

## The Learned Justice Handler: Fond Reflections of a Former Clerk

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I had hoped to clerk for Justice Handler since my first year of law school, when, having read many of his now legion majority, dissenting, and concurring opinions, he quickly became a hero to me. Here is a jurist of exceptional heart and mind, I thought. Later, I would come to learn the depths and dimensions of that very accurate initial impression. Above all else, Justice Handler's most enduring legacy is rooted in the precept that wisdom and compassion are indivisible.

### *The Road to the Clerkship*

In my second year of law school, I submitted my clerkship application and was thrilled to be called for an interview. At last, the opportunity to meet this by now iconic force in my life, this scholar and thinker of the highest caliber, this shaper of my normative development as an aspiring lawyer. I was about to come face-to-face with one of the greatest legal minds of the twentieth century (no exaggeration here). I must prepare. And so I did, for hours and days on end (no exaggeration here). I reduced to a multiple-page summary a list of informed, insightful, and penetrating questions and comments (some exaggeration here), together with what I thought was an impressive critique of state and federal First Amendment jurisprudence in the context of commercial speech (just in case the Justice wanted to know. He did not.)

It was two o'clock on a Friday afternoon, and the interview began. "Hello, Paula, it is a pleasure to meet you," the Justice graciously said, and then, for the next forty minutes, offered a detailed, brilliant exposition on the life of the law and the judge's role. I was captivated but mute (although I did manage to nod

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studiously at what I hoped were several key junctures). At the conclusion of this extraordinary reflection, the Justice stood, extended his hand, and said, "I have an emergent matter that requires some attention. It was very nice to meet you." That was it. The kiss of death, I thought. Instantaneously, a thousand questions racked my psyche. Do I pull out my talking points? Do I impose a question or two, notwithstanding the exigencies of time? Do I fall at the Justice's feet and gush that, next to Karl Llewellyn, he is my absolute idol? Thankfully, I answered the aforementioned queries in the negative and left for the train station, where, for the next ninety-seven minutes, I engaged in various forms of self-flagellation. "How could you have failed to interject, even once?" I thought to myself. "How could you not come up with anything magical, lyrical, poetic, or even mundane to say?" "You blew it, you're finished. And to think, you could have been a contender."

I returned to my gloomy basement apartment on West 116th Street to find the answering machine blinking. It was Justice Handler himself. (I saved the tape. Just kidding. Not really.) "Paula," he said, "I would like you to be my law clerk. Please let me know at your earliest convenience." Approximately six seconds later (I did need time to peel myself off the floor), I accepted the offer. Soon I would begin the most formative year of my professional life.

### *The Clerkship Year*

The clerkship year was remarkable in many ways. I was struck first by the Justice's tireless concern for the rightness and soundness of the Court's opinions. (It is no accident that on the occasion of his retirement he has been described routinely as "the conscience of the court.")<sup>1</sup> In his own words: "The court as an institution and a branch of government earns its authority by the degree to which it can express its decisions unanimously and cogently[.]"<sup>2</sup>

Justice Handler, mindful of the importance and the gravity of the enterprise at hand, saw the law as the "witness . . . of our moral life."<sup>3</sup> It must endeavor to vindicate, in the words of former Chief Justice Earl Warren, "the basic instinct of all human beings for

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<sup>1</sup> Kathy Barrett Carter, *Justice Handler, Voice of Liberals, to Quit High Court*, STAR-LEDGER, June 5, 1999, at 1 (quoting New Jersey Supreme Court Justice Marie Garibaldi).

<sup>2</sup> Rocco Cammarere, *Handler Bows Out. A Key in Court's Golden Era*, 8 N.J. L.J. at 1225 (June 7, 1999) (quoting Justice Handler).

<sup>3</sup> OLIVER WENDELL HOLMES, JR., *The Path of the Law*, in THE COLLECTED WORKS OF JUSTICE HOLMES 473 (Sheldon M. Novick ed., vol. 3, Univ. of Chicago Press 1995) (1897).

freedom, for opportunity, for dignity and for peace."<sup>4</sup>

Justice Handler's was no ivory tower. Our opinions must inform, educate, guide, and, hopefully, inspire, he would say. The law guides perceptions, shapes destinies, and charts outcomes. With so much at stake, judicial decisions must be crafted with impeccable care and meticulous attention to detail.

In this regard, Justice Handler vindicated the mission statement of yet another great visionary in the law, Ambassador Sol Linowitz, who wrote:

History is not always pretty, and it does not teach just one lesson. Our goal must be that Americans come to understand the tone and climate of our legal rules of fair play, the reasons self-incrimination under oath is odious, the difference between evidence one may feel is good enough for deciding whether to buy this car rather than that one and evidence that is really good enough to place the weight of law on the side of one party to a dispute rather than the other: We wish a community devoted to justice, and we need citizens who know they need law to guide perception. This means we need an understanding of the forces that have shaped and nourished our legal system.<sup>5</sup>

Often, the Court had to go "well beyond the firm ground of settled law[,]"<sup>6</sup> in arenas as complex and important as housing, education, birth, health, survival, and dying—all, in the Justice's own words, "matters of intense human concern that uniquely touch our deepest feelings as persons."<sup>7</sup> In these poignant and profound settings, the traditional adjudicative mode vanishes as the facts of the dispute at hand go beyond societal consensus or established norm. Justice Handler appreciated that

[i]n such cases the courts act alone against a background of uncertainty and disagreement. In the cases that have attracted our attention, courts have decided disputes with strong moral overtones providing solutions which purport to settle questions that society itself has not yet answered. Courts have proffered judicial answers to these dilemmas, at the same time acknowledging the responsibility of others in these matters. In these cases courts have not pursued the role of social arbiter, but

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<sup>4</sup> Earl Warren, *Remarks at the Unveiling of the Cornerstone at Fordham University School of Law*, in A.B.A. INT'L & COMP. L.B., July 1960, at 36.

<sup>5</sup> SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 209-10 (1994).

<sup>6</sup> Alan B. Handler, *Individual Worth*, 17 HOFSTRA L. REV. 493, 493-94 (1989).

<sup>7</sup> *Id.* at 497.

of social catalyst.<sup>8</sup>

The Justice long recognized the independence as well as interdependence of the governmental powers. He understood implicitly that in effectuating those matters implicating both individual rights as well as societal interests, any “compartmentalization . . . among the executive, legislative and judicial branches has never been watertight.”<sup>9</sup> Judicial participation exists in the form of a continuous and fluid dialogue with the coordinating branches, administrative agencies, and the public. Our increasingly complex and litigious times call out for a judiciary committed to, and capable of, responsive participation in such a colloquy. The Justice saw that this critical dialectic, at its best, allows for “principle . . . evolved conversationally, and not perfected unilaterally.”<sup>10</sup>

For that matter, Justice Handler was mindful of “the easy and ready criticism that courts are being pugnacious and too activist.”<sup>11</sup> He would respond:

It is possible to rejoin by urging that courts are doing what they have always done. The judicial function has not changed—the problems, the issues and controversies have changed. The function of the courts is to adjudicate cases and controversies properly brought before them. While a court is not an orphanage for foundling cases, when cases land at the courthouse steps, they must be taken in. This has meant that in many situations the court has been called on to reach decisions on matters with respect to which there has not yet evolved a societal consensus. It is, therefore, understandable that judicial resolution of such . . . matter[s] stirs controversy and perhaps resentment.<sup>12</sup>

Justice Handler brilliantly and courageously honored the judicial as well as judicious function. As Karl Llewellyn observed, “Compassion without technique is a mess; and technique without compassion is a menace.”<sup>13</sup> As my most precious teacher in the law, Justice Handler taught that the rigorous commitment to excellence, to mean anything, must be accompanied by virtue, integrity, and generosity.

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<sup>8</sup> *Id.* at 496 (footnote omitted).

<sup>9</sup> See *Knight v. City of Margate*, 86 N.J. 374, 388, 431 A.2d 833, 840 (1981) (quoting *In re Salaries for Probation Officers of Bergen County*, 58 N.J. 422, 425, 278 A.2d 417, 418 (1971)).

<sup>10</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 244 (1962).

<sup>11</sup> Handler, *supra* note 6, at 533.

<sup>12</sup> Handler, *supra* note 6, at 533-34 (footnote omitted).

<sup>13</sup> Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 510

*The Handler Legacy*

A prolific writer, Justice Handler leaves behind close to 500 opinions, including dissents and concurrences.<sup>14</sup> He excelled in the rarest of ways, as a great leader of majorities and as a great dissenter. His opinions reveal the craft of the law and the skill of this uniquely gifted craftsman. Human dignity and worth reside at the core of his jurisprudential vision. So much of his work realizes the hope that we never forget "the role that human experience, emotion, and passion play in the judicial process."<sup>15</sup>

For more than twenty-two years the Justice contributed in immeasurable ways to the work of a precedent-setting Court, one widely regarded by legal experts as among the nation's very best.<sup>16</sup> His eloquent voice emerged as champion of the underserved, the underrepresented, the silenced, and the victims of bias and disparate treatment. He wrote three major opinions on financing for poor school districts,<sup>17</sup> championed First Amendment rights,<sup>18</sup> extended the doctrine of eyewitness trauma,<sup>19</sup> redressed workplace discrimination,<sup>20</sup> and reshaped for the better the law of products liability and toxic tort doctrine.<sup>21</sup>

Often, the Justice would remark that federalism is a two-way street. In his now-famous concurring opinion in *State v. Hunt*,<sup>22</sup> the 1982 decision finding that New Jersey citizens have a right to privacy in their telephone billing records, the Justice set forth seven factors for state courts to consider when determining whether to depart from federal standards and instead offer more protection than the United States Constitution would require: the textual difference in state and federal language, legislative history, preexisting state law,

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(1987) (quoting Karl N. Llewellyn).

<sup>14</sup> See Matt Ackermann, *Handler Says He's Retiring Sept. 1, Two Years Early*, 156 N.J. L.J. at 837 (June 7, 1999).

<sup>15</sup> William J. Brennan, Jr., *Reason, Passion, and the Progress of the Law: The Forty-Second Annual Benjamin N. Cardozo Lecture*, 10 CARDOZO L. REV. 3, 4-5 (1988). Justice Brennan said of Justice Cardozo: "He attacked the myth that judges were oracles of pure reason, and insisted that we consider the role that human experience, emotion, and passion play in the judicial process." *Id.* at 5.

<sup>16</sup> See Cammarere, *supra* note 2, at 1225.

<sup>17</sup> See *Abbott v. Burke*, 153 N.J. 480, 710 A.2d 450 (1998); *Abbott v. Burke*, 149 N.J. 145, 693 A.2d 417 (1997); *Abbott v. Burke*, 100 N.J. 269, 495 A.2d 376 (1985).

<sup>18</sup> See *State v. Schimd*, 84 N.J. 535, 423 A.2d 615 (1980).

<sup>19</sup> See *Dunphy v. Gregor*, 136 N.J. 99, 642 A.2d 372 (1994).

<sup>20</sup> See *Taylor v. Metzger*, 152 N.J. 490, 706 A.2d 685 (1998); *Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524, 691 A.2d 321 (1997).

<sup>21</sup> See *Rubanick v. Witco Chem. Corp.*, 125 N.J. 421, 593 A.2d 733 (1991).

<sup>22</sup> 91 N.J. 338, 450 A.2d 952 (1982).

the structural difference between the federal and state constitutions, matters of particular state interest or local concern, state traditions, and public attitudes.<sup>23</sup> For the ensuing decades, "New Jersey has led the nation in interpreting our state constitution as more protective of individual rights than the federal Constitution."<sup>24</sup>

The poetry and passion of Justice Handler's voice is felt perhaps most poignantly in his many death penalty dissents. The spirit, commitment, and cogency of his death penalty jurisprudence is unparalleled. It is here, in particular, that the Justice intrinsically reminds us that spiritual values lie at the heart of legal principles. The two are inextricably intertwined, and justice is a secular faith.<sup>25</sup> The theological roots of human rights take as their core the premise that my neighbor *is* me. Thus, in *State v. Marshall*,<sup>26</sup> the Court's 1991 ruling to uphold the constitutionality of the death penalty, Justice Handler stated in dissent:

Our constitution is for all of us: if it fails the most reprehensible, it fails the rest. The death sentence in this case sounds with deafening finality for the defendant, but its discordant reverberations resound for everyone. John Donne in Devotions XVII, gives voice to this truth: "[A]ny man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee."<sup>27</sup>

In *State v. Ramseur*,<sup>28</sup> Justice Handler expressed with sadness the impossibility of ever attempting "to reconcile . . . the abstract justifications of death penalty jurisprudence with the pain and suffering of [its victims]."<sup>29</sup> Most recently, in *State v. Loftin*,<sup>30</sup> the Justice emphatically reiterated that race and class remain the principal determinants of who is executed or who is not. Justice Handler wrote: "We should stop questioning our senses and admit, at the very least, that what we see is, in all likelihood, an

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<sup>23</sup> See *id.* at 364-68, 450 A.2d at 965-67.

<sup>24</sup> Eric Neisser, *Seizing on the New Jersey Constitution to Protect Privacy*, 185 N.J. LAW., June 1997, at 24.

<sup>25</sup> I am indebted to lawyer, teacher, and scholar Raymond Brown, Jr., Esq., for this observation and for his valuable teachings on the theological underpinnings of human rights.

<sup>26</sup> 123 N.J. 1, 586 A.2d 85 (1991).

<sup>27</sup> *Id.* at 267, 586 A.2d at 226 (Handler, J., dissenting) (alteration in original) (quoting John Donne, *Meditation XVII* (1624), reprinted in THE OXFORD ANTHOLOGY OF ENGLISH LITERATURE 1057 (Frank Kermode & John Hollander eds., Oxford Univ. Press 1973)).

<sup>28</sup> 106 N.J. 123, 524 A.2d 188 (1987).

<sup>29</sup> *Id.* at 468, 524 A.2d at 365 (Handler, J., dissenting).

<sup>30</sup> 157 N.J. 253, 724 A.2d 129 (1999).

administration of the death penalty that is racist and unequal.”<sup>31</sup> The Justice remarked that “[t]he black man executed purely because of his race finds no solace and gains no redemption from the argument that had his case been examined ten years later . . . he would have been spared.”<sup>32</sup>

### *Concluding Reminiscences*

Justice Handler saw, and with his esteemed colleagues upheld, the promise of a judiciary able to realize its role as the guarantor of rights, willing to forego the expedient for the just, the popular for the principled, and the self-inflicted for the greater good. He believed that all of us in the law are the custodians of the larger community’s ethical and moral sense and its greatest hope for the attainment of equal access to justice. His legacy is most precious because it helps us to imagine this possibility and to believe that it is attainable.

Justice Handler’s example inspires us to remember who we are and what we stand for. Implicitly, he taught that when we gauge each other’s measure, integrity, leadership, innovation, independence, and service should be the barometers of success. He recently remarked: “I think it is an important and indispensable characteristic for every justice to have character. It is more important than anything else[.]”<sup>33</sup>

Now, as a teacher, whenever I speak to my students of “the craft of the law,” I smile to myself and think of the good Justice. When I ask whether a given opinion has the feel of rightness, the force of authority, the weight of reason, I like to think that I am honoring his lessons taught.

Working with Justice Handler was a venture to the summit, the higher ground. It would come to be important preparation for the journey ahead, back in the trenches. As the poet and traveler René Daumal wrote, “One climbs; one sees. One descends, one sees no longer but one *has* seen. There is an art to conducting oneself in the lower regions by the memory of what one saw higher up. When one can no longer see, one can at least still know.”<sup>34</sup>

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<sup>31</sup> *Id.* at 410, 724 A.2d at 209 (Handler, J., dissenting).

<sup>32</sup> *Id.* at 387, 724 A.2d at 198 (Handler, J., dissenting).

<sup>33</sup> See Ackermann, *supra* note 14, at 837 (quoting Justice Handler).

<sup>34</sup> RENÉ DAUMAL, *LE MONT ANALOGUE* (Éditions Gallimard, Paris 1952), *excerpted in* JEAN BIÈS, *RENÉ DAUMAL* 140 (Éditions Pierre Seghers, Paris 1967).