

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1994

The Hand Biography and the Question of Judicial Greatness (reviewing Gerald Gunther, Learned Hand: The Man and the Judge (1994))

Richard A. Posner

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Richard A. Posner, "The Hand Biography and the Question of Judicial Greatness (reviewing Gerald Gunther, Learned Hand: The Man and the Judge (1994))," 104 Yale Law Journal 511 (1994).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Book Review

The Learned Hand Biography and the Question of Judicial Greatness

Learned Hand: The Man and the Judge. By Gerald Gunther.* New York: Alfred A. Knopf, 1994. Pp. xxi, 818. \$35.00.

Richard A. Posner[†]

Learned Hand is considered by many the third-greatest judge in the history of the United States, after Holmes and John Marshall; some might even rate him higher. Since judges remain at center stage in our legal system, one would expect Hand's career and achievements to receive sustained and critical attention from the legal academy. One would expect careful attention to such questions as whether there is a solid basis for the belief that Hand was such a great judge or whether it is just a piece of professional folklore or Harvard piety, what his greatness (if he was great) consisted in, how he can be compared with judges who sat on different courts or in different eras, what it was in himself or in his environment that can explain his achievements, what other judges can learn from his career, and what that career can teach us about the larger questions of jurisprudence and legal process.

* William Nelson Cromwell Professor of Law, Stanford Law School.

† Chief Judge, U.S. Court of Appeals for the Seventh Circuit, Senior Lecturer, University of Chicago Law School. I thank Larry Downes, Frank Easterbrook, Dennis Hutchinson, William Landes, Lawrence Lessig, Martha Nussbaum, Charlene Posner, Cass Sunstein, and participants in a faculty seminar at Yale Law School for very helpful comments on a previous draft, and Andrew Trask for excellent research assistance.

I.

A biography of Hand could not be expected to answer all these questions, many of which are not biographical. But it would be bound to cast light on them. The Hand biography has been long awaited in the figurative sense, therefore—and in the literal as well. Gerald Gunther of the Stanford Law School began work on this project, at last published,¹ thirty-seven years ago, if one may judge from the date of his first interviews with the judge. The patient industry that Gunther devoted to the work has not been wasted. Despite its massive size (680 pages of dense text and 105 even denser pages of endnotes), the book is superbly readable, clearly written, well paced, and cleverly focused on those aspects of Hand's life and career most likely to interest people who are not fascinated by the work of a lower-court judge—his marriage, personality, views of free speech and the role of the Supreme Court, political activities, failure to become a Supreme Court Justice, lionization by the media in his old age, and relations with famous people ranging from Herbert Croly and Walter Lippmann to Bernard Berenson, George Santayana, and Theodore Roosevelt and including all the legal luminaries of his era. Most of the quotations in the book are from private correspondence, confidential memoranda, or Hand's vivid and stylish oral memoir for the Columbia Oral History Project, and they portray a spicier, racier, earthier Hand than one would infer from his judicial opinions and published speeches alone. When one considers that Hand lived an outwardly dull life, laboring in obscure judicial vineyards, Gunther's achievement in making of Hand's life a moving and even exciting narrative is a veritable *tour de force*. The book is also a work of massive and scrupulous scholarship. The Learned Hand Papers to which Gunther had exclusive access in preparing the biography are said to consist of 100,000 documents, and the collateral reading reflected in the endnotes is massive. Gunther's book is a most distinguished contribution to a distinguished genre of legal and historical scholarship—the judicial biography.

What the book is not is critical, analytical, theoretically ambitious, "deep" (these absences will be considerable *merits* for some readers); and it is, at least to my possibly parochial eyes, off-center. These points are connected. The Hand biography is a work of old-fashioned narrative history. It is not to be despised for that. But that is what it is. It is narrative, descriptive, historiographic in the sense of presenting a reconstruction of past events that eschews speculation; and what it reconstructs and describes are mainly the things that lend themselves to narration, such as the various turning points, the ups and downs, in Hand's personal life and career; his disappointments, politicking, reactions to the big events of the day (the Bull Moose movement, the world wars, the New Deal, McCarthyism), dealings with the great and the

1. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

near-great; the handful of his cases that achieved some national notoriety; and the occasional intrigue and (on one occasion) scandal² in his court. On all these matters Gunther trains a powerful searchlight. He offers fascinating accounts of why, for example, Hand was not appointed to the Supreme Court in either 1930 or 1942, when he seemed to have his best chances, having been blocked in his earlier days by the adamant opposition of Chief Justice Taft, which stemmed from Hand's involvement with the Bull Moose movement. In 1930, as Gunther explains, Hand lost out because President Hoover could not overlook the claim of Charles Evans Hughes, as the Republican Party's elder statesman, to the Chief Justiceship (only if Stone had been made Chief Justice would a vacancy have been created that Hand might have filled). He lost out in 1942, Gunther argues more speculatively, because FDR feared that Hand would give Frankfurter a majority for the type of conservatism in matters of personal liberty that Frankfurter had demonstrated in the first flag-salute case.³

What does not lend itself to Gunther's style of historiography is the actual core of Hand's career: his fifty-two years as a federal judge—his countless votes and 3000 published opinions (a misleading number, though, as we shall see) distributed over many different fields of law. Gunther does not ignore Hand's day-to-day work as a judge, as distinct from the handful of newsworthy cases that fell his way. But that work receives relatively short shrift. For the discussion of Hand's copyright opinions, generally considered Hand's finest opinions taken as a group, Gunther relies almost entirely, by his own generous acknowledgment, on a research memo that a student wrote for him. This was no ordinary student. It was Douglas Baird, who went on to become a distinguished law professor and is now the dean of the University of Chicago Law School. Gunther may have felt that he could not improve on Baird's memo, but if so, this bespeaks the limitations of Gunther's own interests in Hand and in law. Probably the two most influential opinions that Hand ever wrote were *Alcoa*,⁴ one of the most celebrated antitrust decisions of all time, as well as a landmark in the economic approach to antitrust law, and *Carroll Towing*,⁵ where Hand announced the "Hand formula" of negligence, which has played so seminal a role in the economic analysis of law. Neither case is so much as mentioned in Gunther's book. Nor *The T.J. Hooper*,⁶ another great tort case of Hand's—the case that contains the canonical statement of the rule that compliance with custom is not a defense to a charge of negligence. Nor *Helvering v. Gregory*,⁷ the great tax case, where the "substance over form"

2. His chief judge, Martin Manton, was convicted in 1939 of accepting bribes. Hand succeeded him as chief judge (then called "senior judge") of the Second Circuit. See *id.* at 503–10.

3. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

4. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

5. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

6. 60 F.2d 737 (2d Cir. 1932).

7. 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

doctrine originated. Nor *Gregoire v. Biddle*,⁸ Hand's most frequently cited case, a landmark in the law of public officers' immunity from tort suits. Nor *United States v. Peoni*,⁹ which gave the federal courts the definition of aider and abettor that they use to this day. Gunther does discuss, at great length as we are about to see, Hand's decision in *United States v. Dennis*,¹⁰ an opinion that is still cited—although not a museum piece—for its definition of conspiracy,¹¹ which Gunther does not discuss, rather than for its constitutional standard, which is the aspect that Gunther discusses. Federal income tax and federal criminal law were two of the fields where Hand made his most lasting contributions, but Gunther does not discuss the former at all and discusses the latter only in relation to cases involving notorious Communist defendants—Judith Coplon, William Remington, and the Communist leaders who were the defendants in *Dennis*. Also very influential on judicial and academic thinking was and is Hand's theory and practice of statutory interpretation as imaginative reconstruction of the legislators' aims; this receives a little play from Gunther, but only a little.

The reason Gunther gives so little attention to Hand's *oeuvre* of judicial opinions—the very pith and marrow of Hand's achievements—is not, I think, that a discussion of the rather technical fields of law in which many of Hand's finest opinions are found would have interrupted the narrative flow; for in his brief discussion of Hand's patent cases, Gunther exhibits a considerable talent for the elucidation of the obscure. I suspect that the reason is Gunther's professional orientation. He is—has always been, since his clerkship days—a professor of constitutional law. That is the only field, until the biography, in which he had ever published. As a professor of constitutional law, Gunther naturally is preoccupied with the Supreme Court. The body of constitutional law has been created very largely by the Supreme Court rather than by the framers of the Constitution and of its amendments, let alone by lower-court judges; the ratio of the text of judicial opinions construing the Constitution to the text of the Constitution itself is as a hundred thousand to one; and all the great constitutional law cases are Supreme Court cases. Although Gunther did clerk for Hand, before going on to a clerkship at the Supreme Court (with Chief Justice Warren), nothing in Gunther's career—or for that matter in his biography of Hand—suggests that he has much interest in the operations or performance of the lower federal courts.

There is no reason why he should, though it is regrettable that to so many legal academics nowadays, a Supreme Court Justice is the *typical* judge and the rest of the judiciary is invisible. But the result is a mismatch between

8. 177 F.2d 579 (2d Cir. 1949).

9. 100 F.2d 401 (2d Cir. 1938).

10. 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

11. See, e.g., *United States v. Bernal-Obeso*, 989 F.2d 331, 335 (9th Cir. 1993); *United States v. Martínez de Ortiz*, 907 F.2d 629, 633 (7th Cir. 1990) (en banc).

author and subject. Not only was Hand never appointed to the Supreme Court, in his time the lower federal courts had few constitutional cases. Hand wrote only two important free speech cases during his half-century on the bench, and the merest handful of other constitutional cases. His principal foray into constitutional law consisted of a series of three lectures that he wrote and delivered at the Harvard Law School when he was eighty-six years old,¹² and they are, as Gunther comes close to acknowledging, a bust. So for that matter are the two free speech cases, or at least the second; Hand himself eventually repudiated both. Were Hand to be judged by his contributions to constitutional law, he would be considered derivative, undistinguished, and out of the mainstream. Still more remarkable, given Gunther's professional orientation, Hand displayed a positive antipathy toward constitutional law. To exaggerate only a little, he didn't think judges should have anything to do with it.

II.

Hand's first free speech case was *Masses Publishing Co. v. Patten*.¹³ *The Masses* was a left-wing magazine that opposed America's participation in World War I and applauded conscientious objectors. The publisher sued to enjoin the federal government from seizing the magazine under the authority of the Espionage Act of 1917,¹⁴ which among other things forbade causing or attempting to cause insubordination or refusal of duty in wartime. The suit came before Hand, who was then a district judge. Construing the Act very narrowly, as punishing only direct incitement—speech that *tells* the reader or listener to go and break some law—so that the consequences of the speech for the war effort were irrelevant (only the *content* of the speech was relevant), Hand granted the injunction. He was immediately reversed. Gunther claims that Hand's approach received posthumous vindication in *Brandenburg v. Ohio*,¹⁵ which held that government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁶ There is an affinity to Hand's formula in the *Masses* opinion, but not an identity, and not only, or mainly, because *Brandenburg* adds "likely to incite" and the mysterious "or produce." *Brandenburg* does not adopt the two most distinctive features of Hand's approach—that consequences are irrelevant

12. They were published as a slim volume of 77 small pages. LEARNED HAND, *THE BILL OF RIGHTS. THE OLIVER WENDELL HOLMES LECTURES* (1958).

13. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). I omit an obscenity case that Gunther praises, *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913). See GUNTHER, *supra* note 1, at 148–51.

14. Espionage Act of 1917, ch. 30, 40 Stat. 217.

15. 395 U.S. 444 (1969) (*per curiam*).

16. *Id.* at 447.

and that speech to be punishable must explicitly advocate a violation of the law. It does not even cite Hand's opinion.

For a good reason. As Gunther acknowledges in a footnote,¹⁷ the approach that Hand had taken in the *Masses* opinion was at once over- and underinclusive—overinclusive in allowing the government to forbid completely harmless “incitements,”¹⁸ underinclusive in disabling the government from dealing “with the indirect but purposeful incitement of Mark Antony’s oration over the body of Caesar.”¹⁹ *Brandenburg* takes care of the first defect of the *Masses* formulation, albeit clumsily, with the addition of the words “likely to incite,” because “likely to” implies that “incite” has the force of “bring about” rather than (Hand’s sense) “try to stir up.” By failing to define “incite” or “incitement,” however, *Brandenburg* leaves unclear how it means to deal with the second defect in Hand’s formulation. The distinction between incitement and mere advocacy may have some utility, but it cannot be the only line drawn in First Amendment cases.

None of the three opinions in *Brandenburg* cites Hand’s opinion, nor had any of the briefs filed in the case done so, even though *Brandenburg* was represented by the noted civil liberties lawyer and professor Norman Dorsen. Echoing Gunther, Laurence Tribe opines that in *Brandenburg* the Court “combin[ed] the best of Hand’s views [in *Masses*] with the best of Holmes’ and Brandeis’.”²⁰ Maybe. But it is unclear that any of the Justices were actually aware of *Masses*.

Hand’s second major free speech case was *United States v. Dennis*.²¹ Writing for a panel of the Second Circuit, Hand upheld the conviction of the leaders of the Communist Party U.S.A. for conspiring, in violation of the Smith Act of 1940,²² to advocate the forcible overthrow of the U.S. government and to organize the Communist Party U.S.A. as a vehicle for that advocacy. The reigning test was still Holmes’ “clear and present danger,” and no one could have supposed that there was a *present* danger of a Communist takeover of the United States akin to what had recently occurred in Czechoslovakia, the very model of a Communist putsch. Hand modified the formula, however, to permit speech to be suppressed if the gravity of the danger the speech created outweighed its social value, discounted by the probability (Hand slipped and said the “improbability”) that the danger would

17. See GUNTHER, *supra* note 1, at 160 n. *; see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 945–46 (1986).

18. To which I would add incitements not intended seriously.

19. GUNTHER, *supra* note 1, at 160 n. *.

20. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 848 (2d ed. 1988); see also Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754 (1975) (“In one sense, *Brandenburg* combines the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger heritage.”).

21. 183 F.2d 201 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951).

22. Smith Act of 1940, ch. 439, 54 Stat. 670.

materialize unless the speech was suppressed.²³ Since the danger was a violent revolution leading to a Communist dictatorship that would make the United States a satrapy of the Soviet Union—a danger that, if it materialized, would have fearful consequences for the United States and for the world—the curtailment of free speech was warranted, notwithstanding the improbability of such a revolution.

Balancing the magnitude of a potential loss against the probability of its occurrence, so that the greater the magnitude the less need be the probability, and the greater the probability the less need be the magnitude, in order to justify intervention—the same technique that Hand had used in formulating his test for negligence three years earlier—is attractive to the economic analyst of law. Economics deals in trade-offs, and Hand's economic intuitions are a striking feature of his opinions. But did Hand apply his test correctly to the Communist Party? The party was certainly the Soviet Union's tool, the Soviet Union was our enemy, and, as we are beginning to forget since the collapse of the Soviet Union, a formidable one. But at the time of the indictment in 1948, the party was small, extremely unpopular, and both deeply penetrated and closely watched by the FBI. (These things are not mentioned in the opinion, which is short of facts about the Communist Party and its activities; in fairness to Hand, the extent of the FBI's penetration of the party may not have been known at the time.) It had less influence and support than it had had during the Depression, and even then it had posed no serious threat to the stability of democratic institutions in this country. It did not, moreover, actually advocate violence either on a mass scale or in the form of a Czech-style coup d'état. It taught the inevitability of a violent revolution in the indefinite future, but all that it advocated in the present were organizing activities that might lay the groundwork for the eventual revolution and peaceful opposition to various U.S. foreign and domestic policies. There were plenty of Communist spies, but the Smith Act prosecutions concerned the Communist Party's above-ground activities, in hindsight harmless. Consider how little success the Communist parties of our NATO allies had in undermining their host countries, even though those parties were much larger than the American Communist Party.

Hindsight is not a fair judge, of course. The resemblance between the Communist Party U.S.A. in the 1950's and the Nazi Party in the early 1920's was close enough to worry prudent, cautious people, and the Communist Party was a tool of a hostile foreign power to boot. But "better safe than sorry" is not a plausible theory of the First Amendment, and we might expect of a judge of Hand's ability something more than the conventional wisdom of his time

23. 183 F.2d at 212. The Supreme Court accepted the modification 341 U.S. at 510 *Brandenburg* swept it into the dustbin, though it was later revived briefly, in a case involving the balancing of free-press and fair-trial claims. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976)

and place. "[W]e shall be silly dupes," he wrote, "if we forget that again and again in the past thirty years, just such preparations in other countries have aided to supplant existing governments, when the time was ripe."²⁴ Yes, but those countries were not the United States—or remotely like it. Elegant and eloquent as it is, Hand's opinion in *Dennis* was a period piece and it was not the best period for freedom of thought and expression. *Brandenburg* may have borrowed from *Masses*, but it certainly repudiated *Dennis*.²⁵

Hand summarized his approach to constitutional law in the lectures published under the title *The Bill of Rights*.²⁶ He argued that while authority for the Supreme Court to invalidate unconstitutional state action could probably be derived from the Supremacy Clause of Article VI, the Court's assumption of the power to invalidate federal action (whether by Congress or the executive branch) could not be derived from anything in the Constitution itself.²⁷ It was a "usurpation" (not Hand's word, but his sense), albeit one justified by the chaos that would ensue if each department of the federal government could act on its own view of the Constitution with impunity. Since judicial power to invalidate federal action on constitutional grounds had so dubious a pedigree, the power had to be exercised with the utmost circumspection. Actions of the other branches should be struck down only if they exceeded the power that the Constitution had granted the agency in question and not merely because the challenged actions seemed arbitrary or unreasonable. Indeed, in the entire Bill of Rights, only the Free Speech Clause of the First Amendment should be justiciable at all, and then only if Congress or the Executive had not acted in good faith in balancing the competing values of liberty and order.²⁸ This was an implicit repudiation of the view that Hand had taken in *Masses*, and went well beyond *Dennis* by requiring not that the balance struck be reasonable but only that it be honest. Hand went so far as to describe his formula in *Dennis*, his refinement of the clear and present danger formula, as question begging.²⁹ But he did not infer from this that a tighter standard was necessary; he drew the opposite inference. He denied justiciability to the Due Process Clause of the Fourteenth Amendment as well, and, to the delight of the Southern diehards, doubted the soundness of *Brown v. Board of Education*,³⁰ arguing that the Supreme Court had exceeded its authority by making a judgment about the merits and consequences of a racially segregated educational system.³¹

24. *Dennis*, 183 F.2d at 213.

25. A footnote in *Brandenburg* claims that *Dennis* (the Court was referring to the Supreme Court's decision in *Dennis*, but it tracks Hand's) is consistent with the Court's new standard, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), but this cannot be taken seriously.

26. HAND, *supra* note 12.

27. *Id.* at 10–11.

28. *Id.* at 65–66, 69.

29. *Id.* at 60.

30. 347 U.S. 483 (1954).

31. HAND, *supra* note 12, at 54–55.

The principal fruit of *The Bill of Rights* was a powerful reply by Herbert Wechsler, who argued convincingly that the power of judicial review of federal as well as state action was in fact presupposed in the Constitution, rather than having been dragged forcibly into it by judges.³² Hand was a very old man when he wrote *The Bill of Rights*, and Gunther argues that he was gulled by Frankfurter into criticizing *Brown* as resting upon a judgment, properly legislative rather than judicial, about education, rather than upon a principle of racial equality. Frankfurter had failed to inform Hand, who didn't know, having failed to keep up with the Supreme Court's evolving jurisprudence, that the Court had extended *Brown* to a host of other public facilities and, by doing so, had implicitly recast the principle in broader terms more difficult to fault.³³ But that is a detail, especially since, whatever its sequels, the opinion in *Brown* had indeed relied on what Hand would consider legislative-type judgments about the importance of education in the modern world. The fact is that the views Hand expressed in *The Bill of Rights* were the same ones he had expressed throughout his professional life. Hand took the position of Thayer, Holmes, and Frankfurter—that only *completely* unreasonable laws should be invalidated on constitutional grounds—and ratcheted it up a notch, arguing that most constitutional rights should be deemed effectively nonjusticiable.

The reason he gave for this extreme position is encapsulated in the most famous passage in the lectures: He would not like to be “ruled by a bevy of Platonic Guardians” because he would “miss the stimulus of living in a society where [he has], at least theoretically, some part in the direction of public affairs.”³⁴ This is eloquent, but it is eloquent twaddle. Plato advocated a dictatorship of philosophers that would *eliminate* democratic choice entirely. A Supreme Court that has the power to invalidate statutes *limits* the scope of democratic choice somewhat. It is the difference between whole and part. It would be eccentric to conclude that because the Supreme Court enforces the Constitution, the United States is not a democracy. Anyway, Hand's ultimate devotion was to liberty, not to democracy, and they are not identical. In fact, although in many respects mutually supportive, they are also in tension with each other. A court that limits democracy may promote liberty. Indeed, liberty is generally and I think correctly believed to *require* the placing of some limits on democratic choice. That is the lesson of the trial and condemnation of Socrates.

The Bill of Rights, which considers none of these subtleties and which is not a work of original political or legal theory, carried Hand well beyond

32. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV L. REV. 1, 2-6 (1959).

33. Frankfurter, from whose correspondence with Hand and others Gunther quotes liberally, is cast in very poor light as a lifelong prevancator. Whether this is a fair or even an intended view, I am not in a position to say.

34. HAND, *supra* note 12, at 73-74.

Robert Bork as a constitutional abstainer, and I suspect that Gunther is in his heart of hearts embarrassed by it. I would rate Hand's contribution to constitutional thought slight. Gunther's pretense to the contrary is an aspect of the hero worship that informs the book.³⁵

It does not follow from Hand's unexciting performance as a constitutional theorist that we are fortunate that he was not appointed to the Supreme Court. Appointed early enough, before the Court's about-face after its showdown with FDR, he would have been an important voice for intelligent judicial self-restraint, in chorus with Holmes, Brandeis, Cardozo, and Stone. During the period in which he might have served, moreover—he was first considered for the Court in the early 1920's, and he died with his boots on, as it were, in 1961—the Court did a lot more than constitutional law, and did it with far less distinction than Hand could have been expected to bring to that aspect of the Court's work. And because his perspective and experiences on the Court would have been far different from those that he obtained from his sporadic engagements with constitutional law as a lower-court judge, it is impossible to say how his constitutional views would have developed. Plainly he would not have become a Douglas any more than he would have become a Sutherland, but he might not have remained a Frankfurter either, let alone have gone beyond Frankfurter to near-total abstention. Gunther, reflecting his own perspective, treats Hand with unconscious condescension as a kind of Supreme Court understudy, mines Hand's correspondence for clues to his views of the great Supreme Court decisions, and grades him on conformity with Gunther's own conception of enlightened constitutional jurisprudence (so Gunther has to do a lot of apologizing for his hero when he discusses *Dennis* and the Bill of Rights lectures). But there is a big difference between telling a correspondent how one would have decided a case *if* one had been a judge of the court that decided it, and how one *would* have decided the case as a judge of that court. Vicarious judging and real judging are not the same thing, intellectually or emotionally. But since vicarious judging is a great deal of what professors of constitutional law do, Gunther's assiduity in recording Hand's reaction to decisions by the Supreme Court should not surprise.

III.

Preoccupied as Gunther is with Hand's personal life (to which I shall turn next) and constitutional forays, Gunther does not get around to telling us a great deal about Hand's half-century as a federal lower-court judge. There is a little about Hand's famous rudeness to lawyers—when he particularly

35. "He remains my idol still." GUNTHER, *supra* note 1, at xviii. I take it that this characterization, while extravagant on the basis of the written record of Hand's activities and achievements, reflects the strong personal impression that Hand made on Gunther.

disliked a lawyer's argument he would swivel his chair 180 degrees, thus presenting his back to the lawyer, and at times he would toss briefs over the bench in disgust—and about his use of law clerks, as sounding boards rather than research assistants or (thank God) ghostwriters. There is a little about Hand's diplomatic ways with judicial colleagues—so different from his ways with the lawyers who appeared before him—and ample quotations from his pungent, humorous, candid preconference memoranda to the other judges on his panel.³⁶ Gunther quotes more heavily from those memoranda than he does from Hand's opinions. Not until almost the end of the book does one get the real flavor of Hand's jurisprudence, in Gunther's brief but deft review of Hand's wonderfully sensible and humane, but disciplined, immigration decisions.³⁷

Gunther rightly emphasizes the conscientiousness with which Hand tried to figure out what was going on in the complicated maritime and patent cases that came before his court (he had no background in either field), the flair with which he summarized literary and musical works in copyright cases, and his strenuous effort to set aside his personal views and policies in deciding cases. There is almost nothing, however, about Hand's judicial workload;³⁸ about how he allocated his time between his judicial activities and his extensive social (and at times political) life outside the court; whether he cut any corners in his judicial work; how heavily he relied on the parties' briefs and oral arguments; where he got the idea for the "Hand formula"; whether his opinions differ systematically from those of his colleagues along such dimensions as length and number of citations; whether his opinions were and continue to be cited more heavily than those of his colleagues; how often he made factual or legal errors; how opinion-writing assignments were made in his court; whether he consciously specialized in any particular classes of case; how often he cited his own opinions; why he wrote so few diversity opinions; whether he got his opinions out faster or slower than his colleagues did; whether he tried to keep up with the opinions of other courts; how often he was reversed by the Supreme Court; and what truth there is to the homily, "Quote Learned, but follow Gus," a reference to his colleague-cousin Augustus Hand, conventionally thought the "sounder" judge in some sense. There is more about Hand the judge—about his habits of work, his efforts to mediate the feud between his talented but prickly colleagues Charles Clark and Jerome Frank,

36. After argument but before conference, the Second Circuit judges on the (normally three-judge) panel would write brief memos to each other giving their views of the case.

37. GUNTHER, *supra* note 1, at 629–38.

38. The figure of 3000 for Hand's opinions, which Gunther repeats, is accurate but misleading, because it includes a great many very brief per curiam opinions and brief, ephemeral concurrences. In his 38 years as a circuit judge, Hand wrote 1359 signed majority opinions, an average of 35.8 a year. This is not an unusually high number, which helps explain why he had so much time for the other activities chronicled in the book. The average, however, is somewhat depressed by the fact that he was in semiretirement during the last decade of his career. See *infra* note 82 and accompanying text.

and his moral ascendancy over the judges of his court—in Marvin Schick's book,³⁹ which Gunther cites but does not discuss. It would be interesting to know whether Gunther, who has probably investigated these matters in greater depth, shares Schick's assessments.

Gunther's emphasis on Hand's generally unsuccessful forays in constitutional law is so heavy, and his attention to Hand's performance of the core of his judicial role and to the cases for which Hand is most noted in the profession so light, that the reader is asked in effect to take on faith that Hand was a great judge; for Gunther never gets around to demonstrating that he was. Gunther tells us, for example, that "Hand had nothing but scorn for the utility of en banc hearings" and adhered to his promise never to vote for one after Congress authorized the practice.⁴⁰ No effort is made to justify or even explain Hand's position, which is apt to strike the reader as curmudgeonly, even rebellious, rather than as a token of Hand's distinction (as Gunther mysteriously seems to consider it). I suspect that the explanation lies in the simple fact that Hand's court had six judges. For a court with so small, and even, a number of judges, en banc hearings would indeed have little utility. If the original panel of three judges was unanimous and none changed his mind, then even the unanimous disagreement of the other judges would only produce a deadlock. Even if the panel was divided, the other judges would have to be unanimous in disagreement with the panel majority to avoid either reaffirming the panel opinion or producing a deadlock.⁴¹ So Hand's position made sense for his court, though not for all courts.⁴² But to show this would require an attention to the details of judicial administration that Gunther, his eye on matters that—however interesting—are peripheral to Hand's achievements, is unwilling to bestow.

Much as Gunther admires Hand, the emphasis he places on Hand's constitutional views does disservice to Hand's reputation. For it puts Hand in direct competition with Holmes, a competition that Hand, good as he was, cannot win. Gunther is highly critical of the "clear and present danger" formula with which Holmes launched the constitutional protection of free speech.⁴³ But that protection had to start somewhere, and it is unrealistic to suppose that it could have started during World War I with a degree of protection that the Supreme Court did not get around to recognizing until 1969, more than a half-century later. *Masses* was premature at best. Apart from free

39. MARVIN SCHICK, *LEARNED HAND'S COURT* (1970).

40. GUNTHER, *supra* note 1, at 515.

41. If the original vote was 2–1, the judges on the original panel adhered to their position in the en banc proceeding, and the remaining judges voted 2–1 against the panel majority's position, the court would be deadlocked 3–3.

42. Note that the Second Circuit, though much larger today than in Hand's day, rarely grants rehearing en banc. Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 371–72 (1984). Maybe Hand's ghost haunts the courthouse at Foley Square.

43. GUNTHER, *supra* note 1, at 163–64 ("It was not a useful civil libertarian doctrine.").

speech, the principal theme in Hand's writings about the Constitution was disapproval of the decisions in which the Supreme Court, in the name of the Constitution, invalidated a raft of state and (during the New Deal) federal regulatory measures. But in this, Hand was merely echoing Holmes.

Yet Hand could do things that Holmes probably could not have done. It is difficult to picture Holmes as an intermediate federal judge dealing happily with the range of technical issues that engaged Hand's attention and elicited memorable opinions. Holmes was impatient, was not (at least after he wrote *The Common Law*) a detail man, and might well have gotten bored in Hand's place, to the detriment of performance and reputation. Holmes' twenty years on the Massachusetts Supreme Judicial Court yielded a fairly meager harvest until, toward the end of his tenure there, the court began to get cases that dealt with constitutional and other issues of large public moment, which engaged Holmes' interest and capacities to the full. To lesser cases he tended to give the back of his hand. Not that Hand was a patient drudge; but he had a taste for a range of technical and fact-laden cases that, while interesting and important, would not have stirred Holmes. The capacity to find your docket interesting is not the least important attribute of an outstanding judge.⁴⁴

IV.

Though you won't learn it from Gunther's book, Learned Hand, despite his bad temper on the bench and, as we shall see, a surprising tendency to stray outside the boundaries of judicial propriety, really was a great judge. I cannot adequately defend this conclusion within the compass of this Review. For one thing the criteria of judicial greatness are contested. Some might insist that a judge's greatness consists in the "rightness" of his decisions as judged by the test of time. I think that this is too demanding a standard. Most judicial decisions, even of the agreed-to-be-the-greatest judges, like most scientific discoveries, even of the universally acknowledged greatest scientists, usually are superseded and in that sense eventually proved "wrong." I believe that the test of greatness for the substance of judicial decisions, therefore, should be, as in the case of science, the contribution that the decisions make to the development of legal rules and principles rather than whether the decision is a "classic" having the permanence and perfection of a work of art. One can illustrate the point with reference to the decisions, notably *Alcoa* and *Carroll Towing*, in which Hand introduced into the law a degree of economic sophistication theretofore lacking. In retrospect these decisions are not

44. A distinguished professor of constitutional law remarked to me several years ago, in passing, that the Supreme Court "had decided no interesting cases" in its most recent term. *No interesting cases? Not a one? In the Supreme Court? That professor probably thinks that Hand never had an interesting case*

economically sophisticated at all; but in their time they were innovative, generative.

Creativity is only one possible criterion of judicial greatness. Another, also exhibited in the work of Hand, is the gift of verbal facility that enables a familiar proposition to be expressed memorably, arrestingly, thus enforcing attention, facilitating comprehension, and, often, stimulating new thought (in which case the expressive dimension of judicial greatness merges with the creative).

The weighing of these criteria of judicial greatness is an unresolved issue; as is whether there are other, perhaps better, criteria or even whether the concept of judicial "greatness" misconceives the judicial role altogether, by overemphasizing individual at the expense of corporate achievement. I cannot unravel this skein here, but I do present some evidence in the Appendix, if not exactly of Hand's greatness, at least—what is, plausibly, closely related to it—of his influence. But whether on sufficient or insufficient evidence I do think that Hand was a great judge and therefore I think that Gunther underpraises him when he writes in the first sentence of the book, "Learned Hand is numbered among a small group of truly great American judges of the twentieth century."⁴⁵ Why the pussyfooting, and the hiding behind numberers? Does Gunther think that the nineteenth century or perhaps the eighteenth century was America's Golden Age of Judging? Or that other countries have had better judges? He should just have said: "Hand was one of the best judges ever."

One would like to know what made Hand so (if he was, as I believe though unable to prove it). This huge book of Gunther's, while sketchy about Hand's judicial activity, tells us a great deal about Hand the human being; the subtitle should have been "The Man (and, Incidentally, the Judge)." Can we learn from Gunther's work what made Hand such a good judge? Can we learn what to look for in a candidate for a judgeship, especially an appellate judgeship, besides the obvious things—intelligence, relevant experience, integrity, energy, maturity? These questions will preoccupy me in the remainder of this Review.

Hand was born into a family of lawyers in Albany, New York, in 1872, the second of two children; his sibling was a much older sister. His father, whom Hand found rather remote and intimidating and who died when Hand was a teenager, was a distinguished lawyer, as *his* father had been. Hand's sister, mother, and an unmarried aunt, who lived with them, doted on the shy, earnest, bookish child. When he was six *months* old, his grandmother was already calling him "Judge Hand!"⁴⁶ In later life Hand said that he had

45. GUNTHER, *supra* note 1, at xv.

46. *Id.* at 17. Gunther has an eye for the telling detail, as well as for the deliciously irrelevant one, such as that Richard Nixon bought the New York City home that Hand had owned and lived in until shortly before his death. *Id.* at 697 n.142.

always been a neurasthenic, a neurotic, and a nut (his terms)⁴⁷—morbidly fearful, anxious, self-doubting, undecided, discontent, insecure—and that this tendency ran in the family. What *exactly* he meant by these labels never becomes clear in Gunther's book—Gunther does not try to relate them to the categories of modern psychiatry—and perhaps will never be known. Highly imaginative people often are rather fearful and doubting because they have a more vivid sense than the unimaginative of all the lurking disasters that await us. Whether because of some inherited tendency to anxiety, or the protected, “feminine” circumstances of his upbringing, or both, or neither, Hand appears to have suffered from the characteristic anxieties of the hyperimaginative to a greater degree than most highly imaginative people outside the arts do, though not to the point where they impaired either his physical health or immense productivity, or prevented him from leading an essentially normal social and family life. Anxiety may have impeded his progress at the bar, for which we can be grateful, as he would not have become a judge so soon had he not pushed hard for a judgeship in order to escape from practice. He was a trial lawyer, and miscast in the role, because trials made him nervous and flustered. He did not consider himself quick witted, and he had a lifelong terror of speaking extemporaneously. This was an aspect of his neuroticism, for he was in fact marvelously articulate on all occasions.

All that is really clear about this “nut” is that throughout his life Hand was abnormally deficient in self-esteem, distrustful of his judgment, and without a trace of arrogance or complacency. And all this despite—what is further proof that he really *was* neurotic—his academic and professional success. He was the valedictorian of his class at Harvard College, graduated sixth in his class at the Harvard Law School, and was talked about as a Supreme Court candidate while still a district judge; and, particularly toward the end of his life, he was heaped with praise and honors. Yet, he did not think his work as a judge memorable or important—he repeatedly referred to it as solving crossword puzzles. And, what is most unusual for a judge, he lacked confidence that the results he reached in his cases were correct.

Hand was a bookworm, and was free from social snobbery; indeed, like Holmes, he was philo-Semitic rather than anti-Semitic, and he was instrumental in persuading Harvard College not to adopt a Jewish quota. So he might have been expected to scorn the Harvard clubs, the equivalent of fraternities. Yet in fact he never fully recovered from the humiliation of not being invited to join the Porcellian Club. Presumably he was turned down because he was a “grind” from a hick town; he was nicknamed the “Mad Russian” and the “Mongolian Grind” in college, the ethnic appellations reflecting the effect on his appearance of the beard that he sported as a student

47. *Id.* at 4, 13.

and young man.⁴⁸ Hand's lifelong insecurity and timidity coexisted with an extremely bad temper, though one free from malice and manifested mainly to lawyers and law clerks.⁴⁹ They coexisted as well with famously bad table manners⁵⁰ (the Porcellians had grounds, after all), a boisterous sense of humor,⁵¹ an easy sociability, and a penchant for closing his office door and belting out songs from Gilbert and Sullivan, off key.

So anyone who doubts that real people, as distinct from characters in literature, are confusing mixtures will be disabused by Gunther's book. Yet the only feature of Hand's eccentric personality that seems to have had much to do with his judicial performance (if you don't include in that performance his temper tantrums on the bench) was his self-doubt. It seems to have driven him to work hard in order to prove himself to himself—hopelessly, of course—over and over again, and to have insulated him from the overconfidence that is the occupational hazard of being a judge, especially a judge who is smarter than his colleagues and is therefore tempted to browbeat them rather than deliberate with them, and to make snap judgments supported by perfunctory rationales. Because Hand was very afraid of getting things wrong, he performed his judicial tasks with a conscientiousness uncommon in a highly experienced judge, and this shows in the opinions—in the exceptionally scrupulous weighing of contrary views that is so distinctive a characteristic of them, and that makes Hand the Henry James of judicial stylists. We get his flavor in his response to a rebuke by a professor for a disparaging remark that Hand had made about legal realism:

“What I said was really the outburst of an irritated person who I suppose had got tired of trying to digest new notions, who had put too much capital into the old to want to see them scrapped. In other words, I am afraid it is a typical old man's point of view. At any rate, I had no right to abuse without understanding, and I certainly have read too little to understand.”⁵²

48. See the photograph of Hand in 1893, following page 232 of Gunther's book. The book has a fine set of photographs.

49. He actually threw a paperweight at Gerald Gunther in a rage when Gunther was his law clerk. He missed, and anyway it was only a “small” paperweight, Gunther reassures us. GUNTHER, *supra* note 1, at 620. Let us hope that this anecdote will not precipitate a wave of judicial violence.

50. Not remarked by Gunther, but well attested by other sources.

51. Gunther is generous with examples, such as Hand's description (in a preconference memo) of one of his ex-colleagues (Judge Rogers, *see infra* text accompanying note 66) who “‘never took his eye off the ball, for he never saw it. . . . If he got the ball himself and had an open field, he could have run as much as ten yards when he tripped over his own feet and fell; and when the play was resumed it was always found that he had made for his own goal.’” GUNTHER, *supra* note 1, at 300–01. I also particularly liked Hand's limerick mocking his colleague Charles Clark, *id.* at 522, and his suggested label for the last occasion on which he (Hand), by now a very old man, sat with his equally ancient colleagues Thomas Swan and Augustus Hand as, “‘Observe the final appearance of the Dinosaurs,’” *id.* at 646.

52. GUNTHER, *supra* note 1, at 525.

One begins to understand why, despite the paperweight, Gunther *likes* Hand so much.

Successful people often are insecure (though they may hide their insecurity behind a facade of bluster); it is what drives them to success. Obviously, however, being insecure is not a sufficient condition of being a great judge. Most judges who have felt insecure have had good reasons for feeling so, rather than Hand's neurotic reasons, but it hasn't made them great judges even when it has made them workaholics. The self-doubt that was so marked a characteristic of Hand's personality is not a necessary condition of judicial greatness either, as it is a quality in which Holmes and Brandeis, for example, were notably lacking. Holmes had, it is true, as Edmund Wilson explained, more than a trace of Calvinist anxiety, "the undermining doubt as to whether one has really been Elected."⁵³ Wilson plausibly attributed some of Holmes' high and lifelong seriousness of purpose and striving for self-perfection to his Calvinist heritage. It made Holmes an assiduous reader of serious books and thinker about ultimates, but it did not translate into uncertainty about how to decide a case or into anxious second thoughts once the decision was made. Holmes and Brandeis were mentally quicker than Hand, so the spur of insecurity was not as needful in order to get first-rate work out of them. Like his near-contemporary Cardozo, Hand was a very intelligent person but he did not have the striking mental superiority that passes as "genius" in casual discourse. Law has never had a real genius—a Shakespeare, a Mozart, or a Newton, to name just three examples. But it has had a handful of extremely impressive thinkers and writers. Gunther's profuse quotations from Hand's published and unpublished writings, obviously picked to display his idol at his best, display a sensible and humane man, a skillful and conscientious legal analyst, the owner of a distinguished prose style (though, like Cardozo's, a little orotund—as Holmes' is not—for modern tastes), a mind keen, cultivated, curious, and well furnished. That is all, though it is a lot, and it carried Hand, as it carried Cardozo, to the top of the profession, only a rung or two below Holmes.

We must continue our search for the sources of Hand's distinction. The immersion in the classics of which I spoke was an element. Skill in writing—more: flair, style—is a vital ingredient of distinction in appellate judging,⁵⁴ and as Frankfurter once said, I think rightly, Hand wrote better than any judge save Holmes—and in general, though not in every case, writers of distinction began as readers of distinguished writing, molding their style consciously or unconsciously on the classics of their tradition. One thing Gunther fails to tell us is what kind of reading Hand did after he left college.

53. EDMUND WILSON, *Justice Oliver Wendell Holmes*, in PATRIOTIC GORE. STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 743, 788 (1962).

54. See RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 132–37 (1990). Are there exceptions? Cousin Gus perhaps? See *infra* app.

Did he continue reading the classics, like Holmes (who kept a list of every book he ever read—very considerate to any potential biographer), or, as I suspect, did he mostly read more ephemeral stuff, about current issues, his memory of the classics a receding background but exerting an invisible pressure on his writing and thought?

The contrast between Hand and Holmes is worth dwelling on a moment more. Today no biography can be thought complete without a chapter on sex. In the case of Holmes, the great sexual question is whether his “affair” with Lady Castletown had a physical dimension; was he, in other words, an adulterer in the legal, as distinct from the New Testament, sense? In the case of Hand the great sexual question is whether he was a cuckold. Did his beautiful wife’s almost lifelong “affair” with Louis Dow—the photograph of Dow that Gunther reproduces makes him look like the romantic lead in a silent film—have a physical dimension?⁵⁵ Neither question can be answered, though the weight of probabilities in each case is “no.” But the contrast—Hand, as it were, playing Leopold Bloom to Holmes’ Blazes Boylan⁵⁶—tells us something about the differences between these two great judges. Hand, like Bloom, was uxorious, married to a woman whom he could not control or fully satisfy, anxious, a self-conscious outsider, a perfectionist, a painstaking craftsman, a target of rebuffs (the Porcellian rebuff a portent of Hand’s repeated rebuffs in his efforts first to become a district judge, then a circuit judge, then a Supreme Court Justice), ashamed of never having been a soldier, envious of men of action, a plugger, a grind, a bit of a provincial, and a person lacking the last degree of refinement and self-control, which is to say, not quite a gentleman. In all these respects Holmes was the opposite⁵⁷—and I infer from this that a very wide range of personalities is consistent with judicial distinction.

V.

Gunther attributes a great deal of Hand’s distinction to what he describes as Hand’s skepticism. He is constantly drawing attention to “the philosophical

55. At least one neighbor of Mrs. Hand believed that the judge’s wife “was such a cold human being that she could not have been emotionally involved with anyone.” GUNTHER, *supra* note 1, at 712 n.83. One doesn’t have to be “emotionally involved” to commit adultery.

56. Molly Bloom’s lover. I hasten to add, for anyone who has the details of *Ulysses* in mind, that the analogies I am drawing are *loose* ones. Hand, incidentally, was on the panel that upheld Judge Woolsey’s famous decision holding that *Ulysses* was not obscene. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934). The opinion for the panel was written by Cousin Gus because, as Gunther explains, the judges wanted to defuse the hoopla surrounding the case by rendering an opinion that would have no quotable passages in it. GUNTHER, *supra* note 1, at 338–39. Maybe this is the origin of the slogan, “Quote Learned, but follow Gus.” Or maybe the origin is the *Masses* decision—the kind of daring, perhaps indeed foolhardy, leap that Gus would never have taken.

57. True, Holmes *praised* craftsmanship, but he was a hasty and rather sloppy opinion writer, as I have noted.

strength of [Hand's] skepticism;"⁵⁸ he "was too much a doubter to rush passionately to embrace any cause."⁵⁹ Yet repeatedly Gunther describes passionate commitments by Hand—*after* he became a judge—that are inconsistent with either a skeptical temperament or a skeptical philosophy. Hand was so deeply and publicly involved in Theodore Roosevelt's progressive movement that he transgressed, at least by our current standards, as Holmes never did, the boundaries of judicial propriety; this involvement Gunther ascribes to Hand's "profound commitment to the cause of the New Nationalism."⁶⁰ When denouncing in the pages of *The New Republic* the Supreme Court's decisions invalidating minimum-wage laws, Hand was writing as "a committed reformer."⁶¹ Hand's "commitment to free speech," Gunther tells us, was deeper than Holmes'; his allegiance to "keeping open the channels of debate" was "fierce," and expressed "passionately and eloquently."⁶² Hand even "permitted Planned Parenthood to use in its publicity materials a statement he had made at one of his luncheons: 'Concerning the survival of democracy as we know it, I believe Planned Parenthood is the most important thing in the world.'"⁶³ These are the words of a *skeptic*?

In these and other incidents recounted by Gunther (such as Hand's public criticism of *Brown v. Board of Education* during the height of Southern resistance to the decision), Hand seems constantly to have been testing the limits of judicial propriety, and to have been impelled to do so by very strong emotions on public questions and also, perhaps, by having something of a political tin ear. The year before the *Masses* decision, Hand had, at the request of the magazine's editor, written to a distributor urging the latter (without success) not to stop carrying *The Masses*; the distributor had become disturbed by the magazine's "blasphemy."⁶⁴ Standards of judicial propriety have changed, but it is nevertheless remarkable that Hand would have written the letter and, having written it, not have recused himself from the case. His was

58. GUNTHER, *supra* note 1, at 582.

59. *Id.* at 373.

60. *Id.* at 238. "For once in his life, he was a true believer, in the 'New Nationalism' and the progressive cause." *Id.* at 190. Not just once!

61. *Id.* at 250.

62. *Id.* at 281.

63. *Id.* at 586. A pretty wacky statement, by the way, no matter how strongly one supports Planned Parenthood. It is interesting to note that Planned Parenthood in the early 1950's, the period from which the quotation comes, had a eugenic flavor, see LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 274-90 (1976), and that Holmes himself, an enthusiast for eugenics, had let the skeptical mask slip in his opinion on the constitutionality of the involuntary sterilization of persons with heritable mental deficiencies. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.") See also Hand's concurring opinion in *United States v. One Package*, 86 F.2d 737, 740 (2d Cir. 1936), which gutted the Comstock Act's prohibition against the importation of contraceptives. See RICHARD A. POSNER, *SEX AND REASON* 78-79 (1992).

64. GUNTHER, *supra* note 1, at 154-55.

not the detached, skeptical temperament that refuses to take sides on the burning issues of the day.

Nor was Hand skeptical in the sense of having attempted to work out a philosophy of skepticism; an undertaking that would have required him to wrestle with the problem of self-reference, a problem unnoticed by Gunther though not by Hand.⁶⁵ A consistent philosophical skeptic would have to be skeptical of his own skepticism along with everything else or else explain how it was that his own views alone should be privileged. But when used in a more informal sense, as the denial of certain dogmatisms, skepticism—better called “pragmatism,” because it denies metaphysical truth rather than the local, practical, always revisable truths of science and of everyday life—does describe significant elements of Hand’s judicial practice. And Hand had been a student of William James at Harvard.

Like most good judges, regardless of temperament or philosophy, Hand was hesitant to embody his personal views in judicial decisions. The hesitation came naturally to Hand because of his self-doubting character. But judges like Holmes, who seems rarely if ever to have experienced self-doubt about cases, have often felt the same hesitation. Judges in our system mostly are generalists, which means they know very little about most of the disputes that come before them; and to know that you don’t know is a sign of intelligence, not necessarily of timidity (let alone of philosophy), though in Hand’s case timidity may have played a role. Then, too, our federal judges, not being elected, lack the political confidence that comes from being chosen by the people to exercise power, and they also lack (like other judges) many of the tools required to implement their views of public policy. They are also, these intelligent but not necessarily self-doubting or insecure judges whom I am describing, mindful of the social value of stability and consistency, which further militates against too Promethean a conception of the judicial function. The history of adjudication is littered with examples of aggressive judges who, like the unfortunate Judge Rogers lampooned by Hand,⁶⁶ trip over their feet after ten yards and get up and run to the wrong goal. Hand’s formative years coincided with the revolt led by Holmes against the dogmatism and immodesty of the judiciary in the late nineteenth and early twentieth centuries. Hand himself displayed, as Gunther points out approvingly, a high degree of judicial self-restraint—at times perhaps too high.

Hand, like Holmes, found in the pragmatists’ rejection of certitude a powerful argument for liberty in general and freedom of speech in particular. If, as Plato thought, philosophers have a pipeline to truth and goodness, why bother with liberty? Giving a voice to the *hoi polloi* would merely foment error, confusion, and immorality. But if we doubt the possibility of discovering

65. See *id.* at 582.

66. See *supra* note 51.

final verities (or of knowing when we have discovered them), whether moral, political, aesthetic, or scientific—if, pragmatist-fashion, we believe in the advance of knowledge but doubt whether the advance will ever be completed—we shall be inclined to prefer a competition in truth seeking to appointing truth tellers and shutting up everyone else.

I have called Hand a pragmatist, but he may have been a full-fledged, out-and-out skeptic when it came to morality, which, following Holmes, he seems to have considered purely a matter of public opinion, and unarguable.⁶⁷ Whatever the abstract merits of such a position, it informs in a constructive way Hand's very fine immigration opinions, in which he made the touchstone of "good moral character" (a statutory prerequisite to naturalization) the moral standards actually prevailing in society rather than Hand's own standards or, as his colleague Jerome Frank urged should be the touchstone, those of the nation's ethical leaders, whoever they might be. So Hand decided—I think accurately identifying the dominant moral opinions of the time—that extramarital sex was not inconsistent with good moral character but that euthanasia was. He deferred to democratic preference because he did not believe that there was any "objective" standard of morality, at least (or so I would add) in so diverse a society as that of the United States.

Pragmatic skepticism spilled over into something more rigid, more "philosophical," not only in Hand's immigration decisions but also, and this time with untoward consequences, in Hand's thinking about free speech. For here he ran into, and was undone by, the problem of self-reference. While he believed on skeptical grounds in the importance of protecting freedom of speech, he was equally skeptical about judges' having enough certainty of being correct to be justified in invalidating actions by the legislative and executive branches of government. The clash of these skepticisms led to the tepid view of the appropriate scope of judicial enforcement of the First Amendment that Hand articulated in his lectures on the Bill of Rights. A corrosive skepticism may also explain his puzzling position on judicial review of decisions by the National Labor Relations Board and other New Deal agencies. Gunther explains that "unlike many of his fellow judges, [Hand] gave genuine deference to the administrative agencies even while he periodically doubted their expertise and impartiality."⁶⁸ Gunther thinks this admirable, but doesn't explain why.⁶⁹ One might think that enforcing impartiality, and

67. "Values are incommensurables. You can get a solution only by a compromise, or call it what you will. It must be one that people won't complain of too much; but you cannot expect any more objective measure." LEARNED HAND, *A Personal Confession*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 302, 307 (3d ed. 1960). For more on Hand's moral skepticism, see Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1066.

68. GUNTHER, *supra* note 1, at 451. I don't think he means "periodically." I think he means "intermittently."

69. At times Gunther gives the impression that he thinks that the fact that Hand believed something is a *reason* for *our* believing it. The idea that there is an authoritative circle of legal insiders whose word

insisting that expertise be demonstrated and not merely asserted, would be the cornerstones of responsible judicial review of agency action. If judges are so skeptical of their own abilities that they defer blindly to the actions of other departments of government, why make those actions justiciable? Hand's deference sounds in this instance like abdication of the judicial function.

Ronald Dworkin, another former Hand clerk who is a constitutional theorist, and whose review of Gunther's book tracks Gunther's own emphasis on Hand's contributions to constitutional law and theory, argues that Hand's skepticism was different from and better than Holmes'. It was better because it was the commonsense skepticism of someone who worries that he may be mistaken, rather than a philosophical skepticism that Dworkin thinks "muddled."⁷⁰ "Hand's skepticism consisted not in the philosophical view that no moral conviction can be objectively true, but in a disabling uncertainty that he—or any one else—could discover which convictions were true"⁷¹ Passing the question whether, when due weight is given to that word "disabling," there is any practical difference between the two brands of skepticism, I believe it was *precisely* Hand's view "that no moral conviction can be objectively true." It is the view reflected in the immigration cases and stated explicitly by Hand on other occasions.⁷² It led Hand, as it never led Holmes, to the brink of that paralysis to act that is entailed by consistent skepticism.

Gunther may put so much weight on Hand's skepticism because it figures prominently in the two aspects of Hand's legal thought that most interest Gunther: Hand's reaction to the effort by the Supreme Court to limit, in the name of due process, state and federal intervention in the economy; and his view of free speech. The emphasis on Hand's skepticism is thus another example of Gunther's dislocating the emphasis in his life of Hand from Hand's actual career as a lower-court judge to the features of his life and thought that Gunther finds interesting—namely his personal life and his constitutional views. I think that this dislocation of emphasis can fairly be criticized—that I am not just wincing at the implied lack of interest in the work of a federal circuit judge, being one myself, or upbraiding Gunther for writing a different kind of book about Hand than I would have been inclined to write in his place. It is only by virtue of his work as a lower-court judge that Hand merits a biography, and neither his neurotic personality nor his constitutional views are either terribly interesting or explain his judicial performance, except that his

is (prima facie) law is characteristic of a type of legal scholarship with which Gunther has demonstrated sympathy in his past work. For criticism, see MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 183–84 (1988).

70. Ronald Dworkin, *Mr. Liberty*, N.Y. REV. BOOKS, Aug. 11, 1994, at 17, 20.

71. *Id.* A curiosity about Dworkin's conception of Hand's skepticism is that, as I point out in the text, it largely equates to pragmatism—to which Dworkin is opposed. See RONALD DWORKIN, *LAW'S EMPIRE* 151–75 (1986).

72. See *supra* note 67.

neuroticism may have driven him to work harder and more carefully than he would otherwise have done, and thus improved that performance. This is worth pointing out, for many people have doubtless thought that Hand was effortlessly brilliant, rather than a plugger; three cheers for pluggers. And I certainly do not mean to tax Gunther for not having attempted to undertake a social-scientific analysis of Hand's judicial career or to place that career under the lens of feminism or critical legal studies. That sort of thing is not Gunther's *métier*. What he could have done, and done splendidly, would have been to discuss Hand's most durable and important opinions and explain what made them durable and important.

VII.

But since Gunther decided to concentrate so heavily on Hand's personal life, I wish he had tied up two loose ends: the question of finances and the question of children. Gunther talks about Hand's meager income from practice, his persisting "[m]oney worries," and the fact that he was not "independently wealthy."⁷³ These assessments seem to overlook the change in the purchasing power of the dollar wrought by inflation. In 1907, Hand earned \$6000 in the practice of law, and his annual income from an inheritance was \$9000.⁷⁴ The salary of a federal district judge in 1909, when Hand was appointed, was also \$6000.⁷⁵ So his annual income in these years was \$15,000. This is the equivalent of more than \$225,000 in 1991 dollars.⁷⁶ In 1906, when Hand was thirty-eight years old, he and his wife (who also came from a prosperous family) laid out \$50,000 to buy two homes, a winter home in New York City and a summer home in Mount Kisco.⁷⁷ That would be more than \$750,000 today, and there is no indication that the Hands were living beyond their means. Hand traveled frequently to Europe at a time when such jaunts were for the upper class, not the middle class as now, and bought his suits on Savile Row. It seems to me that Hand, like Holmes, Brandeis, and Cardozo, was a wealthy man; not an important fact, perhaps, but, if true, one that lends added piquancy to Hand's self-esteem deficit. I am not sure it is true, because evaluating the purchasing power of the dollar at a remove of almost a century from the present is a procedure fraught with uncertainty, and because we are never told what Hand's income was in later years, or how large an estate he

73. GUNTHER, *supra* note 1, at 99, 124.

74. *Id.* at 106, 124.

75. *Id.* at 124.

76. I used the Consumer Price Index (CPI) to translate current dollars in the years in question into 1991 dollars. The CPI is found in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, SER. E at 135-66 (Bicentennial ed. 1976), for the years from 1906 through 1949 and in the Census Bureau's annual *Statistical Abstract of the United States* for the more recent years.

77. GUNTHER, *supra* note 1, at 99-100.

left (and to whom). Gunther refers to various gifts to charity by Hand, implying that they were generous, but the amounts usually are not given or related to Hand's wealth. I would have liked to see Gunther address the issue of Hand's wealth. I hope this curiosity doesn't make me seem a Victorian, more interested in money than in sex.

The other loose end has to do with Hand's children. He had three, all daughters who, like their mother, went to Bryn Mawr, and at least two grandchildren (Gunther thanks them by name) who are now adults. I should like to know something about the daughters and the grandchildren. Hand and his wife were big believers in the education of women; what did that mean for their daughters? Hand was a very intelligent person, and, so far as one can surmise, his wife also, though Gunther judges her—and I have no reason to doubt the accuracy of the judgment—intellectually lazy. Did some of the parents' brains rub off on the children? Also, Hand thought that his neuroticism ran in the family, and Gunther presents some evidence in support of this, in discussing Hand's ancestors. Well, what about the descendants? Have Hand's eccentricities shown up in any of them? And, recurring to the issue of finances, did Hand leave his children a lot of money? Or his grandchildren? If so, what have they done with it?

By raising these questions I reveal—what I have no desire to conceal—that I became caught up in the personal story of Hand that Gunther tells so well. What he set out to do, he has done, and done superbly. Despite its length, the book is not too long. It is too short. We want to hear more from Gunther on Hand. May this Review help to evoke that more.

APPENDIX: A CITATION STUDY OF LEARNED HAND

Was Hand really a great judge? Gunther, I have argued, does not so much demonstrate as assume an affirmative answer. I explore the issue empirically in this Appendix.

The number of times a scientific or other scholarly work is cited in the scholarly literature is an index to the influence, and less confidently to the quality, of the paper. The counting of citations to the work of a scholar is therefore a possible method of evaluating the quality of the scholar's output, and of comparing the output of different scholars. It is not only a possible method, but one that is heavily used.⁷⁸ There is no reason in principle why it could not be used as a method of evaluating appellate judges.⁷⁹ Not as the only method—certainly with no pretension to infallibility—but as one method.

78. For discussion and references, see POSNER, *supra* note 63, at 69–72. William M. Landes and I apply the method to legal scholarship in our article *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993).

79. See POSNER, *supra* note 63, at 72–73.

I used it in my book on Cardozo,⁸⁰ and it confirmed Cardozo's high repute; and I use it here on Hand.

Because different courts, and even the same court in different periods, have different, often enormously different, types of case, overall workloads, working methods, and judicial authority (which dictates that, for example, Supreme Court decisions will be cited far more frequently than decisions of other courts regardless of relative quality), I do not think it is feasible, at least in the current state of the art, to use citation counts to compare judges other than with their colleagues. Hand served for a long time and a number of his colleagues, including Augustus Hand, Jerome Frank, Charles Clark, and Thomas Swan (the latter two both former deans of Yale Law School), were themselves distinguished judges.⁸¹ Of course, none of them served exactly the same length of time as Hand. Some were near the end of their careers when he started, such as Charles Merrill Hough, another distinguished judge; and Hand himself was a very old man—nominally, at least, semiretired—for the last decade of his life, yet still churning out opinions, though at a lower rate than when he was younger.⁸² Ideally one would like to compare Hand in his prime with his colleagues in their prime, and that is not possible to do in an exact and objective manner. There is a further difficulty. Judicial decisions, as precedents for the guidance of future cases, tend to depreciate as law changes, or as the principles announced in a decision become repeated in later decisions that are then cited instead.⁸³ So if two equally able judges of the same court wrote the same number of opinions in the same period but the opinions of one were concentrated in the early part of the period and the opinions of the other in the later part, the second judge's opinions would tend to be more heavily cited, simply because they were more recent.

I have tried to correct for these problems by presenting, in Table 1 below, data on citations to Hand and his colleagues in five- or six-year slices.⁸⁴ Take a look at the first slice, 1925 through 1929. The order of the judges is the order of the total number of citations, in all years (through 1992), to the signed, published, majority opinions that each judge wrote during the five-year

80. *Id.* at 80–91.

81. The most distinguished of Hand's colleagues, however—Henry Friendly—was appointed only three years before Hand died, and at a time when Hand was very old and semiretired, which makes comparison difficult. The other judges I have mentioned served in their prime with Hand in his prime.

82. Hand's average annual output of opinions, over his entire career, was 35.8. See *supra* note 38. However, in his last 10 years, after he took senior status, he averaged only 14 opinions a year. The average for his active years was thus 45.1. This is similar to the average for federal circuit judges today. There are more judges, they have larger staffs, the cases in which they write opinions are on average more complex, and they have larger caseloads although also a higher fraction of frivolous cases.

83. See William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

84. The reason for the two six-year slices is to prevent Hand's semiretired period from overlapping with his active period.

period.⁸⁵ Learned Hand leads easily with 2269 total citations and also (if we exclude Judge Rogers, who wrote only a small number of opinions) with an average of 9.3 citations per opinion, though I do not consider that as meaningful a measure of quality; it penalizes a judge for a greater output of opinions. An example will demonstrate my point. Imagine two master craftsmen, each of whom turns out twenty peerless calabashes a year—but one of them also turns out twenty generic calabashes a year, of lower quality. Then the *average* quality of the output of this second craftsmen would be lower, yet the total quality of his output is higher, and why should he be given no credit for being more productive than the first craftsman?

The last column in the table counts total citations in just the last five years for which there are data (1988–1992). This is a measure of the durability of a judge's opinions—and here Hand's lead is the greatest.

TABLE 1. *Citations to Learned Hand and His Colleagues*

1925–1929				
<i>Judge</i>	<i>Opinions</i>	<i>Citations</i>	<i>Citations per Opinion</i>	<i>1988–1992 Citations</i>
HAND	244	2269	9.3	46
Manton	291	1560	5.4	11
Swan	121	790	6.5	7
Hough	141	680	4.8	8
Rogers	66	660	10.0	19
A. Hand	85	417	4.9	4
Chase	17	77	4.5	3

85. Thus, unpublished opinions, per curiam opinions, and concurring and dissenting opinions are excluded. The universe of citations is limited to citations by federal courts of appeals. Hand's opinions and those of his colleagues have also been cited by state courts, federal district courts, and the U.S. Supreme Court, but these citations have not been counted. This omission is a significant, though remediable, shortcoming of my study.

1930-1934				
<i>Judge</i>	<i>Opinions</i>	<i>Citations</i>	<i>Citations per Opinion</i>	<i>1988-1992 Citations</i>
HAND	257	2300	8.9	72
Swan	245	1529	6.2	15
Manton	306	1251	4.1	9
A. Hand	216	1071	5.0	14
Chase	223	916	4.1	4

1935-1939				
<i>Judge</i>	<i>Opinions</i>	<i>Citations</i>	<i>Citations per Opinion</i>	<i>1988-1992 Citations</i>
HAND	224	2025	8.3	81
Swan	236	1250	5.3	18
Manton	268	1213	4.5	21
A. Hand	216	1043	4.8	21
Chase	209	830	4.0	9
Clark	21	192	9.1	4
Patterson	25	152	6.1	6

1940-1944				
<i>Judge</i>	<i>Opinions</i>	<i>Citations</i>	<i>Citations per Opinion</i>	<i>1988-1992 Citations</i>
HAND	215	2436	11.3	39
Clark	193	2287	11.8	49
Frank	140	1822	13.0	39
Swan	211	1430	6.8	27
A. Hand	191	1180	6.2	16
Chase	183	948	5.2	13
Patterson	33	178	5.4	3

1945-1950				
<i>Judge</i>	<i>Opinions</i>	<i>Citations</i>	<i>Citations per Opinion</i>	<i>1988-1992 Citations</i>
HAND	224	3149	14.1	119
Frank	191	1624	8.5	52
Clark	198	1595	8.1	23
Swan	202	1372	6.8	16
Chase	179	1164	6.5	22
A. Hand	144	808	5.6	12

1951-1955				
<i>Judge</i>	<i>Opinions</i>	<i>Citations</i>	<i>Citations per Opinion</i>	<i>1988-1992 Citations</i>
Frank	147	1535	10.4	50
Clark	167	1415	8.5	27
Swan	113	1188	10.5	20
HAND	82	1049	12.8	42
A. Hand	74	731	9.9	22
Chase	102	714	7.0	22
Medina	54	500	9.3	27
Harlan	23	252	11.0	17
Waterman	3	22	7.3	0
Hincks	32	0	0.0	0

1956–1961				
<i>Judge</i>	<i>Opinions</i>	<i>Citations</i>	<i>Citations per Opinion</i>	<i>1988–1992 Citations</i>
Friendly	91	1825	20.1	107
Waterman	155	1642	10.6	61
Clark	169	1454	8.6	64
Medina	127	1283	10.1	62
HAND	84	645	7.7	41
Swan	70	562	8.0	22
Moore	68	399	5.9	23
Smith	28	356	12.7	12
Hincks	95	304	3.2	7
Frank	35	265	7.6	2

Continuing down the table, we see that Hand leads in total number of citations in every period until he took senior status, and in average citations in all but two of those periods (one really, because the winner in 1935–1939, Charles Clark, was newly appointed and wrote only a handful of opinions). Hand also led by citations made within the last five years in all but one of these periods—the same period as his “clean” loss of the average-citations lead, 1940–1944, when he was third in average citations and tied for second in citations within the last five years.⁸⁶ Hand continued to perform with great distinction during the first half of his period of senior status, despite his great age (he was eighty-three at the end of the period); he led in average citations, though he lost the lead in total citations and in citations within the last five years.

The fact that Hand generally leads by an even greater margin in recent citations (last column of table) than in total citations implies that the table may understate his lead over his colleagues, since the count of citations is truncated at 1992.

Could it be that Hand’s opinions are so well cited because he cited himself a lot? No, it could not be; because when the citation count is rerun with self-

86. He became chief judge, purely by operation of seniority, in 1939, but there is no indication in the table (or elsewhere) that he used the chief judge’s power of assignment to “hog” important cases for himself, thereby artificially inflating his citations count

citations omitted, the only change is that Hand jumps from third to second in average citations in 1940–1944. And when the count is rerun to exclude citations in Second Circuit opinions—so that what is being counted are citations by judges not bound as a matter of precedent to follow the opinions of the judges in my sample, and therefore free to choose the best opinions to cite—Hand does even better. Now he leads in both total and average citations in every period until he took senior status. Finally, it does not appear to be the case that Hand sacrificed quality to quantity—a case, recurring to the calabash example, in which the twenty calabashes produced by the craftsman who has the lower total output are better than the twenty high-quality calabashes produced by the other one. In a count of the average number of citations to just the ten most heavily cited decisions rendered by each of the judges in the table during the period of Hand's service as a circuit judge, Hand leads with 211.7, followed by Frank with 193.8, Friendly with 148.3, Clark with 116.4, and Augustus Hand with 111.9.

The analysis in this Appendix furnishes some confirmation—bearing in mind the high quality of the Second Circuit during Hand's tenure—that Learned Hand was indeed a great judge. They also cast at least a sidelight on the admonition to quote Learned but follow Gus. Following Gus would imply, I should think, citing his opinions, as distinct from quoting from them. But the table, as well as the count of citations to just the most-cited opinions of each judge, shows that Gus was and is cited much less frequently than his cousin. The homily should be, "Quote Learned, and follow Learned." Gerry should be pleased.