

William & Mary Law Review

Volume 15 (1973-1974)
Issue 3 Symposium: *The Nuclear Power Plant
Licensing Process*

Article 15

March 1974

Book Review of Judge Learned Hand and the Role of the Federal Judiciary

William F. Swindler
William & Mary Law School

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Law Commons](#)

Repository Citation

William F. Swindler, *Book Review of Judge Learned Hand and the Role of the Federal Judiciary*,
15 Wm. & Mary L. Rev. 755 (1974), <https://scholarship.law.wm.edu/wmlr/vol15/iss3/15>

Copyright c 1974 by the authors. This article is brought to you by the William & Mary Law School Scholarship
Repository.

<https://scholarship.law.wm.edu/wmlr>

BOOK REVIEW

JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY. BY KATHRYN GRIFFITH. Norman, Okla.: University of Oklahoma Press, 1973. Pp. 251. \$8.95.

WILLIAM F. SWINDLER*

Few American jurists—and perhaps only one who was not a member of the Supreme Court—merit the cliché of becoming legends in their own time. There is definitely one, however, and his name was Billings Learned Hand (1872-1962), who not only inspired encomia in law reviews and popular magazines but encomia prepared by some of the leading figures of the profession.¹ In the dozen years since his death, there have been three admiring and admirable books about him: *The Art and Craft of Judging*, a thoughtfully edited collection of his most insightful opinions;² *Learned Hand's Court*, a unique study of the Second Circuit in what now seems a golden age of the cousins Learned and Augustus Hand, Jerome Frank, and Thomas Swan;³ and this latest work, a study in the development of a judicial philosophy which skillfully integrated the spirit of the age with the practical requirements of expounding the law on a wide variety of subjects.

This same objective, of course, inspired Shanks' collection and underlay the painstaking analysis by Schick of the accomplishments of the Second Circuit. One must lift an eyebrow, in fact, upon noting that neither of these valuable predecessors to Dr. Griffith's study has been acknowledged. Another missing reference, which certainly would lend

* LL.B., University of Nebraska; Ph.D., University of Missouri. Professor of Law, The College of William and Mary.

1. E.g., Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947); Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666 (1957); Frankfurter, *Learned Hand*, 75 HARV. L. REV. 1 (1961); Wyzanski, *Learned Hand*, ATLANTIC MONTHLY, Dec. 1961, at 54. A 1947 issue of the *Harvard Law Review* containing a collection of articles praising Judge Hand was dedicated to "Judge Learned Hand, whose wisdom and eloquence have made his seventy-fifth birthday an occasion to be celebrated by all who serve the law . . ." 60 HARV. L. REV. 325 (1947).

2. THE ART AND CRAFT OF JUDGING (H. Shanks ed. 1968).

3. M. SCHICK, LEARNED HAND'S COURT (1970).

itself to the perspective of Hand and his concepts, is Cardozo's classic, *The Nature of the Judicial Process*.⁴

All that aside, however, it remains to commend this as a study in political philosophy—that, rather than jurisprudence or legal philosophy, if there is an ultimate difference between the two. Dr. Griffith begins with the natural questions: What made Learned Hand unique? What specifically *was* his philosophy? How has it stood the test of rapidly changing times? She has undertaken to reach her answers by a summation of his writings on various seminal topics—the nature of the judicial function, the standards of constitutional freedoms which ought to guide the courts, the relation of the judicial to the legislative and, less frequently, the executive branches of government.

Perhaps the most useful chapter in the book is the tenth, entitled "American Political Thought," in which a background for evaluating Hand's thought is created by tracing the fundamental shifting of national convictions from the natural rights assumptions of the eighteenth and nineteenth centuries to the relativism and pragmatism of the twentieth. "At the beginning of the twentieth century," Dr. Griffith writes, "political philosophers became acutely conscious of the limits of scientific discovery based strictly upon the tools of science, such as observation, measurement, and logical reasoning."⁵ Under the impact of totalitarian iconoclasm, it appeared necessary to concede that the scientific method was not equipped to establish the validity of the basic assumptions upon which American traditions had been built.⁶ The alternative was a second-generation school of pragmatism, so to speak—an acceptance of the legitimacy of diversified premises, a skepticism toward claims that any one premise offered the ultimate solution for anything, and accordingly a tolerance for the contradictory and controversial.⁷

To ascribe this frame of mind to Hand is essentially to say that he was one with Oliver Wendell Holmes, Brandeis, Cardozo, and Frankfurter. To demonstrate that he, as they, could articulate these convictions and integrate them into judicial decision is to emphasize how great an intellectual task he accomplished in a smaller arena. The other jurists spoke from the eminence of the Supreme Court, and that bench itself lent authority to what they said. Learned Hand spoke from the inter-

4. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

5. K. GRIFFITH, *JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY 187 (1973)*.

6. *Id.* at 187-88.

7. *Id.* at 190-91.

mediate bench (although admittedly one of the two most important circuits, along with the District of Columbia), and his eloquence lent authority to his court.

To students of efficient and effective judicial administration, it has seemed regrettable that Hand in fact was never "elevated" to the Supreme Court. The most common explanation is possibly simplistic: when he was the right age, the appointing authority, the President, was unsympathetic with his philosophy; when the appointing authority was sympathetic, he was presumed to be past the desired age.⁸ But a more relevant observation is that the intermediate courts—where, despite the complaints of Supreme Court workloads, the majority of appellate business is done and finally disposed of—need judges of the caliber of the Second Circuit in its great age. Indeed, the key to the quality of justice administered in the federal judicial system today may ultimately be recognized as limited by the caliber of circuit court appointments fully as much as it is affected by Supreme Court appointments.⁹

This brings us back to the initial question: How does a great jurist emerge, and what shapes his principles of law, on a particular bench? What were the qualities that have made Roger Traynor of the California Supreme Court a figure among state appellate court judges comparable in stature to Judge Hand? It may be accepted that Traynor's contribution to modern American law has been the logic of legal analysis as a craft,¹⁰ where Hand's judicial performance has been, as Shanks accurately characterized it, an art as well as a craft.¹¹ If there was an element of luck in Hand's story, it was, as Schick emphasizes, the remarkable assemblage of several keen minds in Hand's court at the same time.¹² But when all this is said, it remains evident that the man himself was unique: he discerned the intellectual needs of his own age, when familiar and accustomed landmarks were disappearing and the public interest in general and the law in particular required a new synthesis of principles of applied justice.

Dr. Griffith's primary concern, as the title of her book indicates, is the function of the judiciary, and especially the federal judiciary, in

8. *But cf.* Note, *Politics of the Appointment Process: An Analysis of Why Learned Hand Was Never Appointed to the Supreme Court*, 25 STAN. L. REV. 251 (1973).

9. Cf. P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* (1973).

10. Cf. Traynor, *La rude vita, la dolce giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223 (1962).

11. THE ART AND CRAFT OF JUDGING, *supra* note 2.

12. M. SCHICK, *supra* note 3, at 5-38, 348-55.

the administration of justice. The main part of her study is subtitled "The Federal Judiciary—Motor or Brake?" and presumably it is this particular aspect of applied justice that she finds most persuasively treated by her biographee. She sees Hand, like Frankfurter, as a zealous advocate of judicial restraint; in Hand's view, the judge should not be transfigured into "a crusader for righteousness as righteousness may appear to his incandescent conscience,"¹³ for this threatens to blind the members of the court to "the purposes and ideals of those parts of the common society whose interests are discordant with [their] own."¹⁴

This viewpoint led Judge Hand logically into Bill of Rights questions, where he strove for a pragmatic alternative to the vague natural rights declarations of "self-evident" and "inalienable" principles. In this he was opposed to the absolutist values of Justice Black and closer to the rule of reason espoused by Justice Harlan. He was similarly opposed to the judicial activism of the Warren Court, considering it a needless complication of already complex issues which the legislature rather than the judiciary ought to resolve. Incorporation of the Bill of Rights into the fourteenth amendment was for him a proposition of even greater doubtfulness. He was the ultimate Holmesian: "He had no illusions about the difficulty of preserving democracy," Dr. Griffith observes, "and yet he possessed a high hope and a certain faith in its endurance. His view that trial and error and experimentation are the only paths to truth accounts for his willingness to permit the legislature freedom to experiment within the boundaries established by the Constitution."¹⁵

Thus the great judge: accepting as a first principle the necessity for tolerance of widely diverging viewpoints and, as a corollary, the right of the majority to act within a representative assembly under the guidelines of a written constitution. For the activists, the principle set out in the Constitution was the starting point; Hand would add, the starting point for the legislative, representative branch of the government. Hand did not share Cardozo's conviction that in the absence of legislative action the courts should be guided by a consensus as to social ends to be served; and yet, when the time came to test the legislative action against the principle expressed in the Constitution, Hand likewise came down on the side of the angels.

13. K. GRIFFITH, *supra* note 5, at 89.

14. *Id.* at 90.

15. *Id.* at 140