



LEARNED HAND

The Man and the Judge

Gerald Gunther

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GERALD GUNTHER

*with a Foreword by
Justice Lewis F. Powell, Jr.*

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Foreword

AS A BIOGRAPHER'S SUBJECT, Learned Hand must inspire feelings of both gratitude and intimidation. Hand left his chronicler a rich source of material. In addition to thousands of judicial opinions and many public speeches, the great judge left a monumental correspondence with leading figures in law and letters, including Oliver Wendell Holmes, Jr., Felix Frankfurter, Walter Lippmann, and Bernard Berenson. So the Learned Hand Papers confront the biographer with the task of reviewing more than 100,000 items, an awesome physical task in itself. Happily, the honor of serving as Hand's biographer fell to Professor Gerald Gunther of the Stanford Law School.

I can think of no one better prepared than Gerald Gunther—best known perhaps as the author of the leading casebook on constitutional law—to write this biography, and he has enjoyed exclusive access to the Learned Hand Papers. Not only that, but after being graduated in 1953 from the Harvard Law School with distinction, he was privileged to serve as law clerk to Hand. Apart from family members, few people ever know a judge quite as well as the law clerk. The clerk sees the judge under pressure, observes and participates in the agony of deciding close and difficult cases, and comes to know his human and intellectual qualities.

Federal circuit judge Billings Learned Hand (1872–1961) was widely admired during his own lifetime. Asked to say who among his Supreme Court colleagues was the greatest living American jurist, Justice Benjamin Cardozo replied, "The greatest living American jurist isn't *on* the Supreme Court." Popular journals of Hand's day tried to remedy this oversight by referring to him as "the Tenth Justice." Although

public knowledge of Hand has perhaps diminished since his death, his reputation among members of the legal profession has only continued to grow.

The most obvious reason for Hand's stature is his vast body of opinions. I cite but a few of the best-known examples. In the First Amendment area, perhaps the most famous was his opinion in *Masses Publishing Co. v. Patten*, decided during the World War I year of 1917. Writing as a district court judge, Hand articulated a standard that was even more protective of dissident speech than the "clear and present danger" test of Hand's judicial idol, Justice Holmes. In the fervor of wartime, this opinion was bitterly criticized, and it was reversed on appeal. It nevertheless remained important to First Amendment debate and was partly accepted by the Supreme Court fifty-two years later. First-year students of torts know Hand for *United States v. Carroll Towing*, in which he derived an algebraic formula to determine liability for negligent behavior. Recent interest in the application of economic principles to legal analysis has brought renewed attention to Hand's formula. In another case, Hand had the opportunity to sit in the place of the Supreme Court, if not on it. When the Court was unable to muster a quorum in *United States v. Aluminum Co. of America*, Congress enacted a special statute designating the Court of Appeals for the Second Circuit, on which Hand sat, as the court of last resort in the case. Hand's landmark opinion established key principles of antitrust law.

No less important are Hand's public addresses and extrajudicial writings, which, more than his opinions, reveal a unique literary style. He found the process of composition difficult and often said that he wrote with his "life's blood." "I suffer," he said in one interview, "believe me, I suffer." Yet the results of Hand's painstaking efforts, particularly in the collection of works entitled *The Spirit of Liberty*, rank with the finest examples of English prose.

In addition to these public writings, Hand's correspondence is a uniquely valuable record of part of the intellectual history of the twentieth century. Hand's contempt for the telephone was legendary, and this may in part explain his voluminous correspondence, but it is the quality of the letters rather than the quantity that is important. Hand wrote frequently and in great depth to the leading figures of American life about the challenges facing democracy in the modern world; the letters reveal many previously unknown aspects of famous events. Professor Gunther has drawn on this source to reveal Hand's philosophy in far greater depth than any other writer.

Hand contributed to the legal and intellectual life of the country through other extrajudicial activities. He was a founding member of

the American Law Institute, and served on its council from 1923 to 1961. He participated actively in various ALI projects, including the institute's publication of "Restatements" of the law. Hand faithfully attended the ALI's meetings—I saw him there many times over the years—for they allowed him a cherished opportunity to maintain friendships with law professors and leading practitioners outside New York City. Some years earlier, Hand had participated in the founding of another well-known institution: in 1914, along with Herbert Croly, Walter Lippmann, and others, he participated in the establishment of *The New Republic* magazine, to which he frequently contributed for a few years thereafter, though he eventually concluded that his status as a judge required him to give up writing on matters of current controversy.

Popular fascination with Hand can be attributed to his appearance and his colorful personal character: his rugged square features and imposing eyebrows became the public's ideal of what a judge should look like, and his imposing courtroom manner could strike terror into the heart of any young lawyer. I can attest to the latter from experience, having sat beside a senior partner from my firm in an argument before Hand during my early days in practice.

Numerous popular tales concern Hand's attempts to avoid annoyances that might disturb the absolute concentration he required when working. An example was his legendary encounter with a white bulldog named Jiggs, whose occasional barking—twenty-four floors below his office and three blocks away—Hand claimed to find intolerable. Although none of his staff could even hear the dog, Hand sent out his messenger in an unsuccessful attempt to buy Jiggs and have him muzzled. Other features of Hand lore include his daily four-mile walks through Manhattan to the courthouse, and his entertaining the aging Justice Holmes with off-color sea songs.

Hand was known for his swings of mood, but those who knew him well said that his occasional bluster did not obscure his warm personality. An example occurred when Hand found that his longtime messenger, Murray Sherman, was losing his sight. Hand ordered Sherman to a New York hospital, paid for the necessary surgery, and visited Sherman there every day. Hand was also a devoted father, and delighted in making up outrageous stories for his daughters. In later years he amused his grandchildren by placing a wastebasket over his head and leaping around the room in the role of an Indian warrior.

This biography of course makes clear that the importance of Hand's life is not to be found in amusing anecdotes. His fame and his place in history rest largely on his approach to the task of judging and on

his perception of the judicial role in American government. He is often identified with what may loosely be called the “restrained” model of judging. The contrasting “activist” model values judicial decisions largely in terms of the substantive results they achieve. The more modest approach, associated with Hand, Holmes, and Frankfurter, looks instead to the quality of the process by which decisions are made; it values impartiality, thorough analysis, and sound reasoning, and is slow to embrace politically controversial judicial initiatives.

Hand was suspicious of judicial interference with the decisions of elected legislatures. He voted only twice to invalidate statutes on constitutional grounds, and his correspondence shows that he regretted not maintaining a “perfect” record in this respect. This is not to say that Hand viewed the democratic process with unqualified trust. He feared, in an age of mass communication, that society could fall under “the power of the conglomerate conscience of a mass of Babbitts, whose intelligence we do not approve, and whose standards we may detest.” Nonetheless, he steadfastly believed that the democratic process was superior to any available alternative, and that almost any popular initiative was likely to be less dangerous than the consequences of its suppression.

Hand’s belief that the judiciary should restrain itself from interference with the political process was not the product of a narrow “originalist” view of the Constitution. He did not believe the document served to “embalm the habits of 1789,” and emphasized that it is “not a strait-jacket but a charter for a living people.” Judicial restraint in the mold of Learned Hand comes not from rigid doctrine, but from a healthy mistrust of the idea that judges necessarily know better.

This book makes plain that Hand’s unease with an aggressive judicial role was but one aspect of a skepticism and constant self-examination that governed all facets of his life. Hand placed a high value on openness to all points of view, including those with which he was inclined to disagree, and a correspondingly low value on his own infallibility. “Skepticism is my only gospel,” he was quoted as saying, “but I don’t want to make a dogma out of it.” He owed this attitude in part to his teachers at Harvard—philosophers including William James, George Santayana, and Josiah Royce—who instilled in him the importance of critical thinking, and a willingness to reexamine the premises underlying one’s opinions.

Gunther traces the effects of Hand’s skepticism through the whole of his public career. More than this, he highlights the close relationship between the public philosophy and the private man. Earlier profiles of Hand have recounted his family’s Colonial origins and the distinguished

legal careers of his ancestors; they describe young Learned as “bustling” through college, summa cum laude and Phi Beta Kappa, and describe a rapid rise to law-firm partnership and the federal bench. Gunther probes below this idealized surface and reveals that Hand’s imposing first name and the reputation of his father’s legal career made him despair of meeting family expectations. Hand’s short career in practice was marked by limited success and pervasive doubts about his own legal aptitude. Seen in the context of his private life, Hand’s philosophy appears to have been a product of personal self-doubt, introspection, and perception of himself as an outsider.

The effects of being an “outsider” are equally relevant to the early life of Gerald Gunther, whose early childhood was spent in Usingen, Germany, where as one of only two Jewish students in his class in the local *Volksschule*, he was relegated to the corner of the classroom and subjected to relentless anti-Semitic taunts from his teacher. Arriving in America at the age of eleven, with no knowledge of English, Gunther rose in the space of fifteen years to the top of his Harvard Law School class and a coveted clerkship with “the Great Judge.”

Gunther’s career continued with other conspicuous successes. His casebook on constitutional law, now in its twelfth edition, remains the leading publication in the field, from which a generation of American lawyers have learned constitutional law. His articles have been equally influential. (His generous retirement tribute to me in the 1988 *Harvard Law Review* might leave my impartiality on this point open to question.) I do know that his 1972 article on equal protection is the most widely cited law-review article of the last forty years, and I can also state from experience that his writings draw the attention of the justices of the Supreme Court. And I recall that at the time of my retirement from active service on the Supreme Court in 1987, when the *New York Law Journal* conducted a poll on the subject of judicial nominations and asked who, if ability and not political ideology were the sole criterion, would make the best justice, the runaway winner was Gerald Gunther. He was suggested by liberals and conservatives alike, and described as having “an unparalleled, yet nondogmatic familiarity with the Constitution.” Another journal stated that he is “universally regarded for his evenhandedness.”

Gunther’s nondogmatic, evenhanded approach and his relationship with Learned Hand are surely not coincidental. Hand believed that our future depended on citizens willing to question the correctness of their own views as well as those of their neighbors and leaders. “The spirit of liberty,” he said, “is the spirit which is not too sure that it is right.” This biography gives us for the first time a complete view of the public

and private life that Hand built around this philosophy. Gunther's portrait of Learned Hand is a model not just for judges; it is a model for all citizens who share Hand's concern for the preservation of liberty and democracy.

—Lewis F. Powell, Jr.
Justice, Supreme Court of the United States, Retired

Preface

LEARNED HAND IS NUMBERED among a small group of truly great American judges of the twentieth century, a group that includes Oliver Wendell Holmes, Jr., Louis Brandeis, and Benjamin Cardozo. Yet among these judges, only Hand never sat on the Supreme Court. Instead, his legacy lies in some four thousand opinions that he composed during more than half a century on the bench. He is one of the most often cited judges in the United States, and many of his rulings became the law of the land. Perhaps most important, his career offers significant insights on the debate about the proper role of judges in a democratic society, a debate as important today as it ever was.

Hand had an unmatched capacity to work both modestly and creatively, in accordance with the prescriptions of the restrained model of judging he believed in, a model that contrasts with the activist one associated with judges such as Earl Warren and William O. Douglas. His striking name and equally striking looks—he was a stocky, barrel-chested man with a square head accented by stiff, gray hair, thick bushy eyebrows, and large, piercing eyes—helped to fix him as America's popular ideal of a judge.

Born in 1872 to an Albany, New York, family in which his father, two uncles, and grandfather were all lawyers, Hand, pressured by his family, abandoned dreams to pursue graduate study in philosophy and turned instead to the law. Even though he disliked law practice and did not think he was good at it, he gained renown in New York's legal and intellectual circles in the early 1900s. When he was thirty-seven years old, in 1909, President Taft appointed him a federal district

judge. Fifteen years later, he was promoted to the U.S. Court of Appeals for the Second Circuit, where he served for the rest of his life.

Hand's judicial record demonstrates that disinterestedness and lack of crusading zeal on the bench need not condemn a judge to intellectual impotence. His decisions were noted not for dramatic overturning of majoritarian sentiments, but rather for superior craftsmanship and for creative performance within the confines set by the executive and legislative branches. Probing the underlying questions beneath the surface of words, rejecting glib formulations, suspecting absolutes, and striving for orderly sense amid the chaos of legal wisdoms, he was innovative in areas he thought legitimately open to judicial determination.

Hand's deep convictions about the limited role of judges in curbing legislative choices, views first formed at the feet of his influential Harvard law professor James Bradley Thayer, were expressed in their most extreme form in his Holmes Lectures of 1958. Yet Hand was a true liberal, especially in his devotion to the fullest possible scope for freedom of expression. His controversial ruling in the *Masses* case of 1917, protecting antiwar publications at a time when the political atmosphere was hostile to dissent, was personally costly. His approach to freedom of speech in that case did not become the established law until five decades later, long after Hand had given up hope that his position would be adopted. Liberalism for Hand primarily meant skepticism and open-mindedness, qualities that he considered central to judging, qualities that were deeply embedded in his own personality.

Despite his lifelong commitment to restrained judging, Hand frequently took an active and public part in political affairs. In the first decade of his judicial career, he was an enthusiastic supporter of Theodore Roosevelt's Progressive-Bull Moose campaign for the presidency in 1912, and he served that movement as a behind-the-scenes adviser and platform drafter. The following year he permitted his name to be used as the Progressive candidate for the chief judgeship of New York's highest court. In 1914, he was deeply involved with Herbert Croly and Walter Lippmann in the founding of *The New Republic*, and he frequently contributed to its pages in its early years. After World War I, Hand concluded that his position on the bench precluded extrajudicial involvements in controversial issues, yet his political convictions reemerged in the 1950s, when he vigorously spoke out against McCarthyism.

Skepticism and restless probing came naturally to Hand. Reflectiveness, intolerance of absolutes, and relentless searching for answers despite an abiding conviction that there were no permanent ones were well-ingrained traits by the time he became a judge. Intellectually

engaged and always ready to reexamine his assumptions, he was a philosopher and a humanist. To social acquaintances, he seemed a gregarious, joyful companion; yet he also harbored darker elements of anxiety and melancholy.

Although public portraits depicted Hand as a magisterial, serene figure, he viewed himself as beset and driven by self-doubts. He never ceased questioning the worth of his own work. As an undergraduate at Harvard, he could not quell the feeling that he was an uncouth outsider, excluded by the most prominent clubs on a campus marked by social snobbery. And his self-doubts permeated all aspects of his adult life: his family relationships, his friendships, his forays into public affairs, and his judicial career. Yet these dark agonies did not produce intellectual paralysis. The doubting judge—always convinced that he had not found Truth and, indeed, that Truth was not findable—nevertheless pressed on in the search with all the talents and energies he could muster.

Hand's personal traits shaped his style of modest judging: the questioning, open-minded human being could not help acting that way as a judge. And despite his doubts, he handed down thousands of lucidly written decisions on a wide range of issues; his gifts were such that lawyers and judges bestowed on him the unusual accolade of noting his authorship of the Second Circuit decisions he had composed. His major legal legacy lies in his demonstration that wise and detached judging is in fact humanly possible.

Hand's personality, character, and career raise a number of intriguing questions. Why is it that a man of his national renown was never appointed to the Supreme Court, though he was seriously considered in 1930 and again in 1942? How is it that an individual so torn by self-doubt, so prone to seeing all sides of the question, could escape paralysis and produce such an enormous body of influential work? How did Hand reconcile his public participation in political controversies with his deep belief in apolitical judging? How does his vigorous enforcement of First Amendment norms when he was a trial judge go along with his extreme reluctance later on to strike down legislative decisions threatening individual rights, as illustrated by his controversial decision upholding the Smith Act and sustaining the conviction of the Communist party's leaders in 1951? The answers to questions such as these lie not only in his judicial work but also in his lively, intellectually rich private life. It is clear, as his extensive correspondence with his wife, Frances, and with friends such as Felix Frankfurter, Walter Lippmann, and Bernard Berenson illustrates, that Hand's mind never ceased pulsating, always challenging widely accepted assumptions.

In seeking an understanding of Hand's life and work, I have benefited from exclusive access to the Learned Hand Papers, a collection of nearly 100,000 documents deposited by Hand's literary executor at the Harvard Law School Library. I have also been greatly helped by the custodians of other manuscript collections and by interviews with many of Hand's family members, law clerks, and acquaintances. And I have inevitably relied on my own recollections: I clerked for Hand in 1953-54 and spoke frequently with him during the last decade of his life.

I began work on this biography despite the fear that my admiration might preclude an absolutely unprejudiced portrayal of the man and the judge; I end hoping that I have pictured him fully, warts and all. He remains my idol still.

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