BOOK REVIEWS

THE BILL OF RIGHTS. By Learned Hand. Harvard University Press, Cambridge, Mass., U.S.A., 1958, pp. 82. $2.50.

In going over the Dean's Report, Harvard Law School, for 1957-1958, we note that "the Oliver Wendell Holmes Lectures were delivered on February 4, 5, and 6, 1958, by the Hon. Learned Hand, LL.B. 1896, retired Judge of the United States Court of Appeals for the Second Circuit." This book embodies Judge Hand's lectures.

Who is Judge Learned Hand? To the uninitiated he might well be just another judge but to all others he is a demi-god.

No federal judge had served longer on the bench than Learned Hand when he retired from regular active service on June 1, 1951. First appointed by President Taft as a U.S. District Judge at the age of 37, in 1909, he was appointed by President Coolidge in 1924 to the United States Circuit Court of Appeals for the Second Judicial Circuit covering Vermont, Connecticut and New York. As a judge, Hand wrote almost 2,000 opinions on practically every conceivable justiciable matter which can be found in over 300 volumes of the *Federal Reports*.

It has been said of Judge Hand that he was the spiritual heir of Marshall, Holmes, Brandeis and Cardozo. As early as 1923 Holmes had expressed the hope that Hand would be appointed to the Supreme Court. In an article in the February, 1947 issue of the *Harvard Law Review* which was dedicated to Judge Hand on the occasion of his 75th birthday, Justice Frankfurter called him "one at whose feet I sat almost from the time I came to the bar and at whose feet I still sit." But like the girl who was always a bridesmaid but never a bride, Judge Hand somehow did not make the Supreme Court. One reason overtly advanced was his age. It is said that in 1942 when President Roosevelt was urged to appoint Judge Hand, then 70, to a vacancy in the Supreme Court, Roosevelt vetoed him because of his age. It may well be, however, that no president found Judge Hand's skepticism palatable. For his over-all philosophy is embodied in Oliver Cromwell's plea just before the Battle of Dunbar: "I beseech ye in the bowels of Christ, think that ye may be mistaken." Speaking before a congressional committee on June 28, 1951, he said: "I should like to have that written over the portals of every church, every school, and every court house, and . . . of every legislative body in the United States." And it was because of such philosophy that a few years before, in Central Park, New York City, on the occasion of "I Am an American Day" ceremony, he said of liberty: "The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has not quite forgotten; that there is a kingdom where the least shall be heard and considered side by side with the greatest."

Judge Hand was born in Albany, New York, on January 27, 1872. He entered Harvard College in 1889. He majored in philosophy under Santayana, Royce and William James. He graduated *summa cum laude*, earned membership in Phi Beta Kappa and was the Class Day orator of the class of 1893. In 1894, he received his M.A. degree, also from Harvard College, and then he went on to Harvard Law School where he became an editor of the *Harvard Law Review* and graduated with honors in 1896. (For more on Judge Hand, read: The Spirit of Liberty, a collection of papers and addresses of Learned Hand by Irving Dillard; Frankfurter, Of Law and Men; Ross, The Legend of Learned Hand, Reader's Digest, July 1951, p. 105; Hamburger, The Great Judge, Life, November 4, 1946, p. 117; and Current Biography, 1950, p. 218.)

In his lectures Judge Hand re-examines the American doctrine of judicial review—a subject, according to him, that is well-worn but nonetheless always fresh—in respect of statutes and acts of the President which collide with the Bill of Rights. The lectures, not surprisingly, reflect Judge Hand's skepticism.

Judge Hand states that the American Constitution, in allocating powers to the different departments, did not expressly provide for the situation where a department finds it necessary to consider the validity of some earlier act of another department. Such a situation might be met by (a) the second accepting the decision of the first that the act was within the competence of the latter; or (b) the second deciding the question according to its own light; or (c) the courts to decide which was right.

The third solution prevailed in *Marbury v. Madison* although, according to Judge Hand, "there was nothing in the United States Constitution that gave courts authority to review the decisions of Congress; and it was a plausible—indeed to my mind an unanswerable—argument that it invaded the 'Separation of Powers' which, as so many then believed, was the condition of all free government." Nonetheless Judge Hand believes that "without some arbiter whose decision should be final the whole system would have collapsed." According to him the courts were the best choice for "by the independence of their tenure they were least likely to be influenced by diverting pressure." He cautions, however, that "it was absolutely essential to confine the power to the need that evoked it; that is, it was and always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those frontiers."

Legislation, according to Hand, presuppose, among other things, a choice which depends upon an appraisal of values and sacrifices. This is not an easy task and when a court determines the rightness of the adjustment between values and sacrifices, it does not merely set the ambit of legislation but assumes "the role of a third legislative chamber." This is especially true, he says, in respect of the "inept phrase, the Police Power" which has been so loosely defined as to leave "no alternative to regarding the court as a third legislative chamber."

The observations of Judge Hand appear to be appropriate for in August, 1958, the Conference of State Chief Justices approved a report, citing Judge Hand, which reads in part as follows:

> "The extent to which the Supreme Court assumes the function of policy maker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.
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> "We believe that, in the fields with which we are concerned and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical nonreviewability in most instances, no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role. We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seems to us primarily legislative powers. See Judge Learned Hand on the Bill of Rights.
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> "We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises.
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> "It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of powers between national and State governments, one branch of one government—the Supreme Court—should attain the immense and, in many respects, dominant power which it now wields. We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy." (U.S. News & World Report, Oct. 3, 1958, pp. 101-102.)

Judge Hand assumes that a third chamber is necessary to pass upon the merits of legislation. But should that chamber be the courts? He gives arguments pro and con and answers the question as follows:

> "Each one of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies. No one can fail to recognize the perils to which the last forty years have exposed such governments. We are not indeed forced to choose between absolutism and the kind of democracy that so often prevailed in Greek cities during the sixth to fourth centuries before our era. The Founding Fathers were acutely, perhaps overacutely, aware of the dangers that had followed that sort of rule, though, as you all know, they differed widely as to what curbs to impose. For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus

> of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it, I reply, following Saint Francis, "My brother, the Sheep." "

In the Philippines we are fortunate in having the Supreme Court adhering to its strictly judicial powers. And unless there should be a drastic change in its approach, the Supreme Court, which often leans heavily on technical considerations, will not likely get the same critical appraisal as the Supreme Court of the United States.

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EQUAL JUSTICE UNDER THE LAW, by Carroll C. Moreland, Oceana Publications, Inc. 1957. Index. Pp. 128. ₱5.50

An unimpeachable essay on the Rule of Law, the book treats of the courts as media for the dispensation and administration of order with justice. Couched in clear and forceful language, it presents a realistic solution to the unending problem of equal justice.

The administration of justice and equality under the law, according to Moreland, is not the concern of the lawyer alone; it also is, in the ultimate analysis, the responsibility of every citizen. It is the primordial duty of everyone to see to it that this equality is maintained and safeguarded. Vigilance and consciousness to present tendencies might as well be the watchword of every individual. To do so, he must know the means by which this equality is accomplished. Such knowledge ordinarily can only come to him from a book such as this, which supplies the information necessary to an understanding of the operation of our legal system, and adds the vital attribute of true understanding to his mental picture of the courts.

What equal justice under the law means, the essay profoundly and subtly distinguished. It proclaims not only the equality of everyone, rich or poor, weak or strong, but also the more important and basic doctrine, that government is one of laws and not of men. And these systems of law tend to vary according to differences in resources, climate, geography and culture. Justice therefore is relative—changing according to circumstances of time, place and persons.

The book underscores the importance of the legal system in the maintenance of the American way of life. Individual liberties corrode and vanish in proportion to the decline in the independence of the courts. It gives a vivid image of how these instruments function and account for in the struggle between the state and its constituents. Being brief and comprehensive at the same time, this survey is a *must* reading for the practicing lawyer and the law student alike.

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CRIMINAL MAN, by George Godwin. George Braziller, Inc., New York, 1957. Bibliography. Index. 277 pp.

Crimonology is one field of study replete with perennial problems. The causes of crime, punishment of the criminal, insanity, capital punishment, to mention but a few: all these have been the subject of varied theories and opinions from earliest recorded history. Dostoevsky's *Crime and Punishment* very vividly depicts the confusion.

Who is the criminal? What are the causes of crime? Prof. Cesare Lombroso propounded that the criminal is born, not made. He believed in the existence of a "criminal type" susceptible to diagnosis by the anatomical anomalies of the skull and recognizable by certain physical stigmata. Opposed to this theory is Dr. Charles Goring, who postulated that there is no such thing as a "criminal type." His thesis was that there is no criminal class but that it is just that some individuals have elected for the criminal way of life. That man's fate is in his genes is Prof. Johannes Lange's opinion. He stated that biological inheritance is the governing factor in the production of the criminal elements of society. The results of his investigations being that

heredity plays a part far more important than environment, he looked upon crime as destiny. Prof. Karl Berg theorized that some people commit crimes because they are damned. These are the "monsters" and the "sadists." In them, remorse, shame, and moral sense are completely absent. The biological and environmental hypotheses are rejected by Prof. Max Schlapp as causative factors. Certain categories of offenses excepted, his mechanistic theory of criminality attributed all crime to defective bodily function. Another contribution to the problem of the etiology of crime is that of Dr. Frederic Wertham. He advanced the theory that the criminal may in certain cases be the victim; he may be the victim of social circumstances. It may happen that crime is the only means of escape from the "intolerable situation." The question then for Dr. Wertham is not only why the criminal does it but also how the criminal justifies it to himself.

Summing up, the author writes: "So the truth would seem to be that the causes of crime are manifold and that to dogmatize involves that sort of danger which befell Lombroso with his rigid theory of 'criminal man.'"

Can the criminal be cured? How should he be treated? There was a time in Europe when the evils of the criminal law and the inhumanity of punishments were so disgusting that they moved noble minds in protest. Cesare Bonesana, Marchese di Beccaria, made the greatest single contribution to the cause of reform in this field. His principles of penology remain as valid now as during his time. To the existing problem of the nature of crime and punishment, Jeremy Bentham applied the method he employed in the philosophical examination of every subject that engaged his mind. That is why his writings on the subject were full of sound sense. He published a plan upon which he had been working for years—a plan for the ideal prison. His scheme came to nothing, but it had an influence on the theory of prison architecture. Samual Romilly rebelled against the so-called "wisdom of ancestors." He spearheaded a humanitarian crusade for penal-law reform and consequently made it easier for the generation coming after him to dispel old errors. John Howard and Elizabeth Fry made great achievements in the moral sphere. Another man who challenged long-accepted ideas of penology was Thomas Osborne. He posited that to be of use to society, a good prison must be one that gives an offender some power of choice between alternatives. His was one of the early steps towards the honor system and the modern prison without walls. Dr. W. H. de B. Hubert and Sir W. Norwood East emphasized the value of psychological treatment in the prevention and cure of crime. They advocated the creation of a special institution for the care, study and treatment of a selected group of criminals.

The trend then in penology is, as put by the author, "the improvement of all methods which help to reduce the criminal elements of society by prevention and by reform or cure."

As can thus be seen, the reader, after reading the book, is at once acquainted with the big figures of criminology and their lives. What more, their theories are made more understandable to him because they are presented in the context of the circumstances and conditions obtaining at the time they were evolved. The book is therefore more than a compilation. It is a compilation beautifully annotated by the author.

Mr. George Godwin is a novelist, biographer, playwright, and writer. It is not therefore surprising to find the different topics presented in a stylish and dramatic manner. For the same reason, literary allusions and diversions are scattered throughout the book. Despite this, it can be said that the author succeeds in selling to the reader his main idea, *viz.* that the criminal himself be studied and not the crime.

The author has some good suggestions on the rules of insanity (the famous M'Nagthen Rules) prevailing in England today. His arguments against capital punishment are cogent. And he makes brief but enlightening comments on the police system at Scotland Yard. The reader's only regret is that Mr. Godwin did not go well beyond a discussion of English criminology.

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