burden of the message of Mr. Justice Holmes, a sermon to the effect that mortal man does not possess the truth and probably never will; but "must grope his way through the murk" by trial and error.

If this is so, why should not Hand either as philosopher or judge give full rein to every vagrant social impulse to change, even to change by violent revolution? The answer seems to be, in part at least, that this would be failing to "maintain that tolerable continuity without which society dissolves, and man must begin again the weary path up from savagery." But this is not the whole of Hand's answer. If eternal verities are to be distrusted, not only the venerable traditions of the past must be skeptically received but also the seductive panaceas of the present, "the imperious nostrums," as he calls them, "which will brook no dissidence." Such nostrums not only offend skepticism but defy that tolerance which forms yet another theme of this wise book; and taken together with the rest, conjures up the spirit of liberty—"that spirit which is not too sure that it is right . . . which seeks to understand the minds of other men and women . . . which weighs their interests alongside its own without bias . . . the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but never quite forgotten, that there may be a kingdom where the least shall be heard and considered side by side with the greatest."

The judge is not very hopeful about the preservation of that spirit in modern America. Having described with a mordant wit the techniques of advertising and propaganda, he submits "that a community used to be played on in this way . . . is not a favorable soil for liberty." He has little faith in "liberal weeklies . . .

[or] American Civil Liberty Unions" to preserve liberty; and as little in "laws, or courts, or principalities or powers, to secure it. You may write into your constitutions not ten, but fifty amendments," he declares, "and it shall not help a farthing, for casuistry will undermine it as casuistry should, if it have no stay but law." The very political processes in our democracy he sees as potentially hostile to liberty because, viewing them in a realistic Hamiltonian light, he believes them to be little more than the competition of selfish interests. Indeed he goes so far as to assert that even in our democracy, "Liberty is so much latitude as the powerful choose to accord the weak."

But if Learned Hand is not very hopeful, neither is he altogether without hope. He seems to believe it possible for the powerful themselves to practice some forbearance; and for those who aspire to be powerful to do the same. He seems to believe it possible, if difficult, for groups and interests to view even their own aims with some measure of detachment and those who oppose them with some degree of respect. This hope arises from his continuing faith in the efficacy of the Jeffersonian ideal of education,—not training in taxidermy or teaching, in merchandising or medicine—but education in the Liberal Arts. "I conceive," he says, "that there is nothing which gives a man more pause before taking as absolute what his feelings welcome . . . than even the flicker of a recollection that something of the sort has been tried before, felt before, disputed before, and for some reason or other has now quite gone into Limbo . . . In short, I argue that the political life of a country like ours would . . . tend to escape its greatest danger, which is the disposition to take the immediate for the eternal, to press the advantage of present numbers to the full, to ignore dissenters and regard them as heretics, by some adumbration of what men have thought and felt in other times and at other places . . . The principles of a common pump . . . are not so important politically as Keat's *Ode on a Grecian Urn*."

Whether education of this kind could produce enough men of Judge Hand's temper really to matter much is a moot question. If it could, we should see not only the Philistine in the cultural world but also his counterpart in the political world vanish away before our eyes; and as learning is secure when every scholar, if he hopes to gain the respect for his work that he himself feels for it, in a measure abrogates its claims to predominance, so liberty is secure when every citizen, prompted by a similar motive, does the same with his interest. This would be that *constans et perpetua voluntas suum cuique tribuendi* in which alone, according to the Judge, liberty can be secure.

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One wonders whether wise reflections of this sort did not form the inarticulate major premise that lay behind Judge Hand's famous decision in *Dennis v. United States*. Mr. Dilliard, like many others of the liberal school, seems not to like that decision. This reviewer likes it; and cannot see how upon the ground of most of the texts which this book furnishes the judge could have decided otherwise than he did, even though he does express a skeptic's distaste for regarding dissenters as heretics. If the dissenters in question, make it clear that they will countenance no dissent at all, once they come to power, to indulge them in their conspiracy to seize power, would be to run to meet what one would most avoid. Learned Hand is of a temperament too exquisitely balanced to blunder into this kind of *cul de sac* or to invite this kind of frustration.

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