Rethinking the Political Judge: The Civil Liberties Jurisprudence of Learned and Augustus Hand, 1909-1961

Jak Allen

A Thesis Submitted for the Degree of Doctor of Philosophy

School of History

University of Kent

August 2020

Word Count: 92,626

Abstract

Allegations of voting on partisan or political lines has become a regular feature of discussions on the role of the U.S. judiciary. The result has been the framing of judges within the conventional political binary of liberalism and conservatism. This tendency has also extended to the scholarly analysis of historical judicial actors. However, this thesis argues that the application of such labels distorts and simplifies the complex role of judges, both past and present. It does so by investigating the role of fellow lower federal court judges, and cousins, Learned and Augustus Hand, in civil liberties cases in the early-to-mid twentieth century. Although both men have been popularly regarded as symbols of judicial independence, their contributions to law have typically been framed in political terms. This thesis examines the Hands through a judicial biography focused on civil liberties cases to reveal the ways in which their opinions and rulings reflected a complex philosophical methodology that transcended political labels. In turn, it exposes the limitations of the contemporary political binary as an accurate measure of judicial decision making.

The thesis traces this approach through the Hands' formative years and the legal areas of political speech, obscenity, immigration, and criminal rights. It scrutinises landmark and highly contentious civil liberties cases, as well as lesser known and unstudied cases, to highlight how they reshaped law whilst maintaining judicial independence. Furthermore, it draws on new documents and letters to display how their relationship dynamic prompted differing views on the optimal approach to maintaining judicial restraint. In so doing, the thesis shows how the Hands were able to avoid political and personal inclinations to provide lasting contributions that continue to influence and shape current legal debates. With the Supreme Court under intensifying calls for reform, this thesis adds timely nuance to our historical understanding of the delicate relationship between politics and law.

Acknowledgements

Many sincere thanks go to Karen Jones, Emma Long, and George Conyne. You have given me endless time, energy, and feedback throughout this journey. Whenever I had a query or a request for you to go through one of my many drafts, you have never hesitated to help. Your assistance throughout has been crucial to sharpening my legal and historical arguments. Most importantly, you have made me become a better historian by appreciating the balance of your different perspectives. Furthermore, I extend my thanks to my examiners, David Rabban and Gaynor Johnson, for the rich intellectual discussion during my viva. Your engagement added to my motivation to continue pursuing my research through new and exciting avenues.

The research for this thesis has received invaluable funding for multiple archival trips. Without that assistance, it would not have been possible. I would like to thank the University of Kent and the School of History for placing your trust in me and providing my scholarship. A big thank you also goes out to the panel for the Christine and Ian Bolt Scholarship. Your generosity made my first research trip possible. Many thanks also go to the other funders for my research: the European Association for American Studies, Historians of the Twentieth Century U.S., the Royal Historical Society, and the American Politics Group UK. I am also grateful to the many librarians and archivists who facilitated my research and directed me to many important sources. A particular thank you to the staff at the Harvard Law School Library in Cambridge, MA; the Rare Book and Manuscript Collection at Columbia University Butler Library in New York City, NY; and the Rare and Manuscript Collections at Cornell University in Ithaca, NY. I also thank the staff from the Bruce Crary Foundation at the Hand Family House in Elizabethtown, NY, and Middlebury College in Middlebury, VT, for responding promptly and providing digital sources when I needed them most. A special thank you also goes to Paul Bender and Thomas Ehrlich for the generosity, time, and insight they provided about their experiences clerking on the federal judiciary under the Hands. Your words help that generation's stories live on.

During this process, I wrote an article for the *American Journal of Legal History* from which this research is based. I want to reiterate my appreciation to the anonymous reviewers. Their careful insight and kind words proved both useful and inspiring. Kent's Centre for American Studies, as well as the various conferences and workshops I have attended during this research, have also been vibrant hubs for discourse and sharing ideas. They have enriched and broadened the perspective of my research.

Finally, I would like to express my love and gratitude to my family and friends. Without your support throughout, none of this would be possible. Even the simple things, including the interest you showed in my research and the questions you asked during some of the most grinding times, motivated me to push on. There are too many names I could mention, but a special thank you to: Lee Allen, Glenn Pinner, Sofia Thompson, Adam Thompson, Max Allen, and Harrison Pinner. A special thank you goes to my mum, who has been there for me whenever I needed her: Sandra Pinner. I dedicate this thesis to you.

Contents

Introduction

> If I were to write a prescription for becoming the perfect district judge, it would be always to quote Learned and always to follow Gus.[1]
>
> **Supreme Court Justice Robert Jackson, 1951.**

When Robert Jackson spoke the above words at a New York City hotel in 1951, he confessed that he was verging on a 'canonization' of Learned and Augustus Hand.[2] Saintly vocabulary has been ascribed to only a select few judges in United States (U.S.) history, such as John Marshall, Oliver Wendell Holmes, Louis Brandeis, and Benjamin Cardozo. The Hands shared with these men a reputation for pioneering contributions to American law and pushing the boundaries of legal philosophy. Combined, they served over ninety-two years on the federal bench and wrote over 5,000 opinions, where they applied ground-breaking interpretations of law that touched many of the most important issues affecting American public life, from copyright to free speech and admiralty to immigration.[3] What the Hands did not share with these other men, however, was a place on the Supreme Court. As lower federal judges, their opportunities to present innovative interpretations of the law were more circumscribed than their higher court brethren, thus making their judicial reputations all the more remarkable.

There are many other reasons as to why the Hands were compelling men and judges. One unique reason elevates their biographical interest beyond their judicial reputation. They were cousins who worked together on the same two courts, first as trial judges on the U.S. District Court for the Southern District of New York (S.D.N.Y.) and later on the Second Circuit Court

[1] Robert Jackson, 'Why Learned and Augustus Hand Became Great', New York County Lawyers' Association Speech at the Waldorf Astoria in New York City, 13 December 1951 <https://www.roberthjackson.org/wp-content/uploads/2020/06/why-learned-and-augustus-hand-became-great.pdf> [accessed 3 August 2020]. Over 1,000 guests attended the event to honour the Hands.

[2] For the sake of convenience, the Hands are referred to by their respective first names throughout this thesis.

[3] The approximate number of opinions is different amongst publications. This figure comes from, 'The Hands — A Distinguished Family of American Jurists', *Middlebury College Newsletter*, Autumn 1972.

of Appeals.[4] A common point made by friends and contemporaries was the contrast between the strong bond they had together on the federal bench and their very different personalities and judicial styles. The flamboyance of Learned's opinion writing was a projection of his brilliant but emotionally fluctuating character off the court, whereas Augustus' direct, plain speaking manner was reflective of his general response towards life. Nonetheless, they were considered by a colleague as 'perfect foils for each other'.[5] As such, individual character traits worked to embellish their professional relationship and, in Augustus' words, prompted them to become more like 'brothers'.[6]

Two other features that are commonly referenced by commentators when reflecting on the Hands and their distinguished legacy are family background and physical appearance. With strong family ties to the law and educations that led them both to Harvard, one of the foremost Law Schools in the country, scholars often ascribed a sense of predestination to Learned and Augustus' paths to the bench.[7] The physical presence of the Hands was equally noted.[8] Each possessed traits that one would attribute to a caricature of a great twentieth century judge, which have been romanticised in their visual presentation by colleagues. Augustus, the older cousin by two and a half years, conveyed an austere figure. He was a 'big, ponderous, slow-moving man'.[9] He stood an inch or two short of six foot, but his massive frame, deep voice, rugged face, close-clipped moustache, and big 'bushy eyebrows' combined to prompt a sense of calm and stability, according to contemporaries.[10] However, it was his demeanour, as

[4] Learned served on the S.D.N.Y. from 1909 to 1924, whilst Augustus served from 1914 to 1927. On the Second Circuit, Learned served between 1924 and 1961, and Augustus between 1927 and 1954. The Second Circuit comprises the states of Vermont, Connecticut, and New York.
[5] Charles Clark, 'Augustus Noble Hand', *Harvard Law Review* 68 (1955), 1113-1117 (p.1114).
[6] Documents in this thesis are referenced by box and, if relevant, folder or copying book number; Cambridge, MA, Learned Hand Papers (hereafter LH), Harvard Law School Library (hereafter HLS) 109/16, letter from Augustus Hand to Franklin Delano Roosevelt (F.D.R.), 13 November 1942.
[7] This mysticism was particularly used for Learned. For example, 'Learned Hand was destined to be a judge', in Hershel Shanks, *The Art and Craft of Judging: The Decisions of Judge Learned Hand* (New York: Macmillan, 1968), p.3. Also, 'Learned Hand was born to be a judge', in Charles Culp (C.C.) Burlingham, 'Judge Learned Hand', *Harvard Law Review* 60 (1947), 330-332 (p.330). However, such ascription is wrong. As Chapter One of this thesis shows, their legal careers were prompted more from family pressures than long held personal ambitions.
[8] See Appendix A for photos of the Hands.
[9] Cambridge, MA, Michael Smith and Herbert Packer Research Materials (hereafter S&P), HLS, Charles Horsky, interviewed by Herbert Packer, 19 May 1970.
[10] S&P 14, Albert Sacks, interviewed by Jack Molloy, 11 April 1970.

visualised by a former law clerk's encounter in judicial conference, that best symbolised the assured steadiness of the man,

> Picture an oldish man before you, a bulldog pipe in his teeth…He slowly hoists one foot until it is lying across the other knee. On the shoe sole thus exposed, he scratches an ordinary kitchen match, applies the flame to his pipe, and, standing on one foot, puffs and puffs. Finally satisfied, he removes the pipe from his mouth, blows out the match and then, with the utmost deliberation, lowers the long-elevated foot until he is standing on two feet again. During this process, the foot on the floor has never twitched, the body has never leaned, no arm or hand has been waved in the air. The effect has been one of an equilibrium and stability.[11]

In this context, it is of little surprise that when Augustus died in 1954, the moment was described as a 'great oak' falling.[12]

In many respects, Learned shared similar physical characteristics to Augustus. He was a stocky man with thick eyebrows and a large head. But whereas Augustus exuded calmness, Learned's face gave the sense of a more vibrant character. Similarly, descriptions of his appearance have been used as a visual marker of iconic status. For example, the *New York Times* saw 'the most beautiful old man…[with] a face cut out of stone, eyes that are…sad, but incandescent, and an indescribable aura of goodness, wisdom and strength'.[13] He was shorter than Augustus, approximately five foot seven, something which struck those meeting him for the first time who 'assumed he was giant, in body as well as mind'.[14] His trademark flamboyance shone through whenever he sensed a lawyer was steering towards flattery of the court or required a reminder of the 'eternal principles of justice ringing down the ages'.[15] On such occasions, he would apparently slap a hand to his brow, lean far back in his tall leather chair and, with a voice like the 'crackle of lightning', shout 'rubbish!'.[16] If the argument seemed germane, however, he would listen attentively.

[11] S&P 16, letter from John Hollands to Herbert Packer, 2 December 1969.
[12] Thomas Reed Powell, 'Augustus Noble Hand', *Harvard Alumni Bulletin*, January 1955, p.292.
[13] Martin Gumpert, 'Ten Who Know the Secret of Age', *New York Times*, 27 December 1953, p.10.
[14] Thomas Ehrlich, interviewed by Jak Allen, 25 April 2018.
[15] Philip Hamburger, 'The Great Judge', *Life*, 4 November 1946, p.117.
[16] Ibid.

Amongst the various descriptions and reflections that have moulded the Hand legend, however, the most unifying element for contemporaries and scholars has been the belief that their conduct on the court epitomised traditional judicial values — self-limiting, independent, detached, and neutral.[17] This is striking because, at the same time as promoting the Hands as impartial and independent interpreters of the law, many scholars have also framed their judicial records in increasingly politicised terms. This has included 'libertarian' and 'progressive', but the most prominent framing has been under the binary of 'liberal' and 'conservative'. The use of these terms is not unique to the Hands. Indeed, the application of these political labels has become part of a growing tendency in academic scholarship, the media, and the public, to scrutinise judges, past and present, on the basis that their decisions reflect attempts to reach certain personal or policy ends.[18] With much contemporary and historical legal literature looking to find ways to remedy the assumed politicisation of the judicial arena, attention has been diverted away from analysing whether framing the nature of judging in this way is accurate.

In this context, the definition of 'political' in this thesis is deliberately flexible and wide reaching for two particular reasons. First, it is to reflect this broad application with which it has been used to assess judicial performance. This applies to both a general application of the term by scholars, media, and the American public about the judiciary, and more specifically with the Hand literature. The unifying characteristic in the use and understanding of political labels is the assumption that the deliberation and rulings of a judge are motivated by certain personal or policy preferences. Where the use of labels differentiates, however, are in the

[17] When Learned and Augustus were appointed to the S.D.N.Y. and Second Circuit, three of the appointments were made by Republican Presidents and one by a Democratic President. Learned was appointed by William Howard Taft (R) in 1909 and Calvin Coolidge (R) in 1924. Augustus was appointed by Woodrow Wilson (D) in 1914 and Coolidge in 1927. This was a result of the reputation they garnered for impartiality, which blurred allegiance to political affiliations.

[18] For a good example of a legal-media figure, see James Zirin, *Supremely Partisan: How Raw Politics Tips the Scales in the United States Supreme Court* (Lanham, MD: Rowman & Littlefield, 2016). More academic and legal-historical focused pieces that have been published in the last twenty years include: Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: Norton, 2006) and Jack Balkin, 'What *Brown* Teaches Us About Constitutional Theory', *Virginia Law Review* 90 (2004), 1537-1577. These rely heavily on the argument that Supreme Court decisions have been driven by external political pressures. See further suggestions in footnote 33.

degrees to which these preferences are influential to the final outcome of a ruling. For example, on one extreme, 'political', 'liberal', or 'conservative' represent accusations of overt partisanship and attempts to use judicial powers to reach specific policy or party-political positions. On the other end of the spectrum, they are used to identify more subtle attempts to shape decisions around general personal values, such as support for free speech. Using free speech more specifically on this scale, this ranges from ruling to suppress or support speech based on the agreeableness of its content, to making decisions based on more abstract positions about its utility. The second reason for the flexible definition of 'political' is to expose the danger of loosely wielding labels that incorporate such a broad brush of connotations. The most notable consequence is that a mild definition of a political decision can easily be conflated with accusations of partisan behaviour, thus fostering an even greater culture of misunderstanding of the judicial role. This is not dismissing the reality that the line between law and politics is not hard and fast. U.S. judges frequently make decisions that have political implications on large swathes of the country's citizenry. However, their political function is fundamentally different to that which is popularly identified with the legislative and executive branches of government. Judges have historically suppressed political tendencies through an experience built on legal training, a collection of values centred on neutrality, adherence to institutional limitations, and politically transcendent legal-philosophical influences. Whilst general audiences may not be aware of this nuance, many legal scholars do, thus presenting the opportunity to apply politically charged labels with greater care.

This thesis assesses the Hands within this broader debate about the role of the U.S. judiciary by arguing that the use of politically charged labels are simplified and misleading in the evaluation of their contributions.[19] Through their opinions, votes, and rulings, the Hands as a case study show that understanding approaches to judging requires a more complex and nuanced understanding of the legal realm. In so doing, it follows the sentiment of leading

[19] A version of this argument appeared in a separate article by this author. However, it examines a variety of different sources and themes, including the Hands' correspondence and views on social welfare. See Jak Allen, 'Political Judging and Judicial Restraint: The Case of Learned and Augustus Hand', *American Journal of Legal History* 60 (2020), 169-191.

appellate judge and legal scholar of the last forty years, Richard Posner, who noted, 'I am struck by how unrealistic are the conceptions of the judge held by most people, including practicing lawyers and eminent law professors'.[20] A key factor in the proliferation of political labels has been the guarded nature and strict privacy of the judiciary, which has prevented people from the outside obtaining a full picture of the individuals in the robes. As a colleague of the Hands, Jerome Frank, once noted, the difficulty was that, 'The private life, the inner environment of a judge, his deeper motivations, usually become extraordinarily opaque, hidden from public gaze, after he ascends the bench'.[21]

Examination of the Hands presents an opportunity to address these issues, but there has not been a side by side investigation of their private lives and responses to their work on the federal bench, let alone an assessment of their judicial achievements. To date, Learned has received a single biography in 1994 from a former law clerk, Gerald Gunther, whilst Augustus has not received an equivalent piece of scholarship.[22] This is remedied here by the investigation of a collection of their understudied private and unpublished papers, including correspondence with each other, family members, colleagues, and prominent public figures. The focus of attention here is the arena of civil liberties cases. It makes a distinctive contribution to our understanding of what scholars have written about the Hands. Furthermore, it assesses their judicial achievements whilst also delving into judicial biography and enriching readers' understanding of the human side to these men, showing how they influenced each other on and off the court.

Although the Hands' contributions on the S.D.N.Y. are recognised throughout this thesis, a majority of the focus is dedicated to their work on the Second Circuit, which spanned from 1924 to 1961. In addition to the Hands' individual reputations, there are three other reasons why their civil liberties jurisprudence merits special scrutiny. First, as appellate judges, the

[20] Richard Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2010), p.2.
[21] Jerome Frank, 'Some Reflections on Judge Learned Hand', *University of Chicago Law Review* 24 (1957), 666-705 (p.667).
[22] See Gerald Gunther, *Learned Hand: The Man and the Judge*, 2nd edn (New York: Oxford University Press, 2010).

Hands were one step below the highest court in the land and wielded some of the greatest interpretive powers in the country. As they were granted life tenure, they were also highly insulated from direct political pressure. However, although they were given a wide host of novel civil liberties issues from lower courts, they were also bound by the judgements of the Supreme Court. This position in the judicial hierarchy makes them a good case study for examining the competing pressures of a judge's freedoms and constraints.

Second, the Hands were the vanguard of a group of judges on the Second Circuit broadly considered of great intellectual capacity who presided over well-respected rulings. The landmark period is generally believed to be between 1941 and 1951 when the six seats of the court were occupied by the Hands, Thomas Swan, Charles Clark, Harrie Chase, and Jerome Frank.[23] A foreign observer at the time described it as the 'strongest tribunal in the English speaking world'.[24] Likewise, Yale Professor John Frank described it as the 'ablest court in the U.S.', with an 'all-star combination'.[25] Alongside their colleagues, the Hands witnessed rapid change in its key urban centre, New York City, during their time on the bench between 1909 and 1961. They experienced Prohibition, the Great Depression, the New Deal, two World Wars, and the start of the Cold War. With the city's growing reputation as a hub for communication, immigration, and organised crime, there was also an increasing emphasis placed on the individual's rights in the urban state. Thus, the thesis also provides discussion of the important context of the social movements that shaped judging, adding to its intersection between politics and law.

Moreover, the Hands' opportunities to showcase their legal intellect came in an era in which profound changes to the political backdrop fundamentally reshaped U.S. law and law making. The most instrumental development was the mass centralisation and expansion of the federal

[23] Panels on the Second Circuit comprise three members. As the Hands held two of the six seats, at least one was involved in the majority of issues that came before the court.
[24] Edward McWhinney, 'A Legal Realist and a Humanist — Crosscurrents in the Legal Philosophy of Judge Jerome Frank', review of Jerome Frank, *Not Guilty* (1957), *Indiana Law Journal* 33 (1957), 111-116 (p.115).
[25] John Frank, 'The Top U.S. Commercial Court', *Fortune*, January 1951, p.92.

government, which manifested in both a practical and ideological sense. At the turn of the century, many political circles embraced a growing philosophy that emphasised the utility of an interventionist government to enforce widescale economic reform and social planning. Two particular issues accelerated the push of these ideas into the mainstream. One of these was the fallout from the mass industrialism of the late nineteenth century. At the turn of the twentieth century, the U.S. had become the richest country in the world and, following its 1898 victory and territorial acquisitions in the Spanish-American War, had established itself as an international power. Despite this, political tensions and labour battles over rising economic inequality characterised this period. This was due to a growing consensus in American society that, whilst industrial progress had rewarded and enriched some segments of society, large swathes of labourers and minorities had been left behind. For these groups, poverty remained high and their welfare had not measurably improved. The other issue was the challenges presented by World War One. This included the necessity for a nationwide effort to mobilise and coordinate support to the war effort. However, the expanded administrative state quickly became a permanent reality of government when it was seen as a useful tool in the post-war years to address growing fears that the war had torn at the fabric of American values, morality, and cultural unity.

The Hands saw as these trends prompted tangible shifts in the ideological spectrum of American political circles. In particular, social Darwinist emphases on individualism and free markets gave way to ideals that encompassed social welfare and economic safety. At the start of the century, reformist zeal was driven by a wave of progressivism in the 1900s and 1910s — led by Theodore Roosevelt's Progressive Party campaign in 1912 — which advanced an agenda focused on regulating campaign finance and working hours, and promoting women's suffrage. As the century continued, various events — such as the Great Depression and World War Two — prompted a revisitation of practical economic and political measures that had been brought about earlier in the century, but tailored to the new circumstances of the time. Notably, the government steadily evolved in its mandate, where paternal responsibility for

economic minorities extended to ethnic, religious, political, and racial groups. These various events and periods shared a consistent theme of re-examining the values and ideals of government. In each discussion, the momentum was behind a reorientation to the idea that frequent and positive government interventions were an essential remedy. This served to make government a permanent force in social planning and order. Importantly, the Hands witnessed these ideals play as central factors in political thinking as the century pushed on to its mid-point.

These political developments converge with the third and final reason as to why the Hands' civil liberties opinions and rulings deserve greater scrutiny. This is that they produced significant contributions to the law in the midst of a complex and changing landscape about the correct use of judicial review. The Hands sat on the federal bench during a time in which an intense intellectual debate was occurring about the role of the judge. Specifically, they built their reputations as thoughtful champions for restrained judging in the face of pressures for the judiciary to follow suit with the legislative and executive branches' adaptations to new powers, functions, and responsibilities. In the late nineteenth century, judicial review had been at the centre of a fierce debate between proponents and opponents. However, this started to change after the Supreme Court's decision in *Lochner v. New York* in 1905, which invalidated New York's restriction on bakers' working hours on the grounds that it violated the due process clause of the Fourteenth Amendment.[26] This set the course for the Court to use its review powers more boldly in the first half of the twentieth century, which included it notably striking down various pieces of New Deal legislation in the 1930s.

The reaction to *Lochner* represented the old debate on the judiciary. The ruling received strong pushback from scholars and political leaders, particularly from the progressive side: their criticism was not whether one agreed with the substantive policy issue, but whether courts had the authority to address economic imbalances. This prompted a divide in the first half of the twentieth century between those who called for maintaining a restrained judiciary and

[26] *Lochner v. New York*, 198 U.S. 45 (1905).

those who supported a more 'activist' Court.[27] However, whilst the Court continued to intervene in economic issues, two other development in this period started to change the nature of the debate. First, new theories of judging emerged, including legal realism and sociological jurisprudence.[28] Throughout the nineteenth century, the concept of oracular judging — that judges could mechanically interpret the law, separate from their private predilections — held as the mainstream interpretation of courts. This changed when the new theories rejected old notions of judges interpreting fixed legal principles and stressed other factors that affected judicial decision making, including changing social conditions and consequences. Second, because these theories recognised that human will had played a bigger factor than previously believed, politicians became more alert to the idea of using courts for their own personal expediency. The most famous example was when President Franklin Delano Roosevelt introduced a bill to expand the Supreme Court's number of seats in an attempt to fill those vacancies with Justices who would be sympathetic to his New Deal agenda.

This changing expectation of courts was assisted by the expansion of the federal government's social planning remit. Just as the government intervened in a greater array of issues affecting American society, lower court judges' involvement in related cases became more frequent and important. For example, the Second Circuit's docket broadened in jurisdiction, from cases primarily involving bankruptcy and copyright to cases surrounding the government's new economic regulations, such as the New Deal programmes of the 1930s; breaches of privacy alleged against federal officials during Prohibition; and disputes around the government's attempted regulation of dissent during periods of war. The Judiciary Act of

[27] Arthur Schlesinger is believed to have authored the term 'judicial activism' in 1947, but its underpinning principles were used earlier in the century by individuals who argued against expanding the courts' use of judicial review. See Arthur Schlesinger, 'The Supreme Court: 1947', *Fortune*, January 1947, 202-208.

[28] Sociological jurisprudence's leading proponent was Roscoe Pound, who argued that judicial decisions should take influence from changing social conditions. See Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence', *Harvard Law Review* 24 (1911), 591-619. Legal realism built on sociological jurisprudence but suggested that hypotheses in law should be tested against empirical observations of the world. This could identify patterns in human decision making. Two of the most notable contributions to the field are W. Underhill Moore, 'Rational Basis of Legal Institutions', *Columbia Law Review* 23 (1923), 609-617, and Karl Llewllyn, 'A Realistic Jurisprudence — The Next Step', *Columbia Law Review* 30 (1930), 431-465.

1925 also added to the quantitative weight of certain courts' work, including the Second Circuit, by relieving the Supreme Court of much of its mandatory caseload.[29] This made the Hands part of a new last line of appeal for many American citizens.

The fallout of a judiciary more involved in politically and socially consequential cases was a greater tendency to use the terms liberal and conservative to explain the opinions or rulings of judges. For example, the Court that ushered in the *Lochner* era represented a form of 'conservatism' that was primarily concerned with protecting the 'vested interest of big business' and defending the 'prevailing economic and social order' of laissez-faire capitalism.[30] These terms expanded in their application for the Court as it struck down new areas of law, such as those involving civil rights. The most prominent example was after the famous ruling of *Brown v. Board of Education* (1954), where the Court under Chief Justice Earl Warren ruled to desegregate public schools.[31] In this instance, the accusation had flipped, where the Court's use of its review powers to protect liberties was now considered as favoured by those to left of the American political spectrum.[32]

As this tendency to label judges under the liberal-conservative binary has become more common with each subsequent generation, the core constitutional debate of restraint versus activism has become a secondary consideration. Consequently, publications today are now saturated with headlines and book titles that frame courts, and most notably the Supreme Court, as a group of partisans.[33] This has extended into the wider public sphere, with very few in American society believing federal judges do not allow their political views to influence

[29] Judiciary Act of 1925, 43 Stat. 936.
[30] Herman Belz, Winfred Harbison, and Alfred Kelly, *The American Constitution: Its Origin and Development*, 7th edn, 2 vols (New York: Norton, 1991), ii, p.515.
[31] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[32] 'Friends call it progressive, foes call it arrogant — or worse'. See 'The Warren Court: Fateful Decade', *Newsweek*, 11 May 1964, p.24.
[33] Two recent examples are Neal Devins and Lawrence Baum, *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (New York: Oxford University Press, 2019) and David Kaplan, *The Most Dangerous Branch: Inside the Supreme Court's Assault on the Constitution* (New York: Broadway Books, 2018).

their decisions.[34] The polemical nature of this debate has also fed into historical scholarship. This has included a tendency to affiliate the Hands' decisions with simplified political labels.

A more complex picture of these men emerges in this thesis, one that reveals how judgements on the bench reflected deeper philosophical issues about the rightful limitations and powers of federal judges, a view — incidentally — which was distinctly separate from their personal or political views on the key civil liberties issues of the time.[35] Chapter One contextualises the Hands' approach to judging by focusing on their formative years and identifies their philosophical ideas and world views as they developed. It reveals how they were guided by complex and nuanced principles that include considerations about democracy, the limitations of the judge, and the preconceptions and biases that influenced judicial decision making. These guides belie conventional understanding of political thinking, particularly under the binary liberal-conservative framework. From there, the thesis investigates the Hands through four distinct areas of law. Chapter Two examines Learned's role in political speech cases. This area of law involved Learned's most controversial rulings, which, in turn, has also inspired the most frequent and prominent accusations of political bias. Instead, however, the chapter reveals how such labelling has created a distorted and presumptive narrative that Learned 'transformed' from a liberal on free speech when he first joined the bench to a conservative by the time of the Cold War. It argues here that Learned never changed his views on speech and explains that his interpretations of speech protections came down to a philosophical vision of democracy that attempted to provide both expansive individual rights and strong legislative powers. Chapter Three explores the Hands' contributions to obscenity

[34] 'In general, do you think that the Supreme Court is mainly motivated by politics or mainly motivated by the law?', *Quinnipiac University Poll*, 27 June 2018-1 July 2018. The breakdown of responses were: 50% said mainly politics, 42% mainly law and 7% unsure/no answer. The question is infrequently posed by polling companies, but these numbers already represent a swing from thirteen years ago, when 51% believed the law was the driving factor in judges' interpretive methods to 43% believing it is their own beliefs and opinions. See 'Do you think judges usually base their decisions mostly on their interpretation of the law or mostly on their personal beliefs and political opinions?', *Associated Press-Ipsos Poll*, 17 May 2005-19 May 2005.

[35] The thesis recognises that human subjectivity makes the separation of judicial conduct and personal values impossible in entirety. However, it shows how the Hands' concerted attempts to draw a firm line between the two was critical in their thinking and is fundamental in terms of the ways in which the holders of the judicial office measure their efficacy.

law. In helping substantially reshape the law to provide greater protections and freedoms to artists, poets, and writers, the focus of previous scholarship has been on the seeming 'liberal' imprint that they left behind. This chapter redirects focus from the substantive results to the procedural innovations that the Hands achieved. In so doing, it shows that their greater intervention in this area of law was actually part of deeper concerns about judicial power and a broader intent to minimise the scope of judicial discretion in future cases. Chapter Four analyses the Hands in immigration law and serves as a reminder of the clear line that judges establish between their personal and professional positions. Immigration prompted some of the most vocal and passionate pleas from the Hands for more tolerant policies in the U.S. on people seeking to become citizens or avoid deportations. Despite this, their mixed rulings on immigrants revealed how little personal or political positions played in the final outcome of cases. Chapter Five looks at criminal law and police investigatory powers to highlight the Hands' key contributions, specifically on search and seizures and identifications methods in technology, as well as pointing to the complexity of disentangling legal judgements, real-world outcomes, and personal values. It highlights some of the most important differences between the Hands, thus showing how sophisticated and nuanced interpretations of restraint can prompt contrasting judicial outcomes, despite a strong overlap in their philosophical values. Collectively, these chapters draw on the Hands' record in civil liberties jurisprudence to reveal a complex landscape of personal positions and philosophical principles that rarely conform to the binary political labels that judges are commonly placed under.

The Hand Historiography

Although very few figures doubt the importance of the lower courts, they continue to remain an overlooked subject for understanding the American judiciary. Indeed, although literature on these institutions is growing, it will always be overshadowed by the dominance of the Supreme Court and its position at the top of the judicial hierarchy, which is reflected in its primacy in academic writing. However, with an ever-growing docket of cases, there are

increasing opportunities to show how the lower courts have historically contributed to American law and society in a profound way.

In this context, a survey of the Hands' judicial reputation is long overdue. Despite being recognised as two of the greater lower court judges of the twentieth century, there is little literature on them. Of that which does exist, there are three striking patterns. The first is that there is more written on Learned than Augustus.[36] One good explanation for this is that Learned left behind a substantial collection of correspondence. This was a result of his extensive writing habits and hostility to the telephone as means of communication. It was once written to him in jest that he was the 'last living letter writer'.[37] Accordingly, the Harvard Law School Library possesses over 65,000 items related to Learned, the majority of which are letters to and from friends, family, and colleagues. Another reason for his relatively greater coverage amongst scholars lies with his wider recognition by fellow judges. Learned has been quoted by legal scholars and the Supreme Court more than any other lower court judge.[38] He even received an entire tribute edition of the *Harvard Law Review* in 1947, whilst still serving on the bench. As a reflection of his standing, Learned often received endorsements to be appointed to the Supreme Court. He never reached the highest court, but the *New York Times* called him the 'Tenth Justice', in recognition of his ability.[39] Supreme Court Justices Oliver Wendell Holmes and Felix Frankfurter frequently articulated their desire to see him reach the Court, whilst Benjamin Cardozo once noted of him, 'The greatest living American jurist isn't on the Supreme Court'.[40] Nonetheless, when quantitatively weighed against the literature

[36] Gunther recalled, 'Gus once said to a young man writing a doctoral dissertation on Learned's judicial work, "Why not do a study of my work? I am the balance wheel in the Hand combination"'. In Gunther, *Learned Hand*, p.558.
[37] LH 103A/1, letter from Louis Dow to Learned Hand, 26 November 1918; 'he'd pick up the telephone and say, "Yes?" You felt, you have thirty seconds to give your message, let's get it over with', in S&P 14, Louis Henkin, interviewed by Herbert Packer, 14 May 1970.
[38] Mark Fulks, 'Augustus Noble Hand', *Great American Judges: An Encyclopedia*, ed. by J. Vile, 2 vols (Santa Barbara, CA: ABC-CLIO, 2003), i, 311-319 (p.319).
[39] 'Judge Learned Hand Dies; On U.S. bench 52 years', *New York Times*, 19 August 1961, p.17.
[40] Quoted in Gerald Gunther, 'Learned Hand', *American National Biography Online* (2000) <https://doi.org/10.1093/anb/9780198606697.article.1100379> [accessed 4 August 2020]. It has become well known that Frankfurter strongly pushed F.D.R. for Learned's promotion. Frankfurter also wrote, 'Holmes coupled Learned Hand with Cardozo as the two judges whom he wished to see on the Supreme Bench', in Felix Frankfurter, 'Judge Learned Hand', *Harvard Law Review* 60 (1947), 325-329 (p.329). A good insight into Holmes' support of Learned being on the Court is in the correspondence in

on other judges, there is still little written on Learned. This has prompted surprise from judges and scholars, each 'want[ing] to hear more…on Hand'.[41]

Augustus' coverage is even more strikingly bereft. He was also an enthusiastic writer, but not to the same extent as Learned. In writing to one of his law clerks on the matter of penmanship, he showed good foresight, 'I have never done it enough and it is undoubtedly the road to academic recognition'.[42] Indeed, Augustus did not leave behind a collection of his papers, thus making the task of assembling a coherent judicial biography a more challenging task. Some effort was made to provide insight into Augustus' life and career when Herbert Packer and then later, Michael Smith, were commissioned to write a book about the Second Circuit Court during the Hands' tenures, but this never came to fruition, as both died before the project was ever complete. Abetting this lack of scholarly attention was the fact that when Augustus was mentioned, it was frequently in comparison to his more recognised cousin. As a former law clerk noted, he was 'well known in the [judicial] profession, but had not acquired the peculiar esteem that Learned had'.[43]

The key exception in the Hand literature and most comprehensive book on Learned, or any judge in the history of the Second Circuit Court of Appeals, is Gerald Gunther's *Learned Hand: The Man and the Judge* (1994).[44] The culmination of three decades of research, this lone judicial biography was commissioned by Learned's close friend, Felix Frankfurter, in a

Holmes-Laski Letters, 1916-1935, ed. by M.D. Howe, 2 vols (Cambridge, MA: Harvard University Press, 1953).

[41] See Richard Posner, 'The Hand Biography and the Question of Judicial Greatness', review of *Learned Hand*, *Yale Law Journal* 104 (1994), 511-540 (p.534). Posner also wrote on p.511, 'Since judges remain at center stage in our legal system, one would expect [Learned] Hand's career and achievements to receive sustained and critical attention from the legal academy'. Meanwhile, James Thomson expressed his hope of further '"Learned" historiography' and noted that only 'a very small fragment of Hand's voluminous correspondence has been published'. See James Thomson, 'Evaluating a Federal Judge', review of *Learned Hand*, *Northern Kentucky Law Review* 22 (1995), 763-809, (pp.766, 767).

[42] S&P 16/51, letter from Augustus Hand to Laurens Rhinelander, 16 September 1947.

[43] New York City, NY, Columbia University Butler Library, Rare Book and Manuscript Collection (hereafter CRBMC), Telford Taylor, interviewed by Harlan B. Philips, 1956.

[44] Gunther finished the book thirty years after it was commissioned. Some scholars would argue that David Dorsen's 2012 biography of Judge Henry Friendly is the closest rival to Gunther, in terms of insight and breadth. See David Dorsen, *Henry Friendly: Greatest Judge of His Era* (Cambridge, MA: Harvard University Press, 2012).

bid to dissuade Learned from burning his papers.[45] Gunther's tome depended heavily on Learned's previously unpublished private papers and correspondence to chart the man's life from childhood and education to his career on the bench. Furthermore, it was designed to showcase Learned as a great judge, with Gunther confessing that the judge 'remains my idol still'.[46] In providing intimate insights into the nature of Learned's character, Gunther also provided snippets of the affectionate relationship with Augustus, or the 'Hand Boys'.[47] However, it did not provide an analytical insight into that relationship or the similarities, differences, and influences that marked the engagement of the cousins on the bench.

Gunther's presentation of Learned's personal ties to progressive politics allowed him to recreate a picture of the urban, social, and political scene of the early twentieth century, particularly in New York City. This has left his work not only important for its coverage of the Hands, but also for U.S. historiography beyond legal history. However, its essentially biographical approach did have notable caveats. Primarily a narrative and descriptive reconstruction of the past, Gunther's book devoted great attention to important moments in Learned's life rather than situating him in a broader legal context. This approach substantially curtailed its scope for deep analysis on a variety of opinions where Learned made significant contributions to the law — an issue that this thesis addresses.

Although Gunther represents the only comprehensive work on Learned, there have been three books that have reprinted documents, letters, and speeches from the Hands. Irving Dilliard's *The Spirit of Liberty* (1952) led the field in reprinting Learned's most famous speeches.[48] Marcia Nelson's *The Remarkable Hands* followed in 1983. This joint project

[45] Jeffrey Rosen, 'The Craftsman and the Nihilist', review of *Learned Hand*, *The New Republic*, 4 July 1994 <https://newrepublic.com/article/62408/the-craftsman-and-the-nihilist> [accessed 3 August 2020].
[46] Gunther, *Learned Hand*, p.xvii.
[47] Ibid., p.556. Gunther said the phrase was used by Augustus, as recalled in a 1955 letter from *Harvard Bulletin* editor, Joseph Hamlen, to the then-widow of Augustus, Susan Train Hand.
[48] Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand*, ed. by I. Dilliard (London: Hamilton, 1954). A series of lectures Learned presented at Harvard in 1958 were also published by the university. These are often considered Learned's most famous speeches, where he called for more limited judicial review in the wake of recent Supreme Court decisions. See Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures* (New York: Atheneum, 1964).

between the Second Circuit Historical Committee and the Federal Bar Council published documents that covered 'the human side of the two lifelong companions' and highlighted the potential value of analysing the Hand judges in parallel.[49] Finally, Constance Jordan's *Reason and Imagination* (2013) contained an extensive collection of Learned's private correspondence.[50] This body of material was interesting, both for the fact that it indicated buoyant interest in the legal lives of the two cousins, and in highlighting the need for a thorough analytical study that examined their judicial records.

Whilst the lack of focused, in-depth scrutiny is the most noticeable feature of the Hand literature, the scholarly inquiry that does exist tends to follow two established patterns. The first focuses on Learned's judicial philosophy and, specifically, his brand of judicial restraint, and emphasises his distinguished service as an independent judge. Where Augustus has received similar scholarly analysis, he is treated likewise. The second, conversely, paints a portrait of the Hands as irrevocably political judges, whose tendencies lay on both sides of the political spectrum. In both contexts, there has yet to have been an authoritative analysis of the contributions made by Learned and Augustus to civil liberties law.

An early example of the first category listed above was Hershel Shanks' *The Art and Craft of Judging* (1968). Shanks was the first to challenge the idea of assigning Learned a political label on the scale between liberalism and conservatism. He called these terms 'facile evaluations' for Learned, because the judge's 'judicial product' transcended them.[51] In addressing questions around the role of the judicial function and the relationship between the legislative and judicial branches, Kathryn Griffith's *Learned Hand and the Role of the Federal Judiciary* (1973) followed Shanks' line of thinking. She noted of Learned, 'A common thread ran through his decisions — his deep concern for justice according to the rules as he understood them. This…makes it impossible to classify his opinions in the ordinary categories

[49] Marcia Nelson, *The Remarkable Hands: An Affectionate Portrait* (New York: Foundation of the Federal Bar Council, 1983), Acknowledgements.
[50] Constance Jordan, *Reason and Imagination: The Selected Correspondence of Learned Hand, 1897-1961* (New York: Oxford University Press, 2013).
[51] Shanks, p.298.

of liberal and conservative'.[52] Augustus has been evaluated similarly by some scholars. Most notably, Thomas Reed Powell exemplified a popular perception of Augustus, '[his] attitude did not spring from zeal for any cause…unless it be a cause to believe in being a conscientious and impartial and objective judge and not a protagonist in the cause of causes'.[53]

In the other historiographical camp, meanwhile, scholars championed a 'political' label. However, these scholars have showed little cohesiveness in their methods and definitions. Differences have emerged on interpretations of the Hands' political identity, the level of personal influence required for a decision to be deemed 'political', and the depth of scholarly scrutiny used to substantiate claims of political judging. For example, Marvin Schick's book, *Learned Hand's Court* (1970), depicted Augustus as a 'conservative'.[54] Schick conceded the difficulties with applying such broad labels, but noted that his decision came from an examination of Augustus' 'relative tendencies', rather than any 'absolute position'.[55] In explaining his categorisation, Schick identified the tendencies from Augustus' votes and opinions. However, he did sometimes incorporate Augustus' 'style' as an additional area of focus, believing that it 'complimented [his] philosophy'.[56] This included Augustus' positions on criminal law cases, where Schick cited his conduct as influential in unfavourable outcomes against defendants. As Schick noted, such outcomes came from of a mixture of the judge's own values and, where he differed moderately to the rest of the panel, 'strenuously work[ing] to avoid dissent and accommodate his views to those of his colleagues'.[57] Contrastingly, Charles Wyzanski described Augustus as a 'liberal', but used this term with less nuance than Schick by basing his evaluation solely on the judge's 'substantive outlook'.[58] As a sign of the limited and imprecise nature of such a label, Wyzanski did not develop his point in great depth. Instead, he briefly signposted elements in Augustus' body of judicial work, including a 'level

[52] Kathryn Griffith, *Judge Learned Hand and the Role of the Federal Judiciary* (Norman, OK: University of Oklahoma Press, 1973), p.11.
[53] Powell, p.292.
[54] Marvin Schick, *Learned Hand's Court* (Baltimore, MD: John Hopkins Press, 1970), p.192.
[55] Ibid.
[56] Ibid., p.198.
[57] Ibid., p.196.
[58] Charles Wyzanski Jr., 'Augustus Noble Hand', *Harvard Law Review* 61 (1948), 573-591 (p.586).

head[ed]' approach to the World War One prosecutions of dissenters and his advice on the American Law Institute that led to 'the most progressive view of the common law of labor disputes and of evidence'.[59]

Learned has also been painted as both a liberal and conservative. Most notably, Gunther described Learned as a 'partisan of liberal values'.[60] However, Gunther's application of the term was in reference to the general values reflected in Learned's judicial opinions. Although he examined an extensive body of Learned's work, Gunther lent his claims largely to the judge's passionate free speech defences in both his judicial opinions and off-bench correspondence. Whilst Gunther believed that personal values played a guiding influence in Learned's judicial outlook, though, more recent scholars have gone further by asserting that Learned's judicial behaviour and decisions were heavily and overtly influenced by politics. For example, Edward Purcell claimed that Learned's 'judicial restraint no more proves the absence of driving personal motivations than judicial activism proves their presence'.[61] He argued that there were examples where Learned ignored case law and tailored decisions around the positions he personally favoured, particularly on free speech.[62] Jack Van Doren went further in his suggestion that Learned's calls for judicial restraint were rooted in strong political motivation. He described the dramatic evolution of Learned's ideology, where he 'started out as a progressive liberal', but 'his views turned conservative over time'.[63] Van Doren based his argument on two parts. The first was that, as Learned became entrenched in upper middle class society as a judge, he retreated from the progressive social and economic views that he held in his early years on the bench. Second, his more conservative political outlook over time translated into his judicial philosophy. Thus, when he expressed opposition

[59] Ibid., pp.586-587.
[60] Gunther, *Learned Hand*, p.300.
[61] Edward Purcell, 'Learned Hand: The Jurisprudential Trajectory of an Old Progressive', *Buffalo Law Review* 43 (1995), 873-926 (p.925).
[62] Ibid., p.900. Purcell specifically cited Learned's free speech opinions. See pages 899-902 for more details.
[63] Jack Van Doren, 'Is Jurisprudence Politics by Other Means? The Case of Learned Hand', *New England Law Review* 33 (1998), 1-38 (p.33). On page 3, Van Doren confesses that 'liberal' and 'conservative' are insufficient terms, but nevertheless justifies their application, 'While these terms are imprecise and shifting in meaning, they are still useful shorthand concepts'.

to an increasing tendency of courts in the 1920s and 1930s to use judicial review to protect certain liberties, Van Doren attested this to personal reasons rather than long held philosophical principles. Finally, Morton Horwitz also framed his curiosity of Learned under the liberal-conservative binary, 'the question I would like answered: How did a young, fairly radical judge become an old conservative in the 1950s?'.[64] Similar to Van Doren, he believed there was an overtly political nature to Learned's strict judicial restraint. Pointing to Learned's public speeches later in his career, Horwitz saw them as the product of his increasing hostility to free speech and the use of judicial review to protect other liberties. The confusion between these historiographical sides in their framing of the Hands thus reveals the various degrees of 'political' attachment assigned to their judicial contributions and exposes the inability of the political binary to accurately grasp the full thrust of these judicial figures.

The politicisation of the Hands' decisions reflects a broader tendency in legal-historical literature. In fact, very few judges throughout U.S. history have been immune from the charge of political bias.[65] This trend has been facilitated, in part, by an influential section of political science literature that has scrutinised judicial decision making outside of traditional legal theory. The most prominent example is the attitudinal model, spearheaded by Jeffrey Segal and Harold Spaeth's *The Supreme Court and the Attitudinal Model* (1993). The thesis of their

[64] Morton Horwitz, 'Commentary', *NYU Law Review* 70 (1995), 714-722 (p.715).

[65] Notable examples include some of the most influential Supreme Court Justices of all time. This also spans the entire history of the Supreme Court, showing that the issue is endemic. For example, John Marshall has been noted as pushing 'Federalist' ideas. Meanwhile, Marshall's successor as Chief Justice, Roger Taney, has been noted for his 'Jacksonian jurisprudence'. In the twentieth and twenty-first centuries, 'liberal' and 'conservative' have become the popular terms for framing judging through a conventional political lens. For example, Sheldon Novick explained how Oliver Wendell Holmes' judicial record was frequently framed by intellectuals and scholars in the first half of the twentieth century as the work of a 'political liberal'. More recently, Antonin Scalia has been described as allegedly using his position on the Supreme Court to promote 'conservative' policy. See John Fabian Witt, 'The Operative: How John Marshall Built the Supreme Court around his Political Agenda', review of Richard Brookhiser, *John Marshall: The Man Who Made the Supreme Court* (2018), *The New Republic*, 7 January 2019 <https://newrepublic.com/article/152667/john-marshall-political-supreme-court-justice> [accessed 7 May 2019]; Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007); Sheldon Novick, 'Justice Holmes's Philosophy', *Washington University Law Quarterly* 70 (1992), 703-754; and David Schultz and Christopher Smith, *The Jurisprudential Vision of Justice Antonin Scalia* (Lanham, MD: Rowman & Littlefield, 1996).

book was that judges' policy preferences primarily drove their legal outcomes.[66] By determining decisions based on the values and personal preferences of a judge and suggesting that those who shared similar preferences and values voted accordingly with one another, it compartmentalised judges within liberal and conservative blocs.

However, some scholars have pushed back at this by extrapolating the process of judicial deliberation as complex and fluid. A different model for determining court decisions is offered by rational choice theory, which tends to subscribe to two approaches. One approach includes Louis Fisher's *Constitutional Dialogues* (1988) and Lawrence Baum's *Ideology on the Supreme Court* (2017). Both have argued that other elements to consider beyond liberal and conservative tendencies include external forces, such as judges' attitudes towards social and political groups, and the actions of lower courts.[67] The other variant, often described as internal rational choice, suggests that judges are influenced heavily by their interactions and bargaining with one another. A prime example of scholarship in this vein is Forrest Maltzman, James Spriggs, and Paul Wahlbeck's *Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making* (1999).[68] Further challenging the employment of political labels, Stefanie Lindquist and Frank Cross (2009) argued that the concept of 'ideological activism' does not hold up consistently and proposed that the debate over 'political judging' should move beyond subjective terms.[69] Although they admitted that no terms are completely free of subjectivity, their suggestion of using specific empirical measurements and social

[66] See Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993) and Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 1998). See also Donald Songer, 'The Relevance of Policy Values for the Confirmation of Supreme Court Nominees', *Law and Society Review* 13 (1979), 927-948, and Robert Boucher and Jeffrey Segal, 'Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court', *The Journal of Politics* 57 (1995), 824-837.

[67] See Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton, NJ: Princeton University Press, 1988) and Lawrence Baum, *Ideology in the Supreme Court* (Princeton, NJ: Princeton University Press, 2017).

[68] Forrest Maltzman, James Spriggs, and Paul Wahlbeck, *Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making* (Chicago: University of Chicago Press, 1999). For an example of an earlier work, see Walter Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

[69] Stefanie Lindquist and Frank Cross, *Measuring Judicial Activism* (New York: Oxford University Press, 2009) <https://doi.org/10.1093/acprof:oso/9780195370850.001.0001> [accessed 4 August 2020].

scientific techniques signified an attempt to shift the conversation away from ideological and politically charged terminology. Although useful, however, many of these approaches still depended heavily on numbers and statistics, and reached their conclusions by focusing on decisions and neglecting the processing of legal theory in judges' decision making.

The foregrounding of biography in this thesis offers a way to see judges holistically and come to understand that it is not just votes and outcomes, but all the elements of a person which lead to opinions. Moreover, it adds to the genre of historical biography and, more specifically, legal biography, by steering away from traditional approaches. As Daniel Meister noted, the more traditional biographical method comprises two core elements: it studies lives with little written on the larger context behind the actions of individuals and is written in a narrative form.[70] This thesis adopts the sentiment of a more recent school of thought that sees the value of biography as a way to address larger questions. The benefit of this approach has been displayed by works on historical figures, such as Christopher Dummitt's book on former Canadian Prime Minister, Mackenzie King.[71] Dummitt used King's diary as a lens for exploring broader changes in Canadian society. Similar opportunities arise in the legal biographical genre. Drawing from his direct experience as an appellate judge, Richard Posner has usefully explained that the many factors that inform judicial behaviour, such as psychology, typically go unnoticed by scholars and the wider public.[72] This entertained the benefits of a deeper, biographical examination for understanding the legal reasoning behind judicial decisions. In the year that Gunther published his biography on Learned (1994), two other high profile judicial biographies also came out and displayed the benefits of delineating the various influences — such as legal training and early life experiences — that shaped individuals' views about judging. Roger Newman's biography on Justice Hugo Black, for

[70] Meister's article gives a good summary of the various merits and debates that persist over the genre of historical biography. See Daniel Meister, 'The Biographical Turn and the Case for Historical Biography', *History Compass* 16 (2018). For a more comprehensive study on the methodological arc of historical biography, see Birgitte Possing, *Understanding Biographies: On Biographies in History and Stories in Biography* (Odense: University Press of Southern Denmark, 2017).
[71] Christopher Dummitt, *Unbuttoned: A History of Mackenzie King's Secret Life* (Montreal: McGill-Queen's University Press, 2017).
[72] Posner, *How Judges Think*, p.10.

example, explained how the Justice's strong defence of the liberties in the Bill of Rights centred on a belief that the law should work for the common people.[73] This was rooted in being a populist brought up in a small town in Alabama and witnessing first-hand the impact of law on people. Likewise, John Jeffries' book on Justice Lewis Powell explained how an upbringing as a liberal Southerner shaped both his support for the *Brown v. Board of Education* ruling to desegregate public schools and his discomfort with the potential ramifications for judicial empowerment.[74] Michael Gerhardt has reflected on this method in biography as part of shift to a new understanding of judges and their decisions. As he explained, 'More than anything else…[they] personalize judicial decision making in a way that conventional legal scholarship never could. In pulling the curtain back to expose these judges at work, they remind us that judges are first and foremost people and that personality and background shape judicial outlook and achievements'.[75] Gerhardt adds that such biographies dispute the notion that judicial decisions are predictable. This thesis is shaped around these important elements. It is not a pure biography in the sense of being narrative and hagiographical. Instead, it adds to a new methodology that places biographical and personal details of the judges Hand as a contextual tool for analysing their subsequent opinions and rulings.

Some of the Hands' most influential opinions and rulings have come in civil liberties cases, but the lack of coverage on their contributions also represents the other primary weakness in the corpus of literature. Beyond the key works that have glanced at the Hands' judicial record, there have been shorter scholarly pieces on their work as judges, many of which cover a blend of topics. These include examinations of the Hands' writing styles, personal tributes by law clerks and judges, and analyses of individual opinions that they wrote.[76] However, the dearth

[73] Roger Newman, *Hugo Black: A Biography* (New York: Pantheon,1994).
[74] John Jeffries, *Justice Lewis F. Powell, Jr.* (New York: Scribners, 1994).
[75] Michael Gerhardt, 'The Art of Judicial Biography', review of *Learned Hand*; John Jeffries, *Justice Lewis F. Powell, Jr.* (1994); and Roger Newman, *Hugo Black: A Biography* (1994), *Cornell Law Review* 80 (1995), 1595-1645 (p.1645).
[76] Prominent examples for Learned include: Charles Wyzanski, 'Judge Learned Hand's Contribution to Public Law', *Harvard Law Review* 60 (1947), 348-369; George Wharton Pepper, 'The Literary Style of Learned Hand', *Harvard Law Review* 60 (1947), 333-344; and Henry Friendly, 'Learned Hand: An Expression from the Second Circuit', *Brooklyn Law Review* 29 (1962), 6-15. For Augustus, see Charles

of accompanying civil liberties literature can be attributed to those scholars who investigated Learned's jurisprudence to find his impression in this area insignificant. For example, in contextualising Learned's rigid adherence to judicial restraint during the era in which he served on the bench, G. Edward White's *The American Judicial Tradition* (2007) claimed that Learned's jurisprudence was viewed as far too restrictive by his peers by the end of his life in 1961.[77] Richard Posner and Jeffrey Rosen presented more critical verdicts on Learned's jurisprudence that downplayed his contributions to civil liberties and constitutional law. Posner described Learned's restraint as waiving all burden as a judge, or in his words, 'nearing judicial abdication'.[78] Rosen referred to Learned's jurisprudence as 'judicial nihilism' and frequently, and very selectively, aligned it with decisions that went against the progressive grain of the period.[79]

However, there have been a few scholars who have recognised the influence of Learned and Augustus in civil liberties law. James Thomson's *Evaluating a Federal Judge* (1995) cited Learned's substantial input on a vast range of legal judgements, including civil liberties.[80] Furthermore, short biographical pieces on Augustus, such as Roger Miner's in 2009, have suggested that he made 'significant contribut[ions] to national jurisprudence'.[81] More specifically, Mark Fulks described Augustus' opinions in obscenity law as his 'greatest contribution' as a judge for 'usher[ing] in an era of radical reformation of the government's ability to censor obscenity', whilst also noting that he has been coveted for his 'distinguished' written jury instructions on First Amendment law.[82] Laura Weinrib has also noted that Augustus authored 'some of the most influential obscenity decisions of the 1930s'.[83]

Horsky, 'Augustus Noble Hand', *Harvard Law Review* 68 (1955), 1188-1121; Clark, 'Augustus Noble Hand'; and Erwin Griswold, 'Augustus Noble Hand', *Harvard Law School Bulletin*, December 1954.

[77] G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges*, 3rd edn (Oxford: Oxford University Press, 2007).

[78] Posner, 'The Hand Biography', p.532.

[79] Rosen, 'The Craftsman and the Nihilist'.

[80] Thomson, 'Evaluating a Federal Judge', p.798.

[81] Roger Miner, 'Augustus Noble Hand', *The Yale Biographical Dictionary of American Law*, ed. by R. Newman (New Haven, CT: Yale University Press, 2009), 247-248 (p.248).

[82] Fulks, pp.311, 314.

[83] Laura Weinrib, 'The Sex Side of Civil Liberties', *Law and History Review* 30 (2012), 325-386 (p.358).

Significantly, none of these furnished substantive scholarly analysis beyond these general statements.

These factors have combined to prompt an overall misconception that Learned and Augustus' contributions to civil liberties were not sufficient enough for academic investigation. Consequently, there has been few focused pieces on Learned or Augustus' rulings on immigration, criminal law, or obscenity. New York City has not suffered from a shortage of books that provide insight into the period and its related social issues. Two books have tried to connect such issues to the legal questions of the period. Jeffrey Morris' *Federal Justice in the Second Circuit* in 1987 stood out for covering each era of the Second Circuit from its then ninety-six year history, which included a compressed summary of highlights from the court under the Hands.[84] William Nelson's *The Legalist Reformation* went further, shedding new light on case law and connecting the judiciary's influence to progressive change in the early-to-mid twentieth century.[85] Nelson believed that leading intellects in the judiciary, including the Hands, helped shape a legal ideology which promoted tolerance and a pathway for the underclass, including immigrants, into the economic and social mainstream of New York life. However, his focus on the Hands was limited. Martin Shapiro *did* dedicate a section of a 1960 article to Learned's immigration opinions.[86] He was largely critical of Learned in trying to reduce the role of judges in morally complex issues, but the analysis is still quantifiably small. In response, this thesis' intervention into this literature provides an even more substantive analysis to an incomplete picture. It presents an alternative narrative to the one that suggests that the Hands effected tolerant change by showing many opinions where they ruled against immigrants. However, it explains this by examining the influence of their

[84] Jeffrey Morris, *Federal Justice in the Second Circuit* (New York: Second Circuit Historical Committee, 1987).
[85] William Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980* (Chapel Hill, NC: University of North Carolina Press, 2003).
[86] Martin Shapiro, 'Morals and the Courts: The Reluctant Crusaders', *Minnesota Law Review* 45 (1960), 897-962.

largely ignored judicial philosophy, showing its importance in separating the Hands' sympathies for immigrants from their duty-bound positions.

Meanwhile, Orrin Judd's 1947 article, 'Learned Hand and the Criminal Law', provided a nice overview for a first time reader of Learned's reach into this area of law, but there has been little else.[87] Small commentaries have come from Griffith and Shanks' books, whilst Schick and Posner have argued that this was because Learned's impact was not substantial. Despite believing that he was influential in criminal law, Gunther devoted just six pages of his biography to Learned's influence. Therefore, this thesis adds the first substantial and fine-grained investigation of the criminal law contributions of Learned and Augustus, providing the evidence of an influential imprint that endures in law and legal theory today.

Likewise, the contributions to obscenity are also sparse. Due to Augustus' opinion in a high profile 1934 case involving James Joyce's novel, *Ulysses*, a mixture of publications have looked at the controversies surrounding the event, with reference to the judge's role.[88] However, these publications have often been narrative or cultural histories that focused on the broader debate between censorship and circulation of *Ulysses* in the U.S.[89] Outside of these, there has been little written on the Hands in obscenity law. The thesis addresses and shifts the narrative focus to a deeper investigation of the procedural innovations of the Hands' obscenity cases. As a result, it shows that these innovations were the primary marker for the Hands' obscenity jurisprudence, rather than the substantive results.

The literature on political speech is the one anomaly in the study of Learned's civil liberties jurisprudence. Although each of the amendments in the Bill of Rights are argued to be of equal importance, American society has afforded a special position to the First Amendment.[90] This may have played a role in bringing more scrutiny to this area of the Hands' legal work.

---

[87] Orrin Judd, 'Judge Learned Hand and the Criminal Law', *Harvard Law Review* 60 (1947), 405-422.
[88] *U.S. v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934).
[89] A prime example is *U.S v. Ulysses: Documents and Commentary — A 50-Year Retrospective*, ed. by L. LeBlanc and M. Moscato (Frederick, MD: University Publications of America, 1984).
[90] *U.S. Const. amend. I*, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.

Learned's greatest moment amongst civil libertarians was his opinion in *Masses Publishing Company v. Patten* in 1917, where he upheld a magazine's right to post anti-war material if it did not call for a direct incitement to violence.[91] Because it was written just two years before *Schenck v. U.S.* (1919), a famous First Amendment opinion by Supreme Court Justice Oliver Wendell Holmes, the opportunity to compare these two opinions invited more scholarly evaluation.[92] Notably, this literature, too, fell into the trap of evaluating his free speech legacy through a liberal and conservative lens. This was especially important in the case of *U.S. v. Dennis* (1950), where Learned wrote an opinion upholding the conviction of members of the Communist Party of the USA, which scholars read as a sign of liberal to conservative gravitation over the course of his career.[93] This thesis rejects the premise that Learned changed in his viewpoints, proposing that he remained consistent. Alternatively, it directs attention to a deeper philosophical consideration that has not been previously identified, but fundamentally shaped his free speech jurisprudence — the tension between a desire for both expansive free speech and a strong armed legislature.

In summary, the thesis makes an important contribution to the legal-historical field in addressing key issues and omissions from the prior literature on Learned and Augustus. It uses the case study of the Hands to show how lower court judges have helped engineer profound changes in the trajectory of American civil liberties protections and shaped important debates around the role of the judge. This, in turn, shows how lower court judges have been unjustly undervalued in scholarship. In this close scrutiny, it also reveals how the Hands exist in a sort

[91] *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).
[92] *Schenck v. U.S.*, 249 U.S. 47 (1919). In considering contributions to First Amendment protection in the early twentieth century, Gunther was the first to suggest that Learned's free speech test was 'a distinctive, carefully considered alternative' to Holmes' assessment of speech on its 'clear and present danger'. See Gerald Gunther, 'Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History', *Stanford Law Review* 27 (1975), 719-774 (p.720). Harry Kalven evaluated the merits of both and found Learned's test 'vastly superior' in protecting speech against the state's impulse to prohibit radical speech in times of tension. See Harry Kalven, *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row, 1988), p.125. On the opposite spectrum, Bernard Schwartz argued that Learned's test was not an improvement on 'clear and present danger' but a dilution. See Bernard Schwartz, 'Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action', *The Supreme Court Review* (1994), 209-245.
[93] *U.S. v. Dennis*, 183 F.2d 201 (2d Cir. 1950). See Chapter Two: Political Speech.

of interpretative paradox: they have been honoured for their esteemed contribution to the American judiciary, but their core beliefs and contributions have been largely undissected. In response, the thesis unearths unpublished materials on Learned and Augustus that are rich in content and informative of the men. It emphasises a biographical element by examining the Hands on a human level as a way to explain their judicial decisions, whilst diverging from Gunther's narrative approach to provide a deeper, contextualised analytical coverage of their opinions. Using these methods, it shows that the conventional political dichotomy used to evaluate the Hands has overlooked the complex considerations that went into their decision making. These include their social biases, interpretations of the law, institutional restraints, and precedent. In turn, it contributes to a growing trend in historical and legal biography that charts the origins and influences of judges to explain questions about judicial behaviour and rulings. Along the way, it also exposes common misconceptions in the Hand literature, such as the framing of Learned, a life-long progressive, as 'conservative' for his outspoken loyalty towards judicial restraint. This, in turn, shows that a binary political interpretation of the Hands represents an inadequate means for measuring their judicial performance.

Chapter One: The Formative Years

Learned and Augustus' close relationship is commonly presented as a celebratory piece of legal-historical folklore. They were cousins by birth, but the popular conception is that their friendship was better described as a brotherly kinship. The *New York Times* once referred to the judges as 'the right hand and the left hand'.[1] Although jocular, it was suggestive of a bond both unbreakable and in close synchronisation. When one Hand was straying too far from their original point, the other was there as a counterbalance to set him back on course. Such imagery was particularly pronounced in discussions of their working lives. For such a feted interpersonal connection, however, there has not been a comprehensive scholarly piece on the origins of that relationship or its formative influences. Filling such a gap thus performs an important biographical task and sheds light on various interpretive questions around their legal work, notably about the role of political judgement in guiding the cousins' rulings on jurisprudence. Casting a microscopic glance over their formative years usefully contextualises their approach to judging and addresses key misconceptions about their judicial tenure.

The biographical nature of this chapter serves as the first 'side by side' look into the dynamic of the two Hands' formative years, including their similarities and differences in response to the challenges of childhood and education. In so doing, this chapter makes three key points. It primarily shows that the Hands formulated jurisprudence that belie conventional liberal or conservative political thinking, thus presenting a more accurate perspective of the Hands. This chapter both refutes the assertion that they were 'political' judges and suggests an alternative positioning of these individuals that transcends the political binary. Thus, it argues that the Hands took inspiration from a number of philosophical guides and ideas in their formative years. These guides were connected by their emphasis on the correct process and methods in legal interpretation, rather than the outcome. As a result, they steered the Hands

[1] 'Augustus N. Hand, Jurist, Dies at 85', *New York Times*, 29 October 1954, p.23.

away from partisan political reasoning, which works on the assumption that judges start with a policy position and find a legal argument to meet it.

Second, the chapter reveals how Learned and Augustus formed their nuanced understandings of the judicial role. In so doing, it argues that their visions of the correct functions of judging were the result of an early life that stressed the virtues of independence and critical thinking. In much legal scholarship, the burden of analysis is often placed upon the interpretation of a judge's opinion or a court's ruling, but consideration of the biographical root of judges' reasoning processes still remains underexplored. In this sense, it is useful to ask not only what made the Hands' formative years so significant but also to highlight the way the Hands consistently and directly referenced these early years in their long careers. This aligns with the sentiments of Lawrence Freedman, a renowned psychiatrist who spent some time with Learned.[2] In recounting Learned's presence on committee debates on penal codes, Freedman described how Learned possessed a 'frank sense that he and we were men, fallible, each with a childhood which not only trailed behind but sat right there beside, behind, and within us at the august tables of deliberation'.[3] The beginning of the chapter, therefore, focuses on the Hands' genealogical roots and childhoods. It examines three particular influences from their early family life: hard work, political affiliation, and legal lineage. This is because these were the primary forces that pushed an ongoing dialogue in the Hand lineage between striving for intellectual achievement and conformity to certain customs and traditions.

Third, the chapter shows that Learned and Augustus were heavily influenced by their philosophical education at Harvard. However, it goes beyond previous scholarly emphasis on the influence of prominent teachers to show how the environmental climate of the institution more broadly helped formulate a judicial identity. Specifically, it encouraged both Learned and Augustus to adopt a strong adherence to judicial restraint; favour scepticism of judicial

[2] Freedman was a psychiatry professor at the University of Chicago. His results came from his role as a psychiatric advisor and member of the Criminal Law Advisory Committee of the Model Penal Code, which lasted from 1952 to 1962 and included Learned.
[3] Lawrence Freedman, 'A Psychoanalysis of the Making of the Model Penal Code', in *Crime, Law and Corrections*, ed. by R. Slovenko (Springfield, Ill: Thomas, 1966), 213-231 (p.224).

authority; and respect the experimental abilities of the legislature. The particular teachers covered in this chapter each represented a certain trait and contributed to the interplay of various separate influences in the Hands' complex philosophical makeup. Thus, the importance of the wider picture comes into focus, as these early years foreshadowed intellectual and behavioural patterns that were displayed throughout the Hands' lives.

The Hand Family

Two pervading themes emerge in the childhoods of Learned and Augustus. The first is a sense of inescapable and uncomfortable pressure from the weight of a distinguished family lineage. The second relates to the tension created by the cousins' desire to test the boundaries of this expectation and forge independent identities from an early age. The nature of the early pressures of childhood varied, but the most prominent centred around the challenge of a family history entrenched in legal and political traditions. In political science literature, family has been attributed as a strong socialisation agent for shaping the views of young people, including in the determination of party identification and political ideology. Living in an environment that preached strong specific loyalties to the Democratic Party and the legal profession indicates the Hands as a useful case study in this vein.[4]

The legal tradition in the family shows just how overbearing this element was in the Hands' formative years. Of the three generations born between 1802 and 1872, six out of seven Hand males — including Learned and Augustus — entered the law. Furthermore, of the nine females, five married lawyers and three of them had four sons, sons-in-law, or grandsons who would also become lawyers, thus leaving a Hand 'dynasty' that produced fifteen lawyers of eighteen men in five generations.[5] This originated in November 1827, when Augustus

[4] See Russell Dalton, 'Reassessing Parental Socialization: Indicator Unreliability versus Generational Transfer', *American Political Science Review* 74 (1980), 421-431; M. Kent Jennings and Richard Niemi, 'The transmission of political values from parent to child', *American Political Science Review* 62 (1968), 169-184; and Shelley Taylor, Letitia Peplau, and David Sears, *Social Psychology* (Englewood Cliffs, NJ: Prentice-Hill, 1994).
[5] 'The Hands', *Middlebury College Newsletter*, p.81.

Cincinnatus Hand set out from Lake Champlain, near Shoreham, Vermont, to study law at the Litchfield Law School in Connecticut — the first proprietary law school founded in the U.S.

Augustus Cincinnatus was a strident symbol of inspiration to Learned and Augustus. Part of this came from the image created by family members, such as Uncle Clifford. He wrote to the ten year old Augustus Noble, 'The grandfather whose name you bear has set you a splendid example of pure and honorable living, and I have great confidence that you will bear the name worthily'.[6] Consequently, both Hands grew to admire Augustus Cincinnatus' achievements, especially as he had to live off limited savings and small loans from his father. Following success later in life, Augustus Cincinnatus received an honorary degree from Middlebury College in 1839. He commented, in a letter to his brother Richard, 'I have been always accustomed to work for what I obtained and it seems rather awkward to accept anything gratis instead of mining and claiming it. Still I am grateful'.[7] Grandson Augustus deeply respected this attitude. In numerous speeches, he boasted of possessing lecture notes written by Augustus Cincinnatus in 1827 and 1828, bound in three volumes covering 1500 large, closely written pages and covering all phases of common law and equity jurisprudence.[8] That said, he also claimed that any recitation of the achievements of his ancestors was never to elevate the family's glory, because he had always been taught that Augustus Cincinnatus' success came from virtuous traits, such as sacrifice, study, and an inquiring mind. Learned shared this deep respect for his grandfather. Augustus Cincinnatus became an eminent lawyer and judge, as well as a prominent figure in upstate New York Democratic politics, but his modesty was what attracted Learned's attention. In particular, Augustus Cincinnatus had been reluctant to use his imposing middle name in informal correspondence, going by the abbreviation 'C'. It was something with which the grandson could empathise; he later quickly watered down his own birth name, Billings Learned Hand, during his Harvard days to be referenced as simply 'B'.

---

[6] Letter from Clifford Hand to Augustus Hand, 20 February 1880, in Susan Train Hand, *Letters of the Hand Family* (New York: E.S. Gorham, 1923), p.305.
[7] 'The Hands', *Middlebury College Newsletter*, p.86.
[8] Augustus Hand, 'Practise of the Law — Then and Now', *Proceeding of the Vermont Bar Association* 34 (1940), 61-80 (p.69).

Although Augustus Cincinnatus proved to be an inspirational figure in Learned and Augustus' life, he also established the foundations for the family legal and political traditions that would follow. Since such traditions would later prove uncomfortable tests for Learned and Augustus' inquisitive and non-conformist minds, there was an ambiguity to their grandfather's legacy. Having been admitted to the New York bar in 1830, Augustus Cincinnatus settled in Elizabethtown, New York, a year later with his new wife, Marcia. He set up a busy legal practice in this small town, known as the eastern gateway to the Adirondack Mountains. It was here where, between 1831 and 1839, he had five children — Ellen, Marcia, Clifford, Samuel, and Richard Lockhart — the two latter becoming the fathers of Learned and Augustus. The three sons of Augustus Cincinnatus were among the fifteen Hand family members who became lawyers. In 1849, having lived for eighteen years in a simple framed house next to his law office, Augustus Cincinnatus decided to build an impressive brick house next door.[9] In combination with the presence of this office, he taught his young sons that there was no higher profession in the U.S. for him than being a 'distinguished member of the bar'.[10] This claim was written to his brother Richard, but it projected on to his other sons, too, each of whom entered the profession. However, whilst Clifford and Samuel moved to larger cities — New York City and Albany respectively — Richard Lockhart stayed at home and became a successful country lawyer. As a result, Augustus Cincinnatus had established a linear pathway and culture of expectation that would pass on to, and also trouble, the young, free thinking Learned and Augustus.

The Early Years

If the Hand lineage set the standard of expectations through tradition and stories, Learned and Augustus' upbringing saw them exposed to the direct pressures from their close family. Born

[9] Elizabeth Folwell, 'A Show of Hands', *Adirondack Life*, October 2003 <http://www.adirondacklifemag.com/blogs/2012/10/23/a-show-of-hands/> [accessed 23 October 2019].

[10] Letter from Augustus Cincinnatus Hand to Richard Hand, September 1839, in Susan Train Hand, p.118

two and half years apart, Learned and Augustus benefited from the financial comforts of an upper middle class family.[11] Much of the time also happened to be in intimate, caring households. However, they also went through challenging moments which shaped their intellectual and social makeup. These challenges, presented in two stages, were connected by the shared weight of expectation. The first was the expectation to conform to the hard-working ethos of the family in their early school years. Their fathers' influence was especially prominent, as they pressed their children to achieve strong academic credentials and develop critical thinking skills. Second, was the transition from children to young men, reaching points where critical decisions had to be made about their career and political orientations. They were faced with fundamental decisions between following or resisting a family path which expected a legal career and political attachment to the Democratic Party. Their doubts over both indicated an attraction to independent and sceptical personalities (something which manifested when they attended Harvard), as well as projecting their own different personas that they would display as judges.

Augustus

Born in 1869, Augustus' upbringing was one of a typical small-town boy. He grew up on the homestead his grandfather Augustus Cincinnatus built in Elizabethtown. The town's history typified small town United States — a place that reached its peak population in 1870, a year after Augustus' birth, when it had 1,488 residents. With a few additional enhancements to the house in the days since Augustus Cincinnatus, he encountered a pleasant home in which to be raised.

The architecture of the family house provided the first hint that Augustus was destined for law. On the side of the house remained the large five room rural law office, which stood as an imposing symbol of the connection of one generation of Hands to the next. The young Augustus worked within the confines of an office that boasted an extensive library. For a child

[11] Augustus was born 26 July 1869. Learned was born 27 January 1872.

who loved reading it was the perfect setting, and would later become a place which he believed perennially useful for writing opinions, both in terms of its legal resources and tranquil character. Among the items the library contained were the complete U.S. Supreme Court and Federal Reports, complete New York Appellate reports, two hundred years of English Law Reports, and the *Congressional Reporter*, an antecedent of the *Congressional Record*, from 1787 to about 1820. His reading there was the foundation for his reputation for wide reading and deep legal knowledge. Certainly, the law office communicated to guests a striking sense of being 'very solid' and 'very well situated', but also 'placid', where a 'person could have a good deal of peace'.[12] In that sense, it was an apt surrounding for a character like Augustus.

Little has been said about the direct influences that shaped the steady-natured legal mind of Augustus. However, his father, Richard Lockhart Hand, was the primary force prior to his time at Harvard. Along with his mother, Mary Elizabeth Noble, both of Augustus' parents proved to be caring and loving individuals. Augustus was not prone to frequently reflect on a deep sentimental level, but he made exception for Mary, who he often described as having a 'really…tolerant heart' and being a 'loving friend'.[13] She was often a primary port of call to reflect on the joys of his 'magnificent' and exciting summer expeditions with Learned, Uncle Clifford, and Richard into the region of the Adirondack Mountains around Elizabethtown.[14] Likewise, Augustus the child appreciated frequent letters from his father, when he was away on work, stressing his love and hope that his son remained physically healthy. However, the patriarch of the family was also most demanding and a constant reminder of the duties in upholding certain Hand traditions. His actions were suggestive of a man with set expectations for his son, often taking Augustus to the Elizabethtown courthouse that lay close to the Hand homestead. Augustus recollected one particular time, when he was 'about six years old', a certain case caught his attention.[15] It involved a farmer's complaint that his horse had been frightened by the negligence of a travelling circus, which had caused it to run away and leave

[12] S&P 14, Albert Sacks, interviewed by Jack Molloy, 11 April 1970.
[13] LH 109/13, letter from Augustus Hand to Learned Hand, 20 July 1924.
[14] Letter from Augustus Hand to Mary Hand, 27 August 1882, in Susan Train Hand, p.310.
[15] S&P 25/1, Augustus Hand, untitled draft of a speech, 1933-1939.

the owner in the road with a broken leg. After the jury decided to award damages to the farmer, Augustus took great exception, proceeding to write an argument for the jury and a charge on the part of the judge. Augustus reflected on the 'great amusement' of his grandfather, Augustus Cincinnatus, upon reading the charge and explained that it was 'perhaps' a sign that he was 'predetermined for the law'.[16]

Richard's own successes also left a powerful and persuasive imprint on a young Augustus. The impression was of a hard-working father and accomplished lawyer. After graduating from Union College in Schenectady, New York, in 1858, Richard pursued his law career in the home law office with his father Augustus Cincinnatus. Richard was a man of many talents, leading in the organisation of local affairs, such as those connected to schools, roads, and water systems. However, his legal achievements were the most profound. Richard was elected president of the New York State Bar Association (1904-06) and appointed by New York Governor, Charles Evans Hughes, to be commissioner of state prisons, commissioner of the Board of Charities, and in 1908 a special commissioner to investigate charges against New York State's attorney general. The vision of a hard-working man was accentuated further by Uncle Clifford, who stressed to a ten year old 'Gussie' in 1880, 'Like your papa my maxim has to be "business first and pleasure afterwards"'.[17] He added that, 'one of these days when boyhood is past and your man's work is begun you will appreciate the difference'.[18] The letter was emblematic of the lessons Augustus' elders sought to pass on to the cousins. There was love and care, but also a serious undertone to the message to keep Augustus on track with their linear, but lofty ambitions.

There was an evident willingness by the young Augustus to abide by his father's lessons, with the hardworking element coming naturally. Graduating from Elizabethtown Union High School at just fourteen, Augustus was already competent in Greek, Latin, and classical readings. His father would later confess 'anxiety' that he pushed Augustus too far, to the point

[16] Ibid.
[17] Letter from Clifford Hand to Augustus Hand, 20 February 1880, in Susan Train Hand, p.305.
[18] Ibid.

of overwork.[19] Nonetheless, his son's early success laid the foundations for a merited reputation later in life of hard work and intellectual intrigue.

Learned

Learned's childhood was similar when it came to financial security and a warm and loving home. However, it also shaped a man who was dramatically different to Augustus in personality, style, and, in some ways, philosophy. The primary factor that provoked these differences was the sudden death of Learned's father, Samuel, the shock from which prompted mixed emotions. In reality, there was a sense of liberation for Learned, which accelerated his own intellectual independence. However, it also passed on a weightier burden, which increased the need and anxiety to shoulder the legacy of his father.

As with Augustus, family recollection cemented a sense of a boy born into his profession. His maternal grandmother, Mary Billings Learned, described the six month old Learned, whose penetrating black eyes were just 'like his father's', as being ready 'to make a speech, so earnestly does he look into your face. We call him Judge Hand. We are all devoted to his honor'.[20] Born in January 1872 in Albany, New York, Learned was brought up in a redbrick urban house on a busy residential street. Although he was not burdened by the daily visual reminder of the Elizabethtown law office, Albany weighed down on him in other ways as he viewed it as a joyless town. Nonetheless, he benefitted from a comfortable, spacious bedroom and the assistance of a nursemaid during his early years, and then a housemaid later on. With this socio-economic security came expectation from his parents, who sent him to the prestigious Albany Academy at seven years old, where he spent the next ten years. Learned proved to be a bright student, finishing second in his class in his final year.

[19] Letter from Richard Lockhart Hand to Augustus Hand, 1 November 1897, in Susan Train Hand, p.322.
[20] Letter from Mary Billings Learned to Marcia Northrup Hand, 19 July 1872, in Marcia Nelson, p.84.

Learned's father, Samuel, was the most imposing figure in his early years. Like Augustus, a lot of the pressure Learned felt in childhood came from the paternal figure in the family. But unlike Augustus' respect for Richard, Learned's pervading emotion towards Samuel was fear. He reflected on Samuel's 'quick temper' and retold how 'when his key rattled in the door, it always gave me a little sense of fear…I had always been a little afraid of him'.[21] Samuel's achievements were also daunting for Learned, who would later call himself a comparatively unsuccessful lawyer. Like Richard, Samuel's achievements reflected a man of legal talent and influence. After splitting his higher education between Middlebury and Union Colleges, he read law under Augustus Cincinnatus in Elizabethtown before joining a small law firm in Albany in 1859, at the age of twenty-six. Samuel achieved a number of successes in the legal realm, becoming a leading lawyer in his firm by the age of just thirty-two. But of most significance, he was elected in 1878 to serve as the first president of the newly formed New York State Bar Association and, in that same year, also appointed to the New York State Court of Appeals by the reform Democrat governor Samuel J. Tilden.

Early letters show that Samuel made his expectations clear to Learned. Samuel wrote to his mother, Marcia Northrup, in 1880, '[Learned] was getting demerit marks every day for whispering…and once his card came home with "deportment" marked bad, I talked with him about it, showed the absurdity of it & he has never had a demerit mark since'.[22] At the time, Samuel described how it struck him 'as showing a fair amount of self-control for a little boy of eight'.[23] This self-control was channelled into adopting the Hand family values of hard work and academic success. However, Samuel's death from cancer in 1886 was a turning point for Learned and revealed the differences between him and Augustus. In the face of a demanding father, Augustus presented a strong façade and relished his guidance. In contrast, Samuel's presence alone seemed a draining burden on Learned.

[21] Family interview of Learned Hand, reprinted in Gerald Gunther, *Learned Hand*, p.3.
[22] Letter from Samuel Hand to Marcia Northrup Hand, 16 December 1880, in Marcia Nelson, p.88.
[23] Ibid.

Even Learned's writings in the wake of Samuel's death showed his mixed reactions. There was a sense of unshackled relief, but he still acted as a boy chained down from a sense of certain duties and values. Included in this was the need to take greater charge as the only male in his household. Far from being able to escape his father's image, his mother encouraged Learned to see an idealised version of his father, which he never fully lost. It became conventional for Learned to think that Samuel would have gone on to do 'wonderful' things had he lived longer and likely 'had more brains' than his son.[24] The stress of expectation was evident when Learned wrote to Augustus shortly after his father's death, 'I know that you will honor [the Hand name] from what you have shown already in your character but as to myself I am not so sure'.[25] He explained that as the new 'head of our little branch of the family', he felt a greater 'responsibility'.[26] This responsibility materialised into action when he wrote again a month later, explaining that his decision not to go to the same Exeter Academy that his cousin attended was because of his mother's anxieties, 'I find it entirely impracticable to go to Exeter…it would only cause her some uneasiness of which she has had enough already'.[27] Thus, although Learned was free to establish his own identity as a man, the imprint of Samuel Hand proved looming and was emblematic of the broader family burden that subsumed the Hands' early lives.

The Cousins Together

Youthful interactions show another side to Learned and Augustus. Their correspondence and time together worked as a primary relief from the burdens of their households, but also showed the fruits of their hard work and educational success. With hard work drilled into their ethos from a young age, summers in each other's company came as an extra gratifying retreat. That time of the year was something a young Learned particularly craved and indicated how much

[24] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957.
[25] LH 109/1, letter from Learned Hand to Augustus Hand, 23 May 1886.
[26] Ibid.
[27] LH 109/1, letter from Learned Hand to Augustus Hand, 13 June 1886.

he already began to lean on Augustus. This was his annual opportunity to come up from Albany and visit Augustus in the Adirondack Mountains, where they would go swimming and climbing. Their education and thirst for intellectual stimulation also prompted them to discuss a wide range of topics, with the reading they had been set as children ensuring extremely mature thinking and debating by the boys from a young age. At night, they would sit behind Augustus' house under the light of a lantern, discussing free will and predestination. As Augustus recalled, however, 'We early decided…that the problem was insoluble'.[28] Although Learned is often praised as the 'brilliant' mind of the Hands, such discussions at a young age indicate a shared early culture of intellectual digest and communication.[29]

For the rest of the year, particularly in the cold and short days of winter, Learned and Augustus' letters to one another reveal a form of escapism from work, full of reflection, summation, and excitement for the next time they would meet. In fact, Learned's desire to see Augustus was evident before he was even putting pen to paper, when father Samuel wrote to Augustus on his behalf, '[Learned] sends his love and says he will be very glad of again coasting up with you'.[30] Samuel even noted to his mother of his son's wish to live in Elizabethtown 'the year round'.[31] The theme persisted through the letters of the younger cousin, whose emotional leanings on the steadier, older cousin took shape early on in their lives. At as old as sixteen, Learned still made evident his desire for frequent interaction with Augustus, sending an impatient letter during a trip in Europe whilst simultaneously and ironically recognising the logistical difficulties of intercontinental correspondence, 'I have not heard from you for quite a while, but I cannot expect to go to the mails with regularity when I am going around the continent as I am now'.[32] Learned later confessed to Augustus in 1924, 'I used to feel that the house was a second home. Indeed, there was a time when — little turncoat that I was — I used to think it much superior to my own'.[33] The void of a brother, or

[28] Philip Hamburger, 'The Great Judge', *Life*, 4 November 1946, p.125.
[29] C.C. Burlingham, 'Judge Learned Hand', p.331.
[30] Letter from Samuel Hand to Augustus Hand, 18 January 1881, in Marcia Nelson, p.94.
[31] Letter from Samuel Hand to Marcia Northrup, 16 December 1880, in Marcia Nelson, p.86.
[32] LH 109/1, letter from Learned Hand to Augustus Hand, 12 August 1888.
[33] LH 109/13, letter from Learned Hand to Augustus Hand, 27 July 1924.

male role model after his father's death, was filled by Augustus in times when Learned sought male companionship. However, it was also indicative of the urge to retreat from the household pressures whenever the opportunity arose.

Later life on the court showed just how remarkably influential these early years played in shaping Learned and Augustus, especially the familial burden of expectation. Moreover, these formative years also indicated an important interpersonal dynamic; Learned was already following Augustus on a level that saw the older cousin as an emotionally comforting influence. Childhood also saw the development of intellectual curiosity, an evolution of character traits, and a critical point of challenge to the political persuasions of the Hand family.

The Political Burden

Family was a strong shaping and socialisation agent for the Hands, but as influences of their family's political inclinations showed, it should not be overplayed. Political heritage was a strong presence in the Hand family for two reasons: the deep-seated history of its activities and affiliation with the Democratic Party, and the consequent and vocal expectations that Learned and Augustus' elders laid on them to follow. With the first, Augustus Cincinnatus Hand started the tradition when he held a number of non-judicial offices under the party banner. Most notably, he was elected to Congress in 1839, when the party was still running under the name, 'Democratic-Republican', and was later nominated as a delegate to the 1868 Democratic National Convention. The generation that followed was described by Learned as 'partisan Democrats'.[34] His father, Samuel, was a lifelong Democrat and closely involved in party social circles. This proved beneficial when he was eventually appointed to the New York State Court of Appeals by his friend, Governor Samuel J. Tilden, a reform Democrat. Samuel's brothers, Richard and Clifford, were of the same ilk. Richard was very active in party affairs and was the Democratic nominee for County Judge and Surrogate of Essex County, New York,

[34] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957.

in 1878 and 1890, respectively. He was also Democratic nominee for Justice of the New York Supreme Court in 1885 and 1903.

Clifford was less active, but his communications with Learned and Augustus are the most revealing of the demand placed on the young cousins. Learned recalled that Clifford was vocal in his ideological adherence to the Democratic Party's values and retraced his early years spent with his uncle in Elizabethtown, 'I've heard the history of the Democratic Party so many times…I sat there and he went on and on'.[35] He described it as boring, but was also anxiously aware of the expectation to follow suit. When the time arrived for the cousins to go to university, this became a chief concern for the family. As Augustus entered Harvard, there was a sense of fear from the men of the family that he would become a 'damned little Federalist'.[36] Such a family reaction aligned with what Learned described as Copperhead values — in that they were 'Northern men of Southern principles'.[37] He specifically cited his family's adherence to 'Jacksonian' philosophy, which emphasised 'doctrinaire individualism'.[38] This, Learned described, was 'so neatly…defined and so confidently accepted upon all political questions'.[39] Thus, in similar vein to their family's legal legacy, Learned and Augustus were frequently reminded in both subtle and unsubtle ways that certain political affiliations were expected.

Although both clung on to some traditions from the family political mould, they did not always choose the set path. For example, Augustus continued the family's loyalty to the Democrats (voting for the party at every presidential election, bar one) but was also described as a political 'independent', in part because other than some limited caucusing for the party

[35] Ibid.
[36] S&P 14, Charles Wyzanski, 'Augustus Noble Hand: In Memoriam', Meeting of the New York Country Lawyers' Association and the Association of the Bar of the City of New York, 4 May 1955, p.12.
[37] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957. Copperhead was a term frequently used in the 1860s to refer to Democrats in the Union who opposed the Civil War and advocated a peace settlement with the Confederacy. Learned said his family were never explicitly called that, but they 'would have been classed' as such, based on their values and positions.
[38] LH 109/2, letter from Learned Hand to Augustus Hand, 6 November 1898.
[39] Ibid.

during his time as a student, he rejected an active life in politics.[40] Learned took an even more drastic course. His voting patterns broke away from the long-held party loyalties of his family. He said such patterns emerged as a youthful course. At first, he 'wasn't at all interested' in political affairs, but quickly lost 'faith and virtue' with the Democratic Party when he believed he had wasted his first ever vote on William Jennings Bryan in 1896.[41] In highlighting the magnitude of his action to then waver between political loyalties, he speculated later in life about how his father and two uncles would have reacted, 'If they'd known that they'd have a descendant who voted for sixteen Presidents, eight Republicans and eight Democrats…That would have been a most terrible betrayal'.[42] In that sense, their actions revealed the early inclination to reject conventional or doctrinaire positions by presenting political, intellectual, and familial independence.

Harvard: The Roots of Restraint

Before Harvard, Learned and Augustus faced periods of struggle between the demands and expectations of their family and the impulse to shape their own identities. What bubbled under the surface was a philosophical groundwork of critical thinking and individualism, but constrained by the forces surrounding them. However, entrance to Harvard College marked the start of a liberation from such constraints. There were two key reasons for this. First was simply the personalities of Learned and Augustus. An inclination to reject norms and conventions as early as their childhood saw them distance themselves largely from the political trappings of their family. Although Augustus, for example, later became a loyal Democrat, there was rarely a letter or reflection from him or Learned in this period that suggested their views were taking final form on topics such as politics, foreign affairs, economic conditions, and the key social issues of the period. This combined with a second factor, learning under a

[40] Cambridge, MA, Charles Culp Burlingham Papers (hereafter CCB), HLS 6/15, C.C. Burlingham, 'Unpublished Tribute of Augustus Hand', 29 November 1954.
[41] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957.
[42] Ibid.

golden generation of philosophers and legal experts. Overlapping in their time at Harvard, the Hands converged on the great figures who taught their students the values of independent inquiry and prompted them to challenge conventional thinking on the ideas of truth and morality.[43] But rather than politics or law, their intellectual inquiries were instead directed to the great questions of philosophy.

The Hands' frequent references back to these years revealed it was *the* central influence on their way of thinking. What distinguished the Hands' experience at Harvard from their early educational years was that they were learning and adopting substantive philosophical positions that would shape and guide their intellectual ruminations. Their experience in both their undergraduate and Law School years is a prime case study in the deep and complex makeup that goes into interpreting the law. The figures the Hands cherished most were telling. The work of one particular man, William James, in the Hands' undergraduate years, showcased the philosophical foundations to which they were exposed. From that, they became enticed by four of the great minds of the Law School — Christopher Columbus Langdell, James Bradley Thayer, John Chipman Gray, and Samuel Williston — because their arguments were held together by philosophical pillars very similar to those of James. At the core of the teachings of these men were a stress on pragmatism, scepticism, restraint, and moderation. These principles and ideas were critically entwined and shaped the Hands' intellectual and judicial makeup for years to come. Although the Hands took inspiration from each, the final philosophical outlook reflected their own worldviews and makeup. Being exposed to the full arguments of the men who were heard in Harvard's lecture halls encouraged the Hands into thinking of their own answers to intricate questions on law, civilisation, and society, and to consider the origins, purpose, and function of these concepts. However, most significantly, it allowed them to appreciate the applicability of such values to the role of the judge. Their conceptions of the judicial role transcended political thinking because they were formulated from their teachers'

[43] Augustus entered Harvard in 1886 and graduated in the class of 1890. Learned entered in 1889 and graduated in the class of 1893.

emphases on processes and means over ends-orientated decision making. As a result, the Hands frequently invoked the influence of their teachers when on the court, as practical constraints against their personal biases.

William James, Pragmatism, and Scepticism

The most identifiable and striking principle in the Hands' philosophical makeup was their scepticism. This meant self-scepticism, in addition to scepticism of other individuals, institutions, and ideas. In their later desire to conduct their judicial duties with great impartiality, scepticism became a core tenet. Learned was famous for paraphrasing throughout his life Oliver Cromwell's speech to the General Assembly of the Church of Scotland in 1650, 'I beseech you, in the bowels of Christ, think it possible that you may be mistaken', claiming such words should be inscribed on every courthouse in the country.[44] Moreover, Augustus became distinct for his disparaging reference of public figures, such as New Dealers, describing them as 'Children of the Dawn' for their lack of introspection and self-scepticism.[45]

The theoretical foundations of their scepticism were built at Harvard, particularly under the influence of William James. Making James a key point of focus, Learned reflected later in life on the 'unequalled opportunity' he had of developing his judicial thinking from 'crusaders and pioneers'.[46] At the heart of James' teaching was a sophisticated web of ideas that placed priority on openness, inquiry, and the never-ending search for answers. These ideas were antipathetic to those that assumed moral absolutes. James did not tailor his philosophy around the function of legal institutions, yet his contribution was one of the most profound on the Hands' jurisprudence. This is because he steered them away from the assumption that the tough political questions plaguing the country could be solved by definitive or 'correct' solutions. If such solutions were not existent, the justification that a judge possessed such

[44] Oliver Cromwell, Speech to General Assembly of the Church of Scotland, 3 August 1650 <http://www.olivercromwell.org/Letters_and_speeches/letters/Letter_129.pdf> [accessed 30 May 2019].
[45] This often interchanged with 'Children of the Light', but the sentiment remained the same.
[46] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957.

answers was void. This caution became a defining element in the final makeup of their jurisprudence.

Indeed, one of the key elements of James' imprint on the Hands was the idea of pragmatism. In this view of judging, cases were evaluated impartially on their individual merits. This replaced the popular notion in judging of fixed truths in moral, social, and political issues with a greater emphasis on empiricism and constraint. Augustus described it as a position of modesty and a prioritisation of 'truth, earnestness and humility'.[47] At the heart of this was James' scepticism of the individual who claimed to possess all knowledge and solutions. This was a prime example of a philosophical position instilled in the Hands that stressed the importance of the means over the ends. To James, no truths were immune from scrutiny and no individual held, with full certainty, the answers to society's greatest questions. As James explained, pragmatism was a move away from 'fixed principles, closed systems and pretended absolutes and origins'.[48] Instead, one adhered to 'completeness and adequacy, towards facts…it means the open air and the possibility of nature as against dogma, artificiality and the pretense of finality of truth'.[49] Thus, rejecting the notion of absolutes or universal truths and values was the intellectual foundation to steer away from the attraction of tribalism and partisanship, and the very demagogues who promoted or exercised these principles.

Learned and Augustus extended James' pragmatism to the functions of democracy, which also helped formulate their broader ideas around social progress and the correct role of the judiciary. Learned frequently credited this thinking to the 'masters who trained his youthful thoughts'.[50] In this sense, he was alluding to James when he argued that, if values are incommensurable, democracy should be viewed through the lens of human limitations. Thus, progress stemmed from the trial and error of weighing conflicting values into a legislative product. The test was to 'strike a balance', or a solution where 'there are no standards or tests

[47] Wyzanski, 'Augustus Noble Hand', *Harvard Law Review*, p.12.
[48] William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (New York: Longmans, Green & Co, 1907), p.51.
[49] Ibid.
[50] LH 106/19, letter from Learned Hand to Walter Lippmann, 7 March 1955.

save what will prove the most nearly acceptable compromise, what will most accord with existing conventions'.[51] However, in accepting this, it was necessary to suggest two things. The first was that the path to further social evolution and democratic progress rested on the tolerance of different opinions — thus breaking down the partisan divide. It required the pragmatic mind to challenge conventions and norms, and understand how one reached their conclusions rather than denounce such conclusions as morally invalid. In essence, it was a commitment to James' concept of the 'intellectual republic', which promoted individual freedom, peaceful interrelationships, and tolerance.[52]

Second, both Learned and Augustus emphasised that the idea of such a republic was the antithesis to a strong-armed judiciary, because it based itself on the idea of a population of critical thinkers. Such thinkers initiated change through legislative procedures rather than the supposed wisdom of a select few men on a judicial bench. This idea of a restrained approach to judging was therefore painted not only as a possibility for social progress and prosperity, but somewhat desirable for such goals. It stressed a clear focus on the correct distributions of power and duties for the respective branches of government in a democratic system. In this vision, there was a strong emphasis on the legislature to take responsibility. It was, in essence, a 'first among equals' in this system of separation of powers. As Augustus explained, 'present parties must be left to "fry in their own fat" until the legislative branch sees fit to change the procedure'.[53] This shifted the burden back on to the people. In an enlightened and empowered democracy, the power and accountability of elected representatives, not courts, were what was held directly through the people. Therefore, the connection between James' complex formulation of truth and the Hands' ideas on pragmatism, scepticism, and the role of the legislature revealed a groundwork of apolitical principles.

[51] Ibid.
[52] William James, *The Will to Believe and Other Essays in Popular Philosophy* (Cambridge, MA: Harvard University Press, 1979), p.33.
[53] Augustus Hand, 'Lawyers in a Revolutionary Age', *Pennsylvania Bar Association Quarterly* 18 (1946), 46-58 (p.55).

Harvard Law School

After a period of intellectual freedom and experimentation at Harvard College, the more conformist family pressures returned for the Hands after graduation when the question of entering the law resurfaced. Augustus' and Learned's undergraduate years proved to be liberating from their demanding childhoods. There were, of course, pressures in the intense academic environment, but they were distinctly different to those of childhood. The Hands' interest, in particular, in the ever-questioning mind of James led them to a philosophy that was intellectually demanding — but it was also rewarding for the young men's thirst for free thinking. With an expected decision looming on their careers, their hesitancy to commit wholeheartedly to a life of law was strikingly similar to their approach to family politics. It revealed an ongoing tension between their non-conformist instincts, which, in this case, caused neither to envisage a career in law, and a resignation to be bound to certain duties and expectations.

In Augustus, there was more of an air of a pensive young man who mulled over things in detail rather than acting impulsively. In living up to this reputation, it made his decision making process a little smoother. However, the notion of Augustus as the 'wise and unwavering' figure also neglects the existence of moments of uncertainty.[54] He admitted that he was more interested in teaching Greek following his undergraduate years at Harvard. Furthermore, he confessed, 'I usually do not make up my mind until the last gun is fired and the emergency is upon me'.[55] After graduating with his bachelor's degree *summa cum laude* in 1890, he read law in father Richard's office in Elizabethtown for a year before taking the advice of Harvard friends Ralph and Henry Kellogg and enrolling at the university's prestigious Law School. Only after the decision had finally been made and he had begun participating in the lectures and courses did Augustus wake to the possibilities of a career in the legal profession. It was natural that his childhood and training at Harvard College led him

[54] Burlingham, 'Judge Learned Hand', p.331.
[55] S&P 16/45, Augustus Hand, untitled and undated quotes.

to be both intellectually curious and unashamedly self-assured. However, it revealed that the concept to 'follow Gus' should not suggest he was always so certain of the correct course of action. As he explained upon entering Harvard Law School, 'There I ceased to be what Browning called "a long cramped scroll"'.[56]

In contrast, an anxious Learned had his sights firmly set: but on a career involving philosophy. However, in spite of the joy and intellectual stimulation it gave him, the response from people whose opinions mattered to him most were indifferent or oppositional. Learned's reflections indicate he was stung by the lack of support. The response that hurt the most was from his uncle, Richard, who wrote a condescending and presumptuous letter that attempted to dissuade him from a career in philosophy. This was in response to a heartfelt letter where a bevy of emotions, doubts, and pressures from Learned revealed the long lasting psychological effects of his childhood. Fear was a prominent theme, when he confessed he had 'dreaded' broaching to Richard even the possibility of following a profession other than the 'almost hereditary of the law'.[57] Adding to this, he explained how 'childish and ephemeral' he had been made to feel of his flirtations with philosophy.[58] This, he said, was 'undoubtedly unworthy of a man's rightful independence', showing how he still envisaged life as a battle against conformity.[59] Family was an important substrata in this. However, in this instance, a naive Learned felt defeated and accepted he would go to Harvard Law School.

Despite such doubts, this period in the Hands' lives was a fruitful three years for both.[60] The stiff intellectual challenges they were presented on law and society created many philosophical challenges in its own right. These challenges came at a particularly important time for the Law School. The faculty was comprised of just seven individuals when both

[56] S&P 25/1, Augustus Hand, untitled and undated draft of speech. Augustus' reference is to English poet Robert Browning and the lyrics in his poem, *The Last Ride Together.* The metaphor is used in the context of an individual smoothing out their issues and finding purpose.
[57] LH 110/6, letter from Learned Hand to Richard Lockhart Hand, 4 January 1893.
[58] Ibid.
[59] Ibid.
[60] Augustus entered the Law School in 1891, graduating in the class of 1894. Learned started in 1893 and graduated in the class of 1896.

started their courses, but it was full of star power in figures such as Christopher Columbus Langdell, James Bradley Thayer, John Chipman Gray, and Samuel Williston. As Augustus remembered, 'These were giants in those days', who presented to the Hands a deeper understanding of the complex philosophical dilemmas of the judge.[61] These specifically included what powers a judge possessed, when a judge should exercise restraint, and what boundaries limited their decisions in moral and social issues. The Hands' responses to these questions shared three common themes. First, there was a strong and evident connection between the lessons they were taught and their own formulations of correct judging. Second, their interpretation of such judging transcended the conventional political paradigm used by scholars today to assess historical judges. Instead, the ideas taught were shaped by considerations around the dynamics of democracy and the function of public figures, and they were answered by men who stressed attributes that promoted caution in interpretation of the law. Similar to James, that caution was displayed by a strong focus on the correct process and methods. Third, the appeal of such teaching was a result of their attraction to values that promoted independent and critical thinking, and led to a much more complex philosophical foundation. They later invoked these men regularly as the driving force behind such nuanced judicial thinking.

Christopher Langdell and Precedent

The root of the Hands' legal philosophies is traced to the chief architect behind the dramatic restructuring of the Harvard Law School in the second half of the nineteenth century, Christopher Columbus Langdell. In the complex philosophical makeup of the Hands, there were two core elements they adopted from Langdell. First, they were taught to respect and strictly adhere to legal precedent. If this factor was the judicial barrier to dramatic change, the second was the legislative barrier. Even if precedent could be modified or was not present in a decision, a court should first exhaust all scenarios for deferring to the legislature. There was

[61] Augustus Hand, 'The Law School when I was a Student', *Harvard Law School Bulletin*, June 1954, p.11.

room for legal changes and creativity, but Langdell taught them that the threshold was high. Change should come steadily and often slowly. This afforded the legislature the opportunity to experiment with legislation in attempting to remedy society's great issues. If such powers were placed so firmly in the hands of judges, there would be less accountability for wielding dramatic change far too quickly. In combination, these factors circled the Hands back to the danger of judges infusing their own sense of justice and biases into decision making.

Langdell's significance to the Hands is linked to his appointment as Dean of Harvard Law School in 1870, after a successful legal career in New York City. His most notable contribution as Dean was the reorganisation of the Law School's resources — which helped elevate it to elite status — and his application of a case system. Langdell was another teacher who emphasised the methods in legal interpretation over the ends. Firmly of the belief that 'law is a science', he encouraged his colleagues to embrace a purist method of communicating 'experience in learning law'.[62] In turn, such teachers could better empathise with inexperienced students as they attempted to open and engage with the minefields of novel legal questions and terminology. To Langdell, the student was expected to read the various opinions of selected court rulings in their purest form. His rationale was that the lawyer based his brief, or the judge his case, not on the treatises but upon the reports of decided cases. Thus, such volumes of cases did not come with explanatory materials. Students were expected to provide their own interpretation from the cases and, subsequently, to debate these interpretations in their teachers' lectures. Langdell personally wanted to get to the root of the matter with each issue and critically analyse the systematic evolution of legal doctrines through time.

This approach, both Hands admitted, was demanding and stretched their intellectual capacities to the limit. Augustus reflected on how the course 'seemed very difficult at first' and sympathised with those who lacked the experience that he at least obtained from spending a year in his father's law office.[63] He would often read opinions from scratch that were written

[62] James Barr Ames, 'Christopher Columbus Langdell', *Great American Lawyers*, ed. by W.D. Lewis, 8 vols (Philadelphia: John C. Winston, 1909), viii, p.482.
[63] Augustus Hand, 'The Law School when I was a Student', p.10.

in Latin or French and, along with his fellow students, try to find out what was going on by 'main force and awkwardness'.[64] Likewise, Learned reflected on the lack of instruction in Langdell's dialectic case method as 'rather silly'.[65] The younger Hand cousin described a particular situation when he was tasked with reading a fifteenth century case on property, 'I hadn't any ideas what the words meant. You read it over and over and over, until sort of by osmosis, it would come in, and I suppose in a way it did'.[66]

Despite Learned's criticisms of the method, there was an acceptance that it seemed to work, and he was inspired by how thoroughly Langdell could 'dissect a case and finally expose the central ganglia'.[67] Primarily, it instilled in both an appreciation of precedent and slow growth in legal doctrine, which became core to their jurisprudential thinking. They learnt that every civilised society depended upon an existence, and adherence to, some body of principles. They were made to understand, as Learned noted, that authority 'is derived from continuity with the past; it is traditional'.[68] Similarly, Augustus explained that, 'Most of our laws and customs have some justification in experience and at any rate cannot be rudely disregarded without disaster'.[69]

However, whilst they learnt to respect the supremacy of certain rulings, they were also prompted to look at precedent critically and find those gaps where change was necessarily initiated in the law, thus nurturing a fine line between creativity and restraint. As Learned noted, one should be cautious with playing the role of moral arbiter and to not assume that the compromises of the past 'are necessarily those that would emerge from similar conflicts today, or for that matter, were ideally the best even when originally they got themselves accepted'.[70] Values were painted as incommensurable and ever-evolving, so the best legal litmus test was if ideas had proved their ability to 'withstand the shock and abrasion of time; because no better

[64] Ibid.
[65] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957.
[66] Ibid.
[67] 'Harvard Reminiscences by Learned Hand', in Marcia Nelson, p.126.
[68] Ibid., p.128.
[69] S&P 25/2, Augustus Hand, 'Address at Luncheon of the Alumni Association of the Yale Law School', 17 June 1935, p.8.
[70] 'Harvard Reminiscences by Learned Hand', in Marcia Nelson, p.129.

solutions have as yet been able to establish themselves in their place'.[71] The ability of law to withstand democratic experimentation was painted as a sign of authority and respect. This inspired the Hands' own path to the idea that judicial power used to overturn such laws should be limited. A respect for precedent tamed judges' urges to change laws.

This emphasis on precedent aligned with a second key principle from Langdell's teaching — a preference for limited and stable change. The Hands questioned the idea of radical reformation, particularly those where ideals of morality were enforced upon past decisions. This is because morality is built on ends-based judgements, which conflicted with Langdell's encouragement to consider a means-based approach with the interpretation of precedent. The steady process of legal evolution showed how changes were made and, more importantly, not made. Government was proposed to the Hands as a tool for adjusting conflicting interests, but its stability, Learned explained, depended 'upon the measure of moderation the more powerful groups are willing to impose upon themselves'.[72] Their ideal role of a judge, therefore centred heavily around the need to avoid cutting legal corners to reach a desired result. This meant maintaining procedural tradition, regardless of their substantive positions on policies. As Augustus noted, courts should be patient with the democratic process. They should not seek to infuse their own biases, especially when they were politically fuelled, into the process of divisive issues, since this would set dangerous standards for the future. Although many judges adopted this approach with degrees of success, Augustus predicted that courts would not be 'tolerated' in the future 'if they undertake to decide cases merely in accordance with their sense of justice'.[73]

Langdell was not the deepest legal thinker at the Harvard Law School, but the ability of his case method to train others to be critical thinkers was a significant influence on the Hands' jurisprudence because it expounded a deeper purpose for precedent in an evolving judiciary. His teachings were fundamental in training the Hands to be more conscious that precedent can

[71] Ibid.
[72] Ibid.
[73] Augustus Hand, 'Lawyers in a Revolutionary Age', p.54.

deter judicial overreach. This placed the Hands in a fascinating jurisprudential position. When they later ascended to the federal bench, they were caught between two key interpretations of precedent. There were judges of the early nineteenth century tradition who saw precedent as something to unquestionably and technically apply in the steady course of legal progression. Then there were others who responded to an increasing demand for law to move more quickly in adapting to the mass industrialisation and urbanisation of the late nineteenth and early twentieth century, which meant sometimes disregarding precedent. Langdell's approach, however, taught the Hands to respect precedent whilst scrutinising it. As Augustus described it, settled law may have 'the mutterings of Balaam's ass', but it was still 'valid'.[74] Therefore Langdell imparted on the Hands an acceptance that they could often disagree fundamentally on the social and political terms of a legal ruling, but not overrule it simply in line with their preferences.

James Bradley Thayer and Judicial Restraint

Of their teachers at the Law School, the one who made the most profound impression on the Hands was James Bradley Thayer — a renowned disciple in the school of judicial restraint. Following eighteen years at the bar, Thayer went to teach at Harvard in 1873 at age forty-three. He was the fourth original member of the Law School's Langdell era that helped its elevation to elite status and augured a new era of legal instruction. According to Augustus, Thayer made 'the most important impression on the best students' because he was 'the most original of our instructors'.[75] Likewise, Learned described Thayer as the 'teacher who counted most with me'.[76] At the heart of Thayer's appeal was his enthusiasm for digging deeper than conventional teaching points, which challenged students to think originally and proved an endearing factor.

[74] Ibid., p.52.
[75] 'Harvard Reminiscences by Augustus Hand', in Marcia Nelson, p.123.
[76] LH 89/27, letter from Learned Hand to A. James Casner, 10 November 1959.

There were two particular reasons why Thayer's influence on the Hands was so significant. The first was that he was renowned in legal circles for dramatically advancing scholarship in the area of constitutional law. Augustus described him as, 'a generation ahead of his time in his views'.[77] Learned added that his course on the topic was seen as the 'fitting crown' of the whole three years, because it laid out a set of ideas that were 'feared and deeply deprecated by those who set their hopes for the existing order'.[78] According to Learned, that existing order rested 'upon that repository of eternal principles: a judicature invulnerable to popular assault'.[79]

Thayer's school of thought appealed to a great number of the Law School's students outside of the Hands. Other notable disciples of Thayer included Supreme Court Justices Oliver Wendell Holmes, Louis Brandeis, and Felix Frankfurter.[80] Like the Hands, these men were not considered politically ideological conservatives. Yet their adherence to Thayer's teaching of strict judicial restraint frequently left them framed under this label. Augustus later reflected on this issue of Thayer, judicial restraint, and the political connotations, when he wrote to his friend, Charles Culp (C.C.) Burlingham, 'to define conservatism as unwillingness to declare acts of legislature unconstitutional…is absurd'.[81] Thayer's school of thought and the Hands' channelling of it through their own philosophies and careers, therefore, placed it in a greater spotlight.

To define Thayer's judicial restraint as conservative serves as a great misrepresentation of the complex institutional and democratic considerations that it comprised. Where Thayer's work fits within the field of legal jurisprudence depends on the definition of judicial restraint which, in itself, has been open to various interpretations in legal scholarship.[82] Of the various

[77] CCB 6/14, letter from Augustus Hand to C.C. Burlingham, 15 September 1942.
[78] 'Harvard Reminiscences by Learned Hand', in Marcia Nelson, p.127.
[79] Ibid.
[80] For a comprehensive look at the philosophy and adherents of Thayer's judicial restraint, see Richard Posner, 'The Rise and Fall of Judicial Self-Restraint', *California Law Review* 100 (2016), 519-556.
[81] CCB 6/14, letter from Augustus Hand to C.C. Burlingham, 15 September 1942.
[82] Such an open debate will continue to rage on for decades. A succinct look into the various facets of the debate can be found in John Daley's 'Defining Judicial Restraint', in *Judicial Power, Democracy and Legal Positivism*, ed. by T. Campbell and J. Goldsworthy (London: Routledge, 2017), 279-314. Daley argues that despite 'judicial restraint' becoming a greater tool of political currency in

meanings, Thayer's vision leaned mostly on the voluntary nature of the judge. He urged for great self-restraint from declaring executive or legislative acts unconstitutional by stressing the importance of constitutional checks between the three branches of government. Beyond these constitutional boundaries, his philosophy was also fuelled by an understanding of competence. Thayer admitted that judicial restraint should, in part, be dictated by a dose of judicial humility — or, the idea that legislatures are better equipped for understanding the best policies for the society that elected them. Similar to James, therefore, the focus of Thayer's teachings was on the methods and conduct that it fostered in legal interpretation, rather than the outcomes. The role of the legislature was at the centre of Thayer's ideal of a well-functioning and healthy democratic structure. Its strength, however, required judges that were aware of their own obstructionist implications from their decisions. With this in mind, Thayer wrote that the conditions set out early in the American republic showed that a statute could be invalidated as unconstitutional only when it was a clear and unequivocal breach of the Constitution, or 'beyond a reasonable doubt'.[83] Thayer elaborated that it was not when a 'mistake' had merely been made by lawmakers, but when one was so 'very clear' that it was 'not open to rational question'.[84] Thus, the degree of doubt over the legislature's intent or result was the central consideration for the judge.

When looking at how Learned and Augustus described the role of courts, the linguistic, thematic, and substantive overlap with Thayer is strikingly similar. For example, Thayer's vision was also driven by a strong sense of scepticism — in this sense, a scepticism of certainty. He doubted individuals' abilities to make consistent, rational decisions in matters of deep constitutional ramifications. The Hands agreed. As Learned noted, the discourse was that 'most of constitutional law had been constructed out of circular propositions, which justified the predetermined attitudes of the judges, who — being more often than not, primarily men of

contemporary debate, it is a complex and multi-faceted term that goes beyond the simple assertion that judges should never make the law. This includes doctrines of jurisprudence which are not universally accepted as restraint but embody principles that put them on the margin.

[83] James Bradley Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law', *Harvard Law Review* 7 (1893), 129-156 (p.151).

[84] Ibid., p.144.

action — were unaware of the verbal traps that lay about them and into which they unwittingly fell'.[85] This is a remarkable hypothesis for two reasons. First, in specifically alluding back to Thayer for holding such a strong warning against the follies of constitutional law, this undermines arguments that have claimed Learned became more restraintist or judicially 'conservative' as he grew older. Learned suggested this vision was something he and Augustus 'always retained'.[86] Second, the position could be interpreted as a nihilistic view of the very legitimacy of constitutional interpretation. But living up to his billing, this explanation was more a product of Learned's linguistic flamboyance. Learned was one of the strictest adherents to judicial restraint in the twentieth century, but as his opinions showed, he did not advocate complete abdication of the judiciary's constitutional function. Instead, he was forcefully explaining the purpose of restraint in the context of the frailty of human judgement. Viewing the judiciary through such a lens justified a heavy stress on the sceptical judge to combat the prescient traps to which Thayer warned.

Learned and Augustus agreed on Thayer's fundamental principle about deferring to the legislature. However, in his interpretation of Alexander Hamilton's Federalist Paper No.78, Augustus explained that the 'power of the people' superseded that of the legislature and the judiciary.[87] As a result, when the legislature stood 'in opposition to that of the people' the judiciary was duty-bound by the latter to strike down the former's statutes.[88] Beyond that, Augustus was more willing than Learned to accept that American society gravitated towards courts as the most 'desirable' and 'impartial' arbiter for solving society's conflicts — and this scenario represented its 'political function'.[89] Nonetheless, he still agreed with Learned and echoed Thayer when he said that judicial intervention was only necessary when 'there can be no justification in the minds of reasonable men' behind certain legislation.[90] He also stated

[85] 'Harvard Reminiscences by Learned Hand', in Marcia Nelson, p.126.
[86] Ibid., p.127.
[87] S&P 25/2, Augustus Hand, 'Fundamental Law', undated. In 1788, Hamilton's *Federalist* essay No. 78, titled 'The Judiciary Department', is famous for addressing Anti-Federalists' concerns over the power of the judiciary under the proposed U.S. Constitution.
[88] Ibid.
[89] Ibid.
[90] Ibid.

that to identify and strike down legislation that was irrational required 'really great' judges.[91] These must fit under the vague definition of being 'men of tolerance and freedom from prejudice which is very rare, and with a high intelligence and an almost prophetic insight'.[92] If followed, Augustus believed these imposing standards would dissuade judges from freely extending their review powers.

Furthermore, contrary to the concept that judicial restraint is inherently conservative, Thayer's formulation actively sought to deter political intrusion into the judiciary. This was done through its focus on the self-scepticism of judges. For Thayer, self-awareness represented the pinnacle of the various ingredients that made up a great judge. His teaching had stressed the necessary institutional and democratic limitations imposed on courts, but to adhere to this framework prompted judges to follow a high personal standard of expectation. This comprised discipline, self-limitation, emotional detachment, and impartiality. The end goal was the apolitical judge. This was important when conflicts with the others branches of government could prompt unwarranted political disputes. He stressed that the negative effects of a judiciary that lacked self-discipline would be felt in the function of other areas of government. For example, if a judge freely invalidated what the legislature had passed, it could force a sense of worthlessness upon the work of the legislature, which, in turn, would breed a 'petty and incompetent' body.[93] Learned adopted this sentiment in his own philosophy. But in contrast to Thayer, he spun the self-discipline topic by often focusing on the positive ramifications that would be lost rather than the negative ones that would be gained. For example, he explained the benefit of empowering other bodies at the expense of judicial intervention, 'The American people cannot escape their moral responsibilities by devolving them upon the Supreme Court. Nothing will preserve liberty but sentiments in the hearts of the people'.[94] This revealed a key difference between Learned and Augustus, which emerged later in their opinions. Both

[91] Ibid.
[92] Ibid.
[93] Thayer, 'The Origin and Scope', p.141.
[94] Learned Hand in Spencer McCulloch, 'Judge Learned Hand: An Interview with the Dean of American Jurists', *St. Louis Post-Dispatch*, 15 July 1951, p.27.

emphasised the importance of the legislature to tackle the key decisions in society and act representatively on behalf of the American people. However, when it failed to provide clarity in its statutes, Augustus often believed courts were the only other avenue to lean on for interpretation. This was a simple dichotomy in choice between two democratic bodies that could address societal problems. Because this choice was so confined it also prompted him to be even more rigorous in his scrutiny of judicial powers. He was willing to exhaust all scenarios with the legislature before deferring to the judiciary. In comparison, Learned agreed with the important role and purpose of the legislature. However, there was a third dimension to his focus, which was the direct role that American citizens played in developing an active and enlightened democracy. This presented him a sense of burden as a judge to defend and empower society's voice when it seemed the legislature was acting unrepresentatively, which prompted him to implement more active and practical measures in such cases.

The most evident demonstration of Thayer's apolitical vision of judicial restraint, though, was in the contrast between judicial positions and policy positions. A key example was his views of the U.S. decision to acquire and retain the island possessions of Spain in 1898.[95] On a political level, he was sceptical of Congress' decisions on the constitutional rights of those from the annexed territories of Spain, but it did not affect his view of the constitutionality of these decisions. He supported the Supreme Court's broadly restraintist approach in the Insular Cases on the issue, which effectively upheld the right of Congress to make a number of key decisions, including the ability to tax these territories and define the boundaries of constitutional rights for the inhabitants.[96] The cases have since been criticised by many legal scholars as an endorsement of 'constitutional colonialism'.[97] However, Thayer believed the Court's decision was an apt symbol for his philosophy of restraint, 'nothing but the plainest

[95] Though Thayer's opinion on the matter was after the Hands had left Harvard Law School, the fundamental principles of his argument were the same.
[96] The first three Insular Cases were argued and decided together. These were: *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Dooley v. U.S.*, 182 U.S. 222 (1901), and *Downes v. Bidwell*, 182 U.S. 244 (1901).
[97] A prime example is Edgardo Melendez, 'Citizenship and the Alien Exclusion in the Insular Cases: Puerto Ricans in the Periphery of American Empire', *Centro Journal* 25 (2013) 106-145.

constitutional provisions of restraint, and the plainest errors, will justify a court in the disregarding the action of its coordinate legislative department'.[98]

This reinforced to the Hands the value of judicial integrity. One may often decide a case that conflicts with their personal values — a common challenge for the judge — but the key test is whether they could follow this principle. Although judges have often expressed the distinction between their disapproval of a legislative policy and their judicial duties, Learned was more vocal than others when he reached the federal bench. As the twentieth century saw an acceleration in the Supreme Court's 'activism' in civil liberties cases, he privately aired his disenchantment on a frequent basis, showing the influence of Thayer. Thus, despite both Thayer and the Hands being framed in certain political dichotomies, the rationale behind their restraint was much deeper and nuanced. Their considerations focused on the prospect of an over-powered judiciary, its capabilities in ruining democracy, and the institutional and psychological restraints needed to prevent such ruin.

John Chipman Gray, Biases, and Self-Limitation

Second to Thayer's influence on the Hands was that of John Chipman Gray. Gray was co-founder with John Codman Ropes of the now international law firm, *Ropes & Gray,* in 1865. He later joined the Harvard Law School faculty in 1869 as one of the four members in Langdell's new guard. Although Thayer was viewed as the most original, Gray had the simpler appeal of being a 'great gentleman'.[99] Learned reminisced that Gray's lectures were full of 'charm and humour', whilst Augustus was mesmerised by his 'profound philosophical mind'.[100] His primary imprint on the Hands was to enlighten them on the inbuilt preconceptions and biases in judges' decision making. But contrary to their other teachers, his

[98] James Bradley Thayer, 'The Insular Tariff Cases in the Supreme Court', *Harvard Law Review* 15 (1901), 164-168 (p.164).
[99] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957
[100] Learned Hand, 'Foreword', in Samuel Williston, *Life and Law: An Autobiography* (Boston, MA: Little, Brown & Co, 1941), p.vii; Augustus Hand, 'The Law School when I was a Student', p.11.

willingness to sympathise with judges who openly rested on such biases was largely rejected by the Hands.

Although Gray had strong views on judicial restraint and scepticism, they were not displayed in print in full until his 1909 book, *The Nature and Sources of the Law*. The book reflected Gray's broader views on the evolution and function of the law, and established him as one of the primary original contributors to the school of legal realism.[101] Much of the realist rationale centred on the idea that judges' political and moral intuitions played a more frequent role than had previously been assumed. In his book, Gray defined law as 'composed of the rules which the courts…lay down for the determination of legal rights and duties' and that a statute was not law until 'the courts put life into the dead words of the statute'.[102] Thus, the judge was very much sovereign and 'The law of a great nation means the opinions of half-a-dozen old gentlemen'.[103] Although he retained the positivist notion that stressed there was a logical process in deducting law from historical sources and facts, he called attention to the influence of personality, prejudice, and other non-logical factors in the shaping of the law. However, in observation of these trends, Gray suggested such influences were not necessarily bad, particularly in morally blurred issues. He explained further when he wrote about the notion of 'right and wrong' as the only determining factor in cases, 'suppose…that his notions of right and wrong differ from those of the community…I believe that he should follow his own notions'.[104]

There has been little scrutiny on what influences the Hands rejected in forming their jurisprudential outlook. Gray's lessons were useful to Learned in that regard, as they largely served as reinforcement of his growing attraction to Thayer's conception of judicial restraint. In identifying biases in judges' decision making, Learned became particularly critical about the use of natural law in constitutional adjudication. He later lamented in 1952 to his friend,

[101] See references to legal realist literature in Introduction.
[102] John Chipman Gray, *The Nature and Sources of the Law*, 2nd edn (New York: Macmillan, 1921), p.84.
[103] Ibid.
[104] Ibid., p.288.

Bernard Berenson, of natural law's revitalisation in the twentieth century after a wide assumption it had died in the previous century. Specifically, he believed there was a renewed appeal to the concept of judges holding the answers to moral questions, 'When you and I were growing up all these theories we thought to be finally disposed of, but we were wrong. St. Thomas Aquinas and the Stoics are coming back, horse, foot, and dragoons'.[105] Learned's belief in pragmatism led him to reject the reconsideration of concrete solutions in law, because the assumption that such solutions existed invited decision making that used morality to justify the absolutism or purity of one's decisions. He observed this trend in politicians, whom he accused of building their arguments on the 'heavy hand of conformity' and the fostering of a moral dichotomy between those that advocated their positions and those that did not.[106] The attempt to justify actions or conduct from the positions they held was antipathetic to the means-based approach Learned embraced from his education in law. Thus, he feared that judges adopting a similar mindset to politicians would prompt more rulings based on the righteousness of their ideas, explaining, 'mankind has for eons come so to confuse the means with the end that the means have become ends in themselves'.[107]

Therefore, Learned's vision of judicial restraint contained certain caveats or exclusions. For example, he was aware that judges were often left with opportunities to flex their creative muscles. One such situation was during statutory interpretation — particularly older or more ambiguous statutes. Learned noted that the judge must 'reconstruct' the authors' words and identify 'how they would have dealt with this occasion which was not known to them, which they weren't thinking about'.[108] However, Learned recognised Gray's argument that such a practice still led to a judge doing 'what you really think best'.[109] His response was simple. One must first maintain confidence in their ability for impartiality, when he explained, 'Is it not the

[105] LH 99/21, letter from Learned Hand to Bernard Berenson, 17 February 1952. Learned's reference and rejection of Aquinas was out of his influence on natural law. Aquinas defined natural law as representing a strict line of morality between good and evil. This line was supposedly objective, universal, and derived from human rationality.
[106] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957.
[107] LH 100/16, letter from Learned Hand to Edward Burling, 6 February 1944.
[108] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957.
[109] Ibid.

duty of a rational man to know the actual basis of his conclusions, and, by such introspection as he can muster, to proceed rationally?'.[110]

In comparison, Augustus showed more agreement with Gray in that he was less explicitly fearful of judges shaping their decisions on their preconceptions or biases. In the democratic makeup of the U.S., he noted to a friend, judges were still set up to be the most optimal and impartial institution to remedy issues where the legislature failed. In his description of courts, he wrote, 'whatever its imperfections, in no other way is a real hearing so likely to be had with a chance for deliberation and freedom from insistent and irrational public clamor'.[111] But he also stressed caution, knowing that judges without 'tolerance and social sense' could lead to 'disaster'.[112] Gray's teachings thus inspired a strong emphasis on self-awareness in Augustus. For an 'experienced judge', he explained that,

> there is a standard to which he owes allegiance that is quite beyond the mere satisfaction of his personal inclinations or even convictions, and that to work out his decision in a way that will conform to that standard and at the same time make any advances which can be justified is a difficult and anxious process.[113]

Because the process required great focus, experience, and talent, he warned of the capability of judges to mishandle their 'political function' by targeting legislation unnecessarily and based on their personal, social, and political biases and predilections.[114] Although, contrary to Learned, who feared a snowballing of judicial power, he feared backlash in American society that could prompt a loss of judicial power, as the legitimacy of judicial institutions would be placed in doubt. Such fears showed that Gray's influence still served to reinforce Augustus' belief in the necessity of strict judicial restraint.

Gray's teachings are instrumental in fully understanding how Learned and Augustus viewed the sensitive relationship between judging and political influence. There has been a justifiable focus by scholars on Learned's appeal to Thayer's judicial restraint, but less so on

[110] LH 55/4, letter from Learned Hand to Joseph Hutcheson, 2 July 1929.
[111] S&P 27/9, letter from Augustus Hand to Lawrence Lowell, 25 January 1924.
[112] S&P 25/2, Augustus Hand, 'Fundamental Law', undated.
[113] Augustus Hand, 'Mr. Justice Frankfurter', *Harvard Law Review* 62 (1949), 353-356 (p.355).
[114] S&P 25/2, Augustus Hand, 'Fundamental Law', undated.

Gray's influence. In understanding what the Hands rejected from their teachings, one gains a more developed picture of complex philosophical makeup of both Hands. Gray's teachings represented an emerging challenge to the view of technically minded, impartial judges by asserting there was clear bias in his or her decision making. This brought to light the influence of more passive, pre-determined attitudes that came into the decision making process of a judge. Learned believed this a graver threat than Augustus, although both were uncomfortable with Gray's empathy to the possibility of such biases frequently shaping judicial rulings. Already fearful of the threat of direct or more nakedly partisan power grabs by the judiciary, both were given further reason to justify a position that was both restraintist and vocally defensive of a politically transcendent judiciary.

Samuel Williston and Moderation

Whilst Gray's realism enlightened the Hands about the role biases played both consciously and subconsciously in judges' decision making, Samuel Williston's methods helped formulate a philosophical foundation that could deter such abuse of judicial and political power. Williston was a graduate of Harvard College in 1882 and subsequently graduated first in his class from the Law School in 1888 — just three years before Augustus began. Such efforts were rewarded with an assistant professorship in 1890. A renowned academic, Williston would become one of the leading authorities on contracts and sales, and made an impressive contribution to the literature on jurisprudence that lasted for generations.[115] Augustus acknowledged him as 'probably the…clearest expositor I ever saw'.[116] However, his greatest attraction was his youth and inexperience, which prompted him to seek a greater understanding on the deeper questions of the law. Thus, his eagerness to engage with his students and openness to shifting his position impressed the Hands.

[115] Williston was the author or editor of eighteen casebooks and treatises and more than fifty articles in law reviews and legal journals.
[116] Augustus Hand, 'The Law School when I was a Student', p.11.

The key philosophical trait Williston left was that of moderation or anti-tribalism. The sentiments of this philosophy resonated with the Hands after their childhood experiences of overbearing family tribalism. Having labelled his family as political partisans, Learned appreciated how Williston conjured with ways to escape rigid party lines or binary choices. He described how Williston spoke his mind on the law faculty and sought to advance his views, 'but he was never a factionalist'.[117] Learned appreciated this approach, because it stifled 'overwhelming loyalties' to certain positions or causes that he had directly experienced as a child.[118] In relation to courts, Learned channelled Williston and made it a key point throughout his life to express his fear of rigid partisan or tribal thinking by warning of the signals that 'consent' was becoming the 'cornerstone for much of the political thinking of the time'.[119] Relating it to Williston's speciality, Learned bemoaned how judges had gone to great lengths to discover in contracts 'an initial acceptance of consequences they felt bound to impose upon the promisor'.[120] This led to 'harsh results if one could say that the sufferer had agreed to them in advance', which Learned claimed was often built upon sophist rationale by judges, a tool he described as a 'facile handmaiden to authority'.[121] Thus, Williston's 'direct and penetrating mind…free to act upon any such plating' was an inspiration to Learned and opened his eyes to such deficiencies practiced in contract law.[122]

Furthermore, Learned explained that Williston's inquiry into law was the antithesis of ideologues.[123] He described these ideologues as the 'Luthers of this world'.[124] Society often owed such figures a great debt, but too many also posed a threat to 'much that is good'.[125] This is because their causes were often built on 'burning concepts, arrived at intuitively, coming

[117] Erwin Griswold, 'In Memoriam: Samuel Williston', *American Bar Association Journal* 49 (1963), 362-363 (p.363).
[118] Learned Hand, 'Foreword', in Williston, p.vii. Williston's invite to Learned to provide the foreword signified the strong personal imprint each had on the other.
[119] Ibid., p.viii.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Ibid.

with the impact of absolute certainty'.[126] The similarities to those who chose to be moral arbiters in judging was close for Learned. He believed that the best response was a healthy makeup of values which stressed 'scepticism, tolerance, discrimination, urbanity, some — but not too much — reserve towards change…and, above all, humility before the vast unknown'.[127] He, therefore, rejected the idea of revolutionary ideas, which were more likely to fester if judges were given the remit to extend their review powers unaccountably and use such powers to infuse their own partisan ideals into rulings.

Similar to his interpretation of William James' lessons, Learned applied Williston's philosophical ideals beyond the law. During his time in the public eye, Learned's correspondence and extrajudicial contributions revealed the values taught by Williston, especially when he reacted to tribal and extremist trends in the American and international political spheres. For example, he confessed to Frankfurter in 1914 that he had flirted with membership of the Socialist Party of America, but ultimately rejected joining because of the ideological rigidity and purity of the party. Painting the party under negative religious comparisons, he explained, 'I cannot myself quite take the socialist party seriously…Ecclesiastical organizations, crusades, and revival meetings have since that time ceased to appeal to me'.[128] Furthermore, as a keen and worried observer of the rising extremist ideologies in Europe in the 1930s, Learned was vocal about his concern with the 'deadly significance of symbols'.[129] In a speech on July 1939, he cautioned against the potential loss of lives, liberty, and democracy, 'when we turn to the East, we see symbols of deadly import — the Sickle and Hammer, the Swastika and the Lictor's Axe. These…threaten our civilization'.[130] After World War Two, Learned's fears remained, revealing lifelong uneasiness with tribal behaviour across the globe. As he explained in a letter to Berenson in 1945, collectivism could be positive if it incorporated democratic ideals, but it was clear to

[126] Ibid.
[127] Ibid.
[128] LH 104A/4, letter from Learned Hand to Felix Frankfurter, 31 July 1914.
[129] Learned Hand, 'On Receiving an Honorary Degree', Harvard Commencement Speech, 22 June 1939, in *The Spirit of Liberty*, 134-139 (p.134)
[130] Ibid.

him that the form that manifested in many European nations was leading to the continuation of the 'Totalitarian State'.[131] At the forefront was Joseph Stalin's leadership under the Soviet Union, where Learned predicted that the conformity of opinion, allure of a strong authoritative presence, and 'the extraordinary manifestation of Russian power' would 'impress folks and make them forget the price of it in tyranny'.[132] In turn, this prompted Learned to prognosticate that Europe's central debate over the next 'thirty to fifty years' would surround ways to combat these tribal behaviours and seek a moderate ground similar to one that had been articulated by Williston.[133]

Augustus was also influenced by Williston, making calls against tribalism a key theme in his broad philosophical views. For example, he frequently attested the lack of 'patient, independent thinking' in the U.S. to a large collective mentality in society which 'cast aside every unaccustomed thought as an alien enemy'.[134] But his criticisms transcended political partisanship, as he frequently called out the 'dogged resisters' and 'cheerleaders' on both sides of the political paradigm.[135] For example, he blamed conservatism for preventing what he viewed as an inevitable and necessary wave of social change in the early-to-mid-twentieth century. An example he often cited was the opposition against labour unions. Augustus saw unions as a natural and desirable counter balance to economic exploitation and, therefore, bemoaned those who attempted to stop their rise as people who were 'entitled to their present status because they belong to the old stock and are still more or less in the saddle'.[136] Augustus was discouraged by the tribal rationale behind such a position, rather than the actual anti-union position in itself, because it was entrenched in ideology rather than facts. On the other hand, Augustus sometimes rationalised with resistance to certain progressive movements in society. The 'Luthers' of the world may have helped stimulate societal and religious progression, but he also criticised their 'intolerance or stupidity' for 'advocat[ing] everything that involves

[131] LH 99/18, letter from Learned Hand to Bernard Berenson, 4 June 1945.
[132] Ibid.
[133] Ibid.
[134] Augustus Hand, 'Lawyers in a Revolutionary Age', p.47.
[135] Ibid.
[136] Ibid., p.48.

change'.[137] A prime example were the keen advocates of the New Deal. Their assumption of holding the great moral high ground above their brethren, as well as their belief that all conventions must change, was an equally troubling and rigid approach for Augustus.

In this context, Augustus took his lessons from Williston and applied them to his definition of 'judicial temperament'.[138] There were multiple components, the first of which was to not line up on any 'false issues' that made 'both sides unsound' in the political paradigm.[139] Therefore, he was one of the strongest voices of his time for cautioning against partisan behaviour creeping into the judiciary, particularly when it inspired radical thoughts. Second, he called for a new wave of moderation, which started with a fundamental adherence to toleration. Thus in defining the term liberal, he interpreted it as a state of mind, rather than a political position, 'A greater readiness to believe in the possibility of change, a courage to face change and…the possession of fewer and more simple assumptions'.[140] Third, such change should come with balance and gradualism. As he explained, 'Improvement can only come with change. But the important change shall not be so rapid as to destroy what experience has fairly justified, or so violent as to stop the wheels of the social machine'.[141] Reform, not revolution, was his emphasis, and this would come 'profanely, not piously — by management, by tactics and clamor'.[142] In light of this, Augustus also strayed from the levels of scepticism that Learned reached. This became evident in cases where he refrained from limiting the experimenting powers of officials in issues surrounding immigration and criminal law. Although he was an adherent to scepticism, he also saw it as a tool for cynicism that had devasted the reputation of many public institutions in the early twentieth century, which made it a threat to moderation. Thus, in heeding Williston's cautions against tribalism, Augustus' final formulation of the correct judicial function saw an appreciation of the context of changing

[137] Ibid., p.47.
[138] S&P 27/9, letter from Augustus Hand to Felix Frankfurter, 1 February 1924.
[139] Ibid.
[140] S&P 16/55, Augustus Hand, 'The Church and Fundamentalism', Speech to the Church Congress of Boston, 29 April 1924.
[141] Augustus Hand, 'Local Incidents of the Papineau Rebellion', *New York History* 15 (1934), 376-387 (p.377).
[142] Ibid., pp.377-378.

times, intellectual flexibility in debating issues, and a resistance to allowing law to fall into the manipulation of political persuasion. In this adaptation, the 'liberal' judge could conserve the key restraints of judging whilst seeking progression in the social conflicts where they were mandated to adjudicate.

Like Learned, Augustus also used his over four decades on the bench to extend these teachings of Williston into his responses to the extremist ideas, groups, and events that developed outside of the U.S. For example, Augustus expressed great concern with the outburst of socialism in Russia in 1917, which he believed just as dangerous and detrimental to humanity as the country's autocratic leadership under Emperor Nicholas II. Nonetheless, in adhering to his belief that humanity, including Europe, would progress away from notions of conformity and tribalism, Augustus predicted, 'Autocracy is a thing of the past. A few people with power are not in the future going to be able to cause the death of hundreds of thousands by their mere say-so…a day of reckoning for the sort of arbitrary power that was exercised has got to come'.[143] His forecast was wildly inaccurate, as communism and fascism took rise in the two decades following World War One. Consequently, Augustus continued to channel Williston by expressing strong disgust with the prominence of authoritarianism and the absence of moderation in Europe. In one particular letter in 1934, he pointed to Adolf Hitler, Joseph Stalin, and Benito Mussolini for establishing regimes that 'not only denies liberty in the sense of the Western World but exterminates all resistance, in thought or action'.[144] Thus, having witnessed both the scars of global war and the domestic infighting over social welfare programmes, Augustus displayed deep scepticism with all sides of the global political and ideological spectrum by 1946. In seeking and hoping for a timely interjection of moderation, he noted, 'The talk of the average conservative about the movements of the day is distressingly ignorant and can hardly be exceeded in intolerance or stupidity by that of the liberal who advocates everything that involves change and has the imprimatur of the "Children of the

[143] S&P 26/2, letter from Augustus Hand to Aunt Mamie, 9 September 1917. 'Mamie' has not been identified for her full name. She was not a close blood relative to Augustus, but she was married into the Noble family to Charles H. Noble and resided in Santa Barbara, CA.
[144] LH 109/15, letter from Augustus Hand to Julian Mack, 24 September 1934.

Dawn"'.[145] The consequences that tribal behaviour had served to humanity reinforced to Augustus the viability and foresight of Williston's teachings.

Conclusion

The Hand family legacy was associated with specific legal and political affiliations, and served as a frequent and imposing reminder to young Learned and Augustus. This environment of expectation played a pivotal role in preparing them from a young age to shoulder the burden of great pressures. In turn, this acted as a catalyst to their independence because it pushed them to exercise the traits that facilitated original and critical thinking. Although they conformed to the most important aspect of the family legacy — becoming respectable entrants to the list of family legal figures — their willingness to consider alternative paths revealed an inherent tension between a family tradition and their own growing sense of intellectual curiosity. This helped shape the Hands into young men who admired the characteristics of impartiality, emotional detachment, and resilience in the face of pressures to conform to certain beliefs and expectations. Furthermore, this childhood was significant in foreshadowing a career and lifetime of facing these high pressures.

A demanding childhood was perfect preparation for the intellectual rigor of Harvard and the formative influences in education explicitly influenced the Hands' jurisprudential views. Augustus did not shy away in his public speeches from invoking the lessons he learnt from academics including William James.[146] Likewise, Learned confessed in old age that many of the lessons he retained throughout his life came 'many years ago' from the challenging, yet appealing, lessons of his lecturers.[147] He preached the lesson of 'aloofness' above partisan political thinking and a rejection of 'advocates, agitators, crusaders, and propagandists'.[148]

---

[145] Augustus Hand, 'Lawyers in a Revolutionary Age', p.47.
[146] For example, see S&P 25/1, Augustus Hand, 'Address to the Graduates of the New York Hospital Training School for Nurses', undated.
[147] Learned Hand, 'On Receiving an Honorary Degree', Harvard Commencement Speech, 22 June 1939, in *The Spirit of Liberty*, 134-139 (p.137).
[148] Ibid., p.138.

However, the Hands' educational and philosophical 'origin story' communicates a wider significance beyond that of pure judicial biography. Specifically, the cousins' attempts to master the complexities of the law presented a context beyond the political binary of liberal or conservative that has been typically applied to their rulings and opinions, and thus reveals a more entangled process in the development of the judicial mind. A number of themes from their education also shaped their judgements. At the heart of this was the necessity of exercising judicial restraint. But this restraint went deeper than an adherence to social conservatism or even a more general preference for conserving traditional methods within the law. It developed separately from politics. Learned and Augustus, occupied by the daily grind of a Harvard education, found little time to consider their lessons in the context of domestic party politics. Their attraction to certain ideas ran much deeper than any partisan suggestions. In their case, philosophy truly took shape before they found their positions in the morass of political, social, and moral issues of the time whilst on the federal bench.

Their attraction to certain philosophical ideas was underpinned by a mixture of influences rather than one specific approach. These influences, however, all had a similar trend: they ran on the idea of seeking rather than giving answers, and praising the importance of the means in legal interpretation and not the ends. Learned reflected, 'As I look back on the masters who trained my youthful thoughts, they did not…believe that there were any ascertainable general principles of government that could be made to serve as guides for the solution of concrete problems'.[149] In large part, this came back to the appeal of William James. His hunger for knowledge was attractive to young and searching minds such as the Hands. Thus, scepticism, pragmatism, and the rejection of fixed truths became the core tenets of their approach to the law. They were led to believe that not always being certain need not have negative connotations. With this education, the Hands became sceptical of the claimants of 'truth', believing it a simple but effective tool in gaining enough trust to wield authority.

[149] LH 106/19, letter from Learned Hand to Walter Lippmann, 7 March 1955.

From this, they latched on to a growing school of thought that feared the potential rise of the authoritarian judge. Primarily through Thayer's teachings, this painted judges as neither left nor right leaning in their philosophy, but instead unrestrained by the warnings not to take on the role of legislator. It warned that without scepticism about the concepts of fixed moral, social, or political truths, the undefined checks upon judicial power could be bypassed. This fear of the activist judge proved to be the key motivation in the Hands' comprehension of judicial restraint. Langdell's influence was critical here in championing a restraintist mentality. His case study system stressed the importance of the slow growth of precedent, but also emphasised the necessity of its scrutiny. As part of a new wave of law students that respected precedent but no longer adhered to it unquestionably, the internal personal conflictions in the Hands' later cases can be traced back to the influence set by the Dean of Harvard Law School.

The formulation of judicial restraint was also justified in a number of notable ways by their teachers — each of which reinforced the legitimacy of a sceptical approach. Gray led the arguments on legal realism with his observations that moral and political intuition indeed played a much larger role than legal scholarship had accepted. He put the supposed objectivity of approaches such as natural law into doubt, which, compared to the Hands' judicial records, accentuated their fears of biases filtering into judicial opinions. Whereas Gray reached the conclusion that relying on biases can be beneficial, the Hands' view was that policy was being shaped undemocratically by a small number of men on the bench and the answer was to channel their lessons of scepticism into an effective exercise of self-scepticism for judges. Williston extended this and framed the law as susceptible to distortion by tribalism and dogmatism. He, too, focused on the importance of process and means in legal interpretation. His core message was that tribalism promoted the binary behaviours of 'right versus wrong' or 'us versus them' that feeds into political characterisation. If this emerged in the conduct of courts, it would compromise the integrity of an impartial judiciary. Using contracts, he showed the potential results of personal intuition in judicial decisions and displayed it as a microcosm of something that could be expanded to greater effect. Williston therefore promoted

moderation as both a judicial solution and a value that could be applied more broadly to combat extremist values in political and social arenas. Converging the influence of each teacher, law was thus presented in a broader sense to show its ability to preserve steadiness and incremental progression. Government was an adjustment of conflicting interests, which required moderation to combat the imposing will of powerful groups. The forbearance of change, however, rested upon a country's citizens, not the subjective whim of judges acting as moral arbiters. Restraint was not only a virtuous human trait, but it symbolised to the Hands a greater openness to democratic experimentation. A democratic system that saw the law upheld and the loyal enforcement of certain principles would create a strong structure and make it tough for antithetical ideas to break this system down. This presented to the Hands the value of conserving certain methods and drove home the idea that the law's solidity and durability was greater than the powers or policy positions of the judge — something that heavily shaped their decision making on the bench.

However, the principles that these men taught also prompted different conclusions from the Hands in their interpretations of the correct powers of judicial review. Learned took the more extreme approach. For example, he saw how James argued that truth was not absolute and that we must rely on our combined experiences and wisdom to reach the best of a set of imperfect solutions. This fit neatly with Thayer's emphasis on the importance of the legislature, since it presented a better mechanism for combining the collective wisdom in democracy than the judiciary. Learned's language placed greater emphasis on a direct engagement with democracy, though, believing the unfixed issues of society did not stop at the legislature, but with an active, enlightened, and vocal populace. As he explained in reference to courts, 'For myself it would be most irksome to be ruled by a bevy of Platonic Guardians…If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs'.[150] Augustus presented a more moderate approach

[150] Learned Hand, 'The Guardians', *The Bill of Rights*, Harvard Law School, 6 February 1958, 56-77 (p.73). Learned's words proved heavily influential to Supreme Court Justice, Hugo Black, who quoted them in *Griswold v. Connecticut*, 381 U.S. 479 (1965), p.526, in arguing against judges invalidating legislation 'offensive to their "personal preference"'.

that saw greater value in judicial review, as long as the judges fit a high competency standard. His approach reflected a pattern that sourced to his early years, when he acted as an emotional leader and intellectual counterweight for Learned. Despite this, he still retained a strong preference for judicial restraint based on the education imparted from his Harvard mentors, but he differed from Learned by believing in a more traditional sense that the legislature was one of two choices to address problems in society.

Nonetheless, between the similarities and differences of Learned and Augustus is the revelation of a deep complexity that comprises judges' views and the issues of categorising judicial approaches. Misconceptions of the two have been built around the idea that politics or personal positions drove their judicial decision making. Yet they embraced an education that taught them to disregard political influences, emphasise the means over the ends, and adopt a philosophy of restraint that actively warned against the politicisation of judging. Thus, as social progressives in many areas, civil liberties cases would later prove the most challenging to this education on judicial restraint. In adopting open-minded values, yet trying to preserve certain judicial traditions in the face of new and unprecedented challenges, this tested their values to the limit in the twentieth century.

Chapter Two: Political Speech - A Tale of Two Cases

No two cases stirred up more controversy during Learned's career than the seminal political speech cases of *Masses Publishing Company v. Patten* in 1917 and *U.S v. Dennis* in 1950.[1] Their significance came in part from their dramatically different outcomes. The earlier ruling set out a test that protected a wide range of rights related to political speech and reversed a postmaster order which had banned the anti-war content of *The Masses* magazine from being distributed in the mail. The later decision ruled the speech of members of the Communist Party of the USA (CPUSA) illegal and upheld their convictions for advocating the forceful overthrow of the U.S. government.

These contrasting and controversial opinions have fuelled historical debates over Learned's credentials as a champion of free speech.[2] His opinion when he was a district judge in *Masses* has been praised as a positive chapter in the history of free speech in the U.S. and is recognised as one of the first major contributions in the development of modern First Amendment doctrine.[3] The introduction of the 'direct incitement' test in the opinion protected all but explicit counselling of unlawful conduct. In Learned's words, this involved all speech that 'stops short of urging upon others that it is their duty or their interest to resist the law'.[4] In recent decades, scholars have suggested that Learned's test would have deterred the many convictions for dissent during World War One, had it not been reversed by the Second Circuit Court of Appeals. Furthermore, Learned's opinion is credited with shaping modern First Amendment interpretation and later Supreme Court decisions on free speech.[5] In contrast,

[1] *Masses Publishing Co. v. Patten,* 244 F. 535 (S.D.N.Y. 1917) and *U.S. v. Dennis,* 183 F.2d 201 (2d Cir. 1950).
[2] For the purpose of this chapter, 'free speech' is used in reference to political speech, unless stated otherwise.
[3] It was the 'first great speech case in the American tradition', in Kalven, p.4.
[4] *Masses,* p.540.
[5] For example, Justice Louis Brandeis cited *Masses* in his concurrence in *Whitney v. California,* 274 U.S. 357 (1927), p.376. On scholarship, Gunther suggested that, although not explicitly invoked, *Masses* provided the intellectual foundation for the current American standard for free speech. He argued that the Supreme Court incorporated Learned's test in the case of *Brandenburg v. Ohio,* 395 U.S. 444 (1969). The Court ruled in this case that the three elements to judge the criminality of speech were intent,

Dennis is one of the most criticised opinions in Learned's entire judicial career and has been viewed by many as a stain on his reputation as a civil libertarian. The test he laid out in the case was that, 'In each case [the government] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'.[6] Unlike *Masses*, Learned's restrictive test in *Dennis* became the standard adopted by the Supreme Court and reached a wider national audience, to the detriment of his legacy.[7]

The primary focus for historians has been to identify what reasons motivated Learned to reach two vastly different conclusions. The popular approach has been to resort to a political binary. Learned's protection of speech in *Masses* and affirmation of the defendants' convictions in *Dennis* represented his long-term transition into a more political and social conservative. By his later years, Learned believed the restraint of courts was more important than the protection of free speech, despite holding this right in higher esteem than others.[8] This argument also suggests that Learned made an exception to his commitment to judicial restraint in *Masses*, because the necessity for a free democratic platform for political speech was his priority. As he became more politically conservative, he soured on free speech issues, particularly when people with whom he vehemently disagreed espoused its most radical forms.

This interpretation leaves much out of the equation. Using a rounded analysis of the two opinions, and supported by Learned's private correspondence and contribution in less known

---

imminence, and likelihood to cause a crime. Intent — inferred from the explicit nature of the words used — was originally proposed in the *Masses* opinion. See Gerald Gunther, 'Learned Hand and the Origins of Modern First Amendment Doctrine'. Various scholars have hypothesised that, had Learned's test prevailed as the dominant legal standard during World War One, it would have prevented most of the over 1,000 convictions of anti-war dissenters. For example, David Rabban, *Free Speech in its Forgotten Years* (Cambridge: Cambridge University Press, 1997). Furthermore, James Weinstein noted that Learned's thematic and sentimental legacy plays a huge role in First Amendment thought and law today. See James Weinstein, 'The Story of *Masses Publishing Co. v. Patten*: Judge Learned Hand, First Amendment Prophet', in *First Amendment Stories*, ed. by R. Garnett and A. Koppelman (St. Paul, MN: West Academic, 2011), 61-97.

[6] *Dennis*, p.212.

[7] See *Dennis v. U.S*, 341 U.S. 494 (1951). A prime example comes from Geoffrey Stone, *Perilous Times: Free Speech in War Time — From the Sedition Act of 1798 to the War on Terrorism* (New York: Norton, 2004), p.409. '[Learned's] standard created an intolerable uncertainty of application and a potent chilling effect on free expression'.

[8] Thomas Healy, *The Great Dissent How Oliver Wendel Holmes Changed his Mind — and Changed the History of Free Speech in America* (New York: Henry Holt & Co, 2013), p.248. According to Healy, Learned's commitment to judicial restraint was 'nearly absolute' by his final years on the bench.

speech cases, this chapter proposes a different narrative. It argues, first, that the suggestion that Learned was a liberal-turned-conservative creates a false binary. The tendency to view Learned's decisions and opinions through a political lens has invited loosely connected political assumptions about him from commentators less familiar with his record. For example, by the time Learned was considered a conservative, the Cold War scholar and *Dennis* commentator, Michael Belknap, incorrectly asserted that Learned was a Republican based on his appointment by Calvin Coolidge to the Second Circuit.[9] Ironically, Belknap made this assertion about a period when Learned was strongly criticising Republican conduct, particularly regarding its communist accusations against members of the Truman Administration, as that of 'indecency and utter lack of regard for the very foundations of our…world'.[10]

Such misconceived political determinations from commentators have grown from a scholarship that has tied Learned's use of judicial restraint to his political views. For example, Ronald Dworkin suggested that Learned was willing to make a 'significant exception to his creed of restraint' to have opinions reflect his own values in *Masses*.[11] This has promoted the assumption that the speech restrictive ruling and opinion in *Dennis* was a conservative decision. For example, Burt Neuborne struggled to square that the author of *Dennis* also authored the extremely different *Masses* opinion, calling the latter 'an audacious, aggressive exercise of judicial power bordering being on excessively aggressive'.[12] He followed this by conflating Learned's judicial behaviour with his supposedly changing positions on free speech, 'How could the same judge have been so audacious in the defense of free speech in the *Masses*, and so passive and deferential in *Dennis*?'.[13] In this view, *Masses* proved that Learned was

[9] Michael Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, CN: Greenwood, 1977), p.124.
[10] LH 99/20, letter from Learned Hand to Bernard Berenson, 20 September 1950.
[11] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996; repr. 2005), p.338.
[12] Burt Neuborne, 'A Tale of Two Hands: One Clapping; One Not', *Arizona State Law Journal* 50 (2018), 831-854 (p.835).
[13] Ibid.

willing to push the boundaries of his restraintist principles to protect free speech, yet chose not to do so when the opportunity again arrived in *Dennis*.

However, this chapter reveals a different perspective of the judge. For *Masses*, his careful considerations of legal precedent, restraint, and Congressional intent during World War One shows someone who was not sacrificing judicial principles to institute his speech protective opinion. With *Dennis*, it shows he was not caught up in Cold War hysteria nor adopting a more conservative mindset for free speech, but was constrained by institutional limitations and an evolving legal landscape on free speech. Showing how these two cases were primary examples of the tension between Learned's public and private personas on civil liberties reveals what he was not — a political judge.

What the chapter does, secondly, is show what Learned Hand was — a man who did not change much at all. With both cases there is a remarkable consistency in his judicial philosophy, contrary to the assumption he shifted in his views on the judiciary and speech. In his later years, he remained deeply driven by the philosophical guides of his early life. These guides shaped a vision of democracy based on two core pillars: expansive speech rights and strong legislative powers. Whereas other scholars have explained the different outcomes in *Masses* and *Dennis* through Learned's changing political views, this chapter shows that the different outcomes came because of a fundamental tension in his philosophy. That tension focused on the potential for a freely experimental legislature to restrict speech. If achieved, it suddenly suppressed one of the two core tenets of Learned's democratic vision. Therefore, although Learned's philosophical vision never changed, it was complicated by this consideration that the legislature was both a key component and a potential hazard. What led to contrasting outcomes in *Masses* and *Dennis* were numerous other factors that Learned contemplated in competing with this tension. Most prominently, this involved considering a speech test that could solve the dilemma of legislature versus speech whilst recognising the value of legal and legislative precedent. As a result, despite believing he maintained his principles on judicial restraint, Learned was still able to formulate two opinions shaped by

their very different times. Previously neglected speech cases from Learned in the years in between the two major cases also usefully highlights this commitment to near unfettered speech whilst simultaneously maintaining loyalty to a form of judicial restraint he was taught at Harvard.

Alongside this, the chapter adds to a growing, although still limited, group of scholars who call for greater appreciation of Learned's 'direct incitement' test. As shown in this chapter, its beneficial effect in protecting a broader range of speech far outweighed the complicated and more loosely defined 'clear and present danger' test that has been championed more frequently in historical scholarship. The lack of appreciation by scholars, however, reflected a pattern of thinking that dated back to Learned's contemporaries when he handed down the opinion. Amongst that crowd was Augustus. Although he did not contribute significantly to the field, this chapter brings to light Augustus' previously unearthed responses and contributions in the complicated morass of political speech cases. It shows that the contributions he did make reveal a man very different in approach to his cousin, but one carefully considerate of a rapidly changing landscape for free speech. Although Augustus agreed with Learned on his desire for wide protections for speech, he was more willing to defer to the government's interpretation of the powers in the Espionage Act. This left Augustus predominantly unnerved on the issue, whilst Learned's more troubled conscience, in contrast, left a more complicated legacy for scholars to decipher.

Masses Publishing Co. v. Patten

The *Masses* case emerged during one of the tensest periods in the history of free speech in the U.S. After the country entered World War One on 6 April 1917, President Woodrow Wilson and Congress moved to quickly pass the Espionage Act two months later on 15 June. The law did not specifically outlaw speech, instead prohibiting, amongst other communications, 'false reports or false statements' which attempted to cause 'insubordination, disloyalty, mutiny, [or]

refusal of duty'.[14] It also outlawed attempts to 'obstruct the recruitment or enlistment service of the United States'.[15] However, the law quickly became notorious over the next several years for its frequent invocation by the government to suppress dissenting voices towards U.S. involvement in the war. The most common casualties were socialists and other labour activists. This was the culmination of decades of conflict prior to World War One which had heightened between the government and left-wing individuals. Disputes had ranged from workers' rights to fundamental questions about the democratic makeup of the federal government.[16] This tension reached extreme levels at the turn of the century, as the assassination of President William McKinley in 1901 by the anarchist Leon Czolgosz and the growth of the Socialist Party of America to a nationwide force by the early 1910s left many government officials apprehensive about the rise and potential threat of radical, anti-establishment voices. By the time of the Espionage Act (1917), the government had found a malleable tool to suppress individuals who expressed an opposing voice. The most famous example was Eugene Debs, a five-time presidential candidate for the Socialist Party, who was convicted and sentenced to ten years in prison and disenfranchised for life for an anti-war speech delivered on 16 June 1918, in Canton, Ohio.

The period was crucial for the response it provoked amongst the judiciary. At the national level, free speech had not been a primary point of contention in the country since the early years of the republic and the passing of the Alien and Sedition Acts of 1798. However, free speech disputes in the judiciary also did not abruptly begin at the start of World War One. In the pre-war years, most courts relied on the 'bad tendency' test to decide cases — an English legal doctrine which punished speech based on its 'natural and probable tendency' to cause criminal activity.[17] The test was used by both state and federal courts to settle a variety of

[14] *Espionage Act of 1917,* 40 Stat. 217.
[15] Ibid.
[16] An insightful article on these disputes can be found in, David Rabban, 'The IWW Free Speech Fights and Popular Conceptions of Free Expression before World War I', *Virginia Law Review* 80 (1994), 1055-1158.
[17] The foremost English legal scholar of the eighteenth century and one of the most influential names in consideration of the American adoption of English common law, William Blackstone, defined 'bad tendency' as covering a wide range of speech. This included any writings of a 'pernicious tendency',

disputes surrounding libel, public displays, contempt, and obscenity.[18] However, most courts adopted the test uncritically and showed an unwillingness to seriously consider the boundaries of speech protections. This explains why the issue of free speech did not reach greater national recognition sooner in the judiciary and was consequently not fully comprehended in many legal circles at the time. Thus, when World War One arrived, courts continued to adopt the 'bad tendency' approach and leave dissenters with little protection under its loosely defined phrasing. The censoring of 'anti-war' political speech in 1917 presented a new opportunity amongst lawyers, sociologists, and intellectuals in progressive circles to respond and provoke a discussion over what role the courts could play in protecting the right of free speech. However, when the time came to critically scrutinise the few courts that heard speech cases, progressives were hamstrung by their scepticism about expanding judicial review. The consequence was that the government prosecuted 2,168 people under the Espionage Act and secured 1,055 convictions.

In this context, Learned's 1917 opinion in *Masses* was remarkable for both its bravery and legal-philosophical insights. On the former, it was one of the first opinions to interpret the

---

which ought to be punishable for the 'preservation of peace and good order'. Provocation was the key determinant and came in the form of anything that was deemed 'improper, mischievous, or illegal'. These terms were not further defined. See William Blackstone, *Commentaries on the Laws of England*, ed. by G. Tucker, 5 vols (Philadelphia: W.Y. Birch and A. Small, 1803), v, p.150. For a study of the birth of the free speech debate in the twentieth century in grassroots organisations and its consequences, see Paul Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, CN: Greenwood, 1972). For a look at the judicial response and the applications of the 'bad tendency' test, see Alexis Anderson, 'The Formative Period of First Amendment Theory, 1870-1915', *American Journal of Legal History* 24 (1980) 65-75, and Rabban, *Free Speech in its Forgotten Years*. For a comprehensive look into how the First Amendment and other civil liberties were compromised during World War One, including key figureheads who fought over these liberties in the Supreme Court, see Stone, *Perilous Times*.

[18] For a plethora of pre-war case examples, see Rabban, *Free Speech in its Forgotten Years.* Examples included the Michigan Supreme Court's argument in 1878 that it could be 'actionable' to restrict speech which 'in any way tend[ed] to bring ridicule, contempt or censure on a person'. See *Foster v. Scripps*, 39 Mich. 376 (1878), p.380. The Supreme Judicial Court of Massachusetts also relied on the 'bad tendency' doctrine regarding a public display of a red flag. It argued that the flag represented 'revolutionary and terroristic' ideals and is 'associated with blood and danger', thus giving it the 'tendency' to 'provoke turbulence'. See *Commonwealth v. Karvonen*, 219 Mass. 30 (1914), p.32. The Supreme Court also applied 'bad tendency' in a small number of cases linked to speech. The most notable was the contempt case of *Patterson v. Colorado*, 205 U.S. 454 (1907), p.462. Justice Holmes' opinion for the Court explained that a newspaper's criticism of judicial behaviour in a pending case 'tend[ed] to obstruct the administration of justice'. For further details about the introduction and application of the 'bad tendency' test in U.S. obscenity law, see Chapter Three: Obscenity.

Espionage Act and stray from the 'bad tendency' doctrine. His correspondence at the time revealed a man fully aware of the potential personal and professional consequences of protecting unpopular speech. Moreover, on the questions of legal impact and philosophical insight, the opinion remains significant for two reasons. First, although it has not been celebrated or covered in textbooks to the same extent as other free speech opinions in this period from the Supreme Court, it should be acknowledged for its superior protection for speech and more defined boundaries between acceptable and criminal speech. Second, it presented a man favourable to expansive free speech rights. However, contrary to the claim it was an aggressively activist opinion, it introduced a fresh and broader standard of protection for speech than previous courts whilst maintaining a commitment to restraint. Learned's opinion was driven by a set of philosophical guides from his Harvard mentors and a free speaking society was one of the principles strongly advocated. Free political speech was the by-product of a broader vision of democracy which encompassed judicial restraint, legislative deferment, and a standard which was just as important for combatting tribal decision making — a common trait of society in war time — as it was for protecting political speech.

Masses arose from the decision of the New York Postmaster in 1917, acting upon direction from the Postmaster General Albert Burleson, to prohibit circulation of the August edition of the anti-war journal, *The Masses*. The Postmaster claimed that this edition of the publication violated the Espionage Act by conveying 'false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States', and attempting to cause insubordination in the military forces or obstruct recruitment.[19] The magazine carried a socialist message, expressed by the way of a variety of graphic art, poetry, political cartoons, and opinion pieces. Among the contributors to the self-described revolutionary and radical journal were the editor Max Eastman, William 'Big Bill' Haywood, Carl Sandburg, and Art Young.[20] The content of the August edition that allegedly violated

[19] *Masses*, pp.535-536.
[20] For a detailed insight into the content of the magazine and the politics around its numerous censorship fights, see John Sayer, 'Art and Politics, Dissent and Repression: The Masses Magazine versus the Government, 1917-1918', *American Journal of Legal History* 32 (1988), 42-78.

sections of the Espionage Act included four cartoons, entitled 'Liberty Bell', 'Conscription', 'Making the World Safe for Capitalism', and 'Congress and Big Business'.[21] These cartoons depicted typical anti-war symbolism. For example, 'Conscription' showed a weeping mother on her knees in front of a cannon with dead youth strapped to it. 'Congress and Big Business' showed a scrawny and pathetic Congressman nervously asking a group of rotund business magnates, 'Excuse me gentleman — where do I come in?', which merited the following response, 'Run along now! We got through with you when you declared war for us'. In addition to these were four separate texts, including a tribute poem that lionised the famous anarchists, Emma Goldman and Alexander Berkman, who had both been sentenced to two years in prison for conspiracy to 'induce persons not to register' for the draft. The other disputed content included letters from English conscientious objectors, which revealed the 'brutality in the treatment of these persons'.[22] In combination, the New York Postmaster said these gave him the power to deem the content non-mailable.

Following the magazine's ban, Eastman promptly took the government to court and sought an injunction to stop the postal authorities' actions. The case came before Learned. At the time serving on the S.D.N.Y., he issued his opinion a month after the Espionage Act passed Congress, making him one of the first judges in the country to interpret the law. Learned's opinion is widely celebrated for ruling that the magazine's content represented lawful speech. But contrary to the idea that it represented an activist attempt to align the ruling of the case with his civil libertarian or liberal values, the opinion revealed a very cautious and restrained approach. This was evident in two early sections, where Learned interpreted the powers of the Espionage Act.

First, when the chance came to strike down the law's constitutionality, Learned was disciplined in stressing his limited judicial role, employing a narrow interpretation of his powers of constitutional review. This was crucial because, in the conflict between his personal

[21] See Appendix B.
[22] *Masses*, pp.535-536.

pro-speech views and judicial restraint, he consciously chose the latter despite the opportunity to follow the former. Indeed, numerous factors in the case could have served as invitations to interpret his review powers more broadly. For example, Learned had little precedent to follow and had witnessed the manipulation of the Espionage Act to suppress minority voices, despite warning only at the start of the war against 'abandon[ing] the labor of thought. However crude and weak it may be'.[23] A zealous judge may have seen this as a recipe to test the constitutional boundaries and seized the opportunity to challenge the Act's constitutionality. However, Learned was concerned that this would be obstructionist. It would not only legitimise judicial intervention any time a judge questioned the efficacy of a statute, but would place into doubt the abilities of Congress, the principal legislative body in the country, to experiment and shape war time statutes. As Learned explained, 'It must be remembered at the outset, and the distinction is of critical consequence throughout, that no question arises touching the war powers of Congress'.[24] The 'exact scope' of his powers, therefore, came down to a simple statutory interpretation of Congress' intended powers of the Espionage Act.[25]

Second, Learned had the opportunity to limit this section of the opinion to a basic reiteration of Congress' war powers, but he went further by articulating the broader powers and means of the legislature to experiment. This was significant because the former approach seemed optimal for a man who championed broad speech rights in his extrajudicial and private writings. He explained that any speech repressive measures passed into law, in the aim of the safety of the nation, could be reshaped and changed by 'Congress alone'.[26] This statement may have sufficed as his definition. However, Learned devoted the rest of the section to a strongly worded description of the extent of the powers. He noted that the 'peril of war, which goes to the very existence of the state' could justify 'any measure of compulsion, any measure of suppression, which Congress deems necessary to its safety, the liberties of each being in

[23] Learned Hand, 'Force and Ideas', *The New Republic*, 7 November 1914, p.7.
[24] *Masses*, p.538.
[25] Ibid.
[26] Ibid.

subjection to the liberties of all'.[27] Furthermore, even the most 'fundamental personal rights of the individual must stand in abeyance during times of war'.[28] This powerful use of language was a forceful affirmation of the legislature's powers. Learned adopted a position here that reflected the lessons of his Harvard tutors. For example, in stating Congress' powers, Learned adopted a blend of Thayer and James' influences with an emphasis on legislative supremacy and its necessary experimentation in law. Since he did not believe in absolutes, his own reservations about suppressing speech were outweighed by the allowance of trial and error in democracy. This included the risks and ramifications that came with it. If Congress deemed any measure of suppression useful in times of war, then it was an experiment that must be allowed to proceed.[29] Therefore, in both downplaying his own powers as a judge and strongly affirming those of the legislature, the opening to his opinion was the antithesis to an activist power grab.

Despite this, Learned's following nod to vigorously protecting speech rights represented the other key, but conflicting, element to his philosophy. Although he affirmed Congress' powers forcefully, he also identified suppressive tendencies and tactics of tribal thinking as a threat to *The Masses*' speech. In Learned's conception, this was epitomised by actions that promoted rigid partisanship and minimised alternative voices in the political sphere. Learned saw part of his role to temper this and, in interpreting the first clause of the Act, which prohibited false statements 'with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies', he stated that none of the content in the magazine was factually false because it never claimed to be facts. He explained, they were 'all within the range of opinion and of criticism; they are all certainly believed to be true by the utterer'.[30] One of the government's arguments in the case rested on

[27] Ibid.
[28] Ibid.
[29] The *New York Tribune* described this section of the opinion under the sub-heading, 'Don't Question Congress', with the following passage, 'Judge Hand…made these remarks because it is important at the present time that no implication may arise upon the absolute and uncontrolled nature of the war power of Congress'. See *New York Tribune*, 25 July 1917, p.16.
[30] *Masses*, p.539.

the tendency for the magazine to cause unlawful behaviour. It argued the general tenor and animus of the magazine's opinions had a strong chance of leading to seditious and subversive acts. However, Learned believed this was not the intent of the Act and challenged the nature of this argument. He believed such an argument was the catalyst to government mandates that suppress any 'intemperate and inflammatory public discussion'.[31] If given the chance under such powers, the government could then close down any unfavourable opinion of its policy if it could loosely conflate it as a factual misstatement. This would strike at the heart of a healthily functioning democracy, since it would allow the 'clannish' behaviour and 'storms of popular feeling' that one more frequently saw in war time to prevail.[32] Learned's educational influences are evident in his reasoning here. The manipulative actions that a government might undertake with broader powers would be a danger in the faction-ridden atmosphere against which his teacher, Samuel Williston, had warned, since it would intimidate 'many a man' from expressing unpopular yet genuine criticisms out of fear of punitive treatment.[33] Without that, an important feature of free democratic thought and exchange — the ability to propagate reformist action — would be nullified.

To combat the dangers that accompany tribal or partisan war time thinking, Learned sought a free speech test that best tempered censorious sentiments. In essence, the test he introduced focused on the content of the speech rather than the effect. The judgement over dangerous free speech could have been handled by Learned with a simple cause-effect analysis. This is what the 'bad tendency' doctrine was based on, since judges predicted the tendency of speech to lead to criminal activity. The problem with this, however, was that speech that did not wilfully provoke criminality could still be culpable if at least an obscure connection was found between the two. Learned believed the weakness of this approach was that it was too subjective because a broad interpretation of the word 'cause' could allow 'the suppression of all hostile criticism,

[31] Ibid.
[32] Cambridge, MA, Oliver Wendell Holmes Papers (hereafter OWH), HLS 43/30, letter from Learned Hand to Oliver Wendell Holmes, 1 April 1919.
[33] Ibid.

and of all opinion except that encouraged and supported the existing policies' of government.[34] He sought criteria that was, in his own later words, 'objective' and could not be manipulated by either side of a partisan discussion.[35] This led to the formulation that speech would be illegal when 'only the clearest expression of such a power justifies the conclusion that was intended'.[36] The standard came to be known as the 'direct incitement' test. This distinguished itself from the 'bad tendency' test by not basing the legality of speech on the predictions of its possible effect. It sought explicit counselling of a crime by focusing on the specific language used by the speaker, rather than the causal relationship between speech and action. Therefore, factors such as the immediacy with which an action occurred from speech did not matter. This was revealed in his handling of the second clause of the Espionage Act, which prohibited content that attempted to 'wilfully' cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces.

Learned's test had little scope for varied interpretation, which was something he recognised. Notably, his test required that speech must show clear intent to 'counsel or advise others to violate the law'.[37] To avoid any doubt and to clarify his standard, Learned devoted parts of his opinion to emphasising that the literal 'meaning' of the words was the only proof of 'direct incitement'.[38] This was to avoid speculative attempts to link words to actions. To stress this importance, the 'meaning' of the words was a theme he visited on seven occasions in the opinion. In his explanation, he emphasised that words are not only the 'keys of persuasion', but the 'triggers of action'.[39] Speech, which has no purpose other than to violate the law, cannot 'by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state'.[40] Under this criteria, it was Learned's hope

[34] *Masses*, p.539.
[35] Cambridge MA, Zechariah Chafee Papers (hereafter ZC), HLS 4/20, letter from Learned Hand to Zechariah Chafee, 3 December 1919.
[36] *Masses*, p.540.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.

that speakers were now aware of what limits they should not breach if they wanted to avoid their time in court.

A technical criticism of Learned's 'direct incitement' standard in *Masses* is that, by only seeking speech that explicitly counselled the violation of law, it left open the possibility for speech that fell outside of this criterion to prompt criminal behaviour, without any accountability. In this instance, clever speakers who were aware that their speech may excite audiences into breaking the law were not liable to criminal prosecution if they did not directly or explicitly advocate the unlawful behaviour. In his opinion, Learned was aware that this limitation to his test could later surface in criticism. He accepted, 'Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution'.[41] However, in his defence, he focused on the great value that he placed on a free speaking, tolerant democracy,

> to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists.[42]

Speech, in all its forms and consequences, was still a bedrock to democratic values. Learned's argument therefore, was that these values justified the risk that accompanied indirect incitement.

The question for Learned, therefore, was whether *The Masses* directly incited criminal activity. His standard was best illustrated in his analysis of the content which argued that anti-war activists, Alexander Berkman and Emma Goldman, were martyrs of the anti-war cause. Learned explained that, 'One may admire and approve the course of a hero without feeling any duty to follow him', thus establishing an 'appreciable distance between esteem and emulation'.[43] This distinction reinforced the strict construction of his test, which assessed

[41] Ibid.
[42] Ibid.
[43] Ibid., p.542.

speech based on its actual content. Therefore, he concluded that none of the content in *The Masses'* August issue violated the Espionage Act and filed an order granting Eastman's injunction two days after issuing the opinion.

Although the opinion was celebrated for its liberal outcome in protecting the magazine's speech, and has been overwhelmingly credited as such by scholars, there was no direct correlation or proof behind the simple narrative that Learned deliberately produced its liberal outcome to reflect his personal and political positions. Maintaining the principles from his education, Learned's opinion was driven by a blend of factors: respect of the legislature's autonomy, anti-tribalism, and a desire to promote the value of free speech in his ideal democratic vision. As Learned mulled on the dramatic fallout from the opinion, he made clear that his test was designed to prevent partisan or political manipulation and was done in the sincere belief he was not tainting his own restraint-driven judicial principles.

'My little toy ship'

Admirers of Learned's *Masses* opinion have found it difficult to refute the charge that his decision was driven by partisan and personal motivations because of their own eagerness to credit the liberal ruling to the liberal man. Suggesting that Learned tailored the opinion to fit his civil libertarian values aligns too closely to the idea he was being consciously activist and aggressively attempting to have it reflect his personal and political values.[44] The consequence is that this downplays the extent to which Learned's deep philosophical ideals of a democracy were the key driver behind his opinion. Specifically, Learned stressed the need for moderation during periods of incendiary national and international politics whilst preserving legislative autonomy and freedom of speech. This tension between the latter two presented a dilemma,

[44] For example, Gunther made the 'civil libertarian nature' of Learned's opinion a theme in his analysis. See Gunther, *Learned Hand*, p.134. Mark Graber also described it as a 'celebrated' opinion in the early twentieth century 'civil libertarian' construction of the First Amendment. See Mark Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley, CA: University of California Press, 1991), p.114.

but he produced a test that he believed accommodated each of these three priorities whilst still preserving his commitment to restraint.

Learned's life-long theoretical defences of his *Masses* test may not have been so thorough and insightful if the opinion was not quickly reversed on appeal. After the government appealed to the Second Circuit, Judge Charles Hough wrote an opinion just two weeks after Learned's, supporting the government's motion for a stay of the decision whilst its appeal was pending. During this time, the government was allowed to continue prohibiting *The Masses* issue from circulation in the mails. This was seen as an unusual step because Hough confessed that it provided the magazine the mandate to sue for damages if it won on appeal. Three months later, when the Second Circuit reversed the ruling in an opinion written by Henry Wade Rogers, it prompted resentful outbursts by Learned in numerous references to the judge in later years. For example, in a 1932 private court memo Learned described Rogers as, 'Hon. Henry Wormwood Rogers, a knight errant of the law, well known for luminous comment upon the principles of jurisprudence, for penetration and scope and chiefly perhaps because he never took his eye off the ball, for he never saw it'.[45] Learned's description was excessive and bitter, but there is some merit to his resentment. In overturning the use of the 'direct incitement' test, Rogers' opinion chose to use an old, existing test, rather than seize the opportunity to think innovatively. The Espionage Act posed a challenge to speech of a magnitude not seen since the eighteenth century. Whilst legal opinions in the preceding decades displayed little critical examination of the pervading 'bad tendency' precedent, Learned's creative opinion posed a rethinking for how political speech should be preserved whilst signifying a key nuance to his restraint. However, when it came to protecting dissenting opinions during the war, Rogers relied on the more loosely termed 'natural and reasonable effect' of speech — a product of the 'bad tendency' doctrine.[46] The Second Circuit believed that a new statute did not require new thinking. Thus, the court was content that no rights were infringed in *Masses*. As Rogers

[45] LH 190/23, Learned Hand memo for *U.S. v. Drexel*, 13 February 1932.
[46] *Masses Publishing Company v. Patten*, 246 F. 24 (2d Cir. 1917), p.38.

explained, 'Liberty of circulating may be essential to freedom of the press, but liberty of circulating through the mails is not'.[47]

The urgency and passion with which Learned defended his test was provoked initially by his reaction to this and a broader belief that it lacked little 'professional approval' from fellow judges and legal scholars.[48] In typically self-deprecating manner, he ended up describing his test as, 'my little toy ship which set out quite bravely on the shortest voyage ever made'.[49] His suspicions had been evident before his ruling was even overturned by the Second Circuit. In a letter to C.C. Burlingham a month before the ruling, he wrote, 'I think all of this building…is against me'.[50] This was in reference to his colleagues in the federal courthouse, but accusations piled on from other sources, further vindicating his suspicions. Amongst them was Attorney General Thomas Gregory, who accused Learned of trying to take the teeth out of the Espionage Act.[51]

Although this process disenchanted Learned and laid the foundation for his defiant support of his *Masses* opinion, it was the lack of private support that provoked him to shed intellectual insight into his thinking behind his test. One of the opinions that mattered most was Augustus' — but it also hurt him the most. Augustus did not write to Learned about his own stance on the 'direct incitement' test, but he framed Learned's belief that it lacked support as a result of his paranoia, or 'natural perversity'.[52] The reasons behind Augustus' more passive stance were complex. In 1924, Augustus reflected on his sympathies with the use of the Espionage Act, 'Most of the academic people were acrobatic on the subject at the time. Personally I believed the law was necessary but I always gave the jury such a charge on free speech that a man who did not do anything except talk was unlikely to be convicted'.[53] Augustus was on the side of

[47] Ibid., p.27.
[48] ZC 4/20, letter from Learned Hand to Zechariah Chafee, 3 December 1919. Learned also speculated to numerous friends and colleagues that *Masses* pushed him out of the running at the time for a potential promotion to the Second Circuit Court.
[49] OWH 43/30, letter from Learned Hand to Oliver Wendell Holmes, 1 April 1919.
[50] LH 100/26, letter from Learned Hand to C.C. Burlingham, 6 October 1917.
[51] See 'Suggestions of Attorney General Gregory to Executive Committee in Relation to the Department of Justice', *American Bar Association Journal* 4 (1918), 305-316 (p.306).
[52] LH 100/26, letter from Learned Hand to C.C. Burlingham, 6 October 1917.
[53] S&P 27/9, letter from Augustus Hand to Thomas Nelson Perkins, 30 January 1924.

the debate that accepted a broad use of the Act's powers to regulate speech because this preserved legislative autonomy, but he also met a similar dilemma to Learned in his preference to see speech preserved. As a result, he also believed it necessary that the jury, as a representation of society, be given 'common sense' instructions.[54] By this, Augustus meant a similar focus to Learned's, which stressed the need for caution towards tribal and emotionally driven decision making. Therefore, he garnered a reputation at the time for instructions which warned juries to not outlaw speech based on their 'own feelings or convictions as to the truth or falsehood, rightness or wrongness, reasonableness or unreasonableness'.[55] He also warned against decision making formed out of 'conjecture, supposition or presumption', and stressed the idea that speech criticising the government could and should be regarded as legitimate.[56] As he explained, 'It is the constitutional right of every citizen to express his opinion about the war…even though they are opposed to the opinions or policies of the administration; and even though the expression of such opinion may unintentionally or indirectly discourage recruiting or enlistment'.[57] These instructions conflicted with the government's own interpretation of the Act's powers, which it argued did not require speech directly discouraging recruitment before it could be outlawed. Consequently, these instructions have merited Augustus the title as 'an emerging champion of free speech' at the time.[58]

In private, Augustus explained the reasoning behind his approach to the instructions, 'The long trials in the New York Federal Court which we conducted under the Espionage Act resulted in disagreements of the juries and showed how unworkable is the attempt to control the propagation of ideas in any place where men differ and the herd impulse does not dominate the atmosphere'.[59] The 'herd impulse' was neither desirable nor attainable in an efficient

[54] Ibid.
[55] *U.S. v. Max Eastman* (S.D.N.Y. 1918) (per Judge Augustus Hand), in *Espionage Act Cases: With Certain Others on Related Points — New Law in Making as to Criminal Utterance in War-Time*, ed. by W. Nelles (New York: National Civil Liberties Bureau, 1918), p.29.
[56] Ibid.
[57] Ibid., p.30.
[58] Laura Weinrib, *The Taming of Free Speech* (Cambridge, MA: Harvard University Press, 2016), p.104.
[59] S&P 16/55, Augustus Hand, 'The Church and Fundamentalism', Speech to the Church Congress of Boston, 29 April 1924.

democracy. In stating these various points, Augustus placed himself closer to Learned's position than the government's. His values aligned similarly to Learned's when it came to supporting broad speech rights, including anti-war rhetoric. He also opposed the government's belief that it should actively use the Espionage Act to suppress anti-war voices. However, whilst Augustus sided with Learned on the application of the Act, he agreed with the government in its theory that the Espionage Act did grant those suppressive powers if it chose to use them, including in war time. This explained his more passive response to the reversal of *Masses*.

A combination of Augustus' position and the criticism and defeat of the *Masses* test stung Learned, but also invigorated him to defend his positions. He explained this to Zechariah Chafee, the most notable proponent of his opinion. Learned thanked Chafee for his 'very generous, and, I must believe, exaggerated, recognition of my views', which he described as the 'most whole-hearted support I have ever got'.[60] With Chafee's support, Learned fought his corner on *Masses* to peers and colleagues throughout his life, noting that, 'I was never better satisfied with any piece of work I did in my life. I do not mean that I was pleased with it as a judicial performance, but with the result'.[61] In contrast to the 'judicial performance', Learned's definition of 'result' was that it had gone a commendable distance to preach greater 'temperateness and sanity', and providing an argument that rallied against decisions driven by political or personal reasons.[62]

The specific arguments Learned used in the years after to defend *Masses* provided critical insight into the complexity of his position. One criticism is that, if Learned was philosophically consistent, why did he not allow Congress to apply the Espionage Act loosely? If Congress wanted to convict speakers, Learned could have simply carried out its will. That he did not

[60] ZC 4/20, letter from Learned Hand to Zechariah Chafee, 3 December 1920. Chafee dedicated his book on free speech to Learned. He wrote, 'To Learned Hand…who during the turmoil of war courageously maintained the tradition of English-speaking freedom and gave it new clearness and strength for the wiser years to come'. See Zechariah Chafee, *Freedom of Speech* (New York: Harcourt, Brace and Howe, 1920).
[61] LH 100/26, letter from Learned Hand to C.C. Burlingham, 6 October 1917.
[62] Ibid.

suggests he chose to disregard restraint and impose his liberal values. However, what has been missed by scholars in Learned's worldview was the inherent tension between the role of the legislature to experiment with policy and the emphasis on free speech as a mechanism for increased human understanding and innovation, democratic evolution, and exchange of ideas. He had learned from his Harvard days that society was stuck in a slow, complex process, which involved the experimentation of ideas, good *and* bad, as part of a necessary painful growth. However, under certain circumstances, it was reasonable to fear that a political culture promoting unrestricted legislative experimentation may lead to the suppression of speech. When this happened, democracy was on a clearer path to the situation Learned opposed — notably a population following orthodoxy and tribal thinking. In this sense, *Masses* presented a dilemma between legislative powers and speech rights. He was stuck in a position where broad judicial protection of political speech might undermine Congress' powers to make its own decisions on those protections. On the other hand, allowing the suppression of speech could stifle free thought and threaten one of the core elements that he believed necessary for a thriving and diverse democracy. The difficulty was in compromising on certain elements in this balancing act.

The question then becomes: if Learned did not decide *Masses* upon personal or partisan positions, what led him to produce an opinion he believed protected the *Masses* speech whilst preserving the integrity of his restraint philosophy? Learned's debate with Oliver Wendell Holmes reveals more about his reasoning. The debate centred on the differences between Learned's 'direct incitement' test and Holmes' standard for speech in his opinion for the Supreme Court in *Schenck v. U.S.* in 1919. In writing a unanimous opinion for the Court, which upheld the conviction of Charles Schenck and other members of the Socialist Party of the USA under the Espionage Act for handing out leaflets that criticised the draft during World War One, Holmes laid out the following formulation, 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic…The question in every case is whether the words…are used in such circumstances and are of such a nature

as to create a clear and present danger'.[63] Although the 'clear and present danger' test upheld the convictions of the socialists, it was cited frequently by the Supreme Court and popularly held in the next three decades for setting the course for a modern and liberal formulation of First Amendment free speech protections.[64] At the time, however, Learned's purpose was to convince Holmes of the differences between their tests before suggesting why his would better serve American democracy.

After numerous letters between the two men, Holmes concluded, 'I didn't quite get your point…I don't see how you differ from the test as stated by me'.[65] This related to a debate that started on a train journey in June 1918. Learned had felt dissatisfied with his performance on the train, 'I gave up rather more easily than I feel disposed about tolerance…Here I take my stand'.[66] In the written exchanges that followed, Learned's goal was to clarify the difference between his 'objective' test and Holmes' more loosely defined test. Both accepted that speech had consequences, which shaped the specific boundaries they each set for lawful speech. However, the clearest difference between the two tests is that Learned's 'direct incitement' test did not factor in the causal relationship between speech and action. His test focused solely on the content of speakers' words. For example, an individual's explicit call to a mob to loot and burn a local liquor store would be considered unlawful under the test, regardless of whether mob proved responsive. However, the more important element of the test was its ability to protect speech that was less clear in interpretation. Judges may interpret the meaning of words in different ways, but when trying to identify direct counselling of a crime the scope of interpretation was small. As Learned noted, the question of a speaker's responsibility for effecting a crime was not 'dependent upon reasonable forecast, with the excuse when the

[63] *Schenck v. U.S.*, 249 U.S. 49 (1919), p.52.
[64] This was also pushed by books such as Paul Murphy's *The Meaning of Free Speech*. He praised Holmes' contributions to a more vibrant free speech culture in the twentieth century, but ignored Learned's important role.
[65] LH 103/24, letter from Oliver Wendell Holmes to Learned Hand, 3 April 1919.
[66] OWH 43/30, letter from Learned Hand to Oliver Wendell Holmes, 22 June 1918.

words had another possible effect. The responsibility only began when the words were directly an incitement'.[67]

In comparison, Holmes' test was a balancing act that *did* predict the likelihood for speech to provoke unlawful activity. It had to consider elements such as the immediacy or remoteness of a crime following speech. The issue with this was that the definition of 'clear and present danger' was much looser and, depending on who was administering the test, could cause imprecise and inconsistent applications. Elaborating on this association between speaker and unlawful act, Learned explained, 'In nature, the casual sequence is perfect, but responsibility does not go *pari passu*'.[68] It gave the potential for some judges to only restrict speech when they identified a strong connection between speech and a consequent crime. However, others could succumb to pressure in more heated times and restrict speech based on looser connections between speech and crime. This inherent problem was what provoked Learned to reshape the standards for assessing speech in his 'direct incitement' test.

Nonetheless, Learned struggled to convince Holmes of this key distinction. His frustration poured out into exchanges with others, which revealed further differences between the two tests. What truly drove Learned's thinking was the social and political atmosphere that surrounded speech. In considering the tension between the freedom of the legislature and the freedom of speech, Learned factored in Williston's teachings on the dangers of twisting law to standards that reflected times of hysteria and heightened tensions. Since his test did not rely on the possible effect of speech, it paved the way for the 'expression of egregious opinion in times of excitement', if the speech did not directly incite unlawful behaviour.[69] This was the risk worth paying to avoid 'our chief enemies...Credulity and his brother Intolerance', he explained.[70] In a later exchange, he explained how the reliance of Holmes' test on predicting the effect of speech stripped away this protection,

[67] OWH 43/30, letter from Learned Hand to Oliver Wendell Holmes, 1 April 1919.
[68] Ibid.
[69] ZC 4/20, letter from Learned Hand to Zechariah Chafee, 8 January 1920.
[70] Ibid.

> I am not wholly in love with Holmesy's test and the reason is this. Once you admit that the matter is one of degree, while you may put it where it genuinely belongs, you so obviously make it a matter of administration, i.e., you give to Tomdickandharry...so much latitude, that the jig is at once up. Besides even their Ineffabilities, the Nine Elder Statesmen, have not shown themselves wholly immune from the 'herd instinct'.[71]

Learned pitched his *Masses* test to Chafee as an alternative to this, describing it as a 'qualitative formula, hard, conventional, difficult to evade'.[72] This characterisation protected speech from the suppressive tendencies of wartime. 'Clear and present danger' could potentially restrict speech ranging from the most outrageous claims about recruitment to the draft and U.S. military methods to sincere criticisms, regardless of the strength of connecting evidence to any subsequent crimes. In contrast, Learned's direct incitement standard guaranteed protection of such speech, in all their inflammatory forms, outside of those directly counselling crimes.

Learned offered similar messages to Holmes after he presented his dissent in *Abrams v. U.S.* Holmes' *Abrams* opinion came in November 1919, eight months after *Schenck*. In this instance, the Court again upheld a conviction for speech under the Espionage Act, but Holmes this time dissented by relying on sentiments and standards that shifted closer to Learned's 'direct incitement' test. Holmes wrote that, although the defendants in the case produced and distributed a pamphlet which called for a cessation of weapons production, they did not show intent 'to cripple or hinder the United States in the prosecution of the war' against Germany.[73] Whereas the previous construction of 'clear and present danger' left open the ability to outlaw speech even if it caused no direct or immediate effect, Holmes tightened his definition here. He explained that the government may punish speech 'that produces or is intended to produce a clear and imminent danger'.[74] This formulation still rested on the causal relationship between speech and action, but the greater focus on intent aligned more closely with the concept of speech that Learned had advocated, seeking direct and deliberate calls to a crime.

---

[71] ZC 4/20, letter from Learned Hand to Zechariah Chafee, 2 January 1921.
[72] Ibid.
[73] Holmes' most notable passage, however, involved his invocation of the need for a marketplace of ideas, 'The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out'. See *Abrams v. U.S.*, 250 U.S. 616 (1919) (Justice Holmes dissenting), pp.626, 630.
[74] Ibid., p.627.

Learned was heartened by this more protective standard, even if it was in dissent.[75] He decided to write to Holmes to explain his discouragement over the public becoming 'rapidly demoralized in all its sense of proportion and toleration'.[76] This, again, referred to threat of hysteria. Learned bemoaned the ongoing 'merry sport of Red-baiting' that was infesting social and political discourse in the U.S.[77] He, therefore, felt an urgency to continue stressing the necessity of his test if the increasing threats of suppression were to be combated. Learned introduced his test to deter the threat of the herd instinct. It was this that became the principal reason for his advocacy of the test, rather than suggestions of liberal sympathies to free speech or, even, *The Masses* magazine's actual content. Learned was comforted in his belief that his test would provide a narrowly interpreted standard that could not be shaped by the whims of a war-inspired society.

Although now bound by precedent, Learned also used other political speech cases in this period to echo similar sentiments. In so doing, he adopted the Langdellian guide of both respecting and critiquing precedent. A year after *Masses*, Learned wrote in *U.S. v. Nearing*, offering his interpretation of the new precedent set by the Second Circuit's reversal. On the requirements for speech that would not be protected, he wrote, 'the counsel or advice need not be explicit, since the meaning of words comprises what their hearers understand them to convey. Yet the terms, "counsel" or "advice"…do not depend upon the subjective intent of their author'.[78] Here, he pointed out the issues of loose standards for speech. When words need not be explicit to be unprotected, issues were as simple as identifying who was to interpret when a crime was 'counselled'. Furthermore, Learned added, 'I tried unsuccessfully in *Masses* to suggest an analysis of what is included in those terms, and shall not attempt it again'.[79] The opinion was a direct and forward way of announcing himself as begrudgingly

[75] It has been suggested that Learned's earlier written intervention played a significant role as part of a broader push in progressive circles to convince Holmes to alter his standard for speech to a more protective level. See Healy, *The Great Dissent.*
[76] OWH 43/30, letter from Learned Hand to Oliver Wendell Holmes, 25 November 1919.
[77] Ibid.
[78] *U.S. v. Nearing*, 252 F. 223 (S.D.N.Y. 1918), p.227.
[79] Ibid.

bound by precedent. In another case in 1922, he dissented in a Second Circuit ruling on fears that the 'real danger' lay in 'small encroachments upon the right of free criticisms of all the acts of public officials'.[80] Again, he championed the need for a consistent test to combat a situation in which, 'If a judge may punish those who indirectly interfere with possible decisions, remote in time…the line between that and punishment for unseemly or false comment upon past decisions becomes so shadowy as in application to disappear'.[81] The sentiments reflected deep concerns about the dissipation of speech.

A final element to consider in Learned's reasoning for introducing the *Masses* test is revealed in the views he expressed after the case pertaining to the state of speech jurisprudence during the period. The accusations that Learned's *Masses* opinion was activist and partisan do not appreciate the full context of these views. In Learned's interpretation, activism involved courts invoking the Constitution to invalidate statutes and often using this to mask their personal decisions. However, he criticised neither Congress, nor the Espionage Act in his private correspondence and never suggested that there was a clear separation between his interpretation and the legislature's intent with the Act. This fell in line with his philosophical principles to respect Congress' power to enact the legislation, as he also laid out in his opinion. He never sincerely reconciled with the idea that he was minimising Congress' intended powers from the Espionage Act, and therefore his own restraintist principles, in order to save speech. The expansive set of war powers that he also strongly outlined in his opinion showed a man believing he was sticking to a judicially restrained approach.

Furthermore, Learned believed that he had little precedent with which to work, but it did not lead him to assume he had a broad scope to instil his personal vision. First, Learned's private insistence on his ignorance of First Amendment free speech precedent should be taken with some scepticism since it reflected his typical self-deprecation. Nonetheless, his *Masses*

[80] *Ex parte Craig*, 282 F. 138 (2d Cir. 1922) (Judge Learned Hand dissenting), p.160. As district court judges, Learned and Augustus were often called up to preside on a three man panel for the Second Circuit.
[81] Ibid.

opinion is striking for its very few historical references and he did frequently air concerns about his lack of knowledge.[82] Following his *Masses* opinion, he admitted to numerous colleagues, including Holmes, that he 'had no present access to the history' of free speech adjudication when debating the right test for speech.[83] Likewise, Learned confessed to Chafee, 'I wish I had known half as much as you do about the subject when I wrote my opinion, I could have made it so much better'.[84] His lack of knowledge can also be attributed to a wider consensus at the time that there was a lack of legal precedent on free speech. A dominant narrative amongst legal historians has confirmed this, suggesting that First Amendment jurisprudence did not elevate to a substantial, nationwide discussion until this period in the country's history. Only in 1997 did David Rabban shed a comprehensive light on the history of free speech jurisprudence prior to the 1910s, but even then, he explains that the cases were rarely considered high profile or widely known.[85]

Thus, with these circumstances before him, Learned's vision of democracy is crucial in showing that he was not conducting himself in an activist manner. With little precedent before him and just one month after the passing of the Espionage Act, Learned's belief was that a fresh statute required fresh thinking. However, although he favoured strong protections for speech, he sought a test that also accommodated to legislative autonomy. This was the crux of his thinking and he noted that it was a difficult dilemma,

---

[82] Learned cited no cases that focused on free speech as the primary issue. He only referenced two cases regarding the power of the postmaster to prohibit elements of speech. These were *Ex parte Jackson*, 96 U.S. 727 (1877) and *Ex parte Rapier*, 143 U.S. 110 (1892) in the following passage at page 538 of the *Masses* opinion, 'It may be that Congress may forbid the mails to any matter which tends to discourage the successful prosecution of the war. It may be that the fundamental personal rights of the individual must stand in abeyance, even including the right of the freedom of the press'.

[83] OWH 43/30, letter from Learned Hand to Oliver Wendell Holmes, 22 June 1918.

[84] ZC 4/20, letter from Learned Hand to Zechariah Chafee, 3 December 1919. In World War One related speech cases, Learned was not alone with his lack of awareness of precedent. Chafee explained, 'Nearly every free speech decision…appears to have been decided largely by intuition'. This prompted his extensive historical examination of free speech precedent in Zechariah Chafee, 'Freedom of Speech in War Time', *Harvard Law Review* 32 (1918-1919), 932-973 (p.945).

[85] Rabban's *Free Speech in its Forgotten Years* has provided the most comprehensive history of the pre-*Schenck* era of free speech adjudication. See also Anderson, 'The Formative Period in First Amendment History'; Owen Fiss, 'The Early Free Speech Cases', in *The History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910*, 11 vols (New York: Macmillan, 1993), viii, 323-351; and Michael Kent Curtis, *Free Speech: The People's Darling Privilege* (London: Duke University Press, 2000). See footnote 18 for more information about the pre-war cases.

> I had a difficulty reading the statute in a way which would give meaningful, real protections to free speech while holding a general notion that the courts probably were better off not getting into that area…I think it was a crisis as far as I personally was concerned that never was quite so acute again.[86]

Learned's position was that he believed in legislative supremacy, but also in the acceptance of human imperfection. He supported U.S. entrance into World War One, but also supported the right of *The Masses* editor, Max Eastman, to present an alternative view. As he had noted a year before to Eastman about his social and economic views, '[t]hat I prefer another way, does not blind me to the wisdom of giving you the chance to persuade men of yours'.[87] This was because those societies that best thrived were the ones that tested ideas. It hardened society and allowed it to remember not to repeat mistakes. Of such mistakes, the most fundamental lay in the possibility of the legislature suppressing the very tool that kept the wheel of democracy evolving — speech. In *Masses*, Learned greatly factored this consideration. He claimed that his proposal was an objective test because it confined the limitation of speech to words that explicitly incited or counselled criminal activity. This was subject to narrow interpretation, unlike the balancing test in 'clear and present danger', and left speech protected from subjective forecasts of its probable or possible effect. In achieving this, the test neither dishonoured nor undermined powers in the Espionage Act. With a fresh standard before him, he still forcefully reiterated Congress' broad war powers and refrained from invoking the Constitution to limit those powers. This signified that the focus was on establishing a much needed standard for speech, rather than restricting the legislature's abilities or powers.

Therefore, Learned rightly believed that the test he proposed in his *Masses* opinion mitigated opportunities to twist the standard for speech to a judge's personal favourability. This formulated from a man deeply enveloped in various complex considerations. It was these philosophical questions that dominated his thinking, rather than the simple narrative of accommodating the opinion to his 'liberal' values. A similar politicisation was depicted of his

[86] LH 231/10, Learned Hand, interviewed by Gerald Gunther, 1959.
[87] LH 20/1, letter from Learned Hand to Max Eastman, 27 June 1916.

other major political speech opinion, *Dennis*, but this has also wrongly been attributed too much to Learned's personal and political biases.

The Legacy of *U.S. v. Dennis*

After *Masses*, Learned was not confronted with another broadly publicised political speech case for another thirty-three years. During that period, the Supreme Court adjudicated many free speech cases, but its application of the 'clear and present danger' test lacked consistency.[88] When Eugene Dennis and fellow members of the CPUSA were convicted in 1948 under the Alien Registration Act of 1940 (popularly known as the Smith Act) for conspiring to teach and advocate the violent overthrow of the U.S. government, the appeals process brought it to the Second Circuit. Learned's subsequent attempt to define the 'clear and present danger' test led to the court upholding the convictions and contributed to a period known as a dark episode in the country's free speech history. Following a plurality opinion from the Supreme Court affirming the convictions, Justice Hugo Black, in dissent, added that the case 'waters down the First Amendment…to little more than an admonition to Congress'.[89]

For many historians, the most striking aspect of Learned's *Dennis* opinion was its supposed support of a restrictive view of political speech rights. It was hard to reconcile that a civil libertarian and free speech champion would apply a broad definition of 'clear and present danger' and uphold the convictions of the defendants. The reasons as to why Learned did this are varied, but many have played up personal circumstances and ignored the simple role of the appellate judge to apply settled law. Thomas Healy suggested that the sting of the *Masses* outcome prompted caution, '[Learned] would always be second-string, his opinions forever subject to review by a higher authority. Perhaps that is why, when the country faced its next major crisis of faith, [he] was unwilling to put his reputation on the line again for the sake of individual rights'.[90] The suggestion is unfair considering Learned was taking risks by making

[88] See *Gitlow v. New York*, 268 U.S. 652 (1925) and *Whitney v. California*, 274 U.S. 357 (1927).
[89] *Dennis v. U.S.*, 341 U.S. 494 (1951) (Justice Black dissenting), p.580.
[90] Healy, *The Great Dissent*, p.246.

headlines for politically unpopular speeches that cautioned against McCarthyite creep. Nonetheless, others have attributed political prejudices as a key driver. Edward Purcell believed that Learned's hatred of communism was stronger than his devotion to free speech, 'Although he remained committed to the values of free speech, he never doubted the need for American firmness in the face of Stalinist foreign policy'.[91] This led him to believe there was no need to strain himself to protect the defendants. Burt Neuborne agreed that Learned's decision, in part, came down to the simple fact that he was 'plain frightened by the prospect of a violent communist tomorrow'.[92] Geoffrey Stone also echoed this when he argued, 'Even such sophisticated and experienced judges as Hand…were captured by the domestic Communist as treacherous, malignant, and powerful'.[93] In this dominant narrative, it has been particularly common to attribute Learned's *Dennis* decision to an increased conservative mindset.

However, Learned believed he was principled in his restraint in *Dennis,* as revealed in two interrelated lines of arguments. First, to his own private strain, Learned followed philosophical principles that put restraint as a priority over free speech. This belief was as true in the 1910s and the decades that followed as it was in *Dennis*. Second, his free speech stance did not change in between *Masses* and *Dennis*. From his 1917 opinion to his death, Learned remained privately committed to his 'direct incitement' test and continued to criticise the dangers presented to speech by the 'clear and present danger' test. Furthermore, he remained committed to an ideal of free speech that focused on the anti-tribal messages he learned from Williston. This fuller picture shows that the 'liberal' decision of *Masses* and 'conservative' decision of *Dennis* are false representations and betrayals of Learned's philosophical consistency.

[91] Purcell, p.902.
[92] Neuborne, 'A Tale of Two Hands', p.853.
[93] Stone, *Perilous Times,* p.411.

‘Clear and Present Danger’ Revisited

The *Dennis* case arose in 1948 when much of the U.S. was gripped by a sense of paranoia about foreign threats. This fear extended to potential domestic threats. Whilst it was mostly socialists in World War One, the target had become communists by the end of World War Two. Staunch nationalists painted an image of a country infested by covert saboteurs and Soviet sympathisers determined to destroy the fabric of American political and cultural life. Although never used as often as the Espionage Act, the Smith Act became the favoured legislative tool to suppress the communist threat.[94] The most high profile set of casualties were Eugene Dennis and eleven other leaders of the CPUSA in 1948, who were convicted of teaching and advocating the overthrow and destruction of the U.S. government, in violation of the Act.

After the defendants were indicted in July 1948, the case came before Judge Harold Medina in the trial court. The proceedings lasted nearly nine months, beginning on 17 January 1949 and ending on 14 October. At the time, this made it one of the longest proceedings in the country’s history. Rather than refer to a specific plan for the overthrow of the government, the prosecution used teaching materials of the CPUSA, such as *The Communist Manifesto*, as broader evidence of a violent revolutionary philosophy. The jury found all eleven defendants guilty, with Medina sentencing ten of the defendants to five years imprisonment. The case also became famous for its heated nature, where persistent interruptions and charges of corruption were made by the defence’s legal team against the court. This led Medina to sentence six of the members for contempt of court following the verdict of the jury. The Second Circuit received this in a separate case, in which Augustus wrote the opinion upholding Medina’s verdict.[95]

---

[94] *Alien Registration of 1940*, 54 Stat. 640.

[95] See *United States v. Sacher*, 182 F.2d 416 (2d Cir. 1950). Augustus wrote the opinion in a two to one decision by the court, decided on 5 April. The six defendants were Abraham Isserman, George Crockett, Eugene Dennis, Richard Gladstein, Harry Sacher, and Louis McCabe. They objected on a number of grounds, including Medina’s decision to delay the conviction order until the end of the case and that their due process rights to a trial were violated. In his opinion, Augustus ran through a long list of the alleged acts of contempt before he explained on p.429, ‘The course adopted by Judge Medina warned

On appeal, *Dennis* came before the Second Circuit and a panel of Learned, Thomas Swan, and Harrie Chase. The importance and difficulty of deciding the case prompted the trio to put it off until the end of the judicial season, where they finally deliberated at the end of June 1950.[96] It was decided that the court would uphold the constitutionality of the Smith Act and the convictions of the CPUSA members, and that Learned would write the opinion for the Court. Learned did not hesitate in writing an opinion which highlighted early on the personal strain of restricting speech. In his views on the First Amendment right to free speech, he showed that he still felt the same way as he had in 1917. He reiterated that it was essential to preserve free speech when herd or group mentalities thrived and that the threat of such mentalities were exacerbated when the power of dialogue was confined to positions of power. He noted, 'official opinion may be wrong' and the best way to correct this 'is complete freedom of criticism and protest'.[97] This protection rested on the William James' notions of 'scepticism as to all political orthodoxy' and a belief that there are 'no impregnable absolutes'.[98] These ideas also strongly reflected Learned's own view on free speech — a freedom where absolutes could not be found and a 'fair field' was available for all ideas, regardless of the popularity of opinion.[99]

However, as Learned had laid out in *Masses*, this right was constrained to beliefs alone and not actions. And, in the *Dennis* opinion, he strikingly proposed a hypothetical application of his *Masses* test. He described how a mob leader who, 'already ripe for riot gives the word to start' would not fall under the protection of the First Amendment.[100] Invoking the essence of

---

the appellants that they were misconducting themselves at their peril. It tended to prevent further obstruction, and also demonstrated that its orders and warnings were not in vain by punishing the offenders, after the verdict was recorded'. For Augustus, a 'punishment should follow the acts of contempt with reasonable promptitude', but this need not be immediately after if it endangered the defence's argument in a criminal case. The Supreme Court upheld the decision in *Sacher v. U.S.*, 343 U.S. 1 (1952).

[96] This is one of the few cases where there is no documented memo of Learned, although it was decided early that he would write the court's opinion.

[97] *Dennis*, p.207.

[98] Ibid.

[99] Learned Hand, 'A plea for the Open Mind and Free Discussion', University of the State of New York, Albany, NY, 24 October 1952, in *The Spirit of Liberty*, 274-285 (p.283).

[100] *Dennis*, p.207.

his *Masses* standard, he explained how the First Amendment could have been interpreted as to leave 'provocation to unlawful conduct' unprotected, regardless of 'how remote or immediate' the speech.[101] In this instance, Learned proposed that this view of the Amendment would have not protected the speech of the CPUSA. Although attempts to persuade others of the aims of communism would have been protected, this would have been lost when coupled with 'advocacy of the unlawful means'.[102] To reinforce this, Learned cited an example to show that this standard need not involve inflammatory topics, 'One can hardly believe that one would be protected in seeking funds for a school, if he suggested that they should be obtained by fraud'.[103] Like the CPUSA's speech, Learned noted that it was possible to be in violation by using speech where persuasion and instigation were not separable.

Learned followed by noting that this was not the test he would use and that he would subscribe to the Supreme Court's standard for the rest of the opinion, but his dicta indicates two things. First, Learned's inclusion of this passage signified his remaining commitment to his *Masses* test and dissatisfaction with 'clear and present danger'. In private, he still stressed that his approach was the optimal standard for speech, but his public posturing displayed a brashness with proposing legal scenarios that had no relevance, nor influence in the final ruling. Second, it suggests that he would have found the CPUSA members guilty with his test, despite his belief in the need for a wide platform for free speech. Learned's test outlawed the explicit incitement found in words, even where there was no practical probability of a consequent crime. In determining the teachings of 'Marxism-Leninism' in *Dennis* under his test, he suggested that it explicitly prompted the 'use of "force and violence"' when a 'propitious occasion will arise'.[104] Therefore, this interpretation focused on the legal limitations of his test, rather than personal opinion. Significantly, by explaining that his 'direct incitement' test would have led to the same result as 'clear and present danger', it further

[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid., p.206.

disproves the suggestion that Learned formulated the *Masses* test to fit to a partisan liberal view towards speech.

Despite this passage, Learned followed with defeatist language when he confessed that, in reaching a decision in *Dennis*, he had to undertake a 'wearisome analysis' of the Supreme Court's prior First Amendment decisions.[105] This signified the dramatically different circumstances of 1950 from 1917. Whereas the small sample of historical precedent and need for fresh statutory construction presented Learned with a broad freedom for interpretation in *Masses*, he was dealing with more restricted constitutional boundaries in *Dennis*. Since Holmes' opinion in *Schenck*, the Court had made 'clear and present danger' the default standard to apply in speech cases. The legal precedent was followed, but the early, overt use of dicta in the opinion was a product of the Langdellian in Learned. This indicated a man bound by a factor vastly underestimated by scholars — his sense of duty as an appellate judge in a much different legal framework in 1950.

Having set the terms of the case, Learned used what leeway previous Supreme Court opinions afforded him to apply his own nuances and interpretation in his adoption of the 'clear and present danger' test. Relating to his scepticism of absolutes, he noted that the test did not have an absolute standard and instead involved 'in every case a comparison between interests which are to be appraised qualitatively'.[106] He added that it had come to be used as a 'shorthand statement of those among such mixed or compounded utterances' which the First Amendment does not protect.[107] Therefore, he interpreted the last three decades of free speech jurisprudence to form the following test, 'In each case we must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'.[108] In essence, Learned's test minimised room for justifying the protection of speech as the gravity of said speech increased. For example, a statute that prevented a call for

[105] Ibid., p.212.
[106] Ibid., p.211.
[107] Ibid., p.212.
[108] Ibid.

the violent overthrow of government dealt with a categorically more probable threat than a statute which sought to tame speech of union leaders by keeping them on a register.

Despite following precedent by applying the 'clear and present danger test', it must be noted that Learned's formulation of the test did mark one distinct pivot from recent Supreme Court interpretations when it minimised the importance of the temporal standard. Although Learned had found the Court's First Amendment decisions post-World War One 'wearisome' and unclear, the Court had also never departed from this key element of 'clear and present danger'. The measurement of the imminence of a 'present danger' had been at the centre of Learned's concerns with the test when he had corresponded with Holmes, because it presented a flexible standard that allowed judges to broadly interpret the dangers of speech and, subsequently, suppress it. Nonetheless, the Court had been charting a path to a more speech-protective interpretation of the term 'clear and present danger' in numerous cases since World War One. This had culminated in its opinion in *Bridges v. California* (1941), where Justice Hugo Black narrowed the temporal standard to the following, 'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished'.[109] Hand's reformulation of 'clear and present danger', however, proposed that the gravity of danger was the more important factor. If speech comprised serious and dangerous content, even if it had little chance of producing the 'evil' that it represented, then it could be suppressed. This signified a clear distinction from the measuring standard in *Bridges*.

Although this change to the test ensured that Learned left a significant imprint on 'clear and present danger', his application of the test to the speech in *Dennis* still crystallised his limited powers as an appellate judge. As a strong free speech advocate, he reiterated the positive democratic connection between a society with greater free speech and its ability to withstand the bad ideas. To allow a 'bitter outcast vent his venom', he wrote, was 'a measure of the confidence of a society in its own stability that it suffers such fustian to go unchecked'.[110]

[109] *Bridges v. California*, 314 U.S. 252 (1941), p.263.
[110] *Dennis*, p.212.

However, bound to the language of the Smith Act, Learned believed he was obligated to uphold the convictions of the CPUSA and justify the reasons for doing so. Learned's detestation of communism was well known at the time, but he was also aware that such a high profile case was speaking to a large audience of non-legal experts. This explains why he painted a simplistic image of the speakers and the ideology they espoused, because it crafted a sharp and effective justification to rally around the divisive ruling,

> The American Communist Party…is a highly articulated, well-contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. The question before us, and the only one, is how long a government, having discovered such a conspiracy, must wait. When does the conspiracy become a 'present danger'? The jury has found that the conspirators will strike as soon as success seems possible, and obviously, no one in his senses would strike sooner.[111]

To Learned, the question was simple, what was the probability of an attempted overthrow of the U.S. government at the time of indictment in the summer of 1948? As a global threat, he described communism as the most pervasive 'East to West' ideological movement in Europe since Islam and weighed up the danger by saying, 'Any border fray, any diplomatic incident, any difference in construction of the *modus vivendi*…might prove a spark in the tinder-box, and lead to war'.[112] He added that one could not deny such a probable danger unless 'we must wait till the actual eve of the hostilities'.[113] Under these circumstances, the speech of the CPUSA was held to be clear and present, a term Learned was careful to use consistently throughout the opinion to assert that this was simply a reconstruction of the test.[114]

Learned wrote a striking final paragraph, too. He used it to stress the important philosophical considerations of free speech, its value in society, the role of the judge, and the future ramifications of the decisions. He wrote, 'It is of course possible that the defendants are inspired with the fanatical conviction that they are in possession of the only gospel which will redeem this sad Planet and bring on a Golden Age'.[115] However, courts 'need not consider

[111] Ibid., p.212-213.
[112] Ibid., p.213.
[113] Ibid.
[114] Ibid., p.212.
[115] Ibid., p.234.

how far that would justify the endless strategems to which they resorted', nor was it their duty to say whether such a prosecution in *Dennis* 'makes against the movement or…creates more disciples'.[116] He summarised by noting the role of the appellate judge, 'ours is only to apply the law as we found it'.[117]

'I should never have prosecuted those birds'

Private correspondence showed that Learned remained philosophically consistent on free speech since 1917 and his opinion in *Dennis* best exemplified a man using hyperbole to justify precedent on free speech to which he personally and strongly disagreed. This narrative is proven in three points. The first were Learned's own reflections at the time. In the immediate aftermath, he told Augustus that he believed it a 'mistake' to put the CPUSA members in jail. He explained, 'I am a firm believer that "the blood of the martyrs is the seed of the church"'.[118] After the Supreme Court had affirmed the Second Circuit ruling in *Dennis*, Learned reiterated to Frankfurter, 'I should never have prosecuted those birds...it will encourage the faithful and maybe help the Committee on Propaganda'.[119] Learned's message came back to his general philosophy to tolerate all ideas, even those to which he personally opposed. This highlighted the conflict between the desirable outcome and duty-bound outcome as judge. With *Dennis*, he believed he 'had no alternative' with his opinion.[120]

Learned was also frustrated with the growing boldness of the Supreme Court to intervene in contentious issues, since he believed it was the legislature's right to decide the fate of the defendants. As he noted to Frankfurter, 'Now that the mists have in part…lifted, I am once more impressed with the inefficiency of our political scheme which puts judges at the top of the deeply contentious issues of our society'.[121] Ideally for Learned the legislature would

[116] Ibid.
[117] Ibid.
[118] LH 109/17, letter from Learned Hand to Augustus Hand, 8 August 1950.
[119] LH 105B/16, letter from Learned Hand to Felix Frankfurter, 8 June 1951.
[120] LH 87/14, letter from Learned Hand to Irving Dilliard, 3 April 1952.
[121] LH 105B/16, letter from Learned Hand to Felix Frankfurter, 8 June 1951.

choose the boundaries for speech and he would not have had to rule at all, 'I would leave it to Congress to require the utterer to separate the wheat from the chaff'.[122] Learned's deference to the legislature saw him in a minority in undervaluing the protective abilities of the Bill of Rights. He believed there was room for the First Amendment to protect speech, but in abiding to his *Masses* values, this would not include those which directly aided or counselled the violation of the law. When the issue was not clear, or 'mingled with otherwise permissible speech', he would leave it Congress.[123] *Dennis* fit these criteria, since the language of the Marxist teachings of the CPUSA was advocating illegal actions, but as a broader long term goal rather than an imminent or explicit proposition. Learned believed this position deterred the possibility of judges imposing their political values on decisions. Likewise, it would avoid any accusations of such. Thus, although he regretted that he had to make a decision in *Dennis*, he did not regret the decision he and the court reached, as he was inclined to side with the legislature.

Second, Learned showed private and vocal disdain for McCarthyism and was aware that the conviction of the CPUSA members would be considered a win for McCarthyites. However, it is true to recognise first that Learned hated communism and displayed some of that emotion in his *Dennis* opinion and in private. His perceived lack of empathy for the defendants in the case can be explained in one of his last sentences in his opinion, 'Their only plausible complaint is that that freedom of speech which they would be first to destroy, has been denied them'.[124] Furthermore, he expressed private concern to friends about U.S. apathy towards the spread of communist ideology across Europe, 'Without energy of conviction and deep concern for the fate of Europe, its own unbewept fate, [we are] congratulating ourselves that we have never been so corrupted by Communism'.[125] Scholars, such as Geoffrey Stone, believed that concerns about a global and domestic communist threat translated into the ruling and opinions of even sophisticated judges, including Learned. Justice Hugo Black's dissent to the Supreme

[122] Ibid.
[123] Ibid.
[124] *Dennis*, p.234.
[125] LH 99/21, letter from Learned Hand to Bernard Berenson, 17 February 1952.

Court's *Dennis* opinion confirmed this theory, in part, when he suggested that the Court had fallen to 'present pressures, passions, and fears'.[126] Such pressures, passions, and fears would have been natural human reactions, as Learned and the Supreme Court wrote their opinions in a time in which the nation was witness to the investigations of the House of Un-American Activities, the introduction of a federal loyalty programme to root out communism in government ranks, increasing anxiety about Joseph Stalin's control over Eastern Europe, heightened talk about a Soviet atomic bomb, and the fall of China. Thus, there was an unprecedented and overwhelming set of developments that would have created fertile ground for stoking anxiety, even amongst judges.

Nonetheless, such scholarly suggestions that Learned was swept up in this panic around communism does not fully reconcile with the reality that Learned hated McCarthyism just as much. This was because, despite acting as an opposition to communism, it shared many similar traits. These traits, including collectivism, tribalism, and repression, were all antithetical to the values and guiding philosophical principles that Learned held. In private, he expressed his concerns about red hysteria and how it had prompted Americans to hide any communist inclinations, 'We are in a convulsion, likely in the end, as are most such violent reactions, to do more towards fostering what we have come frantically to dread, than if we could keep better hold on ourselves'.[127] However, the most significant action was his public intervention in October 1952. By then, Learned had reached a boiling point where he felt the need to speak out on the increasing domestic tensions. In an address to the State University of New York in Albany, New York, he made an eloquent plea for free discussion,

> Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread a broad spirit of general suspicion and distrust, which accepts rumour and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in the process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection...where orthodoxy chokes freedom of dissent.[128]

[126] *Dennis v. U.S.*, 341 U.S. 494 (1951) (Justice Black dissenting), p.581.
[127] LH 99/20, letter from Learned Hand to Bernard Berenson, 8 January 1950.
[128] Learned Hand, 'A plea for the Open Mind and Free Discussion', p.274.

Public speculation claimed this had been targeted at Senator Joseph McCarthy and his followers, which is confirmed by Learned's private correspondence.[129] The essence of his message maintained that intolerance was the main threat to the nation. His solution to the problem was simple, accept 'an honest race to all ideas'.[130] The public call was significant because it was also uncharacteristic of a man who had preached the necessary restraint of the judiciary.[131] In Learned's mind, this also included a restrained public persona. In preparation for the speech, he wrote to Frankfurter revealing his anxiety and careful consideration over its undertaking, 'Sometimes I ask myself whether a deep demon does not really lead me to publicity "stunts" while my public upper cortical centers strike noble attitudes in apology'.[132] Aware that it could cause a political stir and come at a cost to his message of restrained public image, he still believed it necessary to avert the disastrous course McCarthyism was sending the country. This indicated he was not a man who allowed his anticommunism to override his judicial commitments.

The third, and final, factor in more effectively understanding Learned's work was his remarkably consistent record on free speech and the role of the courts. Outside of the vastly different circumstances between *Masses* and *Dennis*, including the contrasting legal landscape for free speech from 1917 to 1950, there are two other considerations comprising this factor. The first consideration has not been comprehended in the literature to date, which is Learned's other opinions and cases on free speech in between *Masses* and *Dennis*. These cases showed a man both restrained in his judging and avidly supporting free speech rights. For example, in the 1931 Second Circuit case, *Gitlow v. Kiely*, Learned's private memo to his colleagues showed his frustration with upholding the suppression of speech, 'If we get into a discussion

[129] See LH 105C/17, letter from Learned Hand to Felix Frankfurter, 30 October 1952. 'It did seem relevant enough, however, to drag in, as a kind of "stinger" in the coda, what I fear most in the present time — McCarthy and his Cartesian crew'.
[130] Learned Hand, 'A plea for the Open Mind and Free Discussion', p.274.
[131] Although delayed, the speech eventually caught on in media circles a month later and was making headlines. The most striking was from *The Saturday Review*, which reprinted most of the address as its leading article in the issue of 22 November 1952, under the heading, 'The Future of Wisdom in America'.
[132] LH 105C/17, letter from Learned Hand to Felix Frankfurter, 30 October 1952.

of the theoretical limits of free speech we are sure to get mixed up and probably shall not agree. If I am right about *Gitlow v. U.S…*we have no right to question that decision, whether we like it or not'.[133] In the 1940s he repeated these sentiments when he attributed his support for speech heavily on the philosophical ideal that it leads to a more prosperous and forward thinking democracy. In an opinion related to the press, he wrote, 'the First Amendment…presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all'.[134] The Supreme Court would later quote this in support of its monumental 1964 press freedom opinion in *New York Times v. Sullivan*.[135] Learned's position in the press cases was also frequently echoed privately, where he warned, 'Inquisition into the beliefs and feelings results in the most terrible of tyrannies, it stifles the very springs of invention and advance, and is likely to dissolve the society which resorts to it'.[136]

Therefore, Learned remained consistent on the issues of free speech. As legal precedent grew, however, he was obligated to defer to prior Supreme Court decisions as his guide, not his own personal intuitions. This was an issue for Learned, because he was deeply frustrated with the Supreme Court's consistent intervention in speech cases throughout the decades. He described himself to Augustus in 1942 as, 'somewhat of a nut on not interfering'.[137] Furthermore, he expressed his anger to Frankfurter in 1948 in response to the Court's opinion in *Winters v. New York*. He stressed his belief that the Court had interfered too much in speech issues and described this as a 'priggish illiteracy which seeks to impose its "uniliterary"…dullness on any intelligible management of human affairs'.[138] This weighed

[133] LH 188/8, Learned Hand memo for *Gitlow v. Kiely*, 23 April 1931.
[134] *U.S. v. Associated Press*, 52 F. 362 (S.D.N.Y. 1943), p.372.
[135] The Court ruled unanimously that the First Amendment restricts the ability of U.S. public officials to sue for defamation. The burden upon public officials extended the standard requirements to prove an allegation was false and defamatory to also include proof that the statement was made with 'actual malice'. For the reference to Learned, see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), p.270.
[136] LH 134/28, letter from Learned Hand to Walter Bennett, 4 December 1944.
[137] LH 109/16, letter from Learned Hand to Augustus Hand, 14 July 1942.
[138] LH 105B/14, letter from Learned Hand to Felix Frankfurter, 26 April 1948. Learned was specifically reacting here to the Supreme Court's First Amendment ruling in *Winters v. New York*, 333 U.S. 507

down on a man aware that following the Court's inferior 'clear and present danger' standard could contribute to the suppression of more speech. In an opinion for a case just under six months before *Dennis*, he noted that the First Amendment 'presupposes that there are no orthodoxies — religious, political, economic, or scientific — which are immune from debate and dispute'.[139] Despite the libertarian values this comment outlined, he still noted that the legislature had the power to choose whether to adhere completely to them. Thus, he also explained in the same opinion, 'Congress, in the search for a compromise between the conflicting interests…decided to draw a line…the propriety of decision is not for us'.[140] The evidence was that Learned remained committed to the value of free speech *and* the value of restraint. This evidence was overwhelming and spanned decades.

The other consideration on Learned's consistent record on political speech comes in how he was still privately and publicly championing his *Masses* standard whilst expressing discontent with the 'clear and present danger' test. Learned had already shown in *Dennis* a willingness to air publicly his scepticism of the Court's test. In private reflection on *Dennis* too, Learned wrote many times about his resentment of the Court's persistent use of the test to the extent that he was willing to criticise one of his idols, Oliver Wendell Holmes. As he explained to Frankfurter, 'Holmes...for once slipped his trolley on "clear and present danger"'.[141] Adding to this, he said, 'I have never felt satisfied that there was not an adequate qualitative distinction...I tried to state it years ago in the *Masses* case but have had to abandon it'.[142] This distinction was the same one he tried to explain to Holmes many years prior: the 'direct incitement' test in *Masses* outlawed a narrow range of speech by seeking explicit counselling of a crime from the content of the speech. This made it tough to twist the meaning of a speaker's words, especially in times of mass hysteria. In comparison, 'clear and present

(1948), which overturned a state law prohibiting the publication or distribution of 'true crime' magazines. Learned's grievance was with the Court presuming it should be the 'final arbiter in…conflicts of interest' relating to state laws.

[139] *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 181 F.2d 34 (2d Cir. 1950), p.40.

[140] Ibid.

[141] LH 105B/16, letter from Learned Hand to Felix Frankfurter, 8 June 1951.

[142] Ibid.

danger' balanced a number of factors in identifying the possible criminal effect of speech. It remained Learned's concern that Holmes' test was too open-ended and slippery because what constituted 'clear and present danger' was subject to personal interpretation, making it an 'unreliable…litmus test'.[143] Learned's persistent articulation and defence of his test showed that his commitment to free speech had not changed since 1917.

The common theme in these assessments is that Learned remained a principled man and one bound by restraint as an appellate judge. He was far from being a conservative when *Dennis* arrived, nor did he succumb to a desire to limit speech during the heightened Cold War hysteria of the late 1940s and early 1950s. It is why when the Supreme Court expanded the protection of speech and watered down the Smith Act's censorship powers in *Yates v. U.S.* in 1957, he showed support.[144] This came in his 1958 Harvard lectures where, in reference to the case, he maintained, 'It would be difficult, indeed perhaps it would be impossible, to imagine an occasion on which the statute would make the advocate of "principles divorced from action" a principal in a crime, even though his words had in fact provoked the hearer to commit it'.[145] He suggested that there were perhaps some caveats where a speaker is culpable, such as when they preached to a crowd ripe for a riot. However, the fundamental issue remained that a court must pay focus to 'the specific intent with which the speech or activity is launched'.[146] This diligence was essential during 'periods of passion', without which could lead to a situation where 'serious damage may have been done that cannot be undone, and no restitution is ordinarily possible for the individuals who have suffered'.[147] This drove his unchanged principles and ongoing commitment to his 'direct incitement' test over forty years later.

---

[143] Ibid.
[144] See *Yates v. United States*, 354 U.S. 298 (1957). In a six to one majority, Justice John Marshall Harlan narrowly construed the Smith Act, arguing that it did not prohibit the 'advocacy of forcible overthrow of government as an abstract doctrine'. For the Court, the distinction is when one actually takes action to encourage others to achieve such an end, thus increasing the burden of proof for unlawful speech. The focus on intent and explicit encouragement drew more similar parallels to Learned's *Masses* test than previous formulations of the 'clear and present danger' test.
[145] Learned Hand, 'The Guardians', *The Bill of Rights*, p.59.
[146] Ibid.
[147] Ibid., p.69.

Conclusion

Learned's considerable presence in legal doctrine on political speech has been accompanied with a mainstream line in scholarship that asserts that the substantial differences in his *Masses* and *Dennis* cases displayed an evolution from a liberal to a conservative mentality. This was indicative of both Learned's judicial positions, by becoming more restraintist, and by personal and political ideals, with the suggestion that his hatred for communism drove a desire to allow certain censorship over freedom of speech. However, an examination of the opinions, private correspondence, philosophy, and arc of Learned's free speech rulings reveal a different narrative in which he remained consistent on the issues of speech and judicial restraint throughout his life. Learned was both critical of the precedent he followed and the radical speech he interpreted, whilst remaining philosophically consistent. The idea that his opinions and decisions reflected either a liberal or conservative judge creates a false and simplistic understanding of his legal methodology. The key factor to understanding this alternative narrative is realising that Learned was philosophically conflicted by his vision for democracy. In this vision, the legislature was given very broad powers to experiment with statutes. In order for it to best function, however, it needed a free system of communication, where the best ideas could only defeat the worst with an environment of little restriction. The threat was that the legislature's freedoms enabled it to suppress speech, but if judges intervened to preserve speech they would compromise the principle of legislative freedom. This scenario became reality in the facts behind *Masses* and *Dennis*. It was the driving dilemma behind Learned's thinking with the two cases, leading him to decide the outcome upon various other weighted factors.

Learned did personally favour the outcome of his ruling in *Masses,* but the factors were more complex than this conventional argument. First, Learned had to decide how he could avoid undermining Congress' powers in the Espionage Act. He believed his opinion was true to his principle of judicial restraint, despite claims by Neuborne and Dworkin that it was an activist anomaly in his career. As one of the first judges to interpret the Espionage Act, he used

strong language to display his full support of Congress' war powers. His opinion was also bereft of historical references. Although recent scholarship has recognised that multiple areas of speech were being reviewed in the courts in the pre-war years, courts' unflinching reliance on the 'bad tendency' test reflected a broader acceptance that the First Amendment and speech were not considered primary points of contention in U.S. history prior to the 1910s. This supports Learned's claims that he had little constitutional precedent on which to draw. Therefore, what emerged was a significant nuance in Learned's idea of restraint. This was crystallised in his differences with Augustus. Whilst both agreed on the need to preserve speech in a healthy democracy, Augustus was more content to defer to the government's interpretation of the Espionage Act when there was little precedent with which to work. Learned, however, believed the case was one of statutory construction, which gave him a mandate to formulate a test for a novel statute. This prompted a standard that he believed stayed true to his restrained approach in protecting speech. Learned's creation of the 'direct incitement' test comprised 'objective' criteria. By this, Learned explained that speech was legal outside of explicit incitement in its wording. This separated admiration from emulation of criminal activity. It set the bar high for all speakers, including those who gave inflammatory speeches. By focusing solely on the words used in speech and seeking explicit intent, it placed itself outside of a common framework that concentrated on the causal relationship between speech and actions. This reduced the ability of judges, juries, and other people in power to determine speech on the highly subjective approach of identifying the 'tendency' of speech to lead to a crime, thus also showing a remarkable rigidity and durability for anticipating future threats to inflammatory speech. As a result, Learned presented a superior standard for protecting speech than Holmes' later 'clear and present danger' test.

The test was even more remarkable for respecting the autonomy of the legislature. The impassioned speaker could not go to jail for criticising a government short of advocating the violation of laws, even if the speech led to such an occurrence. In Learned's idea, this preserved the Espionage Act's cause, since it did not infringe on its ability to outlaw what it

explicitly cited in its clauses, but also protected the speech of *The Masses* magazine — which did not directly advocate the violation of the act's clauses.

Dennis also highlighted the misconceptions of Learned's intent when it came to political speech cases. It is believed that he exhibited a more conservative mindset by wilfully allowing the CPUSA members' convictions to be upheld on a contentious allegation that their speech was dangerous or promoting law-breaking. Without the context of these other factors behind Learned's *Masses* decision, the logical connection was that if he was willing to go to the extent to protect the magazine in 1917 he could have protected the speech of Eugene Dennis and his colleagues if he wanted to do so. Although there are variations to the explanation, the assertion adds that he was driven by a detestation of communism, growing entrenchment with restraint, or both — combining to form the product of a more conservative man and judge. However, three factors disprove this narrative. The first, and most obvious, is that the times had changed dramatically since *Masses*. His powers were restricted as an appellate judge, but scholarly tendencies to presume decisions are driven by a simple political binary have undervalued Learned's institutional limitations. The Supreme Court had used the 'clear and present danger' test in multiple high profile cases since World War One and Learned believed himself obligated to follow precedent and apply this test in evaluating the speech used by the CPUSA members, to their misfortune.

Second, Learned still championed his *Masses* test and criticised 'clear and present danger', both publicly and privately. From his Langdellian teachings, Learned expressed similar sentiments of support for his test. This was displayed in his opinions including the dicta in *Dennis*, and his private correspondence throughout the decades, with the substance and positions of this content never altering significantly. The primary reason for this dogged faith rested on the belief his test could not be manipulated to conform to the suppressive standards of wartime and political hysteria. The driving factor was the urge to preserve speech — a trait he maintained even when he failed to convince cousin Augustus of the threats of ambitious legislative restrictions to speech, such as those in the Espionage Act. Learned's construction

for ‘clear and present danger’ showed an attempt to discuss a number of principles that he had laid out in *Masses*, even if the test had been rejected over the previous three decades. For example, immediacy was much less important to Learned in determining what should be considered lawful speech; advocacy of unlawful action was a more important factor. Nonetheless, his formulation of what standards comprised the ‘clear and present danger’ test highlighted the key difference with the *Masses* test. The content of the words was not the primary determinant for unprotected speech. Instead, it was the ‘gravity of the “evil”, discounted by its improbability’. This was a begrudging interpretation by Learned, since he had criticised ‘clear and present danger’ throughout his life. Despite this, Learned also admitted that his application of the *Masses* test in the *Dennis* case would have led to the same results for the defendants.

The third factor revealed how strongly the Harvard teachings of Williston pervaded Learned’s thinking with his constant referring to the threat of hysterical and herd thinking. It is true that Learned hated communism — to the point where he expressed this hatred too forcefully with his colourful rhetoric in his *Dennis* opinion. However, he also vehemently opposed the atmosphere of fear that had been generated and driven by Senator Joseph McCarthy. As a result, it prompted one of Learned’s greatest speeches in his address in Albany to preserve speech despite the radical thinking that both McCarthyism and communism promoted. The relevance of the speech remains just as important today in an age in which the boundaries of free speech are misconstrued in the mainstream as being much narrower. Thus, the historiographical debate has wrongly and simplistically emphasised that a more conservative mindset from Learned emerged in *Dennis*. Instead, Learned argued that suppression during times of high tensions must be avoided where possible. However, he believed a court should allow a legislature’s standard to prevail unless it was not ‘the product of an effort impartially to balance the conflicting values’.[148] Only then could a court intervene. Learned acknowledged the dangers of leaving such power in the hands of the legislature

[148] Learned Hand, ‘The Guardians’, *The Bill of Rights,* p.59.

unchecked. Furthermore, he also believed the First Amendment invoked judicial responsibility to protect speech short of aiding, counselling, or abetting speech. However, when it was hard to discern this explicitly from speech, he stressed his desire for Congress to make the decision. He believed it a more worthy risk to place the fate in the hands of a legislature because he failed to trust that judges would not start inserting their personal notions into rulings, which would set an undesirable mandate for rule by judicial force.

Learned introduced a new test for political speech which upheld his vision of judicial restraint and disregarded political or personal notions in the decision making. In hindsight, appreciation for Learned's approach to political speech has grown with historians — particularly in reference to his *Masses* opinion. Under this evolving context, such appreciation should continue to grow for Learned's complex decisions.

Chapter Three: Obscenity - To Allow 'Depraved and Corrupted Minds'?

Defining and regulating obscenity was a prominent topic of debate for American society during the early twentieth century. At the same time that New York City was establishing itself as a global publishing hub, the country was going through a dramatic moral transition. The Hands faced many challenges that came from this transformation and handled them with a mixture of skill and inventiveness. However, because much of the scrutiny of Learned's record on free speech has come from his involvement in the highly politicised cases of *Masses* and *Dennis*, his legacy in the field of obscene speech has been underappreciated by scholars.[1] In comparison, Augustus' obscenity opinions have been given some deserved recognition.[2] Nonetheless, no scholar has thoroughly analysed the process through which Augustus came to his opinions. Furthermore, even though there has been brief coverage of Augustus' well-known contributions, such as his opinion in *U.S. v. Ulysses* (1934), other opinions, such as *Anderson v. Patten* (1917), have been ignored.[3]

This chapter sheds light on this much understudied area of free speech and reveals how the Hands, both individually and jointly, changed the law to provide a more protective standard for writers and artists. It shows that they were ahead of many other judges of their time, including the Supreme Court itself. The chapter also makes two other key points. First, there is a tendency to view the Hands' opinions in this area of law as another reflection of their liberal credentials.[4] This is often based on their role in facilitating the replacement of the widely used *Hicklin* test — a loose standard that predicted the probable effect that lewd or

[1] All references to 'free speech' or 'speech' are related to obscenity in this chapter, unless stated otherwise.
[2] See Introduction.
[3] *Anderson v. Patten*, 247 F. 382 (S.D.N.Y. 1917).
[4] Kevin Birmingham described Learned's first key obscenity decision in 1913, *U.S. v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913), as a 'liberal ruling'. Likewise, Harry Whitmore described Augustus' *Ulysses* opinion as a 'liberal test'. These were commentators not familiar with American legal history or analysis, which signified how scarce the coverage has been and explains, in part, why it has been seen as expeditious to refer to these rulings with political language. See Harry Whitmore, 'Obscenity in Literature: Crime or Free Speech', *Sydney Law Review* 4 (1963), 179-204 (p.182) and Kevin Birmingham, *The Most Dangerous Book: The Battle for James Joyce's Ulysses* (London: Head of Zeus, 2014), p.334. There are further examples for particular cases in the footnotes throughout this chapter.

obscene speech could have on susceptible readers — with a governing rubric that required a far more rigorous examination of content. The 'liberal' argument draws attention to the overall impact of the Hands' opinions, which stripped away conservatives' abilities to use the test to supress material that they believed were a threat to the moral fabric of society. Focusing on the substantive results, rather than the procedures of interpretation that the Hands changed, plays to the popular narrative of the political dichotomy. Therefore, the Hands are considered as opposed to conservatives in this period, who believed in a paternalistic philosophy of protecting society from obscene material, and supportive of liberals, who believed that the sacrifice of such exposure was less important than the ability for writers and artists to experiment freely. A closer examination shows that the Hands aligned with neither side in their judicial duties. They skilfully examined obscenity law under a measured balancing standard that minimised the judge's personal values or interpretations of literature and placed greater emphasis on situating their judgements in the context of ever-changing social norms.

The legal arguments that the Hands saw played out before them on the matter of obscenity reflected critical cultural disputes in the first half of the twentieth century.[5] On one side, social and political conservatives sought to preserve the Victorian values and social codes that pervaded pre-war American society. After World War One, Warren Harding successfully campaigned in the 1920 presidential election on a return to 'normalcy'. This was interpreted as having various connotations, but its connection to American traditionalist values was most evident with Harding's support for upholding the Eighteenth Amendment and advocating Prohibition — a national ban on alcohol that harked back to the moral, religious, and socially conservative tenets of the nineteenth century temperance movement.

At the same time, liberal and progressive circles pushed into the mainstream a new age of experimentation and openness in cultural life. For one thing, the rise in technological

[5] One of the best surveys of this period in U.S. history is William Leuchtenberg, *The Perils of Prosperity, 1914-1932*, 2nd edn (Chicago: University of Chicago Press, 2004). This includes a particularly useful chapter, 'The Revolution in Morals', which provides insights into the innovation in literature and the arts, as well as the changing roles of women and minorities.

innovations at the turn of the century presented a near insurmountable challenge for those wishing to stem the tide of modernity. With radio and film used as forums for disseminating mass information, marketing, and advertisements, the prospects of a cultural backlash to social conservatism in the first two decades began brewing in earnest in many urban centres. This exploded in the third decade of the twentieth century, which famously came to be known as the Roaring Twenties. Some developments represented direct responses to the suppressive tactics of social conservatives, such as the sprouting up of speakeasies in cities. These bars and nightclubs often served as the primary place for individuals to share and drink alcohol during the Prohibition years of 1920 to 1933. Other trends, meanwhile, left conservatives deeply uneasy, including a rising consumer culture that invited much of middle America to aspire to become part of a sophisticated and affluent modern society. This stood in contrast to the values of decorum and modesty that had dominated the social visions of conservative moral leaders. Elsewhere, this newfound appetite and freedom for cultural experimentation led to the popularisation of jazz and dancing, new artistic and architectural movements, and innovative ideas about sexuality, rights, and roles for women.

This fundamental shift in American moral values marked the battle line in legal disputes between liberals, who advocated innovations in literature, art, entertainment, and education, and conservatives, who sought to deter any such innovations by arguing that it tore at the country's moral fabric. A famous example that epitomised these tensions came in the *Scopes* Trial after Protestant fundamentalists had successfully banned the teaching of evolution in schools in Tennessee.[6] When these cultural clashes spilled over into the issue of obscenity, literature came to the forefront of scrutiny.[7] In the post-war period, many more books, magazines, and periodicals were encouraged by the cultural transformations in U.S. society to trade in sexually explicit content and to test the boundaries of normative thinking. Other issues

[6] *John Scopes v. State of Tennessee*, 154 Tenn. 105 (1927).
[7] See Rachel Potter, *Obscene Modernism: Literary Censorship and Experiment, 1900-1940* (Oxford: Oxford University Press 2013). Potter's book examines the battles and consequences between law and literature in this period, showing how the widening parameters of literary experimentation pushed moral policing to its limits.

subsequently emerged as points of legal consideration, including the educational, scientific, and artistic values of literary content.

However, whilst liberals and conservatives fought for command over the moral direction of American culture, the judicial philosophies of the Hands showed that they were interested in the legal methods for defining obscenity, not the results. This is revealed through the examination of four primary opinions in this chapter, which showed that they carefully considered the role of the judge in an area of law that inspired animated discourse and highly subjective moral-based arguments. The Hands were sceptical of the widely used *Hicklin* test because it placed too much importance on the judge as the final arbiter on issues of obscenity. In assessing whether the obscenity of an item or speech could deprave minds, the test also claimed to represent the interests of society. However, its vagueness was often used by powerful political brokers to amplify their influential, but ultimately unrepresentative, voices in American civil society. In their attempt to reshape this law in a dramatic fashion, the Hands thought deeply about their interpretation of restrained judging. And in navigating this judicial minefield, they found a compromise: although they eventually overruled a widely used precedent, they replaced it with standards that minimised the influence of judicial discretion.

This chapter explains the principles that led to the Hands' formulation of these standards. Most notably, they asked for a test that better reflected society's voice. In turn, this fostered the participation of a more actively engaged democracy in the vein of William James' teachings. As Learned noted, this placed emphasis on a patient approach because it rested on the 'slow advance of the spirit of tolerance'.[8] In putting this into practice, they seized on a growing societal consensus that accepted greater literary and artistic freedoms. Thus, although their actions stretched the standards for judicial restraint, their test minimised the importance of the judge's view on obscenity and shifted the burden to society's evolving position on the issue.

[8] LH 69/16, letter from Learned Hand to Norman Cousins, 8 February 1947.

This chapter also highlights key differences in the jurisprudence of the Hands. It clearly indicates that Augustus remained the primary force behind the key judicial decisions of this period. He believed firmly that there was still material that should be restricted or censored if it contained no intellectual or educational merit. In contrast, although Learned believed in the final say of the legislature to restrict speech, he argued against suppressing works of literature and art, even if they possessed no value. Nonetheless, the Hands ultimately found common ground in agreeing on the necessity for an overhaul in contemporary methods for assessing obscenity law.

The Origins of the *Hicklin* test

Whilst the U.S. Government's censorship of dissenting voices during World War One was a significant issue in the 1910s, the social pressures of traditional morality meant that most legal rulings on matters of obscene speech had already been put in place. Therefore, whilst the Espionage Act of 1917 prompted Learned to rethink the contours of 'political' speech, the standard for obscenity still reflected the court judgements of the late nineteenth century and the continued saliency of the *Hicklin* test. Courts followed the 'bad tendency' method with this test by predicting what they believed would be the negative effect that various forms of literature and art could have on its readers. As the established precedent, it was frequently used to place strict limits on literary boundaries.

The test owed its origins to an 1868 English case, *Regina v. Hicklin*. In the case, Lord Chief Justice Alexander Cockburn defined obscenity as, 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall', regardless of the artistic or literary merit of the publication.[9] Law Professor Stephen Gillers explained, 'No judicial pronouncement from an American or British court in the last 140 years has been as harmful to

[9] *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868), p.371.

creative artists as Cockburn's single sentence'.[10] The main point of contention, critics noted, was the loose standards attached to the test, which left obscenity open to a wide range of interpretation by judges. This proved to be of huge assistance to the moral crusaders of the late nineteenth century. One of those, Anthony Comstock, the founder of the New York Society for the Suppression of Vice and a highly influential lobbyist and campaigner, helped force through the Comstock Laws of 1873.[11] These federal laws were phrased in vague, subjective terms, such as banning the sale of 'immoral' materials, and provided government officials with substantial leverage in terms of censorship powers.[12] With the statutes' failure to define obscenity in concrete terms, courts were able to provide expansive and dramatically different interpretations under the *Hicklin* test.

The case which introduced *Hicklin's* 'bad tendency' standard into American law was *U.S. v. Bennett* in 1879.[13] The case involved *Cupid's Yoke*, a widely recognised pamphlet on free love. The author, Ezra Heywood, was a critic of Anthony Comstock and the traditional notions of marriage, a combination which caught Comstock's attention. Consequently, when a radical publisher, Deboigne Bennett, was found disseminating the pamphlet through the mail in 1879, he was arrested and convicted of distributing material that advocated legalised prostitution. When the case came before the district court, Judge Samuel Blatchford adopted Lord Cockburn's test in his opinion.[14] In upholding the conviction of Bennett, the court stressed that the test was decided upon the effect it may have on the reader, rather than the motive of the author. In the following decades, *Bennett* was cited in many cases to justify the *Hicklin* test as the favoured approach to determining obscenity rulings. The test made its first appearance at

[10] Stephen Gillers, 'A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from *Hicklin* to *Ulysses II*', *Washington University Law Review* 85 (2007), 215-296 (p.221).
[11] Comstock Act 17 Stat. 598 (1873).
[12] For a well written biography of Comstock, see Anna Bates, *Weeder in the Garden of the Lord: Anthony Comstock's Life and Career* (Lanham, MD: University Press of America, 1995). For a comprehensive look at the wide variety of suppression tactics used in this period, see Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (New York: Vintage Books, 1993) and Paul Boyer, *Purity in Print: Censorship from the Gilded Age to the Computer Age* (Madison, WI: University of Wisconsin Press, 1968).
[13] *U.S. v. Bennett*, 24 F. 1093 (S.D.N.Y. 1879).
[14] The case came before district judges Charles Benedict and William Choate, and circuit judge Samuel Blatchford. This was prior to the establishment of the U.S. Circuit Court of Appeals system in 1912.

the appellate level in an 1884 obscenity case, *People v. Muller*, when the New York State Court of Appeals cited Cockburn before upholding the conviction of a clerk for selling nine photographs of French paintings portraying naked women.[15]

Hicklin, *Bennett*, and *Muller* established the prevailing standard for obscenity and set out a number of precedents that damaged literary standards and creativity for years to come. The vague standards of the *Hicklin* test were detrimental to artists and writers in three specific ways. The first two related to the test's focus on the effect of the material, rather than the intent of the author. Because this was harder to pinpoint, this left authors with no clear way to defend their work, nor any clear protection from accusations. Judge Blatchford's opinion in *Bennett* illustrated how this operated on the ground when it stated that 'Freelovers and freethinkers' have a right to publish their views if they are not obscene, but that, 'It is not necessary, in order to make a book obscene, that such words should be found in it'.[16] According to Blatchford, words did not have to be explicitly obscene in order to be problematic. Instead, obscenity was to be ascertained by predicting the ideas that might be inspired by words. Significantly, Blatchford did not elaborate on whose responsibility it was to make that determination, nor how that effect could be measured. Consequently, a new legal horizon opened for broad interpretations of obscenity. In theory, if one court speculatively interpreted the 'ideas' of any given material as obscene, this provided sufficient cause to gag the author. The boundaries were near limitless for censors and moral crusaders.

This fuzziness of definition led to the third key problem with the *Hicklin* test. Although courts tried to follow extant legislation and judicial precedent, handing judges expansive powers of discretion under the broadly defined 'bad tendency' standard led to considerable incoherence in rulings. In most cases, the result was censorship, but the rationale continued to vary greatly amongst cases. In some courts, meanwhile, judges ruled in favour of 'obscene' speech. For example, the Supreme Court of Washington reversed a conviction for contempt

[15] *People v. Muller*, 96 N.Y. 408 (1884).
[16] *Bennett*, pp.1101-1102.

after finding that an article did not have a 'reasonable tendency to prevent a fair and impartial trial'.[17] The court made its judgement on the 'entirety' of the article, a sharp contrast with the usual tendency of judges to consider effect in the context of individual passages.[18] Significantly, this cultivated an environment of confusion for artists and literary figures over the exercise of their experimental and expressive rights.

The Supreme Court added to the confusion. In the 1896 case of *Rosen v. U.S.*, Justice John Marshall Harlan wrote for the Court in upholding the conviction of the defendant, Lew Rosen, who was sentenced to thirteen months hard labour and a fine of one dollar for using the U.S. Postal Service to send material deemed 'obscene, lewd and lascivious'. Although Harlan's opinion did not cite *Hicklin*, he followed Blatchford's lead in *Muller* when he stressed that the character of the allegedly obscene content would not be judged on the intent laid out by the author, despite their 'knowledge…of its contents'.[19] This opinion crystallised the issues that the 'bad tendency' test served on artists and writers. By giving no weight to the author's specified intentions, courts took away a key point of their defence. With the words and content of authors subject to the moral-based verdict of judges or juries, material was suddenly prone to the whim of manipulation by moral policing. Since this verdict on the tendency or probable effect of content was the defining factor, the Court also believed it unnecessary that other courts were required to publicly identify the specific materials that were found to be obscene. Furthermore, Harlan wrote that everyone who used the mail in the U.S. for carrying publications 'must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious'.[20] What was considered obscene and lewd, or pure and decent, was never clarified.

[17] *State v. Hazeltine*, 82 Wash. 81 (1914), p.90. See also the Supreme Court's ruling in *Swearingen v. U.S.*, 161 U.S. 446 (1896), p.451, where it found an article in a Kansas newspaper 'exceedingly coarse and vulgar' but not 'calculated to corrupt and debauch the minds and morals of those into whose hands it might fall'.
[18] *Hazeltine*, p.90.
[19] *Rosen v. U.S.*, 161 U.S. 29 (1896), p.33.
[20] Ibid., p.42.

U.S. v. Kennerley

After *Rosen*, the *Hicklin* test was used by American courts for the next four decades to uphold the censorship of numerous creative practices in the fields of art, literature, and education. Although citations slowed during the 1920s and 1930s, it was still invoked as late as 1951, where a district judge in San Francisco referenced the test to declare Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* obscene.[21] That said, there were also signs in the inter-war period of a slow reorientation in the legal parameters of obscenity legislation. Learned's opinion in the 1913 district court case of *U.S. v. Kennerley*, for instance, signalled the start of a reappraisal of the *Hicklin* test towards a standard that better reflected shifting views on morality, acceptance of greater speech rights, and a fairer examination of identified literature. There were two significant sides to his opinion. First, bound by precedent, Learned used the *Hicklin* test to uphold a jury's verdict that found the contested novel in the case to be obscene. In so doing, however, Learned found space to critique the test and speak to its key weaknesses, specifically how its vague instructions served as a tool for subjective and misrepresented interpretations of obscenity. With the power of final determination residing in the judge, this conferred a huge responsibility as the primary arbiter in issues of morality. Second, Learned proposed a different standard for obscenity, which better encompassed the collective social conscience. This spoke to his philosophical ideals around a more engaged and intellectual citizenry, in which a society aware that its voice would be heard was incentivised to think more carefully about the issue of obscenity. Although not implemented, his proposal shifted focus towards limiting judicial discretion in obscenity. It responded to a concern that the current test allowed judges to instil their personal imprint on obscenity law. As an alternative, therefore, these suggestions showed intent to foster a greater culture of restraint in the judiciary.

Learned heard the *Kennerley* case in 1913, four years into his district court judgeship. The case concerned physician Daniel Carson Goodman's *Hagar Revelly*, a novel that charted the

[21] Judge Louis Goodman in *U.S. v. Two Obscene Books*, 99 F. 760 (N.D. California, 1951).

life of a young woman in New York, described as 'impulsive, sensuous' and 'fond of pleasure'.[22] The key concern with the book was the frankness and detail with which it depicted certain scenes of the woman's 'amorous adventures'.[23] Isolated passages were deemed sufficient for a jury to find the book obscene under the 'bad tendency' standard of the *Hicklin* test. When the case was brought before Learned, he wrote an opinion that, although only one page in length, provided an illuminating display of his various thoughts on the subject, although it did not present much in the way of concrete proposals. At its heart was an attempt to reassess whether the *Hicklin* test remained a viable democratic measure in such a divisive issue as obscenity. This targeted the expansive powers of the judge, in addition to the powerful voices on moral regulation that the test had typically served in prior years.

The opening of the opinion showed the limited room for manoeuvre that Learned held as a district court judge. Nonetheless, in accepting the *Hicklin* test as precedent, he also pointed to its key deficiencies. Using a Langdellian critique, Learned recognised that the test still provided the 'proper instructions' to follow, leading him to uphold the jury's verdict.[24] As part of this, he reinforced an important duty-bound point that precedent ruled over personal opinion: 'The test has been accepted by the lower federal courts until it would be no longer proper for me to disregard it'.[25] However, his assessment of the specific mechanics of the test exposed it for inviting the very personal discretion that judges were meant to curtail. First, Learned criticised the unfairness of judging books on isolated passages. He explained the test had been used to cite isolated passages of Goodman's novel as obscene, specifically confirming that two pages in the book 'might be found obscene'.[26] By noting that only these two pages were identified from a four hundred and forty-one page book, it also brought to light the opportunity for misrepresentation in the legal scrutiny of literature. Second, he cast doubt on the practice of determining who might find the book offensive, noting it 'might tend to

[22] *U.S. v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913), p.119.
[23] Ibid., p.120.
[24] Ibid.
[25] Ibid.
[26] Ibid.

corrupt the morals of those into whose hands it might come and whose minds were open to such immoral influences'.[27] Specifically, he added, these were individuals with a cognitive bias that led them to 'most likely to concern themselves with those parts alone, forgetting their setting and their relevancy to the book as a whole'.[28] Learned suggested this applied to 'just' a minority of the American population, albeit one that might command a large influence.[29] Thus, in addition to allowing judges to exercise too much personal discretion, it also invited the possibility that the exercise of that discretion unfairly advantaged a small, unrepresentative section of society. Last, Learned highlighted the lack of a standard of proof for deciding something was obscene. That people 'might' deem content obscene seemed to suffice.[30] As such, the standard did not operate by any kind of certainty, something that was a key problem given the broad powers of censorship that the *Hicklin* test allowed.

Learned's analysis of *Hicklin* was especially significant in highlighting its unrepresentative nature. This was illuminated in the more explicit criticisms that followed in the opinion, where he described the test as being 'consonant with mid-Victorian values' and unable to answer to 'the understanding and morality of the present time'.[31] Learned's response to this issue draws on a key element in his understanding of the concept of restraint. Although suggesting that it may be necessary to overrule the *Hicklin* test in the foreseeable future, this was not a call for wholesale and immediate change. Instead, his proposal recommended mechanisms to reduce the influence of judicial discretion in matters of moral regulation. This started with setting out the following standard, 'I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas'.[32] Learned's suggestion focused on the dangers of concentrating responsibility for arbitrating on free speech in the hands of only a few individuals.

[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid., pp.120-121.

In going deeper into his consideration of defining obscenity, Learned spoke more of democratic principles than specific proposals. This was significant because it captured core elements of his philosophy. The issue in obscenity had been that many regulators acted on a paternalistic mentality, assuming a low expectation of society's ability to handle obscene content. However, Learned's stress on a reduced influence of the judge was tied to his belief that society thrived when it was allowed to engage and experiment with ideas. His language in the opinion indicated that he sought a test to better represent wider society's standards, when he wrote, 'should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?'.[33] When Learned asked for judges to base rulings on society's voice 'here and now', he was contrastingly painting it against the *Hicklin* test, which became symbolic for its use in upholding a 'mid-Victorian' outlook. In pitting his new standard as the opposite, his measurement of societal values would show that it was fulfilling his vision of democracy by representing an evolved and progressive position from the nineteenth century view on obscenity. However, Learned was also aware that this shift to greater openness may not always be smooth, nor fit to his own expectations. The lessons of William James taught him to believe there were no absolutes. This applied to the morally blurry issue of obscenity, in which it was impossible to 'embalm the precise morals of an age or place'.[34] Therefore, he accepted that change may only come from 'gradual development of general notions about what is decent', or may even lead to the restriction of speech, if agreed upon by wider society.[35] However, this was more desirable than keeping obscenity standards concentrated to the small group of voices that had dictated the argument for decades. Besides, the important principle was that his suggestion for replacing *Hicklin's* approach incentivised society to become more engaged in the obscenity debate. As Learned explained, 'To put thought in leash to the average conscience

[33] Ibid., p.121.
[34] Ibid.
[35] Ibid.

of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy'.[36]

Therefore, *Kennerley* was Learned's opportunity to test the waters regarding changing perceptions of obscenity. In arguing for the 'adequate expression of innocent ideas' as the optimum test, when many other courts continued to adopt the *Hicklin* test, Learned was making proposals that presaged those of his colleagues on the bench, including the Supreme Court. Importantly, he did not overrule *Hicklin*, nor suggest concrete standards. However, he laid the foundation for a new discussion on the role of the judge in obscenity. The suggestion of overruling precedent complicates his image as a restrained judge. But by proposing a new standard that reduced judicial discretion, he cleverly reshaped the discussion to show that restraint as a district court judge could be more than adherence to precedent. When the prevailing precedent invited too much in the way of the judge's personal instincts, an alternative proposal could be necessary if it helped foster a culture of restraint in the long run. The vagueness of the *Hicklin* test, in allowing the judge to predict the effect that allegedly obscene content may have on a small group of vulnerable people, was the basis for this alternative. Learned's suggestion was much closer to a sentiment that honoured the free exchange of ideas, because it was widely known that society had progressed from the Victorian standards that were still frequently invoked under the *Hicklin* test. However, Learned's proposal still left open the possibility to regulate many areas of 'obscene' content, if this accurately reflected society's desire. This signified that the end result was not of upmost important — it was the procedure for defining obscenity.

Anderson v. Patten

Learned did not face another obscenity case until after he was appointed to the Second Circuit Court. In the meantime, Augustus *did* face a similar obscenity case just four years after *Kennerley*, in *Anderson v. Patten.* The 1917 case arrived three years into Augustus' judgeship

[36] Ibid.

and is significant for three reasons. First, although it is forgotten in Augustus' rulings on obscenity, it displayed that he was ahead of his time in this area of law. Similar to Learned, he was thinking beyond the *Hicklin* test, believing it too vague and open for judges to define. This left their decisions vulnerable to the persuasion of censors and their prosecutors who singled out isolated passages of literature. Second, the opinion was similar to Learned's in many of its philosophical underpinnings. Augustus accepted the original decision that the postmaster may ban content from the mail, but he criticised the *Hicklin* test whilst promoting the virtues of broader speech rights in shaping a democracy. Third, the opinion highlighted differences between Augustus and Learned's values and jurisprudence. In particular, the greater importance that Augustus placed on the educational merit of classic literature led to him cite this as an exclusion from obscenity charges.

The case involved an appeal against the New York Postmaster, Thomas Patten, after he attempted to withhold from the mail the October 1917 issue of the American literary magazine, *The Little Review*.[37] Founded by Margaret Anderson in 1914, the magazine acted as a forum for transatlantic modernists and experimental writers and artists to publish their work. The magazine caught Patten's attention in October 1917 when it published a short story called 'Cantelman's Spring Mate'.[38] This told the story of a British World War One soldier and his nihilistic ponderings on life and the 'gigantic forces' of nature.[39] Accepting that the conflict would most likely lead to his death, the soldier waged a personal 'war with the world'.[40] As Augustus summarised, 'In his revolt at the confusion and injustice of the war, [the soldier] feels justification at having wreaked his will and obtained his satisfaction, thus, as he says, outwitting nature'.[41]

[37] Patten had also been in the spotlight four months earlier as the postmaster at the centre of the issues in Learned's *Masses* opinion.
[38] Wyndham Lewis was the author of the story.
[39] *Anderson*, p.383.
[40] Ibid.
[41] Ibid.

In his analysis of the content, Augustus revealed an innovative legal approach to obscenity. First, he placed the educational element of the story at the heart of his scrutiny. Prior to *Anderson*, the 'bad tendency' standard had considered the probable effect of content inciting lewd or lustful behaviours, regardless of merit. But merit played an overriding consideration in each of Augustus' points for the case. The key point of contention of the story was where the soldier seduced a young girl and disregarded her appeals when she later became a mother. As Augustus noted, the degree of detail used to describe the relations did not appear necessary 'to teach the desired lesson, whatever it may be'.[42] Augustus was thereby seeking 'artistic merit' which could exempt the story from censorship.[43] In this instance, it could be 'reasonably argued' that the story attempted to attract readers through its 'salacious character', but that also the 'mere description of irregular things in relation to sex may not fall within the statute'.[44] This marked a significant departure from the approach used in the *Hicklin* test, where censors had very broad grounds for challenging material under a loose definition and had the power of speculation at their disposal if they doubted the good intentions of an author. In response, Augustus' proposal stripped from prosecutors the ability to charge for obscenity indiscriminately, since it now allowed obscene material to be circulated and read in public if it possessed a key characteristic — educational or artistic value.

Second, Augustus' incorporation of educational merit highlighted the inherently subjective nature of defining obscenity. Although a protective safeguard for literature and art, it still represented non-legal considerations that needed to be flexibly tailored to each situation and case. Augustus was aware of this in his own consideration of the story under contention. His opinion at times reads like a book review, contemplating the story's variety of moral messages. This included the wickedness of selfishness and indulgence, the demoralising character of war, and, for more reflective minds, how to 'balance the heroism and self-abnegation that always shines forth in war with the demoralization that also inevitably accompanies it'.[45] However,

[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.

he was aware that others may not believe this to be true and that no such summary could encompasses the story's 'full import'.[46] Even the evaluation of educational merit could be limited by numerous factors, including the 'age and fame' of the book and the appeal of such books to a 'comparatively limited number of readers'.[47] With no defined or universal way of approaching an assessment of the merit of the story, it was clearer to see how courts for decades had shown little consistency in their obscenity rulings and how personal views may have played a significant role. Although merit was also subjective, Augustus' description provided a more defined standard than the probable effect predictions of the *Hicklin* test. In considering age and readership, the concept of merit at least provided a kind of measure that could be qualified. This wiped away some of the vague areas for definition that judges could seize upon but also presented some protective guidelines that writers could follow.

Third, in proposing a new approach, Augustus also revealed a close alignment with Learned's philosophical views on democracy. For Augustus, the importance of the opinion was in presenting a procedure that more accurately tied obscenity rulings to the sentiments of society. Echoing Learned's stance that this may not always lead to a favourable result for the author, he ruled out the concept of absolute freedom of speech, believing that only a 'few' people in society would oppose some form of control over lewd publications.[48] However, as a man with an abiding interest in literature, he believed that a broad commitment to freedom of speech remained fundamental for literary and educational creativity to thrive. He was sceptical of the idea that judgements on appropriate morality should be decided by the few. Too frequently he had seen this approach lead to 'narrow and prudish' constructions of the Comstock Laws, which had hurt or suppressed 'literature of permanent merit'.[49] Augustus' vision for defining obscenity was stirred by these fears that further 'really great writings' could, in theory, be banned if the *Hicklin* test was more frequently applied by judges in its

[46] Ibid.
[47] Ibid., p.384.
[48] Ibid.
[49] Ibid.

original form.[50] The duty to define obscenity brought with it a great responsibility, and 'no field of administration requires better judgment or more circumspection to avoid interference with a justifiable freedom of expression and literary development'.[51] Thus, with so much at stake, Augustus' preference was for judges to embrace a more democratic approach to obscenity.

At the same time, *Anderson* also highlighted that the *Hicklin* test remained the precedent. In using its 'bad tendency' standard, Augustus accepted that parts of the story in the *Little Review* had a 'tendency to excite lust'.[52] Furthermore, he noted that a document mentioned in the story was also problematic. The translated document, stated to have been found on a soldier, focused on a German 'committee on increase of population', which was instructing men to impregnate all women available in a designated district.[53] Augustus explained that the document's 'witticism' showed it was not genuine, 'and would not appear to be so to an intelligent reader'.[54] It provided little evidence of a publication intended to give information or to educate on the dangers of the 'Teutonic foe'.[55] Therefore, despite Augustus' criticisms of the *Hicklin* test, its centrality to the assessment made by the Postmaster General was the main determining factor in the case. Channelling the rhetoric of James Bradley Thayer, he confirmed that he could intervene, as a judge, only where the action of the postal authorities had been 'wholly arbitrary and without foundation'.[56] In the case of *Anderson*, Augustus had not found this and refrained from overturning the ban on *The Little Review*.

In presiding over a judgement popularly seen as a victory for social conservatives, Augustus' ruling highlighted the shallowness of the term 'liberal' to assess his judicial legacy. However, the surprise expressed by Margaret Anderson in response to the opinion typified this misunderstanding of how judges approach cases. In the December issue of *The Little Review*,

[50] Ibid.
[51] Ibid.
[52] Ibid., p.383.
[53] Ibid.
[54] Ibid.
[55] Ibid., p.384.
[56] Ibid.

she argued that the consideration of good art and prose should be confined to those well versed in those fields. Therefore, she could not reconcile with a ruling which made 'Our Post Office…the supreme authority on all matters of intellectual interest'.[57] She described it as a 'supreme human joke' and accused the Post Office of being out of touch with the rest of American society.[58] However, Anderson appeared not to have understood Augustus' duty-bound role, which was to separate his personal liberal inclinations and his overall ruling. The contrast in the opinion between Augustus' short section assessing the allegedly obscene content and the more enthusiastic proposal for an evolving obscenity standard highlighted the line separating the judge and the person. The need to preserve high literary standards was an important element for him and, in finding the necessity to outline his concerns about ongoing suppression, he introduced a new protection for literature. This argued that courts should consider the wider literary value of the materials, even where obscenity may be found. In upholding the trial court's verdict in favour of the Post Office, this ground-breaking aspect of the opinion was not even considered by Anderson. However, it was also significant for providing a standard that added some specificity to an area of law that was still dictated by the open-ended *Hicklin* test. Much still needed to be done to check the danger that this test contained in leading judges to predict the effect of obscene literature. Significantly, Augustus' opinion in *Anderson* mirrored Learned's in *Kennerley* in setting out a path for further discussion on obscenity standards in the courts.

U.S. v. Dennett

The *Kennerley* and *Anderson* cases highlighted the limitations of the Hands' judicial powers. Although they publicly criticised aspects of the *Hicklin* test, they were still bound to use it as lower court judges. Thirteen years later, Augustus had an opportunity to revisit these issues. Following *Kennerley* and *Anderson*, rulings by some courts, including state courts, contributed

[57] Margaret Anderson, 'Our Suppressed October Review', *The Little Review*, December 1917, p.49.
[58] Ibid., p.49.

to a shifting tide in the interpretation of obscenity standards.[59] But it was Augustus' opinion in *U.S. v. Dennett* in 1930 which made the biggest leap away from the old measures, when the Second Circuit Court reversed a guilty verdict against feminist activist Mary Dennett for posting a sex education pamphlet through the mail. This was recognised by academics and media commentators, who praised it as a 'liberal decision'.[60] Newspapers throughout the country also praised Augustus' opinion, with one saying it 'indicat[ed] a return to sanity'.[61]

The ruling and opinion in this case were indeed significant contributions to a slowly evolving set of obscenity standards, but the 'liberal' praise equally distorts the essence of what made the opinion so important. First, the same commentators who described it as liberal also noted, 'Judge Augustus Hand, in reversing the decision of the lower court, did not disclaim the authority of *Regina v. Hicklin*. One would wish that a court as liberal as this one would directly disclaim the binding force of the English case'.[62] As *Anderson* revealed, it was not the duty, nor possible, for Augustus to directly overrule a standard that was still widely accepted by many courts as precedent. But through simple and modest language Augustus nevertheless found ways to challenge *Hicklin's* application, if not its overarching restriction. Second, this enabled Augustus to successfully address the vagueness of the *Hicklin* test by promoting standards for a fairer examination of its material. Third, and consequently, the more rigid criteria proposed by Augustus stripped away the ability of partisans — in this case, conservatives — to use the test to achieve their own personal ends. In so doing, it shifted the emphasis away from defining obscenity via a concentration of small, powerful voices and

[59] *People v. Brainard*, 38 N.Y.Crim.R. 470 (1920) and *Halsey v. New York Society for Suppression of Vice*, 234 N.Y. 1 (1922) are two prominent examples in which *Hicklin* was not invoked in the majority opinions. In the former, the court found no passages obscene in the book, despite the fact that it had no moral merit. There were also a number of other charges dismissed by judges, notably those made by the Society of the Suppression of Vice against publishers Horace Liveright and Thomas Seltzer. These examples comprise only a small portion of cases, but still represent a shift from the blanket invocation of *Hicklin* in courts.

[60] Sydney Grant and S. E. Angoff, 'Recent Developments in Censorship', *Boston University Law Review* 10 (1930), 488-509 (p.502).

[61] *Bismarck Tribune*, 6 March 1930, p.4. Dr. Morris Fishbein also described it as an 'excellent decision' in the *Indianapolis Times*, 7 March 1930, p.8. Furthermore, in the *Brooklyn Daily Eagle*, 4 March 1930, p.18, the following was written, 'We may note that the decision of the higher court coincides perfectly with the view all responsible newspapers have taken of this much discussed case and with common public opinion'.

[62] Grant and Angoff, 'Recent Developments in Censorship', p.502.

sought a wider representation of American society's moral position. This was achieved by shrinking the opportunities judges had to define obscenity on speculation.

The pamphlet that came under scrutiny at trial was *The Sex Side of Life*, an educational piece written by Dennett for her children, in response to the 'inadequate' and 'unsatisfactory' content already in the field.[63] In her defence, Dennett presented a plethora of evidence, including the pamphlet's wide range of endorsements from publications in medical journals and a number of orders to buy the pamphlet from Christian and theological associations. In her own writing, Dennett's intent was to provide a 'frank' and 'clear' explanation of sex for children.[64] The pamphlet had been banned as early as 1922, but Dennett had continued to mail it under first class privileges. However, in 1928, an alleged complaint by a Daughter of the American Revolution (D.A.R.) prompted the post office to bring the issue to court by indicting Dennett under the Comstock Laws.[65] At trial, Judge Grover Moscowitz charged the jury to base its decision on the *Hicklin* test. The jury returned a verdict of guilty and Dennett was sentenced to pay a fine of 300 dollars.

Dennett appealed to the Second Circuit, where the case was heard before Augustus, Thomas Swan, and Harrie Chase. Reversing the jury verdict, Augustus wrote an opinion for the court reaffirming that the *Hicklin* test enabled material to be brought to trial if found obscene, regardless of intent. However, Augustus did incorporate considerations of the literature's merit, as he had in *Anderson*, thus highlighting continuity. He focused on the importance of the pamphlet's audience in this case, writing that it was intended for adults to pass on the information to children at their discretion. Augustus explained, 'The fact that [children] might obtain it accidently or surreptitiously, as they might see some medical books which would not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper'.[66] These evaluations were, of course, subjective, but they added an additional layer of

[63] *U.S. v. Dennett*, 39 F.2d 564 (2d Cir. 1930), p.565.
[64] Ibid., pp.565-566.
[65] The D.A.R. is a membership organisation for women with direct descendance from the American Revolutionary era. The group has been historically involved in social and political activism.
[66] *Dennett*, p.568.

consideration for the judge to encompass. In evaluating the educational value of the pamphlet, Augustus considered the full scope and intent of the material. This again dismissed the simplistic application of the *Hicklin* test, which had rested its charges solely on speculating the impact on an individual from reading obscene material.

Augustus went deeper into this process of scrutiny. Aware that the difficulty of defining obscenity had led to vague interpretations, he considered numerous non-legal factors that narrowed the range of interpretation that judges previously applied. This was evident in his examination of the 'meaning and scope' of the words of the Comstock Laws which prohibited the mailing of 'obscene, lewd or lascivious' material.[67] To date, courts had largely assumed that the *Hicklin* test was the only means for interpreting the Comstock Laws. Aware that anyone and everyone could be corrupted by obscene material, censors wielded broad powers with the test under the guise of shielding society. However, Augustus reshaped the nature of this debate by highlighting the short termism and negative effects from such paternalistic behaviour. Focusing on the topic of Dennett's pamphlet, he described how the functions of the sex organs will always potentially 'arouse lust' because the 'sex impulses are present in every one'.[68] However, these biological truisms were not grounds in themselves for depriving the youth of sex education, because 'the risk of imparting instruction outweighs the disadvantages of leaving them to grope about in mystery and morbid curiosity'.[69] If deprived, children would be left to rely on 'ill-informed and often foul-minded companions, rather than from intelligent and high-minded sources'.[70]

What distinguished *Dennett* from the previous Hand opinions, however, was Augustus' formulation of a standard that considered a combination of the educational purposes of Dennett's pamphlet and Learned's previous proposal in *Kennerley* to gauge the 'average conscience of the time'. This was a clear shift of emphasis from the judge's interpretation of

[67] Ibid.
[68] Ibid., p.569.
[69] Ibid.
[70] Ibid.

obscenity as the ultimate decider to the broader considerations of society. Putting these factors into his reading of the case, Augustus wrote, 'The old theory that information about sex matters should be left to chance has greatly changed'.[71] Although there may still have been a difference as to the optimum instructions, 'it is commonly thought in these days that much was lacking in the old mystery and reticence'.[72] The increasing diversity in literature on sex-based topics was evidence of changing times, which had even included a governmental role in funding sex education.[73] This educational assessment and acceptance of the evolving societal definition of acceptable obscenity displayed the fruits of William James' emphasis on an educated and informed citizenry.

In following these principles, Augustus spent a lengthy section of the opinion pushing the educational standard. He followed a similar line to that in *Anderson* by focusing on the wider effect of censorship on literature and education, 'The statute we have to construe was never thought to bar from the mails everything which might stimulate sex impulses. If so, much chaste poetry and fiction, as well as many useful medical works would be under the ban'.[74] Therefore, in evaluating the 'merit' of challenged works, Augustus sought to be as tight as possible in his language. The constitutionality of the Comstock Laws was under no doubt, but the laws were also not designed to interfere with 'serious instruction regarding sex matters unless the terms in which the information is conveyed are clearly indecent'.[75] This was a dramatic shift from the open ability to make obscenity accusations under *Hicklin*. Although the term 'clearly indecent' could also be open to a broad construction, Augustus clarified what was exempt in his next sentence, stating that it was material which contained a 'truthful exposition of the sex side of life' and was 'evidently calculated for instruction and for the explanation of relevant facts'.[76] By focusing on intent from the material, this narrowed the role

[71] Ibid., p.568.
[72] Ibid.
[73] See Treasury Department United States Public Health Service, *Sex Education: A Symposium for Educators* (Washington D.C.: U.S. Government Printing Office, 1927). Augustus cited the pamphlet in his opinion on page 568.
[74] *Dennett*, p.568.
[75] Ibid., p.569.
[76] Ibid.

of impact and focused on the author over the audience. With this standard, Augustus noted that Dennett's material was written with 'sincerity...and with an idealization of the marriage relation and sex emotions'.[77] Thus, truth, relevance, and sincerity were criteria that outweighed the perceived 'vulgar' nature of material.[78] This expanded the more general position he had taken in *Anderson*, which was that material deemed obscene could be exempt from the statute if the material could be justified.

In expanding further on the principles of *Anderson*, Augustus' closing in *Dennett* also marked the most explicit departure from the 'bad tendency' standard and consequently, from the reliance on the judge's predictive abilities on obscenity. He noted that Dennett's pamphlet would invite a 'wide difference of opinion'.[79] However, 'Any incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect'.[80] This wording did not explicitly overrule the existing *Hicklin* standard but it did stress the larger context of the material as a more important factor for the judge or jury to consider. Since the jury had not been given such instructions in Dennett's trial, the conviction was overruled.

Augustus' reinterpretation of obscenity law to encompass the 'main effect' of the content was deservedly championed by the *New York Times* as a 'Wholesome Decision'.[81] His opinion did not question the constitutionality of the Comstock Laws, but it recognised the shift in social perceptions of morality that had occurred in the intervening years and introduced nuances to the assessment of obscenity standards — notably based on the educational merit of the material. These new safeguards reflected changing social norms and replaced some of the vagueness that had been used by judges under the *Hicklin* test to rule on their personal discretion. Thus, the innovations that were introduced sought to restrain judges and potential

[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid. Augustus concluded that the main effect was to promote 'understanding and self-control' in topic of sex.
[81] 'A Wholesome Decision', *New York Times*, 4 March 1930, p.22.

censors in their definition of obscenity. *Dennett* was also far from a cut and dried liberal decision. It still accepted that obscene literature could be banned, but proposed more careful and stringent examination of the value of identified material. Incorporating evolving obscenity standards, it ruled that this material should be subject to a broader democratic consensus. In so doing, this principled adherence to a wide democratic process ensured that the Comstock Laws remained largely intact and the 'bad tendency' standard a consideration. It remained up to the people to signal their desire to reject these standards more forcefully.

U.S. v. Ulysses

An even greater task came before Augustus in 1934, when James Joyce's *Ulysses* was the subject of a famous legal battle. It was a watershed case on which both Hands had to rule, but it was Augustus who produced the opinion with the literary skill, incisiveness, and substance to match the magnitude of the case. *U.S. v. Ulysses* remains one of the most publicised American obscenity cases of all time.[82] This is due to the 'classic' status which Joyce's modernist novel went on to attain in literature. Despite the furore around the book, however, the Hands' contributions in this dramatic saga have been underplayed. This is predominantly due to the attention focused on the opinion of district court judge John Woolsey.[83] Significant to note here is the fact that Woolsey built on the ideas of previous opinions in obscenity law, including those pioneered by the Hands. In their own legal assessments of Joyce's book, meanwhile, Augustus and Learned also built on their previous judicial work in this area to formulate an impressive opinion that struck at the *Hicklin* test's underlying standards. In so doing, the Hands continued to shift more focus to attending to the broader opinions of society on obscenity. This was done despite Augustus' personal scepticism as to the merit of the novel.

[82] Floyd Abrams made this assertion in his article, 'Free Speech and Civil Liberties in the Second Circuit', *Fordham Law Review* 85 (2016), 11-37 (p.15).

[83] This is largely due to the points that have been made by Irving Younger that explain the popularity of Woolsey's opinion. The opinion's praise of the book led to it being reproduced in all Random House printings of the novel. As a result, it is believed to be the most widely distributed judicial opinion in American history. See Irving Younger, '*Ulysses* in Court: The Litigation Surrounding the First Publication of James Joyce's Novel in the United States', in *Classics in the Courtroom,* ed. by J. McElhaney, 25 vols (Minnetonka, MN: Professional Education Group, 1989), xvi.

Whereas Woolsey praised the book on a strong personal level, Augustus presented a skilled but impartial exterior that exemplified his independence. Furthermore, the consideration of non-legal factors dominated Learned and Augustus' thinking, both of whom were cautious of how partisan arguments would grasp at the slightest favourable point in any judicial opinion presented in this high profile case. Although in agreement in protecting *Ulysses*' right to circulate in the U.S., their differences also showed the complex thinking that went into the process, making it far from a simple binary of those for or against the circulation of *Ulysses*.

The publication and circulation of *Ulysses* in the U.S. had been banned since 1921 after *The Little Review's* serialisation of sections of the novel led to a prosecution under the Comstock Laws. Twelve years later, *Ulysses* saw the confines of a courtroom again after customs officials at a New York dock seized a copy of the book that was being smuggled in from Europe. This was part of a carefully coordinated and meticulous effort by Random House publisher and founder, Bennett Cerf, and lawyer, Morris Ernst, to provoke a lawsuit that would reopen discussion about the novel's alleged obscenity.[84] The case came before the flamboyant John Woolsey, who handed down his opinion on 6 December 1933 that found *Ulysses* was not obscene. [85] His most important contribution came from his definition of obscenity, which stressed judgement of the book based on 'its entirety'.[86] This echoed the standard Augustus had first emphasised in *Anderson*, when calling for material to be assessed on their 'full import', and reiterated in *Dennett*, when he stressed the need to substitute the interrogation of isolated passages of material for an examination of the 'main effect'. Thus, assessing *Ulysses* under 'such a test as this', Woolsey wrote that the novel did not excite 'sexual impulses' or 'lustful thoughts'.[87] Despite the praise for Woolsey's opinion and ruling, many of its most important elements touched upon other points that the Hands had previously considered in

[84] See *U.S. v. Ulysses: Documents and Commentary*. The book contains a variety of essays looking at the *Ulysses* trial and its backdrop, as well as holding a large collection of primary sources from Cerf and Ernst surrounding the case.
[85] For example, Woolsey was a fan of the late eighteenth century and even fantasised of himself as an old throwback of the English courts, most evidently through an old photograph that he had taken of himself wearing the wig and robes of an English judge, which he disseminated to colleagues.
[86] *U.S. v. One Book Called Ulysses*, 5 F. 182 (S.D.N.Y. 1933), p.185.
[87] Ibid.

their obscenity opinions. For example, Woolsey found the use of 'dirty words' justified by Joyce's 'attempt sincerely and honestly to realize [the] objective[s]' of his book.[88] Woolsey also stressed the role of Joyce as a 'great artist', compounding on Augustus' emphasis on literary merit.[89]

The government appealed this decision to the Second Circuit, leading to Learned, Augustus, and Martin Manton hearing the case in May 1934. The pre-conference memoranda of these men revealed three markedly distinct views. Manton represented the old argument on obscenity. In calling for maintaining the *Hicklin* test, he stressed that the objective or motive of the author was not important and truth did not preclude material from being guilty of obscenity. Augustus suggested that the book be judged as a whole, again resting on the argument that to do otherwise would lead to the censorship of widely respected publications. However, on this basis, Augustus held *Ulysses* in much less regard than Learned. He believed its 'greatness' was exaggerated, but did not deny that it was still a 'powerful' text.[90] Learned, on the other hand, called for a 'relevance test' from his 1913 *Kennerley* proposal, which proposed the acceptance of content 'honestly relevant to the adequate expression of innocent ideas'.[91] He was most forceful when he wrote that, 'The chance dictum of Cockburn, C.J., has nevertheless been repeated as though it were an authoritative definition. However, the Supreme Court never accepted it'.[92] Learned's justification was grounded in the rationale that the *Hicklin* test was too simplistic and had led to skewed results in favour of censors. Instead, he suggested, a more reasoned balancing consideration had to be considered, 'The conflicting interests are the freedom of the authors to express themselves fully and as they wish as against

[88] Ibid., p.183.
[89] Ibid., p.184.
[90] LH 194/2, Augustus Hand memo for *U.S. v. Ulysses*, July 1934. A letter from Augustus to Charles Wyzanski also exemplified his mixed review of the book. He described *Ulysses* as a 'coarse nasty book'. Yet, simultaneously, he wrote, 'Some parts are beautiful'. See Cambridge, MA, Charles Wyzanski Papers, HLS 2/2, letter from Augustus Hand to Charles Wyzanski, 16 August 1934.
[91] LH 194/2, Learned Hand memo for *U.S. v. Ulysses*, 6 July 1934.
[92] Ibid.

the debauching of their readers' minds'.[93] This was a more rounded interpretation, but it required viewing each work as a whole, as Augustus had suggested.

These different proposals revealed contrasting visions for the treatment of obscenity cases. However, the private correspondence of the Hands was also revealing for the careful thought that went into the wider perception of their judicial powers in obscenity law. Their objective with each obscenity case to date had been to stress that *Hicklin* was too reliant on the judge's personal discretion and that, by stressing new innovations for defining obscenity, they would reduce the influence of such discretion. The Hands were alert, though, to the possibility that overruling the *Hicklin* test in *Ulysses* could be misconceived as an attempt to increase the personal influence of judges in social issues. Thus, Augustus suggested that the court affirm Woolsey's ruling with no opinion, in order to avoid publicity. However, Manton's commitment to voicing a strong dissent prompted the Hands to reconsider their options. Given the contentiousness of the topic, Augustus was ultimately chosen to write the opinion for two main reasons. The most important was that his simpler writing style was more apt for a case where the judging panel wanted to avoid giving any quotable lines. To avoid accusations of partisanship or prejudice from the losing side, the intention was to 'give the book a minimum of advertising'.[94] The second reason apparently related to the expectation that the opinion would receive criticism, regardless of which Hand wrote it. However, whilst Learned was an open non-believer, Augustus had an esteemed reputation for respectability with his Christianity. One of Learned's former law clerks, Arthur Dougan, recalled his boss saying, 'If I had written the opinion they would have said "that lecherous old bastard", but Gus is a vestryman in Trinity Church and if he wrote the opinion no one would criticize his morals'.[95]

Augustus handed down the opinion of the court in *U.S. v. One Book Entitled Ulysses* on 7 August 1934. However, contrary to the Hands' original intentions, his opinion was

[93] Ibid.
[94] LH 194/2, Augustus Hand memo for *U.S. v. Ulysses*, July 1934.
[95] Arthur Dougan on the Hands' 'Religious Faith', in Marcia Nelson, pp.57-58. Dougan begun clerking for Learned shortly after *Ulysses* was handed down.

unintentionally very quotable and adopted a colourful literary style that could easily be mistaken for having been written by Learned. Whether it was indeed by an honest mistake or a natural assumption, the *New York Times* made this error when it accredited the opinion to Learned the following day.[96] In its substance, Augustus' opinion was also significant because it represented a culmination of the standards that he had set out in *Anderson* and *Dennett* that sought to minimise the influence of judges' personal thoughts on obscenity. Primarily, he used his merit standard to consider the voice of experts in literature, describing *Ulysses* as a 'sort of contemporary classic' that built a reputation from people whose opinions are 'entitled to weight'.[97] Furthermore, he praised its ability to combine passages of 'beauty and undoubted distinction' with those of extreme 'vulgarity'.[98] However, Augustus also recognised that the broad mixture of reviews for *Ulysses* revealed the strong influence of subjectivity in assessing the book's quality. Thus, there was a balance needed to assessing the standard, as he noted, 'We may discount the laudation of *Ulysses* by some of its admirers and reject the view that it will permanently stand among the great works of literature'.[99] Furthermore, what made Augustus' opinion so important was the recognition that obscenity was a fluid concept that could change dramatically according to the discreet views of the individual. This made it easy to be freely wielded as an accusation. To provide a fairer process of examination and shield material against this threat of censorship, Augustus added multiple other standards of interrogation to present a clearer definition of obscenity and one which incorporated a broader range of voices in American society. Thus, he invoked many of the other criteria that he and Learned had laid out in previous opinions, often viewing them favourably towards *Ulysses.* Most notably, this included Augustus' interpretation of Joyce's writing as 'sincere, truthful, relevant to the subject, and executed with real art'.[100]

[96] '*Ulysses* is Upheld by Appeals Court', *New York Times*, 8 August 1934, p.15.
[97] *U.S. v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934), p.706.
[98] Ibid.
[99] Ibid.
[100] Ibid.

The opinion also stood out for Augustus' most emphatic denunciation of the *Hicklin* test to date. This included his critique of a fundamental method of the test — judging content on isolated passages. Augustus evaluated the book as a whole under the following standard, 'The questions in each case is whether a publication taken as a whole has a libidinous effect'.[101] Under this assessment, he stated, 'The book…is not pornographic, and, while in not a few spots it is coarse, blasphemous, and obscene, it does not, in our opinion, tend to promote lust'.[102] Even where there were passages that promoted eroticism and lust, Augustus found their significance reduced by the 'portentous length' of the book,

> The erotic passages are submerged in the book as a whole and have little resultant effect. If these are to make the book subject to confiscation, by the same test Venus and Adonis, Hamlet, Romeo and Juliet, and the story told in the Eighth Book of the Odyssey by the bard Demodocus of how Ares and Aphrodite were entrapped in a net spread by the outraged Hephaestus amid the laughter of the immortal gods, as well as many other classics, would have to be suppressed.[103]

Again, the preservation of works of literary standing was fundamental to Augustus. Suppressing a book with 'artistic merit and scientific insight' such as *Ulysses* could set a dangerous precedent and would only embolden the moral crusaders that both Hands opposed.[104] The statement applied to *Ulysses* because, despite Augustus' personally mixed view of the book's qualities, he ascertained that many critiques found it relevant. In part, this had been helped by the work of Ernst and Cerf, who ensured that the confiscated book involved printed excerpts of many positive foreign reviews that it had received. Thus, as Augustus wrote, 'confiscation for such a reason would destroy much that is previous in order to benefit a few'.[105] In order to avoid such consequences, Augustus broadened the field of exemptions from obscenity laws. He said that fictional literature should be added to the list of physiology, medicine, science, and sex instructions, as areas exempt from obscenity statutes, as long as the

[101] Ibid., p.707.
[102] Ibid.
[103] Ibid.
[104] Ibid., p.706.
[105] Ibid., p.707.

promotion of lust was not 'the dominant note of the publication'.[106] *Ulysses'* 'evident truthfulness', sincerity, and relevance included it in this exemption.[107]

Although ambitious in its changes to obscenity standards, the last segment of the opinion again showed that Augustus was promoting the democratic inclusion of more voices into the legal sphere, rather than elevating the powers of the judge. The changes he proposed to obscenity regulation allowed a more diverse set of people to participate in censorship discussions and, with a clearer criterion for the examination of obscene material, this would enable judges to stand aside in future cases. As Augustus noted, he believed it was necessary to point out that the importation of obscene books was still 'prohibited generally' by the statute at hand.[108] Augustus found no authority to rule it unconstitutional, since obscenity remained outside the realm of First Amendment protections. A more 'liberal' landscape for obscene material may be desirable, but it was not for Augustus to decide. Therefore, the power to suppress allegedly obscene material also remained with the judiciary, even if Augustus disagreed with the decision. The importance of the reorientation in standard was that any decision came from a more thorough process. As he wrote, 'Art certainly cannot advance under compulsion to traditional forms, and nothing in such a field is more stifling to progress than limitation of the right to experiment with a new technique'.[109] He explained that the judge must interpret the statute to ban obscenity based on the 'dominant effect' of the content, since risks that came with freedom of experimentation were more valuable than those from broader censorship.[110] To emphasise the threat of censorship, Augustus dug into his arsenal of historical knowledge, retelling 'The foolish judgements of Lord Eldon…proscribing the works of Byron and Southey'.[111] He believed actions of the former Lord High Chancellor of Britain could be seen as a 'warning to all who have to determine the limits of the field within which

[106] Ibid.
[107] Ibid.
[108] Ibid., p.708.
[109] Ibid.
[110] Ibid.
[111] Ibid.

authors may exercise themselves'.[112] It was Augustus' most passionate plea for allowing greater speech freedoms in the country.

Manton's disagreement with the ruling led to a dissenting opinion which underlined the key differences between the traditional *Hicklin* position, which he still held, and the revisionist approach introduced by Learned and Augustus. First, Manton based his views of *Ulysses'* obscenity on the selective, isolated pages cited by the government. Second, he believed in maintaining a rigid moral standard until views had shifted enough to prompt a change by Congress. But what separated Manton's deferral to the legislature from the Hands' view was the paternalistic vision he believed Congress could and should wield. As he wrote, 'The public is content with the standard of salability; the prigs with the standard of preciosity. The people need and deserve a moral standard; it should be a point of honor with men of letters to maintain it'.[113] This was driven by the traditional consideration of protecting 'susceptible audiences'.[114] The Hands had argued that the topic of obscenity required a test that better reflected the complex and multi-layered nature of the subject and its times. They believed in a restrained judiciary and a legislature with great responsibility. However, they echoed concerns from earlier cases that when the legislature failed to act to protect the American people, the Hands were inclined to follow the sentiment of the people. Thus, they simply required that responsibility to be accountable more directly to the wider populace, not only powerful campaigners such as Comstock. This was achieved via the multiple standards they used in assessing *Ulysses*. Thus, their test happened to be antipathetic to an elitist, albeit altruistic, interpretation of protecting the 'less sophisticated members of society'.[115] As a symbol of how quickly Manton's position had become antiquated, he cited other cases that relied on *Hicklin*, but each had largely been decided decades before *Ulysses*.[116]

[112] Ibid.
[113] *Ulysses*, (Judge Manton dissenting), p.711.
[114] Ibid.
[115] Ibid.
[116] Most of these were nineteenth century cases, including *U.S. v. Bebout*, 28 F. 522 (N.D. Ohio, 1886), *U.S. v. Wightman*, 29 F. 636 (W.D. Pa., 1886), and *U.S. v. Smith*, 45 F. 476 (E.D. Wis., 1891).

Although Woolsey's opinion has been more widely recognised, his opinion built on Augustus and Learned's previous opinions to create an important legal precedent for the review of controversial literature. Augustus' subsequent opinion showcased the numerous standards that had reshaped the procedure for defining obscenity law. This placed the focus of judging literature on the wider reflections of society. The task of identifying that wider consensus on obscenity was problematic in itself because the Hands were still the ones who had to make that determination. However, the importance was in shifting from *Hicklin* — and its emphasis on the judge's personal abilities to identify obscenity and its probable effect — to more thorough standards that incorporated the voices of others. Thus, the Hands had to determine if *Ulysses* fit the definition of educational and artistic merit that they said it required, but they did so explicitly in reference to gauging cultural values — not theirs, and certainly not Comstock's. Congress' powers were not limited, but the use of such powers was held to greater account and rigour. The legal establishment could still judge the book, but the burden was on proving that the book's dominant effect was obscene. With its combination of literary colour, cultural understanding, and legal acumen, Augustus' opinion inspired a new approach to obscenity and left Manton's dissent as one of the last of a dying breed.

Preserving *Ulysses*

Following the *Ulysses* opinion, the Hands were involved in a number of other obscenity cases which represented an attempt to preserve what *Ulysses* had established. They continued the focus on limiting the ability of a small number of individuals, including judges, from applying loose definitions of obscenity. However, the first of these cases was also important because it highlighted a notable difference between Learned and Augustus on the necessity of measuring educational merit for 'obscene' material. In Learned's reasoning for rejecting this, he further showed that the obscenity issue for the Hands had always been about changing procedures to limit judicial power rather than reaching a liberal reformulation of obscenity standards.

This case was *U.S. v. Levine* in 1936, which saw the Second Circuit reverse the conviction of Esar Levine by a jury for posting five obscene advertisements in the post. Three of these were submitted as evidence to the Second Circuit. They were *Secret Museum of Anthropology*, *Crossways of Sex*, and *Black Lust*. The first was essentially a pornographic photograph collection of nude women from across the world. The second 'professes to be a scientific treatise on sexual pathology'.[117] The third was considered a fictional 'study in sadism and masochism'.[118]

The case came before Manton and the Hands again, and revealed some of the clear differences between Learned and Augustus. In private, Manton found all three books obscene, Learned was the most lenient in believing only *Black Lust* to be obscene, and Augustus stood in between, finding two obscene — *Crossways of Sex* and *Black Lust*. Although the Hands still expressed the same sentiment for reducing the influence of personal discretion by judges in obscenity, Learned pitched an even more radical judicial retreat from the obscenity issue than Augustus. Augustus had argued that the works should not be given broad protected status as they did not hold educational merit or classical status. However, Learned believed this should not be a factor, since it would set a precedent in excluding fewer mainstream writings from review and thus conflict with his vision of a successful democracy that functioned on a free platform for literary experimentation. For Learned, although educational merit represented a better and more qualifiable standard than the *Hicklin* test's 'bad tendency' standard, it could still be open to wildly subjective interpretations from a judge. Thus, Learned was more inclined to accept even speech commonly held to have little merit, whilst Augustus believed more stringent regulations should be accepted outside educational material, and that the obscenity of two of the books was so clear that the jury verdict 'ought to stand'.[119]

[117] *U.S. v. Levine*, 83 F.2d 156 (2d Cir. 1936), p.156.
[118] Ibid.
[119] LH 197/1, Augustus Hand memo for *U.S. v. Levine*, 24 February 1936.

Nonetheless, when Learned came to writing his opinion, Augustus refrained from dissenting, seeing greater value in a unified court.[120] Learned's opinion served as a useful and forceful statement of the differences between the old *Hicklin* test and the evolved standards for defining obscenity. This was displayed through his criticisms of the jury charges of the trial judge, who had laid out standards for obscenity based on the old *Hicklin* test. Learned described how the judge had confused the jury by asking it to assess obscenity by its effect 'on the usual, average human mind', before later stating that it was to protect 'the young and immature, the ignorant and those who are sensually inclined'.[121] The judge also deemed 'single passage[s]' that excited 'lustful or sensual desires' as sufficient grounds for conviction.[122] In doing this, the trial judge had strayed from two of the core principles established by the *Ulysses* standard. Firstly, he narrowed the effect of the book back down to the perceived vulnerable members of society. Secondly, he did not advise the jury to reflect on the whole context of the material. Learned responded with thoughtful consideration of the value of intellectual and educational experimentation in shaping democracy, attacking the *Hicklin* test's heavy emphasis on combatting the 'evil against which the statute is directed' at the sacrifice of 'all interests of art, letters or science'.[123] But more importantly, he took aim at the ease with which the *Hicklin* test could be manipulated. Notably, he criticised the willingness to censor obscene content based on the mere chance or prediction that someone may get sensual gratification, framing it as the mark of an intolerant society, 'No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently'.[124]

This reinforced the conclusion that Learned's obscenity concerns had always been about questions of judicial power. Learned's transformation of obscenity law was part of a democratic compromise which accepted that there was no binary right or wrong. As he wrote,

[120] Manton also joined for a unanimous court on the finding of inconsistencies in the trial judge's conduct, which was grounds for a retrial.
[121] *Levine*, p.156.
[122] Ibid.
[123] Ibid.
[124] Ibid., p.157.

values were not absolute, 'As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable'.[125] Accepting this characteristic in human decision making, judges were not the optimal reflection of a country's values. Instead, the judge's duty was only to provide an honest and clear charge to the jury. Thus, Learned elaborated on what the trial judge should have done whilst revisiting the standards Augustus had laid out in *Ulysses*,

> the work must be taken as a whole, its merits weighed against its defects if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect not upon any particular class, but upon all those whom it is likely to reach. Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc, like the standard of care.[126]

Measuring speech within obscenity standards had become the subject of multiple variables under the Hands. It had been interpreted this way to protect speech which possessed a clear enough merit to outweigh any 'salacity', and prevent the application of the type of restrictive, 'absolute standard' that the trial judge had set.[127] Thus, this opinion represented a succinct summary of the safeguards both Hands had begun to conjure with more than two decades prior.

The Hands faced another key obscenity challenge seven months after *Levine,* in *U.S. v. One Package*. This served as a much greater unifier for their shared desire of restraint on the issue of obscenity. The case involved a licensed New York physician, Hannah Stone, who was set to receive a new type of diaphragm for testing from a Japanese physician in Tokyo. U.S. customs officials seized and confiscated it under the 1930 Tariff Act, which banned the importation of contraceptive provisions.

The case showed that some obscenity rulings strayed outside of literature, but the common denominator was regarding what could be sent in the mail. In this instance, Augustus showed the adaptability of the standards that he had designed for literary content by applying them to

[125] Ibid.
[126] Ibid.
[127] Ibid.

a very different material culture. In his opinion he continued to put educational merit at the heart of his obscenity standard. Joined by Learned and Thomas Swan, the opinion described the Comstock Laws as 'part of a continuous scheme to suppress immoral articles and obscene literature and should so far as possible be construed together and consistently'.[128] But since obscenity standards had been applied by these laws consistently across the spectrum, from medical practice to literature, Augustus reinforced this approach to allow material to be subject to more rigorous examination rather than simply suppressing it on the whim of speculation. Furthermore, he continued to frame his procedures for defining obscenity as a more accurate way for measuring contemporary societal standards. Thus, he rejected a 'literal' interpretation of the Comstock Laws because information from that period had been much more 'limited'.[129] Since obscenity fluctuated upon the evolution of social values and convention, Augustus stressed that Congress would have only intended literal interpretation of the Comstock Laws had it 'understood all the conditions' under which the laws would be used in the future.[130] Consequently, it was 'common sense' to allow the importation of mail which 'might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients'.[131] Any contrary interpretation could foster a 'complete suppression of articles, the use of which in many cases is advocated by such a weight of authority in the medical world'.[132] This attempt to contrast his method of defining obscenity with the *Hicklin* test was a convincing restatement of how the powers of final determination had shifted to a more representative and wider range of voices.

Although Learned advocated an even more restrained role for judging than Augustus in *Levine*, these two post-*Ulysses* cases signified both Hands' attempts to reconcile with the concept that, to minimise the influence of personal judicial discretion, they had to first wield enough power to transform obscenity law. In *One Package*, Learned noted in a short

[128] *U.S. v. One Package of Japanese Pessaries*, 86 F.2d 737 (2d Cir. 1936), p.739.
[129] Ibid., p.738.
[130] Ibid., p.739.
[131] Ibid.
[132] Ibid., p.740.

concurrence, ‘Many people have changed their minds about such matter in sixty years’, but a statute ‘stands until public feeling gets enough momentum to change it, which may be long after a majority would repeal it’.[133] He admitted that he took this position begrudgingly, because he was aware of the suppression the Comstock Laws had achieved. However, it was more important for the fact that it reflected the ‘average conscience of the time’. Both Hands judged that average conscience had outpaced the draconian standards that the Comstock Laws invoked. This was why Learned was content with Augustus’ doctrine to regulate the legislature’s examination process for pieces of art, educational material, or literature before determining their obscenity.

The fact these revised standards for judging obscenity lived on in the legal doctrine of the Supreme Court clearly highlighted the lasting significance of the Hands’ judgements on *Ulysses*. Indeed, twenty-one years after their landmark decision, the Court spoke directly to their work on obscenity legislation in *Roth v. U.S* (1957). Writing for a six to three majority, Justice William Brennan stated, ‘The test in each case is the effect of the book, picture or publication considered as a whole…you determine its impact upon the average person in the community’.[134] Throughout, the Court used similar language to the Hands in defining obscenity standards, even citing their cases when rejecting the *Hicklin* test.[135] It also confirmed that obscenity did not officially fall within the confines of First Amendment protection — something that is still upheld today.

Again, when the Court finessed its treatment of obscenity law in *Miller v. California* (1973), it relied heavily on elements the Hands had used in their own interpretations. Even more important to note is the fact that in today’s U.S., the Hands’ standards for obscenity remain considerably more protective than certain aspects of current Supreme Court doctrine.

---

[133] *One Package*, (Judge Learned Hand concurring), p.740.
[134] *Roth v. U.S.*, 354 U.S. 476 (1957), p.490. The case involved the conviction of Samuel Roth under a federal statute for sending copies of *American Aphrodite* through the mails. This publication comprised nude photography and erotica literature.
[135] The Court cited *Dennett*, *Ulysses*, and *Levine* when stressing the importance of measuring contemporary standards and the dominant effect of the book.

In two of its three core pillars, the enforced *Miller* test replicated what the Hands originally instituted. First, it gauges whether the 'average person, applying contemporary community standards', finds the work as a whole to appeal to its prurient interest. Second, it asks whether the work possesses artistic, literary, political, or scientific value. On a national level, they are similar in their protective standards for obscene speech. The Court's deferral to the conscience of society and the various merit-based elements reveals that the Hands' broader aims around judicial influence have lived beyond the cases they adjudicated between 1913 and 1936. Their opinions in *Levine* and *One Package* added to the groundwork set out in previous opinions and secured a fundamental shift in the procedure of interpretation in obscenity law. Since these interventions, the influence of judicial discretion has remained in a limited format and never returned to the broader powers wielded in the *Hicklin* test era. However, in writing the opinion for the case in *Miller*, Chief Justice Warren Burger introduced a third factor, which deferred the judgement of obscenity to local norms, rather than on a 'hypothetical and unascertainable "national standard"'.[136] This left certain areas of the country that are heavily influenced by religious social conservatism considerably more susceptible to strict censorship standards, which also showcases how protective the Hands' own innovations proved to be in the earlier twentieth century.

Conclusion

The Hands were part of an *avant-garde* in the early twentieth century that reshaped the legal approach to obscenity, despite the difficulty in defining this inherently subjective field of law. It is easy to frame this movement simply as a liberal response to decades of conservative suppression of literary, artistic, and scientific experimentation. However, the Hands' earlier rulings upheld suppressive actions that were favoured by conservatives, exposing the liberal label as flawed. Instead, the Hands' dismantling of the *Hicklin* test illuminated deeper philosophical objectives in play. Learned's stance in the *One Package* case in 1936 showed

[136] *Miller v. California*, 413 U.S. 15 (1973), p.31.

that he was still cautious of overstepping his bounds, over two decades after his original opinion. Alongside Augustus, he feared an increasing tendency of courts to overreach their boundaries. Obscenity proved an apt test for them, as their district court opinions showed the divide between what they valued as the right interpretation and what they were judicially bound to uphold. What tested them particularly was their opposition to the notion that morality should be dictated by a few loud and influential voices. Learned even wrote to his friend Clarence Day in 1921 that 'the mere ability to go to hell in one's own way is an inestimable boon to most men. The State should be chary in taking it away, even in part'.[137]

This meant that the Hands had to think carefully about positions where their own values and laws ran counter to legal conventions or the views of American society. The *Hicklin* test left the final determination to the personal discretion of the judge in identifying what was obscene and predicting the effect that may have on vulnerable sections of society. The entire process was unrepresentative and vague in its instructions or criteria. In trying to shift the focus away from the judge as a decision maker on obscenity, the Hands emphasised the importance of basing their decisions upon the social consensus of their time. This philosophy sat comfortably within a vision that democracy necessarily grew from its experiences regardless of whether that included sound judgement. The importance, in any case, was to include a diverse set of voices and representation. In their estimation, the history of obscenity law had been one dictated by a few powerful and unrepresentative reactionary voices, a legal environment highly incompatible with their democratic vision. When they arrived on the Second Circuit, they offered differing solutions. Learned proposed the broadest standard for speech with a test that permitted all speech 'honestly relevant to the adequate expression of innocent ideas'. That said, Augustus' imprint in *Ulysses* was the most influential standard in changing the law. The *Hicklin* test rested on moral standards that were highly susceptible to manipulation. Anything deemed to cause the smallest tendency to arouse lustful impulses was vulnerable. *Ulysses*, building on previous opinions, added legal nuances as safeguards to this.

[137] LH 102/8, letter from Learned Hand to Clarence Day, Jr., 31 March 1921.

For example, what could be defined as acceptable moral material remained a factor, but was no longer the main determinant in deciding whether literature was published or not. James Joyce's book was seen to have stepped beyond perceived moral boundaries, but with new variables to consider, including consideration of the wider context of the book, it was within the 'common will' at the time and did not violate federal standards. Regardless of the differences, *Ulysses* arose from previous opinions and signified a masterful reinterpretation of the law. It tightened the administrative requirements of examining a piece of material's obscenity without ever forcing a statutory casualty.

Having achieved more protective standards that they both sought in obscenity law, the post-*Ulysses* cases revealed that the key difference between Learned and Augustus' jurisprudences involved the promotion of an intellectual citizenry. Augustus believed educational or artistic merit a fundamental trait. This made him wary of literature that did not come under this category, since he believed an educated citizenry could only form from an overwhelmingly positive contribution from literature. Learned saw the merit trait as desirable but believed that even this standard was not a necessary level of attainment for protected literature. He preferred an environment that was open to even that material deemed less valuable in society.

Despite this, the Hands' primary legacy still came from their unifying goal towards a standard better representative of the content under scrutiny and amenable to society's broader values. The emphasis on the importance of other organs of democracy in shaping obscenity law played a key role in this and, from this, the remarkable distinction of their opinions came from their emphasis on procedural innovations, not on the result. The legacy of their work was recognised in the Second Circuit in 1960 when Charles Clark acknowledged Augustus' 'classic warning' in *Ulysses* as 'the leading case of the subject'.[138] Clark particularly noted the ruling's protection of the book's circulation in the U.S., which was received as one of the great literary works of its time. This point highlighted the importance of Augustus' test. *Hicklin* was recognised for its use in the stranglehold on existing literature, but it is impossible to quantify

[138] *Grove Press v. Christenberry*, 276 F.2d 433 (2d Cir. 1960), p.436.

the effect it had on refraining artists and authors from taking the risk to experiment with new methods. The Supreme Court later adopted much of the new test Augustus outlined, thus protecting the next wave of literature and opening new gateways for the future.

Chapter Four: Immigration - Deportations and Naturalisations

The mass arrival of immigrants to the U.S. in the early twentieth century sparked widespread discussions in American political and intellectual circles about ways to regulate numbers. As the federal government exerted greater control over the laws that dictated this, discussions fixated on the type and 'desirability' of immigrants who were entering and residing in the country. Scholars have devoted a large amount of work to the role that presidential rhetoric, congressional committees, and new legislation played in creating a culture of increased regulation and restriction that persisted throughout the first half of the twentieth century. However, this scholarship often failed to fully recognise the crucial role that judges, such as the Hands, played in interpreting and shaping immigration laws. Of those scholars that commented on the Hands' contributions, most have praised them. Richard Posner described Learned's opinions as 'wonderfully sensible and humane'.[1] Meanwhile, Marvin Schick has noted that the Second Circuit Court, including the Hands' contributions, were 'distinctly libertarian'.[2] These conclusions, however, usefully highlight the limitations of the current literature. Posner, for instance, reflected a wider scholarly tendency to acknowledge the Hands' contributions to immigration law without thoroughly analysing their opinions. Meanwhile, Schick's comments were built on a premise that their contributions to immigration law could be assessed under conventional political terms. He substituted 'libertarian' for 'liberal', but it was built on the same understanding that the law was shaped in the Second Circuit to meet certain agreed ends. Although the Hands displayed sympathy in their outspoken compassion for immigrants, however, this evaluation exaggerates the idea that personal influence had on their legal opinions.

This chapter addresses this incomplete picture by focusing on how the Hands navigated naturalisation and deportation cases in this period. In so doing, it argues that the Hands

[1] Richard Posner, 'The Hand Biography', p.521.
[2] Schick, p.212.

exercised a judicial restraint which transcended political or personal considerations and which led to rulings that were often in deep opposition to their personal positions. First, the chapter reveals the personal difficulties that the Hands faced with changing the nature of immigration law and its social and political implications. With approximately twenty million immigrants arriving in the U.S. between 1880 and 1920, the federal government passed a flurry of new immigrations statutes that sought to regulate numbers. With courts interpreting an unprecedented number of new regulations, the Hands were frequently considering issues of humanitarianism and the treatment of immigrants. This presented a challenging legal environment, the decisions made in which had great consequence for individuals, including the separation of parents from their families, deporting citizens to a foreign land after living in the U.S. since a child, and denying potential citizenship for applicants. The reality of immigration regulation was additionally testing for the Hands because they were friends with many immigrants during their time on the bench and were also passionate in their private correspondence about the treatment of immigrants in society. A sign of their strong personal views, they also frequently spoke in public about the topic. Despite the necessity to maintain a neutral exterior as judges, such emotional cases laid bare the complexities of managing divergent personal and judicial positions.

Second, the chapter shows that the Hands often ruled against immigrants, despite these sentiments. Focusing on many of their unstudied, but illuminating, opinions in immigration law, reveals that their final rulings were often the opposite of being 'distinctly libertarian'. Indeed, this complicated landscape of decision making suggested the Hands walked a fine line in their attempts to balance judicial codes of impartiality with personal opinion. During their long careers on the bench, the ever-changing political outlook on immigration prompted a mixture of issues, but this chapter focuses on four key themes in the Hands' opinions on immigrants: desirable citizens, the humanitarian issues with deportations, evaluating 'good moral character', and the consideration of loyalties and allegiances of immigrants. Each provoked animated and emotional responses from the Hands. These areas were particularly

challenging to adjudicate on because of the vague and open-ended concepts they related to. Without much specificity from a flurry of new legislative directives, there was plenty of leeway in the first half of the twentieth century for personal influences to play a substantial factor in shaping judges' reasonings. The Hands had to rely on the biographic examinations of immigrants to determine their rulings, which included the studying of any past misdemeanours, lifestyle choices, and educational achievements. Their opinions reveal a foundation of key principles from their Harvard education which guided them with this challenge. This included: an awareness of their biases and prejudices, pragmatism, a rejection of moral absolutes, and a strict deferral to legislatures or precedent, where possible. These were important for distancing their personal sympathies for immigrants.

Finally, the Hands presented fundamentally different approaches to establishing that line between their personal values and professional duties with immigration. This area of law presented some of the deepest humanitarian dilemmas for Augustus, which, in turn, made him particularly outspoken on the topic in an extrajudicial capacity. However, whilst he had had extensively criticised laws that he was bound to uphold in other areas, such as obscenity, he showed less concern in doing so in his immigration opinions so as to ensure that separation between his personal and professional positions were clear. In comparison, Learned used a similar legal test to that in obscenity, under which he deferred moral judgements to the 'common conscience' of society. He was aware that the topic of immigration was one of the most emotionally charged issues in American society and the various statutes were open to a wide range of interpretations. As a result, his purpose was to reduce the scope of judicial discretion in immigration.

Immigration at the Turn of the Twentieth Century

The prominent use by judges of terms such as 'moral character' and 'desirability' did not frequently surface until the turn of the twentieth century, when the federal government responded to a rapid rise in newcomers to the U.S. As Congress became more heavily involved

in immigration issues, it passed legislation that assessed potential naturalisations and deportations on a variety of criteria. Statutes encompassed numerous indicators, some of which evaluated the full biography of an immigrant. This new legislation led to a large number of naturalisation and deportation cases coming before federal courts in this period, but judges, including the Hands, faced a significant challenge in interpreting these vague and ever shifting standards. The lack of technicality to immigration standards left an open-endedness in how judges could define these concepts. With a deluge of new cases, this set a foundation of inconsistent rulings to form the early decades' immigration law. This was especially significant because of the humanitarian ramifications of each ruling.

Up until the 1880s, individual states were free to craft their own immigration policies. A prime example was California's restrictions on non-citizen Asians, including not allowing them to own land. However, immigration was reframed as a national issue by the turn of the century, when the U.S. became wealthier and more people emigrated to it. New York City was a principal entry point where, beginning in the 1890s, a new surge of incomers began arriving in the city. This caused the foreign born population in the city to rise dramatically over a twenty year period from a figure of 639,943 in 1890 to 1,270,080 in 1900 and 1,944,357 by 1910.[3] On a national scale, the number of foreign persons coming into the country in 1903 reached 857,046, which surpassed all previous years in the country's history. By 1907, this figure peaked at 1,285,349 persons, with no signs of slowing down.[4]

Many in both left- and right-wing political circles were alarmed at this dramatic demographic transition, which led to growing support for greater federal intervention on immigration. The formation of a bipartisan investigating committee in February 1907, called the Dillingham Commission, symbolised this changing outlook. Between 1907 and 1911, the

[3] 'Total and Foreign-born Population New York City, 1790-2000', *New York City Department of City Planning Population Division* <https://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/historical-population/1790-2000_nyc_total_foreign_birth.pdf> [accessed 19 April 2020].
[4] 'Statistical Abstracts of the United States' (Washington D.C.: U.S. Government Printing Office, 1908), pp.68-69 <https://www.census.gov/library/publications/1909/compendia/statab/31ed.html> [accessed 6 August 2020].

Commission conducted the largest immigration study ever in the U.S. Although its methods have been challenged by recent scholarship, the significance of its formation and claims were twofold.[5] First, it was a key instrument for painting the mass influx of immigrants into the U.S. as a threat to Americans' way of life, culture, and standard of living. This typified an approach to immigration law in this period that masked subjective determinations behind seemingly scientific terms. Second, the formation of the Commission was emblematic of a culture increasingly accepting of the federal legislature as the only body that could and should fix immigration. As a result, statutes in this period, such as the Naturalization Act of 1906 and the Immigration Act of 1907, reflected a rhetoric that supported nativist and isolationist sentiments. These statutes ultimately focused on specific restrictions, rather than merely regulating immigration numbers, including restrictions on unskilled labour and a racial quota system to reduce the incoming number of Asians.[6]

A key consequence of this shifting rhetoric and centralisation was the lack of clarity and consistency in U.S. courts' rulings. Since the Naturalization Act of 1802, courts had exercised authority in the absence of federal legislation, determining their own requirements for immigrants, setting their own naturalisation fees, and following their own procedures. The 1906 law, however, framed the fundamental rules that would govern naturalisation for most of the twentieth century and created the Federal Naturalization Service, which oversaw federal practice. Despite the attempt to create a uniform standard procedure for immigration, courts struggled with legislation which sought to probe deeper into the characters of those entering American shores but provided little guidance as to what and how they should investigate.

---

[5] Most prominently, Vincent Parillo termed the concept, 'The Dillingham Flaw'. Drawing from the name and methods of the Commission, the concept referred to faulty logic and simplistic data methods that were used to reinforce unwitting, but negative, cultural and racial biases against immigrants. See Vincent Parillo, 'Diversity in America: A Sociohistorical Analysis', *Sociological Forum* 9 (1994), 523-545. For a more recent, critical examination, see Katherine Benton-Cohen, *Inventing the Immigration Problem: The Dillingham Commission and its Legacy* (Cambridge, MA: Harvard University Press, 2018).

[6] For one of the best studies into the history of immigration in the early twentieth century and the debates in government that led to these statutes, see Roger Daniels and Otis Graham, *Debating American Immigration, 1882-Present* (Lanham, MD: Rowman & Littlefield, 2001). Furthermore, for a strong focus on the period and statutes after 1920, see Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2014).

The most problematic statutory concepts for judges, including the Hands, were 'good moral character' and 'moral turpitude'. In 1956, Judge Archie Dawson described the concepts as a 'painful issue' for the judiciary, due to their lack of precision and the reliance on 'individual discretion' to define them, rather than the dictates of precedent.[7] The ambiguity of 'good character' can be traced historically. It first appeared in the eighteenth century as a prerequisite for citizenship in the country's first naturalisation statute, the Naturalization Act of 1790.[8] Following debate, Congress introduced the idea that prospective citizens had to provide evidence of good and proper behaviour. However, no specific standards were laid out for this requirement, leaving it difficult for applicants to interpret. Without a specific list of actions deemed morally unacceptable, judges subsequently leaned on their individual discretion to make evaluations. When immigration came under greater federal focus in the early twentieth century, factors such as adultery and homosexuality were invoked as charges against would-be citizens. Under the opaque category of 'good moral character', many courts deemed these relevant criteria for assessment, but some courts did not.[9] Congress did not provide clear guidelines until the Immigration and Nationality Act of 1952, when it introduced a list of non-exhaustive bars to 'good moral character'.

Another issue was the lack of clarity over the correct method for determining the good character standard — whether that be the average conscience of society or the judge's discretion. Without a consensus on the correct test, judges in the first half of the twentieth century had wide latitude for deferring to their personal intuition. Naturally, this prompted a number of different rulings. Prohibition cases were a prime example. One court denied a

[7] See *Petitions for Naturalization of F-G-and E-E-G*, 137 F. 782 (S.D.N.Y. 1956), pp.783-784. 'The phrase was not defined in any precise fashion and the cases resulted in different conclusions, based upon the interpretation of the phrase by the particular Courts before whom the question came'.

[8] 'Moral' was added to the term five years later. Similarly, the term 'moral turpitude' has not been consistently defined in statute, but it first appeared in U.S. immigration law in 1891, which excluded from the U.S. 'persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude'. For a more thorough explanation, see the Supreme Court's opinion in *Jordan v. De George*, 341 U.S. 223 (1951).

[9] Deborah Rhode provides good insight into some of the cases that faced these issues under the 'good moral character' test. See Deborah Rhode, 'Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings', *Law & Social Inquiry* 43 (2018), 1027-1058.

citizenship application after it had been found that the applicant had possessed liquor for personal consumption. However, this was despite the court admitting that such practice was accepted, even in the 'best society'.[10] On the other hand, other courts in this period suggested that the possession or sale of liquor was not an action of 'moral turpitude'. One example saw a court reverse the disbarment of an immigrant for manufacturing beer solely for consumption by himself and his family in his home. However, the court admitted in its opinion that its definition of 'moral turpitude' did not hide that the term was 'subjective in meaning'.[11] In its own interpretation, the court argued that the term should be 'restricted to those who commit the gravest offense'.[12] This showed that each ruling could be determined by a such a wide application of the moral character test.

This imprecisely defined legislation plagued courts throughout the early twentieth century. Although they frequently dealt with vague statutes, the lack of a defined set of standards until 1952 was problematic in a period that witnessed a mass influx of new immigrants. This was difficult for courts, because it was an area of law that impacted humanitarian issues and livelihoods to a greater degree than others. Furthermore, a lack of precedent added to a legal environment that already invited a wide latitude of interpretation. This opened the possibility for standards to frequently change, as judges brought too much of their own judgement into the law. These issues and dilemmas became evident early on in the Hands' careers on the bench.

The Dilemma with Desirable Citizens

Two early cases in Augustus' career on the bench exhibited some of the central issues that faced many American judges in this period. The cases, *In re Timourian* (1915) and *In re Gaddoni* (1916), focused on two naturalisation applicants whose fates were determined by the

[10] *In re Nagy*, 3 F.2d 77 (S.D. Texas, 1924), p.77.
[11] *Bartos v. U.S. District Court for District Of Nebraska*, 19 F.2d 722 (8th Cir. 1927), p.724.
[12] Ibid. See also a similar ruling in *Coykendall v. Skrmetta*, 22 F.2d 120 (5th Cir. 1927).

'desirable citizen' standard.[13] These were early examples of cases affected by the swiftly changing standards in immigration law. They also brought to the surface early on Augustus' battle to distinguish between his personal opinions on immigration and his application of salient legal principles in the field. Only the first, Timourian, was admitted for naturalisation. This exposes the simplicity of Schick's 'libertarian' label for the Hands. In displaying his own emotional investment in this issue, Augustus revealed the human factors that complicate a judge's reasoning process. However, as his judicial conduct showed, such cases represented a matter of controlling one's own sentiments and following precedent as a lower federal court judge, regardless of personal positions on the matter.

The sequence of events with *Timourian* began on 28 July 1915, just ten months into his district court appointment. Augustus had to determine the fate of Onnik Setrak Timourian after he failed to meet the five year residency requirement for becoming a naturalised citizen. This was because the Turkish-born Timourian had a seventeen month absence during the period to undertake a business trip to buy rugs and carpets. Specifically, he left for Persia on 12 March 1913 and returned on 13 August 1914.[14]

Augustus' opinion was pragmatic and lenient in its acceptance of Timourian's citizenship application. He laid out various strands of evidence that fitted his criteria for being a desirable citizen, ranging from material factors to evaluations of Timourian's character. For example, Timourian was well educated, having gone to Roberts College, Constantinople.[15] Meanwhile, in Augustus' scrutiny of the trip, Timourian had shown sincerity when he claimed he had not originally intended to be out of the country for so long. He had taken a passport good for only six months, spent only a short time in his 'old home' of Turkey, maintained himself wholly upon New York funds, was not engaged in any business other than buying for his New York house, and returned as soon as his business was complete, 'which owing to various delays was

[13] See *In re Timourian*, 225 F. 570 (S.D.N.Y. 1915). Unfortunately, many of the district court opinions were not recorded in an official register, including *In re Gaddoni* (1916). The only details come from Augustus' private discussions of the case.
[14] *Timourian*, p.570.
[15] Roberts College is a prestigious independent private high school and claims to be the oldest American school still in existence in its original location outside the U.S.

much longer than he had anticipated'.[16] Furthermore, in citing previous cases, Augustus found 'unforeseen business exigencies' as an exception when a prospective citizen left the country in the five year naturalisation period.[17] As a result, he granted Timourian's application and ruled that a temporary business trip did not necessarily break the continuity of residence for citizen applicants.

When Augustus issued an opinion for a similar case a year later, in the matter of Luigi Gaddoni, he reached the opposite ruling. This was despite the fact that Gaddoni's situation had been similar to the case in *Timourian*: he left the country for a substantial period to undertake legitimate business and fit well within Augustus' vision of a 'desirable citizen'. However, although Augustus' personal views on immigration had not dramatically changed in this short time, the interpretation of the law *did* change. In April 1916, the Second Circuit Court of Appeals reversed one of cousin Learned's rulings, when it decided in *U.S. v. Mulvey* that an applicant should not be admitted after being absent for twenty-six months of their naturalisation requirement period. The court argued that the five year requirement by Congress was a fair period to allow an immigrant to 'understand and familiarize himself with our institutions and mode of government', and that actual residence 'for a little over half the required time' was not sufficient.[18] After *Mulvey*, the general understanding was that anyone who was out of the country for more than just a year would be precluded from the possibility of continuous residence.

This change was significant for bringing to the fore Augustus' sympathies for Gaddoni but also in drawing the lines between personal sympathies and professional obligations. A letter to Judge Martin Keogh was most revealing in this regard.[19] Augustus was plain and direct to Keogh that his ruling against Gaddoni was out of a belief that 'the government would itself

[16] *Timourian*, p.570.
[17] Ibid., p.571; The cases Augustus cited included *In re Schneider*, 164 F. 335 (S.D.N.Y. 1908) and *U.S. v. Cantini*, 212 F. 925 (3d Cir. 1914).
[18] *U.S. v. Mulvey*, 232 F. 513 (2d Cir. 1916), p.516.
[19] Martin Jerome Keogh, Justice of the New York Supreme Court (1896-1922).

appeal and reverse me'.[20] However, he also revealed that this was not a simple or easy decision, but a principled one. For instance, he had discussed Gaddoni's matter with representatives of the U.S. Labor Department, only to note that, 'The difficulty is in no respect with Gaddoni himself, but with the recent ruling of the Circuit Court'.[21] Augustus also described how he was 'very anxious' to admit Gaddoni, believing that to 'prejudice' an immigrant for undertaking business abroad — in this instance Gaddoni had done so for his employer 'who was in the American service' — was a 'hardship'.[22] Thus, Augustus was prepared to admit Gaddoni but had to reject his application. Although conventional in his adherence to legal principle, that contrast with his sympathies was striking for revealing how inconsequential they were to the final outcome.

These cases together foreshadowed the profound nature of the challenges for the Hands in immigration law, many of which pitted their humanitarian instincts against their duty-bound role. *Gaddoni* showed how the human implications in immigration law carried a great burden without playing a significant role in determining outcome of Augustus' ruling. This is important in establishing the boundaries between judicial duties and personal values. The political labels that scholars have adopted for Augustus often carry connotations of personal influences and biases. However, although these were present in Augustus' sympathies for Gaddoni, they were disregarded in his final legal deliberations. In addition, the case also highlighted the complicated and complex trajectory of the law. The fate of entire groups of immigrants could change quickly and dramatically, due to a lack of a defined approach. A direct comparison that Augustus made in his letter to Keogh between *Timourian* and *Gaddoni* indicated that, had the former case occurred at a later period, a rejection of the naturalisation application would also have resulted. Such concerns remained pertinent as the intense focus on immigrants in the U.S. continued in the 1920s.

[20] S&P 26/2, letter from Augustus Hand to Martin Keogh, 10 January 1917.
[21] Ibid.
[22] Ibid.

Deportation and Exile

The increased pressure to regulate the type of foreign persons entering the U.S. in the 1920s emboldened public officials to pay greater attention to those already residing in the country. The rhetoric and actions of some Congressmen to enforce isolationist-driven and draconian immigration laws included a proposed bill in late 1925 by Cong. James Aswell (D-La.) to provide for the registration of all aliens entering the U.S. The *New York Times* responded by describing it as something that 'smack[ed] of Old World police methods'.[23] Augustus, likewise, described it as a 'step backward' and 'the last thing that is American'.[24] Along with Learned, he represented a collection of intellectual voices that were concerned with a discourse that normalised inhumane deportations. Augustus noted that laws and deportation guidelines were already in place for those who improperly entered the country. As a result, there seemed 'no reason to affront and annoy [immigrants] by a system of registration and espionage' and subject such law-abiding people to a constant state of fear of potential deportation.[25]

This small passage from a speech teased out the contrast between Augustus the judge and the private citizen. The outspokenness exhibited by the Hands, more so than on other issues in these decades, made it a prime example for believing they were leaders in a libertarian cause for protecting immigrants. However, in the context of their rulings and opinions in this period, this outspokenness more accurately serves as evidence of that crucial separation between the Hands' judicial and personal behaviours, rather than the conflation of the two. Indeed, in the mixed results that came from their deportation opinions and rulings, their primary focus was on the need to adhere to current legal tests despite the vagaries they found in immigration law. Indeed, whilst they used striking language in their private correspondence and extrajudicial speeches to criticise the anti-immigrant actions of other public figures, they sometimes upheld reactionary deportation measures. Their mixed rulings were also significant for two other reasons. First, although the Hands' judicial opinions were shaped by an unwavering dedication

[23] 'Judge Hand Asks Fairness to Aliens', *New York Times*, 12 December 1925, p.14.
[24] S&P 25/2, Augustus Hand, Speech on Naturalization, 11 December 1925.
[25] Ibid.

to precedent, their attempt to define concepts, such as 'moral turpitude', showed the profound influence that statutory vagueness played in this area. Second, their responses to immigration law also highlighted fundamental differences between the approaches of the cousins. Learned's disquiet with the government's willingness to deport citizens who had resided in the U.S. from a young age was expressed clearly and emotionally in his opinions. Augustus' extrajudicial contributions showed compassion and empathy, but he exhibited a greater ability than Learned to keep this separate from his judicial opinions.

Learned's role in *U.S. ex rel. Klonis v. Davis* (1926) showcased these points. The case involved a Polish-born citizen who had arrived in the U.S. at approximately ten years old, read English, and become a carpenter. However, Klonis' image as a desirable citizen was destroyed by two convictions for burglary. The Secretary of Labor issued deportation orders under the guidance of the 1917 Immigration Act, which made deportable any individual twice convicted of crimes of 'moral turpitude' and sentenced each time to more than one year's imprisonment. Klonis appealed to the trial judge who had originally imposed the second sentence. The judge entered a retroactive amendment to an order, recommending that he not be deported. This was done following the claim that Klonis' attorneys in his second trial were unaware of his alienage and the danger he suffered of deportation, and had not factored this into his defence. The problem, however, was that any power for retroactive amendments had only a thirty day window after the sentence, which was long past when the judge entered the amendment.

In private, Learned's colleagues in the case, Martin Manton and Charles Merrill Hough, held different positions. Whilst Manton believed in affirming the deportation on the thirty day rule, Hough had equivocated between two lines of thought. On one side, Klonis was a 'bad egg but to all intents and purposes he is an American egg', but Hough stressed that law gave no 'place for mercy'.[26] In response, Learned echoed Hough's sentiments. However, at the heart of his consideration was his concern with the treatment of the immigrant. In cases surrounding the deportation of citizens who had come to the U.S. from a young age, the pervading themes

[26] LH 180/5, Charles Merrill Hough memo for *U.S. ex rel. Klonis v. Davis*, 1926.

in Learned's writings were to resort to emotive language and frame such deportations as a modern form of draconian measures, particularly 'exile'. Thus, he noted that the thirty day rule represented 'intolerable consequences of a rigid application of the language'.[27] Nonetheless, he accepted that the statutory interpretation was precedent, but, in doing so, gave victory to the 'gross inhumanity and the shameless Pharisaism' of anti-immigrant tribalism.[28]

Learned's short opinion struck a similar tone, where he followed precedent, but was expressive with his Langdellian critique of it. This mirrored his approach to free speech issues, where he used cases in which the result favoured the law to critique that law. Thus, he explained in *Klonis* that the thirty day period following the imposition of a sentence remained the requirement to prevent deportation. However, the rest of the opinion was a display of sympathy for Klonis. He first noted that Klonis faced the possibility of securing a pardon and appealed to the hope of the authorities' good nature, 'We cannot suppose that opportunity will not be given for an application'.[29] But furthermore, his message was strong, emotional, and pragmatic when he placed Klonis' case in the broader context of national immigration law,

> He is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.[30]

Learned could have produced an opinion that simply upheld the law and ignored the human consequences of the deportation. However, the inclusion of the dicta reflected his awareness of the impact that it would have with a public audience. This approach was a critical tool in maintaining judges' images as interpreters of the law independent from governmental or public pressure.[31] In writing the passage, he adopted an additional use of his judicial position — to be a sophisticated educator in the democratic discourse. This had important, but subtle

[27] LH 180/5, Learned Hand memo for *U.S. ex rel. Klonis v. Davis*, 4 June 1926.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] The literature on the difference between dicta and holdings is sparse. Nonetheless, an incisive examination of the use and definition of dicta in judicial opinions can be seen in Michael Abramowicz and Maxwell Stearns, 'Defining Dicta', *Stanford Law Review* 57 (2005), 953-1094.

differences from a moral arbiter role because it stressed the limitations of judicial intervention. He could pass on advice without having it dictate the final outcome. Thus, although upholding the deportation, Learned made clear that it was in conflict with his personal sentiments in the case. This is significant for its signalling to the legislature of Learned's desire for some form of remedial action. Making a vocal but limited stand in exerting this pressure enabled him to speak out without infringing on restraintist principles. As his lessons from Harvard had revealed, criticism of law was sometimes useful and necessary. The line separating a restrained and an activist judge was seemingly marked between those expressing critical opinions of the legislative branch and those overreaching their boundaries by overruling the legislature and expanding courts' powers of discretion.

When Learned's correspondence on the treatment of foreign people and cultures outside of *Klonis* is examined, those distinctions between the professional and the personal are reinforced and proven to be sincere. A prominent example was Learned's reaction to Felix Frankfurter in 1923 on the Supreme Court's ruling in *Meyer v. Nebraska*, where the Court ruled Nebraska's prohibition on teaching foreign languages in schools unconstitutional, which displayed the same principles that drove his opinion in *Klonis*. Learned wrote, 'I can see no reason why, if a state legislature wishes to make a jackass of itself by that form of Americanization it should not have the responsibility for doing so rather than the Supreme Court. But then, like you, I am ultra-latitudinarian in such matters'.[32] His position on the derogatory treatment of a foreign language by a state legislature was that it was wrong, but it was rarely in a court's ambit to make that determination, including the Supreme Court. This followed a string of correspondence with Frankfurter in 1923, where Learned's position on *Meyer* was grounded in his opposition to substantive due process. As he also wrote, 'it is silly to assume that the ordinary questions of law that you and other judges are concerned with…has any reasonable relevance…to the "vague contours" of the Due Process clause'.[33] His belief that this

[32] LH 104A/11, letter from Learned Hand to Felix Frankfurter, 6 June 1923.
[33] LH 104A/11, letter from Learned Hand to Felix Frankfurter, 11 April 1923.

represented judicial overreach came back to his democratic principles, which led him to the ideal that such decisions were best decided through discussions and debates amongst legislatures and their constituents.

Learned's consideration of his role as a lower court judge in *Klonis* was also adopted in other cases. One example was *US ex rel. Mitico v. Day* (1929) — an understudied case because it was a judgement given without an opinion. Its importance, however, was in the private correspondence that shaped its ruling and the differences that emerged between Learned and Augustus on the interpretation of the vague term, 'moral turpitude'. The case involved an Italian born immigrant who had come to the U.S. at the age of eight and not returned to his home country in the eighteen years since. He had admitted to two cases of attempting to cause 'malicious mischief', both of which involved breaking private property in a moment of drunkenness. Both individual sentences were for six months imprisonment. This left Mitico within the criteria for deportation, which provided that an immigrant had to be sentenced to prison for one year or more for a crime involving 'moral turpitude'. Thus, after an order of deportation was issued for Mitico, a district court issued a writ of *habeas corpus* for him. Upon the government's appeal, Mitico's deportation hinged on whether the Second Circuit believed the first crime, breaking a door and unlawfully entering a gymnasium, involved 'moral turpitude'.

Learned's private discussion of the case presented a raw and persuasive defence of tolerance that convinced the other two members of the court, Augustus and Manton, to change their minds. Originally, both were for reversing the writ, but the court ended up unanimously affirming it. In one sense, Learned's memo to his colleagues struck a similar tone to previous writings, which displayed personal disdain over the poor treatment of immigrants. Learned repeated the conflation of deportation with exile, stating it 'shocking' that a man who had been in the country since he was a boy would be deported to a country 'in which he will be an entire stranger, because he may have gone into buildings while drunk'.[34] What distinguished this

[34] LH 186/10, Learned Hand memo for *U.S. ex rel. Mitico v. Day*, 8 January 1929.

from *Klonis* was that Learned interpreted the law in favour of the immigrant. As he explained, the New York Penal Code comprised many 'trivial' crimes under 'malicious mischief'.[35] Mitico's crime for destruction of personal property was clearly most apt for this interpretation and not the severity that was associated with a crime of 'moral turpitude'.

Although Augustus eventually sided with Learned, the initial differences between the Hands were significant for two reasons. First, they were indicative of the difficulties with defining terms such as 'moral turpitude' and 'malicious mischief'. Augustus initially sided with Manton when he argued that the term 'malicious mischief', as described in the New York Penal Code, comprised certain crimes which could run penalties up to as high as twenty-five years jail time. This included unlawful destruction of private property. And, as Augustus pointed out, this term could be used loosely, 'That might be a crime involving very little turpitude and yet it would involve moral turpitude'.[36] This typified the inherent issue with morality standards. The vagueness of the term left it open-ended, leaving Augustus to interpret the law in an all-encompassing fashion, which included crimes that lacked the severity of others. As a judge who practiced restraint, it was not within his power to read guidance into statutes or law that was not evident.

Second, Augustus' less emotional responses in private were not derived from a lack of humanitarianism. Instead, he reserved his outspokenness for other forums. In one sense, the purpose of his public criticisms in the 1920s was similar to Learned's in *Klonis*: in other words, open denunciations of immigration restrictions served as useful venues in which to encourage Congress and the public to take a more tolerant stance on immigration. The difference from Learned, however, was that Augustus believed extrajudicial platforms were the more appropriate formats to express such criticisms. One example was his response to the Aswell bill in an impassioned speech on 11 December 1925 to the State Conference of Charities and

[35] Ibid.
[36] LH 186/10, Augustus Hand memo for *U.S. ex rel. Mitico v. Day*, 1929.

Correction. The prominent theme was criticism of racial prejudice and intolerance. In his most eloquent passage, he explained,

> the greatest criticism of the spirit of the hour is the prevalence of race prejudice. It is our pride that we have assimilated foreign races into a homogenous citizenship with marvellous adaptability and skill. That has been in large measure true, but it will not continue to be so if we have so little confidence in America that we fear and distrust those who come to our shores. A real fairness toward the alien and the new citizen born of understanding and toleration is worth thousands of flags and reception committees and condescending speeches.[37]

He also questioned an ethos in American society that left the entire burden on the immigrant to assimilate. Instead, Augustus proposed a reciprocal relationship, 'Our attitude toward them moulds both them and us and is a creative force in the development of the nation'.[38] This suggestion fed into Augustus' broader philosophic vision of democracy, which included a free thinking and self-reliant citizenry. Intolerance of immigrants fostered the very attitudes and ideas that were the antithesis of his philosophy.

Augustus' rhetoric was also matched with action, including a proposed statutory provision for naturalisation examiners, which Congress ultimately enacted in 1926. This involved administrative officials who conducted preliminary hearings of naturalisation applicants and reported their results to the court. Augustus' proposal came from the reality that many judges heard open court testimony from thousands of citizenship applicants. As he explained, he would hear approximately three hundred applications every Monday and Thursday. These people stood in line and filled the corridors for hours, the overcrowding of which added to the 'foul air' of the stuffy court rooms.[39] Under such pressurised numerical circumstances, judges were afforded time for only the 'briefest consideration' in judging the fate of an individual's status in the country, creating a 'poor introduction…to citizenship'.[40] Augustus accepted that applicants received scrutiny for their attachment to the principles of the Constitution, educational qualifications, and compliance with the technicalities of naturalisation law — so

[37] S&P 25/2, Augustus Hand, Speech on Naturalization, 11 December 1925.
[38] Ibid.
[39] S&P 25/1, Augustus Hand, 'Address to the Graduates of the New York Hospital Training School for Nurses', undated.
[40] Ibid.

long as that scrutiny was fair and equal. Consequently, he proposed that judges should enter into the consideration of the application only when 'questions of law' arose.[41]

A separation between personal examinations and questions of law was crucial to Augustus in immigration. His original position in *Mitico* demonstrated that separation between his views on and off the court. Even in cases in which he disagreed fundamentally with the government's moral position on deportations, he was inclined to follow the letter of the law, sometimes to a literal sense. However, he proved pragmatic and flexible where legal guidance was sufficient in the counter-argument — as Learned provided in this case.

The emotional detachment of Augustus is even more pronounced when compared with Learned's dramatically different demeanour in deportation cases in the 1930s. The latter's case memos and opinions continued to represent a key platform for communicating his fiery defences of immigrants. Despite this, two cases involving Learned in this decade raised serious humanitarian questions but led to contrasting outcomes. These cases were *U.S. ex rel. Mignozzi v. Day* (1931) and *US ex rel. Di Tomasso v. Martineau* (1938). In both, Learned repeated a similar message by framing deportation as an outdated punishment. Louis Mignozzi, an Italian barber, was guilty of multiple crimes for possession of fake dollar bills, which prompted the government to order his deportation. Alongside Augustus in a two man majority, Learned reversed the order and warned against 'root[ing] up all those association which we call home [and] banish[ing] him to be an outcast in a country of whose traditions and habits he knows nothing'.[42] This was because Mignozzi had resided in the U.S. since he was a young boy, was married, had an eleven year old child, and had only been a public charge once in his entire time in the country when he was struck with pneumonia for eleven days. Orlando Di Tomasso had committed a more serious moral crime when he had run and maintained a brothel. Nonetheless, Learned described the case as another example of the 'lowest Pharisaism'.[43] He added that the 'wretched boy' had come to the country when he was

[41] Ibid.
[42] *U.S. ex rel. Mignozzi v. Day*, 51 F.2d 1019 (2d Cir. 1931), p.1021. Harrie Chase dissented.
[43] LH 199/20, Learned Hand memo for *U.S. ex rel. Di Tomasso v. Martineau*, 18 April 1938.

nine years old and 'exile to a foreign land' would leave him 'utterly ruined'.[44] His language and position on this issue remained unfazed by the severity of the crime. Instead, the burden was on the country and community to be tolerant, 'We made him, we ought to bear him as a hardship'.[45]

Although he shared the same emotional sentiment in both cases, two different opinions were written by Learned. In *Mignozzi*, the government argued for the deportation of the immigrant on the basis that he had been sentenced more than once for a term of imprisonment for more than a year. The trial judge had ordered multiple sentences for Mignozzi, but made them consecutive. Learned looked at other circuit rulings and found that deportation orders had only been affirmed when multiple convictions came from separate sentences.[46] However, as Learned explained for the case of Mignozzi, 'morally the transaction was a single wrong, to be expiated by a single punishment'.[47] In this instance, government lawyers arguing for the deportation attempted to exploit the vagueness of the law by suggesting that each count should be treated as a separate punishment. This would have given them the leeway to affirm the deportation, as well as many others. Legal precedent had already led Learned to side with Mignozzi, but he also used the opportunity to clarify his scepticism of the government's interpretation, questioning whether Congress would 'stake so grave a consequence on verbal tricks, or to put vital interests in peril on a prosecutor's whim'.[48]

In contrast, Learned found no grounds for helping Di Tomasso, despite his personal opposition to the deportation order. As he privately noted, 'It is loathsome and I should like to say so; but we cannot intervene'.[49] Di Tomasso had rested his appeal against deportation on the grounds that he was given an unfair hearing. His objections included criticisms of the immigration inspector's findings for his alleged crimes and the suggestion that new charges

[44] Ibid.
[45] Ibid.
[46] *Johnson v. U.S. ex rel. Pepe*, 28 F.2d 810 (2d Cir. 1928) and *Nishimoto v. Nagle*, 44 F.2d 304 (9th Cir. 1930).
[47] *Mignozzi*, p.1021.
[48] Ibid.
[49] LH 199/20, Learned Hand memo for *U.S. ex rel. Di Tomasso v. Martineau*, 18 April 1938.

were added during his hearings. However, the difference here was that there was no evidence to prompt intervention. Unlike *Mignozzi*, there were no issues with the vagueness of statutes and there was 'nothing in the recommendation of the judge of the superior court…that the alien should be deported'.[50] Learned, therefore, joined a majority opinion by Thomas Swan, which stated that evidence used by the Secretary of Labor against Di Tomasso was not subject to review. Two cases, therefore, represented similar emotional sentiments for Learned but different guiding principles.

The differences in outcomes between deportation cases in the 1920s and 1930s offered fitting examples of a separation between humanitarian sentiment and respect for the boundaries of the judicial role. Each case presented a moral dilemma which often placed individuals in a desperate situation. The language and platforms used by the Hands to defend immigrants showed a unified opposition to reactionary voices seeking to impose tougher restrictions and more draconian deportation standards. However, their rulings did not produce supposed 'libertarian' or 'liberal' results. Cases such as *Klonis* and *Di Tomasso*, instead, often upheld tough, conservative-driven policies. By working within their judicial limitations, the Hands were not proposing spectacular or novel legal innovations. But their actions were important for showing that they transcended the partisan positions under which they have been frequently labelled. Their efforts to separate 'the man from the judge' continued in the 1940s, but came in the context of a new standard that directed the American debate on immigration more intensely towards the moral fibre of its potential citizens.

'Moral Turpitude' and 'Good Moral Character'

Whilst cases from the 1910s to 1930s had relied on judges to interpret vague terms such as 'desirability' and 'moral turpitude', Learned attempted to rectify this with the adoption of a new test in the 1940s. Judgements had been previously based on connecting sporadic and varied legal precedent, but at the turn of the decade Learned's opinions began explaining the

[50] Ibid.

rulings of the Second Circuit Court by deferring to the 'common conscience' of society.[51] This was in response to the more frequent use of the 'moral turpitude' and 'good moral character' standards in immigration law as a means for testing new and current immigrants in the U.S. The introduction of this new test represented a significant moment in Learned's attempt to clearly establish the divide between his personal and professional positions on immigration. He continued to show concern for immigrants, but the new test marked a similar approach to his and Augustus' obscenity test in its attempt to mitigate the individual discretion of judges. Without an exact method for defining the common conscience of society, it still invited judges to rely to a certain degree on their prejudices and biases. However, by linking the final judgement to the values of society, the test reflected Learned's judicial restraint, self-scepticism, faith in society to come to the right decisions, and trust in the democratic process to succeed without substantial judicial intervention.

The common conscience concept was used by Learned as early as 1929 during Prohibition. In the case, he reversed an order of deportation for an immigrant who had lied on his visa about his history of imprisonment. There was also some obscure evidence that connected him to a fine for selling and possessing whisky in the U.S. In private, Learned explained that the ruling was based on the 'moral sense of the community'.[52] As he elaborated in his opinion for the court,

> While we must not, indeed, substitute our personal notions as the standard, it is impossible to decide at all without some estimate, necessarily based on conjecture, as to what people generally feel. We cannot say that among the commonly accepted mores the sale or possession of liquor as yet occupies so grave a place; nor can we close our eyes to the fact that large numbers of persons, otherwise reputable, do not think it so, rightly or wrongly.[53]

This passage is significant because it painted the choice for a judge between their personal determinations of morality and society's. By choosing the latter, the test limited the scope for judicial discretion.

[51] The term varied throughout this period, but this is the phrase I will use for expediency.
[52] LH 185/15, Learned Hand memo for *U.S. ex rel. Iorio v. Day*, 11 June 1929.
[53] *U.S. ex rel. Iorio v. Day*, 34 F.2d 920 (2d Cir. 1929), p.921.

The test was also significant for representing three key factors in Learned's thinking. First, it reflected his understanding of democracy as shaped by his teachers at Harvard, which was that each democratic decision was the result of human imperfection. In accepting the reality that moral concepts invited ambiguity and inevitably idiosyncratic rulings, he passed the burden of determination from the judge to wider society. In so doing, this vindicated his belief that democratic laws should be shaped through wider participation of its citizenry, rather than paternalistic deference. Second, the test presented logistical issues, as noted by Learned's caution against ruling on 'conjecture'. In using this test, Learned tasked himself with the difficulty of gauging the levels of moral expectations in an ever-shifting society and defining the most accurate way of pinpointing these. The application of the test was not always perfect. Learned's interpretation of the common conscience was sometimes so close to reflecting his own values that it exposed the difficulty of completely mitigating personal biases. This is useful for considering the disaggregation of personal from professional values in terms of how legal jurisprudence is assessed, whilst recognising that subjectivity in inherent to all human decision making. Nonetheless, Learned's application of the common conscience test paid heed to that tension between the professional and personal by representing a concerted attempt to lessen the influence of the latter. Third, the test could have been used by Learned to allow rulings which he personally favoured if American public opinion was shifting fast enough to greater tolerance. However, nativism remained a key element in American public opinion on immigration in the 1920s and 1930s, when the test was first used. Even in every poll taken after the mid-1930s, the percentage of Americans rarely ranged out of the four to eight percent range in wanting more immigration admissions.[54] This public reality was evident in the subsequent mixed rulings that came from Learned's application of the test.

A case involving both Learned and Augustus in 1940, *U.S. ex rel. Berlandi v. Reimer,* exhibited the differences between the common conscience approach and the traditional

[54] Edin Harwood, 'American Public Opinion and U.S. Immigration Policy', *The Annals of the American Academy of Political and Social Science* 487 (1986), 201-212.

restraintist approach of relying on precedent as the primary factor. This led the cousins to reach different interpretations of 'moral turpitude' and showed that there could be flexibility and different outcomes within a restraintist approach. The case involved Alberto Berlandi appealing an order for deportation after he had committed two crimes with sentences of one year or more. They both happened in 1938; the first involved a guilty plea for depositing and concealing twenty-five gallons of whisky, and the second involved a conspiracy to conceal distilled spirits. Both also involved violations in the name of defrauding the U.S. of taxes. Berlandi's contention was that the first crime was not one of 'moral turpitude', which, if accepted, would have invalidated his deportation.

Augustus wrote the opinion of the majority in the case which ruled that Berlandi's crime was of 'moral turpitude'.[55] His short opinion refrained from a detailed debate on the definition of 'moral turpitude' in relation to moonshining or evading taxes. Instead, it focused on the procedural and precedential factors that guided his judgement. He noted that the case had become less clear since the repeal of the Volstead Act, which would have made the case subject to separate violations of the two alleged crimes.[56] But since the legalisation of alcohol, fraud had become the key subject of discussion. In that instance, he wrote, 'The strongest argument for the alien is perhaps his own that he was only a "moonshiner", but this to us is not persuasive. Fraud has ordinarily been the test whether crimes not of the gravest character involved moral turpitude in the sense of the statute'.[57] In following the line of previous court rulings, he noted that intent to defraud a private citizen was frequently held as 'an offense…which involves moral turpitude'.[58] He claimed that Berlandi's attempt to do likewise in defrauding the U.S. government was no different when the intent was to gain a profit. In

[55] Augustus was joined by Learned and Robert Patterson.
[56] Enacted in 1919 to enforce the Eighteenth Amendment's prohibition of the manufacture and sale of alcohol. This was repealed in 1933.
[57] *U.S. ex rel. Berlandi v. Reimer,* 113 F.2d 429 (2d Cir. 1940), p.431.
[58] Ibid.

that instance he was ‘a persistent violator’ of ‘moral turpitude’.[59] This represented a short and direct conclusion from the guiding legal precedent on the issue.

Learned’s dissent highlighted the difference of his approach from Augustus’. Learned’s issue with immigration law was that its vagueness invited wide discretion from judges. Whilst Augustus had relied on precedent, there was still a strong subjective influence to choosing and marshalling the precedent that shaped the ruling. In contrast, Learned believed his interpretative duties should be focused on ascertaining society’s common conscience. His method of judgement involved a degree of subjectivity, but it had his restraintist thinking at its heart by shifting the moral decision away from judges. In his interpretation, society viewed smuggling or evasion of liquor excises as a small matter of ‘venial peccadillo’.[60] He suggested moonshining had been an accepted practice in many parts of the country for over a century and, thus, it set a dangerous precedent in deporting a man based on what people ‘ought consistently to think of him’ rather than what they actually did think.[61] In plainer terms, Learned suggested that one should look to ‘the moral repugnance of the ordinary man’, not the ‘ideal citizen’.[62] For him, since the traditional approach of picking and choosing precedent was influenced too heavily by judges’ individual standards, it was still driven by judges’ visions of the ideal citizen. In contrast, society’s average standards were base, reactive, and fluid. They did not abide by rigid, insular, and idealistic expectations. Therefore, by submitting to society’s positions, he was not only choosing a more representative standard, but establishing greater distance between immigration law and the personal idealism of judges.

When cases arose with more divisive moral questions and graver consequences, the benefits of the common conscience test became clearer. In two cases in 1947, *U.S. v. Francioso* and *Repouille v. U.S.*, Learned continued to use the test to shift the burden off judges to adjudicate on complex moral questions via their personal discretion. These cases revealed deeper layers

[59] Ibid.
[60] Venial peccadillo means a small sin that does not require a large reaction of outrage.
[61] *Berlandi*, (Judge Learned Hand dissenting), p.431.
[62] Ibid.

to his reasoning. For a start, judges were not well equipped or trained to answer questions of great moral significance. He doubted that judges' prejudices and biases were built from any greater understanding of ever-changing moral issues than the average citizen. In addition, when the facts of the case were more sensitive and presented the possibility of greater societal implications, it was likely to provoke greater emotion and animation from the judge. This left the judge more vulnerable to a decision that was not driven by rationality. Society was left with the same possibility, but it represented a broader consensus on the issue and, therefore, a more amicable decision. Furthermore, Learned's instinct was to question whether judges should be involved at all in the issue of immigration law. Thus, although the common conscience test was the better alternative, it was still inadequate. In *Repouille*, he highlighted the logistical difficulties for a judge seeking to measure the test. In so doing, he was making a clearer plea that the legislature was much better equipped to make these decisions of great moral consequence.

Being naturalisation cases, *Francioso* and *Repouille* also added to Learned's argument that judicial determinations were an inadequate solution to immigration issues. The prevalence of the 'good moral character' test in the 1940s left naturalisation hopefuls in the position of having to show that they were 'well disposed to the good order and happiness of the United States' in their five years residing in the country prior to their application. In many respects, these cases were tougher to adjudicate than deportations. Whilst deportations required judges to evaluate specific acts for their 'moral turpitude', naturalisations required a full biographical search of the individual and an assessment as to where this fit in the common moral standing of U.S. society. In that respect, this issue called back to Augustus' concerns in the 1920s that naturalisation applicants were victims of an unfair process when a judge sped through hundreds in a day without a thorough understanding or expertise of each case.

The first of these 1947 cases, *Francioso*, involved an Italian, Frank Francioso, who declared his intention to become a citizen a year after arriving in the U.S. in 1924. The issue with his application was that he had married his niece and had been living with her incestuously during

the five years before he filed his petition. The couple had four children together and had their marriage solemnised by a Catholic priest, with the consent of his bishop. According to the naturalisation judge, the facts presented a man of 'good moral character'. However, the government disagreed, which led to an appeal before Learned and the Second Circuit.

Learned's memo on the case revealed the difficulties in identifying or defining the common conscience of American society. Incest had been outlawed in New York State by 1925 but had not been universally outlawed across the country. On the other hand, by the time period of Francioso's examination, 1938 to 1943, he had been married to his wife for thirteen years. In that sense, Learned suggested that, on balance, forcing Francioso to leave his family was an even larger act of moral delinquency, 'the only course consonant with the faintest tinge of regard for the most rudimentary decencies was to stay with them and support them'.[63]

When it came to his opinion, this also revealed that it was not easy to apply the test, both from an administrative and personal perspective. Learned stated that the judge's role was to identify 'the generally accepted moral conventions of the time, as far as we could ascertain them'.[64] Although the common conscience test proved a good substitute for the judge's personal discretion, *Francioso* showed that it was not a perfect barrier to the seeping in of personal influence. Learned explained that Francioso had been given a moral conundrum: he could leave the country and stay in the incestuous and immoral marriage or remain in the U.S. but break from his family and 'deprive his children of the protection, guidance and solace of a father'.[65] Learned played the moralisers at their own game when he suggested that, by advocating for Francioso to break off one immoral act, they were forcing him into choosing an even more severe immorality. But Learned did not stop there, explaining that it took until 1893 for New York to invalidate incestuous marriage, 'the fact that disapproval of such marriages was so long in taking the form of law, shows that it is condemned in no such sense

[63] LH 210/15, Learned Hand memo for *U.S. v. Francioso*, 17 October 1947.
[64] *U.S. v. Francioso*, 164 F.2d 163 (2d Cir. 1947), p.163. Learned even referenced the different approach from Augustus in *Berlandi* by describing how it 'looked a little askance' at his common conscience test.
[65] Ibid., p.164.

as marriages forbidden by "God's Law"'.[66] Learned believed that the 'consciences of the ordinary man' did not demand that 'degree of ascesis' and affirmed Francioso's naturalisation.[67] However, in coming to that opinion, he intuitively decided what was the greater of the two moral decisions to consider, without explaining how he ascertained this moral position from society. Thus, even when claiming to rule on the moral standards of society, his opinion showed the impossibility for judges to completely detach from responsibility.

This struggle to create a clear and effective standard was even more evident in *Repouille*. The sensitive issues around the case, in which a father, Louis Repouille, had performed euthanasia on his disabled son, made it a testing proposition for Learned. This was evident from the humanitarianism he displayed in the case, which he described as 'tragic'.[68] In similar vein, the difficulties were in containing his personal views and accurately interpreting the moral conventions of society. Therefore, with a case possessing such emotional weight, his ability to largely transcend personal feelings in his opinion and abide by his institutional constraints when he upheld a rejection of Repouille's naturalisation application was commendable. As he later reflected, 'I'm not proud of that decision, but I don't know what else could have been said'.[69]

Repouille's son was severely disabled, suffering from brain damage since his birth, which had left him 'blind, mute, and deformed', dependent on feeding, and with no control of his bladder and bowels.[70] The decision by Repouille to kill him with chloroform was seen by Learned as a merciful act for the child and the rest of the family, since it was also done to alleviate the emotional, time, and financial burdens that were damaging the rest of the family. The jury had concurred, as despite Repouille's indictment for manslaughter in the first degree,

[66] Ibid.
[67] Ibid. 'Ascesis' is the practice of severe self-discipline, typically for religious reasons.
[68] LH 210/18, Learned Hand memo for *Repouille v. U.S.*, 20 November 1947.
[69] LH 231/10, Learned Hand, interviewed by Gerald Gunther, 1959.
[70] *Repouille v. U.S.*, 165 F.2d 152 (2d Cir. 1947), p.152.

its verdict was second-degree manslaughter and a recommendation of the 'utmost clemency'.[71] The trial judge obliged, imposing a minimum five year sentence, but suspending the sentence and placing Repouille on probation. However, a procedural technicality added to Repouille's tragedy. He had filed his naturalisation petition on 22 September 1944, having killed his son on 12 October 1939. Had he filed the petition a month later, his crime would not have been considered in the five year preceding period, and with a record as a 'dutiful and responsible parent', he would have passed the 'good moral character' test without difficulty.[72]

When it came to making a decision, Learned wrote again about the perceived inadequacies of assessing 'good moral character', but he also explained this issue more clearly and specifically. In private he admitted that, 'there are probably hundreds of thousands of people in the United States who would think that it was immoral to relieve a family of so terrible a burden; and hundreds of thousands who would not. How are we to say which is the dominant view?'.[73] Augustus was also a member of the panel hearing *Repouille*, and his response to Learned was brutal and honest, yet still sympathetic. He was 'sorry for this poor fellow', but was not prepared 'to say "in spirit or in truth" that there is any wide sentiment in the community that would hold a person of "good moral character" who takes law into his own hands in a case like this'.[74] His different interpretation of the common conscience of society amplified the issue with the test — it still invited a great degree of personal judgement.

Augustus' additional contribution to the case, however, displayed a humanitarian, pragmatic, and proactive approach. In defining the common conscience in the context of the current legislative framework, the result was 'pretty barbarous' for Repouille, but it 'had a bearing on the sentiment of American communities'.[75] His sympathy inspired a positive vision for Repouille: he be admitted in a situation where the country favoured 'mercy killing', but if sanctioned by the law 'it should have the most careful safeguards to make accord with social

[71] Ibid., p.153.
[72] Ibid., p.152.
[73] LH 210/18, Learned Hand memo for *Repouille v. U.S.*, 20 November 1947.
[74] LH 210/18, Augustus Hand memo for *Repouille v. U.S.*, 19 November 1947.
[75] Ibid.

safety'.[76] These private writings were revealing of three important traits in his thinking. The first two were that the legislature remained the primary force for social change and the final determination did not rest with the judge. The other was regarding his consideration of the prospect of legalised euthanasia. Augustus frequently dealt with the facts of his cases in short and direct memos, but in a case of such tragic consequences, his humanity was more evident. This prompted a remedy for Repouille's situation, where he could simply file for a new application, in which the crime would no longer be in the five year consideration period. This humane proposal represented an approach more frequently identified with Learned, which was to provide guidance as a public figure, particularly when he was voting for the opposite result in court's ruling. In adopting this approach, Augustus similarly drew a clear line between arbiter and educator in the issues of immigration and morality.

Learned adopted Augustus' guidance in his opinion for the court, but not before taking the opportunity to return to the unnecessary burden that immigration law and morality tests placed on judges. Learned touched on numerous issues with the common conscience test. First, there was not a realistic, objective measuring mechanism, since the judge did not have access to 'some national inquisition, like a Gallup poll' when there were questions 'to which the answer is not ascertainable'.[77] Second, the judge had to speculate and, therefore, succumb to the very personal notions this test was meant to minimise. As Learned guessed, 'Many people — probably most people — do not make it a final ethical test of conduct that should not violate the law'.[78] He added, 'Left at large as we are, without means of verifying our conclusion, and without authority to substitute our individual beliefs, the outcome must needs be tentative; and not much is gained by discussion'.[79] Third, without verifiable measuring standards, the evidence that was gained was weak or conflicting. A 'discussion' involved consideration of the jury's verdict as a 'reliable measure of current morals', but this conflicted with state laws such as those in Massachusetts, which had recently led to a similar offender imprisoned for

[76] Ibid.
[77] *Repouille*, p.153.
[78] Ibid.
[79] Ibid.

life.[80] He ultimately concluded the court was 'reasonably secure in holding that only a minority of virtuous persons would deem the practice [of euthanasia] morally justifiable'.[81] In abiding by his restraint, the voice of society suggested that there was not enough consensus in support of euthanasia to rule in favour of Repouille.

Learned's approach in cases such as *Repouille* has received criticism, primarily for the lack of intervention to save immigrants. The most notable critic was legal scholar, Edmond Cahn, who believed that judges had a duty to lead with their moral positions on the issue of immigration. Specifically, he defined a certain sector of judges as 'too sophisticated to ignore the existence of the problem of moral standards, too well read to forget their relativism, and perhaps too modest to insist on conformity by others to what he deems to be virtuous'.[82] Cahn wrote about his broader expectations of judges, but he addressed them specifically to immigration. This was because he believed that the humanitarian implications involved and the vagueness of the 'good moral character' test left judicial rulings in this field of law more open to personal prejudices and bias. He saw this as an opportunity, suggesting that there was space for the judge to act as 'pedagogue and moral mentor'.[83] He even cited the well-known phrase from one of the Hands' teachers, John Chipman Gray, advising judges to follow their own notions of right or wrong when they differed from 'those of the community'.[84] Cahn took specific aim at Learned by accusing him of shirking his responsibility by deferring to the community and even lending aid to majoritarian suppression of immigrants.

However, Cahn's depiction is inaccurate and unconvincing when the common conscience test is viewed in the full context of Learned's judicial philosophy. First, Cahn held great faith in the erudite arbitership of the judge over the community. He downplayed fears that a judge would apply 'erratic, capricious, or idiosyncratic moral standards'.[85] But this very threat was

[80] Ibid.
[81] Ibid.
[82] Edmond Cahn, 'Authority and Responsibility', *Columbia Law Review* 51 (1951), 838-851 (p.841).
[83] Ibid., p.844.
[84] Ibid., p.841. Quoting Gray, *The Nature and Sources of the Law*. Full quote in Chapter One: The Formative Years.
[85] Cahn, p.850.

exactly why Learned distrusted judges. Gray had taught Learned of the power of prejudice in judicial decision making, but unlike his teacher, Learned sought to minimise that influence, rather than use it. As he explained in a letter to a fellow judge, 'The difficulties…are that judges drawn from one economic class feel free to make law on their own "hunches", and those hunches have corresponded to unconscious prejudice of their class'.[86] It was no secret that the judicial system was dominated by those from an upper or upper-middle class background. Learned was no exception, making it a prime driver behind his scepticism of the innate fallibility of judging. Second, Learned's belief in incommensurable values made the common conscience test the best solution in a bad situation. Whereas Cahn saw 'right' and 'wrong' in certain moral choices over naturalisations and deportations, Learned saw 'preferable' and 'non-preferable'. What was framed as moral, to Learned, were the conventions society agreed upon that presented sufficient 'positive sensation' without prompting 'too violent opposition'.[87] These were compromises, but they could change. The fact that there were no true moral absolutes convinced Learned that the larger questions around social, political, and economic issues should be settled by 'men more responsive to popular pressure, and who ought to be in any community in which there are adequate safety valves'.[88] He was, therefore, advocating for a contextual arbitration of the immigration question that took account of cultural relativity. Finally, Cahn argued that when various groups present a number of diverse opinions on immigration, there was a burden for judges to be the arbiter. However, the very essence of a democratic legislature was to proportionately represent the majority opinion within such a diverse selection. If the decision proved to be wrong, a pragmatic thinking democracy would vote for change; a process in which judges were not held to the same accountability.

Cahn downplayed the extent to which judges sought to mitigate the influences of their own biases. Learned's interpretation of the common conscience in *Repouille* provided a prime

[86] LH 55/4, letter from Learned Hand to Joseph Hutcheson, 2 July 1929.
[87] CRBMC, Learned Hand, interviewed by Louis Henkin, 1957.
[88] LH 55/4, letter from Learned Hand to Joseph Hutcheson, 2 July 1929.

example of that judicial self-scepticism in action, but it also signified a broader scepticism of the judiciary at large as figures of moral authority. This was evident in Learned's private lambasting of his colleague, Jerome Frank, for the dissent that he issued in the case. His criticism was not with Frank's right to dissent, but for shaping common conscience into a test that invited too much input from a small representative sample of society. After Frank suggested that 'good moral character' should be defined through the interpretation of the 'ethical leaders' of the country, Learned wrote the following to Felix Frankfurter, 'I assume that he expected the district judge, *sua sponte*, to call the Cardinal Bishop Gilbert, an orthodox and liberal rabbi, Reinhold Neibuhr, the head of the Ethical Culture Society, and Edmund Wilson, to be all cross-examined, ending in a "survey"'.[89] The subject of Learned's criticism was that Frank simply proposed the power of determination be transferred from the confined, class-based prejudice of the judge to the confined, class-based prejudice of others in elite positions.

Learned's main criticism, however, remained that the test still invited too much subjective judgement from the judge. Indeed, as a former law clerk for Learned reflected, he was 'put squarely up against the reality that he didn't want to decide what was "good moral character"'.[90] This sentiment was confirmed when Learned wrote to Cahn in 1952, explaining that the common conscience was a 'bad' standard, but it was still the best choice in a selection of bad options.[91] As Frankfurter wrote to Learned in the aftermath of *Repouille*, 'my interest is aroused by the psychological judicial problem that confronted you, namely, to what extent may a judge assume that his notion of right moral standards are those of the community'.[92] The vague nature of immigration law allowed this test to be twisted to match the moral compass of the judge.

[89] *Repouille*, (Judge Frank dissenting), p.154. LH 105B/13, letter from Learned Hand to Felix Frankfurter, 9 December 1947.
[90] Thomas Ehrlich, interviewed by Jak Allen, 25 April 2018.
[91] LH 82/25, letter from Learned Hand to Edmond Cahn, 12 May 1952.
[92] LH 105B/13, letter from Felix Frankfurter to Learned Hand, 6 December 1947.

Although Learned was liberal or libertarian in the sense that he desired humanitarian solutions to immigration questions, his underpinning philosophy behind immigration law was to minimise personal influence in judicial decision making. In actual fact, the common conscience test did have a major flaw in that Learned's inability to define its method made it ripe for judges to align decisions with their own moral values. As Learned continued to apply the test in cases after 1940, he experienced significant difficulty with finding out how and where the community's common conscience could be identified. As late as 1961, he noted, 'Obviously it is a test incapable of exact definition; the best we can do is to improvise the response that the "ordinary" man or woman would make…Values are incommensurables; and the law is full of standards that admit of no quantitative measure'.[93] The morally blurry case of *Repouille* showed the way in which sensitive issues could provoke greater emotion out of an assumed moral arbiter. Learned and Augustus had strong sympathies for Louis Repouille and suggested that hundreds of thousands of Americans likely supported Repouille's actions. With no defined watermark for the appropriate common conscience, this was an opportune moment to reverse Repouille's deportation order. However, Learned erred on the side of caution by noting that it required a wider consensus. In that sense, his opinion, with the help of Augustus, underlined a strong will to maintain judicial restraint and contain their personal instincts when the temptation was greatest. This test of temptation was equally challenging when the years following World War Two left many immigrants the targets of nationalist rhetoric and pushed further humanitarian dilemmas in front of the Hands.

The Post-War Cases: Loyalty and 'Enemy Aliens'

The outbreak of World War Two intensified scrutiny over the political affiliations and views of immigrants. Such scrutiny was driven by fear and hostility to foreign persons coming to the U.S. from 'enemy' countries.[94] Consequently, the federal government probed deeper into the

[93] *Posusta v. U.S.*, 285 F.2d 533 (2d Cir. 1961), p.535.
[94] As anti-German sentiment is a dominant theme in this section, a seminal work is Don Tolzman, *German-Americans in the World Wars*, 5 vols (New Providence, NJ: K.G. Saur, 1998), v. Volume 5

lives of immigrants in an attempt to root out certain shades of political or subversive ideas. This was a different challenge than the testing of morality because the mistreatment of immigrants in this period went simultaneously with some of Learned's most vocal and passionate calls for humanitarianism, in opposition to this form of nationalism. However, in the midst of this hostile environment, the Hands' actions on the bench showed that they remained consistent with their attempts to establish the boundaries between their personal and professional positions. At a time when reactionary political conservatives exerted a strong influence on the immigration debate, three cases in 1947 — *U.S. ex rel. Bradley v. Watkins*, *U.S. ex rel. Kessler v. Watkins*, and *U.S. ex rel. Ludecke v. Watkins* — exemplified Learned and Augustus' persistent stress on maintaining judicial impartiality and focusing on the legal tests to guide their decisions.[95]

Considering the treatment and persecution of certain social groups in Europe in this period, Learned was deeply disturbed with the rhetoric expressed towards immigrants coming to the U.S. during and after the war. Two speeches in this period embodied his concerns, but they also served as a useful contrast to his later judicial conduct. Both happened during the annual 'I am an American Day' ceremony to celebrate the naturalisation of new citizens to the U.S. Learned's more famous speech happened on a warm Central Park afternoon on 21 May 1944, where he addressed one hundred and fifty thousand newly naturalised citizens and over one million more people who listened through the speakers spread throughout the park.[96] In the speech, he pondered the courage of those 'to break from the past and brave the dangers and the loneliness of a strange land'.[97] Furthermore, he took inspiration from such sacrifice, where many immigrants had left behind other countries, cultures, and homes to begin new lives,

covers Germanophobia in the U.S. and the anti-German sentiment that pervaded in U.S. society and politics during World War Two.

[95] *U.S. ex rel. Bradley v. Watkins*, 163 F.2d 328 (2d Cir. 1947), *U.S. ex rel. Kessler v. Watkins*, 163 F.2d 140 (2d Cir. 1947), and *U.S. ex rel. Ludecke v. Watkins*, 163 F.2d 143 (2d Cir. 1947).

[96] The speech was praised in *Life Magazine* as a 'new and solid stone in the proud edifice of American oratory'. Editorial Note, 'We Seek Liberty', *Life*, 3 July 1944, p.20. The articled added, 'It is not in the great Webster tradition, but in the greater, simpler tradition of Lincoln'.

[97] LH 134/7, Learned Hand, 'I am an American Day Address', 21 May 1944.

many of whom 'sought liberty; freedom from oppression, freedom from want, freedom to be ourselves'.[98]

The speech was also illuminating because it reiterated the very philosophical traits that drove his immigration decisions both before and during this period. These traits were scepticism, faith in societal harmony and progress, and trust in more representative democratic actions. Most notable was the difficult decision to accept that his strong desire for tolerance must come organically and democratically. This meant that paternalistic methods were not viable, including from the judge. His definition of liberty crystallised this, 'I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes…Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it'.[99] This was another call for the 'intellectual republic' that he had learnt from William James. By downplaying the role of courts, constitutions, and laws — the very institutions and tools that guided populations on how they should not act — he substituted a vision of a pragmatic and open minded society, which functioned and evolved by determining its own laws, morals, and authority.

The significance of Learned's second address a year later has not been recognised, but it contains some similarly striking passages.[100] Whilst the first speech illustrated Learned's vision for democracy and the courts in immigration issues, the descriptions in his second speech echoed the traits of his judicial behaviour in immigration cases. On a personal level, Learned was a liberal internationalist in his vision of a post-war world. This entailed a tolerant nation that that accepted immigrants from other countries in a reciprocal relationship of helping each other. As he noted, 'Right knows no boundaries, and justice no frontiers: the brotherhood of man is not a domestic institution'.[101] However, he also painted the optimal conduct of an individual,

[98] Ibid.
[99] Ibid.
[100] Gunther confined it to a footnote and underplayed it as 'less memorable'. See Gunther, *Learned Hand*, p.666, fn.188.
[101] LH 134/32, Learned Hand, 'A Pledge of Allegiance', 20 May 1945.

> let us not content ourselves with noble aspirations, counsels of perfection, and self-righteous advice to others…we shall have to be content with short steps; we shall be obliged to give and take…in the end we shall have fabricated an imperfect instrument. But…we shall have gone forward, if we bring to our task a purse and chastened spirit, patience, understanding, sympathy, forbearance, generosity, fortitude, and above all inflexible determination.[102]

This mirrored his very conduct on the bench in this period. He often personally opposed the decisions he wrote, but he was not always sure he was right, which justified his restrained approach. As he wrote in a letter in response to his first speech in 1944, 'I doubt if liberty is ever possible independently of scepticism about our own conclusions and control of our emotion'.[103] Thus, even when he was often confident and assured in the morality of his positions, his was only one voice — and a less representative one than Congress'. It was better for him to leave to the possibility of changes via a representative and engaged democracy, rather than from a rigid standard imposed by a small concentration of voices on a court.

These speeches were significant for explaining how Learned kept restraint at the centre of his approach to immigration in this period. Three legal cases across a two day period in 1947, meanwhile, illuminated the ways in which Learned and Augustus took a different approach to the question of judicial restraint as applied to morally complex cases around naturalisation, rights, and liberty. The first was *US ex rel. Bradley v. Watkins* on 23 July, which centred on whether an involuntary entry to a country could lead to a determination of the entrant as an 'immigrant' and, if so, what rights that immigrant possessed. The case involved the U.S. Coast Guard's seizure of Jacob Bradley, a Norwegian and former member of the Quisling Party, in Greenland in September 1941, prior to the U.S. declaring war on Germany and Japan. Bradley was taken as a prisoner to the U.S. and given an immigration hearing as an 'applicant for admission to the United States'.[104] Extraordinarily, although the hearing disclosed that he never intended to come to the U.S., the board held that 'the applicant should be classified as a potential immigrant'.[105] When asked if he would like to appeal, Bradley replied in the negative.

---

[102] Ibid.
[103] LH 134/28, letter from Learned Hand to Chester Duel Jr., 21 July 1944.
[104] *Bradley*, p.329.
[105] Ibid.

Following that, he was transferred between various detention centres in preparation for deportation to Norway where the Norwegian government wished to put him on trial as a war criminal.

Learned's private reflections on the case reflected the sentiments of his 'I am an American Day' speeches. He was deeply disturbed about the abuse of Bradley, describing his detaining as a 'kidnapping'.[106] He explained that the vagueness of current law left no real or substantial guidance for involuntary and forced entrance. Thus, he wrote, 'If we put in our midst someone whom we cannot get rid of, it does not wring my withers that we may have added him to our population until Congress sees fit to provide for such cases'.[107] He proposed a compromise. Bradley was not wanted in the country, but authorities had not found a statutory basis to forcibly deport him to Norway after being involuntarily taken into the U.S. Since Bradley suggested he was willing to leave the U.S., Learned proposed that he be allowed to voluntarily depart, thus allowing him the option of his destination.

When the statutory guidance was unclear, like in this case, Learned was more inclined to lean to the side of compassion and narrowly interpret statutory powers. This is what happened when he wrote the opinion in a two to one majority decision with Thomas Swan (who was the third presiding judged alongside Learned and Augustus), adopting the proposals from his private memos. In the context of his passionate speeches in the 1940s and the vagueness of the statues at hand, a simplistic assessment under the political and partisan lens would suggest this represented the type of instinctively 'libertarian' ruling under which Learned became recognised. However, his solution was actually not dictated from such instincts and was guided, instead, by his restraintist judicial philosophy. When there was no set precedent or legislation that clarified a position on the key issue at hand, Learned followed the lessons of Thayer from Harvard days, namely to evaluate if a decision had been made that was 'not open to rational question'. The evidence in this case was overwhelming, not only on a humanitarian

[106] LH 209/24, Learned Hand memo for *U.S. ex rel. Bradley v. Watkins*, 23 June 1947.
[107] Ibid.

basis, but a legal one. As Learned described Bradley's situation, he was an immigrant seized on foreign soil, excluded from entrance in a time of peace, detained for six years, and ordered for deportation. These were an 'abuse of the words' in the law and represented the 'very ideologies against which our nation has just fought the greatest war of history'.[108] Bradley was, therefore, free to fulfil his promise to depart the U.S. on his own terms.

Augustus disagreed with the court and provided a rare dissent. This is notable on one level because the reputation of the Second Circuit as a 'libertarian' court on immigration is complicated by these judicial fissures. However, it also showed that Augustus — a champion of immigrants — was also driven by his interpretive methods and concerns over judicial philosophy, rather than personal inclinations. Like Learned and Swan, he also sympathised with Bradley and found it 'unlikely' that the U.S. Coast Guard's actions bringing him to the country were within statutory authority.[109] However, his argument was weaker by taking a literalist approach and accepting that a far-stretching interpretation of the word immigrant from government authorities was enough to prevent him overruling the decision of the authorities. As he noted, 'Bradley literally "departed" from Greenland when he was transported from that country; likewise he was "destined for the United States" when he left Greenland for America'.[110] Furthermore, Augustus argued that Congress was the authority for defining the term 'immigrant', and he interpreted it to be 'broad' enough to include one in Bradley's situation.[111] Augustus' reasons when it came to judicial authority were stronger that his statutory reading. In his view, the greater threat was creating new grounds for judicial interference, which could be harder to unroll than any individual decision made by immigration authorities. As he noted, he did not want to engraft a 'new implied exception into the immigration statutes' which could 'give rise to serious future troubles in the interpretation

[108] *Bradley*, p.332.
[109] *Bradley*, (Judge Augustus Hand dissenting), p.332.
[110] Ibid.
[111] Ibid., p.333.

of a mass of statutes that are already difficult and confusing'.[112] Thus, a concern to limit judicial overreach played a significant factor in his interpretation.

The other two cases in this period highlighted Augustus' ability to maintain strict restraint in cases that were personally troubling for their humanitarian implications. In *U.S. ex re Kessler v. Watkins,* the individuals were held under suspicion of being aliens of the German government. This made them subject to deportation under the Alien Law of 1798 for being natives of a nation with an 'enemy government', which also made them dangers to the 'public peace'.[113] Despite the government never specifying what actions or evidence tied the immigrants' alleged affiliation to the German government, Augustus' opinion never considered the humanitarian implications of this discriminatory deportation. The sole question, he wrote, was whether the courts had the power to review the findings of the Attorney General.

This exemplified Augustus' restraintist approach and set up the theme for the rest of the opinion, which dealt with the issue through a short, but heavy, dose of precedent. First, the Second Circuit, had already upheld the legality of continued detention and deportation of war-subject citizens in *U.S. ex rel. Schlueter v. Watkins*.[114] Second, Augustus deferred to the Alien Law of 1798. This claimed that authority of the President was not limited to situations where war was declared and could include those where invasions or 'predatory incursion' were 'attempted' or 'threatened'.[115] This was relevant because Harry Truman had declared in a recent proclamation that the cessation of hostilities did not discount that a 'a state of war still exists'.[116] And finally, the Supreme Court had ruled just a year earlier in 1946 that 'peace' only meant the cessation of hostilities when it was 'officially declared'.[117] Therefore, Augustus sourced his opinion from the directive of all three branches of government.

[112] Ibid., p.333.
[113] *Kessler*, p.141.
[114] *U.S. ex rel. Schlueter v. Watkins,* 158 F.2d 853 (2d. Cir. 1946).
[115] *Kessler*, p.142.
[116] Ibid.
[117] Ibid.

Although Augustus sometimes presented a cold exterior in cases such as *Kessler*, other cases showed the humanitarianism that he had exhibited in earlier decades. The other case in this period, *U.S. ex rel. Ludecke v. Watkins*, was a clear example. It was significant because he voted in ruling against the immigrant, but his vocal empathy established that there was a clear divide in his personal and judicial positions. Indeed, in writing the opinion for the court, Augustus affirmed the detention and deportation of Kurt Ludecke for being a 'German alien enemy' and 'dangerous to the public peace'.[118] Similarly to *Kessler*, the government was not specific in its accusations, outside of suggesting that Ludecke was an adherent to a government with which the U.S. was at war. In explaining the ruling, Augustus reaffirmed the court's limited powers of review, writing that the executive's war powers had been confirmed in *Kessler* and *Schlueter*, and adding, 'We see no reason for discussing the nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General for the reason that his order is not subject to judicial review'.[119] However, in an echo of his suggestion in *Repouille*, Augustus believed 'justice may perhaps be better satisfied' with a reconsideration of the deportation, reaffirming that he saw a place for judges to provide ethical guidance when necessary.[120] He also expressed a well-recognised notion that 'it is of doubtful propriety for a court ever to express an opinion on a subject over which it has no power', but he still did so, even if only in a moderation.[121] For a judge known to be more cautious than his cousin, this was significant for dividing the line between judicial interpretation and personal values.[122]

---

[118] *Ludecke*, p.144.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Justice Frankfurter wrote the following in *Ludecke v. Watkins*, 335 U.S. 160 (1948), pp.167-169, 'War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. "The state of war" may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act. Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled'. This authority endured until 2004, when the Court ruled that the U.S. government had authority to detain foreign enemy combatants, but not without said combatants having a Fourth Amendment right to due process. See *Hamdi v. Rumsfield*, 542 U.S. 507 (2004).

Ludecke was a good illustration of the bankruptcy of the political binary in explaining judicial decision making. With precedent consistently invoked as governing mantra, Augustus' rhetoric in the court frequently masked his private sympathies. This was reflected in decisions such as *Kessler* where he refused to touch upon the extraordinary humanitarian circumstances of the situation. Elsewhere, as in *Ludecke*, he affirmed a tough decision on the immigrant even when he made his views public. Whilst such moments were rare and often preserved for work outside of official court opinions, it reinforced the notion that Augustus was a man keen to steer as close as he could to impartiality rather than personal instinct. Learned's approach had similarities. He sided with the court in both *Kessler* and *Ludecke* because it aligned with his restraintist philosophy. However, his speeches at the 'I am an American Day' ceremonies revealed a more outspoken concern. This also projected onto his ruling in *Bradley*, but the vagueness of the statute gave him the flexibility to side with the immigrant. Nonetheless, despite the emotional weight of deportation and nationalist rhetoric in these cases, the Hands' approaches shared a unifying element. This was the crucial and necessary rejection of personal influence.

Conclusion

Immigration cases posed a great struggle for the Hands between personal values and judicial duties. With such grave consequences on the line for many individuals, the Hands were deeply sympathetic on many occasions and often opposed the conservative and reactionary policies that regulated immigration in the early twentieth century. Their ability to set aside private sentiments and vote to uphold policies they opposed was the product of a nuanced and complex philosophy. This presented a multi-faceted outlook on the judicial role, which transcended personal sympathies to incorporate scepticism of authority, particularly of the judge in moral issues; anti-tribalist motifs; a recourse to humanitarianism where the facts of the case presented a suitable opportunity; and a deep-seated faith in the veracity of the democratic process.

Despite this approach, the Hands were not entirely silent on issues that they viewed as morally troubling. However, they aired their grievances in a controlled and cautious manner. This was significant in establishing a divide between their judicial and personal behaviours. The use of political terms for Learned and Augustus' judicial legacy, most prominently Schick's 'libertarian' label, actually do the pair a disservice by failing to emphasise the importance of their sophisticated approach to legal tests and restrained judging, despite the vagaries they saw in immigration law.

A prime example of their restrained judging came in their assumed mantle of moral guides, rather than arbiters: a subtle distinction that signalled their careful reading of the reach and responsibility of legal office. Whilst Learned was characteristically more colourful and freely expressive in his humanitarianism, Augustus' more selective and concise delivery often added greater weight to his words when he saw opportunities to present moral and ethical guidance. For example, it moved Learned when Augustus proposed a solution for Louis Repouille to still become a U.S. citizen, despite conceding that he would lose his initial case. The authority of Augustus' oratory was also recognised in cases such as *Ludecke* when he was revered as one of the great serving judges in the country. Indeed, Justice William Douglas quoted Augustus' warning against hastily deporting Kurt Ludecke and framed it in the broader implications that it portended, 'individual liberty will be less secure tomorrow than it was yesterday'.[123]

The most challenging aspects of immigration law, however, involved the vague statutes and terminologies such as 'desirability' and 'moral turpitude' that judges were expected to interpret. Although vagueness is a common problem in law, the humanitarian implications in immigration cases added the urgency for greater precision in their interpretation. These imprecise terms prompted a variety of rulings across the federal judiciary that reflected different judicial methods and produced mixed outcomes — often reflecting the personal discretion of judges. The reaction of the Hands was to adopt different restraintist approaches. Whilst Augustus adhered to legal precedent throughout, Learned took a more pragmatic

[123] *Ludecke v. Watkins*, 335 U.S. 160 (1948) (Justice Douglas dissenting), p.173.

approach. The ‘good moral character’ test prompted this, since it represented the subjective aspects of immigration law about which Learned had complained. In response, Learned’s introduction of the common conscience standard presented an ambitious attempt to mitigate the personal influence of judges. Most strikingly it displayed consistency in Learned’s jurisprudence across different fields of law, since it mirrored the suggestions that he and Augustus had made in obscenity cases to gauge wider society’s moral conscience. By suggesting that society’s standards were a better democratic barometer for the moral requirements of citizen applicants and potential deportees, Learned dealt a blow to the concept that the judge should serve as trusted or representative arbiter. His attempts to gauge the standards of society were sometimes messy and, ironically, invited the infusion of his personal decision making. For example, when he faced the prospect of weighing two morally troubling outcomes in *Francioso*, he resorted to personal value judgements when justifying the court’s ruling. However, Learned made clear that the standard was the most serviceable option, even if judges were not well equipped to deal with the complexity of its application.

What was most important here was that he tried sincerely to identify the common conscience. As a result, the standard became useful for promoting his positive and progressive vision of society. This vision, as built from Learned’s Harvard education, relied on the regulation of morality to be driven by trial and error, an engaged populace, and judges not interfering in the process. Therefore, whilst critics, like Cahn, sought only victories for morality in naturalisation cases, Learned believed moral victories could be achieved via Congress and wider society — without the judge’s personal intervention in the immigration issue. This position, in fact, symbolised the larger legal philosophy of the Hands. When Augustus had urged that the ‘spirit of the hour’ should prompt ‘fairness’ and ‘tolerance’ to immigrants, he knew that a shift to this mentality lay with the ‘hearts of men and women’.[124] Together, the Hands held personally liberal visions that respected the diverse cultural values of U.S. society and aspired for better treatment of its immigrants. However, they envisioned a

[124] S&P 25/2, Augustus Hand, Speech on Naturalization, 11 December 1925.

reduced role for the judge, with society and the legislature taking the primary mantel for shaping change on immigration.

Chapter Five: Criminal Law - Prohibition to the Cold War

Felix Frankfurter once compared Learned's 'booze opinions' to 'good wine [which] get better' over time.[1] He was referring to the numerous Prohibition opinions written by Learned in which the boundaries of police searches were comprehensively narrowed. The prevalence of these searches represented a response to the rise of bootlegging in the U.S. during its national ban from 1920 to 1933. Emboldened in their attempt to effectively police this criminal activity, law enforcement authorities cultivated a reputation for intrusive entrances onto private property and the use of violent means to seize liquor. Learned earned commendations for his rulings on such matters, especially for his strong response to the frequent cutting of constitutional corners by Prohibition agents during these searches. Alongside his cousin, Augustus also adjudicated on critical issues relating to investigatory powers, including new technologies such as wiretapping and fingerprinting. Read collectively, these legal judgements offered new and significant interpretations of Fourth Amendment rights and federal criminal law that illuminated the Hands' judicial approaches and, moreover, remain influential today.[2] Despite the Hands' lasting contributions to this broad area of jurisprudence, scholars have only briefly covered Learned's record, whilst Augustus' has yet to be scrutinised.

This chapter provides much needed analysis and sheds light on the broad influence of the Hands in this specific field. The Hands were appointed to the federal bench at an important historical moment, specifically the enactment of the U.S. Criminal Code (1909), which was consciously drafted as an attempt to modernise federal criminal law. The Code incorporated a vast range of new subjects on which Congress had not previously attempted to legislate and marked the start of an expansion of the scope of federal criminal jurisdiction.[3] The Hands

[1] LH 104A/10, letter from Felix Frankfurter to Learned Hand, 2 December 1922.
[2] *U.S. Const. amend. IV*, 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'.
[3] See Lawrence Friedman, *Law in America: A Short History* (New York: Modern Library, 2004). Friedman sets forth how legislation prompted a dramatic change of criminal laws in the early-to-mid

were, therefore, presented with novel opportunities to assess a series of issues relating to federal criminal law and American privacy rights. This chapter shows how they interpreted these issues in a timeframe that starts with the Prohibition Era and ends with the commencement of the Cold War. In particular, it covers their key opinions on two areas of police methods: search and seizure and the technology methods used to identify suspects and criminals. These two issues were increasingly important to Fourth Amendment jurisprudence and its wider effect on society in the first half of the twentieth century. Searches and seizures were a key source of contention for Americans during Prohibition after police garnered a reputation for their intrusive search methods. Meanwhile, technological changes represented a new era of cutting-edge experimentation in attempts to crack down on crime. In considering the boundaries of acceptable investigatory methods in both, the Hands had to carefully consider the broader, long term implications in the balance between police powers and Americans' constitutionally protected rights.

On a broader level, meanwhile, the Hands' interventions in these discreet aspects of criminal law illuminates the limited usefulness of the liberal-conservative binary as a way of understanding the American legal world. The nature of terms, such as liberal and conservative, represented fluid and diverse positions in the context of criminal law in the early twentieth century, with interest groups proposing a variety of different methods for the investigation and rehabilitation of suspects and criminals. Nonetheless, those who sought proposed reforms that ended harsh punishments and brought in more sympathetic standards for criminals were often considered liberal, whilst those who opposed such reforms were more frequently aligned with conservatives.[4] Certainly, on a personal level, the Hands held views that were sympathetic to the reform and rehabilitation of criminals. Augustus, for example, was a strong personal advocate of the Youth Correction Authority Act of 1940, which set up the organisation,

twentieth century, including innovations to criminal procedure, the rise of the administrative-welfare state, and changes to the penitentiary system and police forces.

[4] For a succinct summary of the different interest groups over prison reforms in the first half of the twentieth century, see Larry Siegal and John Worrall, *Essentials of Criminal Justice* (Boston, MA: Cengage Learning, 2017), pp.404-405.

administration, and policymaking of a statewide system that would integrate the handling and rehabilitation of young offenders. He described it as 'amazing…in so dealing with young offenders that they ceased their lawless ways and did not become habitual criminals'.[5] He was also a leading voice for public defenders to help those most destitute warning against 'shut[ting] the gates of mercy on mankind'.[6] Likewise, Learned believed in a compassionate approach to criminals, including his support for better legal aid for the poor. He strikingly remarked on the topic, 'If we are to keep our democracy there must be one commandment: Thou shalt not ration justice'.[7]

That said, the Hands' conduct on the bench reflected the deliberations of men that were more complex than compartmentalised political or partisan positions allowed for. Instead, they based their rulings on a range of legal-philosophical considerations that sat comfortably within those foundational values that both had cultivated from a young age. At the forefront were underlying concerns about power, democracy, and the correct functions of government. Learned took a sceptical approach to positions of authority in Fourth Amendment issues. This saw him, in particular, hold police to high standards of accountability, on the assumption that a lack of scrutiny could embolden further authoritarian and unjustified uses of search powers. Augustus took an approach more focused on the institutional restraint of the judiciary, adopting a limited role for courts and embracing the notion of investigatory powers being left to democratic debate and experimentation.

The chapter shows how this fine-grained interpretation of criminal law produced disagreement between the Hands, based on their distinctive reading of legislative reach. This showcases the necessity for a more nuanced framing of the judicial role in legal-historical scholarship, as it reveals how fundamentally different their proposals were for reshaping the fate of many individuals in the U.S. justice system, despite their similar legal-philosophical

[5] Augustus Hand, 'William Draper Lewis', *University of Pennsylvania Law Review* 98 (1949), 8-9 (p.8).
[6] LH 109/17, Augustus Hand, 'Speech to Legal Aid Society at the Down Town Association in New York City', 27 February 1946.
[7] LH 135/7, Learned Hand, 'Speech to the Legal Aid Society at the Waldorf Astoria in New York City', 16 February 1951.

worldviews and shared values on issue of civil liberties. In dealing with the raft of new cases as related to the Criminal Code, Learned was inclined to interpret the powers of authorities narrowly, whilst Augustus tended to interpret them broadly. This reflected their differing understanding of the restraint taught to them by Thayer at Harvard. Both advocated deference to the legislature's directives, outside of actions deemed not open to 'rational question'. As in other civil liberties cases, however, Learned showed a greater eagerness to intervene on behalf of society when he believed legislatures were not effectively responding to public sentiment, whilst Augustus was more conscious of judges interfering in the decisions of other public bodies. In turn, this key difference also showed how the school of restraint is not comprised of a uniform judicial mindset, but rather a richness of different interpretations and applications. This construction of a mosaic of legal and philosophical ideas reveals the complex, but extraordinary agency and responsibility that the Hands invested into their interpretations of the Fourth Amendment.

The Problem of Prohibition

In their first three decades on the federal bench — spanning from the 1910s to the 1930s — the effects of Prohibition were the single most important aspect shaping the Hands' reading and review of the Fourth Amendment. The controversy around police search methods and the shifting support for Prohibition amongst the American public prompted a vast number of cases in this period. This was a direct result of the ratification of the Eighteenth Amendment in January 1919 which prohibited 'the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States'.[8] The enactment of the Volstead Act followed a year later, which outlined the process by which the Amendment was to be enforced.[9] On a local level, many states already had their own alcohol

[8] *U.S. Const. amend. XVIII.* (Repealed 1933).
[9] The formal name was the National Prohibition Act 41 Stat. 305 (1919).

prohibition laws, but soon introduced their own copycat measures that mirrored the Volstead Act and expanded the reach of alcohol legislation beyond the federal level.[10]

The weak enforcement of the nationwide ban on alcohol in the U.S. allowed for the emergence of the bootlegging industry and a subsequent increase in organised crime.[11] The rate of serious crimes was already on the rise during the 1910s, in part a result of alcohol prohibitions at the state level and a temporary federal prohibition instituted during World War One in order to save grain for producing food. However, according to a study of thirty major U.S. cities in the 1920-21 period, the number of liquor-related crimes increased by twenty-four percent. During that time, spending on the police increased over eleven percent, whilst the number of people arrested for violating Prohibition laws more than doubled.[12]

Prohibition had significant consequences for the expectations and perceptions of federal courts. First, the increase in crime prompted a greater volume of cases. In reference to the spike in crime in the Prohibition Era and its effect of federal courts, Martin Conboy noted, 'There were in that brief period an enormously larger number of cases on the subject than there were in the entire previous history of the United States'.[13] These cases introduced novel and complex legal issues that invited courts to provide extensive and thoughtful interpretations on Fourth Amendment doctrine. With the conduct of federal Prohibition agents as a new source of contention, courts were compelled under a new perspective to consider the rights of the accused in the context of competing issues of privacy and property rights versus search powers. Topics that came under scrutiny included the appropriate use of force, interrogation

[10] For example, Oklahoma passed a law in 1917 that established state-wide prohibition. Penalties for its violation included fines up to $500 and six months imprisonment. Meanwhile, Indiana passed its own state prohibition in 1925, which threatened thirty day jail sentences for violators. See Thomas Pegram, 'Hoodwinked: The Anti-Saloon League and the Ku Klux Klan in 1920s Prohibition Enforcement', *The Journal of the Gilded Age and Progressive Era* 7 (2008), 89-119, and Jimmie Lewis Franklin, *Born Sober: Prohibition in Oklahoma, 1907-1959* (Norman, OK: University of Oklahoma Press, 1971).

[11] For a collection of essays and conference papers that covered a broad range of historical analyses of the era, see *Law, Alcohol and Order: Perspectives on National Prohibition*, ed. by D. Kyvig (Westport, CT: Greenwood, 1985).

[12] Mark Thornton, 'Alcohol Prohibition was a Failure', *CATO Institute*, Policy Analysis No.157 (July 1991) <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure> [accessed 23 May 2020].

[13] Martin Conboy, 'Federal Criminal Law', in *Law: A Century of Progress, 1835-1935*, ed. by A. Reppy, 3 vols (New York: New York University Press, 1937), i, 295-346 (p.332).

methods, and identification protocols. These debates seemed to concentrate in certain regions, including the urban centre of the Second Circuit, New York City, which was only outmatched by Chicago as a hub of prohibition and prosecution activity. Both Learned and Augustus, in fact, regarded the increasing number of cases as an unnecessary burden on their legal time. Whilst on the S.D.N.Y., Augustus noted, 'Our only relief is to get rid of petty criminal cases. If we do not do this, this court which has been one of the most important and interesting trial courts anywhere is bound, in my opinion, to sink to a very low level'.[14] Likewise, Learned reflected, 'There is one period of about fifteen years which I sometimes look back on with a disgust that is hard to bear even in memory. We had so many cases!'.[15]

Second, the changing expectations of courts during Prohibition creates a murky picture for legal and historical scholars who look to analyse the actions and views of judges in a binary political fashion. Part of the problem is that historians have found it hard to pin down the political nature of Prohibition. In general, Prohibition enjoyed a significant amount of public and bi-partisan support in the first half of the 1920s. However, it also reflected different political or social impulses. For example, one argument saw anti-alcohol legislation as the result of efforts to enact progressive social reform.[16] Another line of interpretation regarded Prohibition as a more conservative aligned attempt to impose moral policing under the guise of social reform.[17] Furthermore, political support for Prohibition remained elastic. In 1928, Herbert Hoover's (R) victory in the 1928 presidential election against Al Smith (D) was considered to be, in part, due to the latter's anti-Prohibition stance. However, approval had

[14] Letter from Augustus Hand to William Howard Taft, 9 December 1925, in Robert Post, 'Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft', *Journal of Supreme Court History* 23 (1998), 50-78 (p.76).
[15] LH 231/10, Learned Hand, interviewed by Gerald Gunther, 1959.
[16] James Timberlake explained that the Progressive Movement was energised by a number of ideals of Prohibition, including the emphasis on scientific efficiency and the desire to banish crime and poverty. See James Timberlake, *Prohibition and the Progressive Movement: 1900-1920* (Cambridge, MA: Harvard University Press, 1963). Norman Clark also argued that painting Prohibition as a movement of bigoted, narrowminded, and conservative moralists is one of the primary misconceptions of the period. See Norman Clark, *Deliver Us from Evil: An Interpretation of American Prohibition* (New York: Norton, 1976).
[17] Many historians have painted it in this light. One of the primary contributors was Andrew Sinclair, *Prohibition: The Era of Excess* (Boston, MA: Little, Brown & Co, 1962). Sinclair presented Prohibition as a typical example of the American tendency to exert an excessive conservative moralism on society.

wavered significantly by the start of the next decade after the American public witnessed corrupt Prohibition agents intrude on their privacy, destroy property, and inflict acts of physical violence.[18] The Wickersham Commission recognised this in 1931 when it described national opposition as a 'serious obstacle' to further enforcement of the laws, noting the methods of enforcement as a primary issue.[19] By the 1932 Democratic Convention, it was suggested that joy and 'pandemonium' came with the reading of a plan advocating the repeal of the Eighteenth Amendment.[20] This shift exemplified the lack of a consistent political or public position on the matter of Prohibition and reveals the political dichotomy as a poor measurement of support on the issue.

Adding to this complexity were the Hands' views on the matter. According to the Wickersham Commission, Prohibition fuelled a change in the perception of federal courts among the public. It stated, 'The effect of the huge volume of liquor prosecutions, which has come to these courts under prohibition, has injured their dignity, impaired their efficiency, and endangered the wholesome respect for them which once obtained'.[21] The Commission explained that the judiciary were expected to act as police courts, handing tough penalties to a large volume of Prohibition violators. Despite the Commission's indication that federal courts had been pressured under the intensified scrutiny of the public eye, Learned and Augustus' personal standards for maintaining independent judicial temperaments made them relatively unsusceptible to such political and social forces. Furthermore, their philosophical outlooks on the moral arguments justifying Prohibition were too sophisticated to fit the simplified political labels that scholars have placed on them. For example, when responding to a request for his opinion on Prohibition Director Roy Haynes' efforts to affiliate the stigma of sin with drinking,

[18] For a comprehensive look into the controversies around the abuses, see Wesley Oliver, *The Prohibition Era and Policing* (Nashville, TN: Vanderbilt University Press, 2018).
[19] *National Commission on Law Observance and Enforcement: Report No.2, Report on the Enforcement of the Prohibition Laws of the U.S.* (Washington D.C.: U.S. Government Printing Office, 1931), p.88. The Commission was set up by President Herbert Hoover to survey the criminal justice system under Prohibition.
[20] Arthur Schlesinger, *The Crisis of the Old Order: 1919-1933* (London: Heinemann, 1957), p.302.
[21] *National Commission on Law Observance*: *Report No.2*, p.101.

Learned said, 'Only God can make a sin. Congress alone can make laws'.[22] Despite its short and sharp nature, Learned's response represented a multi-layered outlook on the theory and application of Prohibition. He personally opposed the attempt to regulate the nation's morals by restricting alcohol consumption, but also philosophically opposed it due to his belief that values were incommensurable. Since values were ever-changing, he remained highly sceptical of individuals or groups that claimed an absolute position. However, he also understood that Congress should not be obstructed in its experimentation with such laws. In this context, any attempt to read his rulings and opinions along conventional liberal, conservative, or even progressive lines fails to encapsulate his thoughts. This became starkly evident in Learned's Prohibition cases that contested search and seizure measures.

U.S. v. Casino

The first of the key Prohibition cases was the understudied district court case, *U.S. v. Casino* (1923).[23] *Casino* represented a common point of contention, not only in Prohibition cases, but broader criminal justice issues, in which police authorities used the ends to justify the means in their search conduct. The case arrived three years after the passage of the Volstead Act and focused on the interpretation of 'probable cause' — the Fourth Amendment standard by which police must find a reasonable basis to obtain a search warrant for a suspected crime. This standard played a fundamental role in shaping criminal law protections during Prohibition, because it was built on the historical principle that authorities cannot perform random or abusive searches in attempting to obtain evidence. In interpreting probable cause in relation to the search of a property for liquor, Learned wrote an opinion which reflected a distillation of long held ideas and values from the influences of his early years at Harvard that collectively crafted a foundation of basic principles prioritising sympathy to defendants and a scepticism

[22] 'Judge Hand Sails, Commends Padlock', *New York Times*, 21 June 1925, p.2.
[23] Gunther lent *Casino* one sentence of recognition in his biography of Learned. Shanks provided the most coverage of the case by recognising it as a 'widely cited' and reprinting Learned's opinion, but he does not elaborate further. See Shanks, p.269.

of police authority. This shaped his approach, which was founded on a mentality to 'fight to the last ditch' against unreasonable search and seizure measures.[24]

The facts in *Casino* highlighted the difficulty that judges faced in the 1920s with defining the blurry lines of Prohibition agents' powers. The case arose after an agent searched a garage owned by the defendant, Tony Casino, on 17 April 1923 and found and confiscated boxes of liquor. According to the agent's testimony, he applied for a search warrant two days before, on 15 April, after observing an automobile containing suspicious boxes labelled with 'whisky' on the side being driven into the garage under an entrance sign reading 'Casino & Co'. Casino appealed to the district court, arguing that his constitutional rights had been violated and his liquor should be returned. Key to his argument was his challenge of the officer's 'probable cause' and the legality of the warrant. Most notably, he pointed out that the warrant was issued two days after the agent requested it, by which point there was no proof that the liquor was still in the garage. Learned subsequently ruled in favour of Casino, voiding the warrant and ordering the return of his liquor.

In Learned's opinion, the legality of the search and the two day delay between the agent's observance and obtainment of the warrant were indeed the key determinants in his ruling. Since it was the garage, not the truck, which was searched, Learned laid out a strict and specific standard for justifying a delayed search. This was done in two parts. First there was the visual evidence standard. The agent had not seen any of the boxes unloaded, nor the truck depart without the boxes. Thus, there was no proof that the boxes remained in the garage two days after the observed events. Furthermore, the affidavit for warrant did not allege that the liquor was still in the garage on 17 April, the day the search was granted and, subsequently, undertaken. Second, there was no evidence at the time that Casino owned the boxes. As Learned pointed out, the agent's testimony regarding his application for a warrant 'only says that a truck loaded with whisky drove into the petitioner's garage, which for all that appears may have been doing business as a public garage…It is equally consistent with a stop by the

[24] LH 105B/13, letter from Learned Hand to Felix Frankfurter, 27 January 1947.

truck at the garage for repairs, oil, gas, air, or water'.[25] This was significant because it struck at a key issue in criminal law — that many police authorities worked on the assumption that their verbal testimony was *prima facie* evidence. By rejecting this, Learned held them to higher standards of accountability in their searches.

Learned's emphasis on the method, rather than the results, was an important factor in upholding his strict standard for agents undertaking searches. This was also a consideration for him on the defendant's assertion of ownership of the liquor. According to Learned, an attempt to obtain a redress should not force one to disclose that they were guilty of a crime. Subsequently, Learned's forceful rhetoric on police search methods was striking. The most notable passage in his opinion followed,

> The Constitution protects the guilty along with the innocent, for reasons deemed sufficient, into which I need not inquire. It means to prevent violent entries till evidence is obtained independently of the entries themselves, or of the admissions involved in seeking redress for the wrong done. Were it not so, all seizures would be legal which turned out successful.[26]

This was a point Learned emphasised further by noting that a search could be justified on its original grounds, disregarding additional corroborative evidence obtained at a later date. As he explained, 'The showing for the issue must be enough to stand alone, and must be proved upon the hearing, if challenged. It will not do to abandon the "reasonable cause" first asserted, and support the search upon a new charge'.[27] This principal requirement of original evidence was clearly important.

Learned's opinion in *Casino* illuminated how his philosophical inclinations for scepticism worked in reality. He was sceptical of authority figures and their potential to abuse or neglect their powers, but each public body was subject to certain levels of deference by the judiciary. The body given the most deferential treatment was the legislature. However, as Learned had shown in obscenity and immigration law, when the legislature was unclear in its statutes or

[25] *U.S. v. Casino*, 286 F. 976 (S.D.N.Y. 1923), p.977.
[26] Ibid, p.978.
[27] Ibid.

seemingly revealing itself to be broadly out of touch with the sentiment of the American people, judges had the authority to come to the defence of society. *Casino* showed how this worked when a different body was under scrutiny — the police. As later cases showed, Learned was more willing to restrict police powers than legislative powers, because police were appointed officials. Unlike Congress, who at least had a democratic mandate, police had thinner ground to justify their conduct as representative of the American people's will. This explained Learned's dramatic and forceful passage in *Casino*, where he hypothesised the long-term implications of illegal searches. When the police were uncurbed in conducting its worst abuses, he felt less bound by his principles of restraint.

Therefore, C*asino* marked the first case in which Learned narrowed the search powers of Prohibition agents. Learned's opinion may have shown a more activist side to him, but he closed his opinion with a contrasting tone, calling to 'review' his decision in 'view of the doubt concerning the proper practice in such cases'.[28] The case was not heard on further appeal, but it showed his willingness to be reviewed in an area of law where he was more inclined to be adventurous. This revealed a genuine concern in his attempts to balance a sympathetic outlook to defendants and scepticism of police search methods with powers of judicial review. He was worried with becoming guilty of the very activist or rash decision making that he believed he saw in many other judges. This drove him to act cautiously with every decision and consider opportunities where his own conduct could be scrutinised or regulated. *Casino* presented the foregrounding of these concerns. It did not take long for them to be revisited and the stakes to increase when Learned dealt with another important search and seizure case three years later.

The 'Squalid Huckster'

No one case better showcased the various factors that went into Learned's interpretation of searches and seizures than *U.S v. Kirschenblatt* in 1926. Despite the influence that Learned's opinion had in shaping later Supreme Court rulings, its coverage in historical scholarship is

[28] Ibid., p.981.

surprisingly scant.[29] This makes it one of the most underappreciated Fourth Amendment opinions from the twentieth century. However, the case also deserves examination for its insight into Learned's position on criminal law. It was his first major search and seizure case on the Second Circuit Court of Appeals. His opinion built on the philosophy displayed in *Casino*, at the heart of which was an instinctively sympathetic view of the targets of controversial search methods. But it was also a good example of where Learned's personal sympathies in Fourth Amendment cases served as his secondary concern. Ultimately, his scepticism of authority — and especially the exercise of that authority by parties without sufficient seniority in the body politic — played a primary role. This gave him the enthusiasm to write forcefully and beyond the specific facts of the case to warn against the broad potential of the principles that could be established from growing police powers. *Kirschenblatt* also set off a string of cases between the Supreme Court and the Second Circuit, which animated Learned in private. In his correspondence, he displayed various concerns about the use of judicial powers to resolve Prohibition issues.

The case involved the arrest of Jacob Kirschenblatt for violating the Volstead Act after his company, Kirsch, shipped an order of alcohol to an undercover Prohibition agent. Once it was seized, an agent by the name of Gilbert obtained a warrant for a lawful search of Kirschenblatt's offices a few days later.[30] Along with three other agents, Gilbert entered the offices, arrested Kirschenblatt, and searched the entire premises. During the search, the agents seized a small amount of liquor and some of Kirschenblatt's papers that were incriminating. Kirschenblatt subsequently challenged the legality of the general search of the property. After the trial judge sided with him and ordered the return of his papers, the case came before Learned, Martin Manton, and Charles Hough on the Second Circuit.

[29] Gunther described *Kirschenblatt* as a 'landmark, widely-cited' opinion, yet devoted only two lines of his book to the case. See Gunther, *Learned Hand*, p.513.
[30] Any references to surnames are where the Court did not refer to, or clarify, the forename of individuals.

The court was involved in a rigorous private debate when assessing the scope of a search following a lawful arrest, but eventually agreed to unanimously affirm the trial judge's ruling.[31] As a result, Learned's opinion, again, saw him concentrate on the practicalities of the search. By narrowing his scrutiny and suspicion to the procedure of the search, rather than the result, he shifted the focus of the case away from the incriminating evidence against Kirschenblatt and to the long term consequences of the abuse of power used to obtain this evidence. Learned most effectively achieved this by writing about the search in *Kirschenblatt* in the broader historical context of intrusive searches. Specifically, he took aim at the evils of general warrants. He cited cases where a broad search had been found constitutional by federal courts.[32] However, he provided a forceful response to this by alluding to the American legal tradition and its founding on English common law. He noted, 'While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed'.[33] Learned then made a vivid distinction: searching a man's pockets for evidence to use against him was one thing, but 'ransacking his house for everything which may incriminate him' was a practice deemed 'intolerable' by English speaking peoples since the mid-eighteenth century after the English government unsuccessfully attempted to apprehend the authors of allegedly libellous publications.[34]

Herein lay the issue for Learned. The officers had indiscriminately searched every file and cabinet drawer in Kirschenblatt's office. In so doing, they had conducted the type of general search that stood in conflict with the historical principles and protections built from the English-speaking legal tradition. Learned saw mileage in tracing this historical arc further

[31] Manton believed that the evidence was obtained under a legal search because it was found incident to the arrest of Kirschenblatt and proved to be direct 'instruments of the crime' that originally prompted the warrant. See LH 182/16, Martin Manton memo for *U.S. v. Kirschenblatt*, 17 November 1926. After the case, Frankfurter expressed to Learned his 'surprise' that 'you persuaded your sea-dog chief to join you'. See LH 104B/14, letter from Felix Frankfurter to Learned Hand, 14 February 1927.
[32] This included, upon an arrest, the immediate premises may be searched for contraband, in *Agnello v. U.S.*, 269 U.S. 20 (1925), and officers may search for more than contraband with a search warrant, in *Steele v. U.S.*, 267 U.S. 498 (1925).
[33] *U.S. v. Kirschenblatt*, 16 F.2d 202 (2d Cir. 1926), p.203.
[34] Ibid.

because it persuasively highlighted the wider potential consequences of searches, such as that in *Kirschenblatt*. He explained that general warrants had been used to accommodate political abuses of power, 'It was against general warrants of search, whose origin was…derived from Star Chamber, and which had been a powerful weapon for suppressing political agitation, that the decisions were directed, of which *Entick v. Carrington* is most often cited'.[35] Learned also made his historical appeal more germane to the American context. He stressed that the issue of general warrants had been decided in cases just after the American colonists had been 'hotly aroused' by attempts of the British to enforce customs duties.[36] With this comparison, he argued that to 'rummage at will among' a person's papers was 'indistinguishable' from actions made under a general warrant.[37] The connection of the two was also a condemnation of both. By making government abuse the centrepiece of this argument, it emphasised the magnitude and importance of scrutinising the legal procedures of police officers in their search methods.

Learned showed balance in his decision making. But in responding to the counter-arguments, he was keen to frame the issues of the case within his concern for the proper use of authority and further underline the long term implications of police misconduct. For example, the most notable of the counter-arguments was that the search powers of authorities did not exist 'if the supposed offender were not found on the premises'.[38] In this instance, Kirschenblatt was in his office and the rationale for the agents expanding their search was that it was incident to his arrest. Learned confirmed that a search might be made in such instances, but it was a 'small consolation to know one's papers are safe only so long as one is not at home'.[39] He also saw it as diverting from the historical roots of abuse, which prompted the limitation he outlined for the search. As Learned explained, the search could extend as far as the defendant's pockets. Although he did not specify beyond this, he continued with a

[35] Ibid; Learned was referring to the English case, *Entick v. Carrington*, 95 E.R. 807 (1765). The case struck at the generality of warrants, but also the reason for gaining a warrant — politically charged motives.
[36] *Kirschenblatt*, p.203.
[37] Ibid.
[38] Ibid.
[39] Ibid.

memorable passage: 'Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition'.[40] Learned had no personal doubt that Kirschenblatt was involved in law-breaking activities. The defendant was not necessarily a likable character and certainly fit Learned's vision of a 'squalid huckster', but the implications of ruling against the defendant went far beyond the specifics of the case. Thinking forward, Learned was mindful that the next subject of a search could be an innocent man falling foul of new, expansive powers of police authority.

This language represented a more forceful articulation of Learned's thoughts around the limits to authority. His reliance on his philosophical scepticism, rather than personal or partisan sympathies, carried over from his *Casino* opinion, but his calls to history also differentiated *Kirschenblatt* from his treatment of other civil liberties issues. With the scrutiny firmly on the conduct of the police authorities, Learned joined the court in reversing the actions of the authorities. It is significant for marking a different, more aggressive opinion to the eager expressions of his judicial limitations in his obscenity and immigration opinions. However, its additional influence on legal doctrine is still in desperate need of deserved, widespread recognition.

The Legacy of *Kirschenblatt*

Kirschenblatt is not remembered in the legal annals as a classic Fourth Amendment opinion. Unlike Justice Louis Brandeis' famous call in *Olmstead v. U.S.* for an American's 'right to be let alone', which came two years later, Learned's call to protect the 'squalid huckster' did not carry the weight or prestige of a Supreme Court opinion.[41] In 1968, Hershel Shanks, despite praising much of Learned's work, pointed out that *Kirschenblatt's* influence remained unclear.[42] Marvin Schick went further, suggesting that, 'The impact of Hand's decisions of

[40] Ibid.
[41] *Olmstead v. U.S.*, 277 U.S. 438 (1928) (Justice Brandeis dissenting), p.478.
[42] Shanks, p.277. He described the case as being in 'judicial limbo'.

criminal law was not great, though this writer has been told that, particularly in regard to search and seizure, Hand was influential. There is little evidence to support this view'.[43] In actual fact, however, Learned's opinion was significant for its legal and intellectual imprint on Fourth Amendment discourse in subsequent years. As Frankfurter predicted in a letter to Learned, 'The Supreme Court will, I think, eventually sustain you, but in any event you have made it extremely difficult for them not to do so'.[44] For over four decades, Frankfurter's prediction failed to manifest, but that changed in the five decades which followed.

One might start by critiquing Schick's definition of 'impact', which is problematic, at the very least, for its narrow parameters. He suggested that the influence of Learned's opinion should be assessed solely by its recognition and influence in other court cases.[45] Under this measurement, Schick is partly right when considering the impact of Learned's 1926 opinion in comparison to the two decades of subsequent rulings that failed to adhere to the *Kirschenblatt* position. It is significant to note, first, that the Supreme Court did affirm the Second Circuit ruling in *Kirschenblatt*. However, just eleven months later, it took rather a different approach to the subject of reasonable expectations of privacy. Writing for the Court in *Marron v. U.S.* (1927), Justice Pierce Butler surmised that, following the arrest of an individual on his premises, the search of a closet on said premises 'while…not on [the individual] at the time of his arrest…was in his immediate possession and control'.[46] Furthermore, he wrote that the authority of officers to search and seize evidence 'extended to all parts of the premises used for the unlawful purpose'.[47] This contradicted Learned's warning that conflating the search of a person, which he deemed as their 'pockets', with rummaging amongst their documents was the very 'evil' that the Fourth Amendment was designed to prevent. In 1930, the Second Circuit interpreted *Marron* as overruling *Kirschenblatt*.[48]

[43] Schick, p.183, fn.78.
[44] LH 104B/14, letter from Felix Frankfurter to Learned Hand, 14 February 1927.
[45] Schick, p.183, fn.78.
[46] *Marron v. U.S.*, 275 U.S. 192 (1927), p.199.
[47] Ibid.
[48] See *U.S. v. Gowen*, 40 F.2d 593 (2d. Cir 1930), p.598. Joined by Augustus and Manton in a unanimous court, Swan wrote, 'In *United States v. Kirschenblatt*…this court laid down a more limited doctrine, but we do not think it can stand after the *Marron* Decision'.

However, just a year later, the Supreme Court accepted Learned's sentiments about the abuse of search powers, though it refrained from adhering to the specific boundaries he laid out.[49] This showed that *Kirschenblatt* was not completely out of contemplation by the Court.

After the initial twenty years, and as the criminal law landscape moved out of Prohibition to other areas issues involving police searches, Frankfurter tried to revive the principles of *Kirschenblatt* when he issued dissents in two cases in the late 1940s, citing it as the prime standard to settle the issue of searches and seizure.[50] However, the Supreme Court continued to show its unwillingness to endorse a narrow interpretation of search and seizure similar to *Kirschenblatt's*. The most notable cases were *Harris v. U.S.* (1947) and *Trupiano v. U.S.* (1948).[51] In *Harris*, the Court approved a five hour general search of a defendant's apartment whilst he remained handcuffed in the living room. This resulted in the finding of some illegal draft cards in an envelope. Despite Harris' arrest originally resulting for a different crime — conspiracy to violate liquor laws — the search was sustained and the conviction upheld. In *Trupiano*, however, the Court overruled a seemingly more reasonable search, in which the government proved that the evidence seized had been in plain sight and been obtained incident to a lawful arrest. The Court's reversal was because a search warrant had not been issued despite ample time to obtain one. It also did not add clarification on the scope of a search incident to arrest.

Despite *Kirschenblatt's* lack of recognition in these first four decades, Shanks (1968) still predicted that it would one day have a 'weighty influence'.[52] The year after he wrote this, 1969, proved to be good on multiple fronts for Learned's legacy. Just as the Supreme Court's

[49] *Go-Bart Importing Co. v. U.S.*, 282 U.S. 344 (1931), p.358. In the opinion of the Court, Pierce Butler invoked *Kirschenblatt* in a call against the principle of general and 'unreasonable searches'. However, he also never specified whether the limited scope of *Kirschenblatt* was right and insisted that *Marron's* broader grant of powers for police to search the entire premises was still correct.
[50] Frankfurter quoted Learned's 'squalid huckster' passage first in *Davis v. U.S.*, 328 U.S. 582 (1946), pp.615-616, 'If great principles sometimes appear as finicky obstructions in bringing a criminal to heel, this admonition of a wise judge gives the final answer'. Then, in *Harris v. U.S.*, 331 U.S. 145 (1947), p.174, 'before democracy was subjected to its recent stress and strain, Judge Learned Hand…expressed views that seem to me decisive of this case'.
[51] See *Harris* and *Trupiano v. U.S.*, 34 U.S. 699 (1948).
[52] Shanks, p.271.

opinion in *Brandenburg* was a vindication of his *Masses* test, its opinion regarding the search of a suspected burglar's house in *Chimel v. California* was the most profound recognition of Learned's stance on general searches incident to arrest.[53] Justice Potter Stewart's language and arguments paralleled Learned's. For example, he echoed another Frankfurter dissent in *U.S. v. Rabinowitz*, which, in turn, had cited *Kirschenblatt* in discussing the history of 'abuses' against the American colonies. This, 'in large part', was what gave rise to the words and purpose of the Fourth Amendment.[54] Stewart also argued on the same lines as Learned regarding the limited parameters of a search, 'There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence'.[55] This was strikingly similar to Learned's clarifications that a search included only a man's pockets and anything within immediate range deemed a danger. However, most importantly, Stewart directly cited *Kirschenblatt* and explained that the warning against 'routinely searching any room…[or] through all the desk drawers or other closed or concealed areas' was 'so forcefully made by Judge Learned Hand' and remained true.[56]

The authority of *Kirschenblatt* also shaped thinking on the Fourth Amendment beyond *Chimel*. In common with the *Masses* opinion, *Kirschenblatt* has stood out for its intellectual contributions to legal understanding, despite the tendency in U.S. legal scholarship to celebrate and focus mostly on Supreme Court opinions. For example, Justice Oliver Wendell Holmes' 'clear and present danger' test has filled the legal textbooks more frequently than the *Masses* test.[57] Similarly, Brandeis' famous dissent in *Olmstead v. U.S.*, emphasising the 'right to be let alone', has dominated much more in Fourth Amendment discourse than Learned's memorable emphasis in *Kirschenblatt* on the protection of the 'squalid huckster'. But Learned's influence was nonetheless recognised by the judiciary. In 1975, the Second Circuit Court was met with

[53] See Chapter Two: Political Speech.
[54] *Chimel v. California*, 295 U.S. 752 (1969), p.761. See *U.S. v. Rabinowitz*, 176 F.2d 732 (2d Cir. 1949).
[55] Ibid., p.763.
[56] Ibid., pp.763, 767.
[57] See details on Holmes' opinion in *Schenck* in Chapter Two.

frequent Fourth Amendment challenges following the creation and enforcement of narcotics laws by the Drug Enforcement Agency. In one case, Judge James Oakes used the opportunity to place Learned alongside Brandeis, 'one is led to wonder whether, by giving further countenance to this kind of conduct by law enforcement agents, we are forgetting the admonitions…of the judicial lions of the past: Mr. Justice Brandeis's ringing phrases in…*Olmstead* [and] Judge Learned Hand's remark in *United States v. Kirschenblatt*'.[58] More recently in 2014, Learned was quoted by the current Chief Justice of the Supreme Court, John Roberts, in *Riley v. California* — a case that reviewed the constitutionality of a warrantless search of a cell phone, incident to arrest. In his opinion for the Court, Roberts wrote,

> In 1926, Learned Hand observed…that it is 'a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him'. If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house.[59]

That the opinion was considered nearly ninety years on shows that the principles of *Kirschenblatt* remain relevant. Its contextualisation of the threat of broad sweeping search powers helped shape Roberts' and the Court's direction of thinking. This eventuated in a victory for civil liberties with the Court ruling in *Riley* that general warrantless searches of phone data were unconstitutional.

Thus, the journey of *Kirschenblatt* shares a remarkable parallel to Learned's *Masses* test for free speech in its legal impact. However, there was also a striking parallel in Learned's personal commitment to the doctrines he laid out in both. This provides a different but important insight into broader questions about judicial responsibility and its limitations, and showed that, despite Learned's liberal personal values on the issue, these did not accurately define his duty-bound judicial positions. Although Learned never revisited the issue of police searches on the same scale that he did with free speech in *Dennis*, his actions after *Kirschenblatt* revealed two similar, interconnected lessons about him and his appellate role.

[58] *U.S. v. Lira*, 515 F.2d 68 (2d Cir. 1975), p.72.
[59] *Riley v. California*, 573 U.S. 373 (2014).

First, he used his position and influence to promote the virtues of his *Kirschenblatt* opinion and remained deeply committed to it later in life. This shows that his values changed little. However, it also reveals that public posturing was a distinct element in his judicial conduct, and one that he believed was both effective and within the acceptable parameters of his profession. Second, he was greatly restricted in the changes he could initiate in the law. His posturing to other institutions and the broader public revealed the limited nature of his appellate role. This shows that, even if he were considered a liberal, there was a clear distinction between his personal views and what he could actually insert into law.

These two points were evident after the Second Circuit in 1930 interpreted *Kirschenblatt* as overruled. Learned used multiple formats, including other opinions and private correspondence, to emphasise his disagreements. This started with *U.S. v. Poller* (1930). In his opinion, he followed the broader guidelines for searches that the Supreme Court had laid out in *Marron*, but he explained that *Kirschenblatt* was written on the assumption that 'it seemed unreasonable to suppose that an arrest should give wider latitude of search than a search warrant itself'.[60] Although Learned was disconcerted with the wider scope for searches, his best tool from his judicial powers was to raise concerns to the institutions that could initiate substantial change.

In the same year, Learned's more scathing judgement of the Supreme Court in private showed that the contrast between his judicial and personal positions was even starker than revealed in public. His personal positions on searches were expressed with strong conviction. However, they were predicated on hope, rather than confidence, as to whether they would actually become settled law. Notably, he confided in Augustus, who joined him in mocking the Court's interpretation of broad powers for the police, writing, 'We are for the time being to accept [the policy] as the "pole star", ignoring the precession of the equinozes, though in due course that case, like the star, may wobble considerably'.[61] Augustus responded by

[60] *U.S. v. Poller*, 43 F.2d 911 (2d Cir. 1930), p.913.
[61] LH 187/15, Learned Hand memo for *U.S. v. Poller*, 16 June 1930.

degradingly referring to the Court as the 'Amphictyonic Council at Washington, D.C.', and predicting that they would 'return to the historic doctrine which allowed only instruments of crime, like burglars' tools to be seized on arrest. But under the *Marron* decision…we are committed to something broader until the "thunder stone" strikes us'.[62] Their dialogue signified their limited judicial scope to actually reshape police powers to their personal reading.

After Frankfurter invoked *Kirschenblatt* in his dissents in 1946 and 1947, Learned revisited the topic in public. His contributions were useful reminders that he was continuing to push a position he held strongly, whilst also establishing a firm line between his judicial duties and personal values. For example, in a 1948 case he made another call for searches incident to arrest to be framed within his *Kirschenblatt* doctrine,

> As we suggested in *United States v. Kirschenblatt*…The feelings which lie behind it have their basis in the resentment, inevitable in a free society, against the invasion of a man's privacy without some judicial sanction. It is true that when one has been arrested in his home or his office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage, even though both are customarily grouped together as parts of the 'right of privacy'.[63]

Furthermore, in 1949, he expressed his hope that the Court would take a route similar to his personal vision, 'I don't know what the law is, and if I live to be 107 I shan't ever find out. During the dear old forgotten bootlegging days we tried and tried, and almost always we were wrong'.[64] He elaborated that, even if he were 'forced to let the officer search in a wider ambit' to his *Kirschenblatt* doctrine, it would be minimal.[65] As he explained, 'If I had my way and could remould this law "nearer to the heart's desire", I would say that when you arrested a man you might not only search his pockets, but what lay in front of him and maybe in the desk at which he was sitting'.[66] Learned clearly distinguished this position from the Supreme

[62] LH 187/15, Augustus Hand memo for *U.S. v. Poller* 1930. The 'Amphictyonic Council' is a reference to an ancient religious association of Greek tribes.
[63] *Rabinowitz*, p.735.
[64] LH 204/15, Learned Hand memo for *U.S. v. Rabinowitz*, 14 June 1949.
[65] Ibid.
[66] Ibid.

Court's, which granted wider search powers. As he explained, his position was 'certainly not the law of the land and, so far as I can see…it depends on how Stanley Reed got up in the morning in question…I am disposed to hold that until Divus Stanleinis has done another flip-flop, this search was bad'.[67] Not only was Learned visibly upset with the Court's position, which undermined the values of mitigating broad search powers, but he believed it was done without firm conviction or clarity. This brings out a vivid and striking example of the constraints that Learned's appellate position placed on him, particularly because of his passionate and long-held commitment to his *Kirschenblatt* position. His acceptance of the outcome laid out by the Supreme Court, even if it was with great belligerence, reiterated that the legacy of *Kirschenblatt* was largely out of his hands.

Therefore, in spite of Schick's claim that Learned's impact in searches and seizures was not great, his *Kirschenblatt* opinion stood against the prevailing winds of thinking for his time. As Learned confessed, he set limits upon the scope of searching a premises following an individual's arrest, which happened to be narrower than 'those recognized in the broad statements of the [authoritative] textbooks' on criminal law.[68] Learned not only set an intellectual foundation for reassessing general searches, but the proposal skewed much more in favour of the accused than the Supreme Court and much of the judicial community at the time.[69] That the Supreme Court eventually invoked it in *Chimel* in 1969 showed that Learned's stance was taken seriously in shaping its view on the correct search parameters. *Kirschenblatt's* recognition by the Court again in 2014 also showed that it continues to shape thinking in the ongoing development of the modern state. Furthermore, the contrast through the years between Learned's persistence on the virtues of *Kirschenblatt* and his acceptance of the Supreme Court's wider interpretation of police searches served as a useful reminder of his

[67] Ibid. This criticism was directed at Supreme Court Justice Stanley Reed's reputation for frequently changing his voting position on the issue.
[68] *Poller*, p.913.
[69] He disagreed with many rulings from multiple appellate courts in the period, because they failed to uphold the historically imbued protections of the Fourth Amendment. See *Browne v. U.S.*, 290 F. 870 (6th Cir. 1923); *Sayers v. U.S.*, 2 F.2d 146 (9th Cir. 1924); *Marron v. U.S.*, 8 F.2d 251 (9th Cir. 1925); *Furlong v. U.S.*, 10 F.2d 492 (8th Cir. 1926); *Maynard v. U.S.*, 23 F.2d 141 (D.C. Cir. 1927); and *Estabrook v. U.S.*, 28 F.2d 150 (8th Cir. 1928).

limited judicial powers. When Augustus arrived on the Second Circuit, he shortly thereafter adopted a very different approach to Fourth Amendment issues.

U.S. v. Jankowski

An opinion by Augustus in the 1928 case, *U.S. v. Jankowski*, has not commanded great attention amongst scholars, nor did it catch the professional or public imagination at the time. However, it marked the beginning of the first of several opinions that did have a considerable influence on Fourth Amendment law. *Jankowski* presented an increasingly prevalent issue for police in trying to respond with the correct search methods to changing technology. In the case, Augustus shared the same principle with Learned by scrutinising the means and not the ends of the disputed search. However, he differed on the extent to which courts should intervene when the legislature had failed to curb the police. Whilst Learned believed it was the duty of courts to step in under such circumstances, Augustus envisioned a more limited judicial role. This led him to side with police authorities in such matters, believing it best for the legislature to decide the correct limits of public authorities and the police to have freedom in technological experimentation.

The central issue in *Jankowski* related to the increasing use of automobiles to conceal and transport liquor during Prohibition. This was a part of a string of questions in the political and judicial arenas in this period which considered the extent of privacy afforded in automobiles compared to that of a home or office.[70] These issues came before the Second Circuit after two New York State troopers, by the names of Gibbons and Frost, found and seized whisky from a car after originally pulling it over for a faulty light. The case involved conflicting testimony between one of the troopers, Gibbons, and the defendants, Edward Jankowski and his friend Binkowski. Gibbons claimed that he and Frost had pulled the defendants' car over on a

[70] Kenneth Murchison wrote extensively on the developments surrounding automobiles and search parameters for police in the first half of the twentieth century. This includes an examination of *Carroll v. U.S.*, 267 U.S. 132 (1925), where the Supreme Court upheld the warrantless searches of an automobile. See Kenneth Murchison, 'Prohibition and the Fourth Amendment: A New Look at Some Old Cases', *The Journal of Criminal Law and Criminology* 73 (1982), 471-532.

highway in Western New York on 6 January 1928, after believing one of the headlights was flickering. After opening the car door and informing the defendants of their faulty light, they asked them to remove a blanket on the floor. Underneath the blanket was a package, which the defendants admitted contained whisky. Gibbons arrested both men after searching the car and finding sixteen more boxes in the trunk, but later admitted that assuming the car had a faulty light was an incorrect determination and opening the car door was an intrusive over-reach of his duty. However, Binkowski and Jankowski painted a different picture. They claimed that they only came out of the car after Frost broke into the back without permission whilst their registrations were being inspected. Furthermore, they claimed that the blanket concealing the package was not identified until the agents entered the vehicle and added that the agents also continued to search an additional '12 or 14 cars' that were held up by the obstructing search in the hope of obtaining more arrests and seizures of liquor.[71] Gibbons denied searching any other car.

Augustus and Swan formed a majority siding with the government and upholding the legality of the search. Of primary consideration in his opinion, Augustus sought to address a pressing issue — visual evidence and the strength of its relationship to probable cause. By doing so, it led him to focus on a crucial principle that he shared with Learned in his Fourth Amendment adjudication — the need to scrutinise the method of the search, rather than the results. The trial judge had instructed the jury the exact opposite when he said that it was not for them to decide whether the method of stopping the car was proper, and that the only question for them to determine was whether there was intoxicating liquor in the car. Augustus thought otherwise. He believed that an investigation of the search was important to justifying the admissibility of the evidence, otherwise the ends justified the means. This had broader implications for the concept of being innocent until proven guilty. If handed the legal basis for more indiscriminate searches, police may sometimes come up with incriminating evidence, but this would also allow police to forcefully and arbitrarily target many innocent people based

[71] *U.S. v. Jankowski*, 28 F.2d 800 (2d Cir. 1928), p.800.

on preconceptions and presumptions of guilt. Augustus knew that this was exactly the type of issue that the Fourth Amendment was designed to prevent.

Despite this, Augustus in *Jankowski* had a different focus to that of Learned. Whilst Learned's opinions resonated with sympathetic rhetoric favouring the defendants and articulated a fervent scepticism of policing methods, Augustus showed that he would side with authorities when there seemed to be an absence of malice in their conduct. This was evident in his weighting of the credibility of both sides' testimony. He believed Gibbons was telling the truth, as 'it would seem to be more likely to be so than the interested account of the defendant'.[72] The presumptive statement did not elaborate beyond the simple explanation that, 'Gibbons is not shown to have had any interest in misrepresenting the facts, whereas the interest of the defendants was patent'.[73] This lack of scrutiny of Gibbons' testimony stood in sharp contrast to Learned's cross examination of the underlying motivations for police searches.

By accepting Gibbons' testimony, Augustus signalled that he believed the search was legal. His explanation is a pivotal example of where conventional political assumptions fail to accurately summarise judges' opinions and rulings. The tone in *Jankowski* was a prime example of the contrast with Augustus' off-bench demeanour in civil liberties, including in criminal law, where he broadly supported criminal justice reform bills and a sympathetic tone to criminals. In the opinion, however, he accepted a broader search remit for authorities. As he noted, whilst Gibbons was engaging in 'ordinary police work for the state' — enforcing traffic laws — the finding of the package was simply incident to this enforcement, rather than through any illegal means of force.[74] It was also the catalyst for Gibbons' questioning and the subsequent confession and consent to search the back of the car. Augustus showed little willingness to challenge the efficacy of Gibbons' opening of the car door, stating, 'when a policeman, without any protest, opens the door of an automobile to talk to the owner, it

[72] Ibid., p.801.
[73] Ibid., p.802.
[74] Ibid.

certainly goes beyond all reason to say that he is engaged in an unlawful search'.[75] He explained the opening of the door as 'often the most convenient way' to look at a registry card or to talk to the driver.[76] Furthermore, by equating the lack of protest by the defendants with consent, Augustus handed broader powers for the government to meet its aims in *Jankowski*. The government had sought to justify the methods used by Gibbons and Frost in their search, regardless of the response of the individuals being searched. However, Augustus' suggestion that the lack of protest could act as a qualifier to conducting a search, even where the means may be highly questionable, provided broader leeway for the police to justify their search.

Augustus' tough approach on the defendants was not finished here. *Jankowski* also reflected many Fourth Amendment controversies in that it came out of evidence obtained from a search unconnected to its original intent — which had been regarding a faulty light on the defendants' car. Probable cause could not have been ascertained pertaining to the illegal possession of alcohol, because it had not been the reason behind the stopping of the car. In keeping with the pattern of his opinion, Augustus signified that this was not an issue and that a search could be conducted upon automobiles without a warrant. As he added,

> Nor is it necessary, because the lights were not ultimately found to be defective, to assume that the motive for stopping the car was to make an unlawful search for contraband liquor. They may have temporarily been dim because of some irregularity in the electric current, or the officers may have been mistaken. The avowed purpose for stopping the car and opening the door was to enforce state regulations, and the discovery of the whisky was incidental.[77]

This remarkable lack of scepticism was crucial for pushing the burden of proof on the defendants to highlight the perceived misconduct of the search. As later cases involving the Hands showed, that difference between Learned's more sceptical approach and Augustus' more lenient interpretation of the police agents' conduct represented a fine line that could often turn a case in criminal law. In this context, his conduct on the bench showed Augustus was willing to clearly depart from the positions that he held on civil liberties off it.

---

[75] Ibid.
[76] Ibid.
[77] Ibid.

To understand Augustus' stance in *Jankowski* more deeply, one can trace his views on police powers back thirty years. Augustus' position was consistent on police powers, but his tendency to side with the police was the result of two of his primary philosophical guides — judicial restraint and deferral to police experimentation. *Jankowski* represented a position that had changed little from an article he wrote in 1897 when defining the 'right to privacy'. In focusing on a balancing act between the evolution of technology and its regulation by judicial interventions, he signalled that the former should be given priority, 'The limits of a right which has been so little defined by judicial decision are at present of course vague, and it can only be said that the limits of this right…must be determined by the relative demands of individual freedom and public convenience or necessity'.[78] He added that, 'Individual freedom' must be carefully considered by the legislature, but noted that there was little foundation for justifying judicial rejection of evolving police search methods to adapt to advancing technology, since such rejection would be contrary to 'public convenience or necessity'.[79] This position reflected Augustus' position in *Jankowski*. He was ultimately less critical and more understanding of the police in their attempt to identify the correct conduct in searches and arrests involving automobiles.

In upholding the trial judge's verdict in favour of the government, the opinion gave the searching party the benefit of the doubt in cases when both sides' conflicting testimony lacked corroborating evidence that could tip in their favour. Despite switching the case's focus towards the methods of the search, the lack of scrutiny seemed in opposition to the rather more personally progressive leanings Augustus held in many civil liberties issues. Nonetheless, this was not out of tune with Augustus' tendencies to often defer to authority figures. With immigration cases, he had showed a willingness to do the same, despite his greater emotional attachment. At play were complex philosophical deliberations and a distinct interpretation of restraint that stressed a limited judicial role. In matter of police searches, the differences that

[78] Augustus Hand, 'Schuyler Against Curtis and Right to Privacy', *University of Pennsylvania Law Review* 45 (1897), 745-759 (p.759).
[79] Ibid.

Augustus had with Learned over the correct line for judicial intervention showed how two men of similar personal values could reach very different results.

Kelly and Technology

The emergence and wider use by the police of certain evidence obtaining technology in the 1930s and 1940s presented a new challenge to legal decision makers. In adjudicating on the cutting edge of changes in criminal law, police powers, and technology, including fingerprinting and wiretapping, the Hands had to address a lack of clear legislative regulation that gave police vague and untested boundaries. In their interpretation of these boundaries, both Learned and Augustus continued to be driven by jurisprudential guidelines that sat apart from their personal positions. However, there also continued to be clear differences in their judicial approaches. For Augustus, it still led to a broader interpretation of police powers. A case in 1932 on the issue of fingerprinting, *U.S. v. Kelly*, sheds more light on the philosophical outlook that drove him.[80] Most prominently, he continued to entrust his faith in democracy to experiment and debate ideas over police powers and, in turn, saw his judicial role as a passive one in that process. In contrast, Learned continued to take a more sceptical approach to police powers, thus interpreting them on narrow lines. This nuance added to their distinctive ideals of the judicial role.

Fingerprinting had been a product of the rapid development of identification technology to verify individual identity and assist in criminal investigations. However, although it was also implemented in numerous branches of business and civil service, the issue had still not posed many questions before the courts by 1932. Augustus' opinion in *Kelly*, which rejected Mortimer Kelly's challenge to his fingerprinting by police to verify his identity, was a watershed moment because it led to widespread judicial approval in the following years of new technological methods for identifying suspected criminals.[81] This was echoed in 2013 by

[80] *U.S. v. Kelly*, 55 F.2d 67 (2d Cir. 1932).
[81] See Wayne Logan, 'Policing Identity', *Boston University Law Review* 92 (2012), 1559-1609.

Supreme Court Justice Anthony Kennedy, who described Augustus' opinion in *Kelly* as *the* seminal ruling in the country on fingerprinting.[82]

The case arose from Kelly's arrest on 16 February 1931 after he sold a quart of gin to Prohibition agents. On the day of the arrest, the agents told Kelly that his fingerprints were required and, if he refused to provide them, they would obtain them by force. Kelly submitted, but later appealed to the Eastern District Court of New York (E.D.N.Y.) for the return of his fingerprints. The district court ruled in Kelly's favour, saying that the right to take fingerprints did not exist in either a state or federal statute, whilst also claiming that it subjected Kelly to an unnecessary 'indignity' and 'invasion of [his] personal rights'.[83] The government appealed this ruling to the Second Circuit with two particular arguments: fingerprinting was necessary in identifying previous convictions and it was not an infringement of constitutional rights.

The Hands' private correspondence on the case showed that no two cases were the same or represented uniform patterns in their voting or sentiment. In keeping with previous cases, Augustus' empathy with the police authorities was consistent with his position in *Jankowski*. As he noted of Kelly, 'He may be an innocent man, and, if so, it is very hard on him to be arrested and to have his person scrutinized, but these things are penalties which he must suffer for the common good'.[84] Learned agreed with Augustus, finding no constitutional objection to the concept of fingerprinting a man under arrest. He explained that it reflected a natural 'step in the chain of events which connect the accused with the crime', and also stressed the practical convenience of the new technology, which identified criminals with 'new precisions' and 'minimal of inconvenience'.[85]

---

[82] *Maryland v. King*, 569 U.S. 435 (2013), p.458. Kennedy wrote the opinion for the Court, which upheld the taking and analysing of a cheek swab upon an arrest on probable cause. He quoted Augustus when he argued that the Fourth Amendment should not clash with an issue when it was shown that it was 'no more than an extension of methods of identification long used in dealing with persons under arrest'.

[83] *U.S. v. Kelly*, 51 F.2d 263 (E.D.N.Y. 1931), p.265.

[84] LH 190/24, Augustus Hand memo for *U.S. v. Kelly*, 1931.

[85] LH 190/24, Learned Hand memo for *U.S. v. Kelly*, 28 December 1931.

Augustus' opinion in the case inserted a mixture of his and Learned's lines of argument in upholding the legitimacy of Kelly's fingerprinting. He dived directly into the virtues of fingerprinting, including a discussion of its ability to identify repeat offenders and those who may have escaped detention, and its accommodation to the 'most important adjuncts of the enforcement of the criminal laws'.[86] Augustus did, however, recognise that the technology involved a physical 'restraint of the person', which was 'burdensome'.[87] Nonetheless, he alluded back to the idea that 'some burdens must be borne for the good of the community'.[88]

As in *Jankowski*, Augustus' position echoed the one he took in his 1897 article on privacy and the advancement of technology. To determine the response of the police to new technologies, a balancing act should occur between individual freedoms and a sense of the common good for society. This was crucial in the case of fingerprinting. With clear legislative guidance, Augustus was willing to follow this and intervene in the regulation of this technological innovation. However, without such guidance, he deferred to the right of police experimentation as the rationale behind a more passive judicial response. This was not to say that Augustus held reservations about the use of fingerprinting. For example, he noted that U.S. attorneys and marshals were 'not to make public photographs, Bertillon measurements or finger prints prior to trial, except when a prisoner becomes a fugitive from justice, and are required to destroy or to surrender to the defendant all such records after acquittal or when the prisoner is finally discharged without conviction'.[89] If he was to accept the increasing use of technology, this passage reflected his responsibility to sound out the importance of using such powers with 'careful provision'.[90] Ultimately, however, his deference to police experimentation prompted him to side with their justifications of the use of the technology. The development of such technologies represented one of many results from allowing an organic democratic process to play out. The emergence of fingerprinting after exhaustive

[86] *Kelly*, p.68.
[87] Ibid.
[88] Ibid.
[89] Ibid., p.70. The Bertillon system is the focus on the meticulous measurement and recording of different parts and components of the human body to identify and track criminal suspects.
[90] Ibid.

testing and research presented difficulties and challenges to freedoms, but it also symbolised unfettered human progress.

To reinforce that his duty as a judge was not to stem this progress, Augustus identified previous cases in which the human body was used to help agents or officers reach conclusions to investigations. This included taking a prisoner before a dying victim for identification, using a suspect's shoes to retrace footmarks in the snow at the scene of a crime, and a Supreme Court decision where a prisoner was made to wear a blouse to see if it fit him.[91] Augustus quoted Justice Holmes' opinion from the last of these, 'the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material'.[92] Augustus saw this general principle on the use of the human body as the correct judicial interpretation in light of new and increasingly complicated challenges in identification. This led him to explain,

> It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.[93]

Beyond legal precedent, Augustus' duty was to understand the social consequences and science that fingerprinting entailed. In that, he believed the debate was already clear: fingerprinting was widely known and frequently practiced by this period. The practice was 'not in itself a badge of crime' and, as a physical invasion, amounted to 'almost nothing'.[94] Comprehending the issue within this framework, he recognised fingerprinting as a necessary extension of methods of identification.

Although Learned voted alongside Augustus in *Kelly*, the scepticism he directed at authorities in previous cases represented a key philosophical difference from Augustus on

[91] See *People v. Gardner*, 144 N.Y. 119 (1894); *People v. Van Wormer*, 175 N.Y. 188 (1903); and *Holt v. U.S.*, 218 U.S. 245 (1910).
[92] *Holt*, pp.252-253.
[93] *Kelly*, p.69.
[94] Ibid., p.70.

police technology. A later case in 1940, *U.S. v. Polakoff*, best exemplified this difference. *Polakoff* involved the issue of wiretapping. This had been a concept in application dating back to the 1890s, but the increasing sophistication of its use was the impetus for the case. Learned's concerns about wiretapping centred on its potential abuse in cases involving unreasonable searches and seizures. In this case, he dealt with federal agents, who were under scrutiny for seizing evidence that they had identified through the wiretapping of individuals' phones.

Learned's scepticism prompted his frequent default position of suspicion when questioning authority figures in civil liberties disputes. However, sometimes his questioning of authority went further and prompted him to rule against the government. For example, if the legislature had not clearly granted enforcement powers, he was content with reversing the actions of government officials. By 1940, the Supreme Court had not yet found wiretapping unconstitutional, but this did not deter Learned.[95] In attempting to define it, he distinguished between intercepting and listening in on a call. In private, he made clear that he would rule against expanding use of police powers, 'In my view "intercepting" includes all kinds of unauthorized "listening in", and we shall get ourselves hopelessly bogged, if we say otherwise'.[96] The 1934 Communications Act had made the 'interception' of people's communications unlawful and he alluded to this, 'The statute does not speak of physical interruptions of the circuit…it speaks of "interceptions" and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts'.[97] Without mutual consent from both parties to a call, Learned saw the government's interceptions as unlawful. This position fitted with his tendency to use his judicial powers to intervene when the legislative directive was unclear or seemingly distorted. As such, he reiterated this by quoting the Supreme Court,

[95] It was not until 1967 — in *Katz v. U.S.*, 389 U.S. 347 (1967) — that the Supreme Court identified wiretapping as a 'search' under the definition of the Fourth Amendment.
[96] LH 202/11, Learned Hand memo for *U.S. v. Polakoff*, 2 May 1940.
[97] *U.S. v. Polakoff*, 112 F.2d 888 (2d Cir. 1940), p.889.

'A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose'.[98]

Alternatively, Augustus focused less on the scope of police powers. This, consequently, allowed for broader powers to be wielded by them. He, too, emphasised deference to Congress. However, without clear direction, he favoured a passive role for the judiciary in assessing wiretapping. Thus, in his judicial restraint he believed that providing a broad definition of 'interceptions' was obstructive. This stance prompted a rare concurrence in *Polakoff*. Augustus was 'convinced' that preventing wiretapping to detect the activities of criminals who conducted their negotiations by telephone 'imposes great and at times insurmountable obstacles upon the prosecuting authorities in the detection and prosecution of crime'.[99] Nonetheless, his emphasis on judicial restraint still overrode such concerns, 'In the face of the foregoing Supreme Court decisions any remedy must rest with the Congress who, in my opinion, can constitutionally permit wiretapping by government authorities with or without such safeguards against abuse as Congress may see fit to impose'.[100] This conformed to an approach that narrowly interpreted a statutory grant of powers to public officials, unless otherwise clarified by Congress.

These differences between the Hands symbolised the complexity of the issues and the sophistication and context-specific way that both men viewed their jurisprudence and own responsibilities as justices. Both prioritised deference to the legislature and a limited capacity for the judge to define the boundaries of policing powers with technology. However, outside of clear guidance from the legislature, Augustus was of the persuasion to side with the broader police powers, whilst Learned was more likely to abide to his sceptical view of police authority and narrow the interpretation. These nuanced philosophical approaches were essential to their decision making, but they also showed that personal concern for civil liberties did not

[98] Ibid., p.889. This was in reference to the Supreme Court's opinion in *Nardone v. U.S.*, 308 U.S. 338 (1939).
[99] *Polakoff*, (Judge Augustus Hand concurring), p.890.
[100] Ibid., pp.890-891.

necessarily prevent them from upholding the power of the state's authorities where they believed it fell within the legislative remit.

Coplon and the Cold War

If Prohibition marked the first phase of challenges for judicial rulings on the Fourth Amendment, the Soviet threat in the Cold War was the second. The fear of totalitarianism came to a head with the rise of Senator Joseph McCarthy and the subsequent tensions that pervaded in American political and social thinking. However, whilst Learned's Prohibition opinions were assumed to represent a corpus of liberally inclined rulings, some scholars argued the Cold War period marked his transition to a more conservative world outlook. The belief was that Learned supported tougher measures on anti-American sentiment and manifested this in his judicial conduct. The most notable example used to support this contention was his opinion in *U.S. v. Dennis* (1950), which explained the Second Circuit's affirmation of the convictions of members of the Communist Party of the USA.[101] However, a more comprehensive picture of Learned's record must include search powers. In one of the Second Circuit's most high profile cases during the Cold War, *U.S. v. Coplon* (1950), he wrote an opinion that angered conservatives by reversing the conviction of Judith Coplon based on an unconstitutional search of her items by the FBI. This was particularly striking in this case because he admitted explicitly and openly that he held little sympathy for Coplon, believing that her 'guilt is plain'.[102] Rather than liberal or conservative tendencies, it was his scepticism of authority that shaped his opinion. Learned stressed that cutting legal corners in the investigation of an individual was not justified by their reputation, affiliations, or potential animosity to the U.S. In interpreting his judicial duties, therefore, Learned saw his role to check such evident abuses of power and disregard for the correct legal process.

[101] See Chapter Two: Political Speech.
[102] *U.S. v. Coplon*, 185 F.2d 629 (2d Cir. 1950), p.640.

Those scholars who suggest that Learned had become more conservative by the late 1940s and 1950s often ignored his private views on *Dennis*, which showed that he personally opposed the convictions that the Second Circuit Court upheld. Likewise, the private frustration that Learned exhibited regarding broadening police search methods in this period also supports a more convincing counter-narrative that he was not a late stage conservative. Instead, he showed philosophical consistency in a time when American social and political discourse was dominated by voices calling for broader governmental powers to combat the Soviet threat. For a start, Learned was deeply worried by the 1940 Supreme Court rulings which tipped the scales in favour of expanded search powers. This included the Supreme Court's decision in *Harris v. U.S*, where the Court upheld the five hour ransacking of the defendant's property.[103] Having read and reflected on the tyranny that had swept Europe, moderation became his focus when he wrote to Frankfurter in 1947. His concerns over *Harris* were clear, 'coming as it does in a period when it is of the highest importance that we do not imitate the methods of those whom we fear the most, and when there are indications that our fears are likely to make us do just that, the decision is really serious'.[104] The fear of totalitarianism was heightened by his observation that even Justices Hugo Black and William Douglas, supposed defenders of freedom, had joined the Court in affirming expanded police searches in *Harris*. He added, 'to have those crusaders for the underdog…go wrong! My Gods, my Gods, why have ye forsaken me?'.[105]

Learned conducted himself with these principles in mind when *Coplon* came before him in 1950. The case centred on Judith Coplon, who was convicted on multiple counts, including attempting to deliver 'defence information' to Valentin Gubitchev — a United Nations employee who had been an official of the Soviet Foreign Affairs Ministry — and on conspiracy to make copies of documents relating to national defence and transmitting them to Gubitchev. Coplon was a bright young woman out of Barnard College, who graduated *cum laude* in 1943

[103] *Harris v. U.S.*, 331 U.S. 145 (1947).
[104] Cambridge, MA, Felix Frankfurter Papers, HLS 199/4, letter from Learned Hand to Felix Frankfurter, 10 May 1947.
[105] Ibid.

and, shortly after, joined the Department of Justice in Washington D.C. She was recruited as spy for the Soviet Union in 1945, but the FBI only began tracking her in October 1948. This was following reports of suspicious behaviour after she transferred to the Internal Security Section of the Justice Department — where she had access to more sensitive information.[106]

However, the primary fuel for Coplon's convictions came from three trips she took to New York City in early 1949, on 14 January, 18 February, and 4 March — during which she was tailed by the FBI. On the first two visits she met with Gubitchev but delivered no papers to him. The third visit was similar, but Coplon and Gubitchev acted with circumspection. On the day of the visit, Coplon was given a decoy letter by her superior in the Justice Department, which he had described to her as 'hot and interesting'.[107] Although she never passed the document to Gubitchev, the FBI arrested both at about 9:30pm, without a warrant. When the agents searched Coplon's purse, they found a sealed packet containing many incriminating documents, including the decoy and records of the activities of persons in the U.S. suspected of acting on behalf of the Soviet Union. An indictment followed, charging Coplon with attempting to pass on information to Gubitchev and conspiring with him to steal the documents. With the guilt seemingly clear, both were given fifteen year sentences. However, Gubitchev's was suspended on the order that he return immediately to the Soviet Union, to which he duly obliged.

Following these events, the case captivated the nation as a Cold War tale of an impressionable young woman who was tempted into espionage and betrayal. It fuelled newspaper columnists to speculate over what motivated traitorous actions against the U.S. and intensified the sinister rise of McCarthyism.[108] It also left Learned at the forefront of Cold War

---

[106] For more on Coplon, see Marcia Mitchell and Thomas Mitchell, *The Spy Who Seduced America: Lies and Betrayal in the Heat of the Cold War — The Judith Coplon Story* (Montpelier, VT: Invisible Cities Press, 2002).
[107] *Coplon,* p.632.
[108] See Gertrude Samuels, 'American Traitors: A Study in Motives', *New York Times*, 22 May 1949, p.17. Samuels identified four types of traitors: professionals, naturalised citizens loyal to their home country, conspiracy 'crackpots', and idealists. The insinuation was that Coplon fitted in the last category.

issues and, in particular, the debate about balancing national security and civil liberties.[109] This debate prompted fears that courts might allow the erosion of constitutional protections during this tense period. One newspaper stated, 'In this hour of crisis our courts are going to have to recognize that the security of the people is paramount, that traitors must be punished regardless of technicalities'.[110] This represented the general conservative and reactionary outlook that hoped to exert public pressure on the courts.[111] In that context, it represented a similar environment to the Prohibition cases, as dislike of the perpetrators and a view of them undermining society played an influence in trying to dictate how the justice system treated them. However, in scrutinising the arrest and wiretapping of Coplon, the Second Circuit reversed her conviction after finding that the FBI did neither within the correct means.

Learned's opinion explaining the ruling provides a strong example to dispute the idea that he had turned into a judicial conservative by the 1950s. The case showed that despite strong evidence that Judith Coplon had been conspiring with the Soviet Union, he ignored the overwhelming rhetoric and social pressure to uphold her various convictions. More than any other, this case exemplified Learned's adherence to the concept that the ends did not justify the means in a police search. His view of the FBI's search powers resulted from two burning issues in the case, both of which he felt had wide ranging implications for Americans' 'right to privacy'. In order to uphold a rigorous standard for police searches, he first presented a narrow scope of validity for the arrest on 4 March. The arrest had been made without a warrant, which raised alarm bells. However, he realised that there had been previous examples where a warrantless arrest was valid, particularly as noted by Augustus in *Jankowski*. Therefore, the question centred on what powers FBI agents possessed. The 1934 revision of the Federal

[109] At the time, a key book on the debate came from Bernard Schwartz, *American Constitutional Law* (Cambridge: University Press, 1955). At page 279, 'The problem of reconciling the freedoms safeguarded by a bill of rights with the security of the state is tending more and more to be resolved in favour of security by contemporary constitutional theory'.
[110] S&P 69/8, Richard Lloyd Jones, 'Can We Protect Ourselves?', *Tulsa Tribune*, 8 December 1950.
[111] See William Wiecek, 'The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States*', *Supreme Court Review* (2001), 375-434. This article provides an insightful look at how a number of judges ruled on Cold War cases within the context of a hostile and suspicious domestic atmosphere.

Criminal Code under a *prima facie* reading suggested that agents were granted the power of arrest for felonies. Yet, Learned traced the statute's procedural roots thoroughly. He explained that, prior to its confirmation, the Judiciary Committee added a caveat — the person arrested needed to be likely to escape. The Senate had also added that a felony must have been committed, as opposed to the original proposal that one could make an arrest on the 'reasonable grounds' that the person was believed to be guilty of a felony.[112] This was crucial for Learned limiting the FBI's arrest powers. Furthermore, he did so whilst framing it as a judgement ascertained from the legislature, not the whim of judiciary, 'For reasons which we do not know it is therefore apparent that Congress has always been grudging in its grant of this power to the Bureau, and we should not be justified in construing the limitation with an inauspicious eye'.[113]

With the arrest in doubt, this prompted two simple questions: was Coplon on the verge of running from authorities? And, if so, was there sufficient time for the FBI to obtain a warrant? Learned's interpretation, again, showed that he held the FBI to a high standard of evidence. On the first question, there was no ample reason to suggest Coplon was suddenly ready to stop her communications with Gubitchev. On the contrary, nothing had indicated from their last meeting that it was to be the last contact between the two. Although their actions were indicative of a 'concerted venture' to undermine national security, they had shown similar anxious behaviour of being shadowed in the first two meetings but still persisted.[114] Learned suggested that a successful meeting would have reinforced the necessity of Coplon in the criminal conspiracy because she alone had access to the necessary papers. Therefore, he wrote, 'Escape would have put a final end to the enterprise and would incidentally have been the most serious confession of guilt which she could make'.[115]

[112] *Coplon*, p.634.
[113] Ibid., p.635.
[114] Ibid.
[115] Ibid.

This argument made Learned's answer to the second question much easier; the FBI did have enough time to obtain a warrant. The facts suggested that Coplon was not retiring from the conspiracy any time soon. Furthermore, the actions of the FBI also suggested it had settled on arresting Coplon on 4 March. As Learned explained, Coplon's superior had 'delivered to her the decoy letter that morning; an assistant to the Attorney General followed her to New York…a matron had been detailed at the court-house to take charge of her after her arrest'.[116] Thus, the seizure was unlawful and, with 'no alternative', Learned ruled that the package seized from Coplon was incompetent evidence.[117] It was the first strike in the case against FBI agents' scope of power.

The second main contention around privacy regarded Coplon being wiretapped. Similarly, Learned narrowed the scope of investigatory powers, ensuring that the emphasis was on the FBI's ability to show it conducted itself within the correct legal confinements. The issue as to whether wiretapping violated the Fourth Amendment remained ambiguous in 1950, but the 1934 Communications Act still outlawed 'interceptions' of messages. The core legal question, then, was whether evidence obtained from the government's interception of Coplon's phone calls was used against her in court. In a careful examination, Learned made it clear that the burden was with the government to prove that this did not happen. The trial judge had been presented with a number of records by the government and had ruled that they were not used against Coplon. However, the judge had refused on national security grounds a request from Coplon's legal team to view the records. Learned disagreed with the judge's actions and cited it as a violation of Coplon's Sixth Amendment rights, 'Unless therefore there is some excuse which will toll this constitutional privilege it appears irrefragably demonstrable that the suppressed records were incompetent'.[118] In combination with the invalid arrest, the Second Circuit ruled that Coplon's conviction could not stand.

[116] Ibid.
[117] Ibid., p.636.
[118] Ibid., p.635. Learned was referring to the passage of the Sixth Amendment that reads, 'the accused shall…be informed of the nature and cause of the accusation'. See *U.S. Const. amend. VI.*

In explaining the reversal, there is a broader essence to Learned's opinion, which reveals an approach that transcended simple personal expedience. This is represented in two particular points and helps dispel the common notion that Learned was a conservative by the Cold War, not only in his personal views, but also in his judicial opinions. First, he sided with the preservation of civil liberties in the face of 'national security' concerns, despite making clear his unfavourable view of Coplon. He conceded that the government was not compelled to divulge certain 'state secrets' which would imperil the security of the nation.[119] However, he had previously written an opinion for a Second Circuit ruling that stated the government was not free to deny the accused a 'right to meet the case made against him'.[120] Coplon claimed that she would not have been convicted had she been given access to the privileged documents. Learned described this as a 'flimsy grievance', adding 'in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal' for her to see the documents.[121] Nonetheless, his distrust of Coplon's sincerity was outweighed by the potential long term consequences of upholding the conviction and legitimising the FBI's disregard for the correct legal procedures for its investigation.

The second prominent point in Learned's reasoning was his scepticism towards authority. This scepticism, which he had exhibited previously in search cases, was built on the idea of holding authority figures to the highest standard of accountability. This was driven by a fear of irreversible concentrations of power in the government. With authoritarian tendencies on the rise this period, Learned concluded his *Coplon* opinion by applying his scepticism to a historical context. He explained, 'Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty'.[122] Constitutional barriers, he added, were 'devised' as 'precious' tools to deter the government from throwing unchallenged accusations or the public

[119] Ibid., p.638.
[120] Ibid. Learned is referring to *U.S. v. Andolschek*, 142 U.S. 503 (1944).
[121] Ibid.
[122] Ibid.

from imposing 'unpurged' criticisms.[123] And, as Learned reflected, 'A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism'.[124] A path towards such absolutism was frightening for Learned. Thus, he made it clear to emphasise the importance of scrutinising the 'methods' as the clearest deterrence to a legal framework free of accountability.

Learned's stance was also particularly noteworthy during a period in which anti-Communist sentiment was rife. In 1955, the Justice Department said it did not have sufficient evidence for a retrial of Coplon and eventually dismissed the indictment in 1967. In the immediate aftermath, Learned and his colleagues, Thomas Swan and Jerome Frank, received much abuse for the ruling.[125] Furthermore, in a fine example of the misconception of the judicial role, one newspaper columnist argued, 'In saying that Miss Coplon's guilt is plain, the appeal judges were expressing a personal opinion'.[126] This same columnist could not, then, understand why Coplon was not found guilty. But the significance and essence of Learned's judicial determination with his colleagues, whilst noting his belief in Coplon's guilt, was to highlight that very trade off that judges make between strong personal instincts and the correct procedures of democratic law. Learned explained this in an insightful letter to a concerned citizen named Mary McKeon. As he had stated in his opinion, he believed the 'guilt [was] plain' with Coplon. Nonetheless, he agreed with his fellow members of the court that the government had gone beyond its boundaries of authority. With the pervading pressures that McCarthyism had tightly exerted on to American political, social, and cultural discourse, Learned explained to McKeon how the Fourth and Sixth Amendments worked to protect rights during such discourse and how the government had violated Coplon's rights enshrined in both.

---

[123] Ibid.
[124] Ibid.
[125] See LH 69/8. Amongst other things, Learned received explicit letters describing him as an 'old S.O.B.', a 'traitor', and a 'dirty louse'. One letter claimed, 'Lucky Luciano is honorable compared to you hypocrites'. Another took aim at all three judges on the panel, 'may you burn in hell you 3 low down crooks, we should clean out the rats in our courts, we hope the money you got from the Jews puts you in hell'.
[126] S&P 69/8, 'Coplon Guilty, but Not Proved?', *The Milwaukee Journal*, undated.

He then concluded, 'Perhaps, if you reflect, you will agree that it is not desirable to convict people, even though guilty, if to do so it is necessary to violate those rules on which the liberty of all of us depends'.[127]

The letter finely summarised Learned's career-long approach to searches and seizures, culminating in the *Coplon* case. He was driven by his scepticism of authority. This rigid and consistent philosophical guide did not conform to liberalism or conservatism, because these political terms were ever shifting. Rather than Learned changing, it was the expectations surrounding him. He remained committed to a narrow interpretation of search powers with a long view to protecting Americans' rights to privacy against increasing authoritarianism. This dimension is often forgotten or ignored in the evaluation of Learned's judicial conduct later on in his career, but *Coplon* showed that he remained consistent to the beliefs that he held many years earlier. Despite the Second Circuit's reversal of Coplon, Learned's explicit public assertion that she was guilty is a point worthy of reiteration. That stark contrast between judicial procedure and personal instinct helps correct the misconceptions that have placed Learned as a 'conservative' judge by the Cold War phase of his tenure.

Conclusion

Learned's words and their judicial implications went beyond his personal sentiments on the Fourth Amendment. They reflected a complex man who, although he often chose an approach that narrowed the powers of policing authorities and helped defendants, did so from core philosophical guides that shaped his interpretation of the law. His own guiding doctrine revolved around a scepticism regarding authority that he had developed during his time at Harvard. In applying it to the Fourth Amendment, this manifested as a clear concern about the appropriate exercise of an expanded federal power. Learned's fear was that such power could be emboldened by a rapidly changing common will in society. With the Cold War following on the heels of the Prohibition era and its reputation for the intrusive searches conducted by

[127] LH 69/8, letter from Learned Hand to Mary McKeon, 28 December 1950.

police, the opportunities for government authorities to run roughshod over public rights by stressing national security concerns over liberty appeared a present danger.

What distinguished the Fourth Amendment cases from many other fields for Learned was that he was often scrutinising appointed police officials, rather than the more representative and democratically elected Congress. As a result, concerns about judicial restraint and power were less prominent. The result was a number of opinions and rulings that minimised the scope of police powers. Over the long term, this left a substantial imprint on the legal landscape by helping the position of the accused. For example, *Casino* presented strict requirements on any visual evidence used for probable cause. Yet the most important aspect of the opinion was its focus on the method of the search, not the results. This was a precursor to Learned's most influential opinion on the Fourth Amendment, *Kirschenblatt*. The case was remarkable on four levels. The standard reinforced Learned's position for expansive protections for the accused, narrowed the interpretation of searches following an arrest, denounced general searches when other courts refused to do so, and influenced the Supreme Court's thinking. Although the Supreme Court initially avoided incorporating it as doctrine on search and seizure, the opinion withstood the test of time. The Court's invocation of Learned's opinion in *Chimel* (1969), whilst overruling its previous decisions, presented a familiar pattern for Learned. Just as with his stance on free speech, he took abuse for resisting the impulses of popular sentiment, but his legacy was ultimately vindicated.

There are also parallels between the *Coplon* and *Dennis* cases. Learned's fear of the FBI's abuses were best recognised with Judith Coplon's arrest and conviction for betraying her country. Learned did not sympathise with Coplon, but the warrantless search and the wiretapping were contrary to the very values he protected. He stated his belief that Coplon was guilty in his opinion, because this striking statement was important for magnifying these reasons for why the Second Circuit let her go free anyway. Just as with Prohibition cases, Learned reinforced the Fourth Amendment principle that the ends did not justify the means in an investigation or search. Furthermore, the statement on Coplon helped for upholding the

integrity of the judiciary and showing the fallacy of assuming or suggesting that Learned had become a judicial and political conservative by the 1950s. Not only did he privately oppose the conservative-led force of Joseph McCarthy, but his opinion in *Coplon* showed that he cared deeply about the long-term consequences of courts succumbing to the politicised hysteria of McCarthyism.

Augustus' approach was different. He often gave the benefit of the doubt to the police in the absence of a clear legislative direction, which led to a broad construction of police powers. This was evident in *Jankowski*. Unscrutinised testimony from the state troopers and a seeming suspicion of the defendants' vastly different picture of events may have suggested Augustus was of a conservative bent that favoured the strong-handedness of the law. However, this vastly oversimplified the personality of the judge. Augustus may have sometimes been cold for the sake of practicing a sense of professional detachment, but he was not conservative. He wanted a more compassionate environment for criminals and the accused, but he also believed in adopting a restrained judicial role, which allowed democracy and debate to determine the corrects measurements. This inclined him to frequently side with police authorities on the basis that it was not in his purview to disrupt their attempts to adapt and progress with their investigatory powers.

In this context, Augustus was conscious of the challenging period in which he lived. The demand for more efficient ways to identify and document criminal behaviour placed a huge burden on government, police and judicial resources. He had opposed the moral argument for Prohibition, but interpreted his judicial position differently to Learned. Following what he learnt from Thayer, Augustus saw his restraint as only limiting the powers of public officials if their actions could not be rationalised under any reasonable means. The only alternative route to limiting the powers of other public officials was where Congress had presented clear legislation. These positions from Augustus followed similar ones he held in immigration law where he commonly upheld harsh deportations orders. This strict position on restraint also explained why Augustus feared the use of wiretapping less than Learned. They also illuminate

why the *Kelly* case typified a common sense view. He set a high standard for judicial intervention in issues regarding searches and privacy. This required explicit abuse and evidence of long term consequences. With *Kelly*, the benefits of fingerprinting clearly outweighed the grievances from the defendant.

Ultimately, both Learned and Augustus had significant parts to play in dramatically shaping the law around privacy, police powers, and searches and seizures. Their influence has been echoed through the words of recent Supreme Court Justices, providing a clear illustration of the intellectual and legal foundations that they established. The contributions they made to the field included different approaches and layers to their restraint, despite both men possessing similar personal values. This reveals the problem with assuming that Learned or Augustus were liberals or conservatives. Whether they sided with or against the police in Fourth Amendment cases throughout their tenures, these terms have ultimately failed to capture the full extent of legal determinations that these men undertook in considering the fate of the accused.

Conclusion

In a speech in 1946, Learned warned, 'We are assured that only the unsophisticated and naive will believe in the reality of detachment and aloofness in judges…let us not underrate the power of this attack'.[1] The era of American history in which Learned and Augustus served on the federal bench involved a Supreme Court that was active in a variety of new areas of law, including those in civil liberties. The subsequent shift in conception of the role and powers of American judges, and the frequent debates this prompted in legal and political circles, made Learned anxious. His words represented his fear of the growing belief that judges no longer appeared to be detached and neutral observers of the law. He worried that the perception of judges' abilities to conduct themselves independently of their personal and political positions would become irreversibly contested in scholarship and wider public analysis. Learned's foresight proved to be astute. There is a growing tendency today to see judges as more politically partisan, whilst framing them under the expedient liberal-conservative binary. The Hands have not been immune from the proliferation of politically charged labels. Some scholars have used the term liberal, including Gunther's praiseworthy reference to Learned's 'partisan…liberal values'.[2] Others have used the 'conservative' label to define the Hands' judicial record.

As this thesis has principally shown, however, using this framework to assess the Hands' judicial legacies is erroneous, simplistic, and insufficient in comprehending the full set of values they brought to the federal bench. For example, the Hands exhibited personal views on civil liberties that frequently aligned to popular progressive or liberal positions in the first half of the twentieth century, but their broader views about the judiciary and its place in democracy moved outside the confines of left-right boundaries. These views can be traced back to the

[1] Learned Hand, 'Chief Justice Stone's Concept of the Judicial Function', Commemoration Meeting for Chief Justice Stone of the New York City Bar Association, 11 June 1946, printed in *Columbia Law Review* 46 (1946), 696-699 (p.699).
[2] Gunther, *Learned Hand*, p.300.

biographical grounding of the Hands' formative years. These years usefully highlight the legal education that contributed to their understanding of judges as independent figures and reveal the complexity of the philosophy that informed their views. Building on a shared intellectual curiosity and rejection of doctrinaire thinking in childhood, they developed a number of philosophical guides to action from their time at Harvard that evolved into a complex legal approach that went beyond political or partisan lines. The Hands' conduct when they ascended to the federal bench showed that their theories of judging were also used in practicality. Situated in a time of great change in American history, the Hands adjudicated on some of the most fundamental social and political challenges to civil liberties in the first half of the twentieth century. Despite this, the Hands' conduct in civil liberties cases was defined by consistency. This boiled down to their fairly traditional expectations of the judicial role, believing in a restrained approach, narrowing the scope of judicial discretion, adhering to precedent where possible, and stressing that decisions were more representative when a judge could defer to the ballot box of democracy. These factors conspired to create a complex landscape of these men and their decisions.

The issue of political labelling in the literature was remedied, in large part, by addressing a broader issue with scholars' understanding and knowledge of the judiciary — the tendency of courts throughout history to be guarded about their privacy. As Posner and Thomson noted, there remains an appetite to learn more about the Hands and how they navigated the judicial waters as lower court judges.[3] Little has been written on either Hand since Gunther's biography of Learned in 1994. The thesis answers some of the gaps in knowledge on these two men with its focus on their early years. This chapter best exemplified the type of content that is required to gain a full thrust of the individuals that sat for a half century on the federal bench. In turn, it revealed the significance of the judicial biographical approach in showing how the origins and development of the Hands' core ideas contextualised their judicial decisions. From childhood to Harvard, certain themes persisted that are essential to the training of the judicial

[3] See Introduction.

mind: impartiality, critical thinking, and emotional detachment. These were embellished and moulded into more concrete philosophical guides when the Hands took up their educations at Harvard College and Law School. The notions of scepticism, moderation, pragmatism, and judicial restraint all invited the Hands to think critically about the judicial role. The unifying trait among them was the promotion of the judge as non-partisan.

Significantly, what also emerged were the Hands' nuanced interpretations of certain concepts, such as restraint and scepticism. This paved the way for the differences and similarities that they exhibited as judges. A primary element in this thesis' characterisation of the Hands' judicial philosophies came from their antipathy to judges who shaped the law around their personal biases and prejudices. As an alternative, the criteria for best assessing the Hands' jurisprudences, particularly as appellate judges, was by shifting back to a focus on institutional limitations and measuring their adherence to such constraints. In that regard, both believed that the legislature, as the most representative organ of the three branches of U.S. government, was essentially a first among equals. This showed that their reputations as restrained judges are accurate. Nonetheless, the school of restraint comprises a complex set of ideas and viewpoints. Whilst the Hands were taught the same judicial values, their different responses in cases underlined the breadth of reasoning, interpretation, and institutional considerations that went into their judicial rulings. They still believed that there were, quite properly, significant opportunities for judicial intervention, but the line for such action was when the legislature did not act in a representative manner or provided little clarity on a pressing issue. The Hands interpreted that line differently. Augustus was more traditional in believing more often, although not exclusively, that it was a simple case between the legislature and the courts to remedy an issue. However, he strictly adhered to Thayer's instruction that the issue must be one that was 'beyond a reasonable doubt', despite believing that society gravitated to courts when it believed its elected officials were not conducting themselves appropriately.[4] In comparison, Learned believed more consistently in drawing

[4] See Chapter One: The Formative Years.

directly to the American public to reach a position on an issue. This added a different dimension, which saw him more willing to overturn legislation that was seemingly antipathetic to the common will of society. In that regard, he exercised greater powers and showed more hints of 'activist' behaviour. Crucially, however, he ensured that the various tests and procedural innovations that he used to understand society's positions were done so in an attempt to reduce the discretion of judges. These were the most fundamental elements in the Hands' interpretations of restraint and prompted the frequency with which they came to different conclusions in cases.

The formulation and evolution of the Hands' jurisprudence, alongside the importance of judicial biography, comes into greater focus in the context of the opinions that they wrote. The thesis' biographical approach went beyond a narrative chronology and used intimate insights into the Hands' lives to answer broader questions about their conduct on the judiciary. Political speech is the best example of this. It was an area of law where Learned had an irrefutably large presence and is the one key area in the civil liberties landscape where scholars have given it substantive analytical coverage. Yet it is also the most prominent example of where the literature has overused the political binary to assess Learned's contributions. The prevailing belief is that a budding young 'liberal' judge in 1917 became a staunch 'conservative' by the Cold War. The thesis has shown that this is a false narrative. Instead, it highlighted the ways in which a full deconstruction and synthesis of Learned's jurisprudence, opinions, and private correspondence can add to an understanding of the positions he reached. It is true that Learned was an advocate for expansive protection in the area of free speech, but it was not as simple as being a liberal position. When the Espionage Act in 1917 prompted Learned to consider the protections of speech, he had to reconcile with the practical realities of two abstract philosophical ideals: individual rights versus a strong legislature. This was a complex dilemma, since Learned knew that the latter could infringe on the former. His solution — a test that outlawed only speech that was an explicit and 'direct incitement' to criminality — showcased his inventiveness. Learned constructed a clear standard in which the impassioned

speaker could not go to jail for criticising a government short of advocating the violation of laws, even if the speech led to such an occurrence. Unlike 'clear and present danger', which required the judge to predict the likelihood that speech could provoke unlawful behaviour, Learned's test comprised 'objective' criteria that narrowed the discretionary purview of judges, protected speech, and respected the autonomy of the legislature. Learned's *Dennis* opinion in 1950 was significantly different. It is true that, under a changing political landscape, Learned admitted to his strong detestation of communism. However, it is wrong to suggest that Learned's opinion upholding the convictions of members of The Communist Party of the USA was due to a long held narrative in scholarship that he had grown conservative and less sympathetic to the free articulation of radical views. Three factors played a key role in showing the overwhelming evidence that this narrative is inaccurate. First, Learned was deeply critical in private and public about the 'clear and present danger' test. However, he was bound to follow it as a lower court judge. Recognising those limitations highlights how previous scholarship has assessed Learned's contributions by failing to take sufficient account of the limited role of appellate courts. Second, Learned continued to champion his *Masses* test as the superior standard for speech to those who would listen. And third, he was a strong critic of the pervading politics of the early 1950s — notably the 'herd instinct' created by McCarthyism. With little to gain personally, he risked his reputation by opposing powerful conservative interests. Thus, in Learned's consideration of the *Dennis* case, his actions were not those of a man caught up in Cold War hysteria.

Revisiting Learned's political speech cases highlighted where a politicised assessment of judges has been overused and distorted. Obscenity, on the other hand, presented more insight into the deep concerns the Hands held about the procedural mechanisms and innovations in judging. The Hands were at the forefront of reshaping obscenity law in the courts in the first half of the twentieth century and provided a new standard that proved more favourable to literary, artistic, and educational figures. However, the substantive results from this ruling were of secondary importance. Instead, procedural innovations were the Hands' core focus.

These were implemented in light of concerns about judicial power and discretion, and the role that the other organs of democracy could play in shaping this area of law. The pervasive use of the *Hicklin* test by courts in the late nineteenth and early twentieth century was problematic to the Hands, not only because it enabled the widespread choking of freedom of literary and artistic experimentation, but because it presented judges substantial discretion to interpret vague statutory measures for obscenity by using their own standards. Across three decades, the Hands slowly remoulded the law with two key intentions: minimise the scope of judicial discretion and provide criteria for obscenity that sought to incorporate the voice of wider American society. These included the 'average conscience' of society, educational merit, and literary regard, which culminated in Augustus' opinion in *Ulysses* in 1934. Importantly, the Hands ensured that their help in substantially changing obscenity law still honoured the tradition of restraint by shifting the focus away from judges as the all-important final arbiters in an issue of great moral ambiguity.

A common component in the categorisation of judges through a political lens is the conflation or convergence of personal position and judicial position. In immigration law, Marvin Schick provided a stark example in his description of the Hands' Second Circuit legacy as 'libertarian'.[5] However, the Hands' mixed rulings in immigration served as a useful reminder that judges were not the 'knight-errant' that Judge Benjamin Cardozo famously described them as.[6] Judges did not 'roam at will in pursuit of [their] own ideal of beauty or goodness'.[7] The Hands' immigration jurisprudence showed this when emotionally burdensome cases confronted them. They were more impassioned in their vocal support for immigrants than perhaps any other area of civil liberties, but this thesis documented how they established a clear line between their personal and judicial position. By emphasising the differences between the compassion that they exhibited for immigrants in the U.S. and the mixed rulings they handed down, it reinforced the strict judicial limitations that they worked

[5] Schick, p.212.
[6] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), p.141.
[7] Ibid.

within as lower federal judges. The most striking example of this was the tragic circumstances in *Repouille,* where the Hands had to follow a procedural precedent that affirmed the deportation of the defendant despite evidence that he was a loving father and family man. Furthermore, the arena of immigration law also highlighted their solution to another area of jurisprudence in which vague terms required definition, notably 'desirability' and 'moral turpitude'. The Hands presented a multi-faceted outlook in their immigration opinions, the focus of which again galvanised around a scepticism of judicial authority on issues of morality and faith in the democratic process to invoke more compassionate standards. The most prominent result from this was Learned's 'common conscience' test, which mirrored the obscenity standard that he and Augustus had crafted. Although it was similarly done with the purpose of minimising the personal discretion of judges in an area of law short of technical or precedential guidance, it also highlighted the difficulty that even restraintist judges such as Learned faced when it came to mitigating the influence of bias and prejudice. Without the tools or methods to precisely pinpoint society's conscience on a variety of divisive moral issues, it was instinctive for Learned resort to personal value judgements. This represented the human challenges of maintaining impartiality and restricting inherent biases and prejudices. However, whilst Learned made mistakes or did not always rigidly conform to his own standards, his interpretations of the law revealed concerted attempts to mitigate the influence of personal biases.

In attempting to understand judicial decision making, meanwhile, the political binary of 'liberal' and 'conservative' used for the Hands not only fails to encompass the full thrust of their considerations — it also forges the false impression that there were only two sides at play. Of course, most scholars do not believe decisions are made under such a simplistic dichotomy. However, by framing decisions this way, it fails to represent the various complex factors and nuance that comprise a judge's decision making process. In that regard, the Hands' decisions in criminal law revealed how two judges who possessed shared values and similar jurisprudences reached different results in their opinions on the bench. An expedient narrative

presumes that Learned shared a more liberal and empathetic position for the accused, whilst Augustus' frequency with siding with the police aligned with a harder nosed conservative approach. But their opinions explaining different outcomes came down to discreet differences in their understanding of the role of judges and the courts. In disputes about investigatory powers of police, Augustus showed that he was inclined to side with the police in issues around searches and fingerprinting, basing this on the assumption that objection to the procedures they used would come through a more democratic means — principally through the legislature. Learned's scepticism of authority drove him to a more interventionist approach. Since law enforcement officers were appointed, not elected, he rejected the constitutionality of methods of investigation which used the ends to justify the means in stretching the boundaries of acceptable search. Importantly, these differences were often subtle, but they signified that such small differences could swing a judge's interpretation of the law and, subsequently, the outcome of a case. This was epitomised in *Coplon*, which Learned used as an opportunity to remind both the legal world and wider society that the historical grounding of the Fourth Amendment came in preventing the abuse of powers. This took primacy, even if the 'guilt [was] plain' with the accused.[8]

In considering the Hands' reputation in the field of civil liberties cases, this thesis also examined and added to their legacy in two other ways. First, although they have been celebrated in legal-historical circles, only a small fraction of their personal biographies and their correspondence has been examined. This thesis presented a number of important and enriching insights by elaborating on this material. It revealed the core pressures from childhood and a demanding set of standards from their parents. Although they went into law, there were moments of indecision and frailty. These reveal an earthier and more grounded picture of these humans. However, there was also resilience from the Hands to forge their own paths when faced with pressures to conform to their family legal and political traditions. As they joined the federal bench, this human element to the judges was revealed in many cases.

[8] *Coplon*, p.640.

Although they interpreted the law under the constraints and duties as neutral judges, they often did so whilst showing personal and emotional attachment to the issues they faced. The Hands were of broadly progressive values on key social issues of their time. They often shared these values with each other in their private and colourful correspondence and memos. It shows that these men were engaged in rich discussions on complex legal questions about the judicial role and protecting liberties. Most importantly, in each area of law, it revealed differences and similarities between judicial facade and personal sentiment. Learned was more likely to channel his personal emotions into his judicial behaviour, whilst Augustus frequently displayed a tougher exterior despite showing himself often to be a man of compassion in other formats of expression.

The other element of biographical investigation covered here related to their judicial achievements. Whilst the Hands have been praised as judges, the lack of coverage of their civil liberties jurisprudence represents a large gap in scholarly understanding of the pair and, even, a critique of their lasting importance. Posner, for example, described Learned's contributions in this field as 'derivative [and] undistinguished'.[9] This thesis has shown in three particular ways, however, that the Hands' opinions and extrajudicial contributions have had a profound impact on the history and character of the American judiciary. First, certain opinions have been influential in shaping American legal doctrine. The most notable example is Learned's *Masses* test, which has generated an invigorating debate about the parameters of First Amendment rights to free speech in its modern formulation. Second, the Hands adjudicated a diverse set of issues that spoke directly to the rapid social, economic, political, and technological changes in the U.S. in the twentieth century. In interpreting how the law responded to these changes, they engineered and helped determine a legal landscape that would influence later generations. For example, Learned's *Masses* and *Kirschenblatt* opinions informed subsequent Supreme Court decisions on free speech and searches and seizures.[10]

[9] Posner, 'The Hand Biography', p.515.
[10] See *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *Chimel v. California*, 395 U.S. 752 (1969), and *Riley v. California*, 573 U.S. 373 (2014).

Likewise, Augustus' *Ulysses* and *Kelly* opinions crafted new possibilities for artistic/literary experimentations and fingerprinting technologies, and have been celebrated by judges in later opinions.[11]

Third and finally, there is an influence that is not as easily quantified. This involves the Hands' contributions to the everlasting discussion on the role of the American judge. In a period in which courts were expanding judicial review into social and economic issues, Learned and Augustus continued to generate questions about the correct function of courts. They achieved this through two particular means of communication. One of these was in their private correspondence, where their articulation of judicial restraint influenced other colleagues on the bench. As the various chapters in this thesis showed, their most frequent and prominent correspondent on the topic was Felix Frankfurter. He awarded both Hands' part in shaping his own interpretation of the judiciary, but he found Learned's greater eagerness to engage in intellectual discussion as particularly appealing. As early as 1911, Frankfurter attributed Learned with helping him think more deeply about the threat of using the Constitution as cover for exercising judicial overreach. As he explained, 'you made me feel that it's getting to be more and more respectable not to regard the Constitution as the last word on government, however much respect and historical affection an instrument of such long service may be entitled to'.[12] Frankfurter did not become a Supreme Court Justice until 1939, but he recognised the influence of Learned's arguments throughout his life and consistently praised his decisions. Nearing the end of Learned's life and career, Frankfurter thus wrote the following to him, 'The years here…have only confirmed the general outlook I derived from Thayer…deepened by immersion with Holmes and Brandeis (the latter did occasionally depart from his own strong, wise belief in the very limited scope of our job), [and] my talks with you'.[13] Although Frankfurter had philosophical differences with Learned, they proved to be matters of nuance rather than great substance. This ensured that, when Frankfurter did sit on

[11] See *Grove Press v. Christenberry*, 276 F.2d 433 (2d Cir. 1960) and *Maryland v. King*, 569 U.S. 435 (2013).
[12] LH 104A/1, letter from Felix Frankfurter to Learned Hand, 2 March 1911.
[13] LH 105D/22, letter from Felix Frankfurter to Learned Hand, 13 April 1957.

the Supreme Court for twenty-three years, the highest court in the land had a vocal representative for Learned's conception of restraint.

The other effective communication method by the Hands was through the conscious scepticism of the judicial role that they exhibited in their civil liberties cases. This was exemplified by their immigration decisions. In such emotionally charged decisions, they fought for judges to remain restrained and showed how judges could creatively use their roles to provide important moral guidance without brashly overruling distinguished laws and precedent. The same was evident in their obscenity decisions. The Hands should be recognised for identifying new safeguards for artistic and literary freedoms, but their ambition was also broader than the immediate facts of each case. In crafting procedural innovations that moved the legal standard of obscenity away from the wide discretionary powers that were granted to judges, they helped reshape legal doctrine to better reflect restraintist principles and put judges on greater alert to the pitfalls of wielding broad powers. Charles Clark's opinion in *Grove Press* recognised these implications from the Hands' contributions. In citing Augustus' 'classic warning' in *Ulysses*, Clark explained, 'we must of course be cognizant of the risk run by judges in enforcing obscenity statutes…and thus perchance condemning what become classics of our intellectual heritage'.[14] He added that judges should avoid determining the limits of art and literature when experts in the field were better positioned to exercise such determinations. In so doing, Clark articulated the debate that had been led by the Hands, keeping the boundaries of judicial power as a central feature of the deliberation process.

These represented successful attempts by the Hands at disseminating their message — the by-product of which was a richer intellectual discussion. In that sense, the Hands were also able to generate a separate debate between them on the correct form of restraint. Was it to defer to the common conscience or precedent? And what did this mean in the broader context of how to operate as a restraintist judge in the first half of the twentieth century? Ultimately, the presence of these exchanges show that the Hands were at the forefront of maintaining a

[14] *Grove Press*, p.436.

vigorous debate about whether the judge was the correct figure to arbitrate on the key social issues of the day. In a twenty-first century context, their contributions offered prescient warnings about judicial overreach.

This leads to the broader importance of the Hands' civil liberties jurisprudence for legal historical methodology. Like any judges, the Hands were sometimes driven by certain predispositions. As they had learnt from their teacher, John Chipman Gray, biases and prejudices played some role in every judicial decision. However, they trained themselves to mitigate those influences. They ruled with care and precision, remaining alert to the 'verbal traps…into which [judges] unwittingly fell'.[15] Consequently, the divide was often stark between personal ideals and professional conduct. The Hands, therefore, present a significant lesson about the scholarly presentation of judges: they do not fit the simplified political terms so often applied to them. Furthermore, such terms are also problematic because there is no grand theory as to what they constitute. The notions of liberalism and conservativism have shifted with changing times, making their imprecision even more striking when used to assess judicial decisions. Such lessons might usefully be taken into consideration in a contemporary American legal landscape where judicial figures come under increasing pressure from partisan interests.

As this study has illuminated, a balance between the analysis of judicial biography and judicial opinion remains essential to our understanding of the most secretive of the three branches of government. Judges throughout history have inserted their personal biases and prejudices into their decisions. Many have played to the partisan tune. Some have been guilty of this much more than others. However, the Hands represented exemplars in the tradition of judges who strove to uphold the court as a bastion of erudition and independence. The evidence shows that the Hands thought carefully about their judicial roles. At times, this led to results that favoured politically liberal causes and other times it led to the satisfaction of conservatives. These rarely, if ever, factored into their considerations, which is qualified and

[15] 'Harvard Reminiscences by Learned Hand', p.126.

proven with access to their private papers and a broad contextual understanding of their overall civil liberties jurisprudence. The burden is on scholars to shed further light on the potential for misconceived or vague interpretations of judicial decisions and lead the way in reshaping our understanding of the historical figures that have defined the American judiciary. As this thesis has shown, refocusing on adherence to institutional constraints and assessing the Hands' perceptions of judicial power and intervention proved more accurate barometers for their judicial performances in civil liberties. Further possibilities open up for our understanding of the Hands, including deeper interrogation into their views on the key economic, social, and political issues of the time, as well as their jurisprudence in other areas of law. The same can be done for other judges, but we must evaluate each by their position and institutional limitations. Nonetheless, in investigating other judges, past and present, we must continue to scrutinise their views and decisions in public against those in private. This is extremely important in the attempt to refine our understanding of the delicate relationship between U.S. politics and the judiciary.

Bibliography

Primary Sources

Archival Resources

Columbia University Butler Library, Rare Book and Manuscript Collection, New York City, NY.

Oral History Archives: Reminiscences of Learned Hand, 1957.

Oral History Archives: Reminiscences of Telford Taylor, 1956.

Harvard Law School Library, Cambridge, MA.

Charles Culp Burlingham Papers.

Charles Wyzanski Papers.

Felix Frankfurter Papers.

Learned Hand Papers.

Michael Smith and Herbert Packer Research Materials on the U.S. Court of Appeals for the Second Circuit.

Oliver Wendell Holmes Papers.

Zechariah Chafee Papers.

Edited Collections

Hand, Learned, *The Bill of Rights: The Oliver Wendell Holmes Lectures* (New York: Atheneum, 1964).

Hand, Learned, *The Spirit of Liberty: Papers and Addresses of Learned Hand*, ed. by I. Dilliard (London: Hamilton, 1954).

Hand, Susan Train, *Letters of the Hand Family* (New York: E.S. Gorham, 1923).

Nelson, Marcia, *The Remarkable Hands: An Affectionate Portrait* (New York: Foundation of the Federal Bar Council, 1983).

Cases

Abrams v. U.S., 250 U.S. 616 (1919).

Agnello v. U.S., 269 U.S. 20 (1925).

Anderson v. Patten, 247 F. 382 (S.D.N.Y. 1917).

Bartos v. U.S. District Court for District Of Nebraska, 19 F.2d 722 (8th Cir. 1927).

Brandenburg v. Ohio, 395 U.S. 444 (1969).

Bridges v. California, 314 U.S. 252 (1941).

Browne v. U.S., 290 F. 870 (6th Cir. 1923).

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Carroll v. U.S., 267 U.S. 132 (1925).

Chimel v. California, 295 U.S. 752 (1969).

Commonwealth v. Karvonen, 219 Mass. 30 (1914).

Coykendall v. Skrmetta, 22 F.2d 120 (5th Cir. 1927).

Davis v. U.S., 328 U.S. 582 (1946).

De Lima v. Bidwell, 182 U.S. 1 (1901).

Dennis v. U.S, 341 U.S. 494 (1951).

Dooley v. U.S., 182 U.S. 222 (1901).

Downes v. Bidwell, 182 U.S. 244 (1901).

Entick v. Carrington, 95 E.R. 807 (1765).

Estabrook v. U.S., 28 F.2d 150 (8th Cir. 1928).

Ex parte Craig, 282 F. 138 (2d Cir. 1922).

Ex parte Jackson, 96 U.S. 727 (1877).

Ex parte Rapier, 143 U.S. 110 (1892).

Foster v. Scripps, 39 Mich. 376 (1878).

Furlong v. U.S., 10 F.2d 492 (8th Cir. 1926).

Gitlow v. New York, 268 U.S. 652 (1925).

Go-Bart Importing Co. v. U.S., 282 U.S. 344 (1931).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Grove Press v. Christenberry, 276 F.2d 433 (2d Cir. 1960).

Halsey v. New York Society for Suppression of Vice, 234 N.Y. 1 (1922).

Hamdi v. Rumsfield, 542 U.S. 507 (2004).

Harris v. U.S., 331 U.S. 145 (1947).

Holt v. U.S., 218 U.S. 245 (1910).

In re Gaddoni, Unpublished (S.D.N.Y. 1916).

In re Nagy, 3 F.2d 77 (S.D. Texas, 1924).

In re Schneider, 164 F. 335 (S.D.N.Y. 1908).

In re Timourian, 225 F. 570 (S.D.N.Y. 1915).

International Brotherhood of Electrical Workers v. National Labor Relations Board, 181 F.2d 34 (2d Cir. 1950).

John Scopes v. State of Tennessee, 154 Tenn. 105 (1927).

Johnson v. U.S. ex rel. Pepe, 28 F.2d 810 (2d Cir. 1928).

Jordan v. De George, 341 U.S. 223 (1951).

Katz v. U.S., 389 U.S. 347 (1967).

Lochner v. New York, 198 U.S. 45 (1905).
Ludecke v. Watkins, 335 U.S. 160 (1948).
Marron v. U.S., 8 F.2d 251 (9th Cir. 1925).
Marron v. U.S., 275 U.S. 192 (1927).
Maryland v. King, 569 U.S. 435 (2013).
Masses Publishing Company v. Patten, 244 F. 535 (S.D.N.Y. 1917).
Masses Publishing Company v. Patten, 246 F.2d 24 (2d Cir. 1917).
Maynard v. U.S., 23 F.2d 141 (D.C. Cir. 1927).
Miller v. California, 413 U.S. 15 (1973).
Nardone v. U.S., 308 U.S. 338 (1939).
New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
Nishimoto v. Nagle, 44 F.2d 304 (9th Cir. 1930).
Olmstead v. U.S., 277 U.S. 438 (1928).
Patterson v. Colorado, 205 U.S. 454 (1907).
People v. Brainard, 38 N.Y.Crim.R. 470 (1920).
People v. Gardner, 144 N.Y. 119 (1894).
People v. Muller, 96 N.Y. 408 (1884).
People v. Van Wormer, 175 N.Y. 188 (1903).
Petitions for Naturalization of F-G-and E-E-G, 137 F. 782 (S.D.N.Y. 1956).
Posusta v. U.S., 285 F.2d 533 (2d Cir. 1961).
Regina v. Hicklin, L.R. 3 Q.B. 360 (1868).
Repouille v. U.S., 165 F.2d 152 (2d Cir. 1947).
Riley v. California, 573 U.S. 373 (2014).
Rosen v. U.S., 161 U.S. 29 (1896).
Roth v. U.S., 354 U.S. 476 (1957).
Sacher v. U.S., 343 U.S. 1 (1952).
Sayers v. U.S., 2 F.2d 146 (9th Cir. 1924).
Schenck v. U.S., 249 U.S. 47 (1919).
State v. Hazeltine, 82 Wash. 81 (1914).
Steele v. U.S., 267 U.S. 498 (1925).
Swearingen v. U.S., 161 U.S. 446 (1896).
Trupiano v. U.S., 34 U.S. 699 (1948).
U.S. ex rel. Berlandi v. Reimer, 113 F.2d 429 (2d Cir. 1940).
U.S. ex rel. Bradley v. Watkins, 163 F.2d 328 (2d Cir. 1947).
U.S. ex rel. Iorio v. Day, 34 F.2d 920 (2d Cir. 1929).
U.S. ex rel. Kessler v. Watkins, 163 F.2d 140 (2d Cir. 1947).
U.S. ex rel. Ludecke v. Watkins, 163 F.2d 143 (2d Cir. 1947).

U.S. ex rel. Mignozzi v. Day, 51 F.2d 1019 (2d Cir. 1931).
U.S. ex rel. Schlueter v. Watkins, 158 F.2d 853 (2d. Cir. 1946).
U.S. v. Andolschek, 142 U.S. 503 (1944).
U.S. v. Associated Press, 52 F. 362 (S.D.N.Y. 1943).
U.S. v. Bebout, 28 F. 522 (N.D. Ohio, 1886).
U.S. v. Bennett, 24 F. 1093 (S.D.N.Y. 1879).
U.S. v. Cantini, 212 F. 925 (3d Cir. 1914).
U.S. v. Casino, 286 F. 976 (S.D.N.Y. 1923).
U.S. v. Coplon, 185 F.2d 629 (2d Cir. 1950).
U.S. v. Dennett, 39 F.2d 564 (2d Cir. 1930).
U.S. v. Dennis, 183 F.2d 201 (2d Cir. 1950).
U.S. v. Francioso, 164 F.2d 163 (2d Cir. 1947).
U.S. v. Gowen, 40 F.2d 593 (2d Cir. 1930).
U.S. v. Jankowski, 28 F.2d 800 (2d Cir. 1928).
U.S. v. Kelly, 51 F.2d 263 (E.D.N.Y. 1931).
U.S. v. Kelly, 55 F.2d 67 (2d Cir. 1932).
U.S. v. Kennerley, 209 F. 119 (S.D.N.Y. 1913).
U.S. v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926).
U.S. v. Levine, 83 F.2d 156 (2d Cir. 1936).
U.S. v. Lira, 515 F.2d 68 (2d Cir. 1975).
U.S. v. Mulvey, 232 F. 513 (2d Cir. 1916).
U.S. v. Nearing, 252 F. 223 (S.D.N.Y. 1918).
U.S. v. One Book Called Ulysses, 5 F. 182 (S.D.N.Y. 1933).
U.S. v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934).
U.S. v. One Package of Japanese Pessaries, 86 F.2d 737 (2d Cir. 1936).
U.S. v. Polakoff, 112 F.2d 888 (2d Cir. 1940).
U.S. v. Poller, 43 F.2d 911 (2d Cir. 1930).
U.S. v. Rabinowitz, 176 F.2d 732 (2d Cir. 1949).
U.S. v. Sacher, 182 F.2d 416 (2d Cir. 1950).
U.S. v. Smith, 45 F. 476 (E.D. Wis., 1891).
U.S. v. Two Obscene Books, 99 F. 760 (N.D. California, 1951).
U.S. v. Wightman, 29 F. 636 (W.D. Pa., 1886).
Whitney v. California, 274 U.S. 357 (1927).
Winters v. New York, 333 U.S. 507 (1948).
Yates v. U.S., 354 U.S. 298 (1957).

Jury Proceedings

U.S. v. Max Eastman (S.D.N.Y. 1918) (per Judge Augustus Hand), in *Espionage Act Cases: With Certain Others on Related Points — New Law in Making as to Criminal Utterance in War-Time,* ed. by W. Nelles (New York: National Civil Liberties Bureau, 1918).

Federal Statutes

Alien Registration of 1940, 54 Stat. 640.

Comstock Act 17 Stat. 598 (1873).

Espionage Act of 1917, 40 Stat. 217.

Judiciary Act of 1925, 43 Stat. 936.

National Prohibition Act 41 Stat. 305 (1919).

Interviews

Ehrlich, Thomas, interviewed by Jak Allen, 25 April 2018.

Newspapers and Magazines

Anderson, Margaret, 'Our Suppressed October Review', *The Little Review,* December 1917.

'Augustus N. Hand, Jurist, Dies at 85', *New York Times,* 29 October 1954.

'A Wholesome Decision', *New York Times,* 4 March 1930.

'Don't Question Congress', *New York Tribune,* 25 July 1917.

Editorial, *Brooklyn Daily Eagle,* 4 March 1930.

Editorial Note, 'We Seek Liberty', *Life,* 3 July 1944.

'Fanatic Censorship Reversed', *The Bismarck Tribune,* 6 March 1930.

Fishbein, Morris, *Indianapolis Times,* 7 March 1930.

Folwell, Elizabeth, 'A Show of Hands', *Adirondack Life,* October 2003 <http://www.adirondacklifemag.com/blogs/2012/10/23/a-show-of-hands/> [accessed 23 October 2019].

Frank, John, 'The Top U.S. Commercial Court', *Fortune,* January 1951.

Griswold, Erwin, 'Augustus Noble Hand', *Harvard Law School Bulletin,* December 1954

Gumpert, Martin, 'Ten Who Know the Secret of Age', *New York Times,* 27 December 1953.

Hamburger, Philip, 'The Great Judge', *Life,* 4 November 1946.

Hand, Augustus, 'The Law School when I was a Student', *Harvard Law School Bulletin,* June 1954.

'Judge Hand Asks Fairness to Aliens', *New York Times,* 12 December 1925.

'Judge Hand Sails, Commends Padlock', *New York Times,* 21 June 1925.

'Judge Learned Hand Dies; On U.S. bench 52 years', *New York Times,* 19 August 1961.

McCulloch, Spencer, 'Judge Learned Hand: An Interview with the Dean of American Jurists', *St. Louis Post-Dispatch*, 15 July 1951.

Powell, Thomas Reed, 'Augustus Noble Hand', *Harvard Alumni Bulletin*, January 1955.

Samuels, Gertrude, 'American Traitors: A Study in Motives', *New York Times*, 22 May 1949.

'The Future of Wisdom in America', *The Saturday Review*, 22 November 1952.

'The Hands — A Distinguished Family of American Jurists', *Middlebury College Newsletter*, Autumn 1972.

Schlesinger, Arthur, 'The Supreme Court: 1947', *Fortune*, January 1947.

'The Warren Court: Fateful Decade', *Newsweek*, 11 May 1964.

'*Ulysses* is Upheld by Appeals Court', *New York Times*, 8 August 1934.

Polling and Statistics

'Do you think judges usually base their decisions mostly on their interpretation of the law or mostly on their personal beliefs and political opinions?', *Associated Press-Ipsos Poll*, 17 May 2005-19 May 2005.

'In general, do you think that the Supreme Court is mainly motivated by politics or mainly motivated by the law?', *Quinnipiac University Poll*, 27 June 2018-1 July 2018.

'Statistical Abstracts of the United States' (Washington D.C.: U.S. Government Printing Office, 1908), <https://www.census.gov/library/publications/1909/compendia/statab/31ed.html> [accessed 6 August 2020].

'Total and Foreign-born Population New York City, 1790-2000', *New York City Department of City Planning Population Division* <https://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/historical-population/1790-2000_nyc_total_foreign_birth.pdf> [accessed 19 April 2020].

Published Articles, Essays, and Speeches

Blackstone, William, *Commentaries on the Laws of England*, ed. by G. Tucker, 5 vols (Philadelphia: W.Y. Birch and A. Small, 1803) v.

Cromwell, Oliver, Speech to General Assembly of the Church of Scotland, 3 August 1650 <http://www.olivercromwell.org/Letters_and_speeches/letters/Letter_129.pdf> [accessed 30 May 2019].

Hamilton, Alexander, 'The Judiciary Department', *Federalist Paper No. 78*, 1788 <http://avalon.law.yale.edu/18th_century/fed78.asp> [accessed 31 May 2019].

Hand, Augustus, 'Lawyers in a Revolutionary Age', *Pennsylvania Bar Association Quarterly* 18 (1946), 46-58.

——— 'Local Incidents of the Papineau Rebellion', *New York History* 15 (1934), 376-387.

——— 'Mr. Justice Frankfurter', *Harvard Law Review* 62 (1949), 353-356.

——— 'Practise of the Law — Then and Now', *Proceeding of the Vermont Bar Association* 34 (1940), 61-80.

——— 'Schuyler Against Curtis and Right to Privacy', *University of Pennsylvania Law Review* 45 (1897), 745-759.

——— ‘William Draper Lewis’, *University of Pennsylvania Law Review* 98 (1949), 8-9.

Hand, Learned, ‘Force and Ideas’, *The New Republic,* 7 November 1914.

——— ‘A plea for the Open Mind and Free Discussion’, University of the State of New York, Albany, N.Y., 24 October 1952, in *The Spirit of Liberty: Papers and Addresses of Learned* ed. by I. Dilliard (London: Hamilton, 1954), 274-285.

——— ‘Chief Justice Stone’s Concept of the Judicial Function’, Commemoration Meeting for Chief Justice Stone of the New York City Bar Association, 11 June 1946, printed in *Columbia Law Review* 46 (1946), 696-699.

——— ‘Foreword’, in Samuel Williston, *Life and Law: An Autobiography* (Boston, MA: Little, Brown & Co, 1941).

——— ‘On Receiving an Honorary Degree’, Harvard Commencement Speech, 22 June 1939, in *The Spirit of Liberty: Papers and Addresses of Learned Hand,* ed. by I. Dilliard (London: Hamilton, 1954), 134-139.

——— ‘The Guardians’, in *The Bill of Rights: The Oliver Wendell Holmes Lectures*, Harvard Law School, 6 February 1958 (New York: Atheneum, 1964), 56-77.

Jackson, Robert, ‘Why Learned and Augustus Hand Became Great’, New York County Lawyers’ Association Speech at the Waldorf Astoria in New York City, 13 December 1951 <https://www.roberthjackson.org/wp-content/uploads/2020/06/why-learned-and-augustus-hand-became-great.pdf> [accessed 3 August 2020].

National Commission on Law Observance and Enforcement: Report No.2, Report on the Enforcement of the Prohibition Laws of the U.S. (Washington D.C.: U.S. Government Printing Office, 1931).

‘Suggestions of Attorney General Gregory to Executive Committee in Relation to the Department of Justice’, *American Bar Association Journal* 4 (1918), 305-316.

Treasury Department United States Public Health Service, *Sex Education: A Symposium for Educators* (Washington D.C.: U.S. Government Printing Office, 1927).

Secondary Sources

Articles and Chapters

Abramowicz, Michael, and Maxwell Stearns, ‘Defining Dicta’, *Stanford Law Review* 57 (2005), 953-1094.

Abrams, Floyd, ‘Free Speech and Civil Liberties in the Second Circuit’, *Fordham Law Review* 85 (2016), 11-37.

Allen, Jak, ‘Political Judging and Judicial Restraint: The Case of Learned and Augustus Hand’, *American Journal of Legal History* 60 (2020), 169-191.

Ames, James Barr, ‘Christopher Columbus Langdell’, *Great American Lawyers,* ed. by W.D. Lewis, 8 vols (Philadelphia: John C. Winston, 1909), viii.

Anderson, Alexis, ‘The Formative Period of First Amendment Theory, 1870-1915’, *American Journal of Legal History* 24 (1980) 65-75.

Balkin, Jack, ‘What *Brown* Teaches Us About Constitutional Theory’, *Virginia Law Review* 90 (2004), 1537-1577.

Boucher, Robert, and Jeffrey Segal, ‘Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court’, *The Journal of Politics* 57 (1995), 824-837.

Burlingham, Charles Culp, ‘Judge Learned Hand’, *Harvard Law Review* 60 (1947), 330-332.

Cahn, Edmond, ‘Authority and Responsibility’, *Columbia Law Review* 51 (1951), 838-851.

Clark, Charles, ‘Augustus Noble Hand’, *Harvard Law Review* 68 (1955), 1113-1117.

Conboy, Martin, ‘Federal Criminal Law’, in *Law: A Century of Progress, 1835-1935,* ed. by A. Reppy, 3 vols (New York: New York University Press, 1937), i, 295-346.

Daley, John, ‘Defining Judicial Restraint’, in *Judicial Power, Democracy and Legal Positivism,* ed. by T. Campbell and J. Goldsworthy (London: Routledge, 2017), 279-314.

Dalton, Russell, ‘Reassessing Parental Socialization: Indicator Unreliability versus Generational Transfer’, *American Political Science Review* 74 (1980), 421-431.

Fiss, Owen, ‘The Early Free Speech Cases’, in *The History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910,* 11 vols (New York: Macmillan, 1993), viii, 323-351.

Frankfurter, Felix, ‘Judge Learned Hand’, *Harvard Law Review* 60 (1947), 325-329.

Frank, Jerome, ‘Some Reflections on Judge Learned Hand’, *University of Chicago Law Review* 24 (1957), 666-705.

Freedman, Lawrence, ‘A Psychoanalysis of the Making of the Model Penal Code’, in *Crime, Law and Corrections,* ed. by R. Slovenko (Springfield, Ill: Thomas, 1966), 213-231.

Friendly, Henry, ‘Learned Hand: An Expression from the Second Circuit’, *Brooklyn Law Review* 29 (1962), 6-15.

Fulks, Mark, ‘Augustus Noble Hand’, *Great American Judges: An Encyclopedia,* ed. by J. Vile, 2 vols (Santa Barbara, CA: ABC-CLIO, 2003), i, 311-319.

Gillers, Stephen, ‘A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from *Hicklin* to *Ulysses II*’, *Washington University Law Review* 85 (2007), 215-296.

Grant, Sydney, and S. E. Angoff, ‘Recent Developments in Censorship’, *Boston University Law Review* 10 (1930), 488-509.

Griswold, Erwin, ‘In Memoriam: Samuel Williston’, *American Bar Association Journal* 49 (1963), 362-363.

Gunther, Gerald, ‘Learned Hand’, *American National Biography Online* (2000) <https://doi.org/10.1093/anb/9780198606697.article.1100379> [accessed 4 August 2020].

——— ‘Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History’, *Stanford Law Review* 27 (1975), 719-774.

Harwood, Edin, ‘American Public Opinion and U.S. Immigration Policy’, *The Annals of the American Academy of Political and Social Science* 487 (1986), 201-212.

Horsky, Charles, ‘Augustus Noble Hand’, *Harvard Law Review* 68 (1955), 1188-1121.

Horwitz, Morton, ‘Commentary’, *NYU Law Review* 70 (1995), 714-722.

Jennings, M. Kent, and Richard Niemi, ‘The transmission of political values from parent to child’, *American Political Science Review* 62 (1968), 169-184.

Judd, Orrin, ‘Judge Learned Hand and the Criminal Law’, *Harvard Law Review* 60 (1947), 405-422.

Llewllyn, Karl, ‘A Realistic Jurisprudence — The Next Step’, *Columbia Law Review* 30 (1930), 431-465.

Logan, Wayne, ‘Policing Identity’, *Boston University Law Review* 92 (2012), 1559-1609.

Meister, Daniel, 'The Biographical Turn and the Case for Historical Biography', *History Compass* 16 (2018).

Melendez, Edgardo, 'Citizenship and the Alien Exclusion in the Insular Cases: Puerto Ricans in the Periphery of American Empire', *Centro Journal* 25 (2013) 106-145.

Miner, Roger, 'Augustus Noble Hand', *The Yale Biographical Dictionary of American Law,* ed. by R. Newman (New Haven, CT: Yale University Press, 2009), 247-248.

Moore, W. Underhill, 'Rational Basis of Legal Institutions', *Columbia Law Review* 23 (1923), 609-617.

Murchison, Kenneth, 'Prohibition and the Fourth Amendment: A New Look at Some Old Cases', *The Journal of Criminal Law and Criminology* 73 (1982), 471-532

Neuborne, Burt, 'A Tale of Two Hands: One Clapping; One Not', *Arizona State Law Journal* 50 (2018), 831-854.

Novick, Sheldon, 'Justice Holmes's Philosophy', *Washington University Law Quarterly* 70 (1992), 703-754.

Parillo, Vincent, 'Diversity in America: A Sociohistorical Analysis', *Sociological Forum* 9 (1994), 523-545.

Pegram, Thomas, 'Hoodwinked: The Anti-Saloon League and the Ku Klux Klan in 1920s Prohibition Enforcement', *The Journal of the Gilded Age and Progressive Era* 7 (2008), 89-119.

Pepper, George Wharton, 'The Literary Style of Learned Hand', *Harvard Law Review* 60 (1947), 333-344.

Posner, Richard, 'The Rise and Fall of Judicial Self-Restraint', *California Law Review* 100 (2016), 519-556.

Post, Robert, 'Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft', *Journal of Supreme Court History* 23 (1998), 50-78.

Pound, Roscoe, 'The Scope and Purpose of Sociological Jurisprudence', *Harvard Law Review* 24 (1911), 591-619.

Purcell, Edward, 'Learned Hand: The Jurisprudential Trajectory of an Old Progressive', *Buffalo Law Review* 43 (1995), 873-926.

Rabban, David, 'The IWW Free Speech Fights and Popular Conceptions of Free Expression before World War I', *Virginia Law Review* 80 (1994), 1055-1158.

Rhode, Deborah, 'Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings', *Law & Social Inquiry* 43 (2018), 1027-1058.

Sayer, John, 'Art and Politics, Dissent and Repression: The Masses Magazine versus the Government, 1917-1918', *American Journal of Legal History* 32 (1988), 42-78.

Schwartz, Bernard, 'Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action', *The Supreme Court Review* (1994), 209-245.

Shapiro, Martin, 'Morals and the Courts: The Reluctant Crusaders', *Minnesota Law Review* 45 (1960), 897-962.

Songer, Donald, 'The Relevance of Policy Values for the Confirmation of Supreme Court Nominees', *Law and Society Review* 13 (1979), 927-948.

Thayer, James Bradley, 'The Insular Tariff Cases in the Supreme Court', *Harvard Law Review* 15 (1901), 164-168.

——— 'The Origin and Scope of the American Doctrine of Constitutional Law', *Harvard Law Review* 7 (1893), 129-156.

Thornton, Mark, 'Alcohol Prohibition was a Failure', *CATO Institute*, Policy Analysis No.157 (July 1991) <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure> [accessed 23 May 2020].

Van Doren, Jack, 'Is Jurisprudence Politics by Other Means? The Case of Learned Hand', *New England Law Review* 33 (1998), 1-38.

Younger, Irving, '*Ulysses* in Court: The Litigation Surrounding the First Publication of James Joyce's Novel in the United States', in *Classics in the Courtroom*, ed. by J. McElhaney, 25 vols (Minnetonka, MN: Professional Education Group, 1989), xvi.

Weinrib, Laura, 'The Sex Side of Civil Liberties', *Law and History Review* 30 (2012), 325-386.

Weinstein, James, 'The Story of *Masses Publishing Co. v. Patten*: Judge Learned Hand, First Amendment Prophet', in *First Amendment Stories*, ed. by R. Garnett and A. Koppelman (St. Paul, MN: West Academic, 2011), 61-97.

Whitmore, Harry, 'Obscenity in Literature: Crime or Free Speech', *Sydney Law Review* 4 (1963), 179-204.

Wiecek, William, 'The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States*', *Supreme Court Review* (2001), 375-434.

Wyzanski Jr., Charles, 'Augustus Noble Hand', *Harvard Law Review* 61 (1948), 573-591.

——— 'Judge Learned Hand's Contribution to Public Law', *Harvard Law Review* 60 (1947), 348-369.

Books

Bates, Anna, *Weeder in the Garden of the Lord: Anthony Comstock's Life and Career* (Lanham, MD: University Press of America, 1995).

Baum, Lawrence, *Ideology in the Supreme Court* (Princeton, NJ: Princeton University Press, 2017).

Belknap, Michael, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, CN: Greenwood, 1977).

Belz, Herman, Winfred Harbison, and Alfred Kelly, *The American Constitution: Its Origin and Development*, 7th edn, 2 vols (New York: Norton, 1991), ii.

Benton-Cohen, Katherine, *Inventing the Immigration Problem: The Dillingham Commission and its Legacy* (Cambridge, MA: Harvard University Press, 2018).

Birmingham, Kevin, *The Most Dangerous Book: The Battle for James Joyce's Ulysses* (London: Head of Zeus, 2014).

Boyer, Paul, *Purity in Print: Censorship from the Gilded Age to the Computer Age* (Madison, WI: University of Wisconsin Press, 1968).

Cardozo, Benjamin *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921).

Chafee, Zechariah, *Freedom of Speech* (New York: Harcourt, Brace and Howe, 1920).

Clark, Norman, *Deliver Us from Evil: An Interpretation of American Prohibition* (New York: Norton, 1976).

Curtis, Michael Kent, *Free Speech: The People's Darling Privilege* (London: Duke University Press, 2000).

Daniels, Roger, and Otis Graham, *Debating American Immigration, 1882-Present* (Lanham, MD: Rowman & Littlefield, 2001).

de Grazia, Edward, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (New York: Vintage Books, 1993).

Devins, Neal, and Lawrence Baum, *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (New York: Oxford University Press, 2019).

Dorsen, David, *Henry Friendly: Greatest Judge of His Era* (Cambridge, MA: Harvard University Press, 2012).

Dummitt, Christopher, *Unbuttoned: A History of Mackenzie King's Secret Life* (Montreal: McGill-Queen's University Press, 2017).

Dworkin, Ronald, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996; repr. 2005).

Franklin, Jimmie Lewis, *Born Sober: Prohibition in Oklahoma, 1907-1959* (Norman, OK: University of Oklahoma Press, 1971)

Friedman, Lawrence, *Law in America: A Short History* (New York: Modern Library, 2004).

Fisher, Louis, *Constitutional Dialogues: Interpretation as Political Process* (Princeton, NJ: Princeton University Press, 1988).

Graber, Mark, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley, CA: University of California Press, 1991).

Gray, John Chipman, *The Nature and Sources of the Law*, 2nd edn (New York: Macmillan, 1921).

Griffith, Kathryn, *Judge Learned Hand and the Role of the Federal Judiciary* (Norman, OK: University of Oklahoma Press, 1973).

Gunther, Gerald, *Learned Hand: The Man and the Judge*, 2nd edn (New York: Oxford University Press, 2010).

Healy, Thomas, *The Great Dissent How Oliver Wendel Holmes Changed his Mind — and Changed the History of Free Speech in America* (New York: Henry Holt & Co, 2013).

Howe, Daniel Walker, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007).

Howe, M.D., ed. *Holmes-Laski Letters, 1916-1935*, 2 vols (Cambridge, MA: Harvard University Press, 1953).

James, William, *The Will to Believe and Other Essays in Popular Philosophy* (Cambridge, MA: Harvard University Press, 1979).

——— *Pragmatism: A New Name for Some Old Ways of Thinking* (New York: Longmans, Green & Co, 1907).

Jeffries, John, *Justice Lewis F. Powell, Jr.* (New York: Scribners, 1994).

Jordan, Constance, *Reason and Imagination: The Selected Correspondence of Learned Hand, 1897-1961* (New York: Oxford University Press, 2013).

Kalven, Harry, *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row, 1988).

Kaplan, David, *The Most Dangerous Branch: Inside the Supreme Court's Assault on the Constitution* (New York: Broadway Books, 2018).

Kyvig, D., ed. *Law, Alcohol and Order: Perspectives on National Prohibition* (Westport, CT: Greenwood, 1985).

LeBlanc, L., and M. Moscato, eds. *U.S v. Ulysses: Documents and Commentary — A 50-Year Retrospective* (Frederick, MD: University Publications of America, 1984).

Leuchtenberg, William, *The Perils of Prosperity, 1914-1932*, 2nd edn (Chicago: University of Chicago Press, 2004).

Lindquist, Stefanie, and Frank Cross, *Measuring Judicial Activism* (New York: Oxford University Press, 2009) <https://doi.org/10.1093/acprof:oso/9780195370850.001.0001> [accessed 4 August 2020].

Maltzman, Forrest, James Spriggs, and Paul Wahlbeck, *Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making* (Chicago: University of Chicago Press, 1999).

Mitchell, Marcia, and Thomas Mitchell, *The Spy Who Seduced America: Lies and Betrayal in the Heat of the Cold War — The Judith Coplon Story* (Montpelier, VT: Invisible Cities Press, 2002).

Morris, Jeffrey, *Federal Justice in the Second Circuit* (New York: Second Circuit Historical Committee, 1987).

Murphy, Paul, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, CN: Greenwood, 1972).

Murphy, Walter, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

Nelson, William, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980* (Chapel Hill, NC: University of North Carolina Press, 2003).

Newman, Roger, *Hugo Black: A Biography* (New York: Pantheon,1994).

Ngai, Mae, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2014).

Oliver, Wesley, *The Prohibition Era and Policing* (Nashville, TN: Vanderbilt University Press, 2018).

Potter, Rachel, *Obscene Modernism: Literary Censorship and Experiment, 1900-1940* (Oxford: Oxford University Press 2013)

Posner, Richard, *How Judges Think* (Cambridge, MA: Harvard University Press, 2010).

Possing, Birgitte, *Understanding Biographies: On Biographies in History and Stories in Biography* (Odense: University Press of Southern Denmark, 2017).

Rabban, David, *Free Speech in its Forgotten Years* (Cambridge: Cambridge University Press, 1997).

Schick, Marvin, *Learned Hand's Court* (Baltimore, MD: John Hopkins Press, 1970).

Schlesinger, Arthur, *The Crisis of the Old Order: 1919-1933* (London: Heinemann, 1957).

Schultz, David, and Christopher Smith, *The Jurisprudential Vision of Justice Antonin Scalia* (Lanham, MD: Rowman & Littlefield, 1996).

Schwartz, Bernard, *American Constitutional Law* (Cambridge: University Press, 1955).

Segal, Jeffrey, and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993).

——— *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 1998).

Shanks, Hershel, *The Art and Craft of Judging: The Decisions of Judge Learned Hand* (New York: Macmillan, 1968).

Siegal, Larry, and John Worrall, *Essentials of Criminal Justice* (Boston, MA: Cengage Learning, 2017).

Sinclair, Andrew, *Prohibition: The Era of Excess* (Boston, MA: Little, Brown & Co, 1962).

Stone, Geoffrey, *Perilous Times: Free Speech in War Time — From the Sedition Act of 1798 to the War on Terrorism* (New York: Norton, 2004).

Taylor, Shelley, Letitia Peplau, and David Sears, *Social Psychology* (Englewood Cliffs, NJ: Prentice-Hill, 1994).

Timberlake, James, *Prohibition and the Progressive Movement: 1900-1920* (Cambridge, MA: Harvard University Press, 1963).

Tolzman, Don, *German-Americans in the World Wars*, 5 vols (New Providence, NJ: K.G. Saur, 1998), v.

Tushnet, Mark, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: Norton, 2006).

Weinrib, Laura, *The Taming of Free Speech* (Cambridge, MA: Harvard University Press, 2016).

White, G. Edward, *The American Judicial Tradition: Profiles of Leading American Judges*, 3rd edn (Oxford: Oxford University Press, 2007).

Zirin, James, *Supremely Partisan: How Raw Politics Tips the Scales in the United States Supreme Court* (Lanham, MD: Rowman & Littlefield, 2016).

Book Reviews

Gerhardt, Michael, 'The Art of Judicial Biography', review of Gerald Gunther, *Learned Hand: The Man and the Judge* (1994); John Jeffries, *Justice Lewis F. Powell, Jr.* (1994); and Roger Newman, *Hugo Black: A Biography* (1994), *Cornell Law Review* 80 (1995), 1595-1645.

McWhinney, Edward, 'A Legal Realist and a Humanist — Crosscurrents in the Legal Philosophy of Judge Jerome Frank', review of Jerome Frank, *Not Guilty* (1957), *Indiana Law Journal* 33 (1957), 111-116.

Posner, Richard, 'The Hand Biography and the Question of Judicial Greatness', review of Gerald Gunther, *Learned Hand: The Man and the Judge* (1994), *Yale Law Journal* 104 (1994), 511-540.

Rosen, Jeffrey, 'The Craftsman and the Nihilist', review of *Learned Hand: The Man and the Judge* (1994), *The New Republic*, 4 July 1994 <https://newrepublic.com/article/62408/the-craftsman-and-the-nihilist> [accessed 3 August 2020].

Thomson, James, 'Evaluating a Federal Judge', review of Gerald Gunther, *Learned Hand: The Man and the Judge* (1994), *Northern Kentucky Law Review* 22 (1995), 763-809.

Witt, John Fabian, 'The Operative: How John Marshall Built the Supreme Court around his Political Agenda', review of Richard Brookhiser, *John Marshall: The Man Who Made the Supreme Court* (2018), *The New Republic*, 7 January 2019 <https://newrepublic.com/article/152667/john-marshall-political-supreme-court-justice> [accessed 7 May 2019].

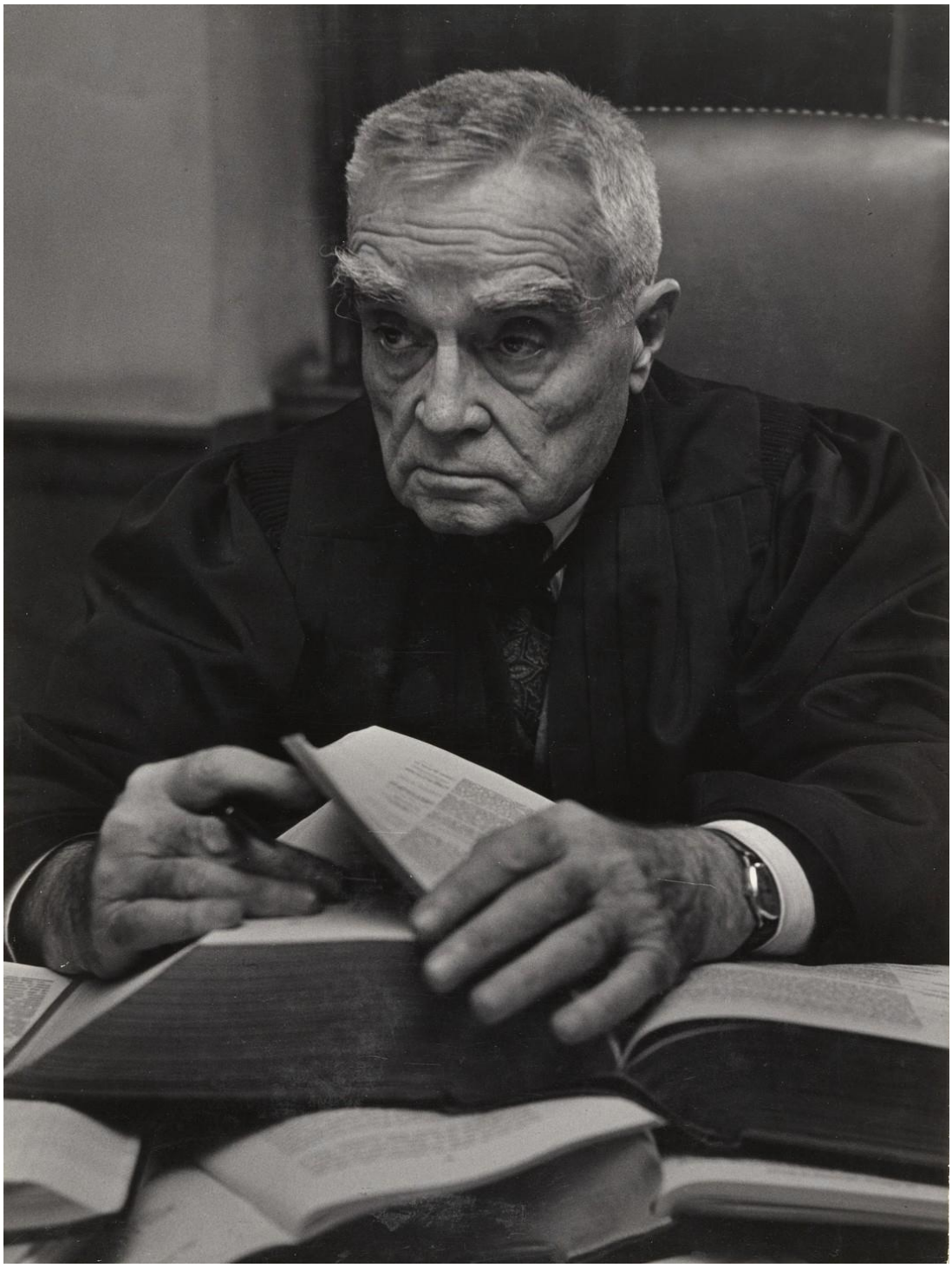
Appendices

Appendix A

A.1 Judge Augustus Noble Hand.

A.2 Judge Learned Hand.

A.1 Judge Augustus Noble Hand.



A.2 Judge Learned Hand, 1951 (Photograph by Dan Weiner).

Appendix B

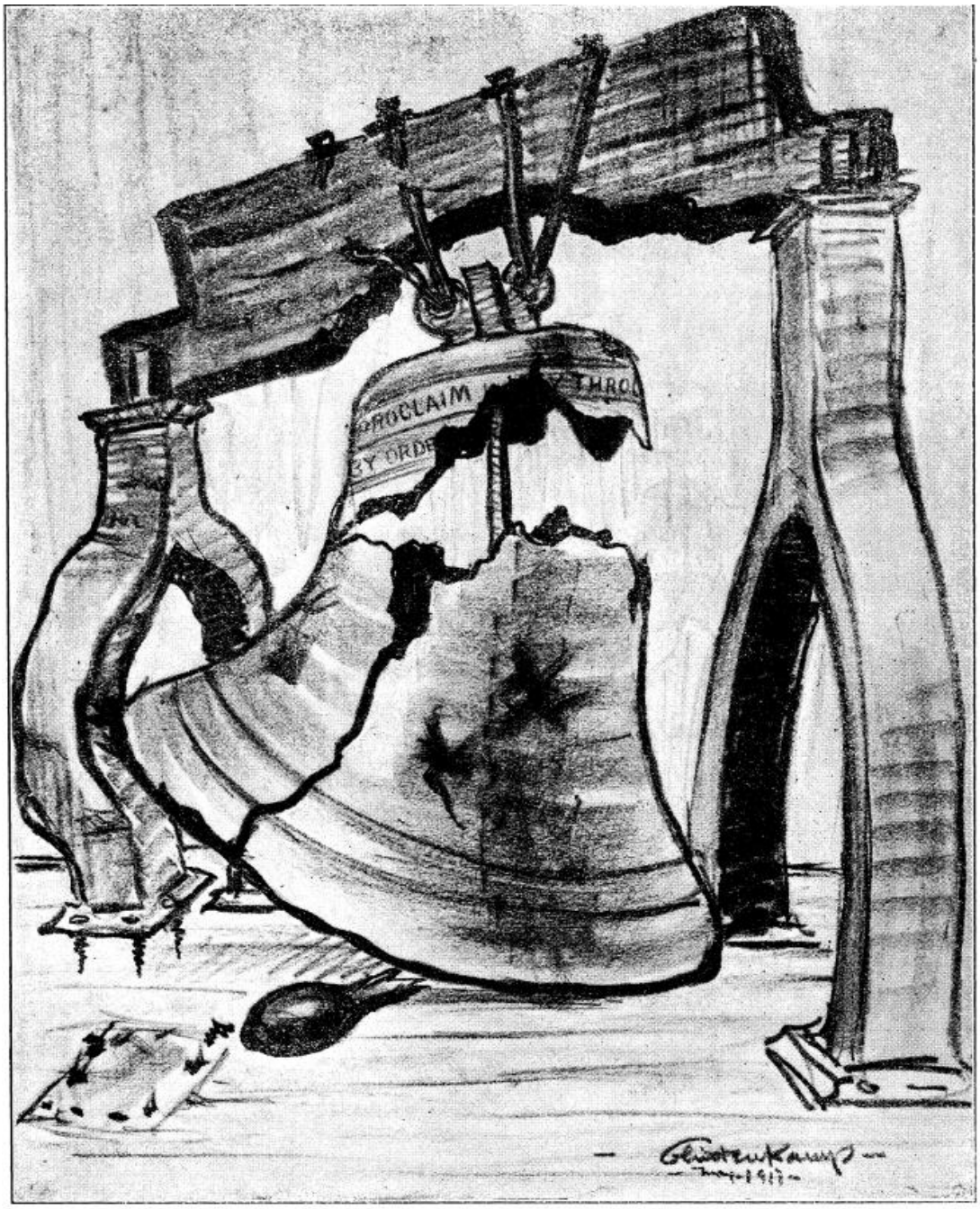
Cartoons in *The Masses*, August 1917 Issue.

B.1 Liberty Bell.

B.2 Conscription.

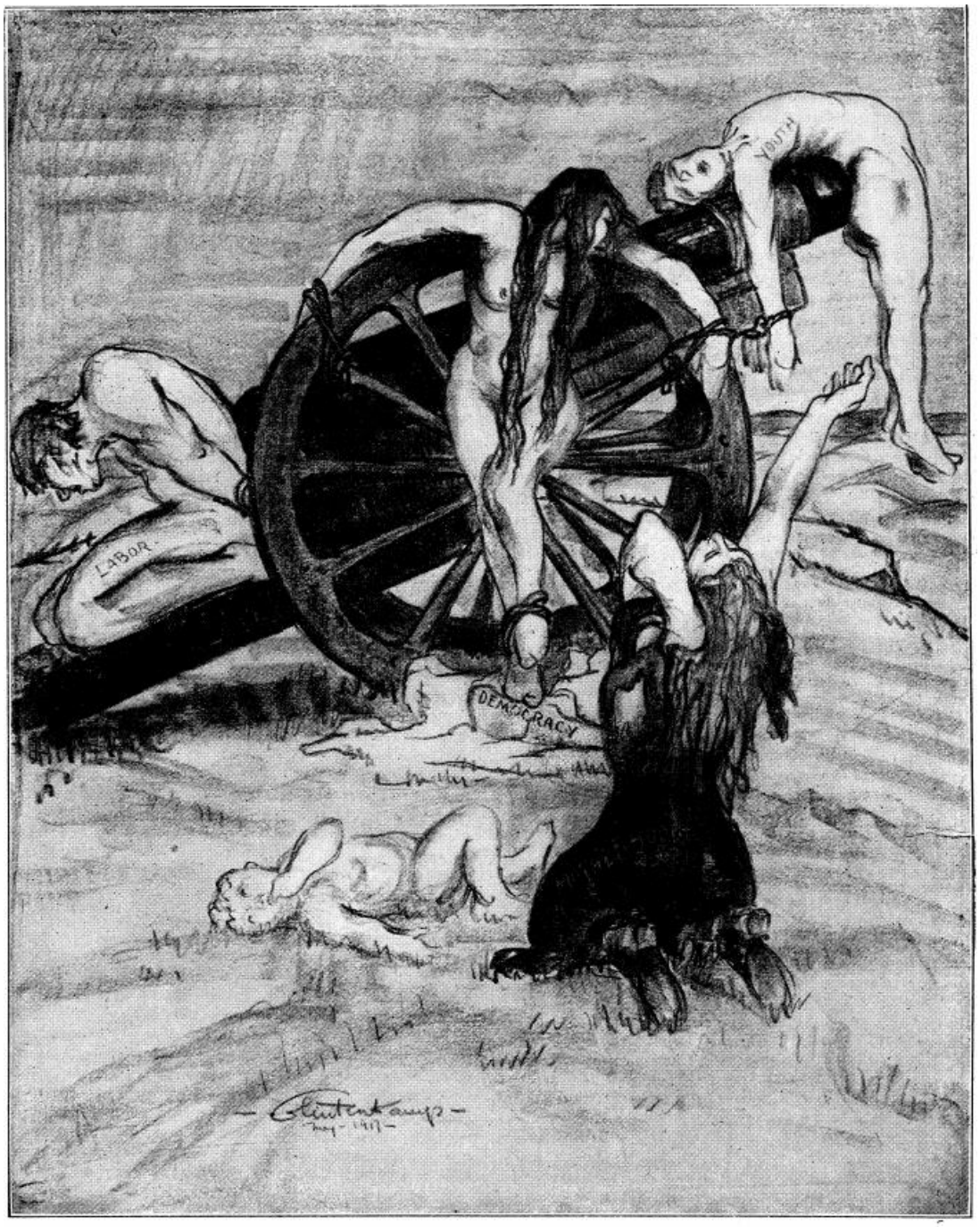
B.3 Making the World Safe for Capitalism.

B.4 Congress and Big Business.



Drawn by H. J. Glintenkamp.

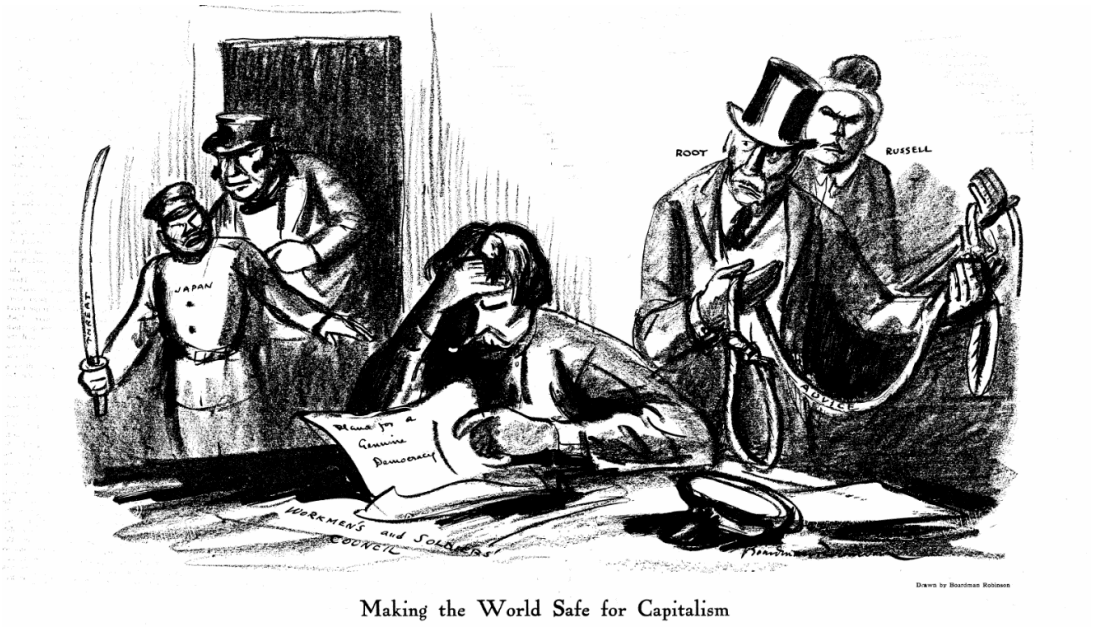
B.1 Liberty Bell (Cartoon by Henry J. Glintenkamp).



Conscription

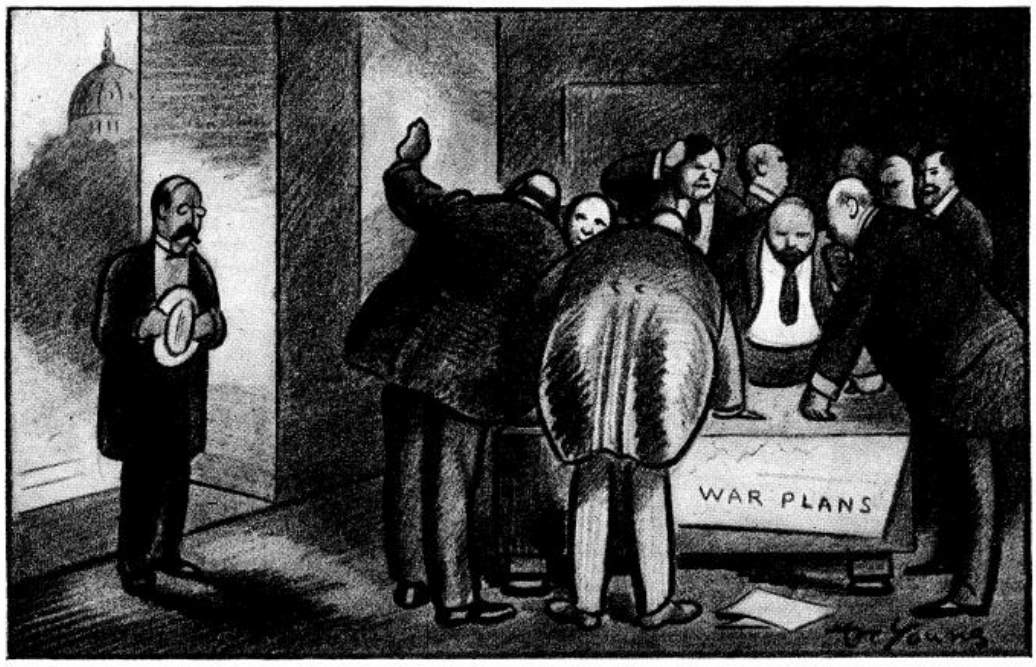
H. J. Glintenkamp.

B.2 Conscription (Cartoon by Henry J. Glintenkamp).



Making the World Safe for Capitalism

B.3 Making the World Safe for Capitalism (Cartoon by Boardman Robinson).



Arthur Young.

CONGRESS: "EXCUSE ME, GENTLEMEN—WHERE DO I COME IN?"
BIG BUSINESS: "RUN ALONG NOW!—WE GOT THROUGH WITH YOU WHEN YOU DECLARED WAR FOR US.

B.4 Congress and Big Business (Cartoon by Art Young).