THE UNIVERSITY OF OKLAHOMA

GRADUATE COLLEGE

A STUDY OF ETHICAL PROOF IN THE CRIMINAL LAW OPINIONS OF JUDGE LEARNED HAND

A DISSERTATION

SUBMITTED TO THE GRADUATE FACULTY

in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

BY

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Norman, Oklahoma

1963

A STUDY OF ETHICAL PROOF IN THE CRIMINAL LAW OPINIONS OF JUDGE LEARNED HAND

APPROVED BY

DISSERTATION COMMITTEE

ACKNOWLEDGMENTS

The writer wishes to express his appreciation to Dr. Wayne E. Brockriede for his valuable assistance as director of this study and to the members of his committee for their useful suggestions and material assistance.

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CHAPTER I

INTRODUCTION

Purpose and Scope of the Study

This is a study of an eminent judge, his criminal law opinions, and the self-recommendations rhetorically made in these opinions. The purpose of this study is to (1) examine Judge Learned Hand's image and (2) with this image in mind analyze his criminal law opinions for the presence of ethical proof used as a persuasive device whereby the Judge offered himself as a credible source worthy of being believed.[1]

About Judge Hand, former Supreme Court Justice Felix Frankfurter wrote: "Equipped scholarship will in good time

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[1]"Ethical proof" as used in this study refers to the broad interpretation of ethos which considers qualities other than those judged to be morally right or wrong. William Martin Sattler says of the broad approach: "To limit ethos to qualities which receive approval on an ethical basis, however, is the narrow definition of the concept. There may be other factors pertaining to the speaker's [or writer's] character which contribute to his persuasive force. Such personal qualities as general intelligence, knowledge of the subject, appropriateness of diction and even pronunciation or appearance are a part

assay his vast output of opinions. . . ."[2] What appears demanded is an in-depth study of Hand's legal opinions against the background of his life, not to render legal interpretations but to explain better why his legal opinions enjoyed the support and praise given them. Even Hand's analysis of a good judge encourages further examination of these opinions to isolate their persuasive elements: "The good judge is an artist, perhaps most like a chef. Into the composition of his dishes he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests."[3] What elements did Hand blend into his legal compound to make it "delectable or at any rate tolerable"? Were some of these elements the manner in which he recommended himself to his judicial critics, first through the way he lived his life and second through the way he subtly introduced recommendations of himself as a credible source into his legal opinions? The interaction of these two sources of persuasion, namely as Hand was favorably perceived apart from his legal rhetoric and as Hand was received through his legal rhetoric, is an intriguing area for study which to now remains

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of the 'character' of the man speaking. At times such traits are judged by the ethical criterion, but they have little to do with the 'ethical.'" "Conceptions of Ethos in Rhetoric" (Unpublished Ph.D. dissertation, Dept. of Speech, Northwestern University, 1941), p. 8.

[2]"Learned Hand," Harvard Law Review, LXXV (November, 1961), 1.

[3]In Felix Frankfurter, "Judge Learned Hand," Harvard Law Review, LV (February, 1947), 327.

unexplored. Consequently, the thesis to be examined is that Hand was a judicial rhetorician, whether intentional or not, who made adept use of the ethical mode of persuasion. The focus of this study is on the use of ethical proof as an artistic creation brought about by Hand's recommendation of his credibility in his criminal law opinions. Preliminary to this focus, description of the Hand image should serve to sharpen the outline of the ethical proof found in the court opinions.

Judge Hand brought into the courtroom a credible image established apart from that manifested in his decision-making. According to Judge Thomas D. Thacher of the Court of Appeals of the State of New York: "Judge Hand has left . . . along his trail many parchments which speak eloquently of his mind, his character and his philosophy of life. These are the extraordinary attributes of the man. If we comprehend them we may perhaps comprehend him."[4] Indeed, if we first understand him, we should be better able to appreciate the introduction of Hand's character into his opinions as a means to enhance their acceptance. Judge Bok, commenting on the average trial judge, echoed Judge Thacher's point when he said: "His friends, his family life, his vacations, his religion--a little of these must be known in order to feel the integrity of experience of which his work is the outward expression."[5] That

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[4]"Judge Learned Hand," Record of the Association of the Bar of the City of New York, II (May, 1947), 189-190.

[5]In Jerome Frank, Courts on Trial (Princeton, New Jersey: Princeton University Press, 1949), p. 177.

"a man's works imply all the influences which have shaped his character" comes from Judge Hand's own philosophical utterances.[6] Therefore, an understanding of pre-existing credibility is necessary to fully appreciate those ethical elements written into Hand's criminal law opinions.

Scholars, speculating about the Hand technique that produced opinions of universal admiration, contend that "if Learned Hand be the great judge that great men of the bench unite in designating him, an analysis of his opinions should show forth his greatness."[7] Even if the Judge had not unveiled himself in his speeches and non-legal writings, his more than two thousand opinions would have offered virgin territory for exploration of those persuasive techniques which induce admiration and acceptance. But, since "law may vary with the personality of the judge who happens to pass upon any given case," determination of any such techniques will not insure their possession by or recommendation for use by another judge.[8] Such determination should, however, attempt to isolate those techniques and that method which serve to excite admiration for a particular judge. Where circumstances warrant and the personality of the judge is fitting, judges in the future may wish

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[6]"Class Day Oration," in Learned Hand, The Spirit of Liberty, ed. Irving Dilliard (New York: Vintage Books Inc., 1959), p. 5.

[7]Robert Samuel Lancaster, "Judge Learned Hand and the Limits of Judicial Discretion," Vanderbilt Law Review, IX (April, 1956), 443.

[8]Jerome Frank, Law and the Modern Mind (New York: Brentano's, 1930), p. 111.

to give thought to replicating the Hand technique with the hope of enjoying similar eminence and acceptance.

To fulfill the specific purpose of this study, which includes analyzing Hand's opinions which might "show forth his greatness," the opinions had to be reduced to those which were both manageable and particularly relevant. Examination of randomly selected cases from the diverse areas in which the Judge rendered decisions indicated that his criminal law opinions satisfied both requirements. They constituted slightly over one hundred in number; and they sufficiently involved Hand in their content in such a manner that ethical components, if present in any of his opinions, could be expected to be found in cases of this nature.

In concluding the purpose and scope statement of this study an underlying motive for attempting the effort requires explanation. Impetus for the study comes from the perceptive observations of Jack W. Peltason, a political scientist, who believes that

> the insulation of judges is related to the lack of widespread and continuous public concern about judicial activity. . . . The general public lacks knowledge about the views and values represented by judges. . . . Many students in college courses on American government can describe the values represented by Senator Bricker, Secretary Benson, or Congressman Tabor. Yet they do not know what concepts of public interest, what values, are promoted by Justices Black or Frankfurter.[9]

An examination of the ethical proof woven into the fabric of

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[9]Federal Courts in the Judicial Process (Garden City, New York: Doubleday and Company, Inc., 1955), pp. 24-25.

a judge's opinion can provide a revealing study of these concepts and values as they assume persuasive characteristics.

Subject of the Study

The words of the late justice, Oliver Wendell Holmes, claims the editor of Hand's papers and speeches, most accurately describe the "purpose and practice" of Learned Hand's life:

> I learned in the regiment and in the class the conclusion, at least, of what I think the best service that we can do for our country and ourselves: To see so far as one may and to feel the great forces that are behind every detail . . . to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised.[10]

For fifty years Learned Hand listened to arguments. For fifty years as a federal judge he evaluated these arguments and passed his evaluations on to posterity in over two thousand legal opinions. Permeated with philosophy his opinions ran the gamut of diverse subjects from patent rights and obscenity to Communism and college education. Many judges and lawyers praised Hand as the outstanding member of the federal judiciary of his age. Though fate denied to the Supreme Court the talents and wisdom of Learned Hand, some compared him anyway with members of the high court. They saw him as the successor to the judicial leadership provided by such greats as Marshall, Holmes, Brandeis, and Cardozo.[11]

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[10] In The Spirit of Liberty, p. v.

[11] Philip Hamburger, "The Great Judge," Life, XXI (November 4, 1946), 117.

What was there about this judge which made him so notable? What was there which caused Judge Herbert F. Goodrich to recall that "his comment upon any legal question carried such great weight that an expressed doubt by him was a source of danger to the acceptance of any proposition, no matter how plausibly urged"?[12] What was there that caused Justice Frankfurter to state upon Hand's retirement from the bench:

> Speaking for myself, the only gain possibly to be had from his retirement from the Court of Appeals is that hereafter I shall feel freer to act on my belief that a decision of the Circuit Court of the Second Circuit might give occasion for review by the Supreme Court, and I might even perchance at times feel that an opinion which he wrote might be wrong?[13]

What was there that has caused the Supreme Court to cite his opinions probably more often than those of any other lower federal judge?[14] There are no quick and easy answers to these questions. A comprehensive study of Hand's life outside the court, his career on the bench, and his opinions is necessary to provide an informed appreciation and understanding of the achievements which created the legend of Judge Learned Hand. "Increasingly the talk is not about a delightful, incalculable, firmly indecisive, whimsically penetrating creature called Learned Hand, but about a legend. For it deserves repeating

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[12]"Learned Hand and the Work of the American Law Institute," Harvard Law Review, LX (February, 1947), 346.

[13]In "A Great Judge Retires: American Law Institute Honors Learned Hand," American Bar Association Journal, XXXVII (July, 1951), 503.

[14]Hamburger, "The Great Judge," p. 125.

that Learned Hand is heading straight for the glory and the dangers of a legend."[15]

Judge Hand was a highly ethical man around whom his critics created the legend. The legend is not founded in myth but in achievement. Guided by an elevated system of consistently followed values, the man's achievements provided him with a rich life. This life, devoted to the hard work of understanding the nature of mankind, had its educational roots in Harvard University. At Harvard, Hand thrived in the philosophical atmosphere of James, Santayana, and Royce and the legal atmosphere of Langdell, Ames, Thayer, and Gray. After Harvard and an abbreviated law practice, at the judicially young age of thirty-seven, President Taft in 1909 appointed Hand to the Federal District Court in New York. Fifteen years later he progressed up to the Federal Court of Appeals in New York where he was to remain until his technical retirement in 1951. Though the Supreme Court appointment eluded him, his esteem in the eyes of the judicial world brought to him the image of the tenth justice of the Supreme Court.

Amid the discussions and clash of minds growing out of appellate court conferences Hand was at his best. Challenged and stimulated by his work he won the respect and confidence of practitioners of diverse specialties of law from admiralty to patents. He was no simple-minded country judge. He was "a man with a first-class mind who . . . used it in that most

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[15]Frankfurter in "A Great Judge Retires . . .," p. 503.

unusual of human endeavors, the thoughtful consideration of hard problems."[16] His consideration of hard problems was, in part, "thoughtful" because he possessed a "profound understanding of human relationships . . . [which] made his judicial pronouncements a cherished heritage."[17]

In 1951, at seventy-nine, the Judge still worked a six-day week including all holidays except Christmas. His customary daily procedure of walking the four miles from his Manhattan home to the United States Court House changed only to enable part of the trip to be made on the Third Avenue Elevated where he read anything from Aristotle to advanced physics.[18] Such was the routine of the learned Judge Hand. Only his retirement from the bench, and his death in 1961, interrupted this routine.

Hand was a man of moods who preferred to be among people. His acquaintance with almost all subjects and his ability to combine high ethical standards with a satirical type of humor produced for him the reputation of a fabulous mimic, storyteller, and talker.[19] Among his intimate friends were men of the arts and sciences, philosophers, statesmen, judges,

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[16]"Learned Hand: Senior Circuit Judge--Second Circuit," American Bar Association Journal, XXXIII (September, 1947), 869.

[17]Tom C. Clark, "The Honorable Learned Hand," Federal Bar Journal, VIII (January, 1947), 151.

[18]Irwin Ross, "The Legend of Learned Hand," Reader's Digest, LIX (July, 1951), 106.

[19]C. C. Burlingham, "Judge Learned Hand," Harvard Law Review, LX (February, 1947), 331.

legal scholars, and lawyers. From all he garnered respect and attention. But what generated this respect? Indeed, the image of an entrancing storyteller who enjoyed long walks to work and full days at the office writing legal philosophy would be a grossly inadequate picture. Perhaps, a more adequate explanation for the respect is implicit in the sentiments of author and lawyer George W. Pepper, who observed

> that Hand has small patience with those who laud self-expression, as such, without insisting on the prior development of the self which it is worth our while to meet. I am sure, too, that he wholly disagrees with those who think a writer has done his all when he has presented the bare bones of his thought without adding those touches by which the Creator managed to fashion man in His own image.[20]

As one meets Learned Hand in this study he might attempt to decide if a judge, "worth our while to meet," displays those touches in his writing which demonstrate how "the Creator fashioned the man in His own image."

Sources of the Study

Despite the respect and praise bestowed on Judge Hand and despite the growth of the Hand legend, no complete biography of the Judge has yet been written. In fact he has left his life and thoughts so unadvertised that only one book-title card in the catalogue of the Library of Congress bears his name as author. However, available literature is of sufficient quantity to enable consideration of those ethical elements which are hypothesized to emanate from the Judge in his judicial opinions.

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[20] "The Literary Style of Learned Hand," Harvard Law Review, LX (February, 1947), 335.

Scholars, educators, judges, lawyers, and journalists constitute the sources for this study. They provide considerable commemorative, biographic, and scholarly insight, explanation, and detail essential to fulfillment of the study's purpose. Principal contributions come from educators, Robert Samuel Lancaster and William Martin Sattler, and a journalist, Irving M. Dilliard. Lancaster presented a Ph.D. dissertation in 1954, while a political science student at the University of Michigan, on "The Jurisprudence and Political Thought of Learned Hand." His research highlights information relevant toward developing an understanding of the Judge. Sattler presented a Ph.D. dissertation in 1941, while a speech student at Northwestern University, on "Conceptions of Ethos in Rhetoric." His research on the rhetorical nature of ethos is a valuable condensation and perceptive synthesis of a vast amount of material, knowledge of which is relevant to an analysis of Hand's opinions and the ethical proof contained therein. Dilliard has gathered together Hand's papers and public addresses and compiled them into the only source of its kind.[21] This study utilizes data from these sources in assessing those ideas and values which were part of the Man and the Judge. Criminal cases, primary source material contained in the federal court reports, and the legal and general periodicals praising and commenting on the Judge all provide information without which this study could not be fully accomplished.

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[21]The Spirit of Liberty.

These sources reflect material pioneered by others; the area the study explores is virgin territory.

Method of Organization

The purpose of this study, examination of the ethical proof in Hand's criminal opinions, necessitates consideration of three ingredients: Hand, ethical proof, and Hand's criminal law opinions. To integrate these three ingredients into a meaningful whole the method of organization, in its four essential parts, is as follows: Chapter II relates the legal heritage and the early beginnings of the embryonic lawyer. The chapter includes the image created by the man himself and by those about him. Appreciation of Hand's emerging image as divorced from the bench lends additional and needed meaning to those ethical elements to be isolated later in the criminal law opinions.

Chapter III develops Hand's career on the bench, his attitude toward the law and the bench, and the assessment of his worth by peers and contemporaries. The chapter includes Hand's conception of the nature and scope of the judicial function as the man merges into the judge and the responsibility of decision-making presents its challenge.

Chapter IV is descriptive, transitional, and preparatory: descriptive in that it describes concepts of ethical proof; transitional in that it binds together Chapters II and III, which develop Hand's general image, to Chapter V which analyzes the ethical proof occurring in his criminal opinions;

and preparatory in that it establishes the constituents of ethical proof which guide the examination of Hand's opinions in Chapter V.

The method of organization used is satisfactory because, according to Judge Frank, Hand "is an exquisitely complex person, or, rather, a complex multitude of persons."[22] Thus, this study of Hand treats him as a man and as a judge, in court and out, at home and in public. Additional benefit from this method results in that an understanding of the whole man is not sacrificed by looking at only segments of Hand's life in isolation without concern for the total pattern. Judge Hand would look with favor upon this advantage for he claimed that "a man's life, like a piece of tapestry, is made up of many strands which interwoven makes a pattern; to separate a single one and look at it alone not only destroys the whole, but gives the strand itself a false value."[23]

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[22]Jerome N. Frank, "Some Reflections on Learned Hand," University of Chicago Law Review, XXIV (Summer, 1957), 668.

[23]"Mr. Justice Brandeis," in The Spirit of Liberty, p. 128.

CHAPTER II

HAND--THE MAN

Introduction

Learned Hand, discussing America's heritage, once observed: "The use of history is to tell us what we are; for at our birth we are nearly empty vessels and we become what our traditions pour into us."[1] The application of this reasoning to human life presents an interesting parallel and prompts concern for understanding Hand's heritage and formative years as that which fate poured into the "nearly empty vessel."

As Hand grew, his image grew with him. Both he and his contemporaries built the image of the Man. That portion of the once "nearly empty vessel" which represented the Man, as distinct from the Judge, is the concern of this chapter. Particularly when contemporaries assess the Man there is difficulty in separating reaction to the Man from reaction to the Judge. On occasion such may not be separable. But, despite the risk of impinging on the subject matter of Chapter III, pertaining to the Judge, the separation appears warranted for

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[1]"The Hall of Our History," New York Times Magazine (August 9, 1953), p. 8.

Hand was a complex creature who did not, and does not now, lend himself to simple, single-label analysis.

Prelude to Judicial Prominence

Learned Hand's attainment of his eventual role as circuit judge was neither prolonged nor meteoric, nor was his ultimate life's work to be unexpected. One need only look at Hand's ancestry, rooted in the law, and at his formative training and experience to give credit to any prophet who might have pre-destined him for the bench.

Heritage

Although one might hesitate about assessing the causal effect which ancestry has upon the making of men, examples of influence derived from attribution of the ancestor's traits to the heir are too numerous in history to ignore. In this respect, young Hand was particularly fortunate in his inheritance.

"In his background of inheritance we find seafaring men who went down to the sea in ships . . .; ministers of the gospel; Puritans who taught Calvinism and lived it; lawyers and judges outstanding in their profession."[2] In America the heritage started when John Hand came from Kent, England, in 1644, and became one of the original settlers of Easthampton, Long Island. By 1792, Hand family activity centered around

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[2]Thomas D. Thacher, "Judge Learned Hand," Record of the Association of the Bar of the City of New York, II (May, 1947), 190.

Shoreham, Vermont, on the shores of Lake Champlain. In neighboring Connecticut, Hand's grandfather, Augustus (1803-1878), attended the first law school in this country. This pioneer of the law, in the Hand name, became a leader at the bar and in public life, a state senator, a member of Congress, and a jurist of the Supreme Court of the State of New York. Learned's father, Samuel (1833-1886), after serving his legal apprenticeship with his father and gaining admission to the bar, married Lydia Learned, and practiced law in Albany, New York. "Almost from the first he was successful. By 1876 his reputation had grown to the point that he was offered an appointment by Governor Tilden to the Supreme Court of New York. Two years later he accepted an appointment as Associate Justice of the Court of Appeals."[3] Before this court he had argued more cases than any other lawyer of his time.[4] In addition, Learned's uncles, Clifford and Richard Hand, shared with his father the reputation for being notable lawyers.

By 1878, six years after his birth, "Learned Hand was unwittingly the possessor of a goodly inheritance. He was the son of a man who had made his mark upon the legal tree of a great state. He was the nephew of two talented and respected

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[3]Robert Samuel Lancaster, "The Jurisprudence and Political Thought of Learned Hand" (Unpublished Ph.D. dissertation, Dept. of Political Science, University of Michigan, 1954), pp. 7-8.

[4]Charles C. Burlingham, "Judge Learned Hand," Harvard Law Review, LX (February, 1947), 330.

lawyers. He was the grandson of a man . . . who became a member of Congress, a Justice of the Supreme Court of his state."[5]

Formative Years

Hand's formative years, which here include those prior to assuming the responsibilities of judicial decision-making, began to fill the "nearly empty vessel" with wide reading, close companionships, broad formal training at Harvard, unhappy legal practice, and a disastrous sortie into politics. All made their mark and shaped the man.

Stimulated by parental encouragement, Hand began early to read widely and develop a taste for good literature. Lancaster believes that "it may be conjectured that the liberal tolerant cast of mind which later so charmingly characterized the lawyer and judge was fashioned in part by the moderating influences of wide reading to which he became accustomed as a child."[6] However, appreciation of good reading at an early age did not result in a cloistered youth; for Learned also appreciated the importance of a close friendship with his cousin, Augustus, who was two and a half years his senior. This friendship resulted in exploring and camping excursions into the Adirondacks where the two boys began an association, which through Harvard and the federal bench, was to long endure.

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[5]Lancaster, "The Jurisprudence . . .," p. 9.

[6]Ibid., p. 11.

A frequent companion on these excursions was Learned's lawyer-father whose life abruptly ended at fifty-three years of age. Learned, then fourteen, lost an early influence on his formative years.

Although the influence of his father ceased, the influence of private school training was just beginning. Albany Academy in Albany, New York, introduced Learned to the rigors and adventures of the classroom. At Albany "he was a solid, earnest student, fond of books and especially interested in sports and excursions into the forests and fields."[7] He also kept busy by playing football and serving as Hunting and Trapping Editor of a school publication, "The Albany Cue." Learned called his editorship "the great fraud of my life. I never had so much as fired a gun or trapped a squirrel, and even though I fancied myself as Deerslayer Hand, all my hunting lore was lifted straight out of the pages of outdoor magazines."[8] Nevertheless, Learned survived "the great fraud of his life," and Albany prepared him for the more advanced training which followed.

Learned Hand entered Harvard University in 1889. The emergence of the intellectual contributions of James, Santayana, Royce, and Munsterberg was then taking place. He majored in philosophy, and examination of his career reveals that this study long continued to permeate his thinking. Later, he

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[7] Ibid., p. 10.

[8] In Bill Davidson, "Judge Learned Hand: Titan of the Law," Coronet, XXVI (September, 1949), 111.

reflected back on his undergraduate days at Harvard: "I felt a keen desire to devote my life to philosophy. I was much impressed by William James, George Santayana, Josiah Royce and Hugo Munsterberg, then on the Harvard faculty."[9]

As a Harvard student Learned was known for his individualistic tendencies. With his hair parted in the middle, a drooping mustache, a pointed black beard, heavy eye brows, and massive features he acquired the moniker of "The Ancient Mongolian." Before completing his undergraduate training, Phi Beta Kappa and class-day orator honors came to him.

Following graduation with the class of 1893, Learned returned to Harvard where he received his master of arts degree. Though philosophy attracted him, the pull of forces encouraging legal training dominated. Cousin Augustus already had entered the Harvard Law School; and besides, as Lancaster explains the matter, "there was the law in his blood."[10] Hand claimed that he decided to study law because "so many of my forebears had been lawyers that my family expected me to follow suit. So I went into law to please them."[11]

Learned Hand graduated with honors from the Harvard Law School in 1896. He took with him the influence of those

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[9]In Herman Finkelstein, "A Memoir of Judge Learned Hand (1872-1961)," Bulletin of the Copyright Society of the U.S.A., IX (October, 1961), 6.

[10]"The Jurisprudence . . .," p. 13.

[11]Finkelstein, "A Memoir of Judge Learned Hand," p. 6. Cf. Philip Hamburger, "The Great Judge," Life, XXI (November 4, 1946), 125.

Harvard jurists who trained him. Their impression on him may have caused the view he later took of the role of the judge. Lancaster believes that

> during his years as a law student at Harvard he came under the influence of those great Harvard jurists of yesterday whose names are still uttered with respect: Christopher Columbus Langdell, John Chapman Gray, James Barr Ames, James Bradley Thayer. Undoubtedly he took from his teachers a view of the nature of law as a social force that colored his later thinking. It is possible that much of the legal realism and the somewhat restricted view Hand later took of the role of the judge as lawmaker may be traced in seminal form to the convictions generated by the discussion, debate, and controversy of those student days. Certainly the young lawyer came out of Harvard with a sharpened mind and a desire to probe for the forces behind the detail.[12]

Hand earned three degrees from Harvard. Columbia, Yale, Pennsylvania, Amherst, Dartmouth, Princeton, and Harvard later conferred honorary degrees upon him. On receiving the honorary degree from his alma mater, Harvard, he told what the educators at Harvard had taught him:

> Many years ago in this place I sat under . . . men who believed that the pursuit of knowledge was enough to absorb all their powers and more. They taught me, not by precept, but by example, that nothing is more commendable, and more fair, than that a man should lay aside all else, and seek truth; not to preach what he might find; and surely not to try to make his views prevail; but to find his satisfaction in the search itself. These men did not seek to rebuild the world nearer to the heart's desire; they were content to be themselves, confident that, if they were faithful in that, their light would shine, steady and far. Like others, I have not been true to what they taught me; I have strayed from their ways; yet in days of discouragement . . . the memory of these teachers of mine has returned again and again to freshen, and renew, my spirit. Unafraid before the unknown universe; indifferent to the world's disparagements and uncorrupted by its prizes; ardent and secure in that faith by which alone mankind in

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[12]"The Jurisprudence . . .," p. 13.

> the end can live; they were themselves the best lesson that I took away.[13]

On yet another occasion Hand explained that which he took away from Harvard in addition to his degrees. He described it as a "creed" whose conviction grew upon him.

> For myself I learned and took away . . . a creed . . . whose conviction has grown upon me as the years have passed. You were not taught it in words; you gathered it unwittingly from uncorrupted and incorruptible masters. It was in the air; you did not affirm or proclaim it; you would have felt ashamed to demonstrate the obvious. You came to know that you could hold no certain title to beliefs that you had not won; and indeed you did not win many. But that did not so much matter for you had come into possession of a touchstone; you had learned how to judge a good title; and, although tomorrow might turn up a flaw in it, you believed that you could detect the flaw. And chiefly and best of all, you were in a company of those who thought that the noblest of man's works was the pursuit of truth; who valued the goal so highly that they were never quite content that the goal that they had reached was the goal they were after; who believed that man's highest courage was to bet his all on what was no more than the best guess he could make; who asked no warranties and distrusted all such; who faced the puzzle of life without any kit of ready-made answers, yet trusting that, if they persevered long enough, they would find--in the words of John Dewey--that they might safely "lean back on things."[14]

After Hand graduated from law school, the New York bar admitted him to practice. In Albany, where his father had practiced successfully, he first ventured out to apply his newly acquired knowledge. Despite having been editor of the Harvard Law Review, having graduated with honors, and having set up practice all was not well. "'He had a speculative train

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[13]"On Receiving an Honorary Degree," in Learned Hand, The Spirit of Liberty, ed. Irving Dilliard, (New York: Vintage Books Inc., 1959), pp. 105-106.

[14]"At Fourscore," in The Spirit of Liberty, pp. 196-197.

of thought,' his cousin recalls; 'and thinking based to a considerable extent on precedent did not particularly interest him.'"[15] "'Many times I felt like putting a gun to my head,' he said. 'Nothing but foreclosures, mortgages, settlement of estates. Everything was petty and formal. Nobody wanted to get behind a problem.'"[16] Nevertheless, Hand practiced law in Albany and New York City for thirteen successful years despite his discontent. He became known as "a good but a rebellious lawyer who disliked legal drudgery and verbose, self-important lawyers."[17] Davidson says of "the repugnance, however, [that it] did not prevent him from making money, and he did meet many able, older lawyers with whom he enjoyed discussing philosophy and metaphysics."[18]

President Taft's attorney general, George Wickersham, and C. C. Burlingham were two of those older lawyers with whom Hand had contact. In Learned Hand they recognized judicial talent. With their encouragement, Taft appointed Hand a federal judge for the Southern District of New York. But within three years of this May 1909 appointment Hand was to reject the man who made him a federal judge, bolt the G.O.P., align with Roosevelt's Bull Moose Party, and run on the Bull Moose ticket for the post of Chief Judge of the New York Court of Appeals.

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[15]Hamburger, "The Great Judge," p. 125.

[16]Ibid.

[17]Davidson, "Judge Learned Hand . . .," p. 111.

[18]Ibid.

Ex-President Theodore Roosevelt, disturbed by Supreme Court decisions, bitterly objected to a judiciary which obstructed industrial, economic, and social reform. In the campaign of 1912, Roosevelt favored the recall of decisions by allowing the Congress to re-enact and make binding a statute nullified by the Supreme Court. Even before this agitation "pretty plainly, Learned Hand . . . believed that, concerning due process as to social and economic legislation, our courts should accept, substantially, the English principle of legislative supremacy."[19] Eventually, Judge Hand, his thinking compatible with that of Roosevelt's, sent a copy of Herbert Croly's book, The Promise of American Life, to Roosevelt, while he was abroad. Croly's book contributed ideas and general principles to the Bull Moose philosophy. As an active Bull Mooser, Hand believed the nation "had to break away from the Hanna thing--the control of the nation by big business."[20] Consequently he ran for Chief Judge in 1913 on the Progessive ticket. Like Roosevelt, Hand, too, failed to be elected. "'He just stood up,' his cousin recalls, 'and was knocked down.'"[21] He never again went into politics and subsequently renounced affiliation with any political party.

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[19]Jerome N. Frank, "Some Reflections on Judge Learned Hand," University of Chicago Law Review, XXIV (Summer, 1957), 689.

[20]In Hamburger, "The Great Judge," p. 125.

[21]Ibid.

Thus, Hand's formative years witnessed academic success, legal-practice discontent, and political failure. Significant, however, was the recognition of judicial qualities in the Man. This recognition initiated a long and fruitful career on the bench for one destined to share his talents for the betterment of a nation whose stature was to grow with the Judge's stature. Indeed, the "nearly empty vessel" was rapidly filling.

Creation of an Image

On April 11, 1959, the day after a celebration honoring Judge Hand for having served fifty years on the bench, the New York Times reported: "He might have been speaking of himself when he wrote that the qualities that clear the path to truth are skepticism, tolerance, discrimination, urbanity, some--but not too much--reserve toward change, insistence upon proportion, and, above all, humility before the vast unknown."[22] This succinct disclosure of character qualities makes a sizeable contribution to the image of Learned Hand. But contributions which build the image exceed those of mass circulation newspapers. The paradoxical Hand as a pensive, contemplative man and a gregarious, witty man, sometimes given to excess, comes alive upon consideration of both personal and contemporary contributions to his image.

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[22]p. 12.

The Thinking Man

Contributions from the Man

What Hand said about himself and what he said about those ideals and values to which he subscribed contribute to the Hand image and to an understanding of the Man.

Perceptions of himself

Some attributes of his character Hand frankly confessed while others he more subtly implied. Skepticism and uncertainty combined with a harmless humility were among his most significant attributes. "'Skepticism is my only gospel,' he is fond of saying, 'but I don't want to make a dogma of it.'"[23] Ross credits Hand for his humility in confessing errors which allowed him to admit when he was wrong and to overrule himself when warranted. He calls this a rare trait among judges.[24] Hand manifested his humility, not by stating that he was humble (such as his statement that he was a skeptic given to uncertainty), but by demonstrating humility particularly in utterances where he showed a recognition of his limitations.

> The simplest problems which come up from day to day seem to me quite unanswerable as soon as I try to get below the surface. Each side, when I hear it, seems to me right till I hear the other. I have neither the time nor the ability to learn the facts, or to estimate their importance if I knew them; I am disposed to accept the decision of those charged with the responsibility of dealing with them. My vote is one of the most unimportant acts of my life; if

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[23]Irwin Ross, "The Legend of Learned Hand," Reader's Digest, LIX (July, 1951), 107.

[24]"The Legend of Learned Hand," p. 107.

> I were to acquaint myself with the matters on which it ought to depend, if I were to try to get a judgment on which I was willing to risk affairs of even the smallest moment, I should be doing nothing else, and that seems a fatuous conclusion to a fatuous undertaking. Because, if all were done, for what after all does my single voice count among so many? Surely I can play my part better in the society where I chance to be, if I stick to my last, and leave governing to those who have had the temerity to accept the job.[25]

At eighty years of age on January 27, 1952, Hand addressed the Harvard Club of New York. Later, he told Irving Dilliard that this speech probably "does more completely represent my views about ultimate values than anything else I have written."[26] These ultimate values include a sincerely optimistic spirit which emerged as Hand looked at himself and the destiny of man:

> I do not pin my dreams for the future to my country or even to my race. I think it probable that civilization somehow will last as long as I care to look ahead. . . . I think it not improbable that man . . . may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace.[27]

Thus, Hand by self-admission perceived himself to be a skeptic faced with the inevitable uncertainties of life. Imbued with a frequently reiterated feeling of humility, he cautiously avoided bold self-assertion and admitted his limitations. While skeptical about what others considered the certainties of life, Hand, nevertheless, remained optimistic

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[25]"Democracy: Its Presumptions and Realities," in The Spirit of Liberty, p. 72.

[26]In The Spirit of Liberty, p. 192.

[27]"At Fourscore," in The Spirit of Liberty, p. 193.

about the perpetual existence of that life. If allowed to redo his own life he once said:

> I think perhaps I would be a physicist--open new vistas, move in step with the world. You know, I used to hope that I might be able to garner a harvest of wisdom. That has turned out to be a mistake, for I cannot see much further into the tangle of life than I could 50 years ago. I'm less disappointed than I should have thought. Indeed, there is solace in a companionship where all are groping their way equally in the same fog.[28]

Professions of beliefs

Although his mind, insight, experience, and literary skill equipped him to write, Learned Hand left no systematic and comprehensive work wherein he collectively set forth his beliefs on man, liberty, tolerance, or any of the other subjects about which he spoke. Nevertheless, his random utterances which have been recorded are of particular interest to the scholar. According to Hamburger, "Many students of Judge Hand's work feel that his public addresses and articles in law journals have been among his greatest contributions. In them he has given expression to some of his deepest feelings on law and life. . . ."[29] An analysis of the variety of subjects dealt with reveals professions of beliefs valuable toward understanding the character of the Man and the image conveyed.

On the preservation of personality. In a 1927 commencement address at Bryn Mawr College, Hand professed his

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[28]Hamburger, "The Great Judge," p. 128.

[29]Ibid., p. 126.

beliefs on the dangers of conformity:

> Our dangers, as it seems to me, are not from the outrageous but from the conforming; not from those who rarely and under lurid glare of obloquy upset our moral complaisance, or shock us with unaccustomed conduct, but from those, the mass of us, who take their virtues and their tastes like their shirts and their furniture, from the limited patterns which the market offers.[30]

A questionable role was found by Hand for those who can "look below the surface" of problems and offer leadership to those who must be managed:

> There must in any event be a few who look below the surface, and know how the game is played. These can determine what the fashions shall be, and being, as it were, at the transmitting station, they can make them what they want. After all, most men are incapable of deciding for themselves, and have got to have a leader somewhere. If the new discoveries in mass suggestion enable us to make government easier, not only political, but moral and aesthetic, why not welcome them like other useful inventions?[31]

But Hand quickly cautioned: "Perhaps some of you will agree with me not to be content with an order in which even the enlightened We might be the wire-pullers, who make the mannikins dance, whilst they, falsely imputing to their prancing a meaning we supply, live and die in ignorance of what it has ever been all about."[32] The importance of the individual as an individual permeated his thinking. "Our problem," according to Hand, "is how to give the mannikin, assailed on all hands with what we now so like to call propaganda, the chance of survival as a person at all, not merely as a leaf driven by the wind, a symbol in a formula."[33]

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[30] "The Preservation of Personality," in The Spirit of Liberty, p. 26.

[31] Ibid., p. 27. [32] Ibid., p. 28. [33] Ibid.

The requirements for one to preserve himself from being lost in the mass of humanity particularly concerned Hand when he stressed that "experience soon teaches the seeker, not so much that he can find the key to the universe, as the limits of his search and the paucity of his trove. Tolerance, scepticism and humility are the commoner end-products of a determination to see for oneself, than of docile and tractable acceptance of what has been revealed to the past."[34]

On tolerance. Frequently Hand has reminded his generation of the values inherent in the tolerant mind. Tolerance of our own limitations, of man's imperfections, and of the fact that permanent solutions to the problems of life do not exist constitute his message.

"We are all inferior creatures," claimed Hand, "we are humans and our imperfections will come out in one way or another. . . . How much of the time are our choices really influenced by our own interests? We cannot expect more of other people than we have ourselves."[35]

Perhaps one of the strongest character traits which strengthened his reasoning process and which highlighted his message about tolerance is that there are no permanent solutions to the problems of life. Hand's recognition of the inevitability of uncertainty, although it impinges on his

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[34] Ibid.

[35] "Morals in Public Life," in The Spirit of Liberty, pp. 175-176.

beliefs about an open mind and the preservation of liberty, still warrants separate consideration particularly for its emphasis on the necessity of freedom of independent thought. In an address before the Juristic Society of the University of Pennsylvania Law School, Hand developed this belief:

> Ideas, fashions, dogmas, literary, political, scientific, religious, have a very similar course; they get a currency, spread like wildfire, have their day and thereafter nothing can revive them. Were the old questions ever answered? Has anyone ever proved or disproved the right of secession? Most issues are not decided; their importance passes and they follow after. But in their day they rack the world they infest; men mill about them like a frantic herd: not understanding what their doctrines imply, or whither they lead. To them attach the noblest, and the meanest, motives, indifferent to all but that there is a cause to die for, or to profit by. Such habits are not conducive to the life of reason; that kind of devotion is not the method by which man has raised himself from a savage. Rather by quite another way, by doubt, by trial, by tentative conclusion.[36]

In the same speech Hand called "liberty" an essence, found in the hearts of men, "in the belief that knowledge is hard to get, that man must break through again and again the thin crust on which he walks, that the certainties of today may become the superstitions of tomorrow; that we have no warrant of assurance save by everlasting readiness to test and test again."[37]

Lancaster, in his study of Hand's jurisprudence and political thought, contends that "Learned Hand is firmly convinced that truth is a relative term. He has traveled as far as most on the narrow path that leads to the temple of wisdom

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[36]"Sources of Tolerance," in The Spirit of Liberty, p. 58.

[37]Ibid., p. 64.

and as he has traveled he has speculated, perhaps brooded, over the saving grace of a tolerant, understanding mind and spirit."[38]

On an open mind. Just as Hand frequently reminded his generation about the values of a tolerant mind so, too, did he impress the value of an open mind freed from the dangers of absolutism and dogmatism. He was skeptical about easy explanations, detested broad generalizations, and though appearing self-assured he constantly re-examined those peaceful meadows in which doubt might grow. His favorite quotation which he would have had inscribed on every church, school, courthouse, and legislative institution epitomized his concern for an open mind. This quotation, the prayer of Oliver Cromwell as he unsuccessfully tried to negotiate with the Scots before the Battle of Dunbar, is: "I beseech ye in the bowels of Christ, think ye that ye may be mistaken."[39] That an open mind is not easily attained was clearly apparent to Hand. "Doubt and scrutiny," he believed, "the most serviceable of man's tools, were the last that he acquired. He has never quite reconciled himself to their use; they are always repellent and painful."[40]

Despite the recognized complications in obtaining and maintaining an open mind, Hand encouraged its attainment and summarized his beliefs on the subject in an eloquent "plea for the open mind":

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[38]Lancaster, "The Jurisprudence . . .," pp. 257-258.

[39]In The Spirit of Liberty, p. xx.

[40]"The Hall of Our History," p. 8.

> Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, to win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any that we dread; and they can be allayed only in so far as we refuse to proceed on suspicion, and trust one another until we have tangible ground for misgiving. The mutual confidence on which all else depends can be maintained only by an open mind and a brave reliance upon free discussion. I do not say that these will suffice; who knows but we may be on a slope which leads down to aboriginal savagery. But of this I am sure: if we are to escape, we must not yield a foot upon demanding a fair field and an honest race to all ideas.[41]

On liberty. Closely interrelated, in Hand's terminology and system of values, with tolerance and an open mind is the subject of liberty. Hand claimed that whether a society based on civil liberties and human rights will endure remains undetermined. However, he found the existing alternatives to be "immeasurably worse."[42] Addressing the American Jewish Committee on the subject of civil liberties and human rights he recognized that "the natural, though naive, opinion is that it [liberty] means no more than that each individual shall be

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[41]"A Plea for the Open Mind and Free Discussion," in The Spirit of Liberty, p. 216.

[42]"A Fanfare for Prometheus," in The Spirit of Liberty, p. 224.

allowed to pursue his own desires without let or hindrance; and that, although it is true that this is practically impossible, still it does remain the goal, approach to which measures our success."[43]

In 1944 at an "I Am an American Day" celebration in New York City, Hand made his most frequently repeated and probably most widely known speech. One passage has been extracted and repeatedly reappears in commemorative articles about Hand. Indeed, nothing need be added to further explain Hand's beliefs on liberty as this concise and revealing passage embodies his philosophy by answering the question: "What then is the Spirit of Liberty?"

> I cannot define it; I can only tell you my own faith. 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 never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.[44]

Thus, Hand on the preservation of personality, on tolerance, on an open mind, and on liberty reveals professions of beliefs valuable toward understanding his character and contributing to his emerging image. For here can be seen a man who believed in the worth of the individual as an individual;

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[43] Ibid., p. 220.

[44] "The Spirit of Liberty," in The Spirit of Liberty, p. 144.

a man who believed that permanent answers to life's problems do not exist; a man who believed in the virtues of doubt, caution, and skepticism; and a man who believed that "the spirit of liberty is the spirit which is not too sure that it is right." An appropriate way to leave this subject and one which adds a final touch to the contributions from the man to his image involves Hand's concept of how man can lead his life to enable him to provide a happy and justifiable defense of his accomplishments:

> By some happy fortuity, man is a projector, a designer, a builder, a craftsman; it is among his most dependable joys to impose upon the flux that passes before him some mark of himself, aware though he always must be of the odds against him. His reward is not so much in the work as in its making; not so much in the prize as in the race. We may win when we lose, if we have done what we can; for by so doing we have made real at least some part of that finished product in whose fabrication we are most concerned: ourselves. And if at the end some friendly critic shall pass by and say: "My friend, how good a job do you really think you have made of it all?" we can answer: "I know as well as you that it is not of high quality; but I did put into it whatever I had, and that was the game I started out to play."[45]

Contributions from contemporaries

Learned Hand was not unconcerned about what others thought of him. "I have often thought it might be interesting if you could come back after you were dead and read your obituary," he once said.[46] Undoubtedly he would have been pleased

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[45]"A Fanfare for Prometheus," in The Spirit of Liberty, p. 224.

[46]In "A Great Judge Retires: American Law Institute Honors Learned Hand," American Bar Association Journal, XXXVII (July, 1951), 504.

if his wish could have been fulfilled. Anecdotal contributions from varied walks of life, coming both before and immediately after his death, constitute that obituary and sharpen the outlines of the man's image.

From the bar

Members of the bar have commended Hand, among numerous other attributes, for his pursuit of the truth, for his human qualities, for his discontent with dogmas, for his respect for freedom, for his high ethical standards, and for possession of a philosophy which reflected itself in his writing.

Herman Finkelstein, former law clerk to the Judge, says of Hand: "There was always a last lingering doubt about everything except a conviction that the pursuit of truth was the highest virtue."[47] Even if Hand could not find the truth, attorney Charles C. Burlingham believes that "he would have been an inspiration to others to pursue the search."[48] Burlingham further regards Hand's blending of high ethical standards with a satirical type of humor as an enduring combination.[49]

"What we all love in Judge Hand is the very simple thing that he is wholly human," claims Harrison Tweed, former President of the American Law Institute.[50] John Lord O'Brian, a distinguished lawyer and close friend of Hand, found his prime contribution to be

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[47]"A Memoir of Judge Leaned Hand," p. 6.

[48]"Judge Learned Hand," p. 331. [49]Ibid.

[50]In "A Great Judge Retires . . .," p. 504.

> his constant attitude [which] has been one of seeking to open up and broaden the minds of men about him; to make humankind wiser in the sense of being less dogmatic and less cautious. He has had no faith in formularies or dogmas, and he has said over and over again that the idea of freedom, in whatever aspect it may arise in daily life, is not a formula. As he has expressed it, freedom is not a concrete concept. It is an essence, and it is an essence that will escape from any vial however strongly corked.[51]

Author, lawyer, and former United States Senator, George W. Pepper, reports on yet another facet about Hand: "His philosophy of life manifests itself in everything that he says. He seems to be able without effort to make a nice choice of words and a pleasing use of metaphor and allusion."[52]

Finkelstein and Burlingham identify Hand with his search for the truth. Tweed notes his human qualities, and O'Brian stresses his contributions to mankind. Pepper's emphasis differs again in that he points to Hand's literary style. These lawyers are not in disagreement. They are well aware that they are appraising a complex individual with multiple attributes. This composite picture drawn from some of the reaction of the bar to the Man further contributes to the total image of Learned Hand.

From the bench

Jerome Frank, an associate of Judge Hand's on the federal bench, regards Hand's life to have been "like a work

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[51]In "Proceedings of a Special Session to Commemorate Fifty Years of Federal Judicial Service by the Honorable Learned Hand," Federal Reporter, 264 F.(2d) 9.

[52]"The Literary Style of Learned Hand," Harvard Law Review, LX (February, 1947), 333.

of art, like a novel written by himself. . . . His long life . . . has enabled him to round out that novel. It is replete with poetry and contains many delightful chapters and interludes."[53] Frank commends Hand for having recognized the impossibility of applying permanent solutions to the challenging uncertainties of life's problems. This insight, according to Frank, resulted from Hand's liberal spirit freed from dogmatism. "Such a liberal has no list of fixed particularized ideas on which he insists as wholly right or wholly wrong. He does not phonograph like, rattle off, with an air if [sic] infallibility, a long series of do's and dont's applicable in all circumstances. He is no slogan-addict. He looks upon liberalism as a mood, not as a system or catalogue of precise commands."[54] Judge Frank's commendation of Hand, in the University of Chicago Law Review, concludes with a tribute to his deep thinking and feeling which produced an understanding of human nature: "Horace Walpole said that 'life is a comedy for those who think and a tragedy for those who feel.' Learned Hand, who both thinks deeply and feels deeply, sees life as a marvelous comic-tragedy. He is not one who 'despises men tenderly.' He has a love for an understanding of his fellow-creatures, like him, humanly fallible. I commend him to you as a great man. . . ."[55] Judge Charles E. Wyzanski, Jr., former law secretary to Judge Hand and later United States

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[53]"Some Reflections on Judge Learned Hand," p. 668.

[54]Ibid., p. 703. [55]Ibid., p. 705.

district judge for Massachusetts, supports Frank's claim that Hand perceptively understood human nature. His reputation grew with the skill and artistry employed in his work, "but what counted most was that his vision, unrestricted by boundaries of partisanship, provinciality, or narrow mores, had an inclusive wisdom, a Shakespearean understanding of what men are like. He shared their melancholy and their robust joy. Like Montaigne, he knew that, though a man sits upon the top of the world, yet sits he upon his tail."[56]

Thus, the bench, of which these two judges, who knew Hand well, are probably most representative in their praise, saw in the Man a tolerant, cautious liberal not given to dogmatism who thought and felt deeply as he attempted an understanding of his fellow man throughout a life which resembled a work of art.

From the literary world

When Hand was eighty-one, Martin Gumpert, in the New York Times Magazine, called him

> an outstanding example of American culture . . . the most beautiful old man I have ever seen--a face cut of stone, eyes that are heavy browed and sad, but incandescent, and an indescribable aura of goodness, wisdom and strength. . . . He is one of the most precious spiritual assets of the nation. . . . No one in our time expresses so forcefully in his own person the values of American ideals, of tolerance, freedom and human dignity, as this great judge.[57]

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[56]"Learned Hand," Atlantic, CCVIII (December, 1961), 54.

[57]"Ten Who Know the Secret of Old Age" (December 27, 1953), p. 10.

Eugene Gressman writing for New Republic adds to Gumpert's concept of Hand by associating him with the "great American tradition." Gressman respects Hand for embodying "the ideals, the aspirations and the emotions which characterize the democratic humane instincts of a free society."[58] His knowledge, necessary to be free, and his wisdom, necessary to relate this knowledge to the surrounding world, are significant characteristics, according to Gressman, "but most of all, he possesses the ability to question his own first principles, to search out the truth wherever it may seem to lead."[59]

The death of Learned Hand in 1961 prompted reflection and comment from various sources as reported in different news media. Max Ascoli, editor and publisher of The Reporter, reflected:

> One must be very measured in praising Learned Hand, for even now that he is dead one can hear how he would react: wise, caustic sometimes profane. He knew how to exert restraint on himself, and how to exact it on others. He made of self-criticism a consummate art, and when he met any man, high or low, who was pompous or smug or vague, that man was out of luck.
>
> The range of his interests was probably equal to the depth of his passion, but he never let his sense of personal and public responsibility take a holiday. . . .
>
> With so rich an inner life to keep under control, he was always self-possessed, never self-centered. To an extraordinary degree he developed the skills of inward discipline and outward perception.[60]

An editorial writer in the New York Times commented:

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[58]"With Vision and Grace," CXXVI (June 2, 1952), 19.

[59]Ibid.

[60]"Learned Hand (1872-1961)," XXV (September 14, 1961), 16.

> America has lost one of the greatest of its judges. Few certainly ever won more respect and admiration from the bench and bar than Learned Hand during his fifty-two years of service as a Federal judge--an exceptional achievement, whether measured by years, influence or distinction. . . . But he was far more than an eminent judge. He was a rare human being. His extraordinary gifts brought joy to all those fortunate enough to know him--gifts that also lent distinction to the way his decisions were expressed. He was a philosopher, ever probing the easy assumptions of the unthinking with a passionate devotion to dispassionate truth. And with all his eminence which he bore lightly, he was the best of company: warm, witty, engaging, with an appealing earthiness.
>
> He will be missed as a judge and as a person of charm.[61]

From the Congress

On June 28, 1951, Hand responded to a request to appear before a Senate subcommittee investigating an unusually low state of public morals in the country. Senator Paul H. Douglas of Illinois, who presided over the meeting, introduced Hand as a man respected by both lawyers and the general public for his integrity.[62]

From the general public

Among the many tributes paid to Learned Hand was a note written in Italian by a man named Speciale, Hand's old friend and shoemaker. Hand prized this note which praised his character and wisdom:

> Illustrious Sir:
>
> I read attentively your excellent speech given at Central Park ["What is the Spirit of Liberty?"].

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[61]August 19, 1961, p. 16.

[62]"Morals in Public Life," in The Spirit of Liberty, p. 171.

> You do not know how excellent you are, but people should tell you of your qualities, and I would like to tell you how well suited you are to govern this great republic. You are a great judge, philosopher and philanthropist. You lack nothing in knowledge and intelligence, and you understand the needs of the people.
>
> I hope that you who are of such great caliber and have such an excellent character will live many many years on this earth, and forever in the hearts of the people.
>
> I remain your humble shoemaker,
>
> M. Speciale[63]

From the bar, bench, literary world, Congress and general public came those contributions which created the image of Learned Hand as a man. Not a dissenter can be found who will deny that Hand hammered out as compact and solid a life as he could, made it first rate, put into it all that he had, and felt the great forces behind every detail. But the "thinking man" had yet another side to him which is equally a part of his image.

The Gregarious Man

Perhaps a less compact and less solid aspect of Hand's image, but nevertheless an inseverable part, pertains to his escapades and eccentricities. Much as with the "thinking man" Hand put into this side of his personality "all that he had," and at times the "gregarious man" went to excess.

Examination of the many sides of Hand's personality reveals that he was a gifted mimic, a fabulous talker, a fine storyteller, and a respected singer of folk songs who further gained repute for being unscrupulously honest and dedicated.

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[63]In Davidson, "Judge Learned Hand . . .," p. 114.

Judge Thacher summarizes Hand's escapades and eccentricities by calling him

> inimitable at any evening party--gay, charming, bright, scintillating and full of devilment and fun. He can tell a story with perfect mimicry; he might have been a marvelous actor if he had not been wedded to the law and in love with metaphysics. He knows large portions of Gilbert and Sullivan by heart, loves music and has a fairish singing voice. He loves all sorts and kinds of people and particularly children, and they love him. He is extremely sociable, calls himself gregarious, dreads solitude, but will not ride in the subway.[64]

As a gifted mimic Hand played the role of William Jennings Bryan addressing a political meeting in Jersey City. Felix Frankfurter found him "fantastically good" at this.[65] Frankfurter also found Hand to be a "fabulous talker" who delighted his listeners. "Through his humor and fancy and range he became the center and circumference of every party."[66] Public gatherings as well as private individuals experienced his ability as a talker. Harrison Tweed of the American Law Institute recalls formal and informal meetings where "contributions from him of philosophy and poetry are probabilities, and wisdom and profanity certainties."[67] "He is an indefatigable memorizer of railroad timetables . . . and can talk for hours on the comparative speeds of the Twentieth Century and Broadway Limited."[68] "In former years," according to Bill

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[64]Thacher, "Judge Learned Hand," pp. 194-195.

[65]In Hamburger, "The Great Judge," p. 128.

[66]Frankfurter, "Learned Hand," p. 3.

[67]In "Proceedings of a Special Session . . .," p. 12.

[68]Davidson, "Judge Learned Hand . . .," p. 113.

Davidson, "he enjoyed discussing Freud and Shakespeare with such characters as Fiorella La Guardia, Franklin D. Roosevelt and a shoemaker named M. Speciale, who repaired the Judge's shoes and taught him Verdi's operas and the mysteries of spaghetti-making."[69]

From talker to storyteller was an easy transition for Hand who enjoyed telling a good story particularly to his daughters.

> The Judge would often reward them with an episode from Br'er Rabbit. "Lippity-lop, lippity-lop," he would say, hopping across the room. Or he might recount a chapter in the history of a blowzy character called Marge, a figment of his imagination. Marge, who has been involved in outrageous encounters with the law for more than 30 years, is well-meaning but cannot avoid trouble. These days [1946], she is in constant demand by the Judge's grandchildren, who also like to watch him place a wastebasket over his head and leap around the room like an Indian.[70]

When Marge is not the center of a story, Hand portrays the Crooked Mouth Family. "He lights a candle and, taking the part of each member of the family, from the largest to the smallest Crooked Mouth, tries to blow it out."[71]

If not in demand as a mimic or storyteller, Hand's friends prevailed upon him to sing. In particular he enjoyed Gilbert and Sullivan lyrics and American folk music. Hand once convulsed Associate Justice Oliver Wendell Holmes of the United States Supreme Court with a collection of "ribald sea songs."[72]

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[69] Ibid.

[70] Hamburger, "The Great Judge," p. 128. [71] Ibid.

[72] Davidson, "Judge Learned Hand," p. 113.

After leaving Holmes, "Hand turned to Frankfurter and said, 'I fear the old man thinks I am a mere vaudevillian.'"[73] "Mere vaudevillian" or not his ballad singing was sufficiently popular that the Music Division of the Library of Congress agreed to have him sing two old ballads, "Phil Sheridan" and "The Iron Merrimac," for a record later made available to the public.

Hand's escapades and eccentricities were not reserved for entertainment purposes. Some even contributed to the aura of honesty built up around the Man. Confused by the language of the income tax laws and unsure of the tax exceptions to which he was entitled, he took none. "The words of such an act as the Income Tax merely dance before my eyes in a meaningless procession," he charged.[74] On another occasion Hand was so loyal to our customs laws that upon returning from Europe he declared a pair of old shoes which had been resoled in Rotterdam.[75] "When writing to another judge he deliberates whether the matter is primarily business or personal in order to decide whether to frank the envelope or affix a stamp."[76]

Learned Hand regularly walked the four miles in one hour from his Manhattan home to the United States Court House. "Several of the other judges of the Circuit Court occasionally go along on the walks, but few men can survive the sheer speed

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[73]Hamburger, "The Great Judge," p. 128.

[74]In Davidson, "Judge Learned Hand," p. 106.

[75]Ibid.

[76]Ross, "The Legend of Learned Hand," p. 106.

of the journey. The other judges have been known to drop out of line, one by one, and jump into cabs while Judge Hand ploughs ahead without so much as a glance behind."[77] "'I shall continue the practice,' he has told a friend, 'until that final morning when, fittingly, I shall fall backward head over heels down the courthouse steps.'"[78] He dedicated himself to excesses in play as well as at work. Judge Thacher recalls:

> One morning I met him to take the usual walk and found him in the depths of depression. He had dined the night before with friends and after dinner the company engaged in playing charades. In the course of the evening he and one of the ladies presented the murder scene from "Othello." He entered into the spirit of the thing with such vigor that he broke the lady's nose, and, in a state of complete moral and mental disturbance, he . . . had to go and see the lady. I always wondered how he got along in court that day.[79]

Summary

Learned Hand possessed a goodly heritage. His formative years, which gained initial strength from his heritage, included wide reading, close companionships, broad formal training at Harvard, dissatisfying experiences with private law practice and politics. The climax of this period of his life came when his judicial potential attracted the attention of President Taft who appointed him a federal district court judge.

As Learned Hand grew, so, too, did his image grow with him. Through his perceptions of himself and professions of

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[77]Hamburger, "The Great Judge," p. 118. [78]Ibid.

[79]"Judge Learned Hand," p. 194.

beliefs he contributed to his image. He perceived himself to be a skeptic faced with the inevitable uncertainties of life. Blessed with humility, he demanded caution of himself in the use of self-possessed authority. Beliefs which professed the worth of the individual, the temporariness of answers to life's problems, the virtues of doubt, caution, and skepticism, and "the spirit of liberty which is not too sure that it is right" came forth from the Man to shape his image.

Learned Hand's contemporaries saw him as both a "thinking" and as a "gregarious" man. They respected him for his pursuit of the truth, for his tolerance, for his human qualities and his understanding of human nature, for his discontent with dogmas, for his respect for freedom, and for his high ethical standards. Independent of those other traits which brought him eminence as a judge, these attributes of the Man's character made him a rare human being. However, Hand, although constituted of such solid qualities, was not without memorable escapades and eccentricities which enlivened and added vigor to the sterner stuff of which he was made.

Francis Biddle, lawyer, author, and former United States Attorney General, has summarized Learned Hand with vividness, rare insight, and devotion. Such perception makes the following a fitting conclusion to an understanding of the Man:

> Learned Hand was endowed with so many talents of heart and mind that it is difficult to choose those which were most characteristically his. First of all it must be said that he was thoroughly normal in his gusto for living, excellently balanced. As a skeptic he discarded the comforting magic of absolutes, and stood alone facing the

adventures of life, while he felt its mysticism and asserted its values. Like Justice Oliver Wendell Holmes, whom he greatly admired, he was never cynical, because life without values seemed to him intolerable. He did not believe that his values were eternal, but they were his--courage, a sense of humor that kept things relative, the spirit of liberty which "is not sure that it is right," and seeks to understand the lives of others. Above all he was tolerant. Yet his tolerance never touched indifference, and he was passionate in his beliefs as well as his feelings. I shall never forget what he said at a meeting of the Law Institute in Washington in May, 1941, putting aside his prepared address, trying to make us realize what the fall of France meant to civilization with an eloquence that made us ashamed that we had not felt as deeply about it as he felt.

To Learned Hand his friends were dear, and they felt his love. He was gay, and could be very funny. He was more companionable, more sharing than anyone I knew.[80]

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[80]"Learned Hand," New Republic, CVL (September 11, 1961), 5.

CHAPTER III

HAND--THE JUDGE

Introduction

Learned Hand's image as a man only partly fills the once "nearly empty vessel." An understanding of Judge Hand's career on the bench and the image which he created and which contemporaries attributed to him both as a deliberative, conscientious judge and as a judge who freely deviated from the staid expectations of judicial performance further contributes to filling the "vessel." Consequently this chapter looks first at Judge Hand's judicial career and then considers those personal and contemporary contributions to the image of the Judge.

A Career on the Bench

A crucial period in the development of American law coincided with Judge Hand's illustrious career on the federal bench. That one was the sole cause of the other would be a conclusion unsubstantiated in fact. That each contributed to the other seems a certainty. The developing law undoubtedly benefited from having a judge of Hand's caliber to guide its growth and progress. Judge Hand's opportunity to attain eminence on the bench undoubtedly benefited from a developing

legal system which provided those necessary opportunities for the Judge to grow and progress.

The Anglo-American legal tradition has had few judges equal to Learned Hand. His long judicial career which spanned fifty-two years culminated in tribute that proclaimed him to be "preeminently the judge's judge."[1] Of Judge Hand's more than two thousand opinions, some became models for law school instruction, some made him known as a leading liberal, and some built his reputation as a master of the English language. "His incisive opinions, clear and eloquent, contributed much to the country's law heritage."[2] Nevertheless, his opinions and public utterances still defy the key by which one can classify Judge Hand. "He belongs to no school of jurisprudence; he is old-fashioned enough to believe in legal principles and modern enough to recognize as a fact the creative activity of the judiciary in moulding the law to fit new circumstances and in shaping its growth in accordance with the drive and movement of the times."[3] To understand better how Judge Hand "moulded the law" and "shaped its growth" the following considers from appointment to retirement his service on federal courts and the breadth and depth of his opinions.

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[1]Robert Samuel Lancaster, "The Jurisprudence and Political Thought of Learned Hand" (Unpublished Ph.D. dissertation, Dept. of Political Science, University of Michigan, 1954), p. 32.

[2]New York Times, August 19, 1961, p. 1.

[3]Lancaster, "The Jurisprudence . . .," p. 33.

The Bench Yields Up Its Star

With President William Howard Taft's appointment of Learned Hand as a district judge for the Southern District of New York, Judge Hand's career on the bench began. The American Bar Association Journal recalls that as a district judge "struggling with the great volume of run-of-mine work which afflicts such a judge, he was vastly industrious, fearless, painstakingly fair, and skilful in dispatch of business."[4] He garnered respect and confidence from practitioners in various specialties of the law. Charles C. Burlingham contends, however, that Judge Hand's "fifteen years on the district bench brought him slight satisfaction. Twice a junior in service was preferred to him and promoted to the circuit court of appeals."[5] Nothing auspicious had yet occurred in his career. However, "when in 1924 President Coolidge made him a circuit judge, he came into his own, for in the conferences of the appellate court there was discussion and a clash of minds."[6] For this Judge Hand was well suited. On the circuit court he handed down decisions for thirty-seven years. His prestige increased virtually with each case and each year of service. However, elevation to the circuit court ended his advancement.

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[4]"Learned Hand: Senior Circuit Judge--Second Circuit," XXXIII (September, 1947), 870.

[5]"Judge Learned Hand," Harvard Law Review, LX (February, 1947), 331.

[6]Ibid.

Promotion to the next and the highest echelon of federal judicial service, the Supreme Court, exceeded his destiny.

Judge Hand's failure to be elevated to the Supreme Court, the zenith in accomplishment for an American jurist, remains unexplained even after his death. How could he with his ability have missed appointment to this judicial citadel? The reasons offered are almost as numerous as those who qualify to speculate. Judge Charles E. Wyzanski sums up the speculation, all or most of which together may have tolled Hand's fate:

> Luck, says Justice Frankfurter. Political distrust, say the die-hards who crushed the Progressive wing of the Republican Party. Geographical accident say those who recall that Hughes, Stone, and Cardozo, all from New York, sat in Washington when Hand was ripe for appointment. When two of them had gone, F.D.R., mindful of his specious argument at the time of the court-packing bill, felt compelled to conclude that "B [Hand] has just the right intellectual age; can't you do anything about his chronological age?" That was an insurmountable question.[7]

Justice Holmes, says Felix Frankfurter, believed that Hand's proper place, even while he was still a district judge, was in Washington. Frankfurter further claims that he spent not a little part of his life promoting that end. However, he now insists "with deep conviction that he [Hand] was lucky in not having won out in that strange lottery."[8] Frankfurter rationalizes that

> to bemoan that the turn of the wheel did not put him on the Supreme Court grossly underestimates what he accomplished

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[7]"Learned Hand," Atlantic, CCVIII (December, 1961), 57-58.

[8]"Tribute to Learned Hand," Reporter, XX (April 30, 1959), 4.

> off it. . . . It is extremely doubtful whether on the Supreme Court, with its confined area of litigation, he would have influenced the course of law in its widest reaches as much as he did from the Second Circuit and through the Law Institute. In this regard and others, he would have found himself much more circumscribed on the Supreme Court than where he was. . . . In any event it is a fact that in his later years he was not only reconciled to have missed the place natural for him but came to believe that the Fates were wiser in this disposition of him than he had at one time desired for himself. Be this as it may, one thing is indubitably clear. Learned Hand's career vindicates a standard of excellence applied in performance that evokes universal esteem unconfused by show of place.[9]

Wyzanski is not as certain as Frankfurter that Hand satisfactorily reconciled his permanent relegation to the circuit court. "Some felt," reports Wyzanski, "that, while Learned Hand outwardly accepted his situation with calm, 'the trophy of Miltiades would not let him sleep.'"[10] Nevertheless, "to most American jurists, and to the legal profession that over the years expressed amazement that he had never thus been rewarded, Judge Hand remained 'the tenth Justice of the Supreme Court.'"[11]

Having completed forty-two years of devotion to hard work on the federal bench and possessed with the feeling he had "hammered out as compact and solid a piece of work as one can," Judge Hand requested retirement. On May 15, 1951, he wrote the following letter to President Harry S. Truman:

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[9]"Learned Hand," Harvard Law Review, LXXV (November, 1961), 4.

[10]"Learned Hand," p. 58.

[11]New York Times, August 19, 1961, p. 17.

> Having attained the age of more than seventy years, and having served as United States Circuit Judge for the Second Circuit for more than ten years continuously, I wish to avail myself, and do hereby avail myself, of the privilege granted me by section 371 of Title 28 of the United States Code "to retain" my "office but retire from regular active service." My retirement will take effect on June first, 1951.[12]

On May 23, 1951, the President responded from the White House:

> Your impending retirement fills me with regret, which I know is shared by the American people. It is hard to accept the fact that, after forty-two years of most distinguished service to our Nation, your activities are now to be narrowed.
>
> It is always difficult for me to express a sentiment of deep regret; what makes my present task so overwhelming is the compulsion I feel to attempt, on behalf of the American people, to give in words some inkling of the place you have held and will always hold in the life and spirit of our country.
>
> Your profession has long since recognized the magnitude of your contribution to the law. There has never been any question about your pre-eminent place among American jurists--indeed among the nations of the world. In your writings, in your day to day work for almost half a century, you have added purpose and hope to man's quest for justice through the process of law.
>
> As judge and philosopher, you have expressed the spirit of America and the highest in civilization which man has achieved. America, and the American people, are the richer because of the vigor and fullness of your contribution to our way of life.
>
> We are compensated in part by the fact that you are casting off only a part of the burdens which you have born for us these many years, and by our knowledge that you will continue actively to influence our life and society for years to come. May you enjoy many happy years of retirement, secure in the knowledge that no man, whatever his walk of life, has ever been more deserving of the admiration and gratitude of his country, and, indeed of the entire free world.[13]

Judge Hand's technical retirement after forty-two years on the bench initiated other tributes to his mind, spirit, and

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[12] In Learned Hand, The Spirit of Liberty, ed. Irving Dilliard (New York: Vintage Books Inc., 1959), p. xxi.

[13] Ibid., pp. xxi-xxii.

overall competence. One such tribute, undoubtedly one of the greatest ever paid to an American jurist, occurred on April 10, 1959, in recognition of his fiftieth year on the federal bench. Judges, justices of the Supreme Court, government officials, and lawyers from across the country gathered in the Federal Court House in New York City to honor Judge Hand. The following year President Eisenhower paid tribute to Judge Hand by appointing him to the President's Commission on National Goals. The letter transmitting the report of the commission cited Hand for his "wisdom and cooperative temper [which] made his participation extremely valuable."[14] Still other tributes came his way. The New York State Bar Association and the Council of the Harvard Law School Association recognized Judge Hand for distinguished service. In the same year, 1960, he was a recipient of the Great Living American Award of the United States Chamber of Commerce. Indeed, the bench had "yielded up its star." In typically modest tones the "star" described his work as a judge: "'Humph!' he said. 'I'm not a scholar at all. I've spent a lifetime of utter drudgery, shoveling smoke. . . .'"[15] Whether the career embraced "utter drudgery" or devoted enthusiastic participation, and the consequence was "shoveled smoke" or lasting contributions to our civilization, the career of Judge Hand was neither unrecognized nor unrewarded.

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[14]In New York Times, August 19, 1961, p. 17.

[15]In Ernest Haveman, "On a Great Judge's Death: A Moving Memoir," Life, LI (August 25, 1961), 38.

The Ablest Court

Few men had the opportunity to study the panorama of American life more intimately or longer than Judge Hand. The Second Circuit Court of Appeals (C.A.2) afforded the Judge the preponderance of occasions for this opportunity. C.A.2, created in 1891 to relieve the Supreme Court of an overload of appeals cases, has been praised by various critics. In 1951, the year of Hand's retirement, Professor John P. Frank of the Yale Law School declared of the court in which Judge Hand vested his talents: "Were courts rated like baseball teams, no expert in judging could be found to rank the Supreme Court first, if only because of the number of rookies on its nine. And while at least four federal courts of appeals have claims to great distinction, most expert judges would choose the Court of Appeals for the Second Circuit as the ablest court in the U.S."[16]

In 1957, Philip B. Kurland, a University of Chicago law professor, spoke of C.A.2 as "a strangely magnificent court dedicated to administer justice under the law." He described the court by recalling that:

> Once upon a time, but not so long ago, there was a great appellate court in this country. It sat not in Washington but in New York. Its senior member was Judge Learned Hand. . . . The court was called "the Second Circuit."
>
> The Second Circuit was a strange court. Every member of the court respected every other member of the court. Although disagreements in judgments were frequent, none

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[16]"The Top U.S. Commercial Court," Fortune, XLIII (January, 1951), 92.

> accused another of treachery to a cause, intellectual dishonesty, chicanery or venality. None was jealous to occupy the middle chair, nor ambitious for high political office, nor eager to lead the whole. If some were hopeful for appointment to the Supreme Court, the chosen path was by proof of capacity to fill the post and not by appeal to the electorate through the instrument of judicial opinions or public speeches. . . . Of the judges of this Second Circuit, vintage 1941-1951, some were wise, and, at times, some were foolish. But they all measured up to a high standard of judicial capacity and they were all dedicated to the job which each had undertaken to perform: to administer justice under law. It was indeed a strange court, and we are not likely to see its equal for many a year.[17]

Both Learned and his cousin, Augustus, served together on C.A.2. Other judges sometimes facetiously referred to them as "the right hand and the left hand."[18] But judges and lawyers alike respected and admired them both as men of "strong character, wide knowledge and utmost integrity."[19] Frank calls the Hand team the "pride of the C.A.2" and believes that each drew qualities from the other. "Learned may be a little quicker on ideas and more effective in expression. Augustus helps keep the family's feet on the ground."[20] As Burlingham puts the matter: "Learned [was] brilliant and speculative--Augustus wise and unwavering. With their associates they made the Circuit Court of Appeals for the Second Circuit . . . the best court in the United States."[21]

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[17]"Jerome N. Frank: Some Reflections and Recollections of a Law Clerk," University of Chicago Law Review, XXIV (Summer, 1957), 661.

[18]New York Times, August 19, 1961, p. 17. [19]Ibid.

[20]"The Top U.S. Commercial Court," p. 110.

[21]"Judge Learned Hand," p. 331.

C.A.2 reviews district courts within its jurisdiction. The district courts in turn attempt to decide cases as they believe C.A.2 would decide them. Since only a few cases go up on appeal to C.A.2, the leadership offered by this or any other circuit court to the courts below is a function of prime importance. When Judge Hand became chief judge of C.A.2 in 1939, "by his character and leadership he quickly restored the confidence of the bar and the public in the integrity of the administration of federal justice in this circuit," thus contributing measurably to making C.A.2 the "ablest court."[22]

Breadth and Depth in Hand's Decisions

Judge Hand's more than two thousand federal court opinions span an extensive range of subjects. "In every legal province--contracts, torts, equity, conflict of laws, criminal law, evidence, admiralty, patents, copyrights, trade-names, taxation, statutory interpretation--he has shaped or reshaped the important doctrines. Everywhere in the judicial domain you can trace his handiwork."[23] An interesting consequence of his longevity on the bench and the breadth and depth of his decisions was that when he obeyed certain Supreme Court decisions he was actually supporting decisions "based on rules of his making."[24] More often than those of any other jurist, the

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[22]"Remarks of J. Edward Lumbard, Chief Judge, at the Opening of the Term of the Court of Appeals--September 25, 1961," New York State Bar Journal, XXXIII (December, 1961), 410.

[23]Frank, "Some Reflections . . .," p. 681. [24]Ibid.

Supreme Court quoted Judge Hand's opinions.[25] Thus, "when he whistles a Supreme Court tune, frequently it is really his own. Even the English House of Lords has been known to follow him."[26]

Cases of consequence

Judge Hand fought for civil liberties and against monopolies. Particularly in these two areas the impact of his decisions in behalf of great causes placed him in the center of public attention.

When during World War I the Postmaster General banned from the mails a pro-Bolshevik magazine, The Masses, for attempting to interfere with operation of the military, Judge Hand found for the magazine because suppression of the press "is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government."[27] Many people when they think of Judge Hand also remember him as the judge who upheld conviction of certain Communist leaders under the Smith Act for "wilfully conspiring to teach and advocate the overthrow and destruction of the government by force and violence."[28] Jerome Frank says of this decision which involved the limits of free speech: Hand "believed that the courts should never treat non-procedural provisions of the

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[25] New York Times, August 19, 1961, p. 17.

[26] Frank, "Some Reflections . . .," p. 681.

[27] Masses Publishing Company v. Patten, 244 F.(2d) 533 (1917).

[28] United States v. Dennis, 183 F.(2d) 201 (1950); Dennis v. United States, 341 U.S. 494 (1951).

Bill of Rights as judicially enforcible commands. Possessed of that belief, it was pretty much a foregone conclusion that, if he possibly could, he would sustain the constitutionality of any federal statute interfering with free speech, no matter how undesirable he thought that interference."[29]

As a trust buster Judge Hand found monopolies in the Corn Products Company case,[30] the Associated Press case,[31] and the Aluminum Company of America case.[32] The influence of these decisions on the history of anti-trust law has been considerable.

Less frequently recognized as the work of Judge Hand but still of considerable consequence was one of the most influential cases in the tax field. In this 1934 case, Helvering v. Gregory, Hand held that "any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[33] "With courtesy and good humor, Hand later fought a battle against the Supreme Court in a series of decisions that so

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[29]"Some Reflections . . .," pp. 694-695.

[30]United States v. Corn Products Refining Co., 234 F. 964 (1916).

[31]United States v. Associated Press, 52 Fed. Supp. 362 (1943).

[32]United States v. Aluminum Company of America, 148 F.(2d) 416 (1945).

[33]69 F.(2d) 809,810 (1934).

dramatized what he regarded as the higher body's tax errors that Congress changed the law to accord with his views."[34]

Judge Hand's opinions were not always fraught with immeasurable consequence. When a lower court refused citizenship to a woman because of her allegedly bad moral character, he reversed the refusal and ruled: "A continued illicit relationship is not inevitably an index of bad moral character. A person may have good moral character even though he has been delinquent upon occasion in the past; it is enough if he shows that he does not transgress the accepted moral canons more often than usual."[35] In yet another citizenship case, handed down in 1961, Judge Hand wrote the opinion unanimously agreed on by C.A.2 "that ignoring parking tickets was not a serious enough offense to bar a man from citizenship."[36]

Thus, Judge Hand utilized his penetrating insight, shrewd intellect, and exhaustive experience on cases involving civil liberties, monopolies, taxes, citizenship, and those from a host of other areas. All served to enlarge the legal universe.

The Judge's criminal law cases

Inevitably a half century on the federal bench exposed Judge Hand to numerous criminal cases requiring disposition.

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[34]Frank, "The Top U.S. Commercial Court," p. 96.

[35]In New York Times, August 19, 1961, p. 17.

[36]Ibid.

More than one hundred alleged violations of the criminal law resulted in opinions written by him. Concurrent with the handing down of these decisions the philosophy of criminal law relative to procedural rules for prosecution and punishment changed markedly. The Criminal Code had just been enacted when Hand received his initial appointment to the federal district court in 1909. The expansion of federal criminal jurisdiction which was to continue throughout Judge Hand's tenure had just begun. "New and speedier methods of communication and transportation rendered imperative the passage of federal law tailored to combat a new type of crime and a new type of criminal. In the work of adapting the old and cumbersome rules of procedure to the needs of a faster and more efficient age, Judge Hand played an important part."[37] Not only did he improve upon archaic procedural rules but he also influenced interpretation and advancement of the substantive law of federal crimes.

Primarily through his judicial opinions the Judge exercised his influence.[38] These opinions in such diverse substantive areas as narcotics, espionage, treason, mail fraud, and price control invaded virtually every aspect of criminal law. In United States v. Rosenberg, Judge Hand upheld the constitutionality of the Harrison Anti-Narcotic Law.[39] He

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[37]Lancaster, "The Jurisprudence . . .," p. 273.

[38]Orrin G. Judd, "Judge Learned Hand and the Criminal Law," Harvard Law Review, LX (February, 1947), 405.

[39]251 F. 963 (1918).

sustained an indictment under the Espionage Act of 1917 in United States v. Nearing.[40] The requisite two witnesses to an act of treason not being present he directed a verdict for the defendant in a 1919 treason trial.[41] As a protector of the gullible he supported the mail-fraud statute; and as federal jurisdiction expanded to encompass new crimes, Judge Hand actively administered new laws such as the World War II Emergency Price Control Act.[42]

The varied procedural aspects on which Judge Hand's criminal decisions touched can be considered in six groups: sufficiency of indictments, harmless error, search and seizure, evidence, contempt, and juries.[43]

Sufficiency of indictments

The first three reported criminal cases with Judge Hand presiding involved attacks upon indictments. These attacks provided the defendant with an opportunity to take advantage of technical errors in the wording of the indictments.[44] Overruling demurrers in these cases, Judge Hand clearly demonstrated that he would not tolerate insubstantial

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[40]252 F. 223 (1918).

[41]United States v. Robinson, 259 F. 685 (1919).

[42]United States v. Arrow Packing Co., 153 F.(2d) 669 (1946).

[43]Judd, "Judge Learned Hand . . .," pp. 406-417.

[44]United States v. White et al., 171 F. 775 (1909); United States v. Franklin, 174 F. 161 (1909); United States v. Franklin, 174 F. 163 (1909).

defenses. He pursued this point in later cases persistently resisting defense counsel attacks on indictments by regarding the attacks as demands for needless formalism.[45]

Harmless error

Although some appellate judges interpreted harmless errors (those which do not effect the substantial rights of litigants) as impediments which justified reversal for mere technicalities, Judge Hand was not so inclined. Orrin Judd, author, lawyer, and former law clerk to the Judge, believes that Hand "brought to the appellate court the same emphasis on reasonableness and fair play rather than legalism that characterized his decisions on demurrers to indictments as a district judge."[46] His awareness of harmless errors avoided that interference by appellate courts which he believed "would weaken the responsibility of trial judges."[47]

Search and seizure

Any violation of Constitutional rights turned Judge Hand into a protector of defendant's interests. United States v. Kirschenblatt, one of his most frequently cited criminal law opinions, involved documents seized by authorities in

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[45]United States v. Kennerley, 209 F. 119 (1913); United States v. Rosenberg, 251 F. 963 (1918); United States v. Nearing et al., 252 F. 223 (1918); United States v. Garsson et al., 291 F. 646 (1923).

[46]"Judge Learned Hand . . .," p. 408.

[47]Ibid.

connection with a lawful warrant and arrest.[48] But Hand held that the Fourth Amendment limits the power to search to the "tools and fruits of the crime." The Constitutional protection extended, according to the Judge, to indiscriminate ransacking of the defendant's house and rummaging among his papers. Lancaster declares that opinions such as the Kirschenblatt case demonstrate that the Judge understood "the history behind the Fourth Amendment" and sought "to realize those historic values in his judicial life."[49]

> While Judge Hand exhibits his characteristic judicial balance in handling cases under the Fourth Amendment, a study of his opinions indicates that in weighing the social interest in preventing crimes and apprehending criminals against the social interest in preserving rights to privacy and immunity from police intrusion, rights to privacy often tip the beam. It is clear, too, that he understands that the historical background of the Amendment affords the key to its interpretation.[50]

Evidence

Judge Hand was a protector of the privilege which frees one from testifying against himself. In United States v. Andolschek he contended that one need not claim such a privilege.[51] Demonstrating a belief in "fair play," in the Andolschek case, Judge Hand also denied to the government the right to claim official reports as privileged when basing prosecution on a transaction related to the reports.[52]

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[48] 16 F.(2d) 202 (1926).

[49] Lancaster, "The Jurisprudence . . .," p. 145.

[50] Ibid., p. 122. [51] 142 F.(2d) 503 (1944).

[52] Ibid., p. 506.

In particular, one of the Judge's decisions on the admissibility of evidence provoked extended law-review debate. In Di Carlo v. United States a witness, challenged for bias, made prior, consistent statements which Hand allowed to be admitted subject to the jury's assessment of their weight.[53] The controversy then ensued.

Contempt

Judge Hand pioneered the application of the doctrine of criminal contempt to evasive answers which block inquiry. In United States v. Appel he set forth his position:

> The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. . . . If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all.[54]

Juries

Judge Hand displayed confidence in the jury system. "His refusal to reverse for insubstantial error can be traced in part to a confidence in the jury's ability to reach a fair decision on the merits, without being led astray by incomplete evidence or inconsistencies in the judge's charge."[55] In

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[53] 6 F.(2d) 364 (1925). [54] 211 F. 495,495-496 (1913).

[55] Judd, "Judge Learned Hand," p. 415.

United States v. Strewl the Judge placed the jury system in the legal scheme: "Trial by jury, certainly for the graver crimes, has a high place in our traditions; around it cluster many memories of freedom won at large cost; its surrender is not to be lightly imputed to the accused."[56]

Orrin Judd contends that "Learned Hand has been a 'strong' judge in criminal cases, and his opinions have frequently been 'strong' medicine."[57] What made him "strong" and what gave his opinions this imputed "strength"? Perhaps, at least a partial explanation lies in the combined explanations of Judge Wyzanski, law professor Seymour, and attorney Judd. Judge Hand, according to Wyzanski, brought to criminal law

> a mind informed by experience, deepened by erudition, and sensitized by awareness of the struggle for liberty. . . . When a plainly guilty man had had a fair trial, Hand was not quick to discover error. Even when he cared little for a particular prohibition or penalty, he did not evade the law's mandate. Yet he was no friend of barbaric police or ruthless prosecutors. The squalid huckster whose Constitutional rights had been violated had no better guardian.[58]

Seymour sees in Hand "a deep concern for justice according to the rules . . . [as] the thread that unites all his opinions. In criminal cases, he has avoided sentimentality over those who are convicted, but has insisted that they be fairly tried."[59] Judd concludes the reaction of the three by claiming that

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[56]99 F.(2d) 474,478 (1938).

[57]Judd, "Judge Learned Hand," p. 410.

[58]"Learned Hand," p. 55.

[59]Whitney North Seymour, "Tribute to the 'Old Chief' of the Bench," New York Times Magazine (April 5, 1959), p. 17.

> Judge Hand is neither a "hanging judge" nor a "defendant's judge." He has provided, not a one-sided approach to the criminal law, but a wise and impartial judgment which balances the public interest in prompt and efficient prosecution with the individual interest (which is not without its social importance) of each defendant in a fair trial. During the important period in federal criminal law which has marked his service on the bench, he has made a major contribution toward making the law an effective instrument of justice.[60]

Creation of an Image

Judge Learned Hand felt deeply about his decision-making responsibility. Publication of the opinion did not necessarily end his anxiety over a case. Expressed uncertainty before rendering an opinion did not become for him assuredness once he uttered the opinion. "I have known him to brood disquietly over decisions he rendered several years earlier," recalls Jerome Frank.[61] Once, distraught about a decision, he told his law clerk: "Now when I die you can perform an autopsy on my body. When you get to my heart you will see a scar, and if you lift that scar you will find underneath the words 'Hatch v. Morosco.'"[62] Not only did Judge Hand feel deeply about his immediate responsibility, but he also felt deeply about those many ingredients which constitute the judicial process. He deliberated about the nature of law, the responsibilities of the legal profession, and the traits of the judge. These

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[60] Judd, "Judge Learned Hand," p. 422.

[61] "Some Reflections . . .," p. 670.

[62] In Herman Finkelstein, "A Memoir of Judge Learned Hand (1872-1961)," Bulletin of the Copyright Society of the U.S.A., IX (October, 1961), 3.

contributions to his image, espoused by the Judge, pervade his writings, public utterances, and judicial opinions. The characteristics of the Judge in court and in preparing his opinions complement the image of the "deliberating" Judge as seen at work by those near him. Other contemporaries, not necessarily closely associated with the Judge, contributed to his image from their vantage points as members of the bench, bar, and general public. Not all spoke consistently of him solely as a "deliberating" judge. In fact some of these same critics saw him as a fun-loving, witty, companionable creature who would deviate on occasion from his deliberative qualities, swerve a little left or right of that narrow norm ascribed to judges, and show that he was not afraid to be a wholly human individual. Thus, as a "deliberating" and as a "deviating" judge, both Learned Hand and the contemporaries who knew and sought to understand him contributed to the image of the Judge.

The Deliberating Judge

Contributions from the Judge

Learned Hand during his lifetime wrote no formal treatise on the purpose and function of law, the responsibilities of the profession, or the inherently necessary qualities for judgeship. Though not a legal theorist or philosopher, his essays, speeches, and legal opinions contain the image-building contributions which he left behind. His characteristics at work, preserved by those who knew him intimately, provide the remainder of his personal contributions.

Hand on the nature of law

Because Judge Hand did not write a definitive treatise on the law does not mean that he did not possess definite deep-felt ideas about the nature of the legal process. "Many students of Judge Hand's work feel that his public addresses and articles in law journals have been among his greatest contributions. In them he has given expression to some of his deepest feelings on law. . . ."[63] One such public address, which Judge Hand presented over the C.B.S. radio network, dealt specifically with the nature of law:

> Law does not mean then whatever people usually do, or even what they think to be right. Certainly it does not mean what only the most enlightened individuals usually do or think right. It is the conduct which the government . . . will compel individuals to conform to. . . . If this is true, there must be some way to learn what is this conduct. The law is the command of the government, and it must be ascertainable in some form if it is to be enforced at all.
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> The only way in which its will can be put is in words, and in modern and civilized societies these are always written. They are in the form of statutes enacted formally, or they are in books which report what has been decided before by judges whom the government gave power to decide.[64]

Sometime later at a Boston gathering the Judge expanded on his conception of law, this time referring to the respect men feel for that customary law imbedded in their nature.

> We accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action. Through the openings given by that disposition,

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[63]Philip Hamburger, "The Great Judge," Life, XXI (November 4, 1946), 126.

[64]"How Far Is a Judge Free in Rendering a Decision," in The Spirit of Liberty, pp. 80-81.

> the common law has been fabricated bit by bit without express assent and under the ministrations of those who have always protested that, like the Bourbons, they learn nothing and forget nothing.[65]

Just as Judge Hand possessed a conception of the law he also understood those conditions indispensable to applying the law to the pursuit of justice:

> The law must have an authority supreme over the will of the individual, . . . Thus, the law surpasses the deliverances of even the most exalted of its prophets; the momentum of its composite will alone makes it effective to coerce the individual. . . . It [the law] must be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation. Yet with this piety must go a taste for courageous experiment, by which alone the law has been built as we have it, an indubitable structure, organic and living.[66]

But, the Judge cautioned about the application of these concepts to attain justice: "Justice, I think is the tolerable accommodation of conflicting interests of society . . . and I don't believe there is any royal road to attain such accommodations concretely."[67]

Judge Hand's notions on the nature of law insofar as law is "the command of the government" included an outspoken belief about the proper role of the courts when enforcing the Bill of Rights. With deep conviction the Judge believed that judicial review, the power of the courts to declare statutes

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[65]"The Contribution of an Independent Judiciary to Civilization," in The Spirit of Liberty, p. 120.

[66]"The Speech of Justice," in The Spirit of Liberty, p. 12.

[67]In Hamburger, "The Great Judge," pp. 122-123.

unconstitutional, should be exercised with great restraint and then only on the rarest of occasions. From the days of his endorsement of Bull Moose philosophy, which included the recall of judicial decisions, throughout his career on the federal bench, "he held to his traditional position . . . criticizing the Supreme Court for exercising what he regarded as too broad a supervision over legislative decisions, functioning in effect as a 'third legislative chamber.' For the courts to pass on the merits of legislation, he asserted, is a 'patent usurpation' of power."[68] The 1954 Supreme Court decision outlawing school segregation exemplified the judicial review he opposed.[69] Only once did he hold unconstitutional a federal statute not involving procedure.[70] Even then Supreme Court decisions, not personal conviction, apparently controlled his decision.[71]

To Judge Hand the law was a living organism. Written words, he believed, in the form of statutes or court reports constituted the ascertainable command of the government. The merits of legislative compromise gave a virtue to legislative supremacy which obligated the courts to discover legislative intent rather than to legislate judicially and become a "third legislative chamber." The Judge saw the importance of popular support for the law but refused to ignore the necessity for

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[68] New York Times, August 19, 1961, p. 17. [69] Ibid.

[70] United States v. A.L.A. Schechter Poultry Corporation, 76 F.(2d) 617 (1935).

[71] Frank, "Some Reflections . . .," p. 690.

"courageous experiment." Accordingly, he refused to subscribe the law to legal dogmas parading as eternal absolutes. "To him the law is an instrument for the solution of legal controversies in accordance with certain principles of procedure and substance which the profession has developed over the course of a long period of time for the achievement of social order."[72]

Hand on the responsibilities of the legal profession

Judge Hand warned the legal profession what each member must feel and do if respect and growth were to result. He assessed the responsibility solely to the profession and insisted that the present caretakers as guardians of a cherished legal system must pass this heritage on to the future with reverence and pride. Hand said:

> When our lights burn low, when we seem to stand futile and without meaning, used up in the senseless strife of interest and passion, concerned with nothing better than to get for others what perhaps they should not have, let us look up to the great edifice which our forebears have built, of which we are now the guardians and the craftsmen. Though severally we may perhaps be paltry and inconsequent, for the present it is we who are charged with its maintenance and growth. Descended to us, in some sort moulded by our hands, passed on to the future with reverence and with pride, we at once its servants and its masters, renew our fealty to the Law.[73]

For the lawyer to protect his public esteem and avoid degeneration in the eyes of a disrespectful society Judge Hand charged the profession with the responsibility to understand

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[72]Lancaster, "The Jurisprudence . . .," p. 308.

[73]"To Yale Law Graduates," in The Spirit of Liberty, p. 69.

the social will.[74] "The profession of the law," avowed Hand, "is charged with the articulation and final incidence of the successive efforts toward justice; it must feel the circulation of the communal blood or it will wither and drop off, a useless member."[75]

The Judge believed that the legal profession was the determiner of its own fate, a fate the attainment of which requires that the profession

> continue to represent a larger, more varied social will by a broader, more comprehensive interpretation. The change must come from within; the profession must satisfy its community by becoming itself satisfied with the community. It must assimilate society before society will assimilate it; it must become organic to remain a living organ. No political mechanism designed to accomplish this by fear will succeed, if the inward disloyalty of purpose remain. The lawyer must either learn to live more capaciously or be content to find himself continuously less trusted, more circumscribed, till he becomes hardly more important than a minor administrator, confined to a monotonous round of record and routine, without dignity, inspiration, or respect. There can be no ambiguity in the answer of those who are worthy of the traditions and the power of a noble calling.[76]

Thus, Judge Hand reasoned that without grasping and adjusting to the social will the prestige of the lawyer is in jeopardy for the consequence is espousal of shallow scholasticism which society will value accordingly.

Hand on the traits of the judge

Long service on the federal bench well prepared Judge Hand to discuss the judge's traits. If not through philosophical

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[74]"The Speech of Justice," in The Spirit of Liberty, p. 14.

[75]Ibid., pp. 11-12. [76]Ibid., p. 15.

precept, at least through experience he qualified himself to be heard on the subject:

What the judge is. Judge Hand was frank, outspoken, and perhaps prone to over-generalize about those characteristics which describe the judge. Hand claimed:

> Individually, we are diffident, pious, occupied, prejudiced, averse to ideas and reasoning, and suspicious of change. We must be won by some honorific apparatus, by the conversion of those among us whom the others hold in high repute. Once that is done, being human, we scrutinize, accept, espouse, and finally sanctify the new ideas. Last stage of all we persecute and ostracize critics among whom yesterday perhaps we were ourselves.[77]

The Judge drew upon his personal experience when he recalled that

> a judge's life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettifogging, all disguising and obstructing the only sane purpose which can justify the whole endeavor. These take an inordinate part of his time; they harass and befog the unhappy wretch, and at times almost drive him from that bench where like any other workman he must do his work. If that were all, his life would be mere misery, and he a distracted arbiter between irreconcilable extremes. But there is something else that makes it--anyway to those curious creatures who persist in it--a delectable calling. For when the case is all in, and the turmoil stops, and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly as his capacities admit, out of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefor [sic] made, the impress of his self upon the not-self, upon the hitherto formless material of which he was once but a part and over which he has now become the master. That is a pleasure which nobody who has felt it will be likely to underrate.[78]

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[77]"Have the Bench and Bar Anything to Contribute to the Teaching of Law," American Law School Review, V (March, 1926), 629.

[78]"The Preservation of Personality," in The Spirit of Liberty, p. 33.

The judge comes from that part of the bar "which has distinguished itself in the field of action," contended Hand. Possessed of "strong will, set beliefs, and conventional ideals" these men "are almost inevitably drawn from the propertied class and share its assumptions" and blessings of equilibrium in preserving the long past of the law.[79] However, Judge Hand further explained that judges proceed to make those changes which do not shock the inertia or existing prejudices of the time, going as far as their moral authority will allow.[80] Also they must not shock existing expectations about "manners, acumen, and style," which he claimed, "count for much in a judge; far more than we are prepared to admit."[81]

What the judge should be. Judge Hand recognized that "men ask more than scholarship . . . of a judge . . . for while scholarship may clear the thickets it can build little. In the end, and quite fairly, a judge will be estimated in terms of his outlook and nature."[82] Wide reading and sensitive understanding combined with an outlook not conditioned by ignorance or class prejudice were his prescriptions to the judge. He indicated how such an "outlook and nature" might be achieved

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[79]"Mr. Justice Holmes at Eighty-Five," in The Spirit of Liberty, p. 19.

[80]"Have the Bench and Bar . . .," p. 622.

[81]"Thomas Walter Swan," Yale Law Journal, LVII (December, 1947), 170.

[82]"Mr. Justice Holmes at Eighty-Five," in The Spirit of Liberty, p. 21.

by a judge passing on questions of constitutional law. Other questions are probably no less demanding. Hand said:

> I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The works he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.[83]

Just one year later the Judge told the Yale Law School graduates about the mental and moral qualities which contribute to the "outlook and nature" of the judge. In this address he proposed that a judge should be aware of the difficulty and the hazards of his duty; be hesitant in what he imputes to any law since its policy "may inhere as much in its limits as in its extent"; be capable of historically reconstructing the "setting which evoked the law; the contentions which it resolved; the objects which it sought; the events which led up to it"; be free in his mind and will from "those personal presuppositions and prejudices which almost inevitably invade

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[83] "Sources of Tolerance," in The Spirit of Liberty, p. 63. Justice Felix Frankfurter claims that although "Learned Hand has made these exactions for others . . . they are the best commentaries on his judicial labors." See "Judge Learned Hand," Harvard Law Review, LX (February, 1947), 328.

all human judgments"; and be cautious to remain detached from preconceiving what the outcome of a proceeding should be.[84]

What the judge should do. Judge Hand expressed special concern that a judge perform his work responsibly in two particular ways. When introducing innovation into the law and when working with words, he charged the judge with understanding the importance of the function and exercising the caution essential to performing these judicial duties.

Reconciling the structure shaped by generations of judges with the changing needs of a heterogeneous society is a judicial task of major importance. Judge Hand urged that the judge "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" or fail to obtain "that tolerable continuity without which society dissolves."[85] On one hand he argued for greater freedom for the judiciary to indulge in human convictions and on the other he demanded that the judge act with great self-restraint. But in the end Judge Hand showed confidence that judges satisfactorily accomplish a composition of the traditional old and the innovated new when he said:

> To compose inconsistencies, to unravel confusions, to announce unrecognized implications, to make, in Holmes' now hackneyed phrase, "interstitial" advances; these are

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[84]"Thomas Walter Swan," pp. 171-172.

[85]"Mr. Justice Cardozo," in The Spirit of Liberty, p. 99.

> the measure of what they may properly do, and there is not indeed much danger of their exceeding this limit; rather the contrary, for they are curiously timid about innovations. A judge who will hector the bar and browbeat the witnesses and who can find a warrant in the Fourteenth Amendment for stifling a patently reasonable legislative experiment, will tremble at the thought of introducing a new exception into the hearsay rule. And . . . in the end things work out very well as they are, for the advantage of leaving step by step amendments of the customary law in the hands of those trained in it, outweigh the dangers.[86]

Judge Hand believed that a satisfactory composition of the old and the new in law depends on the interpretation of words. He regarded the interpretation of words which may cover diverse unforeseen circumstances as the greatest part of a judge's work. These words, chosen from common speech by legislators and judges and without possibly being fitting for every contingency, must be interpreted to find out the will of their users, according to Hand. He speculated on how the judge proceeds:

> Although at times he says and believes that he is not doing so, what he really does is to take the language before him, whether it be from a statute or from the decision of a former judge, and try to find out what the government, or his predecessor, would have done, if the case before him had been before them. He calls this finding the intent of the statute or of the doctrine. This is often not really true. The men who used the language did not have any intent at all about the case that has come up; it had not occurred to their minds. . . . Thus it is not enough for the judge to use a dictionary. If he should do no more he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose.[87]

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[86]"The Contribution of an Independent Judiciary," in The Spirit of Liberty, p. 121.

[87]"How Far Is a Judge Free in Rendering a Decision?" in The Spirit of Liberty, p. 82.

Caught in a contradictory position and attracted by opposite forces, the plight of the judge, said Hand, is that

> on the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed.[88]

Therefore, Judge Hand described the judge as a wholly human person who though plagued by the shortcomings and pitfalls shared by all mankind finds himself in a "delectable" and rewarding calling. He possesses qualities which his critics deny to him, and critics brand him with qualities which he denies possessing. Judge Hand urged all judges to read widely, understand with sensitivity, and view their work without prejudice. Performance of this work, cautioned Hand, should be done with respect for the exercise of self-restraint when innovating and for the importance of words when interpreting.

Hand at work

No treatment of Learned Hand's image as a judge would be complete without considering the Judge's characteristics in court and in his opinion writing. In these situations his vigorous personality became evident. Many who were near the Judge relate these characteristics in stories which they tell.

Characteristics in court. Judge Hand might have been thinking of himself when in a tribute to Robert Patterson, his

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[88] Ibid., p. 84.

late colleague on the federal bench, he doubted

> whether the work of a judge of first instance is to be best appraised by that part which is recorded; and at any rate the other part must be reckoned a close second, if not an equal: I mean that which takes place in the court-room and either slips away into anonymity or remains only in the transient recollections of those who may be present.[89]

The "recollections of those who may be present" reveal Judge Hand to have been a physically imposing figure on the bench consonant with the popular concept of what a great judge should look like. One look at him in court made apparent that he started with an enormous advantage. Stocky, robust, with a massive head and bushy eyebrows, his glance had a piercing quality, stern and incorruptible.[90] "He looks like a great judge," said lawyer Whitney North Seymour about him when Hand was in his fiftieth year on the bench. "It is a noble face--powerful, arresting, mobile. When Hand sits, counsel watches that face with hope and fear--will it remain in repose, while the mind absorbs the argument, or will it show quick scorn and produce a devastating question to sear a bad argument?"[91] "A broadening intellectual experience often with shattering overtones," recalls Hamburger, referring to testimony from those who appeared before the judge.[92] Lawyers who insisted that the case at bar possessed unique aspects of the law or was open and

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[89]"Robert P. Patterson," in The Spirit of Liberty, p. 202.

[90]New York Times, April 11, 1959, p. 12.

[91]"Tribute to the 'Old Chief' . . .," p. 17.

[92]"The Great Judge," pp. 118, 120.

shut based on established doctrine prompted the "shattering overtones." "Judge Hand resists both tendencies with the air of a tolerant schoolmaster. As long as the argument remains germane, he listens attentively, putting on and removing heavy tortoise-shell glasses and leaning across the bench. But let the argument wander or become diffused in mists of rhetoric and he begins to wriggle and twist."[93]

> Broad generalizations leave him in a cold intellectual fury. Lawyers who attempt to impress him by reminding the court of "those eternal principles of justice ringing down the ages" do so only once. His broad jaw drops in anguish. His bushy gray eyebrows rise in horror. His face, a moment ago as serene and inquiring as Cardozo's, becomes as fierce as Daniel Webster's at the height of a peroration. The courtroom echoes with a sharp crack as he slaps a hand to his brow and leans far back in a tall leather arm chair. "Rubbish!" he shouts, almost disappearing from view behind the bench.[94]

If "rubbish" did not sufficiently describe his anguish, he clapped his hand to his forehead and bellowed, "enough, enough, I can't take any more!"[95] When a lawyer humbled himself with the appeal, "as the distinguished court is well aware," yet another flash radiated from the Judge: "We are aware of nothing! You're here to enlighten us."[96] Counsel rarely missed the point.

Although the force of Hand's judicial wrath thundered down and terrified the boldest counsel and his lightning

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[93] Ibid., p. 118. [94] Ibid., p. 117.

[95] In Irwin Ross, "The Legend of Learned Hand," Reader's Digest (July, 1951), p. 105.

[96] In ibid., pp. 105-106.

questions and comments "short-circuited" many arguments, afterwards he became penitent for any suffering incurred. "Sometimes he apologized from the bench, but always he begged forgiveness of his colleagues and he usually found some way of making amends to counsel. He always took great care to seek out any possible merit in points which he had summarily brushed aside in the courtroom."[97]

Judge Hand had both dramatic and sensitive characteristics in court. However, in his routine work on the bench, sound judgment, keen perception, and respectful courtesy were more apparent characteristics than irritability.

Characteristics of opinion writing. Consideration of the preparation and style of Judge Hand's legal opinions provides insight into the image of the Judge at work. Many of his more than two thousand opinions possessed what from other judges might have been meaningless. But the Hand preparation and the Hand style made them moving and persuasive. His opinions took shape as he wrote into them elements of personal charm, keen perception, abundant humor, ready appreciation of the other man's point of view, dislike of affectation and sham, and gentle cynicism.[98]

In preparing opinions, frequently "he sat with his legs upon the desk, a drawing board spread across his knees. On

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[97]"Remarks of J. Edward Lumbard . . .," p. 410.

[98]George Wharton Pepper, "The Literary Style of Learned Hand," Harvard Law Review, LX (February, 1947), 334.

yellow sheets he scribbled, crossed out, and interwove well-nigh undecipherable symbols. As he said, he 'thought with his fingers.'"[99] Before writing, however, he studied briefs and blueprints, paced the floor, and thought for hours. "For me," he said, "writing is like having a baby."[100] When he finally did write, he prepared three to four drafts of every opinion. This was done with "my life's blood," he would say. "I suffer, believe me, I suffer."[101] The Judge rarely dictated an opinion, but he did think aloud the general pattern of his decision to his law clerk.

Judge Hand's meticulous preparation of opinions resulted in what Frankfurter describes as a "muscular, ruminative, and eloquent" style which "it can surely be said . . . was the man."[102] This powerful and graceful style Seymour found to be "the reflection of a cultured mind."[103] The self-revelation of Hand's cultured mind came forth in his decisions. For instance, the form with which he clothed his thoughts

> was a faithful mirror of his manner of speech. Latin tags were part of his normal system of thought. Literary allusiveness reflected the overflowing pressure of his constant reading. And the odd turns he sometimes gave a compressed phrase was the revelation of his personality, not the

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[99]Wyzanski, "Learned Hand," pp. 56-57.

[100]In Bill Davidson, "Judge Learned Hand: Titan of the Law," Coronet, XXVI (September, 1949), 112.

[101]In Hamburger, "The Great Judge," p. 120.

[102]"Learned Hand," p. 2.

[103]"Tribute to the 'Old Chief' . . .," p. 116.

> contrivance of an artificial man. . . . A Hand opinion is comparable to a sonnet: a distillation of thought, prepared within limits strictly defined by convention, but emanating an afflatus beyond the established boundaries.[104]

Jerome Frank supports the belief that Judge Hand's style of writing mirrored his manner of speech and thought. Frank claims the Judge wrote in an English, not an American, style; and this was fitting because he spoke in English, not American, and therefore thought in English. "Stylistically, his opinions might have been written by the best literary artists on the English bench," alleges Frank. "Like Cardozo, he resorts often to metaphors. But Hand's metaphors quicken the thought, do not impede it as Cardozo's frequently did. You can tell much about a man from the metaphors he keeps. . . . Learned Hand's are alive and zesty."[105]

Therefore, in clear and memorable language, "the wisdom, wit and moral fervor which are the mark of his greatness" revealed the man through his style.[106] As a literary craftsman he performed in

> a style characterized by the compassion, the poignancy, the balance, the diction of a sonnet. Some there are--the impatient and the superficial--who regard this style as no more than the artifice of an accomplished man. They would be better pleased if for every line he had substituted a page; for every haunting phrase, a clear, ungarnished paragraph. Others of more discrimination see in Judge Hand's choice of form the subtle revelation of his conception of office. The rigorous limits he imposes on

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[104]Wyzanski, "Learned Hand," p. 57.

[105]"Some Reflections . . .," p. 674.

[106]Ross, "The Legend of Learned Hand," p. 107.

> his own expression acknowledge that the justice he administers is under law. . . . His use of allusion and suggestion, his scorn of didacticism disclose the detachment, skepticism, and tolerance which are for him cardinal virtues of the judge.[107]

That Judge Hand could write is an uncontroverted fact. One need only briefly peruse a sample of his opinions to see how well he did it. He lacked the sometimes obscure quality of Holmes and the ornateness of Cardozo. In plain but picturesque language Judge Hand dispelled any doubt about what he was after. The "very pungent clarity" of his style carried persuasion.[108]

Contributions from contemporaries

If the anecdotal expressions of the bench, bar, and general public are valid criteria for measuring Judge Hand's contributions to his profession, he must be ranked among those who have achieved the very highest distinction among American judges. The final evaluation on Judge Hand probably will not differ considerably from the content of these anecdotal contributions. In the words of rarely extravagant former Justice Frankfurter, "he is headed straight for the glories and the danger of a legend."[109] The bench, bar, and general public all contribute to this legend and hence the image.

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[107]Charles E. Wyzanski, "Judge Learned Hand's Contributions to Public Law," Harvard Law Review, LX (February, 1947), 369.

[108]"Learned Hand: Senior Circuit Judge . . .," p. 871.

[109]In "A Great Judge Retires: American Law Institute Honors Learned Hand," American Bar Association Journal, XXXVII (July, 1951), 503.

From the bench

The acclaim Judge Hand received from the bench frequently bordered on the extravagant. An introductory sampling of this acclaim is indicative of what these and other judges espoused in detail about the Judge. For instance, judge and author Jerome Frank dedicated his book, Courts on Trial, to Hand with this comment: "To Learned Hand, our wisest judge."[110] A distinguished member of the federal bench, John J. Parker, said: "All of us know that he is not only one of the greatest judges of this generation, but he is one of the greatest judges that has ever sat on a court of the United States."[111] When on request Justice Benjamin Cardozo selected the greatest living American jurist he named Hand by stating that the "greatest living American jurist isn't on the Supreme Court."[112] Judge Thacher of the New York Court of Appeals contended that Hand's beliefs "clothed him with true humility and with a conscience which spares him never. Couple these with his learning and his craftsmanship and we have a great judge."[113] And the highly esteemed Felix Frankfurter while on the Supreme Court regarded Judge Hand as "one at whose feet I sat almost from the time I came to the bar and at whose feet I still

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[110](Princeton, New Jersey: Princeton University Press, 1949), p. v.

[111]In "A Great Judge Retires . . .," p. 502.

[112]In Davidson, "Judge Learned Hand . . .," p. 108.

[113]In "Judge Learned Hand: Honored by Harvard Law School," American Bar Association Journal, XXXIII (May, 1947), 476.

sit."[114] The foundation for these exalted tributes becomes apparent by considering more extensively contributions from these and other members of the judiciary.

From Judge Frankfurter. When Judge Hand retired from the bench in 1951, Frankfurter reflected on his personal gain from Hand's departure: "Hereafter I shall feel freer to act on my belief that a decision of the Circuit Court of the Second Circuit might give occasion for review by the Supreme Court, and I might even perchance at times feel that an opinion which he wrote might be wrong."[115] Frankfurter's sentiments arise from his belief that what Pepys wrote of Clarendon particularly fits Hand: "I am mad in love with my Lord Chancellor, for he do comprehend and speak out well, and with the greatest easiness and authority that ever I saw man in my life . . . his manner and freedom of doing it, as if he played with it, and was informing only all the rest of the company, was mighty pretty."[116] Perhaps the "easiness and authority" with which he spoke out so well is traceable to what Frankfurter described as the demonstration which Hand gave "of the fact that moral influence, achievement of excellence, [and] the fertilization of thought are not dependent on place."[117]

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[114]Burlingham, "Judge Learned Hand," p. 326.

[115]In "A Great Judge Retires . . .," p. 503.

[116]In Burlingham, "Judge Learned Hand," p. 329.

[117]"Tribute to Learned Hand," The Reporter, XX (April 30, 1959), 4.

On April 10, 1959, at the fiftieth-anniversary celebration of Learned Hand's appointment as a federal judge, Frankfurter delivered a tribute. He recalled that Hand had summed up his life as "uneventful, unadventurous, easy, safe, and pleasant"; and he chided that five more inadequate adjectives to summarize Hand's life could not have been selected:

> Uneventful--if events take place merely in the world of action and not in the arena of the mind.
>
> Unadventurous--if adventure requires the scaling of Mt. Everest and crossing Antarctica, and if there be no adventures of thought.
>
> Easy--can it really have been easy for him all these years to interpret the mysteries and the mumbo-jumbo of the nine Delphic oracles, and, at pain of a spanking, find clarity in darkness?
>
> Safe--has life been safe, secure? He, safe and secure, who has been buffeted and battered by the largest self-doubt of any human being I have ever encountered?
>
> And then he says "pleasant!" Well, he has something there, but it is a sly bit of truth. Would he have had as much pleasure in life if he hadn't been there?[118]

Frankfurter then offered his own five adjectives: "daring, romantic, antediluvian, sophisticated, and lucky."

> Daring--of course, daring. In a world in which the pressures for conformity are so on the increase, he has dared to be gaily and solemnly himself. He has dared to challenge passion, prejudice and intolerance, even when parading in the name of patriotism and supported by the voice of the multitude.
>
> Romantic--isn't the man a romantic, the windows of whose mind are open to every wind of doctrine and who is ready to find the Holy Grail in the most unlikely places?
>
> Antediluvian--is not our Judge antediluvian, who is guided by the reason of which he is the trustee and the delegate, and not the inventor, who deems his duty limited as a judge's duty should be limited and does not feel empowered to remold the world according to the heart's desire?
>
> Sophisticated--is a man not sophisticated who doubts his own basic premises and yet is guided by them until he discovers better ones?

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[118] Ibid.

> Lucky--. . . [in] a happy marriage [and] . . . in his failures. When years ago he offered himself to the electorate of New York, they declined to send him to Albany. Now, hasn't he had a better time in New York than he could possibly have had in Albany? . . .
>
> Finally--. . . he was lucky in not having drawn a successful ticket in that odd lottery by which men are picked for the Supreme Court of the United States. . . . He would have found himself more contained within the curtilage of the court and, thus, we would have been denied the moral leadership, the great influence of his courageous and eloquent free spirit all these years. . . .
>
> But luckier have we been that he was endowed with these gifts and has put them to the uses to which he has put them.[119]

Justice Frankfurter, who put Judge Hand on an eternal pedestal for all to see, concluded that he "belongs to that very select company of judges in whom one does not find greatness in order to justify merely personal preference."[120]

From Judge Hofstadter. Judge Hofstadter believes that in Judge Hand's utterances one could almost hear the peal of the Liberty Bell "carrying its message of hope to peoples everywhere that man's immemorial aspiration for freedom will be realized through the rule of law. In ringing tones he has declared his faith: America is the guardian of spiritual values which cannot flourish in a totalitarian climate. He has 'made justice clairvoyant' by truth which makes men free!"[121] Hofstadter lauds his skeptical and doubting qualities which

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[119] Ibid.

[120] "Judge Learned Hand," p. 329.

[121] Samuel H. Hofstadter, "A Justice's Faith," New York Times Magazine (April 19, 1959), p. 47.

combined with a cautious use of power. He calls him "the embodiment of the rule of law--continent, serene, civilized."[122]

From Judge Frank. Judge Frank, who sat on the circuit bench with Judge Hand, paid his colleague a remarkable tribute when in 1957 he wrote to him:

> No one else I've known has excited in me such admiration and affection. You are my model as a judge. More, you have influenced my attitude in incalculable ways towards all sorts of matters, intellectual and others. For your eminence lies not alone in the singular nature of your mind, but in the manner in which you infuse your ideas with emotions both noble and humorous. You are, par excellence, the democratic aristocrat.[123]

Judge Frank's privately expressed admiration for Hand overflowed into his publicly expressed opinion writing when in dissenting to Hand's majority report in United States v. Robinson he announced: "I have the very highest respect for Judge Hand. To sit with him is an inestimable privilege, a constant source of education. Consequently, I usually suspect my own tentative opinions, when they vary from his."[124]

Frank extended to the Judge the ultimate in praise when upon comparing him with Justice Oliver Wendell Holmes he granted Hand the higher rating. Frank explained that "Hand has been more generous, more outgoing, more easily accessible to others, always interested in the events of the day, while Holmes led

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[122]Letter to the editor, New York Times, April 10, 1959, p. 28.

[123]"Some Reflections . . .," p. 668.

[124]151 F.(2d) 915,920 (1945).

an essentially cloistered life, and boasted of not reading the newspapers. And Hand has been more willing to admit mistakes."[125] His humility and self-skepticism, claimed Frank, which allowed him to admit mistakes is fortunate "in one who has such wide influence."[126]

From Judge Parker. Judge John J. Parker knew Judge Hand as an honest man with an understanding heart who did not know how to act in a merciless way. He called him "a man whose heart has beat in sympathy with the great masses of humanity as he has shaped the rules of law which will shape, in turn, their lives. He has done justly, he has loved mercy, he has walked humbly before God. He has been given God's greatest gift to man, a wise and understanding heart."[127] Consequently, Parker contended that Hand's written opinions, the work of "a great jurist, a great lawyer, a great master of our English tongue," would guide our jurisprudence for many years to come.[128]

From Judge Lumbard. Through his example and his wisdom, according to Judge J. Edward Lumbard, Hand taught and encouraged two generations of federal judges in his circuit. The accomplishments of these two generations was in large part traceable to Judge Hand, claimed Lumbard. Federal and state courts, he reported, cited Hand's opinions as often as those

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[125]"Some Reflections . . .," pp. 669-670. [126]Ibid.

[127]In "A Great Judge Retires . . .," p. 502.

[128]Ibid.

of any other judge. "Indeed," said Lumbard, "most of the briefs filed in this court cite Learned Hand, whether it be a majority or dissenting opinion and--I might add--whether or not the quotation is in point."[129] He concluded, Judge Hand "belongs not only to us of the law but also to all men everywhere who believe in justice under law and who hope that by reason, tolerance, patience and good will the races of men may yet find some way of living together."[130]

From Judge Wyzanski. Judge Wyzanski assigned Hand to the race of the giants--Holmes, Brandeis, and Cardozo. Wyzanski called Hand the "judge's judge" who "remains a manifestation of the Athenian pattern of authority, the indirect leadership of individual men of insight and understanding."[131] He disdained the judge who assumed the center role as one who betrayed his trust, recalled Wyzanski. "He was commissioned for a different part--a leader of the Greek chorus, interpreting and appraising the drama. The artistry, the forbearance in judgment, and the faithfulness with which Learned Hand has performed that part are his principal contributions to the public law."[132]

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[129]"Remarks of J. Edward Lumbard . . .," p. 410.

[130]Ibid., p. 411.

[131]Wyzanski, "Judge Learned Hand's Contributions . . .," pp. 347, 348.

[132]Ibid., p. 369.

From the bar

If the source were anonymous, whether an anecdotal contribution came from the bench or the bar would be in many cases difficult to discern. However, contributions from the bench tend to emphasize many of those qualities resulting from the special concerns of the judiciary while the bar reflects the special concerns of the lawyer. These concerns provide a design for analysis. Repeated in anecdotal form they dwell on Judge Hand's judicial philosophy which the bar believes to reflect a regard for craftsmanship, a belief in reason, a doubt as to the absolute validity of any conclusion, an understanding of human nature, and a dedication to truth and justice.

Craftsmanship. As a master of his craft, Judge Hand, "with impressive and genuine dignity . . . conducts smoothly and surely the business which comes before him," according to attorney Stephen Philbin.[133] More specifically, George Wharton Pepper cites the craftsmanship demonstrated in his subtle accommodation to the susceptibilities of his audience.[134] Judge Hand's craftsmanship is brought into clearer focus by lawyer Whitney North Seymour, who says of Hand:

> As a judge, he has been bold and imaginative; a genuine architect of the law. His opinions suggest a builder trying to fit each stone into its proper place but also concerned that the resulting edifice will not offend esthetic taste. He claims that the actual process of decision has

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[133]"Judge Hand and the Law of Patents and Copyrights," Harvard Law Review, LX (February, 1947), 403.

[134]"The Literary Style . . .," p. 335.

> always been hard for him. But his doubts are firmly resolved before he renders his opinion; there is nothing amateurish about his dressing and fitting of the stones.[135]

A belief in reason. The opinions of Judge Hand serve as models of "judicial reasoning" and deserve more than casual attention. Attorneys John Cound and Carroll C. Hincks typify acknowledgements of Judge Hand's use of his mental processes in decision-making. Cound calls Hand's mind so unique that anyone who talked with him at length could not "come away with his own philosophy unscathed."[136] However, as he further points out, the Judge "had no illusion that the law is 'nothing else but reason,' divorced from a world of past and present facts."[137] Cound stresses that "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."[138]

Hincks recognizes Judge Hand's fine mind but contends that it was only the "foundation of his equipment" which combined with curiosity, understanding, and capacity for research to produce "an incomparable capacity for analysis":

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[135]"Tribute to the 'Old Chief' . . .," p. 17.

[136]"Learned Hand," Minnesota Law Review, VIL (December, 1961), 217.

[137]Ibid., p. 218.

[138]Ibid., p. 219.

> His reputation as perhaps the greatest judge ever to grace the Second Circuit Bench--indeed as one among the greatest of all American jurists--derived not from the accident that by inheritance he had acquired merely a splendid mind. This was only the foundation of his equipment. For he also had an intellectual curiosity which led his mind, nurtured in literature and the liberal arts, into the sciences and the far reaches of the history and the nature of men and of nations. And his mental equipment was coupled with a sturdy physique which gave him the strength for incredible labor and research. The fusion of these characteristics produced an incomparable power of analysis which rested not solely on his own acute personal observations but also on the impact of the sweep of history upon the whole contemporary scene.[139]

Doubt about absolutes. Although Judge Hand reasserted his final convictions, attorney and close friend John Lord O'Brian commends him for the courage constantly to question the validity of his own conclusions.[140] Archibald Cox believes that Hand's conception of man's final dependence on arbitrary preferences made him "skeptical of those who rush to save the world with sure solutions; but because of it he does not put his own conclusions beyond question, and so is willing to try out the views of others."[141] This tolerance toward the views of others, says Hincks, combined in him with a humility which allowed him to admit his limitations and fallibility.[142]

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[139]Carroll C. Hincks, "Resolution in Memory of Learned Hand," New York State Bar Journal, XXXIII (December, 1961), 412.

[140]In "Proceedings of a Special Session to Commemorate Fifty Years of Federal Judicial Service by the Honorable Learned Hand," 264 F.(2d) 8.

[141]"Judge Learned Hand and the Interpretation of Statutes," Harvard Law Review, LX (February, 1947), 392-393.

[142]"Resolution in Memory of Learned Hand," p. 413.

An understanding of human nature. Former attorney general of the United States Tom Clark contends that a "profound understanding of human relationships" made Judge Hand's "judicial pronouncements a cherished heritage."[143] Hincks offers an explanation for this insight: "Perhaps more than anything else, it was his thirst for friendship and his appetite for the exchange of experiences with his companions that gave him the insight into human nature and the undertaking of human societies that helped to make him a great judge."[144] The Judge's approach to the problems of human nature not only depended on experience with his fellow men but on maintenance of an open mind which through application to great themes "enabled him to speak with a voice of overwhelming authority" on the nature of mankind.[145]

Dedication to justice and truth. Judge Hand's particular ability to avoid sentimentality over the guilty combined with an insistence that they be fairly tried prompts attorney Seymour to praise Hand's "deep concern for justice according to the rules" as the thread which unites all of his opinions.[146] "By his restraint and refusal to twist the law to suit his

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[143]"The Honorable Learned Hand," Federal Bar Journal, VIII (January, 1947), 151.

[144]"Resolution in Memory of Learned Hand," p. 413.

[145]John Lord O'Brian in "Proceedings of a Special Session . . .," p. 8.

[146]In ibid., p. 33.

personal philosophy," recalls attorney Hincks, "as well as by his alacrity, when proper occasions permitted, to recognize and protect individualism, he made an invaluable contribution to the cause of justice under the law."[147]

Committed to intellectual skepticism the Judge sought truth wherever it might be found. O'Brian calls him "not so *much a finder of the truth as a humble-minded searcher for* truth."[148] Cox confirms Hand's "search for the truth" as a complement of his "deep-seated" tolerance.[149] This search made his court an inspiration, recalls Philbin, as Hand pursued only "truth and right" in applying the reason and the spirit of the law.[150]

Tom Clark fittingly summarizes the reaction of the bar to Judge Hand with the words: "His rare faculties as a scholar, a great jurist and a gentleman of wit, charm and broad culture are legend in the profession which he has bettered with them."[151]

From the general public

Judge Hand's image like his reputation grew over the years mostly through the opinions of lawyers whose cases he

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[147]"Resolution in Memory of Learned Hand," p. 413.

[148]In "Proceedings of a Special Session . . .," p. 7.

[149]"Judge Learned Hand and the Interpretation of Statutes," p. 392.

[150]"Judge Hand and the Law . . .," p. 403.

[151]"The Honorable Learned Hand," p. 151.

decided, judges and lawyers who read, assimilated, and followed his decisions, and members of the general public, interested enough because of their specific calling, to react to the Judge and to the response of the judges and lawyers who evaluated the Judge and his work.

Such public reaction was particularly prevalent on two occasions, Judge Hand's retirement in 1951 and his death in 1961. News of his retirement from the bench produced appraisals of his career and his contributions. In an editorial comment the New York Herald Tribune observed:

> It will be difficult, indeed, to think of the Second Circuit Court of Appeals without him. With his cousin, Augustus Hand, he has brought to that court, the second highest in the land, a distinction all its own; his particular wisdom and style have marked many of its most notable opinions. Beyond the judge, whom lawyers hold to be among the most illustrious this country has produced, there has been a radiant sense of life's adventure. The law, said Burke, sharpens the mind by narrowing it; but in a few of our great judges the law has lifted the mind to a level of comprehension and has kindled a degree of human ardor unsurpassed in any other profession. Judge Learned Hand has been among these few. . . .[152]

On his death the New York Times commented editorially:

> He was a superlative judicial craftsman. His opinions were studied and quoted by judges far beyond the limits of his own jurisdiction. Because the Court of Appeals of this circuit over which he presided for twenty-two years included the heart of America's financial and business interests his impact on the conduct of the country's economic affairs was profound. Of powerful effect also was the devotion to human liberty that his decisions revealed.[153]

The extraordinary respect granted to Judge Hand did not result from the novel results he reached in his opinions.

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[152]May 17, 1951, p. 12. [153]August 19, 1961, p. 16.

The respect was not for his skill at innovation but rather for what he brought to the process of judging. His character, understanding of human nature, and astute reasoning ability are among the frequently cited qualities perceived in Judge Hand by the general public. These perceptions are conspicuously similar to those contributed by the bench and bar.

Lancaster asserts that when the final verdict is in and all the facts assimilated "it is the character of the Judge that counts the most":

> Certainly many experiences, much reading and hard study, a deft and sure feeling for the law as a functioning social force, a skeptic's knowledge of the nature of human kind, a philosopher's understanding of the strength and weakness of man in society have all contributed toward producing the judicial character that is Learned Hand. The most pronounced trait of this judicial character is a capacity for objectivity, for detachment. Of all the arrows in the judge's quiver this is probably hardest to come by and yet the most indispensable.[154]

Others note that even when the Judge admonished vigorously from behind the bench the bluster merely covered a warmly human personality that made him "one of the best-loved men on the bench."[155] Not only did his personality enable him to function more smoothly on the bench, but it enabled Judge Hand, as a sensitive observer of human nature, to understand the individualistic and habitual tendencies of mankind:

> Although Judge Hand is at heart an individualist, he knows very well that the individual is a social animal and in spite of the strong individualistic strain that characterizes his thinking, there is the realization that man

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[154]"The Jurisprudence . . .," p. 306.

[155]Davidson, "Judge Learned Hand . . .," p. 109.

> requires patterns of conduct and established folkways in order to express himself as an individual and make his imprint upon the clay of time.[156]

Besides depending on his character and insight into human nature for bringing to bear his full powers on revelation of a decision, Judge Hand could call upon his reasoning ability. He could get behind rules and lay bare their supporting foundations. "Seldom is he content with merely announcing a rule of law; the rule must be founded in reason and Hand, the most reasonable of judges, is not content until the reason is exposed."[157] The Hand method of getting behind problems existed not simply in reason but in reason dominated by an ever present desire to arrive as close to truth as the frailties of mankind will allow. The New York Times realized this when they told their many readers:

> More than anything else Judge Hand symbolizes a method --the judge's endless striving for truth by means as dispassionate and as dedicated as man can achieve.
>
> He might have been speaking of himself when he wrote that the qualities that clear the path to truth are "skepticism, tolerance, discrimination, urbanity, some--but not too much--reserve toward change, insistence upon proportion, and above all, humility before the vast unknown."[158]

Eight years before the celebration of Judge Hand's fiftieth year on the bench President Truman accepted his retirement in a letter of praise and recognition for a job well done. On the date of the fiftieth-year celebration Attorney

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[156]"The Jurisprudence . . .," p. 244.

[157]Ibid., p. 128.

[158]April 11, 1959, p. 12.

General William O. Rogers read another letter which contributed more Presidential praise:

> Dear Judge Hand:
>
> On the occasion of the 50th year of your judicial service to the Nation, it is a privilege to send you my congratulations and long felt thanks.
>
> For half a century as a Federal Judge, you have stood for excellence and temperament essential to the achievement of equal justice under law. The integrity which you bring to your work, your learning, and your dedication to our system of jurisprudence are an inspiration to your colleagues in the law and in the community at large. You contribute greatly to the strength of the American judicial system which preserves undiminished, the vital role of the courts in safeguarding the rights and liberties of each citizen.
>
> I am grateful that even in retirement you continue to serve us with your heart and mind.
>
> Sincerely,
> Dwight D. Eisenhower[159]

Many tributes made by those off the bench and unaffiliated with the practicing bar came to Judge Hand. One that epitomizes such tributes appeared on a Harvard citation conferred upon Hand with the Doctor of Laws degree. This citation described him as "a judge worthy of his name, judicial in his temper, profound in his knowledge; a philosopher whose decisions affect a nation."[160]

The Deviating Judge

The escapades and eccentricities which were a part of the "gregarious man" found their counterpart in the "deviating judge." An appreciation of this esteemed judge's image would

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[159] In "Proceedings of a Special Session . . .," pp. 16-17.

[160] In The Spirit of Liberty, p. 102.

be incomplete without recognition of his variations from the expected norm for judicial conduct. "Strait-laced, cloistered, and tied to the rigors of research, reasoning, and reporting" would hardly be a description consonant with some stories now handed down from fact and folklore. Judge Hand, who mastered profanity as well as the law, enjoyed life, knew how to irritate harmlessly and more important when to irritate, and interjected into what might have been an otherwise drab life that much needed spice which proved him to be a wholly human person. The spice was likely to come almost anytime, such as in preparing opinions, in the opinions, in court, in memos, in debate, in his chambers, or in public. All are worthy of mention for their contribution to the composite image of the Judge.

Judge Hand worked on cases with his law clerks who were mostly former editors of the Harvard Law Review. While he discussed a case with a clerk, they paced back and forth in opposite directions passing each other about every thirty seconds.

> "My feeling," the Judge will say, "is that plaintiff has suffered a grievance for which there should be a remedy. . . ." Then, as he whizzes by the clerk: "Sonny! We have come to a parting of the ways. I smell Spearmint again. Throw out that gum! . . . But amendment of the copyright law is not urged here. Come now, what do you think?"[161]

If the clerk did not respond with an opinion when asked what he thought, the Judge, who treated the clerk as an intellectual

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[161]Hamburger, "The Great Judge," p. 120.

equal, would threaten "to dock his pay, something which both of them know is completely impossible."[162]

Once the Judge reduced his thoughts to a written opinion there was no certainty that his lighter side would not emerge. In 1930, he produced what Bill Davidson calls a "masterpiece" when he was faced with deciding whether the play, "The Cohens and the Kellys," was stolen from "Abie's Irish Rose."[163] In the opinion he said: "There are but four characters common to both plays, the lovers and the fathers. The lovers are . . . loving and fertile; that is really all that can be said of them, and anyone else is quite within his rights if he puts loving and fertile lovers into a play of his own. . . ."[164]

Because certain sounds detracted from his meditation over the law, Judge Hand constantly feuded with telephones and dogs. Telephones to the Judge were "the rudest instrument ever invented by man."[165] He had even less respect for barking dogs, particularly one called Jiggs. Twenty-four floors below and three blocks beyond the Judge's office near a Chinatown saloon lurked this barking white bulldog. His canine sounds filtered up through the noise of the street and into the Judge's sensitive

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[162]Davidson, "Judge Learned Hand . . .," p. 112.

[163]Ibid.

[164]Nichols v. Universal Pictures Corporation et al., 45 F.(2d) 119,122 (1930).

[165]Davidson, "Judge Learned Hand . . .," p. 113.

ears. For years he feuded with the mutt. On one occasion he sent an assistant "down to plead with Jiggs to shut up even going so far . . . as to attempt to buy him."[166]

In court this judge, warm and kindhearted in the eyes of some, was most irritable in the eyes of others. When a thirty-nine-year-old-bachelor applicant for citizenship failed to obtain citizenship on the grounds of bad moral character occasioned by admitted relations with unmarried women, counsel said to the bench: "'You wouldn't . . . want your daughter to marry such a man.' Snapped Hand, 'I wouldn't want her to marry a man of thirty-nine who hadn't had the impulse.'"[167] This attorney was not the only one who ever had his composure shattered by Judge Hand from the bench. In fact "only the most hardy retain their composure, and once, during a Yale Law School moot court at which he presided, a prize student rose to address him, took one look and promptly keeled over in a dead faint."[168]

Both in and out of court Judge Hand gained a reputation for his note-writing. Confronted by an attorney enamored over the sound of his own voice the Judge would "occasionally scribble a note of protest and slip it to a colleague on the bench. 'John Marshall once said,' read one of them, 'that among the qualities of a great judge was the ability to look a lawyer

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[166] Ibid.

[167] Frank, "The Top U.S. Commercial Court," p. 95.

[168] Hamburger, "The Great Judge," p. 120.

straight in the eye and not hear one word he was saying.'"[169] Out of court his memos circulated among colleagues contained eight different, and all uncomplimentary, ways of referring to the Supreme Court.[170]

But Judge Hand could give credit when it was due. He came into his own in the give and take of battle at the council table. Although fierce in battle, "even the neophyte soon perceived that this most royal warrior, while valiant, was never spiteful, mean or petty. And what a triumph it was for any professor or junior judge to have the great Hand admit, as he so readily did when there was occasion, 'a hit, a palpable hit.'"[171] On one hand through expressed appreciation he appealed to another's vanity and on the other he humbly shunned anticipated expressions of appreciation. Davidson relates a story about how far the Judge would go to avoid praise:

> In 1938, an elderly woman came to his chambers after a lower Federal court had ordered her evicted from her farm. She asked Hand to sign a stay until her case came up for appeal. While his law clerk, Archibald Cox, looked on in amazement, Judge Hand berated the old lady. He yelled at her for not having her attorney present, and then excoriated the attorney for having made out the papers incorrectly.
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> Finally, the Judge ceased his denunciation and handed his visitor a legal document. "Here's your stay," he said. "I did your lawyer's job and wrote up a new set of papers while we were talking."

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[169] Ibid.

[170] Frank, "The Top U.S. Commercial Court," p. 95.

[171] Wyzanski, "Learned Hand," p. 57.

> The old lady cast a tearful look at Hand, seized the paper and fled. The Judge then caught Cox's bewildered stare. "Oh," he said to his clerk, "I don't like people blubbering over me in appreciation."[172]

Particularly in leisure conversation the public escapades and eccentricities of the Judge came up for discussion. Sessions of the Law Institute provided Hand's law clerks with opportunities to tell a tale or two about his deviations. The conversation would go: "Do you remember the year the court had to pass upon the patent for a Kiddie Kar? The judge put himself astride the toy and rode around the Post Office Building, calling on one after another of his brethern." Or, "Do you recall how Learned Hand wouldn't let his law clerks give the Harvard Law School a painting of him, and how he finally agreed to a bust by Eleanor Platt, 'who made Brandeis look like Loki.' Then when the sculpture was finished the judge said it was too grand for any place but a bowling alley."[173]

Judge Hand lived his life and performed his work as best he knew how. His deviations were as much a part of his life as his deliberations. Even after some of his opinions pass from the memory of man the harmless, frequently humorous idiosyncrasies, as deviations from the norm of popular expectancy, may give cause for those who reminisce to summon back and restructure the total image of the Judge.

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[172]Davidson, "Judge Learned Hand . . .," pp. 109-110.

[173]Wyzanski, "Learned Hand," p. 57.

Summary

Judge Learned Hand's career on the bench involved him in a multitude of legal controversies. However, he will be remembered not so much for the number of opinions he wrote as for their quality and what he brought to the court that contributed to their quality. Although the Supreme Court never benefited from his competence and overall judicial ability as a member sitting on the highest bench, his contributions to the Circuit Court of Appeals undoubtedly made the work of the Supreme Court easier. These contributions of insight, intellect, and experience emerged as the Judge assumed the role of a devout pleader for tolerance, caution, truth, justice, and constructive thinking.

Expressions of his devotion to the betterment of the legal process came forth not from a theorist or philosopher writing legal treatises but from a teacher delivering speeches and writing essays and legal opinions. The lessons on which he expounded frequently dealt with some phase of the nature of law, the responsibilities of the legal profession, and the traits of the judge. He saw the law as a living organism which periodically necessitated cautious updating. He saw the function of the judge limited by imperative moderation and restraint. The Judge urged those who would interpret statutes to look for the social purposes behind legislation and derive the intent of the legislators from the cultural, political, and social context of the words used. To accomplish judicial

interpretation satisfactorily and apply the law properly he charged judges with the responsibility to read widely, understand with sensitivity, and view their work without prejudice. Through expressions supporting these beliefs he built his image. Through the reaction and reiteration of contemporaries of the bench, bar, and general public who reflected on Judge Hand's deliberations and deviations, the image of the Judge became more distinct.

Judge Hand's career on the bench, dedicated to searching for truth, dealt not with the abstract, but with the concrete issues of American life. "If the virtues which he held worthy were those of his own generation, his conviction that life was change and growth enabled him to meet the problems of law--which are but reflections of life--with an open mind and consistent objectiveness."[174] In meeting the problems of law he left "presidents shocked, lawyers weak, and colleagues proud."[175] All this by one who paradoxically dreaded "a lawsuit beyond almost anything short of sickness and death."[176]

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[174]Francis Biddle, "Learned Hand," New Republic, CXLV (September 11, 1961), 5.

[175]Warren Wright, "The Rhetoric of Learned Hand in Selected Civil Liberties Cases: A Method for Analysis of Judicial Opinions" (Unpublished Ph.D. dissertation, Dept. of Speech, University of Illinois, 1960), p. 17.

[176]Hand in Ross, "The Legend of Learned Hand," p. 108.

CHAPTER IV

CONCEPTS OF ETHICAL PROOF

Introduction

Rhetoricians agree that the impact of the speaker's character or personality is vital to inducing acceptance of belief. Aristotle, however, contends that the audience's prior concept of the speaker's character and personality, an inartistic achievement, should not influence evaluation of the speaker's artistic skill in establishing his credibility in the speech. What the audience thinks of the speaker prior to the speech is not, in itself, a part of the art of rhetoric according to Aristotle. Ethical persuasion, he believes, depends for rhetorical purposes solely on how the audience receives the speaker through the speech. Alleging artificiality in the Aristotelian limitation on ethos, others claim that how the audience perceives the speaker before he speaks is inseparable from how the audience reacts to the speaker through the speech. Support of this concept may exist "if we conceive of ethical proof as an artistic creation brought about by the speaker's skill in asserting his intelligence, revealing his probity,

and accommodating himself to his hearers."[1] But this study does not propose to resolve this dispute or further enter into it. It does propose to draw upon the Aristotelian distinction in order to designate the emphasis of this study, namely the use of ethical proof as an artistic creation brought about by a judge's recommendation of his credibility in his legal opinions. The term "ethical proof," therefore, will pertain to the artistic introduction of Judge Hand's personality and character into his opinions. Whether the Judge's image or reputation existed in the mind of the critic, as inartistic ethos, before exposure to Hand's opinions cannot be conclusively established. Although the emphasis of this study is on "ethical proof" in the opinions, prior development of Hand's image and reputation (Chapters II and III) and treatment of concepts of inartistic ethos (Chapter IV) both assist detection and understanding of the "ethical proof" (artistic ethos).

Ethical Proof in Rhetoric

Rhetoricians from ancient to modern times have respected the impact of the speaker's character in effecting persuasion. Ethos is the term many of them have assigned to the proof found in the character of the speaker. This form of proof allegedly makes the utterance more believable because of the force inherent in the authentic and credible manner in which the speaker recommends himself as worthy of being

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[1]Lester Thonssen and A. Craig Baird, Speech Criticism (New York: The Ronald Press Company, 1948), p. 385.

believed. However, all rhetoricians have not shared similar interpretations, detected the same ingredients, and placed the same emphasis on ethos. Therefore, a concise overview of the relevant history of the rhetorical concept of ethos is necessary to become better acquainted with this subject as approached by various writers.

Pre-Aristotelian

Although the first definitive statement of ethos came from Aristotle, the concept has roots in early rhetorical theory and practice. Corax and Tisias, ancient Sicilian rhetoricians, introduced ethos into their rhetoric through the doctrine of "probability." They regarded "probable" arguments as those which appeared to conform to the truth, that is, what the audience believed. The identification of that believed with the truth meant that to be convincing the successful speaker had to use "probable" arguments, thus appearing as a truthful speaker. In this sense, ethos, though not identified by name, made an early appearance. Also, Corax divided speeches of persuasion into five parts. The first part, the proem, possessed material to create goodwill toward the speaker. Though apparently not designed for direct persuasion, this initial division served to conciliate the hearers in preparation for subsequent persuasion. Both Corax and Tisias appear to appreciate the value of the speaker's character.[2] Thus,

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[2]William Martin Sattler, "Conceptions of Ethos in Rhetoric" (Unpublished Ph.D. dissertation, Dept. of Speech, Northwestern University, 1941), p. 15.

through the use of "probable" arguments and conciliatory proems, ethos, though not identified by name, made an appearance in early rhetorical concepts.

Ethos was not merely a theoretical subject during its formative period. Some orators used ethos as an actual topic of persuasion. For example, Greek logographers with their client and the audience firmly in mind composed speeches which showed their client as faithful, honest, and respectful of Athenian laws and customs. In this manner they sought to display qualities of character which would garner audience respect. Lysias was such a logographer who invested speakers with means of proof through character.[3] He considered traits, habits, and customs, as well as race, family, age, principles, lot, and pursuits of his client in depicting him as just, benevolent, and praiseworthy. Although some of these are not moral qualities, Sattler notes that they do "affect the speaker's life and actions. They are qualities peculiar to the particular individual and in the broad sense, they are part of his ethos."[4] Thus, the logographers in preparing speakers to win in the courts sought to invest them with characteristics which indicated their character.

Plato attacked Athenian rhetoric because it practiced deception and ignored the true interest of the state. Sattler

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[3]George Kennedy, The Art of Persuasion in Greece (Princeton, New Jersey: Princeton University Press, 1963), p. 91.

[4]Sattler, "Conceptions of Ethos . . .," p. 19.

contends that the failure of rhetorical theory to embrace specifically the concept of ethos induced Plato's indictment of rhetoric. Subsequent development of the concept by later writers, claims Sattler, is due partly to Plato's criticism. His attacks aided an understanding of ethos.[5] In his writing Plato did not use the term ethos but employed the conceptual equivalent in what Sattler calls "many of its more important aspects: (a) the speaker should possess good character; (b) the speaker should be intelligent and informed; (c) the speaker should adapt his arguments to the audience; (d) the speaker should consider the goodwill of the audience."[6]

The only extant rhetorical treatise depicting Greek sophistic rhetorical theory as it existed prior to Aristotle is the Rhetorica Ad Alexandrum.[7] This work stresses audience analysis to uncover those arguments which adapt to audience pleasures: "If you wish to write a pleasing speech be careful as far as possible to adapt the character of your speech to that of your public. You will achieve this, if you observe their character--noble, petty, or ordinary."[8] Also recognized is the persuasive effect of good character and the observance of accepted beliefs: "Righteous conduct is to follow the

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[5] Ibid., p. 329. [6] Ibid., p. 66.

[7] Doubt exists about the exact date of this treatise. For purposes of organizational convenience in this study it appears under the "pre-Aristotelian" sub-section with recognition that this assignment has no verifiable basis in fact.

[8] Rhetorica Ad Alexandrum, tr. H. Rackham (Cambridge, Massachusetts: Harvard University Press, 1937), 1434b.

common customs of the state, to obey the laws, and to abide by private contracts [one's personal promises]."[9] Such advice seems to follow the notion condemned by Plato that the only necessity is a favorable impression of "appearing" to act in the best interest of the state. However, unlike the writers of rhetorics of "appearances," this author appreciates the persuasive importance of a speaker possessing real moral qualities when he says: an orator must "be careful not only about one's speech but also about one's personal conduct, regulating it by the principles that have been stated, because one's manner of life contributes to one's powers of persuasion as well as to the attainment of a good reputation."[10]

In summary, several observations about ethos result from the pre-Aristotelian period. For logographers such as Lysias, for the author of the Rhetorica Ad Alexandrum, and Corax and Tisias, ethos, though yet unnamed and unsystematized, constituted a form of proof. The "appearance" of good character through conformity to custom, the persuasiveness of the "moral" speaker, and the importance of the proem for conciliatory purposes all received attention and support.

Aristotelian

At the time Aristotle wrote his Rhetorica ethos still lacked formal systematic treatment. Aristotle not only provides ethos with a formal treatment but offers a rationale for its

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[9] Ibid., 1447^{b}. [10] Ibid., 1445^{b}.

worthy use. The rationale emerges from his belief that a case should be fought only with facts, external matters such as emotional appeals and ethos being extraneous. However, he reasons that "other things affect the result considerably, owing to the defects of our hearers."[11] Thus, Aristotle recognizes that rhetoric depends on more than factual data. Sanction is given those devices which assist in winning audience approval and which can be applied to contingencies.

Aristotle recognizes three modes of artistic proofs which belong to the art of rhetoric. Ethos is one of these. Ethos, says Aristotle, is an artistic proof because the speaker constructs and supplies it. He defines ethos and describes its persuasive values when he claims:

> Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided. This kind of persuasion, like the others, should be achieved by what the speaker says, not by what people think of his character before he begins to speak. It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses.[12]

In addition to defining ethos and describing its persuasive values Aristotle elaborates on good sense, good moral character, and good will, which he regards as ingredients

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[11] Rhetorica, tr. W. Rhys Roberts, in The Works of Aristotle, ed. W. D. Ross (Oxford: The Clarendon Press, 1946), XI, 1404[a].

[12] Ibid., 1356[a].

of ethos and calls "things which inspire confidence in the orator's own character."[13] Good sense and good character inhere in the possession of certain virtues. He believes that a consideration of these virtues enables an understanding of how to make hearers take the required view of the speaker's character.

> The forms of Virtue are justice, courage, temperance, magnificence, magnanimity, liberality, gentleness, prudence, wisdom. If virtue is a facility of beneficence, the highest kinds of it must be those which are most useful to others, and for this reason men honour most the just and the courageous. . . . Justice is the virtue through which everybody enjoys his own possessions in accordance with the law and in obedience to its commands; . . . Temperance is the virtue that disposes us to obey the law where physical pleasures are concerned; . . . Liberality disposes us to spend money for other's good; . . . Magnanimity is the virtue that disposes us to do good to others on a large scale; Magnificence is a virtue productive of greatness in matters involving the spending of money. . . . Prudence is that virtue of the understanding which enables men to come to wise decisions about the relation to happiness of the goods and evils that have been previously mentioned.[14]

These virtues, therefore, mark the virtuous man. The virtuous man, perceived to possess intelligence and character, can better gain the confidence of the audience. But, Aristotle cautions, "do not let your words seem inspired so much by intelligence . . . as by moral purpose: e.g. 'I will this; aye it was my moral purpose; true, I gained nothing by it, still it is better thus.' For the other way shows good sense, but this shows good character; good sense making us go after what is useful, and good character after what is noble."[15]

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[13] Ibid., 1378[a]. [14] Ibid., 1366[b]. [15] Ibid., 1417[a].

Aristotle describes the third ingredient of ethos, good will, as a function of friendship, an element conducive to procuring favor. He defines friendship and friendly feeling as wishing for another "what you believe to be good things, not for your own sake but for his, and being inclined, so far as you can, to bring these things about. A friend is one who feels thus and excites these feelings in return: those who think they feel thus towards each other think themselves friends."[16] Aristotle then takes up an analysis of those character traits which as signs of good will may create a favorable audience response. He alleges that we have friendly feelings toward those who share our feelings of good and evil; who are friendly or unfriendly toward the same people; who have treated us well; who we think wish to treat us well; who are enemies to those whose enemies we are; who are willing to treat us well where money or our personal safety is involved; who work for their living and do not live off others; who are temperate because they are not unjust to others; who mind their own business; who are not too ready to show us our mistakes and are not cantankerous and quarrelsome; who have the tact to make and take a joke; who praise such good qualities as we possess; who do not reproach us with what we have done amiss to them or they have done to help us, for both actions show a tendency to criticize us; who do not nurse grudges but behave toward us as we find them behaving to everyone else; who are aware of

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[16] Ibid., 1381[a].

neither their neighbor's bad points nor our own, but of our good ones only, as a good man always will be; who have some serious feelings toward us, such as admiration for us, or belief in our goodness, or pleasure in our company, especially if they feel like this about qualities in us for which we especially wish to be admired, esteemed, or liked; who are like ourselves in character and occupation; who desire the same things as we desire, if it is possible for us both to share them together; who we help to secure good for themselves, provided we are not likely to suffer by it ourselves; who are honest with us, including those who will tell us their own weak points; and who do not frighten or make us uncomfortable.[17]

Through choices which the speaker makes, Aristotle sees the speaker's intelligence, character, and good will revealed to the audience. In restating the effect of ethical argument on persuasion he observes that "we shall learn the qualities of individuals, since they are revealed in their deliberate acts of choice; and they are determined by the end that inspires them."[18]

Choices which show ethos, he claims, manifest themselves in matters of invention, arrangement, and style.[19] About invention Aristotle says that the speaker presents arguments as

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[17] *Ibid.*, 1381^{a}-1381^{b}. [18] *Ibid.*, 1366^{a}.

[19] Aristotle also says that choices involving ethos occur in matters of delivery (1417^{b}). However, development of this aspect of ethos is irrelevant to a study of ethical proof in written discourse.

examples, enthymemes, and maxims. These forms of argument in order to produce ethos must reflect intelligence, character, and good will. Consequently the maxim, as a general and accepted statement about conduct, is particularly important because it indulges in a moral principle. The maxim enhances ethos for the speaker can identify himself and his cause with ethical principles which can induce persuasion. Aristotle says of the maxim: "It is a statement; not about a particular fact, . . . nor is it about any and every subject . . . but only about questions of practical conduct, courses of conduct to be chosen or avoided."[20]

In regard to arrangement Aristotle treats each of the speech parts. So the audience does not ignore a worthy cause for lack of respect for the speaker's authority and integrity, in the proem, he claims, "you may use any means you choose to make your hearer receptive; among others giving him a good impression of your character, which always helps to secure his attention."[21] About the narration he says:

> You may also narrate as you go anything that does credit to yourself . . . or discredit to your adversary. . . .
> . . . . . .
> The narration should depict character; to which end you must know what makes it do so. One such thing is the indication of moral purpose; the quality of purpose indicated determines the quality of character depicted and is itself determined by the end pursued. . . . This end will . . . be gained by describing the manifestations of various types of character. . . .[22]

Still under arrangement Aristotle urges reliance upon character

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[20] Ibid., 1394[a]. [21] Ibid., 1415[b]. [22] Ibid., 1417[a].

in the absence of strong arguments: "Now if you have proofs to bring forward, bring them forward, and your moral discourse as well; if you have no enthymemes, then fall back upon moral discourse: after all, it is more fitting for a man to display himself as an honest fellow than as a subtle reasoner."[23] Aristotle commits the epilogue to making "the audience well-disposed towards yourself and ill-disposed towards your opponent." He tells the speaker:

> Having shown your own truthfulness and the untruthfulness of your opponent, the natural thing is to commend yourself, censure him, and hammer in your points. You must aim at one of two objects--you must make yourself out as a good man and him a bad one either in yourselves or in relation to your hearers.[24]

Concerning style Aristotle lays stress on the importance of appropriate language to successful persuasion. He finds one element of appropriateness in the way language can express character:

> This aptness of language is one thing that makes people believe in the truth of your story: their minds draw the false conclusion that you are to be trusted from the fact that others behave as you do when things are as you describe them; and therefore they take your story to be true, whether it is so or not. . . .
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> Furthermore, this way of proving your story by displaying these signs of its genuineness expresses your personal character. Each class of men, each type of disposition, will have its own appropriate way of letting the truth appear. . . . If, then, a speaker uses the very words which are in keeping with a particular disposition, he will reproduce the corresponding character; for a rustic and an educated man will not say the same things nor speak in the same way.[25]

Aristotle, therefore, holds that style establishes speaker

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[23] Ibid., 1418[b]. [24] Ibid., 1419[b]. [25] Ibid., 1408[a].

sincerity. "Naturalness," he claims, "is persuasive, artificiality is the contrary; for our hearers are prejudiced and think we have some design against them. . . ."[26] Sattler fittingly summarizes Aristotle on the ethos producible through style: "The orator suggests truth and sincerity by using terms appropriate to himself and his subject. In like manner, current terms conform to custom, which itself is an element of importance in evaluating ethos. Finally, style may be judged on an ethical basis since the use of current terms suggests a simple regard for truth rather than artifice."[27]

Thus, Aristotle provides the concept of ethos with its first complete and comprehensive treatment. He stresses that justice naturally prevails over injustice, and he contends that a speaker who offers worthy proposals through a rhetoric imbued with a moral purpose will more readily succeed than one who speaks without revealing a moral purpose. Treating ethos as one of the three modes of persuasion, Aristotle recommends its importance because audiences place confidence in morally trustworthy men. But, he cautions that ethos embraces more than moral qualities, for audiences also judge speakers on other traits. Aristotelian ethos is, therefore, founded on the speaker qualities of intelligence, character, and good will. A speaker blessed with moral character without the amoral trait of intellectual competence would possess a deficiency in his

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[26] Ibid., 1404^{b}.

[27] "Conceptions of Ethos . . .," p. 100.

ethical appeal. Aristotle describes various virtues which when demonstrated by the speaker produce audience confidence in him and reflect the choices of an intelligent man. Whether the end of speaking be the honorable, the expedient, or the just, the choices made will influence acceptance of the speaker. Choices made in invention, arrangement, and style affect audience estimation of the speaker's intelligence, character, and good will.

Roman

Roman rhetoricians offered their impression of the "ideal orator."[28] This ultimate in man was the end product of philosophical knowledge and speaking skill. He possessed concern for ethics and a reputably good character. Like Aristotle, he understood ethos to embrace all things which induce approval of the speaker, whether moral or amoral. He knew a bad character would impair his effectiveness; and if Quintilian were his critic, he also knew that unless he possessed good character he could not even call himself an "orator."

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[28]See Cicero, The Orations of Marcus Tullius Cicero, tr. C. D. Yonge (London: George Bell and Sons, 1913), IV, 383; Quintilian, Institutes of Oratory, tr. John Selby Watson (London: George Bell and Sons, 1891), I, preface; Longinus, On the Sublime, tr. Benedict Einarson (Chicago: Packard and Company, 1945); St. Augustine, De Doctrina Christiana, tr. Sister Therese Sullivan, in "S. Aureli Augustini, Hipponiensis Episcopi, De Doctrina Christiana, Liber Quartus" (Published Ph.D. dissertation, Catholic University, 1930), pp. 57-59.

Both Cicero and Quintilian delved into the nature of ethical persuasion and contributed to its understanding. Cicero, referring to the forensic orator, prescribed:

> A potent factor in success . . . is the characters, principles, conduct and course of life, both of those who are to plead cases and of their clients, to be approved, and conversely those of their opponents condemned; and for the feelings of the tribunal to be won over, as far as possible, to goodwill towards the advocate. . . . Now feelings are won over by a man's merit, achievements or reputable life, qualifications easier to embellish, if only they are real, than to fabricate where non-existent. . . . It is very helpful to display the tokens of good nature, kindness, calmness, loyalty and a disposition that is pleasing and not grasping or covetous, and all the qualities belonging to men who are upright, unassuming and not given to haste, stubbornness, strife or harshness, are powerful in winning goodwill. . . . And so to paint their [those whose interests are being determined] characters in words, as being upright, stainless, conscientious, modest and long-suffering under injustice, has a really wonderful effect; and this topic . . . is . . . often to be worth more than the merits of the case. Moreover so much is done by good taste and style in speaking, that the speech seems to depict the speaker's character. For by means of particular types of thought and diction . . . speakers are made to appear upright, well-bred and virtuous men.[29]

Quintilian applied his comment to all types of speaking as he attempted to precisely develop the "force" of the term ethos. He believed that ethos is

> recommended above all, by goodness, being not only mild and placid, but for the most part pleasing and polite, and amiable and attractive to the hearers; and the greatest merit in the expression of it, is that it should seem to flow from the nature of the things and persons with which we are concerned, so that the moral character of the speaker may clearly appear, and be recognized as it were, in his discourse.[30]

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[29] De Oratore, tr. E. W. Sutton (Cambridge, Massachusetts: Harvard University Press, 1942), I, 327-329.

[30] Institutes of Oratory, VI, 423-424.

Thus, in essence, Cicero and Quintilian endorsed Aristotelian ethos. They called it "character," but Quintilian occasionally used the word ethos. Cicero and Quintilian essentially agreed about ethos and, in part, credited the success of the "ideal" orator to use of morally commendable arguments and establishment of good character, both vital to winning audience approval.

Medieval

Writers in the early medieval period substituted "ethical," "character," "propriety," "the becoming," and "decorum" for ethos as Aristotle knew it.[31] Although Capella, Julius Victor, Cassiodorus, and Alcuin discussed ethos, they gave it no particular emphasis as a mode of proof. Propriety in style and delivery was the acceptable way to produce audience approval of ethical qualities.[32] In the late medieval period the rhetoric of dictamen with attention to the importance of the exordium and to the adaptation of style to the reader touched on traditional aspects of ethos. Also, tractates on preaching during this period insisted on nobility of character and the value of ethical persuasion in invention through the use of the Scriptures.[33]

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[31] Sattler, "Conceptions of Ethos . . .," p. 232.

[32] Ibid., p. 334.

[33] Ibid., p. 233.

Sixteenth and Seventeenth Centuries

Treatises on rhetoric during this period either followed the classical tradition or the stylistic practice which emphasized tropes and figures. By following Aristotle or Roman restatements, Erasmus, Melanchthon, Bacon, Fenelon, and Lamy referred to ethos as a mode of proof.[34] On the other hand, the figurative devices employed by those who advocated a rhetoric of tropes and figures involved ethos in the choices made by the speaker. Sherry, Peacham, Fraunce, Hoskins and others offered "devices which evince good traits of character. Ethos is applied both in figures which are concerned with invention and in the devices which evince sincerity through style and delivery."[35]

Modern

The eighteenth and nineteenth centuries witnessed development of the classical concept of ethos. Both English and American writers described in more lucid terms the constituents of ethical persuasion. In England, Mason, Sheridan, Burgh, Scott, Knox, and Austin limited their treatment of ethos to characteristics in delivery which showed the speaker to possess sincerity. However, Ward, Campbell, Blair, Whately, Witherspoon, and Adams did not limit their treatment of ethos to delivery and instead relied upon ethos in the Aristotelian

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[34] Ibid., pp. 247-251.

[35] Ibid., p. 337.

sense. "Briefly stated, the entire doctrine of Aristotle appears, ethos as a mode of proof, ethos as adaptation to the audience, and ethos evinced in style and delivery. In fact, the threefold basis of ethos in the Rhetoric is fully explained."[36]

John Ward in a work published in 1759 claimed that a speaker will lose respect if his arguments are inconsistent with his normal conduct. He went on to describe as ethical qualities essential to the orator: wisdom--because audiences follow authority, not arguments, and for fear of being misled they confide in one who is competent; integrity--to supplement wisdom because knowledge without honesty implies deceit; benevolence--because without friendliness, wisdom and integrity are not enough; modesty--because boldness and confidence are not as well received; and simplicity in style--because a speaker's disposition is discoverable in his use of words.[37]

George Campbell, who revitalized the classical doctrine that the primary aim in rhetoric is persuasion, showed a preference for the Roman prescriptions about the ethical possessions of the "ideal" orator. Campbell attributed success in oratory to being a good man "for to be good is the only sure way of being long esteemed good, and to be esteemed good is previously necessary to one's being heard with due attention and regard.

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[36] Ibid., p. 338.

[37] A System of Oratory (London: n.p., 1759), I, 140-146.

Consequently, the topic hath a foundation in human nature."[38] Campbell is important for yet another reason, his use of the word "sympathy" to mean approval of the speaker's character: "Sympathy in the hearers to the speaker may be lessened several ways, chiefly by these two: by a low opinion of his intellectual abilities and by a bad opinion of his morals."[39] He appears to evaluate ethos through a study of virtues:

> One reduceth all the virtues to "prudence" and is ready to make it clear as sunshine that there neither is nor can be another source of moral good, a right-conducted self-love; another is equally confident that all the virtues are but different modifications of disinterested "benevolence;" a third will demonstrate to you that "veracity" is the whole duty of a man; a fourth, with more ingenuity, and much greater appearance of reason, assures you that the true system of ethics is comprised in one word, "sympathy."[40]

Probity, disinterestedness, candor, and other moral qualities contribute to the speaker's ethos, contended Hugh Blair, who seems to ignore his contemporary George Campbell's isolation of the singular most important aspect of ethos. "These give weight and force to everything which he utters," claimed Blair, "they dispose us to listen with attention and pleasure; and create a secret partiality in favour of that side which he espouses. Whereas, if we entertain a suspicion of craft and disingenuity, of a corrupt, or a base mind in the speaker, his eloquence loses all its real effect."[41] Blair

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[38] Philosophy of Rhetoric (New York: Harper and Brothers, 1871), p. 119.

[39] Ibid. [40] Ibid., pp. 146-147.

[41] Lectures on Rhetoric and Belles Lettres (Edinburgh: Bell and Bradfute, 1813), II, 427.

then addressed himself to means for improving eloquence:

> Nothing, therefore, is more necessary for those who would excel in any of the higher kinds of oratory, than to cultivate habits of the several virtues, and to refine and improve all their moral feelings. Whenever these become dead, or callous, they may be assured, that, on every great occasion, they will speak with less power, and less success. The sentiments and dispositions, particularly requisite for them to cultivate, are the following: the love of justice and order, and indignation at insolence and oppression; the love of honesty and truth, and detestation of fraud, meanness, and corruption; magnanimity of spirit; the love of liberty, of their country, and the public; zeal for all great and noble designs, and reverence for all worthy and heroic characters. . . . A true orator should be a person of generous sentiments, of warm feelings, and of a mind turned towards the admiration of all those great and high objects, which mankind are naturally formed to admire. Joined with the manly virtues, he should, at the same time, possess strong and tender sensibility to all the injuries, distresses, and sorrows of his fellow-creatures; a heart that can easily relent; that can readily enter into the circumstances of others, and can make their case his own. A proper mixture of courage, and of modesty, must always be studied by every public speaker. . . . Every public speaker should be able to rest somewhat on himself; and to assume that air, not of self-complacency, but of firmness, which bespeaks a consciousness of his being thoroughly persuaded of the truth, or justice, of what he delivers; a circumstance of no small consequence for making impression on those who hear.
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> Next to moral qualifications, what in the second place, is most necessary to an orator, is a fund of knowledge. . . . Good sense and knowledge are the foundation of all good speaking.[42]

Richard Whately in his early nineteenth century work, Elements of Rhetoric, is highly Aristotelian in his approach to ethos. He recognizes the qualities of good principle, good sense, and good will and says that "if the Orator can completely succeed in this, he will persuade more powerfully than by the strongest arguments."[43] Whately alleges that the opinion of

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[42] Ibid., II, 430-432.

[43] (New York: William Jackson, 1834), p. 128.

the audience about these traits, not the speaker's real character, counts most. Ethos has particular significance for him because a typical audience "must, take into consideration the character of those who propose, support, or dissuade any measure" because they lack complete competence to judge independently.[44] In the manner of Aristotle, Whately holds that "noble, generous, and amiable sentiments" aimed at the truth best serve the speaker conscious of the value of ethical persuasion.[45]

From America both John Witherspoon and John Quincy Adams wrote about the place of ethos in rhetoric and singled out integrity as prime evidence of character. Witherspoon demanded of the lawyer the same moral qualities of any other orator when he observed: "There can be no doubt that integrity is the first and most important character of a man, be his profession what it will; but . . . there are many not so sensible of the importance of it in the profession of the law . . ."[46] As an advocate of Aristotelian ethos, Adams called for endowments of integrity, of the mind, and of good will as components of ethical proof. Without integrity all confidence in a speaker's discourse is lost, he claimed.[47]

Writers of the modern period thus encourage those speaker qualities which can contribute to the speaker's ethical

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[44] Ibid., p. 160. [45] Ibid., pp. 130, 154.

[46] "Lectures on Eloquence," in The Works of the Rev. John Witherspoon (Philadelphia: William W. Woodward, 1802), III, 570.

[47] Lectures on Rhetoric and Oratory (Cambridge: Hilliard and Metcalf, 1810), I, 345.

nature as a mode of proof. Most are suggestive of Aristotelian concepts of ethos when they emphasize intelligence, high character, and good will as constituents of ethical proof.

Contemporary

Contemporary writers of speech texts and researchers probing the unknown aspects of persuasion are keeping the subject of ethos alive. The former reassert the ethical concepts rooted in ancient Greece and Rome while the latter are performing experimental studies to amass new data from which they hopefully can affirm existing theory or formulate it anew.

Writers of speech texts in current usage such as Loren Reid and Robert Oliver display the forceful influence of the long history of ethical persuasion. In his text Reid tells college speech students that "listeners feel that some speakers are more credible and believable than others."[48] He then proceeds to outline "the speaker's character" in remarkably familiar terminology. Characteristics he recommends which should induce a feeling of credibility and believability are intelligence--which he labels "competence"; character--under which he discusses integrity, sincerity, fairness, candor, and courage; and good will--through which the speaker shows consideration for the views and needs of others.[49] Reid's

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[48] First Principles of Public Speaking, 2d ed. (Columbia, Missouri: Artcraft Press, 1962), p. 276.

[49] Ibid., pp. 276-283.

presentation of character concludes with a reminder about the speaker's ethical responsibilities. He urges the student speaker to "set standards of ethical responsibility for yourself. Then when in later years you are confronted with ethical problems, you will, from life-long habit, put yourself on the side of those forces of morality and integrity that should enlist us all."[50] Oliver in his text on persuasive speaking covers the same territory as Reid but in a more elaborate and expanded manner.[51] Ethos in the sense presented by the ancients permeates Oliver's treatment of the subject which he flavors with modern sociological and psychological terminology. He approaches ethical persuasion by considering the influence on the audience of the speaker's representative nature, qualities, attitudes, and adaptive ability. Underlying this approach is Oliver's belief that "the greatest single asset that a persuasive speaker can have is a character that is known to be beyond reproach."[52]

Exploratory research into the rhetorical nature of ethos has become increasingly prevalent among contemporary scholars. Identifying new terms with the concept of ethos these researchers have developed modern experimental studies which may enable systematic analysis of the interaction among

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[50] Ibid., p. 285.

[51] The Psychology of Persuasive Speech, 2d ed. (New York: Longmans, Green and Company, Inc., 1957), pp. 62-91.

[52] Ibid., p. 70.

variables believed to influence the use of ethical proof. They speak in terms of communicator and source credibility, extrinsic and intrinsic ethos, attitude shifts, prestige suggestion, expertness, and trustworthiness. Exemplary of studies conducted have been those in "prestige suggestion,"[53] and "communicator credibility."[54] Those concerned with communicator credibility have investigated how variations in credibility affect "the way in which the content and presentation are perceived and evaluated" and "the degree to which attitudes and beliefs are modified."[55] Hovland, Janis, and Kelley in summarizing the available research evidence on this subject note "that the reactions to a communication are significantly affected by cues as to the communicator's intentions, expertness, and trustworthiness. The very same presentation tends to be judged more favorably when made by a communicator of high credibility than by one of low credibility." But they further conclude that, as yet, no one has been able "to disentangle the effects of the two main components of credibility--trustworthiness and expertness--but it appears both are important variables."[56] Significant in their summary is the implicit admission that although verification of such existing theory about ethos has

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[53]S. E. Asch, "The Doctrine of Suggestion, Prestige and Imitation in Social Psychology," Psychological Review, LV (1948), 250-276.

[54]Carl I. Hovland, Irving L. Janis, and Harold H. Kelley, Communication and Persuasion (New Haven: Yale University, 1953), pp. 19-48.

[55]Ibid., p. 21. [56]Ibid., p. 35.

been made, the formulation of new theory awaits further experimentation.

Summary

From pre-Aristotelian times to the present, ethical persuasion has been subjected to practice, theory, and more recently, experimentation. Although some display an anxious curiosity about the subject and eagerly seek to dispel our curiosity with new answers and more certain concepts, our present indebtedness for much of the knowledge we have about ethical theory goes back to Aristotle and the restatements and elaborations of the Romans. These early rhetoricians provided a more systematic explanation of ethos and a more direct advocacy of the tenets of the concept than had previously existed. They treated ethical proof as one of three modes of persuasion and declared it important because audiences tend to confide in a morally trustworthy man. But they added that judgment of a speaker is not limited to his moral qualities and in addition to character, intelligence and good will received acknowledgment as constituents of ethos. Elaboration on the application of this threefold bases of ethos to rhetoric came with the recognition that through choices made by the speaker he manifests his intelligence, character, and good will.

Rhetoricians from the Aristotelian era to the present have concerned themselves with the importance of choices made by the speaker as they affect his acceptance or rejection by the audience. Choices as to the ends of speaking, whether to

the honorable, the expedient, or the just, and choices made in invention, arrangement, and style are said to affect audience estimation of the speaker's intelligence, character, and good will. Whether called "virtues" or "personal qualities," choices as described by rhetoricians can be categorized according to the threefold bases of ethos. A speaker is intelligent when he shows a familiarity with the needs, interests, and beliefs of his day, has zeal for great and noble designs, establishes his authority based on personal experience, demonstrates a knowledge of history, and uses common sense. A speaker possesses high character when he associates himself with the virtuous and elevated, links those who offend with that which is not virtuous, creates an impression of sincerity, shows consistency through expressions in keeping with his character and conduct, displays admirable courage, is indignant at insolence and oppression and opposes fraud and debasing qualities, maintains a responsible though disinterested attitude, serves as an honest messenger of truth, and shows good taste and modesty. A speaker conveys good will when he uses tact and moderation, identifies his wants with those of his audience, is cautious and tolerant, has warm feelings and tender sensibilities to the sorrow of others, acts to benefit society, favors justice, order, and fairness, and is benevolent and loyal. Thus, rhetoricians claim that a speaker's utterance is more believable because of the force inherent in the authenticity and credibility resulting from his choices which show

intelligence, character, and good will and recommend him as worthy of being believed.

Ethical Proof in the Judicial Opinion

K. N. Llewellyn, lawyer and educator, declares: The judge "is not merely human . . . he is, as well, a lawyer . . . and as such skilled in manipulating the resources of persuasion at his hand."[57] This manipulation takes place within a judicial opinion with a rhetorical nature which provides opportunity for the judge to recommend his credibility. An analysis of both the rhetorical nature and the opportunity shed light on Llewellyn's claim.

The Judicial Opinion: a Rhetorical Instance

Among their many duties federal court judges appoint receivers for bankrupt businesses, preside at jury trials, and admit aliens to citizenship. Primarily, however, they make decisions, issue orders, and write opinions. Peacefully they attempt disposition of conflict and construction of rules which affect others than those immediately interested. Whether the federal judge sits on a district court finding the facts and applying the rules or on an appellate court caring little about the facts but finding mistakes made in applying the rules, similar concerns confront him. He must work with precedents and underlying principles to which he must give appropriate

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[57] The Bramble Bush (New York: Oceana Publications, 1951), p. 45.

direction. His activity involves him in the group struggle about which he must make choices which he reflects in a written opinion. The prestigious nature of federal judges and the belief that they reflect and influence public opinion makes their judicial opinions a potent force in the group struggle.

Although a single opinion may have no wide-spread consequence, it still has persuasive implications. When the opinion has extensive consequence, it may affect all branches of government, the bar, and the people in general. "In either case," says Warren Wright, "the judge is engaged in the same general process. He is defending his judicial choices, and rhetoric provides the instrument for stating that defense."[58] His choices may inevitably become entangled in controversy for

> as part of the public forum, a judge's opinion is always subject to attack and defense. The interests which it thwarts may be expected to respond. The interests which it supports may be expected to come to its defense. As an entry in the public forum, it will be explained and discussed. If it is not a statement on a controversial issue, it may be a statement on an issue which it will cause to become controversial. The judge knows these things and he knows that his opinion must clearly represent his reasoning and his judgment and that it must be persuasive enough to face verbal battle.[59]

Judge Joseph Hutcheson frankly states that when he renders an opinion it must be written so as to "pass muster

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[58]"The Rhetoric of Learned Hand in Selected Civil Liberties Cases: A Method for Analysis of Judicial Opinions" (Unpublished Ph.D. dissertation, Dept. of Speech, University of Illinois, 1960), p. 60.

[59]Ibid., p. 75.

with his critics."[60] Such an admission prompts the question: Who are these critics the judge must influence favorably? They are the lawyers who represent litigants, the lawyers who teach and write, and the lawyers who supply the bench and bar with arguments. They are the law reviews of the law schools, the journals of the bar associations, and the many professional books on law. They are the peers on the bench who affirm, dissent, and overrule. And, they are the general public who depend upon lawyers to translate the meaning and significance of judicial pronouncements. Thus, the range of the judge's audience may extend from

> immediate litigants and counsel to the nation at large. The rhetoric which he employs is probably influenced by years of background in the profession and its subject matter, formed by the attitudes, practices, and traditions of the law and the men who deal in law. His rhetoric may be found in part by his awareness of an audience, whether the audience be local or national. While he may not speak to the popular audience as directly as the members of the other branches, the nature of the audience to which he does speak is such that his opinion may be expected to be an influence on the public forum.[61]

Wright in his incisive analysis of judicial rhetoric makes relevant conclusions about the function and nature of judicial rhetoric. He finds the function couched in the necessity to persuade a critic-audience of the soundness of a decision rendered in the best interest of society. The decision bare of rhetorical assistance may fail to provide a stimulus

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[60]"The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions," Cornell Law Quarterly, XIV (April, 1929), 285.

[61]Wright, "The Rhetoric of Learned Hand . . .," pp. 75-76.

for present obedience or precedent for future application. "Whether the decision is of local or national import," Wright concludes, "the function of judicial rhetoric is to make the opinion clear and persuasive in order that the decision may be plainly understood and willingly obeyed."[62] He finds the nature of judicial rhetoric to rest in

> neither the impassioned cry of a Patrick Henry, nor . . . the vehement argument of a Daniel Webster. It is not the rough-and-tumble rhetoric of the legislative chamber and the election campaign. Rather, it is the studied, deliberate argument of a referee, whose profession severely circumscribes his rhetorical activity. It is the restrained, yet persuasively oriented statement of the American judge as he goes about his daily business of adjusting disputes. Judicial rhetoric is the studied contribution of the American judge to the public forum, made with a knowledge of the judicial opinion's function, its audience, and its potential import.[63]

Judges, therefore, despite their stature and granted power, do not possess restrained dictatorial freedom. As Judge Hand recognized, they are dependent on the force of popular support. To insure needed support and to avoid being overruled at a higher level the judicial opinion is the judge's only medium to justify his choices and state his case. To deny his pronouncements a persuasive function and nature is to ignore realities and to relegate the judge to the mechanistic status of one lacking human qualities.

The Judicial Opinion: an Opportunity for Ethical Proof

Throughout the nineteenth and into the early twentieth century the accepted theory was that good judges decide cases

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[62] Ibid., p. 63. [63] Ibid., p. 78.

by rules and reasoning controlled through the unwavering and purely objective application of logic. Only those who spoke in bad taste or in a joking manner mentioned the human characteristics of the judge. Studies showed that the bench and bar disdained having their attention directed to "the extent to which judging is affected by temperament, training, biases and predilections of the respective judges."[64] As recently as 1949, Judge Frank noted: "And when, not very long ago, some few of us ventured to violate that tabu, a considerable part of the legal profession called us subversive, enemies of good government, disturbers of 'law and order.'"[65] Indeed, acquiescence in the tabu against personal involvement of judges in their decisions would clearly appear to preclude use of the opinion as a persuasive medium, as a medium for revealing those personal qualities which constitute ethical proof. After all, a mechanical disposition of a case is some consolation to a defeated litigant who winces at the thought of his rights being exposed to the uncertainties of humanly influenced judgments. For some the desire fathers the thought. Intelligent analysis of the opinion for what it is accedes to the preferred suppression of realities.

Two theories about the function of the judge have persisted in the Anglo-American law-making process. Under one

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[64]Jerome Frank, Law and the Modern Mind (New York: Brentanos's, 1930), p. 115.

[65]Courts on Trial (Princeton, New Jersey: Princeton University Press, 1949), p. 146.

the presence of ethical proof in a legal opinion would be unreasonable, alarming, and destructive to justice. Under the other such presence would be reasonable, unavoidable, and blessed with the virtues of frankness and sincerity.

The "mechanical" theory says that the judge seeks truth by arriving directly at a judgment from discovered principles, without deviation or turning. Arbitrariness will only result when the judge allows himself to be affected by the circumstances of the case before him. With the general acceptance of this view (called by some the "slot machine" theory), attention focuses away from individual views and preferences to precedents, the "real" authoritative basis of the law. The undependable human element is not to be trusted in administering justice.[66] Stringent limitations on opinion-writing require temperance in language. Judges "are to phrase their decisions and explain them in a technical language which conceals any subjective element and makes the decision appear to be controlled by the law."[67] Acceptance of the "mechanical" theory encourages neither expectations of ethical proof in legal opinions nor an admission that the proof is there even if such a conclusion appears reasonable.

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[66]Charles Grove Haines, "General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges," Illinois Law Review, XVII (May, 1922), 96-98.

[67]Jack W. Peltason, Federal Courts in the Judicial Process (Garden City, New York: Doubleday and Company, Inc., 1955), p. 21.

The other or "free legal decision" theory says that a judge "gathers his conclusions from his own concepts and conscience influenced largely as these are by his training and experience, and by the social and economic conditions surrounding him and the litigants whose controversies are to be settled."[68] Conscious frankness in opinion-writing, this opinion says, is preferable to insincere, unrealistically rigid arguments. The New Hampshire Supreme Court recognized an inescapable fact when it held: "Judges are men, and their decisions upon complex facts must vary as those of jurors on the same facts. Calling one determination an opinion and the other a verdict does not . . . make that uniform and certain which from its nature must remain variable and uncertain."[69] Variability and uncertainty dictate varying courses of action about which choices must be made if judges are to render decisions. Recognition that judges as human beings make these choices and seek to influence other human beings about their choices invites expectancy that the personal characteristics of the judge who responds frankly and sincerely will emerge as ethical proof in his written opinions.

Disciples of the "human" theory about judges are increasingly numerous and their observations realistically tolerant. They tend to recognize those stimuli working on the judge which expose him to certain forces, condition him through

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[68]Haines, "General Observations . . .," p. 96.

[69]In Frank, Courts on Trial, p. 180.

his experiences, and demand of him choice-making. These recognitions dictate to those who endorse the "human" theory that the judge cannot eliminate the personal element from his work. Each force is worthy of separate analysis for the probability it introduces that judges are not "slot machines" and do interject themselves into their work.

His state of health, his momentary temperament, and his advocacy of a point of view are all stimuli which can induce the judge's self-involvement. As the French essayist Montaigne pointed out: "When Justice So and So leaves his house suffering from the Gout, from jealousy or resentment against his valet who has been robbing him, his whole soul dyed and steeped in anger, we cannot doubt that his judgment will be warped accordingly. . . ."[70] Judge Frank's comments show that this notion has changed little since Montaigne's day:

> Of course, no one, except jocularly, has ever proposed explaining all or most decisions in terms of the judge's digestive disturbances. Yet, at times, a judge's physical or emotional condition has marked effect. No one denies that a witness may have made a serious mistake about what he saw or heard because of acute indigestion or a sleepless night. Why refuse to admit the same as to a trial judge when functioning as a witness of the witnesses?[71]

Yet another stimulus indicated by Justice Cardozo is the eccentricities of judges. Cardozo acknowledged that "one judge looks at problems from the point of view of history, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied

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[70] In ibid., p. 163. [71] Ibid., p. 162.

with the present. . . ."[72] Thus, the judge is an active spokesman for a particular philosophy or, at least, a silent advocate of a point of view. Regardless of the nature of these forces, whether health, temperament, or advocacy, each is a stimulus to involving the judge personally in his work.

Still other stimuli condition the judge and influence his responses. All constitute the peculiar personality of the particular judge sitting, for "the great tides and currents," according to Cardozo, "do not turn aside in their course, and pass the judges by."[73] These conditioners include emotions, traits and habits of behavior, and background. This prompted Judge Bok to call the law unscientific "in the sense of a science whose rules are impersonal and beyond the reach of human emotions or behavior. Emotion and behavior are the raw materials from which the law is distilled in one way or another. . . . There is no plea to be made except to keep the law personal."[74] Cardozo, although he generally ignored the impact of personal influences on fact-finding, reinforced Bok when he said: "Deep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."[75] Other conditioners

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[72]Benjamin Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921), p. 177.

[73]Ibid., p. 168.

[74]In Frank, Courts on Trial, p. 176.

[75]In ibid., p. 179.

in the judge's background receive Frank's attention. Speaking of the judge's personality he calls it "a product of numerous factors, including his parents, his schooling, his teachers and companions, the persons he has met, the woman he married (or did not marry), his children, the books and articles he has read."[76] These additional forces, admitted by eminent members of the bench, complement those already mentioned to further detract from the notion that a judge can keep his human characteristics aloof from his judicial duties.

But at least one more important personal involvement of the judge in the judicial process is apparent to those who regard judges as something more than mechanical manipulators of legal machinery. Wright reports on this facet when he says, "Probably all rhetoric reveals some ethical components or overtones. A judge gives indication of his intelligence and character when he selects judicial methods, when he chooses one argument over another, when he gives his reasons for his choices. . . . Thus, ethical appeal plays a part in judicial rhetoric."[77] Attorney Theodore Schroeder sees these choices as "fragments of an autobiography" of the judge:

> Every judicial opinion necessarily reveals a variety of choice. There is a choice of materials from that offered in evidence, as well as among possible precedents and arguments. A choice is made in that which is approved as well as that which is ignored, or expressly disapproved. There is a choice of material brought in by the judge and not a matter of record. There is choice in all that is

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[76] Ibid., p. 152.

[77] "The Rhetoric of Learned Hand . . .," pp. 64-65.

> emphasized, slighted or distorted. A choice is evinced in the very words by which these other choices are expressed.[78]

Deductive logical devices are useless to the judge confronted with these choices. Rather than a point from which the judge begins, the law in this respect becomes his conclusion. As such the personal element is inescapable and the responsibility for critical self-scrutiny and cautious exercise of authority is properly trusted to those whose personality best suits the function. Frank describes Learned Hand as the type of self-demanding judge who can make these choices without having the "personal element" of which he is aware lead him into arbitrariness and detraction from the "true nature of the judging process."[79]

Ethical Proof in This Study

The image of the Man and the Judge has been presented along with the nature of ethical proof and the likelihood of its occurrence in rhetorically oriented legal opinions. With Judge Hand's belief in mind that a good judge is an artist who blends into his work that which to others is "delectable and tolerable" the unexplored territory of the Judge's criminal law opinions will be analyzed and synthesized to ascertain the ethical proof contained therein. The following chapter will reflect consideration of 118 opinions from which emerge examples

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[78]"The Psychologic Study of Judicial Opinions," California Law Review, VI (January, 1918), 97.

[79]Courts on Trial, p. 412.

of ethical proof, categorized with subordinate examples combined with their like types and positioned under the five headings most descriptive of how the Judge recommended his credibility.

The five categories which constitute the organizational pattern for Chapter V are: (1) appearing to act in the best interest of a free society governed by law; (2) demonstrating an understanding of human nature; (3) displaying expertness in the use of reasoning; (4) exercising caution; and (5) identifying with trustworthy virtues.

CHAPTER V

JUDGE HAND RECOMMENDS HIS CREDIBILITY

Introduction

Recalling Judge Hand's comparison of the good judge with a chef who adds those ingredients to his dishes which make them appealing to the fancy of his guests, Felix Frankfurter adds: "Like a good chef he makes the best dish when he uses the best materials. At any rate he avoids stale and underripe materials, and certainly noxious ingredients."[1] What, then, are the "best" ingredients which make the legal opinions appealing; and, more important, what were they to Judge Hand? One need not search far in Hand's recorded thoughts to uncover at least some of the indispensable ingredients without which the opinion suffers loss of an appealing flavor. "In the end, and quite fairly," contended Hand, "a judge will be estimated in terms of his outlook and his nature. He cannot evade responsibility for his beliefs, because these are at bottom the creatures of his choice."[2] The exercise of

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[1]"Judge Learned Hand," Harvard Law Review, LX (February, 1947), 327.

[2]"Mr. Justice Holmes at Eighty-Five," in Learned Hand, The Spirit of Liberty, ed. Irving Dilliard (New York: Vintage Books Inc., 1959), p. 21.

choice in manifesting beliefs and revealing his nature is not only unavoidable responsibility for any judge but an act which exposes him to estimations about his intelligence, character, and good will. This act, the responsibility for which Judge Hand understood so well, caused the Judge to employ ethical proof as he chose to act to benefit society, to understand human nature, to display intelligent reasoning and possession of knowledge, to exercise caution, and to identify with truth and honesty. Each ingredient made the "dish" more palatable as the Judge recommended his credibility and worthiness for being believed. Each ingredient deserves separate analysis for appreciation of the Hand technique of integrating ethical proof into the judicial opinion.

Acting in the Best Interests of a Free Society Governed by Law

In his criminal law opinions Judge Hand both directly and indirectly demonstrated concern for the well-being of society. He gave his support to the Constitutional rights of litigants and to the authority of judges. Expediency, he believed, had a place in the judicial process and harmless error and legal formalism were not to overturn otherwise just decisions. Once justice and fairness had been assured, he freely linked an offending litigant with debasing qualities. In each instance Judge Hand sought to benefit the general and not the special public, to serve the popular and not the selfish interests of his day as he fought oppression and acted to

benefit a society governed by law. As constituents of ethical proof, through these choices the Judge recommended his intelligence, character, and good will to his audience.

Demonstrated Concern for the Well-Being of Society

Judge Hand demonstrated concern for the well-being of our society when he affirmed the conviction of defendants indicted for conspiracy to obtain money by the use of force, violence, or coercion. Their crime, he said, "struck at the heart of civilized society; its very possibility is a strain upon our jurisprudence."[3] He also spoke out for our form of government, for realism about sex, and for litigants' rights.

For our form of government

The Judge through his opinions became an articulate spokesman pledged to defend the freedom assured by a form of government about which he possessed deep convictions. He conveyed these beliefs when he reversed Judith Coplon's conviction for attempting to deliver defense information to a citizen of a foreign nation and for conspiring to defraud the United States. The defendant's telephone wires had been tapped and recordings made. The trial judge held that the inadmissible recordings had not led to any evidence at the trial but he denied defense counsel the privilege of examining the information recorded by the tappings. Judge Hand considered the defendant's act as secondary in harm to the judge's refusal.

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[3]United States v. Compagna, 146 F.(2d) 524,529 (1944).

"A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members," he held, "has already lost the feel of freedom and is on the path towards absolutism."[4] In the must publicized Dennis case he again supported the democratic form of government as he chose to speak and decide in its behalf. Judge Hand upheld convictions for violation of the Smith Act by conspiracy to organize the Communist Party of the United States. He cited the American Communist Party as a wide-spread, ruthlessly disciplined body committed to doctrinal orthodoxy and the absorption of existing governments. "Our democracy," Hand proclaimed, "like any other, must meet that faith and that creed on the merits, or it will perish; and we must not flinch at the challenge."[5] Faced with chosing between abridging absolutely free speech and striking down a "clear and present" danger to his form of government he preferred the latter. "True," he concluded, "we must not forget our own faith; we must be sensitive to the dangers that lurk in any choice; but choose we must, and we shall be silly dupes if we forget that . . . just such preparations in other countries have aided to supplant existing governments when the time was ripe."[6] In time of war when confronted by military hostilities Judge Hand

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[4] United States v. Judith Coplon, 185 F.(2d) 629,638 (1950).

[5] United States v. Dennis et al., 183 F.(2d) 201,212 (1950).

[6] Ibid., p. 213.

was equally as active in offering protection to his country as when confronted by ideological hostilities in time of peace. During World War II certain parties bought forged meat ration "cheques" for which an indictment resulted when they made fraudulent statements to the wartime Defense Supplies Corporation. In upholding a conviction of these defendants under the indictment the Judge cited "their sordid contribution toward breaking down the collective effort to conserve our national resources" as "morally removed only a step from giving aid and comfort to the enemies of their country."[7]

For realism about sex

Judge Hand minced few words in setting forth his notion that tests for obscenity should be geared to the best interests of society at large and not those most easily corrupted. In the Kennerley case he questioned a test for obscenity which protected a vulnerable few at the expense of many:

> I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standards of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature.[8]

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[7] United States v. Central Veal and Beef Company et al., 162 F.(2d) 766,772 (1947).

[8] United States v. Kennerley, 209 F. 119,120 (1913).

Thus, the Judge contended that "to put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy."[9] Twenty-three years later Judge Hand wrote another opinion on this subject when a trial judge applied to advertisements an absolute obscenity standard independent of any readers. In reversing the trial judge he claimed: "No civilized community not fanatically puritanical would tolerate such an imposition. . . ." He continued, "The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands. . . ."[10]

For litigants' rights

A defendant's rights to a jury trial and to be free from oppression by the prosecution were upheld by Judge Hand as essential if society governed by law is to remain free by respect for individual rights. When one defendant waived a jury trial and defended himself the question certified to the appellate court for Hand's decision was whether under these circumstances the judge had jurisdiction to try the defendant. In holding that an accused who is not a lawyer may not consent to be tried by a judge except on the advice of an attorney

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[9] Ibid., p. 121.

[10] United States v. Levine, 83 F.(2d) 156,157,158 (1936).

Judge Hand launched into his convictions about the merits of a jury trial:

> The institution of trial by jury--especially in criminal cases--has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty--to say nothing of his life--only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its vigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree.[11]

By checking the scope of all-inclusive provisions in indictments Judge Hand sought to limit the oppression of litigants and in yet another way protect their rights. Consequently when defendants appealed from a conviction for conspiracy in operating illicit liquor stills, the question arose whether a seller of goods becomes a conspirator with or an abettor of the buyer because he knows that the buyer intends a criminal use for the goods. Hand held that the seller must promote the venture and make it his own to be a conspirator. He concluded that today "many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by

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[11] United States ex rel. McCann v. Adams et al., 126 F.(2d) 774,775-776 (1942).

circumscribing the scope of such all comprehensive indictments that they can be avoided."[12]

Recognition of the rights of the individual and the privileges and necessities of the group, both commendable virtues, served to recommend Judge Hand to his judicial audience as he wrote into his criminal opinions concern for our form of government, for realism about sex, and for protection of litigants' rights.

Protected Constitutional Rights

Closely allied to Judge Hand's concern for the well-being of society and worthy of separate mention for specific attention to the Constitution was the importance he attached to guaranteeing Constitutional rights. Even when the denial of a granted right seemed inconsequential he would overthrow a decision in respect for what might otherwise be sacrificed when the inconsequential became consequential in the future. He felt, for instance, that the judge's refusal to allow Judith Coplon the opportunity to argue that inadmissible wire tap information led to her conviction handicapped her not the slightest. But, he avowed,

> we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments,

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[12] United States v. Falcone et al., 109 F.(2d) 579,581 (1940).

> democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused and unpurged by the alembic of public scrutiny and public criticism.[13]

The likelihood is high that such conviction about the importance of protecting Constitutional rights induced a feeling of trust among Judge Hand's critics. However, he did not leave to inference his feeling of responsibility to act in this area. In applying the "clear and present danger" test to the First Amendment he stated that in each case the court must weigh the severity of the wrong to determine if such invasion of free speech is necessary to avoid danger. "In appreciation of such a standard," the Judge asserted in the Dennis case, "courts may strike a wrong balance; they may tolerate 'incitements' which they should forbid; they may repress utterances they should allow; but that is a responsibility that they cannot avoid. Abdication is as much a failure of duty, as indifference is a failure to protect primal rights."[14]

Judge Hand exercised the responsibility with which he charged the bench when in a treason case which lacked the two required witnesses he held: "There seems to me no question whatever, that without disregarding the whole theory of the

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[13] United States v. Judith Coplon, 185 F.(2d) 629,638 (1950).

[14] United States v. Dennis et al., 183 F.(2d) 201,212 (1950).

Constitution I could not allow a verdict to stand if I received it. I must therefore direct it for the defendant."[15] Even when the testimony of witnesses to an alleged crime was available he cautioned that "an easy complaisance in any plausible tale may deprive defendants of their constitutional rights."[16]

The Judge was particularly concerned about "search and seizure" violations of the prohibition contained in the Fourth Amendment. When a question arose about an arresting officer's power to search certain premises and seize, not only liquors and bottling apparatus, but any incriminatory papers also found, Judge Hand held:

> Such constitutional limitations [on search and seizure] arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.[17]

In another "search and seizure" case officers searched the Brooklyn dwelling of a housewife after they smelled the odor of fermenting mash which grew stronger as they approached the house. The housewife, convicted for maintaining a still, did not protest against the conviction on the basis of her innocence but claimed that the officers procured evidence

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[15] United States v. Robinson, 259 F. 685,694 (1919).

[16] Marsh v. United States, 29 F.(2d) 172,173 (1928).

[17] United States v. Kirschenblatt, 16 F.(2d) 202,203 (1926).

predicated not on a warrant for search but on the sensitivity of their noses. Demonstrating that he did not place the punishment of crime above the Constitutional rights of the defendant he reversed the conviction and admonished the authorities for not first obtaining a warrant. The claim that such an evil in Brooklyn could not be suppressed without such freedom for the officers did not move Judge Hand. "Perhaps so," he said, "any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution."[18] The Judge never left his choice in doubt. Undaunted in his loyalty to protection of Constitutional rights, his audience could only know him as one with allegiance sworn to the "supreme law of the land."

Reinforced Authority Possessed by Judges

Judge Hand displayed a consciousness in his opinions that if the law were to be efficiently administered and respectfully obeyed, he had a responsibility to reinforce judicial authority. As one who would stand behind a colleague in need of support, he communicated loyalty, dedication, and understanding to his peers and promoted judicial harmony. Against the action of defendants, counsel, and witnesses his opinions gave support to needed authority for the bench and, in general, law and order.

In United States v. Bollenbach the defendant protested being brought to trial and repudiated assistance from an

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[18] United States v. Kaplan, 89 F.(2d) 869,871 (1937).

attorney assigned to him. In court he refused to be quiet, became obscene, and undertook a verbal tirade for democracy and against the proceedings. From conviction on two criminal contempt charges the defendant appealed only to find the Judge firmly sympathetic with the needs of the bench. Hand said, "This [persistent obstruction of the court's business] on top of the indecency of his original address, indicated a continuing will to impugn the court's authority which certainly excused effective repression, if it did not demand it. . . . If in such circumstances we were to refuse to support a judge . . . we should weaken the rightful authority of all judges. . . ." He concluded:

> No judge can do his duty, if his power to maintain decorum and secure his authority from being flaunted, is subject to cavil and captious question; he must be able to repress disorders quickly and, if necessary, ruthlessly; and unless when he does so, he will be free from later question, he cannot effectively deal at first hand as he must with the lawless, the defiant, or the covertly contumacious. . . . Coming as the first outburst did . . . the judge would have been unfit for his office if he had not made use of those sanctions which the statute gave him.[19]

In another case not involving contempt Judge Hand gave further support to the trial judge. Here, the appellants, under a conviction for defrauding the United States of sugar in excess of wartime regulations, objected to the propriety of admitting a confession of one accused during a trial of joint parties. Hand ruled that in the conduct of civil as well as criminal trials "the admission of evidence should, as far as possible,

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[19]125 F.(2d) 458,460 (1942).

lie in the discretion of the trial judge, for whose fairness and moderation nothing can ever be a substitute."[20]

When counsel alleged error in the conduct of a trial because the trial judge failed to charge the jury as requested, the judge had no better defender than Learned Hand. He made short work of appeals based on a judge's failure to grant one of a multiplicity of charges. Providing the judge was not plainly in error he treated denial of request to charge of minor importance and subject to summary consideration. "We will not," he wrote in one opinion, "reverse a case well tried in the main, by rummaging through a wilderness of verbiage, which serves no other end, however well meant, than to set hurdles for the judge to leap."[21] In another case where the appellants predicated an appeal on failure of the trial judge to issue two of about 150 requests to the jury Hand said of such multiplicity that it impedes the trial and entraps the judge. The charges refused were to tell the jury to ignore assumptions about what defense witnesses would have said if called. In upholding the action of the trial judge Hand took this opportunity to define the limits of a judge's authority:

> A judge is not required to intervene here any more than in any other issue of fact. He must indeed, as he always must, keep the prosecution in a criminal case within bounds; he must not allow it by implication to invoke unsound legal doctrine . . . just as he must keep passion

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[20] United States v. Gottfried et al., 165 F.(2d) 360, 367 (1948).

[21] United States v. Rowe et al., 56 F.(2d) 747,750 (1932).

> out of the debate and hold the parties to issues. But he is not charged with finding their non sequiturs; the jury are to find these for themselves.[22]

Judge Hand also reinforced the authority of a judge who held a witness in contempt for failure to testify before a grand jury. He acknowledged the power of the district court in the Loubriel case to punish a witness who evaded his duty. "The question," he held, "is no less than whether courts must put up with shifts and subterfuges in the place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance."[23]

Therefore, Judge Hand reinforced the authority of judges forced to interact with defendants, counsel, and witnesses. He displayed loyalty to those who required support of the same powers he insisted on for himself, dedication to preserving for the bench the respect without which it cannot function, and understanding of the judge's necessities which enable fulfillment of his duty. All were written into his opinions--all may have contributed to his credibility.

Recognized the Need for Expediency in the Judicial Process

Besides reinforcing the authority of judges, Judge Hand's recognition of the need for expediency in the judicial

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[22] United States v. Cotter et al., 60 F.(2d) 689,692 (1932).

[23] Loubriel v. United States, 9 F.(2d) 807,808 (1926).

process further characterized him as an efficient administrator of the law. He applied this expediency to the work of prosecutors and judges, to the fate of defendants, and to the drafting of pleadings.

The necessity for expediency in a prosecutor exercising the only reasonable alternative in order to serve the best interest of justice confronted Judge Hand in United States v. Cohen et al. The defendants objected to the conduct of the trial claiming that the evidence was so complex that it could only confuse the jury and detract the real issues from their attention. Hand stressing the importance of expediency, wrote that

> if the objection is valid, a prosecutor, faced with such a web, will be forced to single out the most important malefactors and let the small fry escape; for the burden upon the witnesses and upon successive juries of repeated trials would be intolerable. . . . We are dealing only with the chance, and chance alone it is, that a jury may fail to distinguish between the guilty and the innocent; and in deciding the importance of that chance we must not disregard the only available alternative.[24]

Similarly, prosecution of an alleged violation of the Emergency Price Control Act of World War II vintage resulted in the claim that the prosecutor made the trial unfair by complicating the real issues with evidence which tended to prove defendants guilty of other crimes. In affirming the conviction Judge Hand held: "There would be an end to the punishment of many crimes, if the most cogent proof possible were forbidden, because, in case it did not prove as cogent as the prosecution honestly

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[24]145 F.(2d) 82,91 (1944).

believed it should, it exposed the accused to the chance of conviction for something with which he had not been charged."[25] The complaint of a defendant in another case that the prosecution prejudiced him by showing that his co-defendants had committed a kindred crime with other parties elicited a response from Hand based on expediency. To deny to the jury the "rudimentary power of discrimination," he held, "would make difficult any trial in which the number of accused was large. . . . If we are to clutch at such shadows, the criminal prosecution of complicated crime becomes impossible, and the phantom of the innocent man convicted will prevent any effective enforcement of the law."[26] Disallowing objections in yet another case where such did not impair fairness and the alternative to which was to encumber the proceedings brought forth the frank response from the Judge that "the practice adopted promoted dispatch."[27]

Application of expediency to the function of the judge manifested Hand's sympathy for the judge's plight and the ultimate importance of the practical administration of justice. When a defendant protested that the trial judge did not read or explain to the jury those regulations under which the

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[25] United States v. Glory Blouse and Sportswear Company Inc., et al., 158 F.(2d) 880,882 (1947).

[26] United States v. Liss et al., 137 F.(2d) 995,999 (1943).

[27] United States v. Cotter et al., 60 F.(2d) 689,690 (1932).

indictment charged him with violations, the Judge called the regulation "a very long one in twenty-four articles occupying over twenty pages of agate print in the Federal Register, and laying out with the greatest conceivable particularity the whole system of rationing meat, fats, fish and cheeses." He held, "We will not upset a conviction for such an omission, or require a judge to befuddle a jury by reading pages of verbiage which for its comprehension needs hours of study."[28] Defendants have alleged a miscarriage of justice not only when the judge refused to read a regulation but when he failed to provide a detailed discussion of the facts in his charge to the jury. Judge Hand when confronted by such objection held:

> If the judge had once embarked upon a consideration of the transactions in detail, he would have committed himself to a discussion of them all; otherwise he would surely have laid himself open to the charge of undue emphasis. On the other hand, to undertake such a Herculean task would not have helped the jury, but merely have added to the weight of verbiage that they had already been called upon to bear during twelve days of summing up by counsel.[29]

Statutes, whether they confer power on the court to charge a jury in a particular manner or divide a district territorially for selecting jurors, can and need only be used "with approximate exactness" since the court "is engaged, not in a scholastic exercise, but in the practical administration of justice," said

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[28] United States v. Center Veal and Beef Company et al., 162 F.(2d) 766,771,772 (1947).

[29] United States v. Cohen et al., 145 F.(2d) 82,92 (1944).

Judge Hand.[30] To press an argument with what the Judge called "schoolman's logic" interfered with and encumbered the law. Although allegations in an indictment must be allegations of fact, expediency demanded, Hand believed, that mixed conclusions (wherein facts for their truth depend on rules of law) must not be overthrown by "schoolman's logic."[31]

Disdained Harmless Error and Legal Formalism

As an adjunct of the virtue of expediency Judge Hand disdained allowing harmless error or legal formalism to upset an otherwise just decision. Acting in this manner, which conveyed his concern for the best interests of law and society, he chose yet another way which evinced ethical proof in his opinions.

Judge Hand was not merely a silent adherent to Title 28, section 391 of the United States Code which directs judges to "give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." The Judge in his opinions expanded on and justified his application of this rule. He frequently exercised the discretion allowed in determining whether an error affected the "substantial rights" of a party. A strict interpretation

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[30]United States v. Gottfried et al., 165 F.(2d) 360, 365 (1948).

[31]United States v. White et al., 171 F. 775,777 (1909).

of "substantial rights" resulted in Hand's expressed approval of fundamentally just decisions though confronted by what to some might be reversible errors. His choice to uphold such decisions and justify ignoring what he regarded as harmless error produced the following passages which recommended his credibility: "But like other rules for the conduct of trials, it [a jury may not benefit from that not introduced in the court room] is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity."[32] "Possibly it is true that the trial judge showed some animus against him [defendant], but as there was no possible justification for an acquittal we will not look jealously at what, in a case where there was any dispute, might detain us."[33] "No judge in so extended a trial can avoid on occasion rulings that on reflection he will see to have been wrong; but, unless they cast off some really substantial aspect of the truth, or let in too distracting issues, they are not important."[34] "No prosecution is tried with flawless perfection; if every slip is to result in reversal we shall never succeed in enforcing the criminal law at all."[35]

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[32] United States v. Compagna et al., 146 F.(2d) 524, 528 (1944).

[33] United States v. Krakower, 86 F.(2d) 111,112 (1936).

[34] United States v. White, 124 F.(2d) 181,186 (1941).

[35] United States v. Sherman et al., 171 F.(2d) 619,624 (1948).

Whether the prosecutor,[36] the judge,[37] the defendant,[38] or a witness[39] initiated the harmless error, Judge Hand refused to recognize the error when based on jural subtleties and supported what he deemed the purposes for which courts exist. He summarized his objection to allowing harmless error to upset an otherwise just decision when in a mail fraud case the appellants alleged errors in the conduct of the trial:

> They suppose that we would reverse a judgment clearly justified by the evidence for trivial lapses made at trial. Substantially all were not errors at all, but, so far as any exist, they are inappreciable in the vast morass before us. Criminal prosecutions are not to test the trial judge's adeptness in answering questions of law, put to him in multitude, often in the heat of sharp dispute. Trials are to winnow the chaff from the wheat; when the accused has had fair opportunity to answer the charge; when it has been lawfully proved, and fair men have found him guilty, our duties end. There can be no question that these conditions were here fulfilled.[40]

Appellant insistence on strict adherence to legal formalities was one aspect of harmless error which received Judge Hand's conscious concern. These demands for reversal based on non-compliance of the pleadings or the judge with

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[36] United States v. Brown et al., 79 F.(2d) 321,324 (1935); United States v. Lotsch, 102 F.(2d) 35,37 (1939); United States v. Berger, 73 F.(2d) 278,280 (1934).

[37] United States v. Wexler, 79 F.(2d) 526,530 (1935); United States v. Easterday et al., 57 F.(2d) 165,167 (1932).

[38] United States v. Allied Stevedoring Corporation, 241 F.(2d) 925,935 (1957).

[39] United States v. Garsson et al., 291 F. 646,648 (1923).

[40] United States v. Cotter et al., 60 F.(2d) 689,694 (1932).

procedural technicalities motivated expressions of disapproval from the Judge, who when confronted by such demands refused to upset otherwise just decisions. The protection of society from crime with preservation of fundamental rights to the accused remained his goal. In United States v. Garsson et al. he said:

> No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[41]

Judge Hand was not subtle in his disapproval of appeals predicated on formal errors. Reversals for such errors he called in Van Riper et al. v. United States "a crying scandal, which has brought the whole system into disrepute,"[42] and in United States v. Rebhuhn he condemned reversal on a formal defect as "absurd."[43] He paid tribute to procedural perfection but with insistence upon it he believed "few convictions could survive."[44] Such perfection was occasionally demanded by appellants who contested what they regarded as inadequacies in the judge's charge to the jury. Tactfully but firmly Judge Hand put down such appeals by dissociating the judge's charge from a formal ritual. "Nothing," he held, "is more conducive to absurd

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[41] 291 F. 646,649 (1923).

[42] 13 F.(2d) 961,968 (1926).

[43] 109 F.(2d) 512,516 (1940).

[44] United States v. Liss et al., 137 F.(2d) 995,999 (1943).

formalism, which even yet at times invades a criminal trial, than to suppose that there is a ritual which must be repeated if the charm is to work. We wish once more . . . to repudiate altogether any such putative requirement."[45] In other cases the Judge denounced the elaboration of the judge's charge into an "inexorable" ritual as an impediment to judicial inquiry[46] which overlooks "the actual determinants of a verdict and . . . [mistakes] shadows for reality."[47]

Judge Hand's refusal in the interest of law and society to allow procedural inadequacies to overthrow an otherwise just conviction of a guilty party seldom was more clearly stated than in the Brown case:

> When the very merits of the case are clear; when only one result can honestly emerge; and when the jury has in fact been satisfied, we no longer look upon criminal procedure as a sacred ritual, no part of which can be omitted without breaking the charm. Trial by jury is a rough scales at best; the beam ought not to tip for motes and straws.[48]

Showed Preference for Justice and Fairness

As one who subscribed to the virtues of justice and fairness, Judge Hand further recommended his credibility. He directly identified himself with these virtues by saying that

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[45] Becker et al. v. United States, 5 F.(2d) 45,51 (1924).

[46] United States v. Becker, 62 F.(2d) 1007,1010 (1933).

[47] United States v. Austin Bagley Corporation et al., 31 F.(2d) 229,234 (1929).

[48] United States v. Brown et al., 79 F.(2d) 321,326 (1935).

he was just and fair and expected the same from others. The court "is engaged, not in a scholastic exercise, but in the practical administration of justice" he declared in the Gottfried case.[49] His insistence upon justice for the defendant caused him in a bribery case "in the interests of justice to consider the matter upon its merits, rather than to subject the defendant to the possibility of suffering punishment for a crime which he could not commit."[50] The Judge assured other defendants, convicted of mail fraud, that "all the essentials of justice were accorded them. None of their multitudinous objections go to the heart of the matter; and while, like everyone else on trial for crime, they were entitled to whatever the established procedure gave, we have no disposition to stretch any points in their favor."[51] But just as he assured justice to defendants he was as equally certain to condemn those who abused its application. "Justice is not a game," he warned one defendant, "there is no constitutional right to 'throw dust in a juryman's eyes, or hoodwink a judge who is not overwise.'"[52]

Through his criminal law opinions he discouraged the courts from bringing "odium upon the administration of justice

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[49]United States v. Gottfried et al., 165 F.(2d) 360, 365 (1948).

[50]United States v. Krichman, 256 F. 974,975 (1919).

[51]United States v. Cohen et al., 145 F.(2d) 82,94 (1944).

[52]United States v. Paglia, 190 F.(2d) 445,447 (1951).

in the minds of all sensible people"[53] and warned against that action which would result in a miscarriage of justice.[54] One case in particular, United States v. Marzano, characterized the Hand manner of displaying his devotion to the administration of justice. Marzano, convicted for unlawfully selling and conspiring to sell morphine, based an appeal on the officious interference of the judge in the trial proceedings. During the course of the trial the judge called as witnesses two confederates who had pleaded guilty and were awaiting sentence. Upon their refusal to implicate the defendant, the judge reminded them that he was the one who would sentence them and asked if they desired to change their testimony about Marzano. Judge Hand held this reversible error and recorded in his opinion:

> The situation appears to us to be one in which . . . the judge did not analyze the evidence; he added to it. . . . Moreover, even if the jury were not as likely as seems to us to be the case, to have so understood what took place, the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.[55]

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[53] United States v. Ehrgott, 182 F. 267,270 (1910). Cf. United States v. Falcone et al., 109 F.(2d) 579,582 (1940).

[54] United States v. Lekacos et al., 151 F.(2d) 170 (1945); Loubriel v. United States, 9 F.(2d) 807 (1926); United States v. Austin Bagley Corporation et al., 31 F.(2d) 229,234 (1929).

[55] 149 F.(2d) 923,926 (1945).

Judge Hand on considering an appealed case charged himself "with the duty of regarding the justice of the result as a whole."[56] When a miscarriage of justice existed he noticed errors even though not raised by the defendant.[57] Even after determining a miscarriage had not taken place he added: "We might intervene if it appeared justice had gravely miscarried; but it is apparent that it did not. . . ."[58]

Combined with his insistence upon justice and inherent in its fulfillment, Judge Hand demanded a fair and impartial trial for defendants. "Certainly," he said in the Dennis case, "we must spare no effort to secure an impartial panel."[59] He concluded this case with the observation: "We know of no country where they [defendants] would have been allowed any approach to the license here accorded them; and none, except Great Britain, where they would have had so fair a hearing."[60] About defendants charged with fraudulent statements to a federal agency during wartime, Hand reported: "The accused had a fair trial; their guilt was manifest; their offense struck at the nation's protection in its hour of peril; if punishment is ever

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[56] Vachuda v. United States, 21 F.(2d) 409,412 (1927).

[57] Amendola v. United States, 17 F.(2d) 529,530 (1927).

[58] United States v. Rappy, 157 F.(2d) 964,967 (1946).

[59] United States v. Dennis et al., 183 F.(2d) 201,226 (1950). Cf. United States v. Compagna et al., 146 F.(2d) 524, 529 (1944).

[60] Ibid., p. 234.

justified, the sentences they received were just."[61] Judge Hand's assurance to the defendant that he not only knew the ingredients of a fair trial but that the defendant was a recipient of the guarantee frequently occurred in the Judge's opinions.[62]

Typical of those cases where a finding of fairness in the proceedings disallowed reversal on the grounds complained of was United States v. Allied Stevedoring Corporation. The defendants, prosecuted for attempted income tax evasion, protested that a newspaper story during the trial announcing the indictment of another for income tax evasion prejudiced fairness of the trial. Judge Hand held:

> The press may at times so poison the surrounding atmosphere that it is impossible to have a fair trial at all and the guilty may escape; but it would be to the last degree undesirable to upset judgments, in all other respects just and reasonable, because of circumambient gossamers which not only the jurors said had had no influence upon them, but which would not have had substantial influence upon anyone who was capable of impartial judgment.[63]

Not all attention to fairness by the Judge resulted in his denial of an appeal.[64] Typical of cases where a finding of

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[61] United States v. Center Veal and Beef Company et al., 162 F.(2d) 766,772 (1947).

[62] United States v. Cotter et al., 60 F.(2d) 689,690 (1932); United States v. Berger, 73 F.(2d) 278,280 (1934); United States v. Cohen et al., 145 F.(2d) 82,91 (1944); United States v. Allied Stevedoring Corporation, 241 F.(2d) 925,935 (1957).

[63] 241 F.(2d) 925,935 (1957).

[64] United States v. Matot, 146 F.(2d) 197,198 (1944); United States v. Dellaro et al., 99 F.(2d) 781,783 (1938).

unfairness resulted in reversal was In re Guzzardi. From an order sentencing a bankrupt to sixty days' imprisonment for contempt of court the bankrupt appealed. The primary question was whether the proceeding was obviously criminal from the outset or early enough to advise him and protect his rights. Judge Hand demonstrated an appreciation of fairness when he reversed the lower court and held:

> It is of at least some practical consequence to the respondent in such a proceeding to know whether he is charged with crime; the outcome may be severer, and the degree of proof is higher; his conduct may be governed accordingly. We do not say that this must be known at the outset; it is enough if it becomes manifest in season; but manifest it must be, and not for the first time on appeal.[65]

In addition to the defendant the Judge considered fairness to the prosecution and to witnesses a necessary requirement. When a United States attorney presented to the jury a seemingly immoderate argument based on analysis of the evidence, the defendant objected. Judge Hand supported the propriety of the attorney's action by saying: "He is an advocate, and it is entirely proper for him as earnestly as he can to persuade the jury of the truth of his side. . . . To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials. . . ."[66] On another occasion he called a prosecutor's comment about the public repercussion to an acquital "a fair counterweight to the

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[65] 74 F.(2d) 671,673 (1935).

[66] Dicarlo v. United States, 6 F.(2d) 364,368 (1925).

personal appeals of the defense."[67] In the same case the defense complained that when the prosecution was cross-examining the witness he questioned him for purposes of impeachment about a letter which was not shown him. Ever mindful of the rights of a witness Hand contended "fairness usually does require that the witness shall be told when and where he made the putatively contradictory statement. . . ."[68]

Linked Offending Litigant with Debasing Qualities

Judge Hand demonstrably displayed his opposition to qualities which to him and to his society were morally debasing. By recognizing and stressing disapproval of these characteristics he identified himself with their opposites and thus contributed to his credibility. The descriptive terminology which the Judge used to link debasing qualities with defendants conveyed value judgments which revealed attributes of his character. In his written opinions he accused defendants of offering "silly" explanations,[69] of "pandering to lascivious cravings of their customers,"[70] of being "ruthless" and "grasping" conspirators engaged in blackmail of "wide scope, long duration, and vast returns,"[71] of being "the chiefs of a

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[67] United States v. Dilliard et al., 101 F.(2d) 829, 837 (1938).

[68] Ibid.

[69] Sharron v. United States, 11 F.(2d) 689,690 (1926).

[70] United States v. Rebhuhn, 109 F.(2d) 512,516 (1940).

[71] United States v. Compagna et al., 146 F.(2d) 524, 527 (1944).

wide-spread skein of mean and callous fraud: the plunder of simple people,"[72] of clothing themselves with dishonesty and "employing cheats as active assistants,"[73] of being "cunning" and "audacious,"[74] and of indulging in "illicit, hazardous, and profitable" enterprises.[75]

The Judge was particularly outspoken when detailing the lack of virtue in those who sought to swindle women, small investors, or their country. The trial of one defendant, convicted for fraudulently obtaining money by false representations to induce marriage, disclosed to Judge Hand "a potent swindler, who three times played upon the credulity of single women, fleeced them of all they had, and abandoned them." He concluded: "A jury who did not infer from this history that the enticements were false by which he abused his victim's confidence, would be incompetent to serve at all."[76] Other defendants, convicted of the fraudulent sale of mining stock, indulged in "the usual obligato of dishonest and lurid puffing, the common tactic which has so often proved successful with

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[72] United States v. Cohen et al., 145 F.(2d) 82,94 (1944).

[73] Van Riper et al. v. United States, 13 F.(2d) 961, 966 (1926).

[74] United States v. Austin Bagley Corporation et al., 31 F.(2d) 229,233 (1929).

[75] Chin Wah v. United States, 13 F.(2d) 530,531 (1926).

[76] United States v. Walker, 176 F.(2d) 564,566 (1949).

guileless investors of small means," according to the Judge.[77] However, the debasing qualities which in his opinions he seemed to most strongly oppose were those where his country was the victim. The fraudulent procurement of sugar in excess of emergency wartime regulations caused direct injection of his sympathies into United States v. Gottfried et al. "While the Nation was at grips with its most deadly enemy and in peril of its very existence," the Judge declared, "these men combined to frustrate it in the equitable distribution of a staple, necessary to its defense. That was . . . aid and comfort to the enemy; and if severity is ever proper, we cannot imagine a better occasion for its existence than upon those whose greed led them to such scurvy disloyalty."[78] Whether the act resulted in failure to conserve our national resources,[79] or in an effort to "cheat" the Treasury,[80] he branded it a "sordid" effort. Thus, the unworthy defendant who exploited unsuspecting women, who preyed on simple people, who betrayed his country, or who otherwise riled the Judge's ire and rankled his system of values instigated a denunciation of debasing qualities.

In summary, Judge Hand recommended his credibility as he acted in the best interest of a free society governed by

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[77] United States v. Cotter et al., 60 F.(2d) 689,690 (1932).

[78] 165 F.(2d) 360,368 (1948).

[79] United States v. Center Veal and Beef Company et al., 162 F.(2d) 766,772 (1947).

[80] United States v. Allied Stevedoring Corporation, 241 F.(2d) 925,935 (1957).

law. He made certain choices which painted his character in words and introduced a persuasive quality into his opinions. Rather than constantly indulge in the easy comforts of precedents and literal interpretations of statutes he chose to reveal himself about our form of government, realism concerning sex, and litigants' rights. He chose to discredit the non-virtuous, to guarantee Constitutional rights, and to reinforce the authority of those who depended on him for support in enforcing law and order. Once justice and fairness could be certain he chose to stress the efficiency of expediting a legal proceeding and the desirability of avoiding its overthrow for harmless error or legal formalism. Just as these choices shaped his decisions, structured his written opinions, and influenced society in their consequences so, too, did they evince sagacity, high character, and good will in the form of ethical proof with a persuasive capacity.

Demonstrating an Understanding of Human Nature

Judge Hand's criminal law opinions demonstrated insight into the nature of judges, juries, and other men. This appreciation of the motivations, expectations, and tendencies inherent in human nature produced a display of sympathy, compassion, and understanding about the actions of mankind. These tolerances and the wisdom which created them induced a reasonable expectation that his judicial commands would be considerate of and adjusted to mankind's needs. Thus, the Judge's understanding of human nature which depicted his character and wisdom in words invited the respect of his audience.

Insight into the Nature of Judges

A judge forced to endure a lengthy trial, badgered by numerous requests to rule, tantalized into making comments better left unsaid, and generally shaken from a normally serene nature could find no more considerate review of his alleged errors than that provided by Judge Hand. One trial judge charged with bias caused Hand to observe:

> The record discloses a judge tried for many months by turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with the imperturbability of a Rhodamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess.[81]

Whether a trial had lasted a few or many days the Judge after examination of the proceedings would consider those external irritations which might disrupt any man and induce universal sympathies. Though the trial judge's manner might have incited Judge Hand's displeasure he would understandingly credit lack of urbanity to patience unduly tried by persistent counsel[82] or objections too numerous to handle unerringly.[83] He explained the insight he applied to human nature which allowed him to distinguish between irresponsible action and that which the frailties of mankind make unavoidable when he noted: "We have

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[81] United States v. Dennis et al., 183 F.(2d) 201,226 (1950).

[82] United States v. Liss et al., 137 F.(2d) 995,999 (1943).

[83] United States v. Dilliard et al., 101 F.(2d) 829,836 (1938). Cf. United States v. White, 124 F.(2d) 181,186 (1941).

no ways of reading each other's minds, but by the rude standard of assuming that men are alike, and checking the assumption by the appearance and demeanor of the individual."[84]

Insight into the Nature of Juries

Juries held few mysteries for Judge Hand. He regarded them as a group of human beings fundamentally unchanged in their beliefs and emotions because of their assumed role and not given markedly to changing their habits because of requirements the law may impose upon them. They are, he said in his opinions, subject to "the general feelings prevalent in the society in which they live,"[85] prone to test "a witness's credibility by using their experience in the past as to similar utterances,"[86] incapable of detaching all emotion from their conclusions,[87] and unpredictable as to what they may deem logically material.[88] Essentially the Judge believed a juror should be expected to respond like any normal person. During the case of United States v. Dilliard a male juror escorted a female juror to the judge. She told the judge that a stranger

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[84]Knickerbocker Merchandising Company v. United States, 13 F.(2d) 544,547 (1926).

[85]United States v. Dennis et al., 183 F.(2d) 201,226 (1950).

[86]United States v. Becker, 62 F.(2d) 1007,1010 (1933).

[87]United States v. Garsson et al., 291 F. 646,649 (1923). Cf. United States v. Wexler, 79 F.(2d) 526,529-530 (1935).

[88]United States v. Matot, 146 F.(2d) 197,198 (1944).

had identified one of the prosecutors to her as a former member of the Ku Klux Klan and when she advised the stranger that the prosecutor was not on trial the stranger asked her if she were a Jewish girl. The defendant's motion for a mistrial claimed the male juror's interest showed that "he was committed to a conviction, and no longer had an open mind." Judge Hand denied the motion and held: "There was not the slightest reason to suppose that he was actuated by any such motive: perhaps he was officious, but many fair-minded people are that."[89]

Consideration of the influence upon the jury of a judge's instructions prompted Judge Hand to probe further the nature of juries. "Some jurors are wilful, some somewhat pathetically docile. . . . Indeed," he concluded, "unless we are to abdicate altogether, we may not proceed on the assumption that whatever a judge says, the result will be the same."[90] To the Judge, juries were "not leaves swayed by every breath."[91] They caused him to doubt "whether a succession of abstract propositions of law, pronounced staccato, has any effect but to give them a dazed sense of being called upon to apply some esoteric mental process, beyond the scope of their daily experience which should be their reliance."[92] He clearly was

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[89] 101 F.(2d) 829,837 (1938).

[90] United States v. Downing et al., 51 F.(2d) 1030,1031 (1931).

[91] United States v. Garsson et al., 291 F. 646,648 (1923).

[92] United States v. Cohen et al., 145 F.(2d) 82,93 (1944).

not over-awed by the effectiveness on juries of procedural techniques. When discussing motions to strike evidence in the presence of a jury, he said in Van Riper et al. v. United States: "Indeed, in a case of this kind it is extremely doubtful whether such admonitions have any serious importance. We do, indeed, continue to give them, though it is impossible for any one, lay or legal, to divide his mind into proof-tight compartments, and forget at one moment what he must use at another."[93] Similarly, where a co-conspirator included the defendant's name in his confession and the judge admonished the jury to disabuse their minds of the confession when considering the defendant's guilt, the defendant claimed the confession in its entirety should not have been admitted. Judge Hand regarded it "hard to believe that a jury will, or for that matter can, in practice observe the admonition . . . [because] relatively few persons have any such power, involving as it does a violence to all our habitual ways of thinking."[94]

Insight into the Nature of Other Men

Judge Hand's long tenure on the federal bench exposed him to a multitude of defendants who engaged in so many different schemes and criminal practices that experience alone told him much about the probable nature of those whose fate he determined. His insight into the nature of some required

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[93]13 F.(2d) 961,968 (1926).

[94]United States v. Orlando Delli Paoli, 229 F.(2d) 319, 321 (1956).

little more than the exercise of common sense.[95] However, the nature of others he understood through prior exposure to similar situations. For instance, defendants, convicted of conspiracy to use the mails to defraud, claimed there was insufficient evidence to support a verdict. However, Judge Hand believed it sufficient. "The evidence," he claimed, "seems to us to leave little doubt that, as so often happens in similar cases, the company, being more and more pressed financially, continued to repeat what though once true, had become false and was then known to be false."[96] Habitual policies of defendants concerning procedural practices also told the Judge what to expect when one defendant objected because the trial judge did not provide a detailed discussion of the facts. "It is strange to hear an accused complaining of such a failure," remarked Hand, "we may be assured that, if the power had been used, the complaints would have been louder, and almost certainly better grounded."[97] Although his understanding of human nature worked to the detriment of the defendants in these cases, such was not always true. His understanding of man's love for freedom benefited one defendant who was held in custody for refusing to testify before a grand jury. In this case the judge prohibited the investigation from continuing

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[95] Infra, p. 189.

[96] United States v. Dilliard, 101 F.(2d) 829,834 (1938).

[97] United States v. Cohen et al., 145 F.(2d) 82,92 (1944).

indefinitely until the "pains of punishment" overcame the defendant's will. He held: "A man, faced with perpetual imprisonment till he discloses his confederates, will in the end find confederates to disclose. There is no modern engine to effect the result; the costs are too high, and the results too meager."[98]

Judge Hand spent a lifetime examining human nature. The reflection of the result of this examination in his opinions is not, therefore, unreasonable. In one case he explained how witnesses tell their story in colloquial speech which runs in terms of stating inadmissible conclusions;[99] in another he observed that anything, "a song, a scent, a photograph, an allusion, even a past statement known to be false," can revive a memory;[100] in still another case he claimed that "even respectable persons may have a taste for salacity."[101] In summary, whether he was describing the activity of judges, jurors, or other men, he demonstrated in his opinions an understanding nature and thereby prompted respect for his wisdom and character.

Displaying Expertness in the Use of Reasoning

Rhetoricians have long recognized intelligence as a sign of speaker credibility. This display of sagacity they

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[98] Loubriel v. United States, 9 F.(2d) 807,809 (1926).

[99] United States v. Cotter et al., 60 F.(2d) 689,693 (1932).

[100] United States v. Rappy, 157 F.(2d) 964,967 (1946).

[101] United States v. Levine, 83 F.(2d) 156,158 (1936).

have identified with expertness in reasoning ability. The speaker, they claim, generates audience trust and confidence in his authoritative characteristics when he conveys his wisdom. Judge Hand manifested his wisdom and thus recommended his credibility through his reasoning process. The use of good judgment, common sense, and available knowledge accomplished this in his opinions. He made shrewd inferences when he exercised both good judgment and common sense. The former resulted from his experience and adeptness as a judge, the latter inferences were those common to any reasonably prudent person. He made use of available knowledge as he showed an appreciation of the history and traditions of the law and as he observed accepted legal and non-legal beliefs of his day. Thus, good judgment, common sense, and knowledge of the past and present, as ethical ingredients, recommended the Judge's credibility.

The Use of Good Judgment

Without detectable pattern or plan the Judge appropriately showed good judgment in a variety of different ways. In United States v. Cohen et al. the defendants, convicted for using the mails to defraud, conspired to sell stocks by fraudulent misrepresentations. The prosecution called the defendants "confederates" in a single scheme in the execution of which each of twenty-nine letters cited in twenty-nine separate counts was a step. To join all the transactions into one was fatal error according to the defendants who believed that trying the counts together would confuse a jury into believing

a vast fraud existed. Hand disagreed. After noting that the charges involved two groups of defendants pursuing two generally like schemes, he held: "The most reasonable interpretation is that, while the two groups worked with a general understanding and with mutual help, each was free to fleece its own customers at its own convenience. . . . Therefore . . . there was no variance; a single 'scheme' was proved, though by hypothesis it did not include by any means all the transactions proved."[102]

In yet another conviction for mail fraud where an employee without authority took money from a company, the defendant, an accountant who entered these withdrawals as capital expenses, claimed that he trusted the employee. The prosecution contended that an accountant of defendant's experience and intelligence could not have permitted so much irregularity without becoming aware of the fraud. The question on appeal was whether the cumulation of instances of false entries in the financial statements coupled with defendant's explanation would support his guilt. Judge Hand reasoned that the entries taken individually did not prove defendant knew he was making false entries, "but logically the sum is often greater than the aggregate of the parts, and the cumulation of instances, each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any of them alone." The Judge concluded about this "very irregular method of business" that "fair men might have had no compunction

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[102]145 F.(2d) 82,88 (1944).

in refusing to believe that he was so credulous or so ill acquainted with his calling as a finding of innocence demanded."[103]

Realism in his approach to statutory interpretation exhibited in examples of good judgment was another virtue of the Judge. Under a statute which said "the running of any existing statute of limitations . . . shall be suspended until three years after termination of hostilities" the trial court considered "running" to mean that three years after hostilities end the statute of limitations begins "running" for three years after which prosecution was barred. Judge Hand reasoned that "running" meant "bar" and the statute meant that three years after hostilities end an action is barred, not six years as held by the trial court. He supported his view by describing the propriety of reading words out of their literal meaning to discover their overriding purpose:

> It is idle to add to the acres of paper and streams of ink that have been devoted to the discussion. When we ask what Congress "intended," usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion.[104]

By reasoning what we actually can do when interpreting statutes the Judge demonstrated his preference. "No doubt we ought not to press logic to its conclusions, for we are only dealing with

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[103] United States v. White, 124 F.(2d) 181,185 (1941).

[104] United States v. Klinger et al., 199 F.(2d) 645, 648 (1952).

common words, but we ought to execute the purposes which the words contain," concluded the Judge in another case which attempted to resolve whether a baggage porter who works for the Director of Railways acts in the official capacity of the United States.[105]

A criminal case involving conviction for conspiracy provided the Judge with an opportunity to show that he knew when to avoid making inferences which, though, appearing logical, were actually unreasonable. Of several defendants indicted for violation of the National Prohibition Act the jury acquitted two who the prosecution claimed were indispensable to the commission of the crime. The other defendants claimed that the acquittal of the two made their conviction inconsistent and irregular. Judge Hand admitted to the existence of a rational inconsistency between the verdicts but reasoned:

> the conviction finds that the appellants have done what they could not have done alone; the acquittal, that their inevitable accomplices did not share in it with them. If we were limited to a rational reconciliation, we might perhaps have to say that neither finding could stand, because, as we could not choose between them the doubt would infect both. But we are not so limited; the verdict in either case may have been the result of considerations not rational at all. With that possibility, so far as it touches the acquittal, we are not concerned, because the appellants have no vested right in the punishment of their fellows, however guilty.[106]

In another conspiracy case the Judge reasoned by analogy when inferring the innocence of a defendant convicted of a conspiracy

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[105] United States v. Krichman, 256 F. 974,976 (1919).

[106] United States v. Austin Bagley Corporation et al., 31 F.(2d) 229,233 (1929).

to transport stolen securities in interstate commerce. He failed to find the elements necessary for the conspiracy conviction in that the defendant "had no reason to suppose that any of the bonds he bought had been stolen in other states." Holding that "ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal," Judge Hand then made the following comparison: "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiracy to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past."[107] The defendant, in still another conspiracy case, moved for a mistrial when the judge admitted into evidence the confession of a co-conspirator without deletion of reference to the defendant's name. Judge Hand in denying the motion reasoned that to have blacked out the defendant's name "there could not have been the slightest doubt as to whose name had been blacked out; and, even if there had been, the blacking out itself would have not only laid the doubt, but underscored the answer."[108]

The Judge further revealed his intellectual competency in other criminal cases when he denied the charge that a prosecutor overproved his case because a prosecutor must have

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[107] United States v. Crimmins, 123 F.(2d) 271,272,273 (1941).

[108] United States v. Orlando Delli Paoli, 229 F.(2d) 319,321 (1956).

certain freedom since he can never "know when he has satisfied a jury on the main issue";[109] when he found the procedure of issuing an arrest warrant indistinguishable from that of a search warrant;[110] and when he acknowledged the distinction between an absence of belief and disregard for the truth.[111] All such instances disclosed an expertness in the use of reasoning which embraced good judgment.

The Use of Common Sense

Judges take judicial notice of an element in proceedings before them when the element need not be proved because all people will agree to it as fact. When some inference is necessary and when reasonable and prudent people without special training might be expected to reach the same conclusion, the judge indulges in common sense. The use of common sense by a judge is particularly persuasive in that his audience can find common ground with him as they discover their agreement with his reasoning which is in effect the same reasoning to which almost every person would subscribe. Thus, when a judge through inference reaches a conclusion equally inescapable for almost everyone, he recommends himself as one possessed of shared wisdom.

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[109] United States v. Glory Blouse and Sportswear Company Inc., et al., 158 F.(2d) 880,881 (1947).

[110] United States v. Casino, 286 F. 976,979 (1923).

[111] Knickerbocker Merchandising Company v. United States, 13 F.(2d) 544,546 (1926).

Judge Hand made repeated and sometimes pointed use of common sense as he added to his credibility in his written opinions. A typical example occurred as a result of an alleged violation of the Espionage Act of 1917. The question arose as to whether uttered words inducing insubordination were likely to reach members of the military forces in violation of the Act. The Judge utilized common sense when he held: "I may take notice of the fact that in August, September, and November the country was already subject to the draft, and that large numbers of men were under arms. . . . That being so, it is certainly true that any one in his senses, distributing a magazine generally . . . must have supposed it would probably reach soldiers."[112]

On two occasions the use of common sense served the Judge as a means by which he could verify the guilt of the accused. Defendants who fled from an illegal still when confronted by police "left no doubt in any reasonable mind that they were trying to escape arrest . . . [since] flight is a circumstance from which a court or an officer may infer what everyone in daily life would infer," reasoned the Judge.[113] Other defendants in Dicarlo v. United States claimed a victim whom they allegedly assailed had improper motives in falsely

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[112] United States v. Eastman et al., 252 F. 232,233 (1918).

[113] United States v. Heitner et al., 149 F.(2d) 105, 107 (1945).

identifying them. The Judge considered the victim's declaration to policemen immediately after the assault as

> so near in time as to have the verity generally accorded to spontaneous declarations at the time, which are universally admitted. To exclude them one must suppose that, just after escaping, wounded, from a murderous attack, he should have seized upon the event as a means of escaping from his sentence, by imputing the assault to persons whom he had no reason to suppose the public authorities would be interested in coupling with the crime. To impute to him such a design seems to us fantastic.[114]

Judge Hand in addition to using common sense to verify the guilt of the immediate criminal also used it to verify the guilty implication of alleged privies to crime. Through common sense the Judge linked privies in narcotics, fraud, blackmail, and stolen goods cases. Defendants who received an opium-filled trunk and who denied knowledge of the contents or implication in an interstate conspiracy to ship opium lost to the Judge's reasoning that people do not send extremely valuable drugs "long distances to unadvised consignees."[115] When fraud by subordinates brought denials of implication from a superior, Judge Hand retaliated: "Men do not set up a business of such a kind under a false name, employing cheats as active assistants and keep aloof and ignorant of the means by which the profits are made."[116] After a common-sense explanation of why two other defendants possessed the same fraudulent scheme

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[114] 6 F.(2d) 364,366 (1925).

[115] Chin Wah v. United States, 13 F.(2d) 530,531 (1926).

[116] Van Riper et al. v. United States, 13 F.(2d) 961, 966 (1926).

Judge Hand called his conclusion "an irrefragable inference that each man must have known what the other was doing." "Any jury," he said, "which had allowed itself to be fobbed off with the blind that each man had not been privy to what the other was doing, would have been made up of simpletons or knaves."[117] Even blackmail cases necessitated determining if parties were privies to a scheme. When a defendant imposed upon an employer two employees neither of whom rendered services but were highly paid, the Judge found "it tenable to assume that a ruthless and grasping crew of blackmailers would not provide soft berths for subordinates who were ignorant of the general nature of the undertaking of which they were the beneficiaries."[118]

The theft of goods and handling of stolen property is frequently a multi-party effort. Implication of some parties as knowing participants in a joint venture may be quite remote. However, they were never too remote for Judge Hand to reason why, if in fact common sense dictated, they could be considered privies to the crime. For instance, a truck driver who claimed to have been called in for the occasion denied knowledge that certain goods were stolen. These goods, bales of duck canvas labelled for export, had been moved from one unlikely place of deposit to another. The judge identified the driver as a privy to the theft with the question: "Why should honest men be

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[117] United States v. Center Veal and Beef Company et al., 162 F.(2d) 766,769,770 (1947).

[118] United States v. Compagna et al., 146 F.(2d) 524, 527 (1944).

shifting such goods about in so unwonted and furtive a fashion?"[119] But the Judge did not expect an alleged privy to know the source of stolen goods. In fact, he said, "it is more likely that he will *not* wish to do so. Inquiry is apt to add to that information any evidence of which he will at all hazards wish to suppress; it will be safer to take the securities as they are presented than to meddle into their source."[120] In another case, United States v. Werner et al., involving the movement of stolen goods in commerce, Judge Hand adeptly used common sense. A truck driver took misdelivered blades to the defendant telling him they were not stolen but an over-shipment. Whether the defendant had guilty knowledge that the blades were stolen was the crucial question. "Truckmen," Hand held, "do not honestly become the owners of cases of goods worth $800 which they peddle about without any documents of title. . . . Nobody but a child would have been so fobbed off" as to regard the blades as over-delivery.[121] Hand further provided another example in the Werner case which concludes this discussion of his use of common sense. He commented on the exclusion of testimony of experts as to the value of the blades:

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[119] United States v. Sherman et al., 171 F.(2d) 619, 623 (1948).

[120] United States v. Bollenbach, 147 F.(2d) 199,202 (1944).

[121] 160 F.(2d) 438,441 (1947).

> In prosecutions for receiving stolen property for obvious reasons one of the most telling indices of guilt is a low price paid by the receiver. Thieves are in no position to bargain; they must rid themselves of their loot as quickly as possible and their willingness to sell cheap betrays, or should betray, their predicament. On the other hand evidence that the receiver paid the right price, or close to the right price, for the goods is equally persuasive of his innocence; for no one is likely to incur the risk of buying stolen goods, who has little to gain.[122]

The Use of Available Knowledge

Judge Hand's use of available knowledge in his reasoning showed that he was no novice in his familiarity with the patterns of the past or the practices of the present. By demonstrating that his breadth and depth of knowledge enabled consideration of the many alternatives in a given situation he could generate confidence that he uttered well-informed decisions predicated on an understanding of their historical place in the traditional scheme of things.

Showing knowledge of the history and tradition of the law

The Judge's contact with the history and tradition of the law included those who created as well as those who administered the law. He declared in United States v. Michael Di Re, while condemning an arrest as indefensible, "if the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a

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[122] Ibid., p. 443.

delusion."[123] One such protection which he believed history assured was "trial by jury, [which] certainly for the graver crimes, has a high place in our traditions; around it cluster many memories of freedom won at large cost; its surrender is not to be lightly imputed to the accused."[124]

Judge Hand's adherence to the traditions of trial by jury did not end with its guarantee but also extended to its function. His knowledge of the habitual performance of juries enabled him to give what he called "conventional" answers to otherwise difficult questions. When confronted with whether an uncorroborated accomplice who turns state's evidence could support a conviction, he held: "Again and again it has satisfied juries of the guilt of those on whom such wretches turn; from time immemorial it has been the reliance of prosecutors; and juries have probably shown their good sense in accepting it."[125] "From time immemorial" was an expression the Judge used to reach back seemingly to the dawn of time when supporting his arguments. He used such terminology to describe the history of pleadings as well as juries. Responding to a challenge that an indictment did not contain solely allegations of fact, the Judge insisted on not pressing this requirement with "schoolman's logic" because

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[123] 159 F.(2d) 818,820 (1947).

[124] United States v. Strewl et al., 99 F.(2d) 474,478 (1938).

[125] United States v. Cohen et al., 145 F.(2d) 82,86 (1944).

> in all pleadings from time immemorial there have been allegations of so-called fact which presuppose for their truth the existence of certain rules of law. Allegations regarding "real property," "seisin," "possession," "ownership," and others, have been common from the earliest times, and no one has ever thought that it was necessary to allege all the facts from which the "mixed" [law and fact] conclusions arose. To do so would be to enormously incumber the pleadings, and the law, even in its pedantic days has not been theoretically consistent to that degree.[126]

Whether referring to the intent of Congress when formulating laws or to the activity of judges when conducting their proceedings and applying the law, Judge Hand conveyed an understanding of the past. Refusing to limit the words of a statute to satisfy the defendant's demands he noted that "certainly there was not enough ground for that in the debates of Congress."[127] Or, answering counsel who objected to the prosecution of two crimes at the same time, Hand recalled that "Congress clearly has not meant to insist upon that."[128] In United States v. Rosenberg the Judge combined a comprehension of the habitual practice of both Congress and the courts when he held: "Now, it is of course quite true, and indeed it has been long recognized, that in the exercise of its taxing power Congress may in fact be actuated, in part, anyway, by purposes quite different from the raising of revenue, and the courts will

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[126] United States v. White et al., 171 F. 775,777 (1909).

[127] United States v. Gottfried et al., 165 F.(2d) 360, 368 (1948).

[128] United States v. Lekacos et al., 151 F.(2d) 170, 174 (1945).

nevertheless not question the result."[129] The traditions of the court as described by the Judge touched on various aspects of judicial conduct. He told one defendant who complained because the judge's charge to the jury did not include a detailed discussion of the facts that although Lord Cockburn in England once took a week or more to do this "whatever be the rule across the water, in this country not only has the exercise of the power never been obligatory, but the power itself has been somewhat suspect."[130] To another defendant who protested the prosecution's speeches to the jury Hand said: "These speeches seem to us comparatively pallid in comparison to much that courts have approved."[131]

Judge Hand's knowledge of the history and tradition of the law partly depended on direct personal experience which on occasion he related in his opinions. Offering himself as an authoritative source, when a defendant appealed admission of allegedly irrelevant and damaging testimony, the Judge responded: "To my own knowledge it has been the custom for over twenty-five years in the Southern district of New York to admit such testimony in this class of cases; . . ."[132] Another defendant

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[129] 251 F. 963,964 (1918).

[130] United States v. Cohen et al., 145 F.(2d) 82,92 (1944).

[131] United States v. Dilliard et al., 101 F.(2d) 829, 837 (1938).

[132] United States v. Brown et al., 79 F.(2d) 321,324 (1935).

challenged the method of drawing jurors in the Southern District of New York. His claim that no order had been entered authorizing division of the district territorially in the interest of an impartial trial met with the following reaction: "A practice of such long standing must have been known to the judges of the district and been approved by them. It is true that Judge Hand [cousin Augustus] and I, who served as district judges in that district . . . believe that the practice existed also in our time which in my own case goes back to 1909."[133] Judge Hand may not have been reflecting as far back as "time immemorial" but the attention which he directed to his long experience and personal recollection served with these other examples to recommend his credibility as one closely in touch with the historical roots of the legal tree.

Observing accepted beliefs of his day

Judge Hand's decisions do not reflect isolated reasoning based on outdated convictions but reasoning based on current beliefs. He observed both legal and non-legal beliefs of his day--beliefs shared by his profession and the society which he influenced.

When the questioned discriminative ability of a jury caused hesitancy as to whether they could provide justice, Judge Hand acknowledged the current legal belief that "today courts are disposed more to rely upon the ability of a jury

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[133] United States v. Gottfried et al., 165 F.(2d) 360, 364 (1948).

to distinguish between those who are in fact involved in the crime and those who are not; . . ."[134] In a like manner he stressed acceptance of present, not past, standards for establishing when evidence is first hand. He regarded the requirement to produce original records in order to make a complete chain of proof as antiquated. "Unless the system under which they [bank books] are kept is defective," said Hand, "the danger of mistake is slight and in any event the putative corroboration by the entrants is inappreciable. The Civil Practice Act . . . [serves] to show the inapplicability to present-day conditions of rules made for a simpler society, where the automatic recording of voluminous transactions had not become reliable. . . ."[135] In other cases reflecting a similar emphasis on the beliefs of his day Judge Hand denied reversal due to objection to the prosecutor's conduct by saying, "today, when mere possibilities do not interest us as they did our forerunners, we demand more tangible evidence that damage has been done";[136] affirmed a trial judge criticized for admitting certain evidence by saying, "today such errors have much less importance than they once had";[137] and rejected a plea

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[134] United States v. Falcone et al., 109 F.(2d) 579, 582 (1940).

[135] United States v. Cotter et al., 60 F.(2d) 689,693 (1932).

[136] United States v. Berger, 73 F.(2d) 278,280 (1934).

[137] United States v. Dilliard et al., 101 F.(2d) 829, 836 (1938).

that a man may not commit crime through an agent by saying, "we do not to-day distinguish between principals and accessories before the fact, the only distinction which was ever important in the subject."[138] Characteristic of Judge Hand's observation of the legal beliefs of his day was a response he made to appellants who in their challenge to an indictment claimed false declarations of value do not constitute fraud. By combining an observation of current business practices and the consideration afforded them by the law he held such declarations of value can amount to fraud.

> True the law still recognizes that in bargaining parties will puff their wares in terms which neither side means seriously, and which either so takes at his peril . . . but it is no longer law that declarations of value can never be fraud. Like other words, they get their color from their setting, and mean one thing when exchanged among traders, and another when uttered by a broker to his customer.[139]

Another combination of current legal and non-legal beliefs, observed by Judge Hand, occurred in a case involving a conviction for conspiracy to support aliens as prostitutes without registering them. "Traffic in prostitutes," he held, "gravely offends current moral standards, and is by law contraband in most places as it is in New York. . . ."[140] Moral propriety particularly concerned him and prompted his recognition

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[138] Van Riper et al. v. United States, 13 F.(2d) 961, 965 (1926).

[139] United States v. Rowe et al., 56 F.(2d) 747,749 (1932).

[140] United States v. Mack, 112 F.(2d) 290,292 (1940).

of current moral conventions. He called a defendant's obscene utterances before a jury "quite unnecessary; [and] the fact that there were women among the jurors added to its impropriety."[141] In United States v. Kennerley he identified a test for obscenity with mid-Victorian morals and noted that it "does not seem to me to answer to the understanding and morality of the present time. . . ."[142]

In summary, through his perceptive use of reasoning, Judge Hand recommended his credibility. Expressions embodying good judgment, common sense, traditions of the past, and trends of the present induced an impression of his expertness. Such expertness in the use of sagacity by a communicator has long been recognized as a vital ingredient of ethical proof inherently beneficial to the persuasive effort.

Exercising Caution

Learned Hand--the man was a cautious individual who was never too sure that he was right. He did not reserve this attitude for his non-legal life but maintained a similar disposition in his written opinions. His opinions, rather than taking on an air of artificiality and display, communicated commendable virtues of consistency and sincerity. About the former virtue John Ward maintained "that a speaker's arguments must not be inconsistent with his typical conduct or he will

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[141] United States v. Bollenbach, 125 F.(2d) 458,460 (1942).

[142] 209 F. 119,120 (1913).

lose respect."[143] About the latter virtue William Sattler contended that "sincerity is considered to be a reliable sign to audiences that the speaker's moral purpose is honorable."[144] Thus, as a reliable sign capable of inducing audience respect Judge Hand found those words to use and thoughts to express which were in keeping with his cautious disposition and which were capable of reproducing the corresponding character. He expressed doubt about being right, respected precedent, recognized his limitations, and rebuked with tact and moderation. Each had roots in his personal values, each reflected his honorable character, and each recommended his credibility.

Expresses Doubt About Being Right

Judge Hand did not capriciously render decisions without concern for being right. Quite to the contrary, he would have given anything to be certain that he was right but knowing certainty was impossible he was tolerant of alternatives and not given to being dogmatic about his carefully considered conclusions. He prefaced interpretation of statutes with the comment "if I am right"[145] and when not abundantly sure he concluded statutory interpretation with "if there be a doubt" and awarded the defendant under a criminal statute the benefit

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[143] A System of Oratory (London: n.p., 1759), I, 140.

[144] "Conceptions of Ethos in Rhetoric" (Unpublished Ph.D. dissertation, Dept. of Speech, Northwestern University, 1941), p. 337.

[145] United States v. Ehrgott, 182 F. 267,273 (1910).

of that doubt.[146] Confronted by equally imposing arguments for differing interpretations of a statute and though committed to one in particular, the Judge, nevertheless, tempered an otherwise firm decision by cautioning "that the issue is not free from doubt. . . . He who supposes that he can be certain of the result is the least fitted for the attempt."[147]

The Judge's doubt on one occasion caused him to invite review by a higher court to prescribe proper procedure. Defendants moved for the return of liquors seized under an alleged violation of the Volstead Act. Judge Hand held: "In view of the doubt concerning the proper practice in such cases, I hope the United States will endeavor to review my decision. In that event a stay will be granted, for if I am wrong a bond will not secure the United States, which is entitled to a destruction of the liquors."[148] Similarly, the Judge's doubt in a wire-tap case resulted in allowing bail previously denied and recommending application for certiorari. The question on appeal was whether the judge improperly denied to the accused examination of the prosecution to determine if any evidence in the proceedings was indirectly procured by wire-tapping. Judge Hand called the result doubtful and said: "Against this chance we think that the accused should be allowed bail, pending

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[146] Ibid., p. 271.

[147] United States v. Klinger et al., 199 F.(2d) 645, 648 (1952).

[148] United States v. Casino, 286 F. 976,981 (1923).

application for certiorari. When we denied bail originally, we had not had the chance to examine the record or to appreciate the doubts which have now appeared."[149] And, when the Judge found the jurisdiction of a federal court "open to doubt" bail again served as temporary relief to a defendant encouraged to seek review.[150]

Respects Precedent

Judge Hand's disdain for judicial innovation which flaunts the will of the legislature and the consistency of the courts enabled an abiding respect for precedent. This respect provided an element of predictability in his decisions which was comforting in its consistency and adherence to prevailing wishes. His respect for precedent demonstrated an understanding of the past and the skill with which to apply the past to the present. In addition to reinforcing his arguments in the traditional manner with numerous cases in point the Judge introduced statements manifesting a caution not to betray precedent. "That test [for obscenity] has been accepted by the lower federal courts until it would be no longer proper for me to disregard it," he held in United States v. Kennerley.[151] After citing various cases in a prosecution for theft from an interstate railroad car he commented: "Whatever may be said

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[149] United States v. Nardone et al., 106 F.(2d) 41,44 (1939).

[150] United States v. Yohn, 275 F. 232,235 (1921).

[151] 209 F. 119,120 (1913).

of a state's powers of taxation, it seems to me that these decisions settle it that if Congress chooses to act upon Commerce of the kind at bar, it has the power. . . ."[152] Additionally, Judge Hand also found precedent in the absence of judicial action by other courts and refused to make precedent when he could not "see that as yet any court has gone so far."[153]

Judge Hand was not averse to citing himself and his court for precedent. He once denied a defendant's motion for inspection of the grand jury's minutes with the declaration: "I am no more disposed to grant it than I was in 1909. It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will."[154] In a stock fraud case he answered the defendant's objection by recalling that "we have twice very recently discussed the question, and need do no more than refer to our own decisions."[155] However, Judge Hand did not always use precedent only to reinforce his position. When his belief ran contrary to precedent in United States v. Kelleher he held: "But we also think that we should yield to the opinion of six other circuits and the

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[152] United States v. Yohn, 275 F. 232,234 (1921).

[153] United States v. Center Veal and Beef Company et al., 162 F.(2d) 766,772 (1947).

[154] United States v. Garsson et al., 291 F. 646,649 (1923). Cf. United States v. Freed, 179 F. 236,238 (1910); United States v. Salen, 216 F. 420,422 (1914).

[155] Van Riper et al. v. United States, 13 F.(2d) 961, 964 (1926).

District of Columbia, there being no dissent, and that my decision in United States v. O'Leary . . . must be overruled until the Supreme Court sees fit to declare otherwise if it ever should."[156] In effect Judge Hand recognized the limitation on his personal preferences which precedent imposed. Tolerant of contrary beliefs and cautious not to thwart a will more popular than his he called the law "too well settled for us to change it" in United States v. Lacato et al. and said: "Our own decision was made without citation or discussion, and apparently without acquaintance with the body of authority to the contrary; it seems to us that it can no longer stand in its [authority to the contrary] face."[157]

Recognizes His Limitations

Judge Hand's modest recognition of his fallible qualities resulted in reminders to his audience that he possessed certain limitations. Any signs of vanity or self-assuredness he obscured by sincere recognition that he possessed the same human frailties and externally imposed limitations to which any honest man must inevitably admit. In a sense his inability to be absolutely certain about anything characterized a human frailty and the force of precedents represented an externally imposed limitation. But the limitations which he recognized exceeded even these. He answered a defendant's complaint that

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[156] 57 F.(2d) 684,685 (1932).

[157] 29 F.(2d) 694,695 (1928).

the judge on the voir dire refused to put certain questions to the jury by observing that "it is of course true that any examination on the voir dire is a clumsy and imperfect way of detecting suppressed emotional commitments to which all of us are to some extent subject, unconsciously or subconsciously. It is of the nature of our deepest antipathies that often we do not admit them to ourselves."[158] In addition to human limitations he recalled being admonished by the Supreme Court for his complacency[159] and referred to Congress, not the courts, as the sole determiner of the limits to which relevant evidence should be privileged.[160] These external limitations were but two of others which the Judge recognized as preventing the appellate court from usurping the function of the trial jury, exercising control over sentences, and going beyond an application of the law.

The Judge knew that "except in plain cases we cannot tell from the cold record where the truth lies."[161] Consequently, when asked to reverse a conviction because of a verdict based on "incredible" testimony he held, "as always, we reply that that question is not for us, but for the jury."[162] Judge

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[158] United States v. Dennis et al., 183 F.(2d) 201,227 (1950).

[159] United States v. Lotsch, 102 F.(2d) 35,37 (1939).

[160] United States v. Walker, 176 F.(2d) 564,568 (1949).

[161] Marsh v. United States, 29 F.(2d) 172,173 (1928).

[162] United States v. Compagna et al., 146 F.(2d) 524,526 (1944). Cf. United States v. Bollenbach, 147 F.(2d) 199,201 (1944); Chin Wah v. United States, 13 F.(2d) 530,531 (1926).

Hand also recognized the prerogative of the trial jury to fix sentence and the limitation imposed on the appellate court not to interfere. He refused to allow personal feelings to intrude and cause adjustment of sentences which he found too severe.[163]

The legal opinion was not a media, according to Judge Hand, for making political predictions or telling the government how to conduct its business. He believed the opinion to be a media for reflecting how the judge applied the law. The belief caused him in the Dennis case to hold:

> It is of course possible that the defendants [Communists] are inspired with the fanatical conviction that they are in possession of the only gospel which will redeem this sad Planet and bring on a Golden Age. If so, we need not consider how far that would justify the endless stratagems to which they resorted; and it is not for us to say whether such a prosecution makes against the movement or, on the contrary, only creates more disciples; ours is only to apply the law as we find it.[164]

However, the Judge in the Coplon case subtly overstepped his limitations even while denying to himself the liberty he had just taken. Holding that the evidence did not justify the arrest of Judith Coplon by the F.B.I. he seemingly advised:

> Perhaps, also, the powers of the Bureau to arrest without warrant should be broadened; and perhaps it would be desirable to set limits--as, for example, in cases of espionage, sabotage, kidnapping, extortion and in general investigations involving national security and defense--

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[163] Van Riper et al. v. United States, 13 F.(2d) 961, 965 (1926). Cf. United States v. Bollenbach, 147 F.(2d) 458, 460 (1942); United States v. Gottfried et al., 165 F.(2d) 360, 368 (1948); United States v. Liberale Parrino, 203 F.(2d) 284, 286 (1953); United States v. Chiarella et al., 184 F.(2d) 903, 911 (1950).

[164] United States v. Dennis et al., 183 F.(2d) 201,234 (1950).

> to the immunity from "wiretapping" of those who are shown by independent evidence to be probably engaged in crime.

But then he added: "All these are matters with which we express no opinion; we take the law as we find it. . . ."[165]

Rebuking with Tact and Moderation

Judge Hand was not averse to using the written opinion to enlighten a trial judge or a prosecutor about the inexpertness of his performance in court. To assure an atmosphere within which justice could prevail the conduct of an official occasionally forced the Judge to warn the deviant party. Generally the warning cast in tones of cautious tact and moderation did not terminate in a reversal. The tactful reprimand not only exhibited fairness to the rights of the litigant but also to the one rebuked. Judge Hand in maintaining his composure and employing moderation extended the benefit of any doubt to the offending party. The usual subtlety of the rebuke appeared to leave untarnished the reputation of a judge or prosecutor who depended on respect for performance of his future duties. However, when "outbursts of petulant irritation marred the serenity of the court"[166] or the judge took on the role of partisan and displayed the zeal of a prosecutor,[167] Judge Hand subordinated preservation of the judge's

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[165] United States v. Judith Coplon, 185 F.(2d) 629,640 (1950).

[166] United States v. Andolschek et al., 142 F.(2d) 503, 507 (1944).

[167] United States v. Marzano, 149 F.(2d) 923,926 (1945).

reputation to preservation of justice. A rebuke for conduct which told "heavily in the estimate of judicial service" lacked the tact, moderation, and subtlety otherwise apparent.[168] Generally, however, these latter qualities prevailed.

To a judge accused of bias Hand said in United States v. Liss et al.: "It may perhaps have been true that at times his manner was not as urbane as could have been wished, and counsel may have occasionally smarted under his admonitions; but we can find no evidence that he expressed even indirectly any opinion as to the guilt of the accused."[169] Judges also experienced criticism for the way they unfelicitously turned a phrase or indulged in "unhappy locution." Responding to an appeal which objected to a judge's charge to the jury, Judge Hand held: "There were indeed a few passages not felicitously phrased, e.g., those seeming to demand 'meticulous accuracy'; but when read as a whole the charge does not seem to us really to leave the essentials in doubt."[170] Another judge who said in court that "the heavy tread of false swearing is stalking through the record" but then warned the jury that his opinion was not to affect their judgment precipitated a complaint for bias. "It would be absurd," the Judge held, "to reverse the

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[168] United States v. Andolschek et al., 142 F.(2d) 503,507 (1944).

[169] 137 F.(2d) 995,999 (1943).

[170] United States v. Brown et al., 79 F.(2d) 321,326 (1935).

conviction on this ground, even though it may not have been happy locution."[171]

Not only what the trial judge said but what he inappropriately did brought him under Judge Hand's scrutiny. When one judge at 4 o'clock in the afternoon instructed his clerk to discharge the jury if they had not agreed by 9:30, Hand advised him in his decision that while the trial was still on he should always remain accessible to the jury and could not justify depriving them of a means of communication with him. "Nevertheless," the Judge concluded, "he had in fact fixed the time for their discharge, reasonable in that he was under no duty to keep them out all night, and at most the defendant lost nothing but the chance that he [the judge] might change his mind, and that further confinement might result in acquittal."[172] Thus, Judge Hand, consistent with his reputation, could rebuke a person one minute and lick his wounds the next.[173] In United States v. Bollenbach he declared the trial judge wrong and then placed the blame on his own court. The judge had charged the jury that "possession of stolen property in another state than that in which it was stolen shortly after the theft, raises a presumption that the possessor was a thief and transported stolen property in interstate commerce." Judge Hand replied

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[171] United States v. Allied Stevedoring Corporation, 241 F.(2d) 925,934 (1957).

[172] Kastel v. United States, 23 F.(2d) 156,158 (1927).

[173] Supra, pp. 81-82.

that such a charge was wrong "although it is only fair to add that the mistake was ours, not his, as will appear, he borrowed the instruction directly from us."[174]

Prosecutors as well as judges came under the cautious examination of Judge Hand. Their conduct during a trial was a matter of concern to him and objection by a defendant to impropriety in such conduct elicited his appraisal. About one prosecuting attorney he said:

> It is indeed true that this officer failed in moderation and good taste; we might have been better content had the trial judge seen fit to keep him more closely in hand than he did. But the abuse of his position as prosecutor--for it seems to us to have been such--was not so extreme as to require us to upset the judgment. More can be said as to those questions which he put to Berger implying that Berger had made declarations to him, contradictory to what he swore on his direct. That common device is an abuse which ought to be straitly controlled, at times even at the cost of a mistrial if need be.[175]

Indeed, for the Judge, who possessed the vocabulary to excoriate those who abused their authority, this admonition was most moderate and tactful.

Admonitions showing dedication and fairness recommended Hand's credibility as he rebuked with tact and moderation those who might impede justice.

When Judge Hand was not demonstrating his cautious nature by expressing doubt about being right, respecting precedent, recognizing his limitations, or rebuking with tact and moderation, he could be found telling his audience that

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[174]147 F.(2d) 199,201 (1944).

[175]United States v. Berger, 73 F.(2d) 278,280 (1934).

he possessed this virtue. This occurred in Knickerbocker Merchandising Company v. United States when he concluded: "Nevertheless, out of abundant caution, we affirm the judgment only on the seventh count."[176] In summary, caution, so important to the administration of justice, was a virtue which Judge Hand radiated in his written opinions and through which he recommended the credibility of his character.

Identifying with Trustworthy Virtues

Aristotle said, "Each class of men, each type of disposition, will have its own appropriate way of letting the truth appear."[177] In a general sense each ingredient of ethical proof in Judge Hand's opinions served to let the truth appear. In a more specific sense the Judge induced appearance of the truth as he identified with truth and honesty. Both his expressed pursuit of the truth and his style of writing created the impression that he always dealt with the facts and sought only to understand reality. Indeed, his message became more believable when one realized the source to be a truthful and honest man.

Truth

Judge Hand appealed in his criminal law opinions for "any efforts that help disentangle us from the archaisms that

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[176] 13 F.(2d) 544 (1926). Cf. Loubriel v. United States, 9 F.(2d) 807 808 (1926).

[177] Rhetorica, tr. W. Rhys Roberts, in The Works of Aristotle, ed. W. D. Ross (Oxford: The Clarendon Press, 1946), XI, 1408[a].

still impede our pursuit of truth."[178] Consequently in one case he authorized confronting a witness with contradictory statements to find "what is the truth," and noted:

> Again and again in all sorts of situations we become satisfied, even without earlier contradiction, not only that a denial is false, but that the truth is opposite: "The lady doth protest too much, methinks." This is not to rely upon the statement as a ground of inference, taken apart from the sum of all that appears in court; it is to allow the jury to use the whole congeries of all that they see and hear to tell where the truth lies.[179]

A discussion in United States v. Walker of the marital privilege committed him to the pursuit of truth. Here, he questioned how far the privilege should suppress relevant evidence and lamented that "it deprives the party against whom the privilege is envoked of access to the truth, and a disclosure of the whole truth should be the prime concern of a court of justice."[180] Judge Hand's pursuit of truth and desire to maintain truth as a goal for all judicial proceedings further appeared when he regarded courts as challenged by "shifts and subterfuges in the place of truth" as they seek to end trifling;[181] when he called truth "too precious to society at large to be mutilated" by those who would pervert it;[182] and when he proposed to

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[178] United States v. Allied Stevedoring Corporation, 241 F.(2d) 925,934 (1957).

[179] Ibid., p. 933.

[180] 176 F.(2d) 564,568 (1949).

[181] Loubriel v. United States, 9 F.(2d) 807,808 (1926).

[182] United States v. Kennerley, 209 F. 119,120 (1913).

ignore a judge's allegedly unfair comment unless it "cast off some really substantial aspect of the truth."[183]

Judge Hand's style of writing in addition to his announced pursuit identified him as one who sought the truth. Though possibly only a matter of expression, the repeated use of phrases stressing truth were so numerous as to attract attention to the meaning they embraced. The following phrases reflect examples of this style: "it is true"; "it is of course true"; "it is, of course, quite true"; "it is quite true"; "this being true"; "it is perfectly true"; "it would be truer to say"; "it is indeed true"; and "nothing could be more untrue."[184]

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[183] United States v. White, 124 F.(2d) 181,186 (1941).

[184] See United States v. Nearing et al., 252 F. 223, 231 (1918); United States v. Krichman, 256 F. 974,975 (1919); United States v. Robinson, 259 F. 685,690,691 (1919); United States v. Casino, 286 F. 976,980 (1923); Becker et al. v. United States, 5 F.(2d) 45,51,52 (1924); Avignone et al. v. United States, 12 F.(2d) 509,510 (1926); Chin Wah v. United States, 13 F.(2d) 530,532 (1926); Knickerbocker Merchandising Company Inc., et al. v. United States, 13 F.(2d) 544,545,546 (1926); Van Riper et al. v. United States, 13 F.(2d) 961,964 (1926); United States v. Kirschenblatt, 16 F.(2d) 202,203,204 (1926); Vachuda v. United States, 21 F.(2d) 409,412 (1927); United States v. Downing et al., 51 F.(2d) 1030,1031 (1931); United States v. Cotter et al., 60 F.(2d) 689,692 (1932); United States v. Mack et al., 73 F.(2d) 265,266 (1934); United States v. Krakower, 86 F.(2d) 111,112 (1936); United States v. Strewl et al., 99 F.(2d) 474,477,478 (1938); United States v. Dellaro et al., 99 F.(2d) 781,783 (1938); United States v. Peoni, 100 F.(2d) 401,403 (1938); United States v. Rebhuhn, 109 F.(2d) 512,515 (1940); United States v. Mack, 112 F.(2d) 290,292 (1940); United States v. White, 124 F.(2d) 181,185 (1941); United States ex rel. McCann v. Adams et al., 126 F.(2d) 774,775 (1942); United States v. Zeuli, 137 F.(2d) 845, 847 (1943); United States v. Liss et al., 137 F.(2d) 995,1001 (1943); United States v. Andolschek et al., 142 F.(2d) 503, 507 (1944); United States v. Cohen et al., 145 F.(2d) 82,90,

Honesty

Judge Hand benefited from the attributes of honesty derived from his appearance as a truthful man. In addition he identified himself with honesty directly and by recognizing honesty as a virtue of a responsible jury and conscientious counsel. He credited himself with honesty by referring to a count in a fraud case when he held: "Moreover, I think it may be quite honestly said that the count taken alone is insufficient, if I have correctly limited the scope of the order."[185] He assessed honesty to juries by referring to a charge of mail fraud as "so indisputably proved that no honest jury could fail to convict."[186] And, he said about counsel's efforts that "any honest reasoning is quite legitimate."[187] In each instance the

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91 (1944); United States v. Bronson, 145 F.(2d) 939,944 (1944); United States v. Compagna et al., 146 F.(2d) 524,528 (1944); United States v. Thomas Balogh, 157 F.(2d) 939,943 (1946); United States v. Rappy, 157 F.(2d) 964,967 (1946); United States v. Glory Blouse and Sportswear Company Inc., et al., 158 F.(2d) 880,882 (1947); United States v. Michael Di Re, 159 F.(2d) 818,820 (1947); United States v. Werner et al., 160 F.(2d) 438,443 (1947); United States v. Center Veal and Beef Company et al., 162 F.(2d) 766,770,771 (1947); United States v. Sherman et al., 171 F.(2d) 619,622 (1948); United States v. Walker, 176 F.(2d) 564,567-568 (1949); United States v. Rabinowitz, 176 F.(2d) 732,735 (1949); United States v. Dennis et al., 183 F.(2d) 201,210,215,221,226,227 (1950); United States v. Chiarella et al., 184 F.(2d) 903,908 (1950); United States v. Allied Stevedoring Corporation, 241 F.(2d) 925,932 (1957); United States v. Reina, 242 F.(2d) 302,307 (1957); United States v. Ralph Cioffi, 253 F.(2d) 494,496 (1958).

[185] United States v. United States Brokerage and Trading Company, 262 F. 459,463 (1919).

[186] United States v. Brown et al., 79 F.(2d) 321,326 (1935). Cf. United States v. Wexler, 79 F.(2d) 526,529 (1935).

[187] United States v. Franklin, 174 F. 163 (1909).

Judge found in honesty a virtue valuable to himself and worthy of those with whom he had contact.

In summary, trustworthy virtues which encourage acceptance of a speaker's message as one emanating from a source worthy of being believed occurred in the criminal law opinions of Learned Hand who represented himself as a judge devoted to truth and honesty.

Summary

These five ingredients, concern for the best interests of society, an understanding of human nature, expertness in reasoning, caution, and trustworthy virtues, might well have been what Felix Frankfurter had in mind when he spoke of the good judge as a good chef using "the best materials" to make "the best dish."[188] But Frankfurter cautioned, and rightfully so, that metaphors "in the realm of thought" may not do justice to "a calling which so deeply involves the well-being of society and is so dependent on the scientific spirit of truth-seeking, but which has few of the aids of scientific verification, [that it] calls for men of the highest professional and moral qualities."[189] Judge Hand offered himself in his criminal law opinions as one cast of nothing but "the highest professional and moral qualities." He freed himself of any cause or class and stood for the well-being of the whole of

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[188] "Judge Learned Hand," p. 327.

[189] Ibid.

society. He understood man and his expectations, capabilities, and anxieties. He saw man confronted by more than final solutions found in universally applicable generalizations. He faced difficulty with disinterestedness, not evading the complex and the adverse but searching his soul for absolute truth which he knew he could not find but could not fail to seek. He artistically wove these attributes into his opinions and thus offered to his audience qualities which evoke feelings of approval for their source.

CHAPTER VI

CONCLUSION

The announced purpose of this study is to (1) examine Judge Learned Hand's image and (2) with this image in mind analyze his criminal law opinions for the presence of ethical proof used as a persuasive device whereby the Judge offered himself as a credible source worthy of being believed. Fulfillment of this purpose has been attempted by looking first at Learned Hand as a man and then as a judge. A review of concepts of ethical proof followed. Consideration of the likelihood of finding such proof in a legal opinion preceded the prescribed analysis of the Judge's criminal law opinions. The findings demand condensation to provide needed continuity and perspective to that "piece of tapestry, made up of many strands, which interwoven makes a pattern."[1]

The Image

Through manhood and judgeship as Learned Hand grew his image grew with him. With considerable assistance from both

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[1]"Mr. Justice Brandeis," in Learned Hand, The Spirit of Liberty, ed. Irving Dilliard (New York: Vintage Books Inc., 1959), p. 128.

intimate and more distant contemporaries the Judge built a reputation for conscientious devotion to his profession and his country. He started with a heritage rooted in the legal tree of a prominent state. As though he were predestined to guide the judicial fortunes of a segment of our federal court system, his formative years which gained strength from his heritage, included wide reading, close companionships, and broad formal training at Harvard. As a devoted student of philosophy and an imposing individualist he made his mark on Harvard and Harvard even more indelibly made its impression on him. The infusion of the impression lasted through three degrees, the last in law. To satisfy family desires and to follow in the tradition of his ancestors he pursued legal studies. Profoundly influenced by those great legal minds which brought eminence to the Harvard Law School, Learned Hand emerged with his latent talents about to be unleashed on the scene of American jurisprudence. After a disappointing venture into private law practice fate rescued him from what he regarded as the unstimulating drudgery of a routine and petty existence. He had more ambitious things in mind for himself and so did President Taft who in 1909, attracted to Learned Hand's judicial potential, appointed him a federal district court judge for the Southern District of New York. Judge Hand's fifteen years on the district bench were diligently but inauspiciously performed. They were not unrewarding, however, for the Judge's achievement resulted in his appointment as a federal circuit judge in 1924.

Judge Hand's career on the bench involved him in a multitude of legal controversies spanning litigation from contract and tort to tax and patent cases. However, he is not remembered so much for the number of opinions he wrote as for their quality and what he brought to the court which contributed to that quality. Although the Supreme Court never benefited from his competence and overall judicial ability, as a member sitting on the highest bench, his contributions to the Second Circuit Court of Appeals undoubtedly made the work of the Supreme Court easier. With the clash of minds in appellate court conferences Judge Hand found the stimulation he had eagerly sought in the law. Contributions of insight, intellect, and experience emerged as the Judge assumed the role of a devout pleader for tolerance, caution, truth, justice, and constructive thinking. On the circuit court he handed down decisions for thirty-seven years during which time his prestige increased virtually with each case and each year of service. Frequently the Supreme Court cited his opinions. Consequently the Judge on occasion supported decisions of the higher court based on rules which he initiated.

Through his perceptions of himself and professions of beliefs Learned Hand contributed to his image. He perceived himself to be a skeptic faced with the inevitable uncertainties of life. Blessed with humility, he demanded caution of himself in the use of self-possessed authority. Beliefs which professed the worth of the individual, the temporariness of answers to

life's problems, the virtues of doubt, caution, and skepticism, and a reverence for "the spirit of liberty" came forth from Hand to shape his image. Additionally, his expressions of devotion to betterment of the legal process emanated not from a theorist or philosopher writing legal treatises but from a teacher delivering speeches and writing essays and legal opinions. The lessons on which he expounded frequently dealt with some phase of the nature of law, the responsibilities of the legal profession, and the traits of the judge. To Judge Hand the law was a living organism which periodically needed cautious updating. He saw the function of the judge limited by imperative moderation and restraint. The Judge urged those who would interpret statutes to look for the social purposes behind legislation and derive the intent of the legislators from the cultural, social, and political context of the words used. To satisfactorily accomplish judicial interpretation and properly apply the law he charged judges with the responsibility to read widely, understand with sensitivity, and view their work without prejudice.

Learned Hand's contemporaries saw him as a thinking and sometimes gregarious man as well as a deliberating and sometimes deviating judge. Through the reaction and reiteration of contemporaries of the bench, bar, and general public who reflected on his life and character, both in and out of court, the Hand image became more distinct. They respected him for his pursuit of the truth, for his tolerance, for his

human qualities and his understanding of human nature, for his discontent with dogmas, for his respect for freedom, and for his high ethical standards. They voiced their opinions to the world and told those who heard that they knew a rare human being. For here was a man constituted of solid qualities who tempered his life with escapades and eccentricities which enlivened and added vigor to the sterner stuff of which he was made.

Learned Hand's personal contributions to his image ceased with his death in August, 1961. Those who stand in judgment of his life and work continue to add detail and contribute to an image which as Justice Frankfurter prophesied promises to assume the proportions of a legend.[2] Regardless of who examines Learned Hand's image, if they undertake the effort with integrity and thoroughness, they will expose a man who sought "to see so far as one may and to feel the great forces that are behind every detail . . . to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised."[3]

The Likelihood of Ethical Proof

Two theories have persisted about the function of the judge in the Anglo-American law-making process. The "mechanical"

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[2]"A Great Judge Retires: American Law Institute Honors Learned Hand," American Bar Association Journal, XXXVII (July, 1951), 503.

[3]Oliver Wendell Holmes in The Spirit of Liberty, p. v.

theory says that the judge seeks truth by arriving at a judgment from discovered principles without application of individual views and preferences. The other or "free legal decision" theory says that a judge's conclusions are the consequence of "his own concepts and conscience influenced largely as these are by his training and experience, and by the litigants whose controversies are to be settled."[4] Disciples of this theory tend to recognize those stimuli which expose the judge to certain forces, condition him through his experiences, and demand of him choice-making. Those who endorse the "human" theory believe that the judge cannot eliminate the personal element from his work. Followers of the "mechanical" theory distrust the undependable consequences of the human element and discourage its exercise by judges who, these advocates claim, not only must but can eliminate this element. Acceptance of the "mechanical" theory encourages neither expectations of ethical proof in legal opinions nor an admission that the proof is there. To the contrary the "human" theory recognizes that judges as human beings make choices and seek to influence other human beings about their choices. This theory invites expectancy that the personal characteristics of the judge who responds frankly and sincerely will emerge as ethical proof in his written opinions.

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[4]Charles Grove Haines, "General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges," Illinois Law Review, XVII (May, 1922), 96-98.

Clearly Judge Hand's beliefs and opinions more distinctly exemplify the "human" than the "mechanical" theory. He did not distrust the human element but cautioned judges to understand the inevitable part it plays in decision-making and to assume the responsibility for rendering informed opinions worthy of themselves, their profession, and society. Judge Hand, contrary to the wishes of the "mechanical" adherents, did not couch his decisions in a technical language which concealed any subjective element to make the decision appear controlled only by the law. Rather than risk insincerity through unrealistically rigid arguments the Judge demonstrated a conscious frankness in his beliefs and opinion-writing that judges are men and their decisions upon complex facts face the uncertainty of making necessary choices about which they must influence others. The influence will lie, therefore, not only in the mechanical reproduction of precedents but in the ability of the judge to bring his total logical and ethical resources as well as those of the law to bear on the human production of written legal opinions. Under the "mechanical" theory the presence of ethical proof would be unreasonable, alarming, and destructive. Under the approach with which Hand's theory and practice seems allied, such proof would be reasonable, unavoidable, and blessed with the virtues of frankness and sincerity.

The Presence of Ethical Proof

Analysis of Judge Hand's criminal law opinions, to discover the presence of those ingredients about which

rhetoricians contend create a subtle partiality in favor of the side espoused, revealed numerous recognized elements of ethical proof. They can be grouped into five categories: concern for the best interests of society; an understanding of human nature; expertness in the use of reasoning; caution; and trustworthy virtues.

Judge Hand acted in the best interests of a free society governed by law when he demonstrated concern for its well-being; protected Constitutional rights; reinforced the authority possessed by judges; recognized the need for expediency in the judicial process; disdained allowing harmless error or legal formalism to upset an otherwise just decision; and linked offending litigants with debasing qualities. The Judge used these elements of ethical proof in a manner consonant with the wishes of the author of the Rhetorica Ad Alexandrum who seemed to say that righteous conduct is the consequence of one who gives the impression of acting to benefit the individual and the state.[5] An equally important use of ethical proof and one inherent in the nature of this category was compliance with the Aristotelian notion of creating good will through appearing to behave toward one individual as one might behave toward all.[6] Aristotle also supported the belief that through a

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[5]William Martin Sattler, "Conceptions of Ethos in Rhetoric" (Unpublished Ph.D. dissertation, Dept. of Speech, Northwestern University, 1941), p. 23.

[6]Rhetorica, tr. W. Rhys Roberts, in The Works of Aristotle, ed. W. D. Ross (Oxford: The Clarendon Press, 1946), XI, 1381a.

speaker's choices which evince intelligence, character, and good will he can win audience approval.[7] Judge Hand conspicuously indulged in choice-making and subjected his selections to audience evaluation. Rather than indulge in the easy comforts of precedents and literal interpretations of statutes with meager elaboration he chose to support a democratic form of government, realism concerning sex, and litigants' rights. He chose to discredit the non-virtuous, to guarantee Constitutional rights, and reinforce the authority of those who depended on him for support in enforcing law and order. Once justice and fairness could be certain he chose to stress the efficiency of expediting a legal proceeding and the desirability of avoiding its overthrow for harmless error or legal formalism. Rhetoricians have long regarded choices of the nature Judge Hand made as those essential to effective persuasion. For instance, the logographer Lysias understood the importance of depicting his clients as just;[8] Aristotle called justice a virtue which men honor because it enables everyone to feel they enjoy "their possessions in accordance with the law";[9] Hugh Blair spoke of cultivating a love of justice.[10] Appropriately, Learned Hand demonstrated that he was a just

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[7] Ibid., 1366[a].

[8] Sattler, "Conceptions of Ethos in Rhetoric," p. 17.

[9] Rhetorica, 1366[b].

[10] Lectures on Rhetoric and Belles Lettres (Edinburgh: Bell and Bradfute, 1813), II, 430.

man who would assure justice to all exposed to his jurisdiction. Hugh Blair also urged upon orators the dignity of noble sentiments in refining and improving upon moral feelings. Requisite dispositions and sentiments which he prescribed were indignation at insolence and oppression, detestation of fraud and corruption, and love of liberty, country, and the public.[11] Judge Hand as though well schooled in the teachings of Blair did not tolerate insolence or oppression by counsel, judge, witness or litigant. He identified offending litigants with fraudulent and corrupt intentions, was a renowned spokesman for the "spirit of liberty," and in the best interests of society showed devotion to his country and the public. Just as these choices shaped his decisions, structured his written opinions, and influenced society in their consequences so, too, did they evince, in the Aristotelian tradition, sagacity, high character, and good will in the form of persuasive ethical proof.

George Campbell located the foundation of ethos in human nature.[12] Judge Hand spent a lifetime examining human nature. The reflection of the result of this examination in his opinions is not, therefore, unexpected. His opinions possessed insight into the nature of judges, juries, and other men and displayed appreciation of the motivations, expectations, and tendencies inherent in human conduct. This insight

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[11] Ibid.

[12] Philosophy of Rhetoric (New York: Harper and Brothers, 1871), p. 119.

demonstrated sympathy, compassion, and understanding about mankind. If George Campbell was right, Judge Hand was well fitted for conciliating his audience. For the Judge's understanding of human nature which painted his character and wisdom in words invited the respect of his audience.

In addition to good character, Plato believed that a speaker should be intelligent and informed.[13] Through his perceptive use of inference and his adept awareness of available knowledge, Judge Hand exhibited that he was both intelligent and informed. Little can be added to the support which Aristotle and virtually all who have thought about ethical proof have given to the significance of a speaker's intelligence. But the logographers who insisted that their clients observe existing laws and customs[14] and the Rhetorica Ad Alexandrum[15] which emphasized the importance of observing accepted beliefs and following common customs to show good intentions and win respect and confidence need to be mentioned. Hand induced an impression of his competence with expressions embodying good judgment and common sense and an understanding of traditions of the past and trends of the present. Thus he manifested possession of wisdom and available knowledge and

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[13] Phaedrus in Plato, tr. Lane Cooper (Ithaca, New York: Cornell University Press, 1955), pp. 61-64.

[14] Sattler, "Conceptions of Ethos in Rhetoric," p. 16.

[15] Tr. H. Rackham (Cambridge, Massachusetts: Harvard University Press, 1937), 1447b.

consequently recommended his credibility through expertness in the use of both.

Learned Hand was a cautious man who was never too sure that he was right. His possession of this attribute both on and off the bench demonstrated a consistency and sincerity in that he conditioned his legal arguments in a reserved manner consonant with his routine beliefs and conduct. Thus, as a sign of reliability recognized by John Ward as capable of inducing audience respect[16] Judge Hand found those words to use and thoughts to express which were in keeping with his cautious disposition. Hand's opinions reflected other virtues recognized by rhetoricians as conducive of audience approval. These virtues consisted of a preference for modesty over boldness and jaunty confidence;[17] of an admission to his weak points;[18] of an unwillingness to immoderately detail others' mistakes;[19] and of commendable disinterestedness.[20] The Judge communicated these virtues when he expressed doubt about being right, respected precedent, recognized his limitations, and rebuked with tact and moderation. Each had roots in his personal values, each reflected his honorable character, and each recommended his credibility.

Judge Hand's opinions disclosed a judge who pursued truth and supported honesty. Rhetoricians since early Greece

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[16] A System of Oratory (London: n.p., 1759), I, 140.

[17] Ibid., p. 146. [18] Aristotle, Rhetorica, 1381[a].

[19] Ibid.

[20] Hugh Blair, Lectures on Rhetoric . . ., p. 427.

have called truth and honesty those virtues which create goodwill and respect for the speaker. Corax and Tisias noted that an appearance of good character emerged from apparent conformity to truth;[21] logographers depicted their clients as faithful and honest;[22] the author of the Rhetorica Ad Alexandrum stressed honesty;[23] Aristotle treated honesty as indicative of good will;[24] Hugh Blair urged cultivation of a love of truth and honesty;[25] and Richard Whately said aim at truth.[26] Judge Hand wrote in his opinions about the dependence of the judicial process on honest men who seek the truth. Indeed, his opinions incurred greater believability when one realized the source to be a truthful and honest man who advocated these qualities for others.

Those who knew Learned Hand other than through his opinions knew a man of highest reputation for his professional and moral qualities. His manner of life contributed not only to his reputation but ethically to his powers of gaining audience approval. To these critics as well as to those who first experienced him through his opinions he presented qualities traditionally recognized as capable of evoking feelings of

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[21]Sattler, "Conceptions of Ethos in Rhetoric," pp. 12, 14.

[22]Ibid., p. 16. [23]1431[b].

[24]Rhetorica, 1381[b].

[25]Lectures on Rhetoric . . ., II, 430.

[26]Elements of Rhetoric (New York: William Jackson, 1834), p. 154.

approval for his arguments. Judge Hand freed himself of any cause or class and stood for the well-being of the whole of society, understood man and his expectations, capabilities, and anxieties, saw man confronted by more than final solutions found in generalizations of universal applicability, and faced difficulty with disinterestedness--not evading the complex and adverse but searching his soul for absolute truth which he knew he could not find but could not fail to seek. He artistically wove these attributes into his opinions and thus offered his intellect, character, and good will as characteristics of a source worthy of being believed.

Felix Frankfurter lauded Judge Hand for his wisdom and his eloquence. For those who continue to conceive of law "as the effort of reason to discover justice," Frankfurter concluded, "the body of his opinions will be an enduring source of truth-seeking and illumination. His insights, the morality of the mind which respects those insights, the beauty with which they are expressed, make them so. . . . I must leave to others a detailed exposition and estimate of Judge Hand's contributions."[27] This study has detailed an exposition and made an estimate of one facet of Hand's previously unassessed contributions. The findings reveal ingredients of ethical proof abundantly evident in the legal opinions of an eminent judge.

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[27]"Judge Learned Hand," Harvard Law Review, LX (February, 1947), 326.

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