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## A Modern Hamlet in the Judicial Pantheon

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# A MODERN HAMLET IN THE JUDICIAL PANTHEON

*Charles Alan Wright\**

LEARNED HAND: THE MAN AND THE JUDGE. By *Gerald Gunther*. New York: Alfred A. Knopf. 1994. Pp. xxi, 818. \$35.

My son and his family gave me this massive book for my birthday. It was a splendid choice. The book is one that ought to interest anyone who cares about law. It is a highly readable biography of an extraordinary judge.<sup>1</sup>

The book was of particular interest to me both because of the special concern I have for the federal courts and because I had the privilege of seeing Judge Hand in action. In the 1949-1950 term I clerked for Judge Charles E. Clark of the Second Circuit, during the time when Learned Hand was chief judge. I watched him preside over the court, I saw the memos he sent in cases in which both he and Judge Clark were sitting, and I still have vivid memories of the day during the year when Judge Hand lunched with the six clerks of the circuit.<sup>2</sup> One thing that he said over that lunch table I have often quoted to students: "Anyone can be a killer, but only a jury can make a murderer." It seems to me typical of Judge Hand that he could state an important point in fourteen memorably epigrammatic words.

His brilliant Second Circuit colleague, Jerome N. Frank, once said, "To write a competent biography of Learned Hand would be singularly perplexing."<sup>3</sup> In his Foreword to this book, Lewis Powell says that Learned Hand must inspire in a biographer "feelings of both gratitude and intimidation" (p. ix). Both Judge Frank and Jus-

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1. 1994 has been a vintage year for judicial biographies. The biography of Justice Powell by John Jeffries, Jr., is another splendid example of the biographer's art. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994) (reviewed in this issue — Ed.). And though I have not yet had a chance to read it, I am told by a discerning colleague that the biography of Justice Black by Roger Newman is also excellent. See ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994) (reviewed in this issue — Ed.).

2. I also remember Judge Hand being of the old school that believed that judges should come to the bench "cold." He did not think they should read the briefs before argument. Judge Clark did not agree with him but did not want to disregard openly the chief judge's preference. Before the argument of a particularly interesting case, Judge Clark would send me to the clerk's office to get the briefs surreptitiously.

3. Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 668 (1957).

tice Powell must surely be right. Judge Hand was a complex person. In a record-setting fifty-two years as a federal judge, he wrote some 4000 opinions addressing an immense variety of issues.<sup>4</sup> His work habits, and those of the Second Circuit, provided a huge amount of material. Hand was one of those wise people who hated talking on the telephone and preferred to write letters; that vast correspondence gives information about and insight into the man. And the Second Circuit practice by which each judge, after argument, prepares a memorandum stating his views on the case and circulates it to his colleagues gives a revealing view of Judge Hand's participation in the judicial process. Professor Gunther tells us that there are nearly 100,000 documents in the Learned Hand Papers at the Harvard Law School Library (p. xviii) and that his research required him to examine many other collections of papers and to visit many other libraries (p. xx). That the work has taken decades is hardly surprising, given the complexity of the subject and the abundance of the material. Indeed, the surprise is that it is possible to confine the book to 785 pages.<sup>5</sup>

Gerald Gunther, now the William Nelson Cromwell Professor of Law at Stanford University, was a splendid choice to do the biography.<sup>6</sup> He was law clerk for Judge Hand in 1953-1954 and in his own distinguished career has established himself at the very top rank of legal scholars. To research and write the book was a labor of love. In an interview after its publication, Gunther said that Judge Hand "remains my idol still."<sup>7</sup>

Judge Hand's very name suggests that he was a great judge. How could a judge whose first name was "Learned" not be great?<sup>8</sup> And he looked the part. He was an imposing figure; indeed, a friend described his face as worthy of Gilbert & Sullivan (p. 558). Another admirer thought that the face "might have been hewn by a sculptor."<sup>9</sup> His stern countenance, bushy eyebrows, and penetrat-

4. And wrote is indeed the word. He wrote all his opinions himself in longhand on a yellow legal pad. P. 290. "[E]very opinion that bears Hand's name was produced, word by word, by the judge himself and no one else." P. 289.

5. The text is only 680 pages, but there are also 105 pages of notes. Although these are mostly citations, some contain enough interesting substance that it would be a mistake not to read them as well. One has to go to the footnotes, for example, for such a tidbit as the fact that the house on East 65th Street, which cost the Hands nearly \$30,000 when they bought it in 1903 and in which they lived for nearly 50 years, was purchased by Richard Nixon in the late 1970s for about \$750,000 and sold soon after for more than \$1 million. P. 697 n.142.

6. Norris Darrell, Sr., who was Judge Hand's son-in-law and literary executor, invited Gunther to do the biography and gave him exclusive access to the judge's papers. P. xix.

7. David Margolick, *At the Bar*, N.Y. TIMES, Apr. 22, 1994, at B10.

8. He was christened Billings Learned Hand, and it was not until he was in his twenties that he dropped "Billings," which he hated. Throughout his life his close friends called him "B." Pp. 4-5.

9. Irving Dilliard, *Introduction to LEARNED HAND, THE SPIRIT OF LIBERTY* at v, xx (Irving Dilliard ed., 1952).

ing gaze are familiar from many photographs, the most famous of which is the 1957 picture by Philippe Halsman that is featured on the dust jacket. His manner on the bench fit that stern appearance. "[P]oliteness to counsel and a willingness to tolerate fools gladly were not among his virtues . . . ."10

Behind this intimidating facade, Gunther tells us, there was a "warm, modest, and charming human being" (p. 169). There is much other evidence that this is accurate. His longtime colleague in the leadership of The American Law Institute, Senator George Wharton Pepper, wrote of Judge Hand's "great personal charm, keenness of perception, abundance of humor, ready appreciation of the other man's point of view, and hearty dislike of affectation and sham."<sup>11</sup> The Nestor of the New York Bar, C.C. Burlingham, who pressed successfully for Hand's nomination for the district court in 1909 (p. 130) and who was one of the leaders in the unsuccessful campaign to have him appointed to the Supreme Court thirty-three years later (p. 554), said: "Along with this goes a sort of Rabelaisian humor. He is an extraordinary mimic and his expressions and stories are the delight of his friends."<sup>12</sup> Whitney North Seymour called Judge Hand "the sort of boon comrade who would have been at home in the revels at the Mermaid Tavern or at the Inns of Court."<sup>13</sup>

But along with these attractive qualities there was also insecurity and self-doubt. This is one of the major points of the biography. Justice Frankfurter occasionally referred to Judge Hand as "the modern Hamlet."<sup>14</sup> Gunther writes that "he was uncertain about the proper result in most cases, even after decades of judicial experience" (p. 289) and that his "irresolute behavior" on certain public issues "showed the uncertainty, even fearfulness, that had been part of his makeup ever since childhood; some of his greater caution was less the product of self-disciplined 'forbearance' than of what he himself sometimes called a lack of courage" (p. 388). Indeed, Judge Hand described himself as an "unsure, timorous creature" (p. 575) and as Caspar Milquetoast (p. 586). In his most

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10. Phillip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 668 (1969). Justice Powell writes in his Foreword that Judge Hand's "courtroom manner could strike terror into the heart of any young lawyer." P. xi. Gunther says that Judge Hand "would occasionally berate himself for impatient outbursts in the courtroom, outbursts that caused some lawyers to blanch and shake." P. 301.

11. George Wharton Pepper, *The Literary Style of Learned Hand*, 60 HARV. L. REV. 333, 334 (1947).

12. Charles C. Burlingham, *Judge Learned Hand*, 60 HARV. L. REV. 330, 331 (1947).

13. Whitney North Seymour, *Tribute to the "Old Chief" of the Bench*, in IN COMMEMORATION OF FIFTY YEARS OF FEDERAL JUDICIAL SERVICE BY THE HONORABLE LEARNED HAND, 264 F.2d 31, 32 (1959).

14. P. 136 (quoting Letter from Felix Frankfurter to Charles C. Burlingham (Jan. 1933) (Burlingham Papers, Harvard Law School)).

famous address Judge Hand described “the spirit of liberty” as “the spirit which is not too sure that it is right.”<sup>15</sup> That was his skeptical spirit.

In spite of being a modern Hamlet — or, more likely, because of it — Learned Hand is firmly enshrined in the small group of judges who universally are regarded as great. Indeed, his judicial service stretched over so many years that he was placed in the pantheon long before his death. In 1947, four years before he took senior status, the editors of the *Harvard Law Review* devoted the entire Articles section of their February issue, ninety-six pages, to eight tributes to Judge Hand on his seventy-fifth birthday.<sup>16</sup> In 1959 the Second Circuit held an extraordinary session to mark his fifty years on the federal bench, and a glittering array of speakers, including three Justices of the United States Supreme Court and the Attorney General of the United States, were there to voice their praise (pp. 672-74).

The recognition of Judge Hand’s greatness has not eroded with time. Indeed, the appearance of a major biography of a judge of an intermediate court thirty-three years after his death is itself extraordinary and an acknowledgment of his towering stature. In one of the 1947 tributes in the *Harvard Law Review*, Justice Frankfurter wrote:

It is important for American law and letters that Judge Hand remain a mentor and not become a memory. It is important that he continue to enter not merely anthologies but the minds of men. In time, hundreds of his specific rulings will cease to have interest for the most avid legal archaeologist. . . . Yet, so long as we shall continue to conceive of law not as the disguised manifestation of mere will but as the effort of reason to discover justice, the body of his opinions will be an enduring source of truth-seeking and illumination.<sup>17</sup>

Judge Hand does remain a mentor and not merely a memory. John Frank has demonstrated this in quantitative terms.<sup>18</sup> In each of three recent five-year periods — 1980-1984, 1985-1989, and 1990-1994 — Judge Hand is cited by name in federal-court opinions more often than Chief Justice Marshall, Justice Holmes, or Justice Brandeis. Although the three who sat on the Supreme Court have been cited more often than Judge Hand in state-court opinions in these periods, even in those opinions courts cite him many times.<sup>19</sup> Frank is surely right when he says that “there is no other judge in the federal system who went out of the business of judging thirty-

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15. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY* 189, 190 (Irving Dilliard ed., 1952).

16. P. 573; see 60 HARV. L. REV. 325 (1947).

17. Felix Frankfurter, *Judge Learned Hand*, 60 HARV. L. REV. 325, 325-26 (1947).

18. See John P. Frank, Book Review, 108 HARV. L. REV. 931, 945 (1995).

19. *Id.*

five or more years ago who is even remotely comparable to Hand for continued vitality."<sup>20</sup>

A major reason for the high regard in which Judge Hand was and is held is the quality of his opinions. There surely are great judges who write poorly; we are told on high authority that Chief Justice Morrison R. Waite was one of those.<sup>21</sup> An able judge of the Fifth Circuit has recently reminded us that judges, in writing opinions, should be guided by "a narrow purpose: to help the bench and bar read the law. It is not to entertain. It is not to achieve literary acclaim in future centuries. And it is not for the personal performance or pontification of the author."<sup>22</sup> But good writing helps the bench and bar to read the law.

The most conspicuous quality of Judge Hand's opinions is their clarity.<sup>23</sup> Many of his opinions involve such arcane branches of law as patents, copyrights, and admiralty. Judge Hand had the remarkable ability to describe both the facts of the particular case and the applicable legal principles in a fashion that is readily understandable. Like Justice Holmes and Justice Jackson, Judge Hand wrote in the concise and restrained Attic style rather than in the florid Asiatic style of Justice Story or Justice Cardozo.<sup>24</sup>

The second great quality of Judge Hand's opinions is their conciseness. We live in an age of lengthy judicial opinions. Judges were much more given to short opinions in his day — perhaps because they did not have so many law clerks — but his were conspicuous for their lack of padding. A distinguished observer wrote, "I know of no opinion of Learned Hand's which could be shortened appreciably without spoiling the whole."<sup>25</sup>

Writing that is clear and concise need not be dull. There is still ample room for metaphor, for imagery, for memorable phrases. Lawyers and judges continue to cite and quote Judge Hand because he was vivid and quotable. In a humdrum issue of interpretation of the Trading with the Enemy Act, he made the luminous observa-

20. *Id.*

21. "[T]o deny [Waite] significance is to allow the pedestrianism of his opinions to obstruct understanding of a great judge. History ought not to reflect contemporary misjudgment, due in no small degree to Waite's lack of the grand manner, his total want of style." FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 76 (1937).

22. Thomas M. Reavley, *How I Write*, 4 *SCRIBES J. LEGAL WRITING* 51, 53 (1993).

23. [I]n virtually all fields a felicitous and graceful style is usually evidence of clarity of thought and superior grasp of the subject matter. Particularly in law, though, style is important as a factor in determining influence. Learned Hand's impact on other courts and judges was great; because he was able to put forth his ideas and formulas so clearly, courts and judges readily relied on what he had written. MARVIN SCHICK, *LEARNED HAND'S COURT* 189 n.96 (1970).

24. See BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 7-15 (1991).

25. Pepper, *supra* note 11, at 342.

tion: "[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary . . . ."<sup>26</sup> Dissenting from a case in which he thought the majority was too quick in concluding that the Supreme Court would no longer follow certain older decisions, Judge Hand wrote that it is not "desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."<sup>27</sup> In a copyright case he used an example to give meaning to the rule that anticipation cannot invalidate a copyright:

Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an "author"; but if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author," and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.<sup>28</sup>

As a final example of Judge Hand's superb opinion-writing, I give *Schmidt v. United States*.<sup>29</sup> The case is vivid in my mind because it was argued before Judge Hand, Judge Swan, and Judge Clark during the first week of my clerkship. Judge Clark did not think much of oral argument. He took the view that the Constitution required him to attend argument, but that there was no reason why his law clerk should waste his time doing so. During the first week of my clerkship, however, he allowed me to attend a few arguments to get the flavor of what happens. One of these was the *Schmidt* case, in which the issue was whether a certain college professor was "a person of good moral character," as the naturalization statute required, when he admitted that from time to time he had sexual intercourse with unmarried women. In an opinion of less than two pages,<sup>30</sup> the court reversed the district court and held that the applicant should be admitted to naturalization.<sup>31</sup> Judge Hand stated the problem in deciding what is or is not good moral character:

26. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

27. *Spector Motor Serv. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting), *vacated*, *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101 (1944). The dissent was from an opinion by Judge Clark, for whom I clerked six years later. The doctrine Judge Clark espoused in that decision, and again when the case came back to the Second Circuit during the year of my clerkship, was indeed in the womb of time, but its birth was quite distant. It was not until 1977 that the Supreme Court expressly overruled its 1951 decision in the *Spector* case in which it had reversed Judge Clark's decision. I have described all this in Charles Alan Wright, *Charles E. Clark and the Spector Case*, in *JUDGE CHARLES EDWARD CLARK* 193, 195-97 (Peninah Petruck ed., 1991).

28. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

29. 177 F.2d 450 (2d Cir. 1949).

30. Opinions in those days were quick as well as short. The decision came down 18 days after the case was argued.

31. 177 F.2d at 452.

We do not see how we can get any help from outside. It would not be practicable — even if the parties had asked for it, which they did not — to conduct an inquiry as to what is the common conscience on the point. Even though we could take a poll, it would not be enough merely to count heads, without any appraisal of the voters. A majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers. Nor can we see any reason to suppose that the opinion of clergymen would be a more reliable estimate than our own. The situation is one in which to proceed by any available method would not be more likely to satisfy the impalpable standard, deliberately chosen, than that we adopted in the foregoing cases: that is, to resort to our own conjecture, fallible as we recognize it to be. It is true that recent investigations have attempted to throw light upon the actual habits of men in the petitioner's position, and they have disclosed — what few people would have doubted in any event — that his practice is far from uncommon; but it does not follow that on this point common practice may not have diverged as much from precept as it often does. We have answered in the negative the question whether an unmarried man must live completely celibate, or forfeit his claim to a "good moral character"; but, as we have said, those were cases of continuous, though adulterous, union. We have now to say whether it makes a critical difference that the alien's lapses are casual, concupiscent and promiscuous, but not adulterous. We do not believe that discussion will make our conclusion more persuasive; but, so far as we can divine anything so tenebrous and impalpable as the common conscience, these added features do not make a critical difference.<sup>32</sup>

On a couple of points discussed in this book I have a personal bias that may make me unduly critical of Gunther's treatment. The picture that emerges here of my chief, Judge Clark, is an unflattering one. We are told in two different places that Judge Hand frequently referred disparagingly to Judge Clark as "the GLAPP," his abbreviation for "the Greatest Living Authority on Practice and Procedure."<sup>33</sup> Gunther quotes a limerick Judge Hand sent to Judge

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32. 177 F.2d at 451-52. Justice Frankfurter sent Judge Hand a clipping from a Washington newspaper in which an immigration official there said that what was good enough for New York was "not good enough or moral enough for the rest of the country" and that immigration authorities outside New York would continue to apply their "normal Christian standards." P. 634. To this Justice Frankfurter attached a note addressed to "Dearest B" and saying, "You have already justified your stay on the bench!" P. 634; see also p. 777 n.219.

33. Pp. 300, 522. Professor Gunther says that he had the benefit of working with one of today's truly great book editors. Pp. xx-xxi. I wish that she had excised the frequent repetitions. In addition to the example cited in the text, some other repetitions caught my eye as I read. For example, we are twice told of Justice Holmes's advice to Judge Hand to avoid "heated subjects." Pp. 237, 345. We hear three times that he called his law clerks "puny judges," pp. 141, 289, 620, a pun on the term *puisne judges* for inferior judges. We are told three times that Judge Hand hoped to fill a vacancy on the Second Circuit in 1918, but that it went instead to Martin T. Manton. Pp. 161, 258-60, 270-71. A 1919 letter to Justice Holmes in which Judge Hand speaks of "the merry sport of Red-baiting" is quoted twice. Pp. 167, 348-49. And twice we are given a comment by Walter Lippman, referring to Judge Hand's tolerance of the strange relation between Mrs. Hand and Louis Dow: "The first task of that



Chase making fun of Judge Clark's interest in "the new 'wules'" (p. 522). I have no doubt that all this happened. I also accept Gunther's statement that "Hand never developed affection for Clark" (p. 524). But I think it unduly harsh to call Judge Clark "a recurrent source of friction" (p. 521) and to say that his comments "often struck his colleagues as harsh and supercilious" (p. 522) without also giving any hint of the strengths he brought to the court. Marvin Schick has quoted two sensitive letters Judge Hand wrote to Judge Clark at a time when the latter was feeling depressed about his work. In one of them Judge Hand says that "we all think of you as one of the outstanding judges on the federal bench, or any other bench."<sup>34</sup>

As president of The American Law Institute, I was interested to see what Gunther would say about that organization. Learned Hand was one of the group of distinguished jurists who conceived the idea of the Institute in 1922 and founded it in 1923. He was a member of the Institute's Council from 1923 until he died in 1961, and from 1935 to 1947 he served as vice-president. Gunther discusses this at some length (pp. 410-15), but he seems surprised that Judge Hand should have had that interest. "[T]he work was bound to be technical and ultimately confining to so zestful a mind as Hand's. . . . What prompted a man with Hand's capacious mind to remain so engaged with the ALI?" (p. 412). Gunther surmises that "it appeased his hunger for associations with law teachers" (p. 413) and that "he looked forward to the opportunities for dinners, drinks, and informal chats with congenial associates" (p. 414).

The reasons Gunther cites are plausible ones, but I think a more compelling reason was that Judge Hand felt that what ALI does is important and he enjoyed being a part of it. At the Institute's annual dinner in May 1951, many speakers made tributes to Judge Hand on the occasion of his retirement as chief judge. In responding to those speeches, he noted that "I am the only one left of the original people who started this institution."<sup>35</sup> He talked of what the Institute had done in its years of existence. "The hours we spent! And I enjoyed it all enormously. . . . And we went on until our work became a great achievement; as the years pass, it is being shown how vital a contribution it is to that law with whose custody and development you and I are charged."<sup>36</sup>

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man's biographer will be to enquire why he remained for so long on such good terms with his wife's lover." Pp. 500, 712 n.83. This is a book that people read from front to back. There is no need to repeat things for fear they will be missed.

34. SCHICK, *supra* note 23, at 303-04.

35. *A Great Judge Retires: American Law Institute Honors Learned Hand*, 37 A.B.A. J. 502, 560 (1951).

36. *Id.* at 560-61.

Judge Hand was a leading figure in one of the great debates in the Institute's history, an episode mentioned briefly by Gunther in a note (p. 783 n.129). The Advisers for the Institute's Model Penal Code had recommended that criminal law should not deal with adult consensual sodomy. The Council, however, voted to make punishable "a person who engages in an act of deviate sexual intercourse."<sup>37</sup> At the 1955 annual meeting Robert Braucher, then a professor at the Harvard Law School and later a justice of the Supreme Judicial Court of Massachusetts, moved to delete that provision from the Code. Judge John J. Parker of the Fourth Circuit spoke against the motion. He thought that the Code would not commend itself to the profession if it flew in the face of public opinion, evidenced by the criminal laws in every state in the country.<sup>38</sup> Judge Hand made the principal speech in support of the Braucher motion. He thought it extremely undesirable to have criminal law extend to matters "which are what Jerome in the old days used to call the 'moral yearning statute book.'"<sup>39</sup> He said that criminal law that is not enforced is much worse than law not on the books at all: "I think it is a matter of morals, a matter very largely of taste, and it is not a matter that people should be put in prison about."<sup>40</sup> Judge Hand's view prevailed and the motion to eliminate sodomy from the Code carried.<sup>41</sup>

Gunther quite properly is filled with praise for his idol, and I have been laudatory here in my comments about Judge Hand. But there are two things in the record that have troubled even some of Hand's greatest admirers. One is his opinion for the Second Circuit in *United States v. Dennis*<sup>42</sup> — the case of the eleven Communists prosecuted for violation of the Smith Act.<sup>43</sup> The other is his discussion of *Brown v. Board of Education*<sup>44</sup> in the Holmes Lectures he delivered at Harvard in 1958.<sup>45</sup>

As a young district judge in 1917 in *Masses Publishing Co. v. Patten*,<sup>46</sup> Judge Hand ordered the Postmaster to lift a ban on a left-wing antiwar journal that allegedly hampered the government in its conduct of the war. The opinion drew a sharp distinction between

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37. MODEL PENAL CODE § 207.5(4) (Tentative Draft No. 4, 1955).

38. Transcript of Proceedings, American Law Institute, May 19, 1955, p. 128.

39. *Id.* at 129.

40. *Id.*

41. For reasons now lost to history, the transcript says only that the question was "put to a vote and carried." *Id.* at 131. A contemporaneous account says that the vote was 35 to 24. *Sin & Criminality*, TIME, May 30, 1955, at 13.

42. 183 F.2d 201 (2d Cir. 1950), *affd.*, 341 U.S. 494 (1951).

43. 183 F.2d at 201.

44. 347 U.S. 483 (1954).

45. See LEARNED HAND, THE BILL OF RIGHTS 54-55 (1958).

46. 244 F. 535 (S.D.N.Y.), *revd.*, 246 F. 24 (2d Cir. 1917).

agitation, which is permissible, and incitement, which is not: "[T]o assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government."<sup>47</sup> On this basis, Judge Hand interpreted the Espionage Act of 1917 as inapplicable to the publication before him. Although the Second Circuit quickly reversed the decision, it was much admired by libertarians, as Hand's test was more protective of speech than the "clear and present danger" test that Justice Holmes announced for the Supreme Court two years later.<sup>48</sup> Judge Hand engaged in considerable correspondence with Justice Holmes and Professor Zechariah Chafee, Jr., about the two tests (pp. 161-70).

In *Dennis*,<sup>49</sup> however, Judge Hand reformulated the "clear and present danger" test. Courts, he said, must ask "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>50</sup> This test is even more restrictive than the original formulation by Justice Holmes. Gunther tells us that Judge Hand was "a true liberal, especially in his devotion to the fullest possible scope for freedom of expression" (p. xvi). His extrajudicial utterances, and the views he expressed privately on the issues of the day, certainly support that characterization. Many of his admirers, however, found it difficult to reconcile his *Dennis* opinion with those liberal views.<sup>51</sup> Gunther offers one explanation: "The central answer to the puzzle of how Hand could write so speech-restrictive an opinion as *Dennis* lies in the fact that as a lower court judge, he was bound by and faithful to Supreme Court precedents" (pp. 603-04). That fact is true. But it seems to me more important that in *Masses* Judge Hand was construing a statute, while in *Dennis* he was asked to hold an Act of Congress unconstitutional.

Only once in his long career did Judge Hand vote to hold unconstitutional any federal statute not dealing with procedure.<sup>52</sup> Judge Frank has emphasized Judge Hand's belief

47. 244 F. at 540.

48. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

49. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *affid.*, 341 U.S. 494 (1951).

50. 183 F.2d at 212. Chief Justice Vinson accepted this new formulation in his plurality opinion for the Supreme Court. 341 U.S. at 510.

51. See, e.g., Dilliard, *supra* note 9, at xvii ("Among those who believed that Judge Hand had unfortunately parted company from Holmes at this very important point was the admiring collector of the addresses and papers that make this book.").

52. See Frank, *supra* note 3, at 690. The case was *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (2d Cir.) (Hand, J., concurring), *affid. in part*, 295 U.S. 495 (1935).

that the courts should never treat non-procedural provisions of the Bill of Rights as judicially enforceable 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.<sup>53</sup>

Nor is this belief something that should have been discernible only post hoc. Writing three years before the *Dennis* case, Judge Charles Wyzanski used typically colorful language in correctly predicting how Judge Hand would approach such a case:

Some who know only his opinion in *Masses Publishing Co. v. Patten* may suppose that if such an issue comes before Learned Hand he will march with a flaming torch at the head of the "children of light." But I suspect that the crusaders will have to discover their promised land without him in their zealous band.<sup>54</sup>

It is ironic that the Supreme Court has now eviscerated *Dennis* and adopted a new standard for speech protection that goes back to the "incitement" standard that Judge Hand put forth in *Masses*.<sup>55</sup> It is certainly intellectually permissible to think that in a democracy courts should not strike down the acts of a popularly elected legislature and that this deference to the legislature must extend to personal rights just as much as to property rights. This extension of Thayerism to its farthest limits is not now a view widely held. But it was surely the view of one who in his most famous speech had said:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>56</sup>

In 1958 Judge Hand went to Harvard Law School to deliver the Oliver Wendell Holmes Lectures (pp. 652-59). Much in those lectures is interesting and provocative. His doubts about the basis for judicial review and his hostility toward "Platonic Guardians" have been much discussed. But what attracted the most attention at the time, and still is controversial, is a single paragraph in the second lecture in which he criticized *Brown* as an attempt by the Court "to 'overrule' the 'legislative judgment' of states by its own reappraisal of the relative values at stake."<sup>57</sup> Alistair Cooke was surely right in

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53. Frank, *supra* note 3, at 694-95.

54. Charles E. Wyzanski, Jr., *Judge Learned Hand's Contributions to Public Law*, 60 HARV. L. REV. 348, 354 (1947).

55. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

56. HAND, *supra* note 15, at 189-90.

57. HAND, *supra* note 45, at 54.

predicting that Judge Hand's words would "set off bonfires in Dixie" and make him "the latest idol of the South."<sup>58</sup>

Gunther's explanation of Hand's remarks is fascinating. He produces evidence that Judge Hand would have accepted *Brown* if it had held that the Constitution prohibits legislatures from imposing any racial inequalities. But Hand read *Brown* as holding only that the reasons for racial inequality were not strong enough in the field of education (p. 666). That was a plausible reading of *Brown* in 1954. It was not in 1958. By that time the Court had applied the *Brown* principle to areas outside the field of education, such as parks, bathhouses, golf courses, and buses.<sup>59</sup> It is true that the Court did this without fanfare in uninformative per curiam opinions,<sup>60</sup> but these decisions were not handed down in the dark of night on the far side of the moon. Anyone interested in the legal position on racial segregation could easily see what had happened.

The answer, Gunther tells us, is that "Hand himself did not read most Supreme Court decisions with care by the 1950s" (p. 665). He relied on letters from Justice Frankfurter telling him what the Court had done rather than looking to see for himself. In a series of letters Justice Frankfurter persuaded Judge Hand that *Brown* was only about education rather than, as he had first thought, a color-blind principle (pp. 666-71). Judge Hand gave in "because he was suffering from fatigue about the lectures" (p. 671).

The quotations Gunther gives from the letters between Frankfurter and Hand are strong evidence that this is what happened and that the controversial paragraph "represented Hand's delayed surrender to Frankfurter's self-serving interpretation of *Brown*" (p. 671). But it is odd, or at least unfortunate, that as great a judge as Learned Hand, in delivering what he knew would be his farewell statement, would not look to *U.S. Reports* himself rather than accepting a secondhand version of what was there. It is odd that his able law clerk<sup>61</sup> did not show him the relevant cases. The result was a series of lectures that were not up to the standard expected of Judge Hand. Both on the specific point about *Brown* and also in the general themes that the lectures struck, he "articulated a more rigid, more negative view of judicial power than any he had ever

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58. P. 659 (quoting Alistair Cooke, *Judge Hand Criticizes Supreme Court*, MANCHESTER GUARDIAN, Feb. 8, 1955, at 5).

59. See *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971 (1954) (parks); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses).

60. There is an excellent discussion, drawing largely on the Tom C. Clark Papers at The University of Texas, of these decisions and why they were deliberately unilluminating, in Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 60-73 (1979).

61. Ronald Dworkin (p. 671), now a distinguished law professor.

voiced before" (p. 671). As Gunther rightly says, "the bleakness, pessimism, and extremism of Hand's final major statement did not do full justice to the richness, subtlety, and complexity" of his thinking (p. 672).

In his Holmes Lectures Judge Hand criticized Justice Holmes's "clear and present danger" test and said that "I cannot help thinking that for once Homer nodded."<sup>62</sup> There will be those who think, as I do, that in *Dennis* and in the Holmes Lectures it was Judge Hand himself who nodded. But to say this is not to retreat at all from the conviction I expressed earlier: Learned Hand was a great judge. This excellent biography gives both a better understanding of the man and a better appreciation of his greatness.

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62. HAND, *supra* note 45, at 59.