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# BOOK REVIEW

## THE TENTH JUSTICE\*

*James L. Oakes\*\**

LEARNED HAND: THE MAN AND THE JUDGE, Gerald Gunther, New York: Alfred A. Knopf (1994). 818 pp.

At the end of the preface to *Learned Hand, The Man and the Judge*, Gerald Gunther states that he began work on the biography despite the fear that his admiration for Hand might preclude an unprejudiced portrayal. He ended, however, "hoping that I have pictured him fully, warts and all. He remains my idol still." I believe Gunther achieved his goal and in the process he has given us a positively superb biography of the man, as well as a great insight into the judge.

As a student at Harvard College, Hand was influenced by the Harvard philosopher/psychologist William James.<sup>1</sup> According to Gunther, Hand was fond of the distinction James drew between the tender-minded and the tough-minded.<sup>2</sup> In James's view, the qualities of the tender-minded are that they are rationalistic (thinking in principles), intellectualistic (thinking in terms of abstractions), idealistic, philosophical, optimistic, religious, free-willist, monistic and dogmatical. On the other hand, the tough-minded are empirical (thinking in

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\* Learned Hand's conspicuous absence from the Supreme Court prompted popular journals of his day to acknowledge his place in American jurisprudence by referring to Hand as the "Tenth Justice." See Lewis F. Powell, Jr., *Foreword* to GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* at ix (1994).

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<sup>1</sup> See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 35-37 (1994).

<sup>2</sup> *Id.* at 369; see also WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* (1907) (Chapter I, "The Dilemma in Philosophy").

terms of facts), sensationalistic (gaining knowledge through the senses), materialistic, pessimistic, irreligious, fatalistic, pluralistic, and skeptical. Although Hand tended more toward tough-mindedness—he was irreligious, pluralistic and skeptical—Gunther demonstrates that Hand was a blend of Jamesian components: he thought both in terms of principles and facts and could deal with abstractions as physical realities.

In Hand's earlier career, Gunther informs us that Hand was optimistic. This optimism manifested itself in Hand's association with reform movements. We are told, for example, of Hand's belief in Herbert Croly's *New Nationalism*.<sup>3</sup> Indeed, it was Hand's influence which led Theodore Roosevelt to utilize much of Croly's thinking as a basis for the Progressive Party platform. Hand even ran for Chief Judge of the New York Court of Appeals in an effort to bolster the Bull Moose movement and the Progressive Party's position in New York.<sup>4</sup> In addition, Gunther informs us that Hand had a role in the founding of the *New Republic* magazine in 1913.<sup>5</sup>

In his latter years, however, Hand was, if not pessimistic, at least less optimistic about the state of human nature and the human condition. In a particularly revealing letter to Bernard Berenson, Hand wrote:

My despair when I do despair, which is oftener than I wish, is grounded in the fact that it does seem as though the last achievement of mankind was a detachment, a skepticism, an aloofness from conviction, which has proved the best road, and nearly the only road, that has led us out of the trees . . . [A]s a consistent skeptic, I must be skeptical as to the supreme value of skepticism, and that too I shall try to be.<sup>6</sup>

But privately he was optimistic; when he was 75 he said, "Now the question is: 'How long, oh, Lord, how long?' Curiously, perhaps, I don't want to shorten it a day; I am having a good time."<sup>7</sup>

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<sup>3</sup> GUNTHER, *supra* note 1, at 190-269 (Chapter V, "The Peak of Political Enthusiasm: Herbert Croly, Theodore Roosevelt, and the Progressive Years").

<sup>4</sup> GUNTHER, *supra* note 1, at 235. Despite losing the election, Hand was satisfied with the result, as it boded well for his career, as well as the Progressive Party's future. *Id.* at 236-37.

<sup>5</sup> GUNTHER, *supra* note 1, at 241-69.

<sup>6</sup> GUNTHER, *supra* note 1, at 582.

<sup>7</sup> GUNTHER, *supra* note 1, at 573.

Gunther shows us how, as a human being, Hand himself had many contradictions and paradoxes. He could be gregarious—he enjoyed singing Gilbert and Sullivan—yet he spent much time alone. He could be both gruff and sweet. He could be domineering in the courtroom, yet he considered himself a Caspar Milquetoast<sup>8</sup> and was always somewhat self-deprecating.

Hand appeared excessively modest yet, as he admitted, he “longed as the thing beyond all else . . . to get a place on [the Supreme Court].”<sup>9</sup> He was a doer and could force himself to make decisions, yet he had many self-doubts, and, until he became a district judge in 1909 at the age of thirty-seven, his legal career had been less than positively successful.<sup>10</sup>

Hand was anything but a bleeding heart liberal—in his speech at the presentation of the portrait of Justice Oliver Wendell Holmes, Jr. to the Harvard Law School on March 20, 1930,<sup>11</sup> he referred deprecatingly to “those who live in chronic moral exaltation, whom the ills of this world make ever restive, who must be always fretting for some cure.”<sup>12</sup> As a further example, Gunther shows us how Hand was quite slow to respond even to the implorations of Felix Frankfurter, one of his closer friends and longtime correspondents, to the plight of Sacco and Vanzetti, two Italian immigrants whom many people, including Frankfurter, believed had not received a fair trial because of their political affiliations.<sup>13</sup>

At the same time, however, he was friendly to the only lower-east-side Jew in his college and combated Albany’s Fort Orange Club’s Jewish-exclusion rules.<sup>14</sup> In addition, Hand was the author of an influential letter in opposition to President A. Lawrence Lowe’s proposal to introduce a quota system at Harvard, which was designed primarily for the

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<sup>8</sup> GUNTHER, *supra* note 1, at 586. Caspar Milquetoast, a character created by H.J. Webster, denotes one who has a meek, timid and retiring nature. AMERICAN HERITAGE DICTIONARY 798 (2d coll. ed. 1991).

<sup>9</sup> GUNTHER, *supra* note 1, at 569 (letter to Felix Frankfurter).

<sup>10</sup> GUNTHER, *supra* note 1, at 53-71.

<sup>11</sup> Learned Hand, *Mr. Justice Holmes, Address at Langdell Hall* (1930), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 57 (compiled by Irving Dilliard 1952) [hereinafter *THE SPIRIT OF LIBERTY*].

<sup>12</sup> *Id.* at 62.

<sup>13</sup> GUNTHER, *supra* note 1, at 388-95.

<sup>14</sup> GUNTHER, *supra* note 1, at 115-17.

purpose of limiting the proportion of undergraduate Jewish students.<sup>15</sup>

Furthermore, he became an active and energetic opponent of McCarthyism, which he publicly denounced in an address to education officials attending a meeting of the Board of Regents in Albany.<sup>16</sup> This address was reported on the front page of the *New York Times* and was reprinted as the lead article in the *Saturday Review*.<sup>17</sup> He continued speaking against McCarthyism at the 48th Annual Session of the American Jewish Committee on January 29, 1955, where he received the organization's first American Liberties Medallion.<sup>18</sup> Here, his Jamesian philosophical bent surfaced once again when he reflected that the true principles of civil liberties and human rights

lie in habits, customs—conventions, if you will—that tolerate dissent and can live without irrefragable certainties; that are ready to overhaul existing assumptions; that recognize that we never see save through a glass, darkly; and that at long last we shall succeed only so far as we continue to undertake “the intolerable labor of thought”—that most distasteful of all our activities.<sup>19</sup>

In the realm of constitutional law, we see the various pulls at work on Hand and his own tough- and tender-mindedness. Gunther recounts Hand's law school familiarity with, and—along with Frankfurter<sup>20</sup>—belief in, the teachings of James Bradley Thayer,<sup>21</sup> who maintained that judicial review is of doubtful necessity as a matter of principle and that giving judges the powers of platonic guardians, if judicial review is exercised too broadly, tends to weaken democracy. Perhaps the best expression of this view was set forth in Hand's famous

<sup>15</sup> Learned Hand, *Christians and Jews* (1922), in *THE SPIRIT OF LIBERTY*, *supra* note 11, at 20-23.

<sup>16</sup> GUNTHER, *supra* note 1, at 588-89. This address made the front page of the *New York Times* and was later reprinted as a lead article in the *Saturday Review*. *Id.* at 589.

<sup>17</sup> GUNTHER, *supra* note 1, at 589.

<sup>18</sup> GUNTHER, *supra* note 1, at 591.

<sup>19</sup> GUNTHER, *supra* note 1, at 591.

<sup>20</sup> See Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 52 HARV. L. REV. 440, 443 & n.7 (1939) (lauding Thayer).

<sup>21</sup> See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), reprinted in JAMES B. THAYER, *LEGAL ESSAYS* 1 (1927).

1944 "I-Am-an-American-Day" speech entitled, "The Spirit of Liberty," in which he said

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>22</sup>

But one can go back to Thayer to see the origins of Hand's perhaps most oft-quoted passage: "Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."<sup>23</sup>

We see this skepticism of judicial review expressed again in Hand's 1908 *Harvard Law Review* article, "Due Process of Law and the Eight Hour Day."<sup>24</sup> The article denounced the Supreme Court's (later much-criticized) decision in *Lochner v. New York*,<sup>25</sup> in which the Court intensively scrutinized and then struck down state legislation that established maximum work hours for bakery employees. In a later *New Republic* article,<sup>26</sup> Hand again criticized one of the worst of the Supreme Court's *Lochner*-type decisions, *Coppage v. Kansas*,<sup>27</sup> where the Court struck down, as a matter of freedom of contract, legislation prohibiting "yellow dog" contracts, under which employees were prohibited from becoming or remaining union members. His final anonymous editorial comment, written in 1923, was prompted by the Supreme Court's decision in *Adkins v. Children's Hospital*,<sup>28</sup> which struck down the District of Columbia's congressionally adopted minimum wage law for women, also in the name of freedom of contract.

Hand carried his dislike for *Lochner*-type, interventionist, substantive due process law decisions consistently throughout his life. Indeed, in a tribute to Chief Justice Stone, Hand

<sup>22</sup> Learned Hand, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY*, *supra* note 11, at 189-90.

<sup>23</sup> THAYER, *supra* note 21, at 39.

<sup>24</sup> 21 HARV. L. REV. 495 (1908).

<sup>25</sup> 198 U.S. 45 (1905); *see* GUNTHER, *supra* note 1, at 118.

<sup>26</sup> *Normal Inequalities of Fortune*, NEW REPUBLIC, Feb. 6, 1915, at 5 (published anonymously).

<sup>27</sup> 236 U.S. 1 (1915); *see* GUNTHER, *supra* note 1, at 248.

<sup>28</sup> 261 U.S. 525 (1923); *see* GUNTHER, *supra* note 1, at 251.

somewhat ironically expressed his view that the courts had no more latitude for enforcing their own predilections when they were concerned with personal interests than when they were concerned with property interests.<sup>29</sup> Certainly, his Holmes Lectures,<sup>30</sup> given in February of 1958 when Hand had just turned eighty-seven, condemned the Supreme Court's "patent usurpation" of powers that did not properly belong to the courts and which thereby turned them into a "third legislative chamber."<sup>31</sup> In his second Holmes Lecture Hand stated:

I can see no more persuasive reason for supposing that a legislature is *a priori* less qualified to choose between "personal" than between economic values; and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second.<sup>32</sup>

Of course, this deferential theory of constitutional review, quite contrary to that of the Warren Court and, indeed, calling into question such pillars of the law as *Brown v. Board of Education*, has received considerable revival of interest in the 1980s and 1990s both on the Supreme Court and in certain academic circles.

Gunther concludes "that [Hand's] doubts about judicial activism . . . increased during his last years."<sup>33</sup> In contrast to his conservative view on this area of the law, Hand's views in other areas were more liberal. For example, Hand's view of freedom of speech, as expressed in *Masses Publishing Co. v. Patten*,<sup>34</sup> "was extraordinarily speech-protective," far more so than the "clear and present danger" test which Holmes had announced two years prior.<sup>35</sup> In addition, Hand wrote courageous opinions in two Cold-War espionage cases, *United States v. Coplon*<sup>36</sup> and *United States v. Remington*,<sup>37</sup> in which he voted to reverse the convictions of two defendants on

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<sup>29</sup> GUNTHER, *supra* note 1, at 565.

<sup>30</sup> GUNTHER, *supra* note 1, at 653.

<sup>31</sup> GUNTHER, *supra* note 1, at 654.

<sup>32</sup> GUNTHER, *supra* note 1, at 656.

<sup>33</sup> GUNTHER, *supra* note 1, at 664.

<sup>34</sup> 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917); *see* GUNTHER, *supra* note 1, at 152.

<sup>35</sup> *See* GUNTHER, *supra* note 1, at 152.

<sup>36</sup> 185 F.2d 629 (2d Cir. 1950).

<sup>37</sup> 208 F.2d 567 (2d Cir. 1953).

the grounds of failure to disclose wiretap records to the defendant and prosecutorial abuse of power, respectively, the latter in dissent. Finally, Hand's outspoken public attacks on McCarthyism demonstrate that Hand's deference ended at the bench and did not cross over into his personal life.

In an earlier article that goes more fully into the *Masses* case, Professor Gunther claims that the message of Hand's Holmes Lectures did resemble, even if it exceeded, those he had articulated earlier.<sup>38</sup> But one suspects that the professor would side at least with Paul Freund's criticism that, "The question [regarding judicial intervention] is not whether the courts can do everything but whether they can do something."<sup>39</sup> And one senses that the professor might agree with this reviewer that judicial review results in:

the day-to-day concrete exposition of those rights not only as a continuing educational process—educative to expositor and exposittee alike—but as an activity at the heart of our democratic system . . . . [I]ndeed there is no other institution in our society that continually carries on a systematic exposition of human rights and their relation to society. The "dialogue" then serves not only as an inspiration to both judges and nation, but as a bedrock against the encroachment of tyranny, whatever its derivation, and especially when the sources of that tyranny are, as they are sometimes, hidden in the "hearts of men and women."<sup>40</sup>

In any event, Gunther concludes that

[u]ltimately, the bleakness, pessimism, and extremism of Hand's final major statement did not do full justice to the richness, subtlety, and complexity of his lifelong search for a delicate balance between the competing pressures of passionate devotion to free speech in an open society on the one side and sensitivity to the legitimate restraint on courts in a democracy on the other.<sup>41</sup>

Professor Gunther's biography was over twenty-five years in the making, and its thoroughness shows. Indeed, Justice

<sup>38</sup> GUNTHER, *supra* note 1, at 665. For a discussion of the Holmes-Hand discourse on the *Masses* case, see Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 722-55 (1975).

<sup>39</sup> GUNTHER, *supra* note 1, at 665; see also PAUL A. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 89 (1961).

<sup>40</sup> James L. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 926 (1979).

<sup>41</sup> GUNTHER, *supra* note 1, at 672.



Powell's Foreword points out that Gunther was dealing with over 100,000 written pages—box after box of documents given to him as Hand's literary executor.<sup>42</sup> Perhaps another reason for the delay in publication was not to upset the Hand family with the rather unflattering portrait the biography gives of Hand's wife, Frances Fincke. In any event, Mrs. Hand is one of the most unsympathetic persons in the entire book. Gunther informs us that her "Boston marriage"<sup>43</sup> to a fellow Bryn Mawr College student never came off by virtue of her marriage to Hand. In addition, Gunther gives a tasteful, if unsympathetic, recounting of her three decades of close relationship to a Dartmouth professor, Louis Dow, in Cornish, New Hampshire—the two of them took trips to Europe together without Learned. In a similar vein, Gunther occasionally mentions her not-so-warm letters to her husband.

The book has few, if any, shortcomings. Certainly, Hand's wife's relationship with Dow had to have played a role in Hand's life, but we never quite find out what it is. It may be, too, that Mrs. Hand's premarital relationship with Mildred Minturn, her Bryn Mawr friend, should not have been so detailed. The only other portion of the book that seems to be slightly questionable is the long discussion of the break up of Hand's friendship with Walter Lippman, which evidently occurred when Lippman remarried the wife of a close mutual friend.<sup>44</sup> We see, however, in that event a different side of Hand, the shy side. He never discussed the matter with Lippman because he felt reluctant to do so, just as one would suppose he would have felt reluctant to discuss the relationship between Louis Dow and Mrs. Hand.

Professor Gunther was a law clerk to Judge Hand in the early 1950s, and his book has been reviewed favorably in the

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<sup>42</sup> Lewis F. Powell, Jr., *Foreword to GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE* at ix (1994).

<sup>43</sup> GUNTHER, *supra* note 1, at 96. A "Boston marriage" refers to a long-term relationship between two unmarried women who sought more than a domestic life, but were interested in a relationship that supported their intellectual and professional aspirations. *Id.*

<sup>44</sup> GUNTHER, *supra* note 1, at 489-502.

*New York Times*<sup>45</sup> and in the *New York Review Of Books*.<sup>46</sup> The latter review, written by the writer/philosopher Ronald Dworkin, another former law clerk to Hand, is especially noteworthy because Dworkin seeks to answer Hand's Holmes Lecture, "Extremism." Dworkin concludes that Hand's main reasons for denying judges any power of judicial review, despite the Constitution's direct instruction that government be limited by moral principle, might actually "count against rather than for his conclusions."<sup>47</sup> Dworkin also concludes that developments since Hand's day have made for a greater understanding of the national sense of justice and the public spirit of liberty advanced by virtue of the dialogue to which I have previously referred. Dworkin concludes that "though he was a great judge, it was the man I loved." Gerald Gunther has crafted a wonderful book that illuminates each of these aspects.

Needless to say, this book is must reading for any student of the law and, I would say, any student of democracy.

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<sup>45</sup> Herbert Mitgang, *The Top-Level Player Who Never Made the Team*, N.Y. TIMES, May 13, 1994, at C28; John T. Noonan, Jr., *Master of Restraint*, N.Y. TIMES, May 1, 1994, § 7 (Book Review), at 7.

<sup>46</sup> Ronald Dworkin, *Mr. Liberty*, N.Y. REV. BOOKS, Aug. 11, 1994, at 14.

<sup>47</sup> *Id.* at 14, 22.

