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Judge Learned Hand: genius, path breaker

Recollections of a law clerk

The following is the text of a speech by Thomas Ehrlich, President of Indiana University, who from 1959-60 was a law clerk to the distinguished federal judge, Learned Hand, of the United States Circuit Court, Second Circuit, at New York. Ehrlich addressed the assembly luncheon of the Spring Meeting of the Indiana State Bar Association on April 14, 1989, at Indianapolis.

By Thomas Ehrlich

State Bar President Jeanne Miller suggested that I might reminisce a bit about a year I spent three decades ago as law clerk to Judge Learned Hand, who was among the leading American jurists of our time and perhaps of any time. I say “perhaps” because Learned Hand was skeptical of superlatives, let alone hyperbole, not because of any doubts about his greatness. No one with whom I have ever worked so plainly had the mark of genius. In substance and in style, he continually cut new paths. And although I never could follow him, what I gained by trying — plodding at my own gait — has been a large part of my education. It was a glorious experience — and has been downhill ever since.

Learned Hand was 87 when I went to work for him in the fall of 1959. He had been a federal judge for 50 years, and was widely recognized as the greatest legal mind in our country. I was struck during my first visit with him how short he was, no more than about 5 feet, 7 inches. Somehow, I had assumed he was a giant, in body as well as mind. His head was large, however, and he had enormous bushy eyebrows reaching out beyond a pair of melancholy eyes.

During that initial interview, I remember being nervous for only the first few minutes. Judge Hand asked about my work in college; I must have said several things were “exciting,” for he finally commented that he didn’t like the word “exciting” — that my generation thought far too many things were “exciting.”

He told me of his days at Harvard College, then in the golden age of philosophy with Professors William James, Josiah Royce, and his particular favorite, George Santyanna. Judge Hand said that he literally sat at the feet of Santyanna and discussed philosophy. Apparently Santyanna had an attic room in Cambridge, and a number of his best students would be invited there. The Judge also told me something of his Harvard Law School professors. I particularly remember Judge Hand comparing one of them, Joseph Beale, to St. Thomas Aquinas — an exponent of the view that the law has a great order and he, the professor, was the divine exponent.

At least on the Second Circuit, most of the judges 30 years ago asked their law clerks to draft their opinions. Judge Hand was away part of the year, and when he was away I worked for a number of other judges, including some of the most renowned, drafting initial versions of their opinions. Naturally, the judges revised those drafts, as they did the drafts by their other clerks, and made the opinions their own. But working for Learned Hand was a completely different experience.

Within the first week, I was sitting at a desk literally a few feet from the Judge’s, in the magnificent room at the Foley Square Courthouse that was his chambers. Although I wrote many pages to help in my own analyses of issues, I doubt that more than a total of one paragraph of my prose found its way into his memoranda to fellow judges, let alone into his opinions.

Rather, our routine went something like this. After we had each read the briefs concerning a case, he would ask me to argue one side and he would urge opposing view. Sometimes, we would then switch sides. In all events, he would move back and forth making arguments and countering them. His processes of thought were inextricably linked to his writing, for he wrote and rewrote — eight, 10, and sometimes 12 or more drafts of an opinion. The first would be in long hand, and often he would start all over again with a yellow pad and pen. No word processors then.

Judge Hand never let his clerk do
any writing for him, except to suggest changes in drafts. We discussed our initial views, did research together, then I would have a chance to comment on each draft he wrote. He always considered my suggestions carefully, and adopted some, though he often stood fast, on several occasions for what seemed to me ambiguity. It was only some time later that I recognized the full value of conscious ambiguity to a judge.

Almost at once we began to talk about judicial philosophy. Those who have read Judge Hand’s book of lectures, The Bill of Rights, know the basic stand he took. In the strongest possible terms, he thought that judges should restrain themselves from denying the constitutionality of acts of Congress. In the end, he argued, it is the people’s elected representatives who must choose how we are to be governed under the Constitution; to impose judicial constraints is to promote legislative abdication of responsibility. Judge Hand was especially critical of the then current Supreme Court, particularly Justices Brennan, Black, Douglas, and Warren. He could not understand why those four had a special mandate to do what he considered legislating in the realm of the Bill of Rights. In the main, he viewed what they did as “reaching for the stars.”

Judge Hand believed with a passion that disinterestedness was the essential quality of a good judge. He would — often with enormous effort — begin at the beginning and, without anticipating the result, work toward it. He never examined a case without reexamining all of the principles, no matter how basic, that were argued or that might be used in support of a position.

He believed that the ability to withhold commitment can exist only in the true skeptic, one for whom doubt dispels all absolutes. He was supremely a skeptic, though never a cynic. The Judge’s favorite quotation was that of Cromwell, stated to his soldiers on the eve of battle: “I beseech ye in the bowels of Christ, think that ye may be wrong.” That sentence, he said, should be placed on the portal of every courthouse in the country. A judge must, he believed, decide between conflicting values without imposing his own.

Judge Hand had many great virtues, but modesty was not among them. Once at a dinner he was asked to define heaven. He responded that heaven was a place where in the morning there would be a football game, with Hand scoring the winning touchdown; in the afternoon a polo game, with Hand scoring the winning goal; and in the evening a public dinner addressed by Voltaire, where a heckler would shout, “Sit down and shut up, Voltaire — let Hand speak.”

Learned Hand said that his biggest

One of America’s most distinguished jurists, Learned Hand served a record 52 years as a federal judge. In 1909 he was appointed a judge of the United States District Court of the Southern District of New York. In 1924 he was elevated to the United States Circuit Court, Second Circuit, at New York. From 1939, he served as Chief Judge. Although formally retired in 1951, he continued to sit in many cases until his death in 1961. His Harvard LL.B. came in 1896.
disappointment was not being appointed to the Supreme Court. He told me that he had voted for 16 presidents — 8 Democrats and 8 Republicans — and that he secretly felt his vote for Herbert Hoover in 1928 was in hopes that Hoover would appoint him to the Supreme Court, and that he voted for Hoover in 1932 only to justify his earlier weakness. Incidentally, he subsequently voted for Dewey over Truman.

Judge Hand cared deeply for a number of his colleagues on the Second Circuit, particularly for his cousin, Augustus Hand, as well as Jerome Frank and Thomas Swan — all giants when the Court was at its prime. He had great disdain, however, for some other judges of lesser intellect. He sometimes referred to District Judge Inch as “Judge Millimeter,” because, Judge Hand said, “he’s not worth an inch.” His greatest fury was directed at Judge Manton, who was found to have taken bribes and left the Second Circuit in disrepute.

The Judge viewed law as part of morals, but only the part that is backed by forceful sanctions. He did not accept the notion of natural laws inherent in the order of things, awaiting only human revelation with divine guidance. Reason was important in law, he thought, but only to the extent that it could strip away irrelevant circumstances to lay bare the core of basic values. To him, there was no common standard to choose among basic values except the preference of individuals.

To our inherent values as humans, he would add the requirements of compromise that have become accepted in any given society and endure until, with changed tensions, new ones become substituted.

“Do justice.” Holmes’ response was “Justice! My lad, that is not my job. I am here to play the game according to the rules.”

Playing the game according to the rules was profoundly Learned Hand’s view of being a judge. In an essay about Justice Holmes, he wrote:

Freedom will do well enough as a catch-word for those who are conscious of constraint, but once set free, their lives may prove more inane than when they were hemmed about . . . To most of us, who, like the defendant in Trial by Jury, loved this young lady today, and loved that young lady tomorrow, freedom is a curse; we slink back into our cages, however narrow, and our disciplines however archaic. They are the defences against the intolerable agony of facing ourselves.

Judge Hand, like Justice Holmes, felt that agony deeply, exalted in freedom and in the choices that it offered. But in making those choices, he recognized that he might be wrong.

Over the course of three decades, I have come to disagree with many of Judge Hand’s judicial decisions, and some of his judicial philosophy, especially regarding the Bill of Rights. But I continue to be committed to his belief that the courtroom, like the
university, is no place for moral absolutes. Some people, I recognize, bridle at that statement. What about honesty, compassion, and other basic moral values, they ask. Are they not absolutes? In a sense, of course, they are — and they certainly should be taught. But in the sense that Judge Hand taught, and I learned, such moral precepts have real muscle only when applied, and in their application clouds form.

The honest answer to the question, “How do I look?” may be “Terrible,” but that answer is hardly charitable or compassionate. On a more serious level, professionals constantly must decide whether to tell the truth because it is the honest course, or to withhold the truth because a client’s confidence would be revealed. Every seeming absolute is subject to caveats when applied in such situations. The realm of professional responsibility is full of moral precepts that clash in concrete cases. Ultimately, choices must be made, and Judge Hand was profoundly of the view that one must sometimes stake even one’s life on a decision without the certainty that only faith can bring. But it is essential, he stressed, to keep in mind that one may be mistaken. This attribute is important in most professions, he urged, but it is essential in the judiciary.

The same is true, I know he would have added, with respect to teachers, especially university teachers. He had a special respect for his own teachers, and urged me strongly, and on many occasions, to become a teacher assuming, as he used to say, that I could do so and find a way to “buy coal for the fire.” In concluding his lectures at Harvard Law School on the Bill of Rights he paid special tribute to his own teachers there. “The memory of these men has been with me ever since,” he wrote. “Again and again they have helped me when the labor seemed heavy, the task seemed trivial, and the confusion seemed indecipherable. From them I learned it as craftsmen that we get our satisfactions and our pay. In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none. Go ye and do likewise.”

Was there a weakness in this remarkable man, one who received virtually every honor that our society could bestow? He had, of course, his share of personal and professional disappointments. The failure of any President to appoint him to the Supreme Court was a prime example.

If there was a flaw, perhaps it was a lack of faith that led to a deep melancholy, even pessimism. In writing to me many years ago about Judge Hand, one of my mentors quoted T. S. Eliot, “Intelligence to the highest degree without faith is absolute melancholy.” Judge Hand’s skepticism occasionally undercut his faith in a better future. He believed passionately in the will of the people, and in democratic rule as the best means to govern society. This was the basis for his strong convictions about judicial restraint. But he also knew well the range of human weaknesses — he sat in review on endless cases involving the full spectrum of human frailties. And he did not believe in appeal to authority higher than humanity’s best judgment about humans. He did not have a lasting faith in an order of the world that is past human comprehension.

To some, this was a strength, for it forced him to press himself and those about him to do their best, and then some, for no higher authority would step into the breech. For others, of course, it was a weakness, even arrogance not to recognize that there must be some controlling influences beyond ourselves; that whatever the scope of free will, it has some divine limits; that coincidence and random chance cannot explain the miracles and the tragedies that befell us. Learned Hand certainly faced these issues, often referred to God, and to the force of religion. But his skepticism was deep and abiding, and it led to a dark and lonely dimension in his life.

He and his wife seemed on the other hand, as close as two people could be. He joined her in many activities though not as I recall when she read with friends The Divine Comedy in the original Italian. They were both gracious and thoughtful to Ellen and me through the year. It is, of course, in his role as teacher that I remember him most clearly, and I still remain his student.

Over the course of 50 years on the federal bench, Learned Hand wrote more than 2,000 opinions. Some judges are known for the extraordinary insight they display in torts or contracts or property or procedure. Learned Hand was unique in being recognized as a path breaker in almost every field of federal law. He was a genius in what he wrote and the way he wrote; the two were so closely intertwined that style and substance became one. It was only for those lucky few, as I was, to realize how much writing and rewriting were consumed in the preparation of his seemingly effortless prose.

During the time I was working for Judge Hand, one of my fellow law clerks found a copy of Schopenhauer’s Essays that was owned by Judge Jerome Frank, a close friend as well as colleague of Learned Hand. These words were underlined in red by Judge Frank, and next to them he wrote the initials “L. H.”:

On the wisdom of an old man: Constantly finding new uses for his stores of knowledge and adding to them at every opportunity, he maintains uninterrupted that inward process of self-education.

Until the day he died, a year after I was with him, Learned Hand did maintain uninterrupted “that inward process of self-education.” And with what mind-crackling results!