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Learned Hand

John J. Cound*

Learned Hand taught us many things. What he taught us best was faith in our work: faith that it can be done and is worth doing. This message Learned Hand's life was to all lawyers. It came especially loud and clear to those who were his clerks. *Haec olim meminisse iuvabit.*

Judge Hand's clerks learned much that was practical: that judges and courts "are not fungible"; that a clear statement of facts is the most important part of a brief—to the court, and hence to counsel also; that *stare decisis* means more in court than it often did in the classroom. They learned much too that was interesting: tales of presidents and justices; legal ditties; and a score of fetching epithets. They learned a lot of law. Transcending these things, however, they learned by the most direct contact the old truth that man can live greatly in the law. For they had seen one of profound wisdom and wide knowledge, after decades of similar labors, face each new question with a fresh and ungrudging response, and find his reward in its resolution according to his reason. They learned too that wisdom and knowledge have their doubts, more unsettling perhaps in proportion to their depth and breadth; but they saw that doubts do not excuse (nor need they tempt) one from the task. The mind of a Hand is unique. But the ends to which he worked are open to all, and I do not believe that anyone could talk at length with Learned Hand and come away with his own philosophy unscathed.

As complex a structure as the judicial philosophy of Learned Hand certainly cannot be broken down into a few constituents. Yet frequent recurrence lends special significance to these three: a regard for craftsmanship, a belief in reason, and a doubt as to the absolute validity of any conclusion.

I

. . . in all chosen jobs the craftsman must be at work, and the craftsman, as Stevenson says, gets his hire as he goes.¹

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1. HAND, *The Preservation of Personality*, in *THE SPIRIT OF LIBERTY* 30, 44 (Dilliard ed. 1953), originally published in 7 *BRYN MAWR ALUMNAE BULL.* 7 (1927). See also HAND, *THE BILL OF RIGHTS* 77 (1958); Hand, *Mr. Justice Holmes*, 43 *HARV. L. REV.* 857, 860–62 (1930).

The value which Learned Hand attached to skilled performance arose in part, I am sure, from an aesthetic sense. His career refutes any suggestion of dilettantism, of infatuated adherence to form or concept. Yet were law nothing more than the stuff of conditioned response or *ad hoc* choice, his nature would have had none of it. Hand's story of Holmes telling him that "it's not my business" to "do justice" has been widely repeated. Even more revealing is the relish with which he recounted Holmes' story on the same occasion: Holmes had argued a case before the Supreme Judicial Court of Massachusetts, relying upon a careful exposition of the accepted law, only to have the decision rendered against him on grounds of "public policy." The judge who had written the opinion, meeting Holmes a few days afterwards, congratulated him upon the skill of his argument. "Your honor," replied Holmes, "I came at you with an épée; you hit me over the head with a sack of potatoes."

Hand's regard for craftsmanship, however, had deeper roots than these. His skepticism prevented him from forming any judgment as to man's cosmic significance, yet he cared deeply for man and could not deny him any meaning whatsoever. Man's meaning then is what he does. His work becomes indistinguishable from his reality. In lines almost mystic, Hand says:

Even this obdurate and recalcitrant world is perhaps in the end no more than a complicated series of formulae which we impose upon the flux. If so, we are throughout its builders, unconscious but always at work. In part at any rate, we consciously compose; and as we do, a happy fortuity gives us the sense of our own actuality, an escape from the effort to escape, a contentment that the mere stream of consciousness cannot bring, a direction, a solace, a power and a philosophy.²

II

A ready acquiescence in unsound reasoning for the sake of an immediate end vulgarizes our whole rational life . . . [A] right result reached by unsound reasons gives no assurance of permanent acquisition.³

A disciple of Holmes, Hand had no illusion that the law is "nothing else but reason," divorced from a world of past and present facts. Indeed a hyperlogical decision was apt to set him to chanting the Lord Chancellor's verse: "The Law is the true embodiment of everything that's excellent . . ." But to reason pragmatically is certainly not to refuse to reason at all. Nor does it en-

2. HAND, *The Preservation of Personality*, in *THE SPIRIT OF LIBERTY* 30, 44 (Dilliard ed. 1953).

3. Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 5 *AM. L. SCHOOL REV.* 621, 623-24 (1926).

tail the rejection of precedent as a consideration or symmetry as a value. Judge Hand's contribution to the growth of American law, which is more than considerable, demonstrates that to assert the validity of this consideration and this value may be to argue not for a static law, but for a law which progresses within and strengthens the existing corpus. Progress so conditioned not only guards against fiat, but subjects old law and new to the constant gaze of reason.

Concerned as he was with the pattern of the law, Hand did not accept the notion that a judicial opinion is only a rationalization for a result otherwise reached. That he had a pride of style is obvious. But as nearly as he could make them do so, I believe, his opinions reflected the mental processes by which he had reached his result. The related doctrine that all results are foreordained by the preconceptions of the judge he flatly rejected:

There are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted, always reveal a passionate foundation. Even so; though they be throughout the creatures of past emotional experience, it does not follow that that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crisis, as any other bias. Be that as it may, we know 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.⁴

III

He who supposes that he can be certain of the result is the least fitted for the attempt.⁵

Judge Hand's belief in reason as a source of law, and his distrust of his own reason's results seem paradoxical at first. Yet they are logically conjoined. He who is least certain is most likely to be receptive to reason. He who is most receptive to reason is least likely to embrace those brethren of certainty—the absolute, the general principle, the formula and the controlling concept. The

4. Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 172 (1947).

During the year I worked for Judge Hand, he sat—except in one case—only with Thomas Swan and Jerome Frank. If judges were not amenable to reason which is opposed to their preconceptions, I would think that despite their high mutual regard for one another the diverse experience, temperament and views of these three would have weakened their joint effort. My impression was that on the contrary the diversity was a source of strength, and that indeed no better three-judge panel ever sat. Even where differences occurred, the effect, it seems to me, was to produce more thoughtful analysis and expression than would otherwise have been the case. See, e.g., *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 96, 99 (2d Cir. 1953) (L. Hand, J., concurring; Frank, J., dissenting).

5. *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952).

inquiring mind will continue to inquire. To the extent that this skepticism occasioned a re-examination of received learning we owe to it much of Learned Hand's contribution to our law, and common consensus would stamp it a healthy doubt.

Unquestionably, however, Hand's distrust of judicial wisdom also played a major role in his approach to the question of judicial review on which the consensus is not unanimous. Even in that rare instance when he found an unconstitutional assertion of power he was unable to take refuge in one of the comforting placebos common to the time:

It would be, I think, disingenuous to pretend that the ratio decidendi of such decisions is susceptible of statement in general principles. That no doubt might give a show of necessity to the conclusion, but it would be insincere and illusory, and appears formidable only in case the conclusion is surreptitiously introduced during the reasoning.⁶

But of course it is *Dennis* (and *The Bill of Rights*), and not *Schechter* that have evoked the major criticism, though we cannot be sure with respect to the political freedoms how much his position is due to a belief that however skilled the court our democratic commitment leaves these questions in elected hands.⁷

This is not an occasion for a study of the appropriate scope of judicial review in cases involving freedom of expression. For myself I would mark the question at present one of doubt. It may be

6. *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 625 (2d Cir. 1935) (concurring opinion, representing the majority of the court on this issue).

I once asked Judge Hand whether this was, as I had been told, the only case in which he had held an act of Congress unconstitutional. He snorted, "It wasn't an act, it was a regulation." Then in candor he told me of his Harvard professor (Gray, I believe) who having said that no state took a certain position, replied to a student who pointed out Kentucky, "That's not a state; it's a commonwealth."

7. Judge Hand's views as to the difference in point of view of necessity and desirability between judicial review of statutes dealing with the allocation of powers among governmental units and judicial review of statutes challenged under the first, fifth and fourteenth amendments, is of course the major substance of *THE BILL OF RIGHTS* (1958).

In connection with this book, I would like to speak to a misapprehension held by many. Judge Hand has been criticized for the stand he took there. This is to be expected. But many have read them as an attack on the Supreme Court as presently constituted or even on a particular decision or decisions. I think it worth noting that what he said there he had frequently said before over many years; moreover that he had been planning these lectures over a long period. He had expressed to me (as I am sure he had to earlier clerks) his intention of saying just about what he did say. Indeed, he said that he feared he could really add nothing to Thayer's *The Origin and Scope of the American Doctrine of Constitutional Law*, in 7 *Harvard Law Review* 129, published in 1893. I cannot regard the date of the lectures as more than happenstance.

that the idea, represented by Learned Hand, that "the prohibitions of the First Amendment . . . are 'no more than admonitions of moderation' . . . has done more to undermine liberty in this country than any other single force."⁸ Perspective demands, however, in measuring the man who is gone that we remember that by statutory interpretation he cleared for the mails in time of war a magazine which printed the same things for saying which Holmes and Brandeis affirmed the conviction of Debs under the same statute four months after the war was over.⁹

Learned Hand's doubts extended beyond the principles we hold and argue as lawyers; they dared even to question our importance and his own. But faith in the craft tradition was always there. In speaking to the law teachers in 1925, he seems to have spoken to the entire bar:

The Temple of Justice we think of as especially our own, but its roof covers more than we can occupy. For Justice is no less than the Good Life, and we shall have but a small part in bringing that to pass, so far as it comes. With confidence in the greatness of our share, if not in the sufficiency of our powers, we must pledge ourselves as fellow servants in the small precinct which is allotted to us.¹⁰

8. DOUGLAS, *THE RIGHT OF THE PEOPLE* 45 (1958).

9. *Masses Pub. Co. v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917), *rev'd*, 246 Fed. 24 (2d Cir. 1917); *Debs v. United States*, 249 U.S. 211 (1919).

10. Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 5 *AM. L. SCHOOL REV.* 621, 631 (1926).

