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SOME REFLECTIONS ON JUDGE LEARNED HAND*

JEROME N. FRANK

I WAS ASKED, originally, to speak of Great Judges. I objected. What, I queried, does one mean by "great"? I remembered my dispute with Professor Thorne and Justice Frankfurter about Lord Coke, once Chief Justice of England. I said Coke was a nasty, narrow-minded, greedy, cruel, arrogant, insensitive man, a time-serving politician and a liar who, by his adulation of some crabbed medieval legal doctrines, had retarded English and American legal development for centuries.¹ Thorne and Frankfurter replied that I proved their case, that the duration of his influence, no matter whether good or bad, made him a great judge. I think I lost that argument. But if that be the test, then we must put on our list of "greats" such men as Attila, Robespierre, and Hitler, although most of us consider them evil. And so too as to the great among legal thinkers, lawyers, and judges. Consider Tribonian who contributed importantly to the Justinian codification of Roman law which mightily affected the legal systems of the western world. Who was Tribonian? A brilliant scholar but a corrupt judge.

I concede, indeed I insist, that great men, good or evil, have often helped to shape history. Carlyle's theory of history—that all history results from the deeds or thoughts of great men—is nonsense, of course. But I think equally nonsensical what I call the No-Man Theory of history, according to which men are but puppets of "social forces," or economics, or geography, or the "spirit of the times"—in short, non-human or un-individual factors which wholly account, deterministically, for all human events. I shall not here enlarge on that theme. I wrote a book about it in 1945 which I here incorporate by reference.² There I did by no means exclude accidents, but I included great men among the accidents.

The theme, "Great Judges," is, then, vast and important. Conceivably, one could write much of legal history—as Campbell, Pound, and Seagle have tried to do—by writing the biographies of great judges. But that would be a horrendous undertaking. Were I to accept the theme originally allotted to me, I would at least confine it to some of the great judges whose influence has been beneficent. Even so, how is one to decide what judges deserve inclusion in that category? Obviously, no objective yardstick exists. Estimates of such greatness differ. It all depends on one's notion of the desirable.

* Based on the manuscripts for two talks delivered to students of the Yale Law School in November, 1955.

¹ For a very different appraisal of Coke, see Bowen, *The Lion and The Throne* (1956).

² *Fate and Freedom* (1945).

So I've decided to restrict myself principally to one judge whom I consider great: Judge Learned Hand. I shall not, however, attempt even a short biography. For one thing, all biographies are full of gaps. "No man is an island," said John Donne. That's a half-truth, a misleading metaphor because of what it omits. True, no man can be wholly apart from his fellows. But, if each of us is a promontory, yet the promontory reaches out beyond the social mainland to a point where others cannot intrude. Beyond that point lies an unexplorable lonesomeness, a unique privacy. It is a no-other-man's land, for others can't penetrate it, can't communicate with it.

If this be true of men generally, it is emphatically true of judges. The private life, the inner environment of a judge, his deeper motivations, usually become extraordinarily opaque, hidden from public gaze, after he ascends the bench.³ No judge has had a Boswell, and none has ever left behind him a detailed intimate diary like Pepys'. Sometimes, after his death, we can read a judge's private letters.⁴ But as Howarth said of Pepys' letters, with them, as distinguished from his diary, we are not "inside the man, looking through the window he made of himself on the world," we are only "peering through a curtained pane from without."⁵ We see not his "private face," only his "public face." As another writer observed, "behind the formal reserve of a high official a great deal more often goes on than most people suspect."⁶

The Roman lawyers, affected perhaps by the etymology of the word, thought of a "person," for legal purposes, as a mask, and recognized that legally one man may contain several different persons, having different masks or roles, or personalities, or selves. That pluralistic notion is not to be confined to legal thinking. We are all various persons; and most of the persons constituting a judge are exceptionally well hidden. As no biography, I think, can pretend to adequacy unless it includes a psycho-biography, a judicial biography must be inordinately incomplete. And glib psychological analyses of men, exciting or amusing as they may be, are terribly misleading.

Not long ago, some writers remarked that, since we entrust to "the judicial conscience" the interpretation and enforcement of our laws and constitutions, significant and accurate data about the occupants of the bench should be of major importance. Yet few such data have been assembled. "We do not even

³ Cf. Frankfurter, *A Note on Judicial Biography*, in *Of Law and Men* 107 (Elman ed., 1956).

⁴ Consult, e.g., *Holmes-Pollock Letters* (Howe ed., 1941); *Holmes-Laski Letters* (Howe ed., 1953). Even these have been screened. "In Holmes's published works, whether they be his essays, his opinions, or his letters, he has told us very nearly all that we shall ever know with certainty of his convictions. He was careful to destroy all papers within his control which recorded those events and moods that he considered private." Howe, *Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870* vi (1957).

⁵ Howarth, in *Introduction to Samuel Pepys Letters and the Second Diary* vii (Howarth ed., 1932).

⁶ *The Times* (London) *Literary Supplement*, 364 (July 1, 1955).

have available reliable indices of the intelligence of judges, to say nothing of measures of their psychiatric traits." Until the time when, the writers added, "we can reduce temperament, wisdom and probity to a scientific formula, many will say that any study of judicial personnel is merely touching the fringes of the problem."⁷ That time is surely not here.

To write a competent biography of Learned Hand would be singularly perplexing. For he is an exquisitely complex person, or, rather, a complex multitude of persons. As Whicher said of Emerson: "He can be summed up in a formula only by those who know their own minds better than his"; he is "impenetrable, for all his forty-odd volumes." Moreover, for all that Judge Hand is gregarious—a life-long friend says that "he is a man of moods, and does not like to be alone"⁸—he keeps inviolate, more than most of us, an enclave of reticent privacy which no one may enter.

Now and then, one comes on a man who has made of his life a work of art, like a novel written by himself. Such a man is Learned Hand. His long life—he is now 83⁹—has enabled him to round out that novel. It is replete with poetry and contains many delightful chapters and interludes. But some portions of that novel he alone has read and will never publish. If it be true that "nothing, except everything, can 'explain' anything,"¹⁰ I can't possibly explain Learned Hand. Although I have worked with him for fourteen years, I wouldn't dare to say I have even begun to know him. For that matter, who thoroughly knows any man, himself or any other? "Who," asked old Thomas Fuller, "hath sailed about the world of his own heart, sounded each creek, surveyed each corner, but that there still remains much terra incognita in himself?"

My principal aim, therefore, will be to give you some glimpses of Learned Hand's approach to his work as a judge; to suggest the genesis, the background, of that approach; and to compare him with some other great judges.

In all honesty, in order that you can make allowance for my partiality, I must begin by saying that no man do I esteem more highly. As I wrote him early this year: "No one else I've ever known has excited in me such admiration and affection. You are my model as a judge. More, you have influenced my attitudes 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." I am unabashed in my admiration. It is not unique. Repeatedly, and within

⁷ Mott, Albright, and Semmerling, *Judicial Personnel*, 167 *The Annals of the American Academy* 143, 144 (1933).

⁸ Burlingham, *Judge Learned Hand*, 60 *Harv. L. Rev.* 330, 331 (1947).

⁹ Judge Hand celebrated his eighty-fifth birthday this year (1957).

¹⁰ *The Times* (London) *Literary Supplement*, 492 (August 26, 1955).

the past few weeks, I have seen men leave his presence with a feeling of exaltation, lifted out of themselves to a vision of new horizons.

Many who have written of Learned Hand have lamented the fact that he did not become a Supreme Court Justice, a post for which no one else has ever been so well fitted. Yet I wonder. I think of Cervantes' advice: "Try to win the second prize. For the first is always by favor. The second goes for pure merit." The praises of Judge Hand have been earned, not by occupying the highest bench, but by pure merit. Nor has he sought these praises. So much the better, since, as the Scriptures say: "For men to search out their own glory is not glory." The praises are still being earned, through Judge Hand's unflagging efforts in still producing matchless opinions, despite his years.

Nor have Judge Hand's years abated his keenness or deprived him of a youthful resilience. In nowise does he resemble Kipling's old men who say: "And whatever we do, we shall fold our hands . . . and think well of it. Yes, we shall be perfectly pleased with our work, and that is the perfectest Hell of it." Judge Hand's legendary fame has not made him arrogant. "A man," says the Bible, "is tried by his praise." Judge Hand has stood that trial well. Nor does he exploit the trappings of office to afford him any factitious dignity. He chuckled when recently I quoted to him Montaigne's lines: "Sitting on the loftiest throne in the world, we are still sitting on our behinds." He treats bright young men with warm generosity, and enjoys it when they disagree with him. He invites a colleague who differs from one of his opinions to write a dissenting opinion. He wants no slavish disciples, no hero worship. His way of life recalls Plutarch's report of the Athenians' welcome to Pompey: "So far may you be deemed a god as you confess yourself a man." This trait of humility, of self-scepticism, is fortunate in one who has such wide influence. Lord Acton's famous statement, "Power tends to corrupt and absolute power tends to corrupt absolutely," did not end there. Acton added, "Great men are always bad men, even when they exercise influence and not authority. . . ." I think Acton's aphorism absurdly sweeping. But it does high-light the fact that great influence is great power, and therefore can be corruptly wielded. Learned Hand's influence, if he can help it, will never corrupt.

When younger, he took Justice Holmes as one of his most important mentors. Like Holmes, he delights in contriving generalizations while recognizing their pernicious character if not constantly in gear with particulars. Or, to paraphrase Kant, he knows that generalizations without particulars are empty and particulars without generalizations are blind. Both men have been sceptical of neat, closed, systems; like William James, they have sought the "wild facts" that escape any system. Often Judge Hand is compared with Holmes. Although Holmes too is one of my heroes, I think that, in the comparison, Hand gets the better rating. For Hand has been more generous,

more outgoing, more easily accessible to others, always interested in the events of the day, while Holmes led an essentially cloistered life, and boasted of not reading the newspapers. And Hand has been more willing to admit mistakes.

Holmes once said that in writing judicial opinions, "one has to strike at the jugular and let the rest go"; and, in his later years, many of his opinions disclose a lack of interest in all but the jugular. Not so Judge Hand. Always as a young judge, and increasingly as he grows older, he has delved into the many legal niceties of a case, frequently to the dismay of his brother judges. Judge Hand wrote of Cardozo's "anguish which . . . preceded decision . . . for again and again . . . he had to wrestle with the angel all through the night; and he wrote his opinions with his very blood. But once his mind came to rest, he was as inflexible as he had been uncertain before."¹¹ Learned Hand has experienced that same anguish. But often it does not cease when the opinion has been uttered. I have known him to brood disquietingly over decisions he rendered several years earlier.

I was most pleased to learn, soon after I joined him on the bench in 1941, that we shared an admiration for George Savile, Lord Halifax. In 1684, attacked as a political "Trimmer," Halifax replied in a tract that he delighted in that label. "This innocent word *Trimmer*," he wrote, "signifieth no more than this, that if men are together in a Boat, one part of the Company would weigh it down on one side, another would make it lean as much to the contrary: It happeneth there is a third opinion, who conceive it would do as well if the Boat went even without endangering the Passengers."¹² Halifax's definition of a Trimmer satisfies, in large measure, Judge Hand's definition (and mine) of a true liberal. Liberals, we both think, should be proud to be tagged as Trimmers, in that sense. But they should know that often the way of the liberal is hard. Often he will be denounced as a shameless appeaser. Seldom will he be backed up by a militant crowd. For, as the Bible reports, men do not follow an uncertain call into battle. Extremists on one side breed extremists on the other. The true liberal will be wary of both. His function, however, is to acknowledge that frequently, although not always, the extremists on each side have a point, but one that is exaggeratedly stated; to perceive that these exaggerations foster undesirable ways by which each side pursues its aims; and, if possible, to discover some resolution of the differences which allow for whatever is sound in the respective polar positions. That does not mean that Judge Hand parts his mind in the middle, or that he resembles the Duke in one of Chesterton's plays who tried to show his impartiality by donating equal sums to both sides of every cause.

¹¹ Hand, Mr. Justice Cardozo, in *The Spirit of Liberty* 129, 131 (Dilliard ed., 2d ed., 1953).

¹² *The Character of the Trimmer* 3 (1689). See Foxcroft, *A Character of the Trimmer* (1946).

Learned Hand's Literary Style

Judge Hand's fame derives in some part from the manner, the style, of his writing. Judge Wyzanski says it is "characterized by the compression, the poignancy, the balance, the diction of a sonnet."¹³ Let me read you a sample from an address delivered in 1952:

Our nation is embarked upon a venture as yet unproved; we have set our hopes upon a community in which men shall be given unchecked control of their own lives. That community is in peril; it is invaded from within, it is threatened from without; it faces a test which it may fail to pass. The choice is ours whether, if we hear the pipes of Pan, we shall stampede like a frightened flock, forgetting all those professions on which we have claimed to rest our polity. God knows, there is risk in refusing to act till the facts are all in; but is there not greater risk in abandoning the conditions of all rational inquiry? 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.¹⁴

His words, you'll agree, have a beauty, a lovely cadence, a lilt; but they are not Swinburnian, so bemusing in sound that you forget the thought. They do not merely ruffle the surface of the imagination; they plunge deep into it. They do not bully but they do demand—and receive—the attention. They are never emollient. His writings—to borrow one of his own phrases—contain no clichés designed as "anodynes for the pain of reasoning."¹⁵ They stir the emotions, but emotions disciplined by reason.

Because, I think, of his agility with words, he has a marked interest in verbal meanings. Illustrative of both his style and his theory of statutory

¹³ Judge Learned Hand's Contribution to Public Law, 60 Harv. L. Rev. 348, 369 (1947).

¹⁴ A Plea for the Open Mind and Free Discussion, in *The Spirit of Liberty*, op. cit. supra note 11, at 274, 283-84.

¹⁵ *Commissioner v. Sansome*, 60 F.2d 931, 933 (C.A.2d, 1932).

interpretation is this passage from an opinion he uttered in 1945: "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing. . . . But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary. . . ." ¹⁶

I want now to digress to consider some aspects of the function of style in the activities of the legal profession. I promise you that the digression will be relevant to Judge Hand.

The literary critic, John Mason Brown has said: "Lawyers are excused from the necessity of interesting their readers, and all too often—let's face the evidence—they take advantage of this enviable exemption." Alas, that's true of all too many lawyers, as I know only too well through having had to read a host of their briefs. It's even more true of judges, for they have captive audiences. But some judges, eager to interest their readers, do cultivate literary style—or what they think is style. Some few become masters of the writer's craft. Their opinions are oases in a vast desert of dullness. It does not follow that what they say has value. If it is a mistake, as it is, to confuse obscurity with profundity, it is no less a mistake to confuse brilliance of utterance with sagacity. Novel pithy phrases may induce the acceptance of shoddy ideas. Happily, some judges who write literature also express wisdom.

Without doubt, Cardozo was a most wise judge. ¹⁷ Many have extolled his style. I happen to disagree with that verdict. I admit that, in such matters, usually one wastes time in disputing matters of taste. But I dare to say that, to my mind, Cardozo's style is unpleasantly ornate, baroque, needlessly intricate, a barrier at times to understanding his meaning. I think that, had he not been a judge, literary critics would have criticized severely the style in many of his writings. Yet, since it was a relief to read judicial opinions not worded like a mortgage deed of trust or a section of the income-tax statute, his style received wide acclaim in lawyerdom.

Let me try to explain Cardozo's style. ¹⁸ He was a contradictory personality. Although a recluse, a retiring man, he devoted most of his life to public service, and was therefore constantly making a public appearance. Deeply hurt, in his youth, by a bitter personal experience—the exposed corruption of his father, a judge—he withdrew from the manner of living followed by most of his fellow men. Yet he did not seek refuge in morbid introspection

¹⁶ *Cabell v. Markham*, 148 F.2d 737, 739 (C.A. 2d, 1945).

¹⁷ For testimonials, consult the joint issue of the Columbia and Harvard Law Reviews and the Yale Law Journal published in 1939. 39 Col. L. Rev. 1 (1939); 52 Harv. L. Rev. 353 (1939); 48 Yale L. J. 371 (1939).

¹⁸ In the discussion of Cardozo's style which follows, I have borrowed heavily from my own article, published anonymously, under the title *The Speech of Judges: A Dissenting Opinion*, 29 Va. L. Rev. 625 (1943). The discussion there is, of course, much more extensive than what is reported here.

or in an ivory tower. He did retreat from 20th century living. But he re-entered it—disguised as an 18th century scholar and gentleman. His observations of the contemporary scene were keen, but not quite the observations of a contemporary. He wanted, at one and the same time, to be in and yet out of what was happening in the America of his day.

He achieved a compromise. That compromise reveals itself in his style. It is neither 20th century nor American. It imitates 18th century English: he wrote of 20th century America not in the current American idiom but in the "King's English" of two hundred years ago. The result was not ugly. His writings do have grace. But it is an alien grace.

He tried, I think, to use a private time-machine to transport himself into a past alien speech-environment. In a much-quoted passage, he wrote: "Not honesty alone, but a punctilio of honor the most sensitive, is the standard of behavior." Or consider such phrases as "One may take leave to deny," or "The subject the most lowly," or "An officer must not pause to parley," or "The risk of rescue, if it be not wanton, is born of the occasion," or "So the concept be not abjuring," or "Due process is a growth too sturdy to succumb to the infection of the least ingredient of error," or "Income . . . is the fruit born of capital, not the potency of fruition."

In his own essay on the style of judges, Cardozo remarked: "Form is not something added to substance as a mere protuberant adornment."¹⁹ Look at the form of this very sentence. Would it have been less effective if less decorative? One is reminded of Barney McGee who was "full of phrases of length and latinity, such as honorificabilitudinitary." No wonder that those who adulate Cardozo's style do not compare him with our best 20th century American writers. Instead they say he was "rare enough to compare with Charles Lamb." My own guess is that Cardozo thought of himself as engaged in imaginary conversations with Dr. Johnson.

I stress the character of Cardozo's style for this reason: good writing is speech heightened in tone and polished in form. An Englishman who writes his talk—his daily speech—is close to what he writes. He can pass with ease from oral speech to writing. He talks and thinks and writes in English. He does not talk, and therefore think, in one language and then have to translate it into another. Most Americans, however, talk and think not in English but in American. When they write, however, they attempt to write English—which is really another language. Heighten and polish up American as much as you will, it is still not English. We could more easily learn to think and write in some language we could not fail to recognize as foreign, such as French or German. The very fact that English is not obviously alien—that the differences between American and English are subtle—makes that effort the greater.

This was brought home to me when I visited an English appellate court.

¹⁹ Law and Literature 5 (1931), reprinted in the joint law review issue referred to in note 17, *supra*.

After the argument of a case, the judges conferred for a short time, and then the presiding justice orally delivered the court's opinion. I was astonished by its literary excellence. No American judge, I thought, could match that performance. "What an inferior lot our judges are," I reflected. But I soon changed my mind. For, all over England, I found that moderately well educated Englishmen, casually and without effort, could talk in a style that few Americans of great talent could equal in their best and most carefully prepared writing. You can see the process in reverse when an Englishman tries to write American, for example, Bernard Shaw in his play, *Blanco Posnet*.

Some American authors have written admirably in the American language. For examples of first-rate style in American, written with ease by American judges, look at the opinions of Justices Douglas and Jackson.

I come back now to Learned Hand's style. What impresses the reader is that he writes in a beautiful English, not American, style. He is one of the few living Americans, on or off the bench, who has done so. But he also speaks in English, not American, and therefore thinks in English. Judge Julian Mack said of him that he never knew a man whose writings so conveyed the life of his talk.

How this came about I cannot explain except to this extent: speech in English seems to have been common in his family, of English origin. (His grandfather, in 1848, in a letter to his sons, wrote: "A man may blow away like a cornet for a time," but "the charlatan soon finds his level. Or perhaps by impetus in his descent plunges a little below.") English ways—verbal, social and political—have always charmed Judge Hand. Add the fact that he has a fine ear and an amazing ability as a mimic. (You should hear him tell dialect stories.) Whatever the explanation, stylistically, his opinions might have been written by the best literary artists on the English bench.

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. All of us employ metaphors. Everyday speech is made up of them; all symbols, all abstractions, all analogies, all generalizations, are metaphors, as-ifs. No one can think without them. Scientific thought has always been metaphorical. But most of us use dead or embalmed or half-dead or somnolent metaphors. Learned Hand's are alive and zesty.

Nor does he submit to the foolish admonition against mixing metaphors. Shakespeare's best are mixed. The point is that metaphors should be well mixed, not badly, as in the case of a cocktail. Judge Hand, an artist in making a martini, mixes his metaphors beautifully, knowing that every metaphor, since it is an as-if, should be handled with care, that it must never be taken as an absolute but, like a "fiction," must be used to aid thinking, not to befuddle it.

The poetry in his style signalizes the poet in the man himself, in the judge. You can be sure that Judge Hand is aware that, as Pascal the poetic philosopher said: "The heart has its reasons, which reason does not know. . . . We know truth not only by reason, but also by the heart. . . . And reason must trust these intuitions of the heart." In calling Judge Hand a poet, I don't mean that he is over-delicate. That is a false notion about poets, and surely false if applied to Learned Hand. He has an avid interest in all phases of life. As you probably know, he has made a recording of two old ballads; you can buy the platter from the Library of Congress. He is wonderful as a singer and actor of Gilbert and Sullivan. Some enterprising producer should hire him to play the Lord Chancellor in *Iolanthe*. As Rabelais is one of his favorite authors, you may gather that he little admires asceticism. Once, when we talked of a much respected judge with ascetic habits, he remarked, "I distrust a man who distrusts his senses." Judge Hand is not the kind of person described by Ellen Glasgow as one who, "in his long life, never committed a pleasure."

I have, as others have, made much of his style. I would not have you believe, however, that he would not have been a great judge, had he written in the dullest manner.

Learned Hand as a Trial Judge

For 15 years, until his appointment to the Court of Appeals in 1924, Judge Hand served as a federal trial judge in New York. Except for a few articles and some notable judicial opinions, he would have been known for his efforts in those years to few other than the New York Bar. He gave the reason in 1952,²⁰ saying that "it is open to doubt whether the work" of a trial judge "is to be best appraised by that part which is recorded"; the major part "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."

Judge Hand has written little of his experience on the trial bench, but that little is invaluable. In 1926, reflecting on that experience, he remarked: "I must say that as a litigant I should dread a law suit beyond almost anything short of sickness and death."²¹ That comment by a sagacious judge should destroy any smug satisfaction with the administration of justice.

I will attempt to explain a part of the cause of Judge Hand's alarming remark, and then to link it up with his precept that judges should endeavor to control their personal preferences.

The explanation must begin with a recognition that a trial judge has two major functions: (1) Like an upper-court judge, he must concern himself

²⁰ 7 The Record of the Ass'n of the Bar of the City of New York 182, 183 (1952).

²¹ The Deficiencies of Trials to Reach the Heart of the Matter, 3 Lectures on Legal Topics 89, 105 (1926).

with the legal rules applicable to the particular facts of particular law suits. (2) Unlike an upper-court judge, he often has the responsibility of ascertaining those facts, i.e., in non-jury trials.

Now, although we speak of a trial judge "finding" the facts of a case, in truth he can't "find" them, ready-made, waiting to be discovered. The relevant events happened in the past, before any law suit began. The judge, therefore, never sees them happening. The facts, for purposes of judicial decision, are not what really happened, only what he believes—or guesses—to have happened. He forms this belief, or guess, by listening to witnesses who purport to have observed those past events when they occurred. Often the witnesses tell conflicting stories. Some of them lie; some are honestly mistaken in their original observations or memory. The judge "finds" the facts by choosing which witnesses he will believe. On this choice—the exercise of his fact-discretion, as I call it—depends the fate of the litigants. For in most suits, the entire or principal part of the dispute between the parties relates to the facts, not to the applicable legal rules, so that most law suits could be labeled "fact suits." Usually, for reasons I'll state later, the trial judge's fact-finding is accepted by the upper court on an appeal, if there is an appeal. Because of the incontestable mistakes in the trial judge's findings (or guesses), innocent men go to jail,²² and other men suffer defeat in civil law suits they ought to win, thus losing their property, their fortunes, their jobs or their reputations. On that account, the work of the trial judge in determining the facts—that is, in choosing some rather than other evidence as reliable—represents the most important part of the judicial process. And note that the decisions, in most law suits not yet commenced, can seldom be predicted because the trial court's findings of fact cannot be prophesied. No reading of precedents, no study of legal treatises, can overcome such obstacles to prediction.

This job of trial-court fact-finding is far more difficult, if well done, than that of making and applying legal rules. Yet it shows up, scarcely at all, in law school study of the courts, a study confined chiefly to examination and criticism of the legal rules as expounded in judicial opinions. Accordingly, in law school, students learn almost nothing about those trial judges who are truly great in performing the task of finding the facts.²³

The most significant factor in trial court fact-finding is this: no one has ever been able to contrive any rules to guide the trial judge in making his choice of the believable witnesses. That choice, that exercise of fact-discretion, therefore escapes the discipline of rules. It is un-ruly. When the witnesses testify orally

²² Consult Frank and Frank, *Not Guilty* (1957), reviewed at p. 779 *infra*.

²³ Those who knew Hand as a trial judge report that he was a most capable "fact-finder." Apparently Holmes was not. One who knew Holmes and Brandeis well recently wrote me that Brandeis once said that lawyers avoided trying cases before Holmes and that Holmes had often remarked: "I do not know facts; I merely know their significance." In 1930, Holmes had written me to the same effect.

in the presence of the trial judge, as ordinarily they do, he is guided, in very considerable measure, by his observation of the witnesses' demeanor—their facial expressions, falterings, or glibness. As I once said for our court: "The demeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, . . . his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned."²⁴ As Judge Hand put it: "The whole nexus of sight and sound . . . is lost in a written record. . . . The words that a witness utters . . . are again and again of no probative weight at all because of his address, his bearing and his apparent lack of intelligence."²⁵ He has also pointed out that, therefore, where the trial judge saw and heard the witnesses, his "finding is indeed 'unassailable.'"²⁶ There you have the reason for the incapacity of upper courts, in most cases, to disagree with or correct a trial judge's findings of fact: the upper courts can't observe the demeanor of the witnesses.

Had I the time,²⁷ I'd qualify somewhat my statement about the finality of trial court findings. The qualifications are not too important. By and large, the facts are cooked when a case reaches an appeal court. That's why only some 5% of cases are appealed and why, in those few, many trial court decisions are affirmed. A few years ago, Judge Hand spoke disparagingly of trial judges he knew "who thought they could tell, just as soon as a man comes into the court-room whether he is going to lie or not." "I used to try cases," he continued, "and God knows, I was very unsure about it." Any sensible judge would be unsure. For a witness' demeanor, while sometimes revealing, sometimes deceives: The careful, poised, perjurer may seem reliable; the honest, timid witness, frightened by the ordeal of testifying, may seem to be prevaricating. Nevertheless, our courts—on the whole justifiably—set great store by demeanor evidence. But you see how tricky is this reliance on demeanor evidence: one trial judge will interpret it one way, another judge, another way. There exists no common or objective measure usable in choosing the reliable witnesses.

And now I come to a most disturbing aspect of fact-finding, one which alone would explain Judge Hand's statement about the fear-inspiring character of litigation: the trial judge's belief about the facts, based on his choice of trustworthy witnesses, results from subjective, undisclosed, un-get-at-able, private factors in the trial judge, i.e., his prejudices, for or against witnesses who wear

²⁴ *Broadcast Music, Inc., v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (C.A.2d, 1949).

²⁵ *Purcell v. Waterman S. S. Co.*, 221 F.2d 953, 954 (C.A.2d, 1955).

²⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (C.A.2d, 1945).

²⁷ A more extensive treatment of the subject may be found in my book, *Courts on Trial* (1949).

glasses, or who are women, or blond women, or fat women, or Irishmen, Englishmen, Jews, Catholics, negroes, or red-headed men, or men with facial tics or who speak with a foreign accent or with a Southern drawl, etc., etc. It would be bad enough were those prejudices merely knowable by others. But the situation is worse than that: most of these prejudices are unconscious. That is, they are unknown to the trial judge himself.

Here we arrive at an unexplored phase of the problem of how far a judge evaluating "moral character" should resort to the attitudes of the community. The trial judge, in choosing the witnesses on whose testimony he relies, is evaluating the "moral character" of each witness. Not only does this evaluation entail the difficulty I shall mention later—i.e., the inadequate means available to any judge psychologically to probe deeply another's character—but there is this further difficulty inhering in the trial judge: if his unconscious, sub-threshold, hidden, idiosyncratic prejudices, for or against particular witnesses, were consciously entertained and publicized, they would spell out as evaluations consisting of the application of moral, or immoral, or amoral, standards or norms. They would then be open to criticism by others and by the trial judge himself through his "conscious conscience." Then he could check his standards or norms by comparing them with the publicly avowed moral standards or norms of the average members of the community. In many instances, the judge's norms would then appear to be morally far below the so-called "common conscience." But as the worst of biases or norms of which I'm now speaking are concealed, and unknown to the trial judge himself, neither he nor anyone else can compare them with the community standards. Nor can he restrain or rectify those prejudices. In this respect, the trial judge is self-willed beyond his own power of self-control, and beyond control by the upper courts.

Here is a major element, a most undemocratic element, in the decisional process. Can this problem be solved? I incline to think so, at least partially, by having each judge, with the assistance of a psychiatrist, engage in a voyage of self-exploration and so become conscious of those sub-threshold biases. But that problem will never be solved so long as it is ignored, shoved under the rug, as it has been and still is, by judges, lawyers, and law professors. Moreover, if the problem is insoluble, we but delude ourselves by disregarding its existence.

Judge Hand has not, to my knowledge, discussed this problem. He has urged that judges should try to prevent their personal preferences from governing their decisions. The preferences to which he refers relate to rules and to the policies they embody; such preferences—of an economic, social and political nature—are rather obvious to the judges and others, and consequently can be moderately well controlled. But a trial judge's choices of witnesses, his personal preferences of that sort (largely unconscious), involve no recognizable

rules or policies. In trial court fact-finding, because it does involve un-ruly fact-discretion, the dominant factor consists of the "personal element," the unique, unknowable, inscrutable, uncontrollable components of the trial judge's personality. The problem becomes more baffling in a jury trial when you consider the uncontrollable, unknowable, unconscious components of the personalities of the twelve jurors.

I trust that you perceive some of the startling implications of all this:

(1) We denounce arbitrary and capricious judicial decisions. But the concealed prejudices concerning witnesses, which yield the facts found in law suits, and which thus yield most court decisions, are often arbitrary and capricious as judged by any rational test.

(2) A distinguished judge recently said,²⁸ "Of course, individual judgment and feeling cannot be wholly shut out of the judicial process. But if they dominate, the judicial process becomes a dangerous sham." Yet concealed, unconscious prejudices do frequently dominate trial court fact-finding, the most important part of the judicial process.

I think now you'll understand some of the reasons for Judge Hand's remark that one should dread litigation beyond almost anything short of sickness and death.

Judge Hand had another reason. If, he said in a Kafka-like utterance in 1926,²⁹ you, as a lawyer, watch your client in the courtroom while his case is being tried, "you will . . . see in his face a baffled sense that there is going on some kind of game which, while its outcome may be tragic for him . . . is incomprehensible." He added, "About trials hang a suspicion of trickery and a sense of result depending upon cajolery or worse." These comments open up an immense subject of which I'll say no more than this: according to the present accepted working rules of the game, each lawyer owes a duty to his client to employ all sorts of wiles and stratagems which frequently prevent the trial judge or jury from getting as close as possible to the actual facts of a case. Our profession, I think, owes it to our society to eliminate many of those wiles and stratagems. But that is still another subject.

Once upon a time, and not so very long ago, most American judges and lawyers denied that judges ever legislated. The judges and lawyers exploited, and themselves largely believed, the myth that in the creation of the huge body of common-law legal rules, not enacted by any legislature, the judges had played no part. Judges never have made and never will make legal rules. These rules pre-existed all court decisions. The judges merely find or discover these pre-existing rules—just as Columbus, or whoever it was, discovered America. The courts no more invent new rules than Columbus invented the "new world"

²⁸ Frankfurter, John Marshall and the Judicial Function, in *Of Law and Men* 3, 19 (Elman ed., 1956).

²⁹ The Deficiencies of Trials to Reach the Heart of the Matter, 3 *Lectures on Legal Topics* 89, 95-96 (1926).

when he found it. If a rule announced in a former case is later rejected by a court, it is an error to say that a new rule has been contrived by the court. To speak correctly, one must say that the old, abandoned rule was a sort of false map of the "Law"—just as a pre-Columbian map was false. The judge who announced the erroneous rule in the former decision must have had bad eyesight, for he had made a mistake in trying to find the "Law." Calvin Coolidge was talking in terms of the myth when he wrote: "Men do not make laws. They do but discover them. . . . That state is most fortunate in its form of government which has the aptest instrument for the discovery of laws."

This myth, criticized in 19th-century England, had a peculiarly strong and tenacious hold in this country because, in theory, our constitutions give our legislatures the exclusive power to legislate. If the judges acknowledged that they made new rules, they would apparently be admitting that they were violating the principle of separation of governmental powers. The myth, if believed, absolved the judges from a charge of unconstitutionally usurping power. The myth did deceive the public. But it also induced the judges to deceive themselves.

When Learned Hand, aged 22, entered Harvard Law School as a student in 1894, the myth still largely prevailed. However, in 1891, Ezra Ripley Thayer had published an article,³⁰ entitled *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, in which, with unusual boldness for an American lawyer of his time, he dealt the myth a grave blow. In another article, in the same year, James Bradley Thayer, one of Hand's most influential teachers, said, "It is impossible to exercise the judicial function without such incidental legislation."³¹ But he cautioned that, in law-making, judges should act "with great caution." Before that, Holmes, in 1881,³² had written that the "growth of the law," through judicial decisions, "is legislative. . . . It is legislative in its grounds," based on "considerations of what is expedient for the community. . . ."; and he had suggested that, in the present, judges "should openly discuss the legislative principles," or policies, "upon which their decisions must always rest." When I was a law student, in the first and second decades of the 20th century, it was still heretical to agree openly with James Bradley Thayer and Holmes. But today the myth has dissipated. Judges of our day candidly admit that past judges invented many rules and that present judges do the same.

Since the final interment of the myth in the 1920's, some law teachers and many law students have entertained an equally false notion. They believe that a judge can, and usually a judge does,³³ contrive rules about as he pleases,

³⁰ 5 Harv. L. Rev. 172 (1891).

³¹ The Case of *Gelpcke v. Dubuque*, 4 Harv. L. Rev. 311, 318 (1891).

³² The Common Law 35, 78 (1881).

³³ Cf. Rodell, *Nine Men* (1955) (*passim*).

without restraint. That is wicked nonsense. It represents a gross exaggeration of a partial truth. Judicial legislation, as Holmes put it, is "interstitial." Most law-making is legislative, not judicial.

Repeatedly Judge Hand has discussed this question. No one is better equipped to do so. No one knows better than he that judges do legislate. For no other single judge has invented so many new rules, modified so many old ones. 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. With his creative insights, his penetrating intellect, his imaginative experience, he has enlarged the legal universe; although he obeys the Supreme Court's decisions, many of those decisions have been based on rules of his making. 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.

What, then, has this unusually creative judge said about the limits on judicial creativeness? As Judge Hand sees it, the judge faces a dilemma, being both bound and free. In 1939,³⁴ Judge Hand wrote of the self-contradiction "at the basis of a judge's work." For on the one hand, "his authority and his immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate" by his decisions. So the judge voices, not his own views, but the "dictates . . . of a communion which reaches" into the past "far beyond the memory of any now living." But then, Hand continued, one encounters this paradox: the common-law doctrines have grown. The judges, successively, have contributed to its growth, not merely repeating what their predecessors said, not always speaking with the "mouth of others." So a judge "must manage to escape both horns of this dilemma: he 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."

Judge Hand had considered this dilemma at least as early as 1916;³⁵ he then said that a judge may not properly decide cases according to his own idea of what will best serve the common good, or of what he thinks will represent democratic aspirations not articulated in some legitimate matter. The judge must not thus give rein to his "personal notions" of the desirable; he must bow to "the social will" when clearly set forth in "written word[s]." However, when the language of a statute or a precedent is ambiguous, the judge should

³⁴ Hand, Mr. Justice Cardozo, in *The Spirit of Liberty* 129, 130 (Dilliard ed., 2d ed., 1953).

³⁵ *The Speech of Justice*, id., at 13, 14.

not "frustrate his free power by interpretation to manifest the half-framed purposes of his time." If he does, he "misconceives the historical significance of his position and will in the end" become "incompetent to perform the very duties upon which it lays so much emphasis."

In even greater detail, Judge Hand discussed this dilemma in a more or less popular radio talk, in 1933, entitled *How Far Is A Judge Free in Rendering A Decision?*³⁶ Because this talk is so discerning and so balanced, I quote from it at some length.

He began by saying that there are two extreme views of a judge's role: some think he ought to look solely "to his conscience and follow its dictates," that he should not be bound by "what they call technical rules, having no relation to natural right or wrong. Others wish him to observe very strictly, reading it as though it were all to be found in written words, and never departing from the literal meaning." They are correct to this extent: a judge "ought not to usurp the power of government, and they believe that to exercise his own judgment as to the justice of the cause would be just such usurpation." Judge Hand disagrees with both these views.

Understanding of the problem requires a definition of "law," he says. Some persons think it "includes the customs or usages which are generally current in a society." Judge Hand prefers, with reference to a civilized modern society, a somewhat Austinian definition of law as "those rules which will be enforced by the government"—"the conduct which the government . . . will compel individuals to conform to, or to which it will at least provide forcible means to secure conformity." So defined, "the law is the command of the government, and it must be ascertainable in some form if it is to be enforced at all."

Its commands are put in words; and in our kind of society "these are always written," whether in statutes or in "books which report what has been decided before by judges whom the government gave power to decide." The judges have "the duty of saying what the law means, that is, what the government has in fact commanded."

³⁶ *Id.*, at 103 et seq. When no statute applies to a case and precedents are absent, or when the wording of a statute delegates to the judges the job of filling in gaps, Judge Hand knowingly legislates. In a "legislature," he said in *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D. N.Y., 1943), "the conflicting interests find their respective representation, or in any event can make their political power felt, as they cannot upon a court. The resulting compromises so arrived at are likely to achieve stability, and to be acquiesced in. . . . But it is a mistake to suppose that the courts are never called upon to make similar choices; i.e., to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made. . . ." He concluded that Congress had, under the anti-trust laws, left these particular controversies to the courts. Hand is aware, you see, that as a judge he must make choices on policy grounds, choices likely to be affected by their own preference. A judge is thus required to exercise more than skill in manipulating legal techniques; he is required to display ripe wisdom and experience, together with a lively imagination and a capacity for empathy. All these things Hand can do and do superbly in his struggle to accomplish justice.

The government's commands cannot be put in precise terms like those of mathematics. To be understood by the persons who must obey, these commands must be stated in "terms of common speech." Nor can the commands be nicely precise, for no one can "provide for all situations which might come up," nobody can "divine all possible human events in advance and prescribe the proper rule for each." The law thus uses "vague command[s]" which the courts—judges or juries—apply in respect of "all the circumstances of the particular case."

"The judge must therefore find out the will of the government from words. . . . How does he in fact proceed?" He takes "the language before him, whether it be from a statute or from the decision of a former judge." He tries "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." 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. Strictly speaking, it is impossible to know what they would have said about it, if it had. All they have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for.

"Thus it is not enough for the judge just 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."

Judge Hand grants that: "When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right. Let him beware, however, or he will usurp the office of government. . . . In our country we have always been extremely jealous of mixing the different processes of government, especially that of making law, with that of saying what it is after it is made. This distinction . . . cannot be rigidly enforced; but . . . it has a very sound basis as a guide, provided one does not make it an absolute rule."

The men who framed our Constitution "wanted to have a government by the people" and believed this could be done only "by giving the power to make laws to assemblies which the people chose. . . . They believed that such assemblies would express the common will of the people who were to rule. . . . They might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but he would then have been ruler. . . . Still, they had to leave him scope in which he in a limited sense does act as if he were the government, because, as we have seen, he cannot otherwise do what he is required to do. So far they had to confuse law-making with law-interpreting."

"So you will see that a judge is in a contradictory position; he is pulled by two opposite forces. 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. Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves."

I have several comments on Judge Hand's exposition in this paper:

(1) Discarding the myth, i.e., the Columbus-law-discovery-myth, Judge Hand recognizes that judges have considerable latitude for creativeness. A judge, like Learned Hand, no longer can deceive himself into believing that he never makes rules.

Judge Hand's discussion raises these questions: Did the self-deceiving myth actually restrain judicial creativeness? Does the destruction of the myth mean that judges now create more freely, that we have come nearer to judicial despotism? I think the answer to both questions is no. On the contrary, the old judicial self-deception often led the judges to engage in extensive legislation.

(2) Judge Hand maintains that, when a judge is called on to legislate, he must seek to balance competing social interests, i.e., "desires and values." Judge Hand concedes that such "desires and values are not quantitatively measurable, for," as he said in 1952, "they seldom have any common constituents, and without these they cannot be objectively compared." Many who have espoused this notion of adjusting such interests—in Europe, the members of the "jurisprudence-of-interests" school; in this country Pound and others—have not been as wise as Judge Hand in perceiving that it yields no panacea, no quick and easy solution of legal conundrums. At best, this idea brings home to the judge the nature of his task, prompts him to an awareness of interests he might otherwise neglect. But that awareness merely creates a problem; it does not solve it.

(3) In this 1933 paper, Judge Hand is discussing the judge's function with respect to legal rules, principles, doctrines, legal generalizations. He is not discussing the way trial courts find facts, and the much wider scope of their power in that respect, about which I have already spoken.

(4) With particular reference to statutes, Judge Hand has in mind the separation-of-powers doctrine: he stresses "government by the people," the making of laws by the people's chosen representatives in legislatures which "express the common will."

This last theme suffuses his thinking. I think it fairly clear that he derived it from Thayer. In all Thayer's teaching—whether on judicial legislation or evidence or constitutional law—Thayer underscored this democratic idea.

What we learn from some of our teachers may shape our basic attitudes for

the rest of our lives. From such influences, future judges are not immune. A recent biography of Mr. Justice Sutherland shows that, when he went on the Supreme Court in 1922, at the age of 60, he was still in the grip of ideas he learned in his youth from Professor Maeser, who accorded that rugged individualist, Herbert Spencer, the "first place among philosophers," and in Michigan Law School from another of Spencer's idolators, Judge Thomas M. Cooley.³⁷ So it was with Thayer and Learned Hand.

Thayer, in his teaching and writings on "constitutional law," dwelt on the fact that, until 1886, the Supreme Court—especially in applying the "due process" clause to substantive legislation as distinguished from procedure—had usually held that there is always a powerful presumption in favor of the constitutionality of a statute, that the Court must uphold a statute if it could conceive of the existence of facts which would render the statute reasonable. The Supreme Court had said that such a presumption must be indulged unless invalidity "is proved beyond all reasonable doubt,"³⁸ or "a palpable error has been committed";³⁹ that "For protection against abuses by legislatures the people must resort to the polls, not to the courts,"⁴⁰ to "the ballot-box, not to the judiciary";⁴¹ and that the "courts cannot, without usurping legislative functions, override the will of the people as . . . expressed by their chosen representatives," since the judges "have nothing to do with the . . . policy of legislation."⁴²

But, so Thayer wrote in 1893⁴³—the year before Learned Hand entered law school—a new judicial trend had developed. Now the courts were shifting the presumption, striking down statutes unless their reasonableness affirmatively appeared. Against this trend, Thayer inveighed. When courts so conduct themselves, he said, when they do not, except in most unusual instances, keep their hands off statutes, the people, "not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation; and they are belittled, as well as demoralized. . . . Under no system can the power of courts go far to save people from ruin; our chief protection lies elsewhere," i.e., at the polls.

Thayer urged that, in so far as validity turned upon the reasonableness of

³⁷ See Paschal, Mr. Justice Sutherland 5-9 and passim (1951); Dunham and Kurland, eds., Mr. Justice 123-146 (1956).

³⁸ *Ogden v. Saunders*, 12 Wheat. (U.S.) 213, 270 (1827).

³⁹ *Terry v. Anderson*, 95 U.S. 628, 633 (1877).

⁴⁰ *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

⁴¹ *Powell v. Pennsylvania*, 127 U.S. 678, 686 (1887).

⁴² *Mugler v. Kansas*, 123 U.S. 623, 662 (1887).

⁴³ *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893), reprinted in Thayer, *Legal Essays* 39 (1908).

a statute, a court should act as it does when asked to set aside a jury's verdict. That is, the court should set aside the statute, not on the basis of the court's private standard of what is reasonable, but only if it determines that no reasonable man could think the statute reasonable.⁴⁴ In a period when legislatures were combatting excessive and cruel economic laissez-faire, Thayer was arguing for judicial laissez-faire as a constitutional attitude in opposition to the acceptance of economic laissez-faire as a constitutional principle.

But Thayer had another purpose. In 1901, he wrote: "The power of the judiciary to disregard unconstitutional legislation . . . , even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors."⁴⁵ If, for example, the Supreme Court had held the Legal Tender Act unconstitutional, "we should have been saved some trouble and some harm. But . . . the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, . . . from . . . the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all,—all of this far more than out-weighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature."⁴⁶ The tendency of a common and easy resort to this great function [of invalidating statutes] now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."

Thayer was saying, in effect, that our democratic constitutions contemplate an adult, mature society, in which no one will play father to the citizens, treating them like children. For only in such a society, where the citizens, after discussion, reach their own policy decisions, to be enacted through their chosen representatives in the legislature, can the citizens grow up politically.

The federal Constitution does, indeed, contain restrictions on governmental officials, including legislators. Where those restrictions are fairly specific, the courts, said Thayer, properly enforce them. Where, however, they are vague—e.g., "due process" as applied not procedurally but to substantive legislation—the courts, Thayer argued, should be most reluctant to interfere

⁴⁴ 7 Harv. L. Rev. 129, 149–50 (1893); 1 Cases on Constitutional Law 672 (1895).

⁴⁵ John Marshall 106–107 (1901).

⁴⁶ Thayer admired and cited Bagehot, who, in *Physics and Politics* (1869), had applauded "government by discussion" which fosters a "diffused disposition" toward weighing evidence, a conviction that much may be said on every side of everything which more fanatic ages of the world wanted. A "polity of discussion" tends to cure an inherited excess of human nature, said Bagehot, and leads to "animated moderation." It enlivens thought all through society, making people think no harm can come of thinking. Moreover, it has developed more kinds of people ready to use their mental energy in their own way than would a despotic government.

paternally, since the Constitution looks primarily to self-government, not to citizens in pupillage to the judges.

Where the opposite theory may lead, we can discern in Berman's recent discussion of Soviet justice, disclosing dictatorship in action. The "underlying assumption," he writes, is that the "subject of law, legal man, is not a mature, independent adult . . . but an immature, dependent child or youth, whose law-consciousness must be guided, trained, and disciplined by official legal rules and processes. . . . The Soviet lawmaker or judge is like a parent." The Soviet legal system "may best be characterized as a system of 'parental law' in which people are treated . . . as immature, dependent youths . . . for whom rights . . . are . . . gifts." The system is "dangerous not because it is lacking in law and justice, but rather because it is developing a new type of law which, while helping to satisfy men's need for justice in their personal and social relations, is reconcilable with political and ideological tyranny." For it rests on the basis that rights "are conferred by the state as a matter of grace."⁴⁷

Before I go further in considering Thayer's influence on Learned Hand, it may be well to indicate my own attitude to Thayer's thesis, since it bears on my attitude towards Judge Hand. Some 25 years ago, and before I had read Thayer, I published a book in which I envisioned a mature society where emotional father-dependence would vanish after childhood, in which each grown-up man would become, so to speak, his own father and thus eliminate the need for fatherly authority among adults.⁴⁸ This comes close to Thayer's thesis.⁴⁹

Learned Hand and Judicial Review

If elsewhere Judge Hand has sometimes steered by his own personal notions of justice, unquestionably, when it came to questions of constitutionality,

⁴⁷ Soviet Justice and Soviet Tyranny, 55 Col. L. Rev. 795, 803-806 (1955).

⁴⁸ Consult Law and the Modern Mind (1930). Consult also Bienenfeld, Rediscovery of Justice (1947), reviewed by me in 38 Calif. L. Rev. 351 (1950).

⁴⁹ It is also close to a theme of Judge Hand's, who wrote in 1932: "And so when I hear so much impatient and irritable complaint, so much readiness to replace what we have by guardians for us all, those supermen, evoked somewhere from the clouds, whom none have seen and none are ready to name, I lapse into a dream, as it were. I see children playing on the grass; their voices are shrill and discordant as children's are; they are restive and quarrelsome; they cannot agree to any common plan; their play annoys them; it goes so poorly. And one says, let us make Jack the master; Jack knows all about it; Jack will tell us what each is to do and we shall all agree. But Jack is like all the rest; Helen is discontented with her part and Henry with his, and soon they fall again into their old state. No, the children must learn to play by themselves; there is no Jack the master. And in the end slowly and with infinite disappointment they do learn a little; they learn to forbear, to reckon with another, accept a little where they wanted much, to live and let live, to yield when they must yield; perhaps, we may hope, not to take all they can. But the condition is that they shall be willing at least to listen to one another, to get the habit of pooling their wishes. Somehow or other they must do this, if the play is to go on; maybe it will not, but there is no Jack, in or out of the box, who can come to straighten the game." Democracy: Its Presumptions and Realities, in *The Spirit of Liberty* 90, 99-100 (Dilliard ed., 2d ed., 1953).

he has been unwaveringly faithful to his creed about the limited role of judges in a democracy.

The undemocratic judicial destruction of social legislation, via unconstitutionality, criticized by Thayer in 1891, did not abate after Learned Hand became a lawyer. The courts, state and federal, largely regarded themselves as uncontrollable super-legislatures or, as Mr. Justice Clifford, protesting, had put it, "sovereign over both the Constitution and the people," converting "the government into a judicial despotism."⁵⁰

The courts, Holmes said in 1897, were responding to the fear of socialism on the part of the "comfortable classes of the community" who no longer hoped "to control the legislatures" but looked "to the courts as expounders of the Constitution"; in "some courts," Holmes added, "new principles have been discovered," outside the Constitution, which might be "generalized into acceptance of economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think . . . right."⁵¹

Holmes's analysis was justified. In 1889, Peckham, then on the highest New York court, and later to become a Supreme Court justice, said that a statute fixing the rates of elevators was "vicious in its nature, communistic in its tendency."⁵² That statement echoed the sentiments of Tiedeman who, in an influential constitutional treatise published in 1886, wrote that Socialism and Communism were "rampant throughout the civilized world;" that the "conservative classes" in America were threatened by an "absolutism more tyrannical . . . than any before experienced by man, the absolutism of a democratic majority"; and that the Constitution was opposed to such "democratic absolutism."⁵³ In 1894, the Supreme Court, with the plaudits of most leaders of the bar, destroyed the federal income-tax law; some of the Justices deemed it communistic.⁵⁴ In 1905, in the famous *Lochner* case, the Supreme Court (per Justice Peckham) vetoed a state statute limiting the working hours of employees in bakeries.⁵⁵

In 1908, aged 36, a year before he became a district judge, and after some twelve years at the Bar, Learned Hand, in an article on the constitutionality of state eight-hours-of-labor statutes,⁵⁶ boldly followed Thayer, and perhaps went even further. He agreed with what Shattuck (Thayer's former law partner) had written in 1891, i.e., that the courts had usurped power when they construed "liberty" in the due process clauses of the 5th and 14th Amendments

⁵⁰ *Loan Association v. Topeka*, 20 Wall. (U.S.) 655, 669 (1874).

⁵¹ *The Path of the Law*, in *Collected Legal Papers* 167, 184 (1920).

⁵² *People v. Budd*, 117 N.Y. 1, 71, 22 N.E. 670, 695 (1889).

⁵³ *Limitations of Police Power* vii-viii (1886).

⁵⁴ *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

⁵⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

⁵⁶ *Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495, 498 (1908).

to include "liberty of contract." Hand said that the Supreme Court at one time had held that the "legislature was free to act as it thought best" in legislation on matters which actually affected the "public good" or "public welfare," and that the Court would interfere only if it was obvious that the legislature had acted but colorably (i.e., dishonestly). He clearly indicated that, in his opinion, such was the proper outer limit of judicial review under the due-process clause as to regulatory legislation. He pointed out, however, that the Court later had held that it could and would examine the expediency of a statute. He thought such a standard unjustified. But, if one assumed its propriety, then (following Thayer) he urged that the Court should use the analogy of a judge reviewing a jury's "verdict on the facts": "Only in those cases in which it is obvious beyond peradventure that the statute was the result, either of passion or of ignorance or folly, can the Court say that it was not due process of law." Then (perhaps here going beyond Thayer), he questioned whether even such judicial power—i.e., to veto legislation "with whose economic or political expediency" the Court "totally disagrees"—can endure in a democratic state; in the end, the exercise of such a judicial veto "may demand some change, either in the Court or the Constitution." But until then, he declared, the Court should sustain as constitutional a statute limiting work to eight hours, unless the Court could not see "any reasonable relation to any purpose which reasonable men may think desirable for the public welfare"; it "must be shown that . . . no one could reasonably believe it expedient, in other words, that it was either absurd or oppressive." Pretty plainly, Learned Hand then believed that, concerning due process as to social and economic legislation, our courts should accept, substantially, the English principle of legislative supremacy.

The Supreme Court's decisions aroused the ire of ex-President Theodore Roosevelt. In 1912, he angrily complained that the judiciary had virtually closed "the path to industrial, economic and social reform." In the Bull Moose campaign of that year, in which he ran as a third-party candidate for the presidency against President Taft and Woodrow Wilson, Roosevelt came out for the "recall of decisions," an idea once suggested by John Marshall, i.e., the Constitution should be amended to provide in effect that, if the Supreme Court nullified a statute, then, if Congress re-enacted it, the statute would become valid despite the Court. In advancing this proposal, Roosevelt referred to Thayer's writings.

Although appointed a federal district judge by President Taft in 1909, Learned Hand lined up with Roosevelt. He had had sent to Roosevelt, while the latter was abroad, a copy of Herbert Croly's book, *The Promise of American Life*, which became the basis of much of the Bull Moose political platform. Judge Hand supported Roosevelt in the 1912 campaign. He was, I think, then in favor of the "recall of decisions." In 1913, Judge Hand himself ran (un-

successfully) on the Bull Moose ticket for the post of Chief Judge of the New York Court of Appeals.

Three years later, in 1916, still a federal judge, he again expressed his indignation at undemocratic decisions, in an article, *The Speech of Justice*.⁵⁷ He warned the judges and lawyers to discontinue thwarting the will of those not possessed of "property" by adhering always to old precedents and by narrow interpretations of new statutes favorable to labor. Here Judge Hand, aged 44, once more disclosed himself as an eager advocate of the lesson he had learned from Thayer. He never forgot that lesson. It was underscored when, in the 1920's and early 1930's, the Supreme Court demolished statute after statute which obviously had wide public approval, some of them apparently indispensable to the very economic existence of the country.

Judge Hand, however, has been a doughty defender of the procedural provisions of the Constitution, whether contained in the Bill of Rights or elsewhere. Read, for instance, his dissenting opinion in the second Remington perjury case.⁵⁸ In particular, he has, in his decisions, enforced rigorously the Fourth Amendment's prohibition of unreasonable searches and seizures; our kind of society, he believes, cannot survive unless the courts prevent such incursions on the individual's privacy.

But, thanks to Thayer's teaching, Judge Hand has, I think, never except once—and then only because he felt bound by Supreme Court decisions—held unconstitutional any federal statute not dealing with procedure.⁵⁹ He has used his considerable ingenuity to avoid such a result.⁶⁰

Repeatedly, he has said that, except in its procedural provisions, our Bill of Rights with its "imprecise" provisions, such as the First Amendment, contains no more than "moral adjurations," mere "counsels of moderation," sententious phrases, not like laws which courts can or should enforce. In 1930, in a judicial opinion, he described these as provisions representing "a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction."⁶¹ Eloquently, he has spoken against the hope that courts, in anything they do, can be the saviors of democracy. You hear clear echoes of Thayer in his assertion, in 1942, that a "society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting on the courts the nurture of that spirit, that spirit in the end will perish." The "spirit of moderation" entails, he declaimed, a "faith in the sacredness of the individual." It "is idle to seek shelter" for

⁵⁷ *The Spirit of Liberty* 13 (Dilliard ed., 2d ed., 1953).

⁵⁸ *United States v. Remington*, 208 F.2d 567 (C.A.2d, 1953).

⁵⁹ *United States v. A.L.A. Schecter Poultry Corp.*, 76 F.2d 617 (C.A.2d, 1935).

⁶⁰ See, e.g., *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88 (C.A.2d, 1953).

⁶¹ *Daniel Reeves, Inc. v. Anderson*, 43 F.2d 679, 682 (C.A.2d, 1930).

that spirit and that faith "in a court room." They "cannot be imposed; . . . decisions will not maintain them."⁶² Again in 1944, he said, "I often wonder whether we do not rest our hopes too much upon constitutions . . . 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 court can save it; no constitution, . . . no court can even do much to help it."⁶³

Judge Hand's interpretation of Thayer's thesis relative to constitutional issues is not necessarily the sole interpretation, for others of Thayer's adherents have interpreted it differently. In many of the years when the Supreme Court was mowing down statutes, three Justices—Holmes, Brandeis and (after 1925) Stone—in dissenting opinions expressed the Thayer view. Most of those cases related to statutes affecting rights of "property." In those cases, Holmes and Brandeis insisted on the presumption of constitutionality, as did Stone after he became a Justice. But, when a statute invaded the province of free speech, or freedom of religious worship, they accorded it no such presumption.⁶⁴ Such questions usually arose under the Fourteenth Amendment, which, so the Supreme Court held, embodied the First Amendment's provisions forbidding the enactment of any law respecting the "free exercise of religion" or "abridging the freedom of speech or of the press." Holmes and Brandeis were charged with inconsistency, with applying a double standard.⁶⁵ Without doubt, they faced an apparent dilemma from which, verbally, they never exited.

It was Stone, after Holmes and Brandeis had left the Court, who found the verbal exit from the dilemma. Without mentioning Thayer, he invented a formula which I happen to think was clearly implicit in what Thayer had written. Thayer, you'll remember, had maintained that the vice of judicial demolition of legislation was that it prevented public discussion of policies, thereby keeping the people from attaining that political maturity which democracy required. Stone, in 1938, in the *Carolene Products* case, suggested that, as to any statute which would seriously impede the democratic process, there should be virtually a presumption of invalidity, that perhaps "legislation which restricts these political processes, which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting scrutiny . . . than are most other types of legislation."⁶⁶

Stone developed that idea, in 1940, in his dissenting opinion in the first "flag-salute" case, involving the validity of a statute affecting, so Stone said,

⁶² The Contribution of an Independent Judiciary, in *The Spirit of Liberty* 155, 164 (Dilliard ed., 2d ed., 1953).

⁶³ In *The Spirit of Liberty*, id., at 189.

⁶⁴ See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925).

⁶⁵ Consult, e.g., Corwin, *Liberty against Government* 156 n.63 (1948).

⁶⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

the Jehovah's Witnesses' freedom of religious worship. There, citing *Carolene Products*, he said: "We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against . . . minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities." The specific character of the "constitutional guaranties of civil liberties" as to "freedom of speech and religion" meant that the courts must not permit a legislature the latitude which it must be allowed "when no question of civil liberties is involved." I cannot perceive, he continued, "that in prescribing, as limitations upon the powers of government, the freedom of mind and spirit secured by the explicit guaranties of speech and religion, [the framers] intended . . . any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection. . . . The Constitution expresses . . . a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist."⁶⁷ In another dissenting opinion, Stone referred to the freedoms specified by the First Amendment as having a "preferred position."⁶⁸

Most surprisingly, Judge Hand, in a paper on Stone, published in 1946, shortly after Stone's death,⁶⁹ completely ignored the Holmes-Brandeis dichotomy between free-speech and "property cases," and also Stone's explicit restatement of Thayer. Judge Hand began this paper by relating how Holmes and Brandeis adopted Thayerism. "Their notion," he wrote, was that the Bill of Rights, in its vaguer provisions, "could not be treated like ordinary law; its directions were to be treated rather as admonitions of forbearance," as "merely a counsel of perfection and an ideal of temperance . . . whose infractions were . . . only . . . a matter of regret" not violations of the Constitution, that those provisions "forbade" only "statutes . . . which were so utterly outrageous that nobody could give" them "any rational support," and scarcely ever was such a statute enacted.

Judge Hand went on, correctly, to say that Stone, too, as a Justice, had adopted the Thayer thesis. For, in Stone's famous dissenting opinion in the *A.A.A.* case in 1936, he declared that the Court's majority, in knocking out the statute, were enforcing "their own predilections." "For the removal of unwise laws from the statute book," wrote Stone, "appeal should be not to the courts but to the ballot and to the processes of democratic government."⁷⁰ Stone was taking his Thayer straight.

⁶⁷ *Minersville School District v. Gobitis*, 310 U.S. 586, 605-606 (1940).

⁶⁸ *Jones v. Opelika*, 316 U.S. 584, 600, 608 (1942). Consult Dunham, Mr. Chief Justice Stone, in Dunham and Kurland eds., Mr. Justice 47, 60-63 (1956).

⁶⁹ Chief Justice Stone's Concept of the Judicial Function, in *The Spirit of Liberty* 201 (Dilliard ed., 2d ed., 1953).

⁷⁰ *United States v. Butler*, 297 U.S. 1, 79 (1936).

So far so good. Now note Judge Hand's curious version of what happened in the free-speech and freedom-of-religion cases. Beginning, he said, in the later 1930's, with new Justices appointed by President Franklin Roosevelt, the Supreme Court's former minority view became that of a majority. The Thayer principle of judicial hands-off statutory validity was now dominant. Previously, said Judge Hand, the battle relative to this principle had been fought almost entirely over the constitutionality of statutes invading "property" rights. But, according to Judge Hand, there now arose a question theretofore little considered: did not the Thayer thesis apply also to statutes interfering with so-called "personal rights"—notably legislation interfering with free speech and freedom of worship? As Judge Hand told the story, Stone, always insisting on a "consistent application" of the Thayer hands-off principle, "could not understand how the principle which he had all along supported" could be differently applied when statutes dealt "with interests other than property," since to make such a differentiation would be to allow the judges, in respect of such statutes, to enforce "their own predilections." Judge Hand concluded that, because Stone "was throughout true to this view that . . . we should especially remember him with gratitude, and honor him as a judge."⁷¹

Here we have Judge Hand depicting Stone as ever loyal to Judge Hand's version of Thayerism, and therefore as opposed to those Justices—Black, Douglas, Rutledge, Murphy, and (at times) Jackson—who, according to Judge Hand, used it inconsistently when they faced legislation interfering with free speech and freedom of religion.

A biography often is an unconscious autobiography. So Learned Hand, purporting to describe Harlan Stone, instead described Learned Hand. For Stone was guilty of what Judge Hand regards as an inconsistency. Judge Hand, in his account of Stone's constitutional views, disclosed a surprising blind spot—at precisely the point where Stone's views strikingly differed from his own. The Justices whose position in free-speech cases Judge Hand criticized, have often, since 1938, acted on Stone's restatement of Thayer.

If Judge Hand's description did not fit Stone, it did indeed fit Justice Frankfurter.⁷² In 1940, writing for the Court in the first "flag-salute" case, Frankfurter sustained the statute as not offending the First Amendment.⁷³ Three years later in the second flag-salute case⁷⁴ the Court over-ruled *Gobitis*. Now Frankfurter dissented. His reasoning was precisely that which Judge Hand applauds. The Court's power to nullify a statute, Frankfurter declared, "does not vary according to the provision of the Bill of Rights which is in-

⁷¹ Hand, *op. cit.* *supra* note 69, at 206, 207.

⁷² Justice Frankfurter's position on this issue is to be explored by Professor Herbert Wechsler in the November, 1957 issue of the *Yale Law Journal*, a symposium in honor of Justice Frankfurter's seventy-fifth birthday.

⁷³ *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

⁷⁴ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

volved. . . . [E]ach specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected. . . . [E]ven though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making our laws is no less relevant or less exacting." When, said Frankfurter, Holmes wrote for the Court that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," he did not mean "that, for only some phases of civil government, this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. [Holmes] was stating . . . that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether . . . reasonable justification can be offered" for the legislation. The "narrow judicial authority to nullify legislation . . . is an undemocratic aspect of our scheme of government" since it "serves to prevent the full play of the democratic process." Accordingly, there must be "the greatest caution in" the use of that authority. Frankfurter then quoted at length a passage from one of Thayer's writings.⁷⁵

Frankfurter's reference in that opinion to Holmes was surprising. For Frankfurter, in 1939, just before he became a Supreme Court Justice, had published an article demonstrating that "Holmes was far more ready to find [unconstitutional] legislative invasion" in the field of "civil liberties" than "in the area of debatable economic reforms."⁷⁶

This brings me to the *Dennis* case.⁷⁷ As you know, it involved the conviction of some Communist Party leaders, under the Smith Act, for wilfully conspiring to "teach and advocate the overthrow and destruction" of the government "by force and violence" and "the duty" of so doing. In 1950, Judge Hand, on the appeal from this conviction, held for the Court of Appeals that the statute did not violate the First Amendment.⁷⁸ As an "inferior" judge, he had to deal with the "clear and present danger" test, a test contrived by Holmes and adopted by the Supreme Court in many decisions. Judge Hand interpreted this test to mean that, "In each case [courts] 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."

I shall not discuss this interpretation of "clear and present danger." I do again emphasize the fact of Judge Hand's belief, previously and subsequently expressed with vigor, that the courts should never treat non-procedural provisions of the Bill of Rights as judicially enforceable commands. Possessed of that

⁷⁵ *Id.*, at 648, 649, 650, 667.

⁷⁶ Mr. Justice Cardozo and Public Law, in *Law and Politics* 92 n.2 (1939).

⁷⁷ *Dennis v. United States*, 341 U.S. 494 (1951). This article, of course, was prepared without the benefit of the numerous opinions on the Smith Act handed down by the Supreme Court during the October Term, 1956.

⁷⁸ *United States v. Dennis*, 183 F.2d 201 (C.A.2d, 1950).

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.

In 1951, the Supreme Court affirmed Judge Hand's decision. Frankfurter wrote a concurring opinion. In effect, he rejected the "clear and present danger" test. Instead, he relied 100 per cent on his version of the Thayer doctrine. "The Smith Act and this conviction under it," he said, "no doubt restrict the exercise of free speech and assembly." He conceded that: "Suppressing advocacy of the overthrow [of the government by force] inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed." It "is self-delusion to think that we can punish [the defendants] for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the conviction before us we can hardly escape restriction on the interchange of ideas. We must not overlook," he went on, "the value of that interchange." The "liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge. Liberty of thought shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes. . . . Without open minds there can be no open society. And if society be not open, the spirit of man is mutilated and becomes enslaved."⁷⁹

Yet, in spite of these real dangers which he regarded as flowing from the statute, he concluded that the Court, acting democratically, could not declare it invalid. He described what, to him, was an inescapable paradox; the Court, "by recognizing the right of Congress to put some limitation upon expression," was seeking to "maintain and further" our democratic civilization, although "freedom of expression is the well-spring" of that civilization and although the Smith Act would undoubtedly, by creating fears, seriously impede free expression by non-communists not at all guilty of violating that statute. Nevertheless he asserted, "The democratic process . . . is not impaired or restricted" by the Smith Act. For he believed the Court was bound by his version of the Thayer principle. The Court, he said (quoting Brandeis and Holmes' dissenting in a case unrelated to free speech or the like)⁸⁰ must not become a "super-legislature." The Court can properly set aside the legislative judgment "only if there is no reasonable basis for it." Most explicitly he rejected Stone's statements, theretofore accepted by a majority of the Court in decisions he cited, "that our function in reviewing statutes restricting freedom of expression differs sharply from our normal duty in sitting in judgment on legislation."

Let me now bring you back for a moment to Stone's dissent in the first flag-salute case. There he observed that, in several previous cases, the Court had

⁷⁹ 341 U.S. 494, 517 (1951).

⁸⁰ *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924).

vetoed statutes restricting freedom of speech or worship where there were "other ways," other "alternatives," to "secure the legitimate state and without infringing the asserted immunity."⁸¹ Douglas, dissenting in the *Dennis* case, followed this lead. The government had argued, and the majority opinion made much of the argument, that the Communists had been guilty of "seditious conduct," of actions that were unlawful. Said Douglas, "There is a statute which makes seditious conspiracy unlawful," citing a statute which provides that it is a crime to "conspire to overthrow, put down, or destroy by force the Government of the United States." Had the defendants been convicted under that alternative statute, none of the fears inspired in other innocent citizens, as described by Frankfurter, would have ensued. The vice of the Smith Act, Douglas maintained, was that it criminalized advocacy—teaching, speech—not conduct. "Never until today," wrote Douglas, "has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct."⁸²

Well, there you have markedly divergent judicial views about the meaning of the Thayer principle. Learned Hand and Frankfurter construe it one way; Stone, Black, Douglas and others construe it another way.

I shall not express my own view of the *Dennis* decision. But I do feel that it is absurd to say, as some have said, that only Communist sympathizers will disagree with that decision or with the rationale Frankfurter there employed. Surely Justices Black and Douglas cannot be so characterized.⁸³

⁸¹ *Minersville School District v. Gobitis*, 310 U.S. 586, 603-604 (1940).

⁸² *Dennis v. United States*, 341 U.S. 494, 581, 584 (1951).

⁸³ I cite two eminent lawyers who have criticized the *Dennis* decision. Neither is, by any stretch of the imagination, a radical or subversive. Each detests, and is alive to the real internal threat of the purposes and conduct of the American Communist leaders; each believes that such conduct deserves severe punishment, but each regards the Smith Act as an unfortunate method of accomplishing that end. In 1953, about a year after the Supreme Court handed down the *Dennis* decision, Eugene Rostow took his stand with Stone. Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193 (1953). He deplored the notion that the judicial power to nullify legislation is undemocratic, that it has a "tainted" character. On the contrary, he asserted, the Supreme Court, in the exercise of this power, can have the "effect not of inhibiting but of releasing the dominantly democratic forces of American life." Had the Court reversed the conviction in *Dennis*, Dean Rostow maintained, it would have "forced the executive to prosecute the communists on the direct charge of a conspiracy to subvert the state" under another plainly valid statute. The Smith Act, which provided punishment not for so conspiring but for "teaching and advocating" subversion, embodied, Rostow observed, a principle which would have "jailed Calhoun" and "perhaps Thoreau." It would have jailed, too, "the participants in the Hartford convention" of the Federalists opposed to our 1812 war with England.

Professor Paul Freund, in 1953, also criticized *Dennis*, in the spirit of Stone's and Douglas' suggestions about alternative remedies. Freund, *Competing Freedoms in American Constitutional Law*, in *Conference on Freedom and the Law*, 13 U. of Chi. Conference Series 26 (1953). "The law," he wrote, "must be viewed in the light of the availability of less drastic means. . . . No one doubts that the leaders of a party which disciplines its members in espionage, sabotage and perjury, to say nothing of instruction in techniques of violence, can be punished for such activity. But the Smith Act was not so

In holding the Smith Act valid, Judge Hand, of course, did not remotely intimate that he deemed it desirable legislation. The truth is that he loathes the popular mood which induced the enactment of that act. In so saying, I do not rely on private conversations with me. I can point to several articles he published since *Dennis*.

In 1952, Judge Hand in effect admitted that the Constitution would not have been ratified, had it not then been promised that the Constitution would be amended promptly to include the Bill of Rights, and had it not then been believed that, as Judge Hand himself phrased it, all its provisions would be "mandates" against which "no statute should prevail."⁸⁴ There is every reason to think that statement historically accurate. Much popular opposition to the Constitution yielded only because of that promise and that belief. Moreover, such prominent men as Jefferson and Samuel Adams abandoned their grave doubts about ratification on the assurance that the courts would enforce the provisions of all the Amendments. When Madison, in the First Congress, advocated the first Ten Amendments, he said that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights stipulated for in the Constitution by the declaration of rights."

Why, then, one may ask, should not the courts respect that history which discloses that the First Amendment was intended to be a legal "mandate" and not solely a "moral adjuration?"

Judge Hand thinks it folly to believe that the courts can save democracy. Of course, they cannot. But it seems to me that here, most uncharacteristically, Judge Hand indulges in a judgment far too sweeping, one which rests on a too-sharp either-or, all-or-nothing, dichotomy. In a posthumously published book, Justice Jackson similarly objected to the idea "that the Court can . . . supply . . . some clear bulwark against all dangers and evils that today beset us internally," that the "protection of civil liberties" should be left "wholly to the

framed." Congress, he suggested, had inserted "the knife" too "far from the seat of the disturbance." The statute was "an excessively drastic curb on freedom of expression in order to reach an evil which could be attacked more directly. . . . What is disquieting is that the question of choice of means received such scant notice, and that the decision may support other restrictions on expression which would be unsupportable if subjected to a properly rigorous line of inquiry. . . . Indeed, for all that appears, it would seem that open advocacy of violent revolution, so far from producing the dangers apprehended, was rather a weakening factor in the life of the Party because of its repelling effect." Then Freund added a point which Morris Ernst has often urged, i.e., that "secrecy was the real threat." When speech is "covert," the "countercheck of the forum of ideas is by hypothesis lacking," wherefore "restrictions on such speech need not be subjected to a test . . . designed to foster open trading in ideas."

⁸⁴ A Plea for the Open Mind and Free Discussion, in *The Spirit of Liberty* 274, 277 (Dilliard ed., 2d ed., 1953).

judiciary.”⁸⁵ Obviously, the courts cannot do the whole job. But, just as obviously, they can sometimes help to arrest evil popular trends in their inception. Not only are the Supreme Court’s opinions educational in a general way; they have also had discernible practical effects in stopping undemocratic tendencies.⁸⁶

In a recent address,⁸⁷ Frankfurter, after quoting Judge Hand, noted, with marked pleasure, that no other English-speaking country has adopted anything like what Judge Hand calls the “imprecise” provisions of our Bill of Rights. Here Frankfurter virtually repeated something he had said in an article published in 1924,⁸⁸ i.e., that, without such provisions, “life and property [were] amply protected” in those countries, including South Africa. McWhinney pointedly comments: “There is perhaps today a special irony in the reference to South Africa.”⁸⁹ Only recently at the Yale Law School, we heard from a brilliant South African lawyer how, absent a Bill of Rights in that unhappy land, each time its courts had interpreted a statute to protect legal equality, the legislature had at once enacted legislation to wipe out the democratic decision. When our Supreme Court, acting pursuant to our Bill of Rights, invalidates such a discriminatory statute, our legislatures cannot validly emasculate the decision. Whether, if supported by a Bill of Rights, like ours, the South African Court’s decisions would have withstood the onslaughts of the regnant majority in the legislature, no one can say with certainty. But who can say that such decisions would not have done much to stem the terrifying growth of tyranny in that troubled land, a growth which, so many intelligent observers believe, may issue before long in a devastating civil war?

For a number of reasons, my own inclination is to disagree with Judge Hand’s position that the First Amendment represents merely a “moral adjuration” addressed solely to the people and their elected representatives. However, so profound is my respect for his wisdom in general that my disagreement with him on this subject disturbs me. So I warn you not to make up your minds without much reflection.

Learned Hand and “The Common Will”

Judge Hand’s reluctance to follow his own ideas of justice in opposition to the “common will,” has led him to decide some naturalization and deportation cases which have provoked the criticism of a wise lawyer-philosopher, Edmond Cahn, in general a warm admirer of Judge Hand. The statute requires that an

⁸⁵ The Supreme Court in the American System of Government 58 (1955).

⁸⁶ E.g., *Hague v. C.I.O.*, 307 U.S. 496 (1939). Consult also Freund, *op. cit. supra* note 83.

⁸⁷ John Marshall and the Judicial Function, in *Of Law and Men* 3 (Elman ed., 1956).

⁸⁸ The Red Terror of Judicial Reform, in *Law and Politics* 10, 16 (MacLeish & Prichard ed., 1939).

⁸⁹ The Dilemma of Judicial Policy Making, 39 Minn. L. Rev. 837, 847 n.22 (1955).

alien, to become a naturalized citizen, must show that, for the five years immediately preceding his filing of a naturalization petition, he "has been and still is a person of good moral character." It also provides for the deportation of an alien who has been guilty of a conduct involving "moral turpitude." Judge Hand has treated the two standards as substantially identical. In deciding cases under either section of the statute, he has held that a jury, not a judge, is "especially the organ" to supply "the social sense of what is right,"⁹⁰ "the moral demands of the community."⁹¹ The appropriate test is "the 'common conscience' prevalent at the time."⁹²

Cahn criticizes Judge Hand on two grounds:

(1) A judge can seldom find out the prevalent "'common conscience.'" Indeed, in some of his opinions, Judge Hand has so acknowledged, has admitted that no reliable opinion polls can inform the court of the "moral feelings prevalent in the community."

(2) Even if, says Cahn, the judge can ascertain those community feelings, he shirks his duty, if he shifts his responsibility to the community. "By subordinating his own moral principles to those of the marketplace," writes Cahn, "Judge Hand has seriously distorted the function of the court as pedagogue and moral mentor in a democratic society. I say he distorted the court's function, because instead of exercising such influence as he could to raise the morals of the community to a level approaching his own, he expressed rather an attitude of resignation. . . . By means of its legislation, the community says to the judge, 'Ascertain whether this man, has had a good moral character. . . .' Judge Hand's rationale would send that task back to the community."⁹³ Cahn thinks the judge should be ready to shoulder the responsibility which the statute "imposes on him."

William James once said that "a very real [moral] dilemma is . . . a unique situation. . . ." In 1951, Judge Hand, in one of the naturalization cases, repeated this sentiment, saying that "almost every moral situation is unique."⁹⁴ Wherefore Cahn comments that, in determining whether a particular man has a "good moral character," there can be no community opinion, because the community, unlike a judge deciding that particular man's case, cannot have any attitude about that particular man's character. It is the judge's duty, says Cahn, to evaluate "the whole human personality that stands before him." The "community cannot conceivably know the myriad circumstances [of a unique individual biography]. The community may possibly pass an informed judgment on a single act; . . . [it] can never have the knowledge

⁹⁰ *United States v. Kennerley*, 209 Fed. 119, 121 (S.D. N.Y., 1913).

⁹¹ *United States v. Levine*, 83 F.2d 156, 157 (C.A.2d, 1936).

⁹² *Johnson v. United States*, 186 F.2d 588, 590 (C.A.2d, 1951).

⁹³ *Moral Decision: Right and Wrong in the Light of American Law* 300 et seq. (1955).

⁹⁴ *Johnson v. United States*, 186 F.2d 588, 590 (C.A.2d, 1951).

which the judge must glean and assemble in order to pass judgment on the totality known as 'character.'" The judge should take into account "[all] considerations having to do with upbringing, background, environment, and temptation; [all] considerations antecedent to the intention that accompanied the act; [all] considerations of reformation and personal rehabilitation; and [all] those most sacred considerations associated with repentance, mercy and forgiveness."⁹⁵

Fair enough. But I would ask Cahn whether the judge can competently discharge that duty. Any discerning evaluation of a man's character would require a deep psychological probing of the man, a probing for which our present judicial techniques are hopelessly deficient. They might well be supplemented by calling in psychiatrists; but, as yet, the psychiatrists are at odds with one another concerning the methods of evaluating character. So, today the judge who judges à la Cahn engages in guesswork. Cahn escapes Judge Hand's dilemma but, as matters now stand, encounters another equally baffling dilemma.

Cahn himself notes a difference between (1) saying that good character means "as good in . . . character as the average citizen" and (2) saying that it means "good according to the judgment of the average . . . citizen." The distinction is a real one: The average citizen may demand a character, for purposes of naturalization, better than his own. So it may be, in the case of a judge whose moral standards—as revealed by his conduct or his proclivities—are lower than the community's average, that the administration of justice will improve if he accepts the admonition to consult the community's morality. Yet I admit that such an admonition may encourage such a judge to become "pharisaical." Remember what Jesus said about the need to look at "the inside of the cup." Doesn't modern psychology disclose the danger that one may be excessively harsh in judging others whose conduct resembles that in which he has himself indulged or secretly longs to indulge? A troubled conscience can make a man a bigot as a judge. Shakespeare, centuries before "modern psychology," so perceived in *Measure For Measure*.

Cahn would say that, with such a judge as Learned Hand, the danger is just the opposite: highly sensitive and reflective, Judge Hand surrenders his exquisitely fine compassionate judgments to those that are crudely insensitive.

Whether or not you agree with Cahn's criticism of Judge Hand's decisions in the "good moral character" cases, I trust you'll recognize that Judge Hand's motive in those decisions springs from what Cahn terms his "democratic loyalty." Although Judge Hand usually finds the community standards undiscoverable in such cases, the reference to them does serve as a check on the assertion of his personal predilections. Important here is his distrust of his own infallibility. He likes to quote Cromwell: "I beseech you, man, in the bowels of Christ, have you never been wrong."

⁹⁵ Cahn, *op. cit.* *supra* note 93, at 309.

Tolerance in a judge, Judge Hand believes, breeds dispassionateness, detachment, essential to good judging. In a singularly insightful passage, stirred perhaps by the writings of the psychoanalysts, he wrote: "There are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted, always reveal a passion foundation. Even so; though they be throughout the creatures of past emotional experience, it does not follow that that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crisis, as any other bias."⁹⁶

He knows, however, that no man can always successfully control his deepest prejudices. So he is constantly watchful of, on guard against, his own. As nearly as any mortal can be, he is passionately dispassionate.

He opposes, vehemently, the idea that any eternal principles of justice exist. He does, also vehemently, insist that every society has fundamental attitudes. Those which our society has evolved, he treasures. Should they vanish, we will be in sad straits, he thinks. And today sometimes he apprehends that they may vanish, blown away in the current hurricanes of social intolerance. Nevertheless, it is one of his deepest convictions that judges cannot, and must not try—as judges—to save our people from their follies.

He has not, as a judge, always rejected his own judgments of what is right in favor of lower popular evaluations. I could point to many cases in which he has set his sights higher than the crowd's. In 1952, after expressing his scorn for the sort of judge who, disregarding the established legal rules, acts as a crusader for righteousness, Judge Hand confessed that sometimes he had "brought about desirable results at the expense of the rules, however flexibly one might interpret them."

Cahn could have found support for part of his criticism in Judge Hand's own writings. Thus you may recall that in his 1933 discussion,⁹⁷ Judge Learned Hand spoke of the belief of those who wrote the Constitution, in a "government by the people," through their legislatures, which would "express the common will." You might think that he glibly or naïvely slid over the concept of the "common will." But there he was talking popularly and in simple terms. Previously, he had twice searchingly considered that concept.

In 1932, he wrote that the "notion of a common will" had always "teased [the] political philosophers." He called it a "fiction," and said: "Just where that will resides, or how it is made manifest, is not too plain. . . ."⁹⁸ In 1929, he had explored the subject more intensively, asking "*Is There a Common Will?*" "If," he said, "by common will we mean the assent of a majority of men and women alive today," it "can be demonstrated that there is nothing of

⁹⁶ Thomas Walter Swan, in *The Spirit of Liberty* 209, 218 (Dilliard ed., 2d ed., 1953).

⁹⁷ How Far is a Judge Free in Rendering a Decision, in *The Spirit of Liberty* 103 (Dilliard ed., 2d ed., 1953). See pp. 682-84 *supra*.

⁹⁸ Democracy: Its Presumptions and Realities, in *The Spirit of Liberty*, 90, 95 (Dilliard ed., 2d ed., 1953).

the kind." The "fact [is] that much of the law which governs the lives (citizens) is the *result* of compromises of conflicts long since dead. . . . To impute to [those now living] any actual assent is to create a fabulous entity. . . . Our common law is the stock instance of a combination of custom and its successive adaptations. The judges receive it and profess to treat it as authoritative, while they gently mould it the better to fit changed ideas. . . . Sometimes for this reason we speak of the judges as representing a common will, and this was more nearly true before the advent of democracy, since they were of the class which alone had political power. It is a fiction to say so now." The judges "are not charged with power to decide the major conflicts." The legislature resolves them. But even if we were to say that in the legislature "we have an expression of the common will," we "should be wrong again." Some statutes do "carry something like the assent of a majority. But most legislation is not of that kind; it represents the insistence of a compact formidable minority. . . . The truth appears to be that what we mean by a common will is no more than that there shall be an available peaceful means by which law may be changed when it becomes irksome to enough powerful people who can make their will effective. We may say if we like that meanwhile everybody has consented to what exists, but this is fiction. They have not. . . ."

"Assuming it to exist at all, there is nothing more impalpable, nebulous and fugitive than the common will, as any political doctor will agree. . . . We can only ascertain it by counting noses, and when we have counted we do not agree on the meaning of the result."

What, then, is Judge Hand's answer to his own question concerning the existence of the common will? Here it is: "Of the contrivances which mankind has devised to lift itself from savagery, there are few to compare with the habit of assent, not to a factitious common will, but to the law as it is. We need not go so far as Hobbes, though we should do well to remember the bitter experience which made him so docile. Yet we can say with him that the state of nature is 'short, brutish and nasty,' and that it chiefly differs from civilized society in that the will of each is by habit and training tuned to accept some public, fixed and ascertainable standard of reference by which conduct can be judged and to which in the main it will conform." That standard, Judge Hand concluded, is to be found in what he called the "law."⁹⁹

Learned Hand and Natural Law

A great man, such as Learned Hand, we should prize. Yet—as I'm sure he would tell you—you should beware lest you do him an ill-service by so venerating him that he will stand in the way of those who come after him, paralyzing them through awe of his achievements. Some men, wrote 17th

⁹⁹ Id., at 47, 51-52.

century John Donne, "do not fill the place they are raised to"; but another man may "over-fill his place. He may bring so much justice, so much integrity, to fill the place as shall . . . burthen the place . . ." and so become "a burthen upon his successor to proceed by example. . . ."

Learned Hand would be the last to claim perfection. Being human, he has his faults, of course. But no other judge has contributed as much of enduring value to his civilization. To borrow the words of Anatole France, "We owe him the gratitude due to minds that have fought against prejudices. . . . Men are rare who are free from the prejudices of their period, and look squarely at what the crowd dares not face." Judge Hand has a kind of courage seldom described and too seldom manifested—the courage to accept the fact that, as man is but a finite creature, there are some incurable defects in the solution of most human problems, and that life presents to us challenging uncertainties. This fact does not daunt him, soften him into a flabby defeatist, or harden him into a crusty cynic. A true liberal, he is no dogmatist. Himself dwelling in a temperate zone of attitudes, he has doubts about those who prefer the intemperate zones—excessively hot or excessively cold. He believes in government by discussion, agreeing with Pericles about the virtues of Athenian democracy when he said: "Instead of looking on discussion as a stumbling block in the way of action, we think it an indispensable preliminary to any wise action at all." Such a liberal has no list of fixed particularized ideas on which he insists as always wholly right or wholly wrong. He does not, phonograph-like, rattle off, with an air of infallibility, a long series of do's and don't's applicable in all circumstances. He is no slogan-addict. He looks upon liberalism as a mood, not as a system or a catalogue of precise commands. Nor will he forget that irrational extra-legal restraints may tyrannically do more than the edicts of government to narrow liberty; that among such extra-legal restraints are the irrational biased stereotypes of private groups, including the orthodox heresies and conformity-demanding taboos of rigid-minded pseudo-liberals.

Some persons denounce one who, like Learned Hand, accepts the fact of life's uncertainties, who fearlessly confronts man's limitations as a finite, mortal, human being. Themselves unable courageously to look at life as a drama full of contingencies, they resent it that any other can live without some assurance of cosmic guaranties.

This brings me, once more, to discuss Judge Hand's rejection of the idea of eternal principles of justice or morality. In this, he resembles Holmes. Since Holmes has been berated, on that account, as dangerously immoral, as an exponent of a cynical, sceptical, philosophy which leads to totalitarianism,¹⁰⁰ doubtless, ere long, Judge Hand will be similarly assaulted. I shall

¹⁰⁰ Consult, e.g., McKinnon, *The Secret of Mr. Justice Holmes: An Analysis*, 36 A.B.A.J. 261 (1950); Palmer, *Holmes, Hobbes, and Hitler*, 31 A.B.A.J. 569 (1945).

not here defend his repudiation of any form of Natural Law. I shall, however, question the suggestion that such a repudiation necessarily yields immoral, unjust, undemocratic conclusions.

I might begin with a counter-suggestion, by asking: Does adherence to a Natural-Law philosophy ensure morality, justice, devotion to democracy? Certainly not. Judge Manton adhered to that philosophy, and Judge Manton went to jail for taking bribes. The Italian philosopher, Del Vecchio, preached one version of Natural Law—and became a sponsor of Mussolini. Thomas Aquinas, the leading Natural-Law philosopher, approved submission to despots. The lands which, in our times, succumbed to dictatorship were those where anti-relativism was far more popular than in those which resisted the dictators, e.g., America, in which flourished the pragmatism of William James, the arch-advocate of democracy and the dignity of the individual. I grant at once the unfairness of such an argument. I advance it merely to show the unfairness of those who assail men like Holmes or Hand because they do not espouse Natural Law.

It can be demonstrated that moral relativism neither implies nor induces cynicism or moral indifference. "Why," asks Oppenheim, "should an ethical relativist who has adopted the credo of democracy necessarily be a less enthusiastic defender of his convictions than a philosophic absolutist who claims these convictions correspond to absolute truth? In Europe, the most ardent defenders of the democratic principle of individual dignity against the attacks by absolute monarchy, and subsequently by totalitarianism of the Right and Left, have come from the ranks of the liberal movements" whose "background has been traditionally one . . . of ethical relativism."¹⁰¹ To "hold that value judgments cannot be *validated*, does not preclude anyone from *making* them," or mean that to utter them is meaningless.

Chesterton said that a man's philosophy is the most important fact about him. Once I endorsed that statement. I have come to doubt its wisdom, unless most carefully interpreted. For one should, I think, distinguish a man's formal philosophy from his actual working creed.¹⁰² Influenced by their social heritage, or their teachers, men adopt, and express loyalty to, some particular system of ethics, or metaphysics, or ontology, or epistemology. Yet many a man, in the actual conduct of his life, negates the system to which he avows adherence. He takes over the language of some philosophic school, yet his verbal loyalty does not signify his acceptance of its spirit. He adjusts the system to his own unique inner needs, the product of his peculiar make-up and of his singular reactions to his experience. An ideal, become institutionalized, has many adherents who, while appearing, even to themselves, to

¹⁰¹ Oppenheim, *Relativism, Absolutism, and Democracy*, 44 *Am. Pol. Sci. Rev.* 951, 958 (1950).

¹⁰² Cf. Ramsdell, *Communication from a Christian Perspective*, 50 *Relig. Education* 335, 336 (1955).

accept it, inwardly dissent in varying degrees.¹⁰³ We all know men who talk like absolutists and act like relativists, or talk relativism but act on what they deem unalterable dogma. For example, as I've tried to show elsewhere,¹⁰⁴ Aristotle was a better legal pragmatist than John Dewey. It is notable that the "right wing" of a philosophic school is often closer to the "left wing" of an opposing school than to its own "left wing."

In short, when looking to a man's philosophy as a key to his character, one should search beneath his formal, spoken, avowals to discover, if one can, his living philosophy. I ask, then, whether any of Judge Hand's judicial decisions would have been one whit different had he talked in terms of Natural Law, had he declared a belief in eternal principles of morality or justice? I can think of none. In this respect, at least, any sensible person should be a pragmatist. For pragmatism, wrote C. S. Peirce, "is only an application of the sole principle of logic which was recommended by Jesus: 'Ye may know them by their fruits.'"¹⁰⁵

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 and an understanding of his fellow-creatures, like him, humanly fallible. I commend him to you as a great man and as our wisest judge.

¹⁰³ Consult *Fate and Freedom* 103 (1945).

¹⁰⁴ *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle*, 25 *Notre Dame Lawyer* 207, 460 (1950).

¹⁰⁵ 5 Peirce, *Collected Papers* 402 n.2 (1934).