In the eyes of his contemporaries, there was little question that Learned Hand deserved the seat he never won on the Supreme Court. Indeed, he was referred to as the "Tenth Justice," and much was made of the Supreme Court's deference to some of his Second Circuit opinions. Although Hand never sat on the Supreme Court, he seemed assured of a still loftier place—in the twentieth-century judicial pantheon alongside Holmes, Brandeis, and Cardozo. Hand's Olympian position was so assured that Chief Judge Charles Clark opened the commemorative celebration of Hand's fiftieth year on the federal bench by expressing the unworthiness of those present to provide Hand a meaningful tribute:

I shall carefully refrain from saying that we honor him today; who are we or any of us that we can add any laurels to those the profession, indeed the world, has already bestowed upon him? Instead, I shall say that by this tribute we honor ourselves and the court he has served so magnificently, and through it the profession of which we are the servitors.

* For their contributions to my thoughts on Learned Hand, I would like to thank Professors Archibald Cox, Paul Freund, Duncan Kennedy, Lance Liebman, and Richard Parker.

1. "How could it have befallen that this paragon was never tendered appointment to the Supreme Court of the United States?" asked Charles Wyzanski. C. Wyzanski, Learned Hand, in C. WYZANSKI, WHEREAS—A JUDGE'S PREMISES 79, 89 (1965). In his introduction to the Harvard Law Review's 1947 tribute to Hand, Felix Frankfurter wrote: "That Hand was never chosen must surely serve those, if any there be, who seek to be chosen and those who are there, as a temptation to reflection on the caprices of fortune." F. Frankfurter, Judge Learned Hand, 60 HARV. L. REV. 325, 329 (1947). In fact, it was so clear that Hand deserved the nod for the Supreme Court that many writing on him felt compelled to tell the story of his poor luck. See, e.g., H. Shanks, Introduction to L. Hand, The Art and Craft of Judging 11-13 (H. Shanks ed. 1968). For a closer examination of Hand's appointment frustrations, see M. Kahn, The Politics of the Appointment Process: An Analysis of Why Learned Hand was Never Appointed to the Supreme Court, 25 STAN. L. REV. 251 (1973).


3. Confident that this was a matter of consensus, Gerald Gunther opened his Encyclopedia of the American Constitution article on Hand declaring, "Learned Hand is widely viewed, with Oliver Wendell Holmes, Louis D. Brandeis, and Benjamin N. Cardozo, as among the leading American judges of the twentieth century." G. Gunther, Learned Hand, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 895 (1986).

4. C. Clark, In Commemoration of Fifty Years of Federal Judicial Service by the Honorable Learned Hand, 264 F.2d 1, 6 (1959).
Clark’s laudatory words have an unmistakably conventional ring. Indeed, homages to Hand tended to follow a series of well-worn tropes and established patterns.

Tributes to Hand often listed canonical figures not only of the bench but of Western culture. Jerome Frank’s tribute in 1957 was so laden with names, from Kant and Montaigne to William James and Lord Acton, that it was clear that the subject of his words was more than an exemplary Circuit Court judge.5 Another of the rhetorical ploys of Hand’s admirers, as if to suggest the unreliability of their own assessments, was to quote heavily from other tributes to Hand. Similarly, they also quoted words originally meant for others. As Felix Frankfurter wrote in his memorial piece on Hand, “One echoes the few comprehensive words of Mr. Justice Brandeis when news was brought to him of his brother Holmes’s death: ‘And so the great man is gone.’ Not much more can be said about Judge Hand without being redundant.”6 Charles Wyzanski similarly ventured: “Sometimes they may have found [Hand] not too far from T.S. Eliot’s description of Paul Valéry: ‘Intelligence to the highest degree, and a type of intelligence which excludes the possibility of faith, implies profound melancholy.’ ”7

Those who praised Hand also took to quoting his own fond words for other judges and used them to describe Hand. After quoting Hand on Brandeis and Cardozo, George Wharton Pepper explained that “[i]n these passages he has attributed to Brandeis and Cardozo some of the qualities which characterize his own style.”8 Hershel Shanks used Hand’s tribute to Holmes as a tribute to Hand.9 Similarly, Chief Justice Earl Warren quoted a long paragraph Hand had written for Brandeis’s eighty-second birthday and then observed that Hand’s own “words are appropriate for this ceremony.”10

When Jerome Frank used Hand on Cardozo to explain Hand’s judicial style, he did so because he felt that was what Hand himself had meant.11 Unlike the other eulogists, Frank identified Hand’s words about others as finally meant for himself, and Frank explained that Hand’s essay on Harlan Fiske Stone, in its exaggeration of Stone’s commitment to judicial restraint, was ultimately about Hand himself. In a psychoanalytical gesture that reflected the overall Freudian argument of Law and the Modern

---

7. C. Wyzanski, supra note 1, at 88-89.
9. “As he said of Holmes, to whom he referred as the Great Master, so may it be said of Learned Hand: ‘His mind, his nature, his attainments, his contributions have had their fullest recognition, and will always have it, among those to whom life is complex and universals slippery and perilous. . . .’ ” H. Shanks, supra note 1, at 13.
11. J. Frank, supra note 5, at 67.
Mind, Frank asserted that "[a] biography often is an unconscious autobiography." Frank's observation applies to Learned Hand, for clearly Hand's portraits of others tended to reflect his ideal self-image. They were not the unconscious self-portraits that Frank posits, but ranged instead between the semi-conscious and the fully deliberated. Hand not only used characterizations of others to fill out his ideal image but also used an entire arsenal of rhetoric and imagery to do so. As he wrote in his self-assured voice on copyright infringement and admiralty liabilities, or spoke to various audiences on the common will or constitutional protections, he was engaged in a profound project of self-imaging. These self-images help us to understand the role he played in our legal culture during his five decades on the federal bench.

Hand gave special priority to three self-images during the course of his career — those of priest, craftsman, and scholar. In my discussion of those images, I will suggest some tension among them and point to significant internal tensions within each of them. In fact, each of the three seems to contain a variation that gives it texture and complexity. With all of their contradictions, the images Hand used were ultimately efforts to define himself. If Hand's chosen imagery provided figures for himself, they were also figures for his ideas. In that sense, they provide keys to his judicial philosophy and what it meant for him to be a judge. The scholar, craftsman, and priest are hardly uncommon personages in judicial writings. Yet as conventional as they may sound, they do not exhaust the repertoire of judicial self-images, which includes as well the scientist, the reformer/liberator, and even the businessman. Hand had particular reasons for employing these images. His choices were significant, but just as important were the ways in which he developed conventional symbols into personal ones.

A variety of approaches may be adopted to decipher Hand's judicial and extrajudicial writing. It is important, for example, to read Hand's texts within the historical development of various doctrinal areas in American law; to provide a social and biographical interpretation of Hand's work as a judge; and to place his writings within a political context, whether in their interaction with national politics or in the microcosm offered by the seven judges of the Second Circuit. Each of these tie into my reading of Hand, but I have given priority to the imaginative vocabulary of his self-imaging largely because that sort of imaginative vocabulary is so significant in the composition of our legal culture. In a

13. J. Frank, supra note 5, at 693.
sense, I am offering my reading of Learned Hand as a method of analyzing our legal culture, for law is a construct that depends largely upon the self-construction of lawyers.  

I. PRIEST

In a pamphlet written by Ernst Kantorowicz in response to the events of the loyalty oath controversy at the University of California, Berkeley, the eminent historian of medieval law noted: "There are three professions entitled to wear a gown: the judge, the priest, the scholar." The garment," he continued, "stands for its bearer's maturity of mind, his independence of judgment, and his direct responsibility to his conscience and to his God. It signifies the inner sovereignty of those three interrelated professions: they should be the very last to allow themselves to act under duress and yield to pressure." Kantorowicz's correlation of judge and priest was hardly novel, but American legal realists had rejected the correlation. They had attacked the reigning legal orthodoxy as priestly, and portrayed the predominant legal theory as a faith to be opposed with the greatest weapon of the Enlightenment—skepticism.

One might interpret The Common Law of Holmes—precursor of and model for the legal realists—as a legal analog to the critical historical studies that attacked religious myths, such as Ernest Renan's Life of Jesus or David Friedrich Strauss's book of the same title. Holmes used historical analysis to undermine the beliefs disseminated by the legal formalists. But the strongest attack on the predominant legal ideology as a surrogate religion was embodied by Jerome Frank's chapter in Law and the Modern Mind entitled "The Religious Explanation." Having identified the ideas of Joseph Beale as "legal fundamentalism" and the abstract terms relied upon by most lawyers as "scholasticism," Frank applied ideas culled from Freud's Future of an Illusion to the dominant assumptions of the legal profession, and argued that the belief in a "legal system" was driven by a "religious impulse," which was itself an effort to assert the presence of a heavenly father to replace one's mortal father as

---

16. In this article, I am adapting to a legal context an examination of self-cultivation I have used to examine literary critics. See C. Landauer, Ernst Robert Curtius and the Topos of the Literary Critic, forthcoming in DISCIPLINE OF THE DISCIPLINES (Bloch & Nichols eds. 1992); C. Landauer, Mimesis and Erich Auerbach's Self-Mythologizing, 11 GERMAN STUD. REV. 83 (1988). The greatest influence on my interest in self-cultivation is the art historical work of Svetlana Alpers, especially her discussion of Rembrandt; see S. ALPERS, REMBRANDT'S ENTERPRISE (1988). My approach was stimulated as well by Stephen Greenblatt's literary critical work on self-cultivation; see S. GREENBLATT, RENAISSANCE SELF-FASHIONING (1980).


18. Id.

19. O.W. HOLMES, THE COMMON LAW (1881); E. RENAN, VIE DE JESUS (1863); D.F. STRAUSS, DAS LEBEN JESU (1835-36).

one matured.21

Learned Hand himself was not averse to the strategy of the legal realists and was apt to use religious imagery as a critical weapon. In an address in 1930, he asserted: "Surely we, the children of a time when the assumptions of even the science of our fathers have been outworn; surely we ought not to speak in apocalyptic verities, nor scourge from the temple those who do not see with our eyes."22 In a talk to the American Law Institute, Hand insisted that the language of law "must not be a divine code handed down from Sinai."23 As early as 1916, he challenged that "[i]t is not as the priest of a completed revelation that the living successors of past lawmakers can most truly show their reverence or continue the traditions which they affect to regard."24

Hand's use of religious imagery involved more than a few isolated metaphors. His attack on the notion of the judge as empowered by secret religious knowledge was an expression of his central commitment to judicial restraint. Although I will argue that Hand envisioned himself in a sacred calling, he used religious imagery to seemingly opposite effect—to suggest the judge's lack of special priestly powers. Yet ultimately, these images are complementary rather than contradictory, for Hand's belief in judicial limitation helped define the sacral character of his task. Before turning to Hand's image of his sacred calling, it is important to examine his deep belief in judicial limitation and his espousal of judicial restraint.25

Hand's Holmes Lectures of 1958 remain his most famous statement on restraint.26 They instantly achieved notoriety for his criticism of the Warren Court's civil rights jurisprudence, denouncing what Hand thought an improper use of the Fourteenth Amendment. Yet in his introduction to the published lectures, Charles Wyzanski informs us that Hand "was unwilling to have United States Senators cite these lectures as proof that the segregation cases represented judicial usurpation."27 Hand was not fully comfortable with the political implications of his argument in 1958. It should, however, have been obvious to all that the "Old Chief" was fighting an old battle, inveighing against the evils of the activism of the Lochner-era Court.28 If the Lochner case, so symbolic as

---

25. Marvin Schick maintained that "Learned Hand was a more consistent proponent of judicial restraint than Frankfurter." M. SCHICK, LEARNED HAND'S COURT 161 (1970).
27. C. Wyzanski, supra note 2, at viii.
28. The Lochner era, although named after Lochner v. N.Y., 198 U.S. 45 (1905), is normally viewed as taking its start from Allgeyer v. Louisiana, 165 U.S. 578 (1897). Its centerpiece was use of the Fourteenth Amendment to strike down progressive state legislation in the name of economic rights. See L. Tribe, American Constitutional Law 567-78 (2d ed. 1988).
the index of an era, did not appear in the text of Hand’s lectures, the excesses of the Lochner Court assumed a decisive role in his argument against judicial “usurpation.” Having described the Court’s behavior, Hand tells us that dissatisfaction with its approach became “so formidable as to produce the doctrine of the ‘Recall of Judicial Decisions,’ which had a large—probably a determinative—part in the rise of the Progressive Party and the defeat of the Republican Party after a control of over fifty years, broken only by the two terms of President Cleveland.”

To many in Hand’s audience in 1958, the story of the Progressive Party must have seemed like ancient history. Yet it figured quite prominently in Hand’s personal history, for it was as a Progressive Party candidate that he ran unsuccessfully in 1913 for a seat on the New York Court of Appeals, and a year earlier he had been involved in the drafting of the party’s platform in Teddy Roosevelt’s bid for the presidency. It was, then, the spirit of Progressivism that Hand invoked in his attack on the Warren Court.

Marvin Schick describes these lectures as Hand’s “‘last hurrah’ grounded on a half-century of advocacy of judicial restraint; the views expressed by the old judge should not have come as a surprise to anyone familiar with his decisions and extrajudicial writings.” Indeed, Hand’s arguments on that occasion can be traced back through his writings. His tribute to Harlan Fiske Stone in 1946 can be read as a rough draft for the Holmes Lectures. There Hand made essentially the same points—the grounding of judicial restraint in anti-Lochnerism and the assertion that the Bill of Rights offers no more than “admonitions to forbearance.”

In the Stone essay, Hand admires the Chief Justice for sticking to his guns regarding judicial restraint, and having done so despite the fact that the “field of combat” had changed from property to personal rights. When Hand wrote this in 1946, it was already clear that the judicial philosophy he and Stone shared had begun to change its political import and no longer had automatic associations with its democratic beginnings.

Decades earlier, the position taken by Hand and Stone suggested an unmixed progressivism. Hand’s early allies in this enterprise—especially Holmes and Brandeis—were unambiguous liberal heroes. Although the philosophy of judicial restraint was initially based on democratic premises, Hand usually adopted an apolitical vocabulary to make his argument for it. In 1926, for example, he wrote that Holmes’s decisions

29. L. Hand, supra note 2, at 43.
30. See G. Gunther, supra note 3, at 895; see also Frank, supra note 5, at 689-90. It is telling as well that Walter Lippmann, who was on the first editorial staff of The New Republic, dedicated The Phantom Public to Learned Hand; see W. Lippmann, The Phantom Public (1925).
31. M. Schick, supra note 25, at 156.
32. L. Hand, Chief Justice Stone’s Concept of the Judicial Function (1946), in Spirit of Liberty, supra note 22, at 201, 204.
33. Id. at 205.
are not to be read as indicating his own views on public matters, but they do indicate his settled belief that in such matters the judges cannot safely intervene, that the Constitution did not create a tri-
cameral system, that a law which can get itself enacted is almost
sure to have behind it a support which is not wholly unreasonable.\textsuperscript{34}

Despite the apolitical cast, there was no mistaking the progressive back-
ground of Hand’s words. In contrast to the later lectures, Hand was
unafraid of political inference in his 1916 essay for the \textit{Harvard Law
Review}, which he began by attacking an American conservatism that
“would as eagerly encourage judicial initiative, if the laws were framed
by labor unions, as it insists upon rigid obedience in a system framed for
the most part for the protection of property and for the prevention of
thoroughgoing social regulation.”\textsuperscript{35} This was easily the prose of a man
who helped to found the \textit{New Republic} rather than the man speaking
decades later at Harvard Law School.\textsuperscript{36}

Still anchored in Hand’s mind to its initial reformist impulse, this phi-
losophy of judicial restraint could not but translate into diminished judi-
cial power. And it is the message of diminished power which occupies so
much of his prose and forms a constant motif in his opinions. Ulti-
mately, the strong belief of diminished judicial power was central to
Hand’s self-image as a judge and, as I will suggest, merges with his
priestly self. In 1916, he wrote: “There is a hierarchy of power in which
the judge stands low; he has no right to divinations of public opinion
which run counter to its last formal expressions.”\textsuperscript{37} Many of Hand’s opin-
ions on the federal bench reflect this belief that the judiciary must
defer to the legislature. It has been noted that on the only occasion Hand
invalidated an act of Congress, he invalidated only part of the National
Industrial Recovery Act rather than the entire act.\textsuperscript{38} Hand’s resistance
to judicial review was, however, only part of his larger insistence on the
weakness of the judiciary in the face of legislation. In a 1936 case, he
asserted that there was “a limit to the power of courts to mould the
language of a statute.”\textsuperscript{39} A court should not adopt a view that would
“impute to Congress gratuitously.”\textsuperscript{40} Rather playfully but also quite
dramatically, Hand wrote in \textit{Ungar v. Commissioner of Internal Revenue}
that “in taxation it is often true that, not only at the beginning but at the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{34} L. Hand, \textit{Mr. Justice Holmes at Eighty-Five} (1926), in \textit{Spirit of Liberty, supra} note 22, at 24, 28.
\item \textsuperscript{35} L. Hand, \textit{supra} note 24, at 13-14.
\item \textsuperscript{36} On Hand’s involvement with the \textit{New Republic}, see G. Gunther, \textit{supra} note 3, at 895.
\item \textsuperscript{37} L. Hand, \textit{supra} note 24, at 14.
\item \textsuperscript{38} See C. Wyzanski, \textit{supra} note 1, at 79, 85; United States v. A.L.A. Schechter Poultry Corp.,
76 F.2d 617, (2d Cir.), \textit{aff’d}, 295 U.S. 495 (1935). Similarly, Marvin Schick thought it appropriate
to give his chapter on Hand the title \textit{The Obedient Judge}; see M. SCHICK, \textit{supra} note 25, at 154-91.
\item \textsuperscript{39} Anglo-Continente Treuhand, A.G. v. St. Louis S.W. Ry. Co., 81 F.2d. 11, 13 (2d Cir.),
cert. denied, 298 U.S. 655 (1936).
\item \textsuperscript{40} \textit{Id.} at 12.
\end{itemize}
\end{footnotesize}
ending, is the Word.”41 Evidently, the judge had no power to alter the divine plan.

Hand applied his well-known philosophy of judicial limitation beyond the realm of legislation. His need to follow the decisions of the Supreme Court or the language of treaties is, of course, unremarkable.42 Yet Hand was lavish in his impulse to defer, a deference which even extended to the administrative tribunals established by the New Deal. Universal Camera provides an instance of Hand’s exaggerated deference to the National Labor Relations Board,43 a decision that was later reversed by the Supreme Court.44 And there were many cases of extravagant deference to the Tax Court.45

Hand’s judicial deference extended well beyond the democratically elected legislative bodies of the state and federal government. Perhaps the most extreme example of his willingness to invoke judicial powerlessness was his opinion in Bernstein v. Van Heyghen Freres, where Hand applied the “act of state” doctrine to Nazi Germany two years after the death of the Third Reich.46 There he asserted the familiar doctrine that a United States court should not rule on the legitimacy of another nation’s laws, but he took this position in the extreme context of Nazi expropriation of Jewish property and was willing to invoke the “act of state” doctrine even after the Nuremberg Trials.

Read serially, Hand’s opinions argue for a vast array of limitations on the power and authority of the judge. In the end, this boundary-drawing was a highly self-conscious act. In fact, Hand’s desire to demonstrate the restraints on the judge’s power becomes unmistakable as one reads case after case in which Hand suggests that, were he not bound, he may very well have come down on the other side. Cheney Brothers v. Doris Silk Corp. offers one of the best examples: “True, it would seem as though the plaintiff had suffered a grievance for which there should be a remedy, perhaps by an amendment of the Copyright Law. . . .”47 In the same paragraph, he ventured that it

seems a lame answer in such a case to turn the injured party out of court, but there are larger issues at stake than his redress. Judges have only a limited power to amend the law; when the subject has

41. Ungar v. Comm’r of Internal Revenue, 244 F.2d 90, 94 (2d Cir. 1957).
42. For an example of Hand being bound by a treaty, see United States ex rel. Neidecker v. Valentine, 81 F.2d 32 (2d Cir.), aff’d, 299 U.S. 5 (1936).
45. See, e.g., American Coast Line v. Comm’r of Internal Revenue, 159 F.2d 665 (2d Cir. 1947).
been confided to Legislature, they must stand aside, even though there be an hiatus in completed justice.\textsuperscript{48}

Seemingly meant to comfort the plaintiff, this passage was intended primarily to underline the tribulations of the appellate judge.\textsuperscript{49}

Where Hand felt himself bound by Supreme Court decisions, he went through many of the same steps, although the choreography was further complicated by expectations about his nomination to the Court. Replicating his moves elsewhere, he set clear markers for the range of the Second Circuit's powers. "Certainly," he wrote in one case, "it would be unseemly for us to chop or whittle at the deliberate declaration of the court made under these circumstances; if the rule is to be changed, that court alone may properly change it."\textsuperscript{50} In yet another opinion, Hand expressed an inclination to decide the case the other way.\textsuperscript{51} Yet, unlike his statutory language jurisprudence, Hand's application of Supreme Court holdings often showed impatience with their lack of clarity. At times he relied upon subtle irony to point out the Court's vagueness. He talked, for example, of "following as best we could the doctrine as we understood it of the Supreme Court."\textsuperscript{52}

Hand's impatience over the Supreme Court's vagueness was expressed squarely in the context of his own court's vulnerability, a vulnerability that was most obvious when an interpretation by the Second Circuit was rejected. Hand deliberately exaggerated the lowly position of the Circuit by labelling its reversed decisions "mistakes." When the Supreme Court overruled a decision on the plaintiffs' filings by the Second Circuit, Hand was apologetic about "our mistake," which had resulted in the plaintiffs' forfeiture of rights.\textsuperscript{53} Somehow these admissions of error ring false from the "Tenth Justice," a man who occasionally adopted the strategy of closely following Supreme Court holdings just to demonstrate the folly of their error.\textsuperscript{54} Yet these admissions represent only part of Hand's larger

\textsuperscript{48} Id.

\textsuperscript{49} This became a common trope in Hand's opinions. See, e.g., Fashion Originators Guild v. Fed. Trade Comm'n, 114 F.2d 80, 84 (2d Cir. 1940), aff'd, 312 U.S. 457 (1941); United States ex rel. Neidecker v. Valentine, 81 F.2d 32, 35 (2d Cir.), aff'd, 299 U.S. 5 (1936); Angelus Milling Co. v. Nunan, 114 F.2d 469, 472 (2d Cir. 1944); United States v. Day, 43 F.2d 917, 919 (2d Cir. 1930); Littman v. Bache & Co., 246 F.2d 490, 492 (2d Cir. 1957).

\textsuperscript{50} Sutherland v. Int'l Ins. Co. of N.Y., 43 F.2d 969, 972 (2d Cir.), cert. denied, 282 U.S. 890 (1930).

\textsuperscript{51} "We should have been disposed to call such inattention contributory negligence which could go only in mitigation of damages, had it not been for those decisions of the Supreme Court to which we shall refer." Paster v. Pa. R.R., 43 F.2d 908, 910 (2d Cir. 1930).

\textsuperscript{52} United States v. Poller, 43 F.2d 911, 913 (2d Cir. 1930).

\textsuperscript{53} Federal Deposit Ins. Corp. v. Congregation Poiley Tzedeck, 159 F.2d 163, 166 (2d Cir. 1946). In National Investors Corp. v. Hoey, he twice referred to rejected Second Circuit interpretations as mistakes. At one point he wrote: "In this we were in error, however, for the Supreme Court held...." and half a column later, in reference to another case, Hand declared: "Again we were wrong." National Investors v. Hoey, 144 F.2d 466, 467 (2d Cir. 1944).

\textsuperscript{54} Archibald Cox, who clerked for Hand from 1937 to 1938, remembers times when Hand was quick to show the Supreme Court the folly of one of its decisions by following it to the letter. Interview with Archibald Cox, Carl M. Loeb University Professor, Emeritus, Harvard Law School,
catalog of the Second Circuit's limitations.

All of this lack of power had its reverse side: despite Hand's exaggerated belief in the limits of judicial power, he was convinced that there was a realm in which judges had immense authority. Although Hand did not have Cardozo's state court platform from which to develop judge-made law of a single jurisdiction, he nevertheless made a name for himself as a common-law judge. His T.J. Hooper opinion is well known for its refusal to allow an industry to set its own standards of risk: "Courts must in the end say what is required." Indeed, Hand regularly asserted the prerogatives of courts to set such standards of conduct.

Within the context of such gestures of self-empowerment, one has to understand Hand's expressions of weakness and his carefully articulated obsequiousness as elaborate efforts at frontier marking, intended not so much to deny the judiciary its important role as to set clear boundaries between the realms of judicial power and impotence. Hand's boundary-marking has all the qualities of the separation between the sacred and the profane. It is here that the priestly in Hand emerges, for his judicial strategy enacts a retreat into the temple to guard the sacred flame. In part, his need to act as guardian of the flame was a response to the challenge of legal realism, notwithstanding his agreement with many of its tenets. More significantly, Hand was responding to the threat to judicial power ironically posed by Lochnerism. As he suggested in 1916, the very power play of the Lochner-era courts threatened to delegitimize the judiciary, thereby weakening it as an institution.

The same Hand who derisively used cult imagery against legal formalism made full use of religious imagery in his efforts at self-identification, envisioning himself assuming a priestly office. It may seem strange to imagine the priestly Hand as the same individual who would dance

in Cambridge, Mass. (Mar. 19, 1990). Although there is a general belief that the Supreme Court often deferred to Hand's opinions, Marvin Schick has done a careful empirical study of the cases that went to the Supreme Court from the Second Circuit and discovered that dissents by Jerome Frank—rather than Hand—were most often followed by the Court. See chart for 1942 through 1951, in M. SCHICK, supra note 25, at 247.

55. For a similar dialectic of potency and impotence, see Jerry Frug's discussion of Derek Bok's statements on Harvard's divestment from corporations with business in South Africa. J. Frug, Argument as Character, 40 STAN. L. REV. 869, 886-96 (1988).

56. Although the state court platform was most significant after the demise of Swift v. Tyson, 41 U.S. 1 (1842), the Second Circuit did not get the range of normal contract and tort cases that went to the New York Court of Appeals. Karl Llewellyn in the dedication to The Common Law Tradition identified Hand as one of the ten great common-law judges of the world. See W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 445 n.18 (1985).

57. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S. 662 (1932).


60. At times Hand's religious imagery could run to the Sunday-morning pastoral, as it did when he explained his inclination to "preach a little sermon" at one commencement and quipped to his audience that "the blood of a Baptist preacher runs in my veins." L. Hand, To the Harvard Alumni Association (1936), supra note 22, at 111, 111. Most of Hand's religious imagery, however, was strictly priestly and sacred.
around his chambers and sing Gilbert and Sullivan's "The law is the embodiment of everything excellent." Such lightheartedness seems hardly compatible with a notion of sacred duties. And yet, one does not have to read Freud's *Jokes and Their Relation to the Unconscious* to know that joking has its serious side. Despite all of Hand's derision about "priests of a completed revelation," he turned to religious imagery to describe his own judicial mission. In fact, in the very passage where he chided the self-proclaimed "priests of a completed revelation," he suggested their disavowal of the true faith. "If they forget their pragmatic origin," he stated, "they omit the most pregnant element of the faith they profess and of which they would henceforth become only the spurious and egregious descendants." Evidently, Hand's own jurisprudence was based on a core faith.

In one of his most striking uses of this priestly imagery, he wrote in the long opening paragraph to his memorial to Benjamin Cardozo in 1939 that the judge "must pose as a kind of oracle, voicing the dictates of a vague divinity—a communion which reaches far beyond the memory of any now living, and has gathered up a prestige beyond that of any single man." Although he acknowledged that a judge must draw amply from the "dominant trends of his time," Hand was emphatic that a judge "must preserve his authority by cloaking himself in the majesty of an overshadowing past." It is in this commitment to tradition that Hand assumed his priestly garb.

With such passages in mind, we can begin to understand Wyzanski's talk about Hand's "professional view as a high priest in the temple of the law" as more than loose rhetoric. Indeed, to read Hand's extrajudicial writings is to confront his profound reverence for the law, whether that reverence was expressed as veneration of the law as an institution or embedded in Hand's celebration of a member of his personal legal pantheon. Hand's extreme reverence for his priestly office is most telling in an incident described by Archibald Cox, who clerked for Hand on the Second Circuit. According to Cox, Hand suddenly challenged his young clerk to tell him to whom the Chief Judge was ultimately responsible. It seemed Hand was responsible to no one, "not even those nine bozos down in Washington who may sometimes reverse me." But finally, the judge turned to the books on his wall and pronounced: "That's to whom I'm responsible." Hand was guarding the sacred flame.

---

63. L. Hand, supra note 24, at 16.
64. L. Hand, Mr. Justice Cardozo (1939), in SPIRIT OF LIBERTY, supra note 22, at 129, 130.
65. Id.
66. C. Wyzanski, supra note 2, at xiv.
Hand's notion of the sacred expanded beyond the courtroom to a broader cultural realm. As president of the Harvard Alumni Association, Hand chose to talk at the 1936 commencement about the school's less well-known motto: "Christo et Ecclesiae." Addressing his audience, he intoned: "Those resolute men who founded Harvard and chose those words certainly meant by them much that we should not accept today; but that is not important, if there be an enduring truth that we can gather from them; if we can safely put new wine into the old bottles." Hand knew the faith he invoked was secular, but it was deeply held nonetheless.

While Hand committed himself to guarding the flame, it is clear that he was not merely defending the inner judicial sanctum against the threats posed by Lochnerism and legal realism. He was also concerned about a greater danger, one that troubled him in a more profound way. All was not Gilbert and Sullivan in his world, and some of his deep misgivings appear in his writings. "One wonders," he wrote in 1927, "whether it has not always been true, whether man does not live forever on a thin crust likely at any minute to break through." The cultural Cassandra in him developed further as he continued later in the paragraph: "Civilization is in a fleet of small craft, of which now one, now another, founders, all of which have a precarious hold upon the stormy surface of life, and each of which in the end must perish." This was not simply Hand voicing some fashionable doubt, but a man personally consumed by these concerns. Hand's cultural criticism was deeply felt.

In the face of these doubts, it should not be surprising that the agnostic Hand spoke so emotionally of "faith." In his essay on Harlan Fiske Stone, he described the Chief Justice as a "stalwart, true-hearted, steadfast champion of a faith whose disappearance will in the end bring with it a relapse into the reign of the tooth and the claw." Hand's Chief Justice was a detached and disinterested judge who did not inter-

68. L. Hand, supra note 60, at 111.
69. Id. at 112.
71. Id. at 33-34. To this one should add the opening sentence of Hand's talk to the American Law Institute in 1951: "My friends, our future is precarious." L. Hand, The One Condition (1951), in SPIRIT OF LIBERTY, supra note 22, at 223, 223.
72. This is not to suggest that cultural pessimism is usually superficial posturing. In a book on the Young American critics, Casey Nelson Blake has suggested the "widespread psychological disorientation" that touched the lives of turn-of-the-century cultural critics. C. Blake, BELOVED COMMUNITY: THE CULTURAL CRITICISM OF RANDOLPH BOURNE, VAN WYCK BROOKS, WALDO FRANK, & LEWIS Mumford 49-50 (1980).
73. C. Wyzanski, supra note 1, at 90; Paul Freund also remembers Hand often being consumed by deep doubts. Interview with Paul Freund, Carl M. Loeb University Professor, Emeritus, Harvard Law School, in Cambridge, Mass. (Mar. 16, 1990).
74. L. Hand, supra note 32, at 201, 208.
fere with the proper realm of legislature. Essentially, Hand felt that this conception of the judicial role was necessary to save us from a Darwinian nightmare of tooth and claw. Thus, Hand’s philosophy of judicial restraint was meant to diminish the conflicts of modern American society.

It was thus in the face of an apocalyptic vision that Hand assumed his priestly office, despite his own derisive rhetoric about “completed revelations” and “divine codes from Sinai.” The man who could sting with a metaphor about pouring “our libations to our traditions after they have ceased to mean what once they did,” making full critical use of Edward Tylor’s notions of cultural survivals, was also able to reproduce in his own jurisprudence the totems and taboos of ancient religion.75 His jurisprudence ultimately served to separate the sacred from the profane.

II. Craftsman

At the very end of his Holmes Lectures in 1958, Hand added a short codicil in which he turned from his constitutional argument to offer a paean to his teachers at the law school. “From them,” he concluded in his last sentences, “I learned that it is as craftsmen that we get our satisfactions and our pay. In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none. Go ye and do likewise.”76 Against the backdrop of his Biblical language and his imagery of celestial battle, the reference to craftsmanship seems somehow out of place. Not only has Hand mixed metaphors, but he has mixed worlds. Yet the passage reveals how significant a figure the craftsman was for Hand. It communicates both the modesty that inheres in the image—getting “our satisfactions and our pay” are rather humble aims next to the battle in the universe of truth—and its quiet grandeur.

The modesty invoked by the image of the craftsman—a concept to be distinguished from his image of judicial powerlessness by its earthiness—was itself quite important to Hand. Indeed, he peppered his writings with expressions of humility, often opening his extrajudicial addresses with expressions of modesty. The practice usually involved a suggestion that he might not be worthy of his subject. “My subject,” he opened the Holmes Lectures, “is well worn; it is not likely that I shall have new light to throw on it.”77 In his talk to the Elizabethan Club at Yale in 1941, he admitted that he was “conscious of the small chance of success where so

75. L. Hand, supra note 70, at 30. British anthropologist Sir Edward Burnett Tylor articulated his view that many modern cultural phenomena were the “survivals,” essentially the residual traces, of primitive beliefs or rituals. See E. Tylor, Primitive Culture (1871).
76. L. Hand, supra note 2, at 77. In his essay on Hand, Paul Freund identifies “craftsmanship” as a particularly important value for Hand. See P. Freund, Judge Learned Hand, in ON LAW AND JUSTICE 248, 251 (1968).
77. L. Hand, supra note 2, at 1.
many have failed." 78 For the presentation of Charles Sydney Hopkinson's portrait of Holmes to Harvard Law School, Hand told his law-school audience: "Certainly you have not asked me to appraise his place in the law, you who are well skilled to do so, and who cannot care for what I could say. His work has been so various and so prolific that it must be left for judgment to those expert in its different fields; I have neither the capacity nor the learning to deal with it." 79

It must have been clear to Hand's audiences that these admissions of unworthiness should not be given much heed. In fact, it was rather likely that Hand's audiences listened on, even more certain of the worth of the judge's thoughts. In these expressions of modesty, Hand was observing an ancient rhetorical convention, one that the literary critic Ernst Robert Curtius defined as the topos of "Affected Modesty" and which he traced back to Cicero and Quintilian. 80

Hand, however, went beyond the conventional exercise of personal modesty and described the legal profession in rather uninviting terms. He admonished the Yale Law School class of 1931 that "[m]ost of a lawyer's time—and with your permission I will include a judge's—consists of activity which seems to have small value and small bearing on the greater issues of the community in which he lives." 81 Later in the address he said that "[i]t must at times seem to us that after all our profession is very much like any other gainful calling, of only transient importance to others, justified by no more than the immediate necessities which surround mankind from the cradle to the grave." 82 In 1927, he told his Bryn Mawr audience that a "judge's life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettifogging, all disguising and obstructing the only sane purpose which can justify the whole endeavor." 83

There was indeed a "sane purpose" to all the drudgery of the lawyer and the judge. In both these speeches, he used an uninspiring description of his profession to set up a more inspirational message. His 1927 address at the Bryn Mawr graduation moved from describing the petty nuisances of the judicial life to the realization that, after all, it was a "delectable calling." 84 At that point, Hand described the role of the judge at its most rewarding:

From his pen or in his head, slowly or swiftly as his capacities admit, out of the muck the pattern emerges, his pattern, the expres-

---

78. L. Hand, Liberty (1941), in Spirit of Liberty, supra note 22, at 144, 145.
79. L. Hand, Mr. Justice Holmes (1930), in Spirit of Liberty, supra note 22, at 57, 58.
81. L. Hand, To Yale Law Graduates (1931), in Spirit of Liberty, supra note 22, at 84, 84.
82. Id. at 84-85.
83. L. Hand, supra note 70, at 43.
84. Id.
sion of what he has seen and what he has therefore made, the 
impress of his self upon the not-self, upon the hitherto formless 
material of which he was once but a part and over which he has now 
become the master.85

Those creative rewards have to be placed in context. In his inspira-
tional message to the graduating Yale Law School class Hand cautioned 
that the profession demanded a collective endeavor. "We are," he 
asserted, "workers in the hive; we shall not be missed, nor shall we be 
able to point at the end to any perceptible contribution. But the hive 
goes on, an entity, a living thing, a form, a reality."86 Hand even spoke 
of looking up "to the great edifice which our forebears have built, of 
which we are now the guardians and the craftsmen."87 His judges were 
thus not only guardians of the sacred flame, but also craftsmen laboring 
like worker bees on their own corner of an immense hive.

Despite Hand's expressions of modesty, the judge-as-craftsman's task 
was hardly mechanical. Rather, it demanded the exercise of both skill 
and imagination. Even in the interpretation of statutes—where judges 
were most bound by specific legislative language—Hand insisted on the 
active role of the judge. Time after time, he went through the same 
incantation that statutes should not be interpreted with a dictionary. In 
his CBS radio talk of 1933, "How Far is a Judge Free in Rendering a 
Decision," Hand asserted that in interpreting statutes it was "not enough 
for the judge to use a dictionary."88

Although Hand's primary aim was fidelity to legislative intent, it was 
also clear to him that such fidelity involved an active, imaginative pro-
cess. Legislatures, he insisted, did not use words of scientific precision.89 
Referring to the statutory words that were the focus of Borella v. Borden, 
Hand stated that "[s]ince these are words of colloquial speech, having 'fringes' of connotation, and unlike the terminology of science, deliber-
ately fabricated for its definite outlines, it is to be expected that inter-
pretation will vary."90 It was clear that legislators "do not deal in rigid 
symbols, so far as possible stripped of suggestion, and do not expect their 
words to be made the starting point for a dialectical progression."91

85. Id.
86. L. Hand, supra note 81, at 89.
87. Id.
88. L. Hand, How Far is a Judge Free in Rendering a Decision? (1935), in Spirit of Liberty, 
supra note 22, at 103, 106. See also Electrical Sec. Corp. v. Comm'r of Internal Revenue, 92 F.2d 
593, 595 (2d Cir. 1937); Gregory v. Helvering, 69 F.2d 809, 810-811 (2d Cir. 1934), aff'd, 293 U.S. 
465 (1935). For an extended examination of Hand's anti-literalism and the values involved in his 
method of statute interpretation, see A. Cox, Judge Learned Hand and the Interpretation of Statutes, 
60 HARV. L. REV. 370-93 (1947).
89. In 1914, Hand wrote that statutes "should be construed, not as theorems of Euclid, but with 
some imagination of the purposes which lie behind them." Lehigh Valley Coal Co. v. Yensavage, 
218 F. 547 (1914), cert. denied, 235 U.S. 705 (1915).
91. Id.
What judges needed, then, was not a technical knowledge of scientifically exact terms but skill and imagination.

Such skill and imagination were most important in working out common-law rules and in fleshing out the parts of statutes left by legislatures for judicial definition, such as "a person of good moral character" in the naturalization laws. In his common-law jurisprudence, Hand was not merely concerned with the "interstitial" justice defined by Oliver Wendell Holmes, although he certainly filled in the gaps of legal doctrines. Hand's real interest and talent seemed to be in clarifying legal rules. Indeed, his efforts to clarify and refine legal doctrine formed particularly conspicuous parts of his opinions, for Hand could hardly disguise his pleasure in bringing precision to clouded areas of the law. Essentially, he liked to get to the root of the matter, set things straight, and produce a formula that could be admired for its simplicity.

The most famous example of his flair for formula is in Hand's opinion in United States v. Carroll Towing. 92 After reviewing other holdings on the liability of barge owners for an accident occurring during the absence of the bargee, Hand opened a new paragraph with the observation that "[i]t appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks from her moorings." 93 He conceded that "[i]t becomes apparent why there can be no such general rule." 94 But if the owner's duty was complicated by a series of variables, those variables could be listed: "(1) The probability that [the barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions." 95 Then comes the famous formula: "Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden B; liability depends upon whether B is less than L multiplied by P; i.e., whether B \(< PL.^{96}

The Hand Formula—the darling of the present law and economics movement—may be Hand at his most mathematical. But it is only an extreme example of his general effort at producing schematic formulae. Sometimes, as in Carroll Towing, Hand's schematism may be too hurried, his formula too quick. Hand was clearly applying his talents in a very self-conscious way. His contribution was unmistakably part performance. But in his efforts at clarification, Hand could not work ex nihilo. Rather, he drew on the principles already in place—even if he had occasionally to prune wayward limbs. Hand so often seemed to clar-

92. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir.), reh'g denied, 160 F.2d 482 (2d Cir. 1947).
93. Id. at 173.
94. Id.
95. Id.
96. Id.
ify what was relatively accessible to others. In doing so, he showed a commitment to the organic traditionalism of the common law at the same time that he demonstrated his skill and indulged his imagination. “Discarding the myth, i.e., the Columbus-law-discovery-myth,” Jerome Frank wrote, “Judge Hand recognizes that judges have considerable latitude for creativeness.”97 Hand thrived on the creative aspect of his judicial task; it was the opportunity to make his imprint on the law that made his a “delectable calling.” Nevertheless, he was profoundly convinced that all of his creativity was subservient to a larger architectural project. It was for that reason that the artisan seemed more compelling as an identity than the artist, especially in an age when the image of the artist was colored by notions of avant-garde rebellion. Surely, Hand’s work was not meant for a Salon des Refusés. Rather he permitted himself the small liberties of a medieval craftsman forbidden to alter the basic theological argument of the vestry walls but given great latitude in the creation of monsters and demons.

III. The Scholar

In June of 1939, Hand gave a short address accepting an honorary degree at the Harvard commencement. Although the war in Europe was still a few months off, and two years would pass before the United States would be brought into it, Hand began on an ominous note. “Santayana,” he told his audience, “has spoken somewhere of the ‘deadly significance of symbols.’ ”98 Hand went on to summon the images of “the Sickle and Hammer, the Swastika and the Lictor’s Axe.”99 He told the commencement crowd, however, that the important peril was domestic. Totalitarianism’s true threat was that “[i]n our heart of hearts we doubt our capacity to withstand their blandishments; we are afraid that we may wake up to find ourselves disciples of the hated gospel.”100 Could we assure ourselves, Hand asked, that “our defenses shall not leave us nothing to defend?”101 Even to an audience expecting pious homilies on the importance of education, Hand’s response must have sounded rather strange as he answered his own challenge with a rhetorical question: “And where shall we find a better exemplar of those qualities of heart and mind on which in the end a democratic state must rest than in the scholar?”102

What Hand found in the scholar was “the consecration of his spirit to the pursuit of truth,” a “spirit capable of disinterested scrutiny,” and an

97. J. Frank, supra note 5, at 684.
98. L. Hand, On Receiving an Honorary Degree (1939), in SPIRIT OF LIBERTY, supra note 22, at 134, 134.
99. Id.
100. Id. at 135.
101. Id. at 136.
102. Id.
“aloofness from burning issues, which is hard for generous and passionate natures.”103 To bring his argument to life, Hand set up a contrast between Luther the revolutionary and Erasmus the scholar: “You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar’s gown, or lead flaming causes from a cloister.”104

In similar language, Hand produced the same configuration in the forward he wrote for Samuel Williston’s autobiography appearing in 1941.105 Hand depicted Williston as “an innovator throughout his subject, but by steps and in response to an intellectual detachment which stifled overwhelming loyalties or the afflatus of revelation.”106 He was certain that individuals like Williston never figure among the Luthers of this world, and no doubt the world owes much to its Luthers, . . . but whatever their services, revolutionaries obstruct the path to truth; the qualities which clear it are wholly inconsistent with theirs; skepticism, tolerance, discrimination, urbanity, some—but not too much—reserve towards change, insistence upon proportion, and above all, humility before the vast unknown.107

These are exactly the traits that filled out Hand’s image of the scholar and informed his own role as judge.

Despite the scholarly provenance Hand assigned his thoughts on detachment and disinterested scrutiny, his views unquestionably resulted from the running legal debate over the impartiality of judges. Indeed, Hand was quite willing to fit his argument back into its legal context, to pose it as an answer to the legal realist argument provided by J.C. Hutcheson’s “hunch” theory and given forceful articulation in Jerome Frank’s Law and the Modern Mind.108 Addressing the legal realist argument, Hand wrote: “We are assured that only the unsophisticated and naive will believe in the reality of detachment and aloofness in judges, or in anyone else.”109 Hand wrote in 1947 that there “are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted, always reveal a passionate foundation.”110 As if tailored to answer the psychological argument of Jerome Frank, his Second Circuit colleague, Hand explained that “though [people are] throughout the creatures of past emotional experience, it does not follow that experience can

103. Id. at 136-38.
104. Id. at 138.
105. L. Hand, Forward to Williston’s Life (1940), in SPIRIT OF LIBERTY, supra note 22, at 140-3.
106. Id. at 142.
107. Id.
109. L. Hand, supra note 32, at 207.
never predispose us to impartiality. A bias against bias may be as likely the result of some buried crisis, as any other bias.”

Here he merely resorted to assertion and counterattack: “Be that as it may, we know that men do differ widely in this capacity; and the incredulity which seeks to discredit that knowledge is a part of the crusade against reason from which we have already so bitterly suffered.”

The judicial exercise of reason helped to keep us from the realm of the “tooth and the claw.”

In addition to detachment, tolerance and skepticism figured prominently in Hand’s vision of the scholar, and thus of the ideal judge. Hand based his ideal of tolerance on a conviction that there were no certainties. In essence, tolerance was founded on skepticism. Thus, his address on the “Sources of Tolerance” sounded a skeptical note in its final paragraphs.

He asserted that “the certainties of today may become the superstitions of tomorrow; that we have no warrant of assurance save by everlasting readiness to test and test again.”

Our very inability to be sure of our truths should urge us to greater tolerance.

For Hand, an open-mindedness based on self-doubt was essential to the judge. In his tribute to Holmes in 1926, he ventured that “a sceptical disposition is a hazardous equipment for a judge,” but this was only a rhetorical ploy, for Hand describes Holmes as a man of profound skepticism and one that will always be appreciated by those “to whom life is complex and universals slippery and perilous; to whom truth is a dangerous experiment and man a bungling investigator.”

Hand did not confine skepticism solely to the bench. In a 1944 address before the “I Am an American Day” ceremony in Central Park, Hand told his audience of newly sworn citizens that the essence of liberty was self-doubt: “The spirit of liberty is the spirit which is not too sure that it is right.”

Confirming skepticism’s connection with tolerance, Hand asserted that “the spirit of liberty is the spirit which seeks to understand the minds of other men and women.” Indeed, Hand went so far as to claim that an open mind was essential to civilization itself: “Of those qualities on which civilization depends, next after courage, it seems to me, comes an open mind, and, indeed, the highest courage is, as Holmes used to say, to stake your all upon a conclusion which you are aware tomorrow may prove false.”

For Hand, then, important political and ethical values were bound up

111. Id.
112. Id.
113. L. Hand, supra note 22, at 82-83.
114. Id. at 82.
115. L. Hand, supra note 34, at 25.
117. Id.
with an intellectual posture of open-mindedness. "Tolerance, scepticism and humility," he wrote, "are the commoner end-products of a determination to see for oneself, than of docile and tractable acceptance of what has been revealed to the past."119 All of this sounds a bit facile—the stuff of "I Am an American Day" celebrations and other obviously inspirational occasions. Nevertheless, those same passages gain more texture when we find them accompanied by an occasional reference to William James. Directly following an insistence that "we have no warrant of assurance save by everlasting readiness to test and test again," Hand invoked the name of his undergraduate teacher: "William James was its great American apostle in modern times; we shall do well to remember him."120 Even if Hand's was a watered-down Pragmatism, it is likely that Pragmatism—whether learned directly from James or through the mediation of Holmes—allowed Hand to believe strongly in certain truths, while acknowledging that they may very well fall later into untruth.

Perhaps more important for understanding Hand's commitment to the scholarly virtues of detachment, tolerance, and skepticism was the deep fear of social conflict and class struggle I mentioned earlier. Lecturing on democracy in 1932, Hand told an audience that he had been "in lands where one felt the pervasive foreboding of violence, of armed suppression, the inability of minorities to exert just those peaceful pressures, that seem to us so vicious; where government is conducted not by compromise, but by coup d'etat."121 By comparison, the United States, "distracted as she might be by a Babel of many voices, uncertain of her purposes and her path; [remains a place] where yet there can be revolution without machine guns, and men may quit public office and retain a private life."122 His homage did not, however, prevent him from recognizing the dangers of his time and the threat of class discord. Exactly such troubling thoughts simmer behind what might otherwise seem the superficial pieties of Hand's various addresses.123

In this context, it is important to remember that before the 1912 election, Hand sent Theodore Roosevelt a copy of Herbert Croly's book, The Promise of American Life, and, according to Jerome Frank, the book subsequently "became the basis of much of the Bull Moose political platform."124 Croly—who later founded the New Republic with Hand's par-

119. L. Hand, supra note 70, at 32.
120. L. Hand, supra note 22, at 82.
122. Id.
124. J. FRANK, supra note 5, at 689.
ticipation—argued for a national renewal that depended largely on intellectuals who lacked class allegiances.125 But the intellectuals Croly advocated were not meant to be aloof. Rather, he hoped they would forge a connection with the American public. Only then could one achieve the "promise of American life." And despite all of Hand's talk of distance and detachment, Hand wanted anything but a disaffected bench and bar. Detachment from one's own class prejudices was quite different from complete aloofness. Hand clearly wanted a legal profession marked by empathy, and he pressed this point in "The Speech of Justice," when he admonished his readership that "the profession has not yet learned to adapt itself to the change; that most difficult of adjustments has not been made, an understanding of and sympathy with the purposes and ideals of those parts of the common society whose interests are discordant with its own."126 He felt that "nothing can be more certain than that its authority as interpreter of customary law must in the end depend upon its power to learn precisely that adaptation. As mediator it must grasp from within the meaning of each phase of social will."127 Hand went on to assert that "the profession must satisfy its community by becoming itself satisfied with the community."128

In essence, Hand envisioned not a completely detached and distanced version of scholarly disinterestedness, but an uncompromising fairness founded on an effort at sympathy.129 Despite his evocations of loftiness and his priestly pronouncements, Hand portrayed himself as a completely worldly figure. Many of the personal sketches of Hand describe his full repertoire of impersonations, his penny-ante poker games, and his penchant for Gilbert and Sullivan.130 But Hand also allowed the down-to-earth a fair amount of play in his opinions. Mentioning the "oils in evidence" in a trademark case involving perfumes, Hand did not pass up an opportunity to add that they "to my nose are like turpentine."131 Alongside the earthiness that contrasted directly with his loftier aspect, Hand displayed the sophistication of someone who was a full participant in an elite social milieu. In a champagne trademark case during the war, he indulged himself in a witty depiction of champagne-consuming circles in the guise of a discussion of the value of the bottler's trademark:

125. For a sketch of Croly and his views on the role of the intellectual, see T. Bender, New York Intelect 222-28 (1987).
126. L. Hand, supra note 24, at 17.
127. Id.
128. Id. at 19.
129. Paul Freund described this particularly well when he wrote that "for Judge Hand, to be detached was not to be aloof. Rather, I believe, he meant to prescribe for judges something of the counsel which Matthew Arnold offered for literary critics: that they do two things, enter sympathetically into the experience of a work of art and then withdraw." P. Freund, supra note 76, at 250.
130. See, e.g., C. Wyzanski, supra note 1, at 87.
Champagne is a wine especially cherished by those who seek to impress their associates with their opulence and munificence; to many its consumption is an envied mark of luxury and social importance. Those who covet a name for taste and elegance, do indeed affect discrimination in the recognition of various brands; but, especially as an evening wears on, the label, and only a very casual glance at the label, is quite enough to assure the host and his table that he remains as freehanded and careless of cost as when he began. At such stages of an entertainment nothing will be easier than for an unscrupulous restaurant keeper to substitute the domestic champagne.\textsuperscript{132}

The judge was having fun at the expense of the champagne-drinking crowd. Yet at the same time he made unmistakably clear that he was fully familiar with the scene he had just described. Indeed, Hand was a particularly desired dinner guest in New York society.\textsuperscript{133} And he was also a bit of a club man, fitting comfortably into New York's famous Century Club with its wood-paneled walls and large stuffed chairs.\textsuperscript{134}

Hand's membership in the Century Club, known for its collection of artists and writers, suggests not only Hand as the club man but also Hand as the man of culture. That image was immensely important to him, for there is little doubt that Hand treasured the company of artists and writers. He spent his summers in Cornish, New Hampshire, at the artists and writers' colony that originally formed around Augustus Saint-Gaudens, one of the most important sculptors of turn-of-the-century America.\textsuperscript{135} It was this Hand, the man of culture, who casually referred in his Holmes Lectures to "an epigram from my friend Bernard Berenson," one of the foremost art historians of the twentieth century, who was known for his connoisseurship and, among other things, did much of Isabella Stewart Gardner's purchasing.\textsuperscript{136}

Personal tributes to Hand often spoke of his erudition, his French and Latin tags, and even the correspondence he carried on in classical Greek with George Wharton Pepper.\textsuperscript{137} The image of the erudite judge was not without justification, for Hand's judicial opinions and extrajudicial writings were replete with literary references and allusions. Still, his various citations and allusive turns were usually within the command of a well-educated audience, for few of those references were particularly obscure. Indeed, most of the authors he cited were the standard figures of the


\textsuperscript{133} Interview with Archibald Cox, in Cambridge, Mass. (Mar. 19, 1990).

\textsuperscript{134} Interview with Paul Freund, in Cambridge, Mass. (Mar. 16, 1990).


\textsuperscript{136} L. Hand, \textit{supra} note 2, at 19.

\textsuperscript{137} On Hand's classical Greek correspondence with George Wharton Pepper, see A. Cox, \textit{supra} note 88, at 392.
Great Books canon—Aristotle and Plato, Goethe and Carlyle, Kant and Hegel, Luther and Thomas Aquinas, Spenser and Keats, John Stuart Mill and Matthew Arnold. There were, of course, a range of legal figures like Plowden and Maitland; a few more contemporary intellectual figures, like Charles Beard, Sir James Jeans, James Harvey Robinson, John Dewey, William James, and H.L. Mencken; and figures whom few read but everyone seemed to quote, like Ortega y Gasset, Anatole France, and George Santayana. At times, Hand’s references fall on the hackneyed side of accessibility, such as his endless fondness for referring to Scylla and Charybdis. But in his more straightforward references, Hand conveyed a stronger impression of his erudition, for they suggested set pieces of his mind rather than strained ornaments.

Hand’s command of the Great Books, his often playful allusions, and his Latin tags suggest not so much the serious scholar but a latter-day instance of that nineteenth-century British species, the man of letters. Indeed, Hand’s extrajudicial writings are the excursions of an essayist rather than scholarly endeavors. And nothing is more indicative of Hand as a man of letters than what might be described as the belles-lettres style of his prose.

Few who have written on Hand have been able to ignore his written style. Although much attention is paid to Hand’s clarity, the real attraction was the literary character of Hand’s writing. Herbert Shanks felt Hand’s writing “often appropriate for what in ancient writings is known as monumental script.” George Wharton Pepper, who devoted an entire essay to Hand’s “literary style,” announced after a quote from Hand: “here we have English at its best.” Jerome Frank wrote with further embellishment that Hand’s words “have a beauty, a lovely cadence, a lift, but they are not Swinburnian, so bemusing in sound that you forget the thought. They do not ruffle the surface of the imagination; they plunge deep into it.” Not to be outdone, Charles Wyzanski mused: “Is not his style reminiscent of John Donne’s? Both use a poetic gift to pierce the patterns dulled by habituation. A Hand opinion is comparable to a sonnet.”

138. See, e.g., Parke-Davis & Co. v. H.K. Mulford Co., 189 F. 95, 102 (C.C.N.Y. 1911); Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944), aff’d, 324 U.S. 244 (1945).
139. In an essay on Hand’s literary style, George Wharton Pepper wrote that when Hand “delivers somewhere a commencement address, he delights the graduating class by making them feel that they are already his fellow citizens in a world of ideas.” G. Pepper, The Literary Style of Learned Hand, 60 HARV. L. REV. 333, 335 (1947).
142. H. SHANKS, supra note 1, at 27.
143. G. PEPPER, supra note 139, at 334.
144. J. FRANK, supra note 5, at 671.
145. C. Wyzanski, supra note 1, at 86-87. Wyzanski had used the sonnet label in 1947 as well;
Indeed, both Hand's judicial and extrajudicial writing show an effort at poetic effect, for Hand used an immense range of poetic devices.\(^\text{146}\) He was likely to intone "ours is only to apply the law as we find it" without a parallel possessive in the previous clause.\(^\text{147}\) Although he assured the literary quality of his writing through poetic sentence structure and word placement, the literariness of his writing was furthered by a flair for metaphor. Hand's metaphors are pure self-indulgence. He would talk of a "perpetual Walpurgisnacht of meaningless agitation,"\(^\text{148}\) assert that words "are not pebbles in alien juxtaposition,"\(^\text{149}\) talk of purgation by the "alembic of public scrutiny,"\(^\text{150}\) and describe a tax measure as "a tempering of the wind to the shorn lamb."\(^\text{151}\) He might describe humanity as made up of "chameleons surrounded by others of their species, mysteriously acquiring hue from a colorless environment."\(^\text{152}\) Similarly in a trademark case, he remarked that a "reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask."\(^\text{153}\)

At the core of Hand's literary style was a word choice ranging from the colorful to the ostentatious, and diction ranging from the refined to the overly cultivated—that is, when he was not satisfying his penchant for colloquial usage. Hand would talk in terms of the "sedulous avoidance of any implication,"\(^\text{154}\) and of "the parturition of statutes."\(^\text{155}\) He suggested that Thomas Swan's court-room manner was "an admonition to others whose composure is not equally proof against irritation."\(^\text{156}\) In the Coty perfume trademark case, he ridiculed the defendant's claim that people could understand the word "origan" as the generic name for a genus of aromatic plants rather than a trade name: "And even though here and there some sensuous précieuse be disappointed, Coty may save her trade for aught of her."\(^\text{157}\) Even the central sentences of The T.J. Hooper case—dealing with coal barges overcome by a storm—provide a series of refined, although in this case seemingly simple, word choices:

Indeed in most cases reasonable prudence is in fact common pru-

see C. Wyzanski, Judge Learned Hand’s Contributions to Public Law, 60 Harv. L. Rev. 348, 349 (1947).
146. For a good, short handbook on figures of speech, which is almost the same as a list of Hand's phrasings, see A. Quin, Figures of Speech (1982).
147. United States v. Dennis, 183 F.2d 201, 234 (2d Cir. 1950), aff’d, 340 U.S. 494 (1951).
148. L. Hand, supra note 118, at 198.
149. National Labor Relations Bd. v. Federbusch Co., 121 F.2d 954, 957 (2d Cir. 1941).
151. American Coast Line v. Comm'r of Internal Revenue, 159 F.2d 665, 668 (2d Cir. 1947).
152. L. Hand, supra note 70, at 38.
153. Yale Electric Corp. v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928).
154. Cabell v. Markham, 148 F.2d 737 (2d Cir. 1945), aff’d, 326 U.S. 404 (1946).
156. L. Hand, supra note 110, at 211.
dence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.\(^{158}\)

The last few words of this passage, Hand’s “even their universal disregard will not excuse their omission,” after his rolling series of passages—“never its measure” and “however persuasive be its usages”—is quintessential Hand, all phrased with delicate precision.

Indeed, the delicacy of Hand’s phrasing often suggests the style of Henry James or Henry Adams. A passage about making “distinctions which would leave unfulfilled its apparent purpose,”\(^{159}\) sounds like one of James’s stylish indirections. Indeed, Hand’s writing often tends towards the careful indirectness of James, an indirectness that leaves one unsure of Hand’s exact meaning. Hershel Shanks observed that “although [Hand] could be precise when he wanted to, he knew how to leave a penumbra of meaning that would light the future without confining it.”\(^{160}\) Shanks makes a virtue out of Hand’s lack of clarity, but sometimes Hand’s word choices leave his reader on uncertain ground. When he talks about “a fragmentary earnest of the future,”\(^{161}\) it is not clear what “earnest” means. Although these words appear in one of Hand’s occasional pieces, he was apt to produce similarly vague formulations in his opinions as well. When he wrote in a trademark case that “we should be equally jealous not to undertake the composition of substantial conflicts of interests,” the choice of the word “composition” could only have left a vague impression, and suggests that, after all, he was after literary effect. The man who wrote his opinions in longhand with a pen that he had to fill with an eye dropper was after similar affectation in his prose.\(^{162}\) It is difficult not to see in Hand’s style a certain preciousness and overwrought refinement.

All of Hand’s stylistic extravagances and his broad cultural allusions assured him a persona as a highly cultured judge, a man of letters on the bench. And this persona was closely tied to one of his central intellectual commitments—a devotion to the world of high culture. For him, all this cultural refinement, all this erudition and style, were not fashionable accessories but moral necessities. In his essay on the “Sources of Tolerance,” after speaking of the dangers facing the American people, Hand insisted that “the political life of a country like ours would get depth and steadfastness, would tend to escape its greatest danger. . . by some adumбра-
tion of what men have thought and felt in other times and at other places." 163 He then clarified his goal: "I argue for the outlines of what used to go as a liberal education. . . ." 164

Although he argued for liberal education as a panacea for American society, he stressed its utility for the judge:

I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. 165

This passage quite neatly sums up the canon of the Great Books courses and advances Hand's belief that reading the canon gives the judge—just as it would any participant in our democracy—the perspective needed for the task of judging.

In his advocacy of high culture, Hand fell in with a long line of other cultural champions, many of whom expressed deep cultural pessimism, such as Matthew Arnold, Henry Adams, and Ortega y Gasset. He shared many of the anti-modern instincts of these cultural Cassandras with their attacks on mass society and an increasingly mechanized world. Indeed, many of his extrajudicial writings are filled with attacks on mass culture. "The Sources of Tolerance," which ends in praise of liberal education, dwells on the ravages of modern society. As the central question of the essay, Hand asks, "how far is liberty consistent with the methods of the 'high-power' salesman?" 166 Modern advertising, essentially the same as modern propaganda, is the central evil:

In recent times we have deliberately systematized the production of epidemics in ideas, much as a pathologist experiments with a colony of white mice, who are scarcely less protected. The science of propaganda by no means had its origin in the Great War, but that gave it a greater impetus than ever before. To the advertiser we should look for our best technique. I am told that if I see McCracken's tooth-paste often enough in street cars, on billboards and in shop windows, it makes no difference how determined I may be not to become one of McCracken's customers, I shall buy McCracken's

163. L. Hand, supra note 22, at 80.
164. Id.
165. Id. at 81.
166. Id. at 74.
tooth-paste sooner or later, whether I will or no; it is as inevitable as that I shut my eyes when you strike at my face. In much the same way political ideas are spread, and moral too, or for that matter, religious.\textsuperscript{167}

The danger was clear: “I submit that a community used to be played on in this way, especially one so large and so homogenous as we have become, is not a favorable soil for liberty.”\textsuperscript{168} Indeed, hope seemed slim: “Over that chorus the small voice of the individual sounds not even the thinnest obbligato; it seems senseless and preposterous to sing at all. Why not accept the accredited chant and swell the din?”\textsuperscript{169} Mass culture, for Hand, threatened not only the individual voice but posed a threat as well to the health of democracy.

Indeed, Hand would go so far as to state that the “art of publicity is a black art,” and maintain that “[t]he hand that rules the press, the radio, the screen and the far-spread magazine, rules the country. . . .”\textsuperscript{170} Talking about mass suggestion, he made invidious comparisons to totalitarianism: “We need not look to Russia and Germany, or to their pathetic Italian imitator; we need not leave home at all.”\textsuperscript{171} Although he understood that “something of the kind was possible long before the days of the tabloid, the radio, the moving picture”—citing Sparta, Rome, eighteenth-century Islam, sixteenth-century Spain, and eighteenth-century France—it was clear that the tabloid, radio, and moving picture had altered the balance and made mass suggestion ever more powerful and posed a danger comparable both to the Spanish Inquisition and Hitler’s brown shirts.\textsuperscript{172}

Against the danger of mass suggestion one needed the rock of free inquiry. Hand asserted—somewhat mangling the old saw about “standing on the shoulders of giants”—that “[e]ven in that very technology on which they so much pride themselves, the totalitarians in the end will fail; for they stand upon the shoulders of generations of free inquiry.”\textsuperscript{173} The sentence, unusually infelicitous for Hand, nevertheless set up the opposition of totalitarianism and intellectual pursuit. And when Hand thought of intellectual pursuit, his model—as he repeatedly made clear—was the liberal arts.

Ultimately, for Hand, law was a liberal art. There were times when he indulged himself in the techniques and methodologies of the humanities, especially in copyright cases where he played the amateur literary critic. In Nichols \textit{v. Universal Pictures} and Sheldon \textit{v. Metro-Goldwyn Pictures},

\begin{itemize}
  \item \textsuperscript{167} Id. at 75.
  \item \textsuperscript{168} Id. at 76.
  \item \textsuperscript{169} L. Hand, supra note 70, at 35.
  \item \textsuperscript{170} L. Hand, supra note 161.
  \item \textsuperscript{171} L. Hand, supra note 78, at 149.
  \item \textsuperscript{172} Id. at 149-50.
  \item \textsuperscript{173} Id. at 153.
\end{itemize}
for example, he produced extended plot summaries and descriptions of character development. In describing the real-life model of the literary works involved in Sheldon, Hand pulled out all the stops: “she met a young Jerseyman of French blood, Emile L’Angelier, ten years older and already the hero of many amorous adventures, she quickly succumbed and poured out her feelings in letters of the utmost ardor and indiscretion, and at times of a candor beyond the standards then, and even yet, permissible for well-nurtured young women.”

This was already not the usual stuff of the Federal Reporter, but Hand went beyond these literary critical exercises to suggest more explicitly the tie between law and literary analysis when he wrote that “as soon as a society becomes conscious of self-direction, it begins to apply in some measure a ‘literary’ canon—to borrow from Matthew Arnold—that is, it begins to read the text, not sub specie aeternitatis; but with the recollection that in origin it served to compose some existing conflict of interest, and that this should serve to interpret it.” Thus, Hand’s playful role as a literary critic was related to something more serious—the proximity of law to the humanities and a broader conviction in the importance of the liberal arts to civilization.

In his vision of the high place of the liberal arts, Hand was part of a broad and varied cultural trend taking place both inside and outside the American university. In response to various threats, including general worries about modernity, the advance of science, and the social sciences, there was a move on many fronts to apotheosize high culture, in some cases to produce something akin to the German reverence for Kultur. Thus, in the Neo-Humanism of Irving Babbitt and Paul Elmer More, in the Great Books courses like the one created by Robert Maynard Hutchins at the University of Chicago, in the idealization of the Renaissance and the growth of art history, and in New Criticism’s veneration of the individual poem, this broad cultural movement treasured the great works of Western culture and insisted on the importance of the canon.

Within the legal community, as Edward Purcell has described it, the

---

174. In Nichols, Hand differentiated the characters of the plaintiff’s play, “Abie’s Irish Rose,” and the defendant’s film, “The Cohens and the Kelleys,” by describing one of the characters of the former as “the symbol for religious fanaticism and patriarchal pride, scarcely a character at all.” “Neither quality,” he continued, “appears in the defendant’s, for while he goes to get his grandchild, it is rather out of a turbulent determination not to be forbidden, than from pride in his progeny. For the rest he is only a grotesque hobbledehoy, used for low comedy of the most conventional sort, which any one might borrow, if he chanced not to know the exemplar.” Nichols v. Universal Pictures, 45 F.2d 119, 122 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931).


176. L. Hand, supra note 110, at 216.

threat was more particularized: the social science wing of legal realism—
dominated by figures like Hessel Yntema, Herman Oliphant, and Walter
Wheeler Cook—threatened to divorce legal scholarship entirely from
ethics.\(^{178}\) If, however, Hand’s own humanistic conception of law seems
quite distant from the empirical studies produced at Yale or Johns Hop-
kins, and if Hand’s legal philosophy was insistent on its moral purpose,
he did not adopt the natural law position of many of the opponents of
social scientific jurisprudence described by Purcell—those like Morris
Cohen and Mortimer Adler, who criticized the neutral normative char-
acter of much legal realism.\(^{179}\) Rather, Hand was committed to a com-
plex view of the ethical landscape, one in which there was little certainty.
When Charles Wyzanski asserted that Hand had a “Shakespearian
understanding of what men are like,” it was shorthand for Hand’s deep
appreciation of the complexity of human motivation and ethical judg-
ment.\(^ {180}\) And this description fully conformed to Hand’s self-image.

In his reverence for the products of high culture, his faith in the mind,
and his determination to see the ethical manifold of his nation, Hand
bears a great deal of resemblance to the Lionel Trilling of The Liberal
Imagination.\(^ {181}\) In the preface to The Liberal Imagination, Trilling
ventured that the “job of literature would seem to be, then, to recall lib-
eralism to its first essential imagination of variousness and possibility,
which implies the awareness of complexity and difficulty.”\(^ {182}\) Perhaps in
his similar beliefs, Hand had been influenced by his Harvard teacher
George Santayana, whose lecture, “The Genteel Tradition in American
Philosophy,” attacked the moral single-mindedness of the secular Calvin-
ist culture of America.\(^ {183}\) Like Trilling, Hand had assumed a gentility
outside Santayana’s “Genteel Tradition,” a moral nobility in the knowl-
dge of ethical complexity. They shared the view of the liberal critics of
liberalism who focused on complexity, a view that has been described by
Richard Pells.\(^ {184}\) Both Hand and Trilling were deeply moral about their
sense of a varied and complicated ethical world. Among the various
traits Hand attributed to the scholar and the man of letters, Hand most
treasured a subtlety of judgment that was based on familiarity with a
wide range of human experience, a familiarity he gained explicitly
through the great works of Western culture.

---

179. Id. at 92.
180. C. Wyzanski, supra note 2, at 79.
182. Id. at xv. In his famous essay, “Reality in America,” Trilling criticized Vernon
Parrington’s Main Currents in American Thought (1927), for its simplification of culture, a
simplification suggested even in its title. Id. at 9.
183. G. Santayana, The Genteel Tradition in American Philosophy, in G. Santayana, The
184. In this respect, Pells discusses Trilling along with Reinhold Niebuhr and Arthur
If at times Hand’s delight with the poetic phrase and the literary allusion seemed the after-dinner stuff of the club man, it was also tied to a deep moral conviction about his role as a judge. All of Hand’s poetic turns were part of a cultural elitism that he mustered for the purposes of openness, a defense of high culture meant for the benefit of tolerance. Ultimately, this was the Hand associated with the beginnings of The New Republic, which passionately called in one of its first editorials for the importance of ideas.\(^{185}\) Like The New Republic, Hand’s commitment to ideas was part of his moral impulse.

**CONCLUSION**

“The Roman lawyers,” wrote Jerome Frank in his essay on Hand, “affected perhaps by the etymology of the word, thought of a ‘person,’ for legal purposes, as a mask, and recognized that legally one man may contain several different persons, having different roles or personalities, or selves.”\(^{186}\) A thoroughgoing Freudian, Frank went on to assert: “We are all various persons; and most of the persons constituting a judge are exceptionally well hidden.”\(^{187}\) In this examination of Learned Hand, I have attempted not so much an archeology of the hidden Hands as an examination of the various persons Hand portrayed himself to be, for the personae of Hand’s writings reveal some of his most deeply held values and suggest significant aspects of his sensibility.

Much like the complexity Hand saw in the moral world, there is an undeniable complexity to Hand’s personae. His various self-images often suffered from certain internal tensions. He could use religious imagery as a vehicle for sarcasm against turn-of-the-century legal formalism while envisioning his own judicial role as a priestly office. He might identify himself as a craftsman merely plying his trade, emphasizing the modesty of his position, and then assert the importance of creativity in the art of judging. Clearly, Hand’s craft was an art. He was a man of culture, indulging himself in the production of literary cadences and evincing a playful worldliness, while at the same time he was a sharp cultural critic who had learned from past writers to appreciate the complex nature of human society.

There are tensions as well among the trio of Hand’s self-images. The sacral aspect of the judge-as-priest clashes with the worldliness of Hand both as craftsman and as man of letters. The craftsman’s creativity is at odds with the priest’s powerlessness before the sacred tradition. The scholar’s open-mindedness and skepticism is in tension with Hand’s rev-


\(^{186}\) J. Frank, supra note 5, at 667.

\(^{187}\) Id.
ference for the law. And the philosophic expansiveness of the humanist is set at quite a remove from the task of the craftsman.

Despite the tensions within each of Hand’s three self-images and the outward differences among them, Hand’s personae fit together into a single framework. In rough juxtaposition they reveal his basic philosophy of the judicial task. If he used religious language in sarcastic attacks on the prophets of the conservative legal establishment, it was to suggest their heresy. In his priestly mode, Hand expressed his belief in the sacral aspect of the law, an aspect that defined the borders around the special realm of the judge. Like the priest taking up guard in James Frazer’s The Golden Bough, 188 the judge had a specific object to protect—the realm in which judges exerted their special expertise. As if dividing the world into the sacred and the profane, Hand recognized a strict border between the realms of judicial power and of judicial deference.

Within the closely defined judicial realm, the judge must work like a craftsman. Rather worldly in contrast to the priest, the craftsman symbolized the judge’s skill and powers of creation. Hand spoke of the trade-like ethic of the craftsman and referred to judges plying their trade for money. His implicit message was that a judge’s creativity was limited; for the most part, the judge was charged with discerning the meaning of statutes and the application of common-law rules to specific cases. Still, for Hand, judging was an art that required the craftsman’s imagination. Essentially, Hand replicated the borders between the sacred and profane, if rather less dramatically, in the image of the craftsman. In contrast to the passive role of the priest as mere recipient of the Word, whether from legislators or the legal tradition, the craftsman must apply his own skill and imagination.

If judging was a craft, it was also, as disclosed by Hand’s scholarly persona, a humanistic enterprise. Although Hand played with literary tropes and cultural allusions, he also took them quite seriously. The judge-as-scholar was needed not to entertain the readers of the Federal Reporter but to bring knowledge derived from the world of culture to the task of judging. Only a judge with a depth of understanding conditioned by the great works of literature and philosophy could have the heightened moral sensitivity to exercise correctly the skills of the craftsman and to wear the mantle of the priest. Ultimately, the three self-images of Learned Hand coalesce into a single jurisprudential ideology: although judges must understand the limits of their authority and refrain from usurping responsibilities not their own, in their own sacred realm they are to exert their powers to the fullest extent of their skills, but always schooled in the knowledge of human complexity.

As sacred as was the judicial realm for Hand, he was quite willing to

find the sacred in other cultural realms as well. The words he used to define the judicial role were never all that distanced from the words of his speeches to graduating classes and newly minted U.S. citizens. If the skill exercised by Hand as a judge was that of a specific craft, the moral knowledge he advocated was derived from a broader cultural realm and could be applied in that realm as well. In his “Christo et Ecclesiae” address, Hand ended by asserting that:

our forebears meant that salvation was not to be gained by propitiating demons, or averting evil, or conforming with tradition, or by escape into action, or by any other anodyne or evasion. They founded this institution in the faith that by enlightenment men would gain insight into their own being. . . . A communion of those who lived by that measure, would it not be the City of God, over whose portal there might be written: ‘Christo et Ecclesiae’?189

Hand’s theology of moral knowledge, derived from the liberal arts, transcended the realm of the judge.

Despite the broad scope of Hand’s theology of moral knowledge, his chief concern remained his judicial post. And in developing his image of that post, Hand had images other than scholar, craftsman, and priest available to him. He could, for example, have focused on the judge as scientist, social scientist, or reformer. What is significant, however, is not merely his specific choices among the repertoire of stock characters—priest, craftsman and scholar—but also his distinctive use of those types to define his personal view of the role of the judge.190

Ultimately, Learned Hand’s very stature may be explained in part by his efforts at self-imaging. His vision, as personal as it may have been, both articulated and gave form to one of the prevailing ideologies of twentieth-century American legal culture. The tropes used in tributes to Hand may have been prompted less by the brilliance of Hand’s decisions than by his ability to embody a vision of the judge that his contemporaries found compelling, one which responded to their own ideological needs.

189. L. Hand, supra note 60, at 114.
190. On the importance of character invocation to American legal argument, see generally J. Frug, supra note 55.