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Robert S. Lancaster

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JUDGE LEARNED HAND AND THE LIMITS OF JUDICIAL DISCRETION

ROBERT S. LANCASTER*

Learned Hand stands among the great judges of the Anglo-American legal tradition. He is pre-eminently the judge's judge. His long judicial career, spanning one of the crucial periods in the development of American law, and his long service on the bench in a circuit where crucial legal issues come into final focus and where a major part of the commercial law of the nation is first enunciated and explained, peculiarly fit him for the task of explaining the judge's function in the American system of law and the court's role in our jural order. His own legal experience, his non-official writings, brief as they are, and his official opinions are the sources from which his views as to the limits of judicial discretion may be determined.

Sir Frederic Pollock has said that "the duty of the courts is to keep the rules of law in harmony with the enlightened common sense of the nation,"[1] for the accomplishment of which caution and valor are both needed, caution in making advances which have not become generally acceptable and valor in dispensing with technical difficulties and in overriding what is merely a show of authority on the part of current opinion. If this be the true measure of judicial activity, certainly Judge Learned Hand has filled nicely the judge's role. He has achieved this happy balance between caution and valor which is at once the hallmark and the insignium of merit of great judges.

Like Oliver Wendell Holmes, from whom he drew inspiration and judicial comfort, Learned Hand is hard to classify. He belongs to no school of jurisprudence; he is old-fashioned enough to believe in legal principles and modern enough to recognize as a fact the creative activity of the judiciary in moulding the law to fit new circumstances and in shaping its growth in accordance with the drive and movement of the times. Fortunately, he has expressed his views in his speeches and non-legal writings; but, had he remained silent in these respects, his more than two thousand opinions would have revealed his con-

* Professor of Political Science and Dean of Men, University of the South, Sewanee, Tennessee; Exchange Professor of Comparative Government and Political Theory, University of Baghdad, Iraq, 1955-56.

1. Pollock, *Judicial Caution and Valor,* 45 L.Q. REV. 293, 295 (1929).

victions to the scholar persistent enough to explore the record of his intellectual and judicial activity. It remains to determine their substance and scope and to measure his official practices and pronouncements as against his unofficial statements.

LEARNED HAND'S VIEWS ON THE FUNCTION OF THE JUDICIARY[2]

Judge Hand has stated his conception of the nature and limits of the judicial function in a few articles contributed over the years to legal periodicals, in his speeches, and in his opinions. In 1916 he contributed an article to the *Harvard Law Review* entitled "The Speech of Justice" in which he examined briefly the nature of the judge's work and the proper scope of his creative activity. This article came at a time when the courts were quite generally under the influence of conservative opinion and were freezing the attempts of assemblies of the people to cope with the new problems of an expanding industrial society. The dominant influences were then demanding that judges should adopt a passive role, remain loyal to the law as it was written and refrain from encouraging by judicial interpretation the aspirations of the new class of industrial workers, who were striving to improve their lot under "a system framed for the most part for the protection of private property and for the prevention of thoroughgoing social regulation."[3] These influences justified their position on the ground that judicial loyalty to the existing law was the price of judicial immunity from political pressure and of security of tenure. To encourage the judiciary to weave into the law by interpretation the half-expressed yearnings of an unformulated and scarcely vocal public opinion appeared to them subversive and monstrously wicked. Judge Hand with his penetrating understanding appreciated both the strength and the weakness of this position. He wrote:

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2. For purposes of comparison see the following books and articles: CAHILL, JUDICIAL LEGISLATION (1952); CARDOZA, THE NATURE OF THE JUDICIAL PROCESS (1922); PATON, JURISPRUDENCE 150-75 (2d ed. 1951); REUSCHLEIN, JURISPRUDENCE, ITS AMERICAN PROPHETS (1951); Carter, *The Provinces of the Written and the Unwritten Law*, 24 AM. L. REV. 1 (1890); Clark, *The Dilemma of American Judges: Is too Great "Trust for Salvation" Placed in Them?* 35 A.B.A.J. 8 (1949); Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645 (1932); Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946); Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96 (1922); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929); Llewellyn, *How Appellate Courts Decide Cases*, 16 PA. B.A.Q. 220 (1945); Pollock, *A Plea for Historical Interpretation*, 39 L.Q. REV. 163 (1923); Pound, *The Limits of Effective Legal Action*, 3 A.B.A.J. 55 (1917); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Radin, *Early Statutory Interpretation*, 38 ILL. L. REV. 16, 25 (1943); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

3. Hand, *The Speech of Justice*, 29 HARV. L. REV. 617 (1916), reprinted in

> This attitude is in part right and in part wrong. Much of the law is indeed written in formal shape, the authoritative emanation of the state through agencies to which the judge is confessedly inferior. Beyond the limits of such ambiguity as the words may honestly carry the judge surely has no duty but to understand, and to bring to his understanding good faith and dutiful acquiescence. For the results he may not justly be held accountable; to hold him is to disregard the social will, which has imposed upon him that very quiescence that prevents the effectuation of his personal notions. There is a hierarchy of power in which the judge stands low; he has no right to divinations of public opinion which run counter to its last formal expression. Nevertheless, the judge has, by custom, his own proper representative character as a complementary organ of the social will, and in so far as conservative sentiment, in the excess of caution that he shall be obedient, frustrates his free power by interpretation to manifest the half-framed purposes of his time, it misconceives the historical significance of his position and will in the end render him incompetent to perform the very duties upon which it lays so much emphasis. The profession of the law of which he is a part is charged with the articulation and the final incidence of the successive efforts toward justice; *it must feel the circulation of the communal blood or it will wither and drop off, a useless member.*[4]

In this article Learned Hand argued for greater freedom for the judiciary. While he admitted that the law "must be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will give sanction to its pretensions to unquestioned dictation,"[5] yet he expressed himself as believing that courageous experimentation in times of great change in the convictions of men was necessary to keep the law abreast of the times and in tune with the deeper aspirations of the age. There had been a time, he reasoned, when the legal profession could speak with authority as representative of those interests and that class which could obtain representation. Then justice could be uttered by judges without misgivings, for they were spokesmen for a homogeneous society. To Hand that day had long passed. The judge now, he felt, must adapt himself to a changed society and act as mediator between the forces clamoring for recognition and the old seeking to maintain their ancient dominance:

> As mediator it must grasp from within the meaning of each phase of the social will; it must divine the form of what lies confused and unexpressed and must bring to light the substance of what is half surmised. To adjust and to compromise, to balance and to value, one must first of all learn to know not from the outside, but as the will knows.[6]

L. HAND, THE SPIRIT OF LIBERTY 14 (Dilliard ed. 1952) (hereinafter cited as L. HAND).

4. L. HAND 14-15. (Emphasis added.)
5. L. HAND 15-16.
6. L. HAND 17.

Throughout this article Judge Hand emphasized the creative role of the profession at large and the bench in particular. He expressed the view that like all public functionaries the bench must face up to the responsibility of choosing and of choosing well. He felt that "courage and insight alone can in the end win confidence and power."[7] Yet it can not be said that Learned Hand would have the judiciary in the forefront of the battlers for change and reform. He recognized early in his judicial career that judges are the guardians of a conservative social force and that their particular brand of courage must be tempered with caution and strengthened by restraint in order to preserve a continuity with the past.

In a tribute written for Justice Oliver Wendell Holmes's eighty-fifth birthday, Judge Hand further clarified his views in respect to judicial caution. He wrote:

> Judges are usually taken from that part of the bar which has distinguished itself in the field of action. They are likely to be men of strong will, set beliefs and conventional ideals. They are almost inevitably drawn from the propertied class and share its assumptions. Perhaps on the whole it is better so; law is the precipitate of a long past of active controversy and can not be successfully administered by those to whom equilibrium has no proper values of its own. Still, its virtues are also its defects, for no formulas are final and the political results of a past generation seldom measure very accurately the opposing forces of the next. If we must not change too quickly, at least we must not refuse to change at all.[8]

In this same tribute, a short but pithy piece of writing prepared for publication in the New York World, Judge Hand revealed his sympathy for the Holmesian view that any piece of legislation that can get itself enacted is apt to have behind it reasonable support and justification and his own view that the surest way to protect the power and prestige of the judiciary and to preserve the atmosphere of aloofness and impersonality so vital to its prestige and power is to remove it from the impact of heated and controversial public issues best settled by the more definitely political organs of government. He reasoned that "in such matters the odium of disappointing large numbers of persons must rest somewhere, and perhaps the most important question involved is at whose doors that odium shall lie."[9] He doubted that the courts could bear it while keeping an official irresponsibility to public opinion.

It is probable that the judicial caution, which is only one of the elements in the remarkable blend produced by the Hand formula, may be accounted for by taking into consideration his skepticism and his pragmatism. Like Holmes, Judge Hand is no believer in absolutes.

7. L. HAND 19.
8. L. HAND 24, reprinted from New York World, March 8, 1926.
9. L. HAND 28.

Speaking on the subject, "Sources of Tolerance" before the University of Pennsylvania Law School in 1930, Judge Hand said:

> We shall not succeed by any attempt to put the old wine in new bottles; liberty is an essence so volatile that it will escape any vial however corked. It rests in the hearts of men, in the belief that knowledge is hard to get, that man must break through again and again the thin crust on which he walks, that the certainties of today may become the superstitions of tomorrow; that we have no warrant of assurance save by everlasting readiness to test and test again. William James was its great American apostle in modern times; we shall do well to remember him.[10]

Again in 1932 in a speech before the twelfth annual dinner of the Federal Bar Association Learned Hand voiced his distrust of eternal verities:

> Man may be a little lower than the angels, but he has not yet shaken off the brute. His passions, his thinking, his body carry their origins with them; and he fails if he vaingloriously denies them. His path is strewn with carnage, the murderer lurks always not far beneath, to break out from time to time, peace resolutions to the contrary notwithstanding. What he has gained has been with immeasurable waste; what he shall gain will be with immeasurably more. Trial and error is the confession, not indeed of an impotent, but of a wayward creature, blundering about in worlds not realized. But the Absolute is mute; no tables come from Sinai to guide him; the brazen sky gives no answers to his prayers. He must grope his way through the murk, as his remote forerunners groped, in the dank, hot world in which they moved. Look where he will, there are no immutable laws to which he can turn; no, not even that in selfless abnegation he must give up what he craves, for life is self-assertion. Conflict is normal; we reach accommodations as wisdom must teach us that it does not pay to fight. And wisdom may; for wisdom comes as false assurance goes—false assurance, that grows from pride in our powers and ignorance of our ignorance. Beware then of the heathen gods; have no confidence in principles that come to us in the trappings of the eternal. Meet them with gentle irony, friendly skepticism and an open soul.[11]

The man who distrusts eternal principles, who feels that no age or generation has truth securely by the tail, will almost without fail approach his value-judgment tasks in a cautious spirit of forbearance. So Learned Hand would have the judge approach the solution of judicial problems with a wary and cautious mind—a mind distrustful of temporary gusts of opinion that gain momentary power and cautious in writing into the law ancient prejudices and personal bias.

In addition to his firm convictions that judges are charged with the responsibility of shaping the law to conform to the demands of the society in which it operates and that they must be skeptical about old values and cautious in advancing beyond the established frontiers,

10. L. HAND 82, reprinted from 79 U. PA. L. REV. 1, 13 (1930).
11. L. HAND 101, reprinted from *Democracy: Its Presumptions and Realties*, 1 FED. B. J. 40 (1932).

he is just as firmly convinced that the representative assemblies are the forums for the determination of public policy issues. He realizes that it is in these forums that the various pressure groups and interests compromise their differences, and he thinks that such delicate compromises so hard to come by should not be disturbed by a judiciary subservient to an interest or anxious to have its way. In 1933 over a nation-wide radio network of the Columbia Broadcasting System, Judge Hand delivered a lecture under the auspices of the National Advisory Council on Radio in Education on the subject, "How Far Is a Judge Free in Rendering a Decision?" In this lecture he made his position on judicial legislation quite clear. He said:

> 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 has been made. This distinction, if I am right, cannot be rigidly enforced; but like most of those ideas, which the men who made our constitutions believed in, it has a very sound basis as a guide, provided one does not try to make it into an absolute rule, like driving to the right. They wanted to have a government by the people, and they believed that the only way they could do it, was by giving the power to make laws to the assemblies which the people chose, directly or at second hand. They believed that such assemblies would express the common will of the people who were to rule. Never mind what they thought that common will was; it is not so simple as it seems to learn just what they did mean by it, or what anybody can mean. It is enough that they did not mean by it what any one individual, whether or not he was a judge, should think right and proper. They might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but he then would have been ruler like the Judges of Israel. 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 lawmaking with law interpreting.
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> But the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute his even juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.[12]

Learned Hand is undoubtedly aware of the fact that judges actually do a good bit of judicial legislating, but being aware of the judges' freedom to effect the policy decisions of the legislative bodies by the process of interpretation leads him to believe that judges should exercise this function with great moderation and self-restraint. It is probable that Judge Hand would not go so far as Holmes in the direction of judicial legislation. It was Justice Holmes's belief that the

12. L. HAND 108-09.

very ease with which law could be changed justified a large measure of judicial legislative activity. He wrote in *The Common Law:*

> The philosophical habit of the day, the frequency of legislation, and the ease with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy to which the traditions of the bench would hardly have tolerated a reference fifty years ago.[13]

Judge Hand, however, is of the opinion that the very ease with which law can now be made demands that the judiciary leave the matter of determining policy issues to the assemblies representing the people. Before the development which fashioned assemblies into lawmaking bodies there might have been a basis for the judiciary to engage in lawmaking. Then the judges as guardians of the customary law had to shape and fashion it to meet the needs of a dynamic society. The new development rendered it far less necessary and thus, in effect, operated to limit the judge's discretion.[14]

Judge Hand discussed this aspect of the problem of the limits of judicial discretion in a speech entitled, "The Contributions of an Independent Judiciary to Civilization" in 1944, on the occasion of the celebration of the 250th anniversary of the founding of the Supreme Judicial Court of Massachusetts. He began by distinguishing between customary and constitutional law on the one hand and "enacted" law on the other. By the term "enacted" law Judge Hand meant "any authoritative command of an organ of government purposely made responsive to the pressure of the interests affected."[15] He assumed that before such laws were passed the conflicting interests had had an opportunity to exert their influence in the press, in public meetings, and by appearances before committees and the like. The resulting compromise worked out by the legislature, he reasoned, represented the best that could be obtained, and he was of the opinion that these laws should be enforced loyally by the courts until they could be altered by the same process which had made them. "Such laws," said Hand, "need but one canon of interpretation, to understand what the real

13. HOLMES, THE COMMON LAW 78 (1938). In this connection Judge Frank writes: "A satirist might indeed suggest that it is regrettable that the practice of precedent-mongering does not involve *conscious* deception, for it would be comparatively easy for judges entirely aware of what they were doing, to abandon such conscious deception and to report accurately how they arrived at their decisions. Unfortunately, most judges have no such awareness. Worse than that, they are not even aware that they are unaware. Judges Holmes, Cardozo, Hand, Hutcheson, Lehman and a few others have attained the enlightened state of awareness of their unawareness." FRANK, LAW AND THE MODERN MIND 153 (1930).

14. CAHILL, JUDICIAL LEGISLATION (1952).

15. L. HAND 172, reprinted from THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1692-1942.

accord was."[16] The judge, he argued, had no mandate to write his own personal view into law because he no longer represented a homogeneous governing class. His function was merely to enforce the will of the people as that will had become translated into the terms of law which he had taken an oath to enforce.[17]

Judge Hand, however, would permit judges more freedom and a wider scope for the exercise of discretion in interpreting customary law or the common law than in the case of "enacted" law. His views and their justification he expressed succinctly in a cogent paragraph from the same article:

> The respect all men feel in some measure for customary law lies deep in their nature; we accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action. Through the openings given by that disposition, the common law has been fabricated bit by bit without express assent and under the ministrations of those who have always protested that, like the Bourbons, they learn nothing and forget nothing. Logically, the irresponsibility of an independent judiciary is here an anomaly, like the common law itself; in a pitilessly consistent democracy judges would not be making law at all. Why then do we not resent it? In earlier times when the parturition of statutes was slow and painful, judicial license was tolerated partly because judges fairly represented the governing classes. While the king was supreme, or nearly so, he could remove them at pleasure and even when, after the fall of the Stuarts, they began to hold upon good behavior, they were still for long in harmony with those who succeeded to the reins. Occasionally—Lord Mansfield is the classic example—they could without offense make radical changes in the customary law. That is no longer true; both the need and the unison have gone; legislation has become easy, judges no longer speak for the ruling classes. The price of their continued power must therefore be a self-denying ordinance which forbids change in what has not already become unacceptable. *To compose inconsistencies, to unravel confusions, to announce unrecognized implications, to make in Holmes' now hackneyed phrase, "interstitial" advances; these are the*

16. L. HAND at 174.

17. Jaffe discusses this problem in an article reviewing Konefsky's book, *Chief Justice Stone and the Supreme Court.* He writes: "We meet finally a question as perplexing as it is pertinent. If judges must have notions, where are they to get them? Mr. Konefsky speaks of the 'personal equation' as if it were something to be taken for granted; and it is, I think, one of the most unfortunate perversions of the modern school that so many of us have accepted that view in its grossest form. We first, for realistic analysis, recognize the existence of the 'personal equation' and we end by sanctifying it in those judges whose equation we approve. Is every judge commissioned to make his equation the law? If he is a puritan shall the Constitution outlaw cakes and ale? . . . Some latter day thought, misunderstanding the argument and overlooking the practice of Holmes, himself, has assumed that the 'law' is to be a simple day to day register of the 'more progressive view.' However valid a theory of legislation, this is wide of the mark as a theory of judicial power. The judge has no mandate to carry out a specific program. He is not to judge according to his will or with his ear cocked to a constituency. His oath is to judge according to the 'law.'" 59 HARV. L. REV. 304, 307 (1945).

> *measure of what they may properly do;* and there is indeed not much danger of their exceeding this limit; rather the contrary, for they are curiously timid about innovations.[18]

On the question of how much discretion the judge should be permitted as an interpreter of constitutional law Learned Hand expressed rather definite views. Since a constitution is primarily an instrument for the distribution of political powers, he saw the necessity of some tribunal to determine when the distribution had been upset and unbalanced. Otherwise, he reasoned that those who held the purse strings would in the end gain the ascendancy. A tribunal dedicated to the task of upholding the authority of the distributing document must of necessity be an independent one. The price of such independence, he felt, must be an objective and secure aloofness from transient policy making. He realized, however, that the technique of those who sought to solve constitutional questions should be different from that used in the interpretation of statutes. Because constitutions deal in generalities and leave many gaps to be filled, the judiciary has more leeway here. He cited the way in which the judiciary has expanded the commerce power of Congress to meet the needs of a changing society as an example of the way in which general statements may be expanded to meet the demands of the times. This function of the judiciary he considered a proper one and, because the strains set up by decisions of such issues are never very tense, he was of the opinion that no serious consequences would result from the exercise of judicial discretion in respect to such issues.

When it came to the proper limits of judicial discretion to guard and interpret the Bill of Rights, however, Judge Hand expressed himself of another mind. In answer to the question, why should not their meaning be found in the same way as that of the rest of the instrument, he answered:

> [T]hese rubrics were meant to answer future problems unimagined and unimaginable. Nothing which by the utmost liberality can be called interpretation describes the process by which they must be applied. Indeed if law be a command for specific conduct, they are not law at all; they are cautionary warnings against the intemperance of faction and the first approaches of despotism. The answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh. Who can say whether the contributions of one group may not justify allowing it a preference? How far should the capable, the shrewd or the strong be allowed to exploit their powers? When does utterance go beyond persuasion and become only incitement? How far are children wards of the state so as to justify its intervention in their nurture? What limits should be imposed on the right to inherit? . . . The difficulty here does not come from ignorance, but from the absence of any standard, for values are incommensurable. It is true that

18. L. HAND 174-75. (Emphasis added.)

> theoretically, and sometimes practically, cases can arise where courts might properly intervene, not indeed because the legislature has appraised the values wrongly, for it is hard to see how that can be if it has honestly tried to appraise them at all; but because that is exactly what it has failed to do, because its action has been nothing but the patent exploitation of one group whose interests it has altogether disregarded. But the dangers are always very great.[19]

The dangers of judicial interference with the legislative will, Judge Hand felt, flowed from the simple fact that judges are individuals and not more likely to have proper standards by which to measure than any other group nor more likely to be free from the bias of professional interest. If a court were really candid, all it could say would be:

> We find this measure will have this result; it will injure this group in such and such ways, and benefit that group in these other ways. We declare it invalid, because after every conceivable allowance for differences of outlook, we cannot see how a fair person can honestly believe that the benefits balance the losses.[20]

As a practical matter, however, Judge Hand was of the opinion that judges should seldom intervene because the multiplicity of factors bearing upon the decision of the legislature as well as the incommensurable nature of the clashing values make it almost impossible to say that the legislature has surrendered to a faction in a cowardly and incompetent fashion.

His views on the problem of how the Bill of Rights should be regarded by the judge is well summarized in one of his own paragraphs:

> Nor need it surprise us that these stately admonitions refuse to subject themselves to analysis. They are the precipitates of "old, unhappy, far-off things, and battles long ago," originally cast as universals to enlarge the scope of the victory, to give it authority, to reassure the very victors themselves that they have been champions in something more momentous than a passing struggle. Thrown large upon the screen of the future as eternal verities, they are emptied of the vital occasions which gave them birth, and become moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience. If an independent judiciary seeks to fill them from its own bosom, in the end it will cease to be independent. And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these fateful battles. There are two ways in which the judges may forfeit their independence, if they do not abstain. If they are intransigent but honest, they will be curbed; but a worse fate will befall them if they learn to trim their sails to the prevailing winds. A society whose judges have taught it to expect complaisance will exact complaisance; and complaisance under the pretense of interpretation is rottenness. If judges are to kill this thing they love, let them do it, not like cowards with a kiss, but like brave men with a sword.[21]

19. L. HAND 177.
20. L. HAND 179.
21. L. HAND 180-81.

To the question: What will become of these cherished principles enshrined in our constitutions if the judges do not enter the strife to uphold them? he answered:

> I do not think anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—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 upon courts the nurture of that spirit, that spirit in the end will perish. What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the factious product of propaganda— which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual. If you ask me how such a temper and such a faith are bred and fostered, I cannot answer. They are the last flowers of civilization, delicate and easily overrun by the weeds of our sinful human nature; we may even now be witnessing their uprooting and disappearance until in the progress of the ages their seed can once more find some friendly soil. But I am satisfied that they must have the vigor within themselves to withstand the winds and weather of an indifferent and ruthless world; and that it is idle to seek shelter for them within a courtroom.[22]

Again in 1946 in a slender article contributed to the *Columbia Law Review* as a part of a memorial number in honor of Justice Harlan Fiske Stone entitled "Chief Justice Stone's Concept of the Judicial Function,"[23] Learned Hand expressed views almost identical with those which he had voiced two years before in the article from which the above quotation was excerpted. It is true that they were expressed this time as Chief Justice Stone's views, but there can be no doubt that they represented Hand's views as well. In this article he traced the historical development by which the old view that the fourteenth amendment was designed to protect property rights against legislative impairment had been challenged by a new school of jurists who viewed the Bill of Rights as counsels of moderation and considered legislative compromises the very essence of the democratic political process. With the triumph of the new view the matter appeared to be settled until a new school arose which professed to see the Bill of Rights as

22. L. HAND 181-82. Mr. Paul A. Freund quotes this excerpt from Judge Hand's essay and notes with approval the strength of his position. Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533, 551 (1951). However, Mr. Shute quotes this passage and comments: "This attitude denies the power of courts to encourage and foster a feeling of tolerance among the people of the nation through the tolerance of their own decisions. This power exists and has been asserted in the past. . . . The courts are the last hope of a democratic nation; they are the last stop before total decadence; the courts, above all other governmental groups in this country, must foster and protect a love of democratic tolerance, else there is little hope that such will long last." Comment, 17 Mo. L. REV. 193, 204 (1952).

23. L. HAND 202-08, reprinted from 57 COLUM. L. REV. 696-99 (1946).

counsels of moderation when the protection of property was involved but as carrying the old prohibitions as a rule of law when civil rights were affected by the legislative compromise. To Learned Hand this appeared inconsistent. He saw no reason why the same principle should not apply in both areas; nor could he understand by what reasoning the right to property should be classed as something less than a civil right. It was his view that judges should be very chary of disturbing legislative compromises in both areas. Although Judge Hand was speaking of Justice Stone's concept of the judicial function, it is apparent that these beliefs were his own. He had voiced them before.[24]

In the final analysis, much depends upon the spirit with which a judge approaches the solution of a constitutional problem for the words are empty vessels into which he must pour now and again fresh content. Since this is so, Judge Hand would have his judge a man of wide reading and sensitive understanding whose outlook is not limited by ignorance or class prejudice. In this connection his own words are eloquent:

> I venture to believe that it is as important to a judge called upon to pass upon a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon, and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne, and Rabelais, with Plato, Bacon, Hume, and Kent, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.[25]

Professor Eugene V. Rostow of Yale University Law School in an article written for the *Harvard Law Review* on the subject, "The Democratic Character of Judicial Review,"[26] has recently subjected the Hand view of the proper limits of judicial discretion to a heavy critical barrage. It is Professor Rostow's firm conviction that judicial review is "a tool of proven use in the American quest for an open society of widely dispersed powers."[27] He points out that "the freedom of the legislatures to act within wide limits of constitutional con-

24. *Cf. The Contributions of an Independent Judiciary to Civilization*, L. HAND 172-82. See also comment by Freund on Judge Hand's services in pointing up this problem, 4 VAND. L. REV. 533, 546 (1951).

25. L. HAND 81, reprinted from 79 U. PA. L. REV. 1-14 (1930).

26. 66 HARV. L. REV. 193-224 (1952).

27. *Id.* at 199.

struction is the wise rule of judicial policy only if the processes through which they act are reasonably democratic";[28] and he recalls Chief Justice Stone's argument that, since in many instances legislative acts "are directed against interests which are not or cannot be represented in the legislature,"[29] the Court should not accord such legislation the respect usually given statutes which represent compromise of the affected interests. He feels that there is little danger that the present Supreme Court will set itself up as a Third Chamber now, or in the future, for the public has been educated to the exercise of enormous powers by both and national and the state governments. Of Judge Learned Hand's often expressed belief that judges should abstain from the policy struggles of the day and leave such matters to the legislatures except in the clearest cases of abuse of power, Professor Rostow says:

> The argument that action by the courts in protecting the liberties of the citizens is futile in bad times, and unnecessary in good ones, is fundamentally wrong. Judge Learned Hand has given the contrary view its strongest and most eloquent form.
>
> In a passage of Browningesque passion and obscurity, he advances the thesis that the judiciary will lose the independence it needs for its other functions unless it resolutely refuses to decide constitutional questions of this order. The general constitutional commands of fairness and equality, which he nowhere identifies in detail, are "moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience. If an independent judiciary seeks to fill them from its own bosom, in the end it will cease to be independent. . . ." This gloomy and apocalyptic view is a triumph of logic over life. It reflects the dark shadows thrown upon the judiciary by the Court-packing fight of 1937. Judge Hand is preoccupied with a syllogism. The people and the Congress have the naked power to destroy the independence of the courts. Therefore the courts must avoid arousing the sleeping lions by venturing to construe the broad and sweeping clauses of the Constitution which would "demand the appraisal and balancing of human values which there are no scales to weigh." Presumably he would include in this catalogue of forbidden issues problems of freedom of speech, the separation of church and state, and the limits, if any, to which "the capable, the shrewd or the strong," should "be allowed to exploit their powers." Are we to read the last phrase as encompassing the right of habeas corpus, the central civil liberty and the most basic of all protections against the authority of the state? Would it deny the possibility of constitutional review by the courts for laws denying the vote to negroes, for searches and seizures without warrant, for bills of attainder and test oaths?[30]

The clear implication is that inherent in the Hand view of judicial discretion is an affirmative answer to all of the questions raised, and that an affirmative answer is unwise and somehow unacceptable.

28. *Id.* at 202.
29. *Ibid.*
30. *Id.* at 203-06.

Actually the Hand answer to such questions is reasonable and forceful. If a society depends upon courts to preserve those values which it once cherished but has lost, it is doomed to disappointment. Courts cannot save social values that have become meaningless or that have lost their efficacy as social forces. Courts of necessity operate in a social milieu; judges take their values from the community of which they are a part; they must perforce accept what is acceptable to the society of their day and reject what is unacceptable. Courts do not create social values; rather they reflect them. If a spirit of fair play and respect for rights and opinions of others withers in a nation, can it be replaced by a scolding judge or an outraged jurist?

In its essence the argument of Professor Rostow simmers down to the traditional defense of judicial review with a new ingredient: although judicial review as a protection for vested property interests was a wall that had to be torn down, as a protection for civil liberties it must be rebuilt and fortified. It raises once more above this rebuilt wall the tarnished banner of the double standard of constitutional interpretation. It neglects to consider that the essence of democracy is compromise and that even judges must bend an ear to the wind. It fails to weigh the obvious fact that law is a conservative force and feels self-conscious and ill at ease in the forefront of a social advance that has not behind it the united will of society.

The questions may well be asked: From whence comes Hand's view of the nature and scope of the judicial function? Has it been distilled from experience and observation? What factors contributed to its formulation? Naturally, the answers to such questions are somewhat difficult to come by. Certainly one factor to be considered is the nature of the training he received at the Harvard Law School. His teacher of constitutional law, James Bradley Thayer, was extremely interested in the question of the scope of the judicial power in passing upon the constitutionality of legislation. It was Thayer's considered view that the power of courts in this respect was distinctly limited. His essay, "The Origin and Scope of the American Doctrine of Constitutional Law," is devoted to an analysis of his views. A great teacher who could write:

> The judicial function is that of merely fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the lines of its grants.[31]

and

> It [the Court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question.[32]

31. THAYER, LEGAL ESSAYS 27 (1908).
32. *Id.* at 21.

must surely have impressed upon an apt and admiring student the strength of his position.

Another factor bearing upon Hand's concept of the limited nature of the judicial function is the extent to which judicial review was being used during his early years on the bench for the purpose of thwarting the will of the legislatures in respect to statutes regulating industry. To an alert and penetrating mind such as his this development seemed to violate the postulates of a democratic system and do violence to the ultimate power and prestige of the judiciary. It is always harzardous to attempt to assess those influences that shape the character and temperament of a man. In the case of Hand, versatile, intelligent, and sensitive as he is, it is doubly difficult. Yet it may be hazarded that his early legal training as well as his observation, experience, and the cast of his character had something to do with fixing his beliefs.

In summary, it may be said that Learned Hand would draw the limits of judicial discretion rather strictly. He prefers to leave policy decisions to legislatures; he believes that abstention from such heated controversies is the price of judicial prestige and independence. The judge does have a creative role within his limited sphere, and that is the responsible task of gently moulding the customary law to conform to new social patterns and half-emerging jural aspirations. When the judge is called upon to legislate, he should do it with courage and understanding but with his feet firmly planted in the tradition of his craft. He would scarcely approve of Justice Marshall's pronouncement:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by the law; and when that is discerned, it is the duty of the courts to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.[33]

Judge Hand is franker than Justice Marshall to admit that the scope for creative activity by the judiciary is for various reasons relatively wide; nevertheless, in all of his writings on the subject he makes the point that judges should be properly cautious in the legislative function. He is at one with Lord Mansfield that:

> [D]iscretion when applied to a court of justice means sound discretion guided by law. It must be sound discretion governed by rule not humor; it must not be arbitrary, vague or fanciful, but legal and regular.[34]

33. Osborn v. The Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

34. Rex v. Wilkes, 4 Burr 2527, 2539, 98 Eng. Rep. 327 (K.B. 1720). For a statement of Hand's views, see Niagara Power Co. v. Federal Power Comm'n, 137 F.2d 787, 796 (2d Cir. 1943).

There can be little doubt that Learned Hand looks with some disapproval upon the new school of jurists known as the Realists who have won some converts to the view that judges either because of the ready availability of "precedents going both ways" or because they are in the final analysis the chief determiners of the meaning of words, or because of the gaps in the law, are free to decide cases as they will. These jurists maintain that there is no law in existence on a given subject until the court has spoken; that a lawyer can not advise his client as to what the law *is*, but is confined to venturing a prophecy more or less well-founded as to what a court will actually do when confronted with the actual decision of the issue.[35] To Learned Hand the law does exist as a body of principles and rules from which the judge constantly draws inferences and deductions. His logic is the logic of discovery as well as the logic of demonstration. It makes a great deal of difference whether a judge proceeds from a so-called self-evident major premise, or proceeds to establish his major premise by a consideration of all the precedents that bear upon the solution of the legal problem at hand. Judge Hand is aware of this difference. While Hand would agree with Holmes that the "life of the law has been experience," he would still regard this experience as chaotic and unorganized until it has been moulded by logic and reason into a fit and proper legal instrument for the solution of judicial controversies.

Judge Charles E. Wyzanski, Jr., writing in the *Harvard Law Review* in an article, one of several, in an issue dedicated to the celebration of Judge Hand's seventy-fifth birthday, very fittingly said of Judge Hand:

> Many there will be who disagree with his ideal of the judge. They would have him one of the principal seekers after social reform and moral betterment. They would urge that he prepare himself by independent investigation so that at appropriate times he might come forward as a teacher of his original solutions. And they would prefer him to apply the law as the lever by which society was raised as near as may be to the level of his intelligence and vision.
>
> For this role of prophet, innovator and statesman Learned Hand has never billed himself. To him the judge who took the central role would have betrayed his trust. He was commissioned for a different part—a leader of the Greek chorus interpreting and appraising the drama. The

35. Augustus N. Hand in a conversation with the writer indicated that both Learned Hand and he viewed the realists with tolerant skepticism. Professor Edwin W. Patterson of Columbia University, speaking of the Holmes-Cardozo-Hand moderate view of the judicial function, wrote: "In the long run this view represents a sound political principle, that every judge should take a modest view of his power to 'legislate' in order that he may maintain his independence of the political pressures of the moment and be able to protect individuals against oppression by other officials, even when the latter are acting with the approval of majority groups." PATTERSON, JURISPRUDENCE, MEN AND IDEAS OF THE LAW 576-77 (1953).

> artistry, the forbearance in judgment and the faithfulness with which Learned Hand has performed that part are his principal contributions to public law.[36]

THE HAND FORMULA FOR THE INTERPRETATION OF STATUTES

Judge Hand has achieved a firmer and sounder reputation as a judge than most men of his profession. The acclaim which he has received from members of his own calling sometimes almost borders on the extravagant. Judge and author Jerome Frank dedicated his book, *Courts on Trial*, to him in these words: "To Learned Hand, our wisest judge."[37] The Honorable John J. Parker, one of the most experienced and distinguished members of the federal bench, once said: "All of us know that he is not only one of the greatest judges of this generation, but he is one of the greatest judges that have ever sat on a court of the United States."[38] Justice Felix Frankfurter has spoken in such terms as: "I have said of Learned Hand that he has become a legend, but his achievements created that legend."[39] The late Justice Cardozo is said to have labeled him the greatest living jurist.[40] If Learned Hand be the great judge that great men of the bench unite in designating him, an analysis of his opinions should show forth his greatness. And, since the work of the judge is mainly taken up with interpretation of statutes, the Hand formula of interpretation should be a model for lesser men to follow or at least strive after. What is there about the Hand technique or insight that produces opinions of such universal admiration? To determine that technique or quality would not insure its possession by another, but such a determination should at least isolate those techniques and that method which seems to excite most admiration among the experts in the field. Conceivably, it might shed light on the complex problem of judicial interpretation.

For purposes of this analysis, three theories of statutory interpretation merit examination and discussion.[41] The first may be called the literal theory. According to this theory, which Judge Hand calls the "dictionary method," the interpreter confines himself to the very letter of the text of the statute and, having extracted from each word its proper meaning, he applies it to the solution of the case at bar. This process has the value of objectivity and is alike available to both the judge and to him who is being judged. This is a relatively old

36. Wyzanski, *Hand's Contributions to Public Law*, 60 HARV. L. REV. 369 (1947).
37. FRANK, COURTS ON TRIAL, Dedication page (1949).
38. 33 A.B.A.J. 502 (1948).
39. *Id.* at 503.
40. See New York Herald Tribune, May 17, 1951, p. 12, col. 3.
41. See SHARTEL, OUR LEGAL SYSTEM AND HOW IT OPERATES 318-87 (1951), for a discussion of these theories.

method and one hallowed by such a name as that of Justice Story.[42] It is a method that was used in the early days of our judicial history when the volume of statutory law was relatively light and the subjects with which it dealt relatively simple.

The second theory or method of procedure involves an attempt to discover what the intent of the legislature really was—what purposes the legislators were, by the use of the language employed, seeking to realize. This method came to be employed more and more by courts as the volume of statutory enactments increased and as the subject matter of legislation became so complex as to preclude detailed statutory instructions. Naturally enough, it offered less restrictive limits for judicial activity. It had always been the province of judges to shape and mould the law in its application, but this was often forgotten by those who were concerned lest judges usurp the function of legislatures. Judges were accused of reading into the statutes their own preferences while ostensibly hewing to the line of the older theory of interpretation. This led some judges and publicists to propound what has been called the "free interpretation theory."[43]

According to this latter-day theory the judiciary and the public should frankly admit that judges are free to interpret as they choose whenever the text of the statute is not so clear as to make choice usurpation and the legislative will a mockery. This theory stresses the personal factor in the judicial equation. Its proponents differ among themselves in respect to the source of judicial standards; some advocate custom, equity, and good conscience; others prefer that the judge prepare himself by independent investigation to translate into the law the conclusions he has reached.

It can be readily seen that to apply the words of a text literally may often defeat the very purpose of the statute. Much depends upon reading the text in such a way as to effectuate the purpose behind the law. Words are merely symbols for the communication of ideas; their meanings shift, and they sometimes take their import from the entire context in which they are used, culturally as well as rhetorically. Judge Jerome Frank relates an amusing story in point.[44] It is the story of Miss Goodlooks, the chorus girl, who in an emergency acted the part of Ophelia in Hamlet. In the player's scene, according to the text being used, Hamlet asks Ophelia, "Are you chaste?" She answers, "My Lord?" But Miss Goodlooks rendered it, "Chaste? My

42. See 1 STORY, THE CONSTITUTION § 406 (5th ed. 1905). Compare Kent's commentary as quoted by FRANK, IF MEN WERE ANGELS 98 (1942). Thus Chancellor Kent explained how he arrived at a judicial decision: "He first made himself master of the facts. Then he said, 'I saw where justice lay and the moral sense decided the court half the time; I then sat down to search the authorities. . . . I might once in a while be embarrassed by a technical rule, but I almost always found principles suited to my view of the case.'"

43. SHARTEL, *op. cit. supra* note 41, at 327.

44. FRANK, COURTS ON TRIAL 301 (1949).

Lord!" When chided she remarked, "Well, that was my interpretation of the part."

So if there is a danger in interpreting a text literally and applying that literal interpretation for the solution of a legal problem, there is also a danger in free interpretation; for it permits the judge to read into the law his own bias and so plays havoc with consistency and certainty, ideas which lie deep in the very concept—law. Furthermore, to elevate the personal factor undermines the independence of the judiciary. This arises from the propensity of whatever interest is momentarily preponderant to elevate to the courts judges whose personal preferences it desires to make the law.

Judge Hand has managed to steer a safe course between the danger represented by a too literal interpretation and that threatened by an interpretation so free as to enthrone personal bias and individual preference. He described his technique as follows:

> It seems a simple matter, especially when the law is written down in a book, with care and detail, just to read it and say what is its meaning. Perhaps this could be made as easy as it seems, if the law used language coined expressly for its purposes, like science, or mathematics, or music. But that would be practically undesirable, because while the government's commands are to be always obeyed, still they should include only what is generally accepted as just, or convenient, or usual, and should be stated in terms of common speech, so they may be understood by those who are to obey, and may not appear foreign to their notions of good or sensible conduct. . . .
>
> The judge must therefore find out the will of the government from words which are chosen from common speech and which had better not attempt to provide for every possible contingency. How does he in fact proceed? Although at times he says and believes that he is not doing so, what he really does is to take the language before him, whether it be from a statute or from the decision of a former judge, and try to find out what the government, or his predecessor, would have done if the case before him had been before them. He calls this finding the intent of the statute or the doctrine. This is often not really true. The men who used the language did not have any intent at all about the case that has come up; it had not occurred to their minds. Strictly speaking, it is impossible to know what they would have said about it, if it had. All they would 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 the dictionary. If he should do no more, he might come up 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.
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> Thus, on the one hand he cannot go beyond what has been said, because he is bound to enforce existing commands and only those; on the other, he cannot suppose that what has been said should clearly frustrate or leave unexecuted its own purpose. This is his frequent

position in cases that are not very plain; that is to say, in the greater number that arise. As I have said, there are two extreme schools, neither one of which is willing to apply its theory consistently, usually applying it when its interests lie along the path it advocates. One school says that the judge must follow the letter of the law absolutely. I call this the dictionary school. No matter what the result is, he must read the words in their usual meaning and stop where they stop. No judges have ever carried on literally in that spirit, and they would not be long tolerated if they did.

. . . . The other school would give them almost complete latitude. They argue that a judge should not regard the law; that this has never really been done in the past, and that to attempt ever to do it is an illusion. He must conform his decision to what honest men would think right, and it is better for him to look into his own heart to find out what this is. As I have said, in a small way some such process is inevitable when one is interpreting any written words. 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 things 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, even though in a small way he must do so in order to execute its real commands at all.

But the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.

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.[45]

It can be seen from the quoted passage above that Judge Hand attempts to fulfill in his application of the law the underlying purpose of its framers. Another aspect of his technique is the use he makes of legislative history. On many occasions Learned Hand has resorted to congressional committee reports, debates in Congress, and other outside material in order to reproduce the setting in which the law was made so as to understand better just what the lawmakers were trying to accomplish by the words they used.[46] It is to be understood,

45. L. HAND 105-09. (Emphasis added.) *Cf.* Judge Hand's views of interpretation expressed in Harris v. Commissioner, 178 F.2d 861 (2d Cir. 1949), and his statement in Lee v. Aetna Cas. & Surety Co., 178 F.2d 750, 751 (2d Cir. 1949); see Lavin v. Lavin, 182 F.2d 870 (2d Cir. 1950).

46. See Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949); S. C. John-

however, that Judge Hand in no way decisively relies upon legislative history as a primary means of determining the purpose and intent of the lawmakers; rather he uses it as a help, a guide by means of which the intent of the legislators many become clearer and more precise. He does not scorn to use such material merely because it is extra-judicial and non-authoritative. That this technique is coming to be increasingly more acceptable is indicated by the approval accorded it by certain of the publicists and by the Supreme Court's use of the device as an aid in interpretation. Mr. J. P. Chamberlain writing in the *University of Chicago Law Review* in 1933 remarked:

> Committee reports are now definitely a part of the equipment of the court for the interpretation of the meaning of statutes and for deciding their constitutionality. They are not decisive but they are persuasive.[47]

Even earlier, in 1925, Mr. Clarence A. Miller writing in the *University of Pennsylvania Law Review* had given the practice his blessing:

> A more general use of the legislative history of statutes as an aid in determining legislative intent will serve to materially lessen judicial legislation.[48]

The use of legislative history by Judge Hand, as a help in the determination of legislative intent when interpreting the written words of a statute, may properly stem from the general view he holds of the legislative function. If judges are to leave to the legislators the problem of compromising conflicting interests and keep for themselves a very modest role in lawmaking, it follows that almost every device for determining the will, the actual will of the lawmaking body, is justified and explained. A judge who viewed the judiciary as active partner with the legislature in lawmaking would necessarily take a dimmer view of the use that might be made of such materials. Hand's use of outside aids is then a testimonial to his firm conviction that the judge is chiefly concerned with the application of law, not with its creation.

That the Hand formula for the interpretation of statutes includes

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son & Son v. Johnson, 175 F.2d 176 (2d Cir. 1949); Borella v. Borden Co., 145 F.2d 63 (2d Cir. 1944); Lenroot v. Western Union Tel. Co., 141 F.2d 400 (2d Cir. 1944).

47. 1 U. CHI. L. REV. 81, 86 (1933).

48. 73 U. PA. L. REV. 158, 170 (1925). See the following cases for examples of the use by federal courts of legislative history as an aid in interpreting statutes: Federal Power Comm'n v. East Ohio Gas Co., 338 U.S. 464 (1950); United States v. CIO, 335 U.S. 106 (1948); Woods v. Miller Co., 333 U.S. 138 (1948); United States v. Ogilvie Hardware Co., 330 U.S. 709 (1947); United States v. Pfitsch, 256 U.S. 547 (1921); McCauley v. Waterman S.S. Corp., 327 U.S. 540 (1946); Lapina v. Williams, 232 U.S. 78 (1914); Cammetti v. United States, 242 U.S. 470 (1917). See also the following articles: Sparkman, *Legislative History and the Interpretation of Laws*, ALA. L. REV. 189 (1950); *A Re-evaluation of the Use of Legislative History in Federal Courts*, 52 COLUM. L. REV. 125 (1952); *A Symposium on Statutory Construction*, 3 VAND. L. REV. 365 (1950).

both a high regard for the actual words of the passage to be interpreted and an abiding respect for the intent of the lawmakers, as revealed in the legislative context and the historical setting, is shown not only by his extra-judicial pronouncements but by the language of his opinions. Many of his opinions carry dicta on the interpretative function and process. Excerpts from select cases underline his methods and his convictions. In *Commissioner v. Ickelheimer* he said:

> Compunctions about judicial legislation are right enough as long as we have any genuine doubt as to the breadth of the legislature's intent; and no doubt the most important single factor in ascertaining its intent is the words it employs. But the colloquial words of a statute have not the fixed and artificial content of scientific symbols; they have a penumbra, a dim fringe, a connotation, for they express an attitude of will, into which it is our duty to penetrate and which we must enforce ungrudgingly when we can ascertain it, regardless of imprecision in its expression.[49]

Again in *Borella v. Borden Co.,* the judge speaks:

> [L]egislators, like others concerned with ordinary affairs, do not deal in rigid symbols, so far as possible stripped of suggestion, and do not expect their words to be made the starting point of a dialectical progression. We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project on the specific occasion how we think persons actuated by such a purpose would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it once we abandon literal interpretation—a method far more unreliable.
>
> . . . . We do not mean here, or in any other interpretation of language, the words used are not far and away the most reliable source for learning the purpose of a document; the notion that the "policy of a statute" does not inhere as much in its limitations as in its affirmations, is untenable.[50]

In *Cabell v. Markham,* Learned Hand quoted with approval Justice Holmes' statement from *Johnson v. United States*[51] and continued by repeating the ideas on interpretation he had so often voiced:

> "[I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." [Holmes] 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: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[52]

This technique of searching for the purpose behind legislation and

49. 132 F.2d 660, 662 (2d Cir. 1943).
50. 145 F.2d 63, 64, 65 (2d Cir. 1944).
51. 163 Fed. 30, 32 (1st Cir. 1908).
52. 148 F.2d 737-39 (2d Cir. 1945).

using that purpose once determined as a guide in interpreting language was not a latter day acquisition of Judge Hand. As early as 1925 he expressed the familiar view in the case of *United States ex rel. Duner v. Curran:*

> We acknowledge that our construction in fact involves substituting other words in place of those used, and we shall seek no locutions to disguise the liberty taken or the risk assumed. We can appeal, however, to the universal and ancient practice of courts in dealing with any kind of words. Their purpose may appear so clearly as to escape defeat, in spite of the imperfect expression, and though other words must be imputed to the author. In saying that we are thus ascertaining the author's intent we speak somewhat elliptically. That intent as a fact in his mental life is irrelevant; his words are taken to mean what they mean in public use. But if the contrary expression be not too explicit, the disclosed purpose may prevail to cover an unforeseen event, which the author would certainly have comprised by proper words, had it been presented to him. We can see no useful purpose in denying that this is what takes place in such cases, and it is what we are doing here.[53]

In his *Courts on Trial,* Judge Jerome Frank has commented on this practice of Hand's of appealing to the equity of a statute. Commenting on the case of *Usatorre v. The Victoria*[54] he said: "It there appears that a great American judge [who tells me that he has never carefully studied Aristotle] has expressed views that are a modernized paraphrase of that ancient Greek's thesis."[55] The learned judge goes on to point out in copious footnotes to the *Usatorre* case the similarity between Hand's technique and that of Aristotle and even Plowden.

The resemblance is startling. Aristotle wrote:

> The "equitable" is, indeed, "just" but not equivalent to the "legal." It is rather an improvement on the merely legally just. The reason is that every statute speaks in general terms, but there are some cases upon which it is impossible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak generally but not possible to do so correctly, the statute embraces only the majority of cases, although well knowing the possibility of error. Nor is it the less correct on this account; for the fault is not in the statute nor in the legislature, but in the nature of the subject matter. For it is plainly impossible to pronounce with complete accuracy upon such a subject matter as human action. Whenever, then, the statute reads in general terms, but a case arises which is not covered by the general statement, then it is right, where the legislator's rule is inadequate because of its over simplicity to correct the omission which the legislator, if he were present, would admit, and, had he known it, would have put into his statute.[56]

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53. 10 F.2d 38, 40 (2d Cir. 1925).

54. 172 F.2d 438 (2d Cir. 1949).

55. FRANK, *op. cit. supra* note 37, at 381.

56. ARISTOTLE, NICHOMACHEAN ETHICS, bk. V, c. 10, 1137B; quoted by Judge Frank in Usatorre v. United States, 172 F.2d 434 n.12 (2d Cir. 1949).

Plowden explicitly enunciated the doctrine of the equity of a statute in his comments on *Eyston v. Studd.*[57] He, too, as early as 1574 formulated a doctrine of statutory interpretation strikingly like that of Judge Hand. He observed:

> From this judgment and the cause of it, the reader may observe that it is not the words of the law, but the eternal sense of it that makes the law, and our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis.* And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law if you rely upon the letter. And as the fruit and profit of the nut lies in the kernel and not in the shell, so the fruit and profit of the law consists in the sense more than the letter.[58]

It would appear, then, that the judicial method of Judge Hand is not new but rather a method hallowed by time and great names, striking merely because so many judges fail to learn it well and follow it often.

In final analysis the Hand formula of statutory interpretation resolves itself into four propositions which might be summarized as follows:

1. If the words of the statute are so clear and plain as to admit of no doubts as to how they should be applied; if they clearly express the purpose and intent of the lawmakers, the task of the judge is a relatively easy one; he applies the law as it is written to the solution of the judicial problem before him and lets the chips fall where they may.

2. If the words of the statute are so general as to give little guidance, the judge who is principally concerned with effectuating the intent and realizing the implicit purpose of the legislators, must seek to discover that intent and that purpose from the words themselves, the context in which they are used, both rhetorical and cultural, and from a case study of the history of the particular piece of legislation as it was hammered out in the final give-and-take that preceded its final acceptance and final phrasing. Once this intent and this purpose is so discovered the judge must decide the case before him in such a way as to give meaning to the intent of the legislature and fulfillment to its purposes.

3. However, if the lawmakers patently had no intent in respect to the issues before the judge, if they obviously failed to envisage circumstances arising as they did arise, then the judge has his

57. 2 Plow. 450, 75 Eng. Rep. 688 (K.B. 1574).
58. *Id.*, 2 Plow. at 465-67.

difficult hours. Since he is charged with the responsibility of going no further than the legislators would have gone had they the case before them, it is the judge's duty to fathom out the half-emerged purposes behind the legislation and to savor the very spirit of the enactment. The judicial function here might be compared to what the expert mender does with a hole burned in a fine coat which he reweaves—that is, he fits into the legislative omission legal material of the same pattern and design in such a way as give succor to those half-expressed, upthrusting purposes, that groping intent.

4. When it is impossible to dig out any intent, when no underlying purpose may be even dimly discerned, the judge should attempt to weigh and balance the competing interests and compromise them in the spirit of the times, never going so far as to accept what, in his opinion, is not yet acceptable in the society of which he is a part, but still moulding the law gently and by degrees in such a manner as to help in giving expression to the jural aspirations of his age. And all of this must be done with such good sense and proper restraint, with such understanding and sympathy as neither to violate the established principles of social conduct nor jeopardize the prestige and high dignity of the judicial office.

This is the Hand recipe, and, as with most recipes, the finished dish will depend upon the skill and art of the cook. What comes from the hand of the master may be a dish fit for the Gods but from the thick hands and futile brain of the scullery maid fit only for dogs. At least there is this compensation: from the hands of the master comes good eating and satisfaction.