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THE HANDS LECTURE

LEARNED HAND ON STATUTORY INTERPRETATION: THEORY AND PRACTICE

*Thomas W. Merrill**

It is a great honor to take part in the celebration of the Second Circuit's 125th anniversary and in particular to present the Hands Lecture.¹ The Second Circuit in the 1930s and 1940s came to be called the "Hand Court," and during those years it established its reputation as the most admired of the U.S. circuit courts of appeals. It was called the Hand Court because two of its judges, who often formed the majority on three-judge panels, bore the surname Hand. They were cousins. Augustus Hand was a few years older than Learned Hand but was appointed to the bench somewhat later.

In recent years, far more attention has been given to Learned Hand. This does not necessarily mean he was the better judge. Justice Robert Jackson once quipped that he advised new federal district judges, "always to quote Learned and always to follow Gus."² This was probably intended to suggest that Augustus Hand was by no means the lesser judge, in terms of showing consistent good judgment. Yet with apologies to Augustus Hand, the focus of my remarks today will be on his younger cousin, Learned. Learned Hand was more of a public figure and much more given to sharing his thoughts in public venues than his cousin. So for my purposes, there is much more to say about him.

Learned Hand is today regarded as a great common law judge, and significant attention has been given, most prominently by his biographer Gerald Gunther,³ to some of his forays into constitutional law. Less has been said about Learned Hand and statutory interpretation, something he spoke

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1. This lecture was given on September 27, 2017, at the Thurgood Marshall United States Courthouse as part of the Second Circuit's 125th Anniversary celebration. For a discussion of the anniversary, see Robert A. Katzmann, *One Hundred Twenty-Five Years of the U.S. Court of Appeals for the Second Circuit: A Brief Project Overview*, 85 *FORDHAM L. REV.* 1 (2016).

2. Justice Robert H. Jackson, *Why Learned and Augustus Hand Became Great*, Address Before the New York County Lawyers' Association Annual Bar Dinner 43 (Dec. 13, 1951), <http://www.roberthjackson.org/wp-content/uploads/migrated-files/thecenter/files/bibliography/1950s/why-learned-and-augustus-hand-became-great.pdf> [https://perma.cc/M9CE-TK3W].

3. See generally GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

about often in public speeches, and a task he performed on a continuing basis for fifty-two years as a sitting judge. Statutory interpretation has become a subject of controversy in recent years, at least among judges and academic lawyers. I thought, therefore, that it would be interesting, and perhaps illuminating, to consider what Learned Hand said—and what he did—in the way of statutory interpretation.

Any theory of statutory interpretation must be grounded in a conception of separation of powers, at least one that addresses the relationship between the legislative and judicial branches of government.

Learned Hand's conception of separation of powers in this sense was similar to that of Justice Oliver Wendell Holmes, whom Hand intensely admired, and was consistent with that of other judicial luminaries who were roughly his contemporaries, such as Louis Brandeis and Felix Frankfurter. This conception gave nearly exclusive authority to the legislature in setting public policy and cautioned the judiciary not to interfere with the legislative prerogative. In embracing this conception, Hand and his like-minded contemporaries were responding to the central constitutional issue of the times: whether the policy innovations associated with the Progressive Era at the beginning of the twentieth century, and later with the New Deal, were permissible, given the limited government an earlier generation of judges perceived to be enshrined in the Constitution. Hand agreed with Holmes and others that legislative experimentation should be allowed to go forward, and the judiciary should not stand in the way.

Hand's posture of judicial restraint was revealed most clearly in his Holmes Lectures delivered at Harvard in 1958 and published under the title *The Bill of Rights*.⁴ There, he argued for almost complete judicial abstention in matters pitting individual constitutional rights against the government, especially in matters governed by the Due Process, Equal Protection, and Free Speech Clauses. This is a position that would have few adherents today. The lectures, delivered when Hand was eighty-six, concerned a topic—constitutional law—as to which he had been more of an observer than a participant over his long judicial career. Like Felix Frankfurter, who is often characterized as becoming increasingly conservative toward the end of his tenure, Hand was here being faithful to commitments he had developed much earlier in his life, when a different set of issues dominated.

In contrast to constitutional law, where Hand was largely an observer, he was very much an active participant in statutory interpretation. And when we turn to statutory interpretation, we find that Hand had a well-developed and highly original theory of statutory interpretation—a theory more interesting than anything Holmes, Frankfurter, and company had to say on the subject. The starting point of that theory, as I have indicated, was the assumption that the legislature sets the policy, and the courts must defer to that policy as faithful agents of the legislature. But Hand went well beyond his contemporaries in spelling out exactly how that was to be done.

4. See generally LEARNED HAND, *THE BILL OF RIGHTS* (1958).

Hand's theory of statutory interpretation was first set forth in 1935. He was invited to give a radio address by the Columbia Broadcasting System (CBS) as part of a series designed to promote the use of radio broadcasting in education. He chose as his topic, *How Far Is a Judge Free in Rendering a Decision?*⁵ The title suggested a wide-ranging inquiry that would include common law and constitutional law, but the talk was almost entirely about statutory interpretation.

Hand developed his idea about how judges should interpret statutes by contrasting two other positions, both of which he regarded as untenable. On the one hand, there was what Hand characterized as “the dictionary school”⁶ of interpretation. This he characterized as one that would have the judge “read the words in their usual meaning and stop where they stop.”⁷ This, he said, was a recipe for error. Hand was equally skeptical about canons of interpretation. As he put it: “nothing is so likely to lead us astray as an abject reliance upon canons of any sort . . . [O]ne is more likely to reach the truth by an unanalyzed and intuitive conclusion from the text as a whole, than by following, step by step, the accredited guides.”⁸ Clearly, Judge Hand was no textualist—at least he would not embrace the version of modern textualism that relies heavily on dictionary definitions and canons.

On the other hand, Hand also resolutely rejected what he called the approach of “common sense.”⁹ This was the idea, as he put it, that the judge should “conform his decision to what honest men would think right.”¹⁰ This, he said, gives the judge too much latitude and threatens to “usurp the office of government.”¹¹ Hand was no pragmatist either, as the appeal to interpret the law to promote common sense has come to be known. Interpreting enacted law to yield what the judge regards as the just or common sense outcome would make the judge the policy maker, in violation of the fundamental starting point that this function is given to the legislature.

What then is the proper approach to interpretation in cases where the statute is silent or unclear? According to Hand, the judge should ask what the legislature would have decided if the issue had occurred to the legislators at the time of enactment. The judge should put himself in the shoes of the legislators and try to imagine how they would have answered the question. Hand acknowledged that it would be misleading to call this discerning legislative intent. “Strictly speaking,” he said, “it is impossible to know what they would have said about it, if [they] had.”¹² Still, he cautioned, “the judge must always remember that he should go no further than he is sure the

5. LEARNED HAND, *HOW FAR IS A JUDGE FREE IN RENDERING A DECISION?* (1933), reprinted in *THE SPIRIT OF LIBERTY* 103 (Irving Dilliard ed., 3d ed. 1963).

6. *See id.* at 107.

7. *Id.*

8. *Van Vranken v. Helvering*, 115 F.2d 709, 711 (2d Cir. 1940).

9. HAND, *supra* note 5, at 107–08.

10. *Id.* at 108.

11. *Id.*

12. *Id.* at 106.

government would have gone, had it been faced with the case before him.”¹³ This conception of how a judge should go about interpreting a statute would later be labeled “imaginative reconstruction” by Richard Posner, who briefly endorsed it early in his judicial career.¹⁴

Interestingly, Hand’s commitment to imaginative reconstruction was not motivated by a view of the legislature as reflecting some kind of popular will or voice of the people. Usually, those who advocate a strong faithful agent theory of interpretation—think of originalists in matters of constitutional law—tend to valorize the enacting body. Constitutional originalists, for example, tend to depict the Framers of the Constitution as uniquely far-sighted statesmen, whose work received the endorsement of the people after they read the trenchant explanation of the Framers’ objectives in *The Federalist Papers*.

Hand’s view of the legislative process, in contrast, was very nearly the opposite. Hand was born in and, for the first thirty years of his life, lived in Albany, New York, where the New York State Legislature meets. And at one point early in his career he became an active participant in the affairs of the Progressive, or Bull Moose, Party, going so far as to accept the party’s nomination for election to the New York Court of Appeals.¹⁵ As a close observer of the political scene, Hand did not embrace any kind of dewy-eyed or idealized conception of the legislative process. Instead, his understanding of that process was similar to what would later be called the “interest group” theory of politics. Consider this passage from a speech to the Federal Bar Association, given a few years before his CBS radio address, bearing the title, “Democracy: Its Presumptions and Realities”:

Every man who aspires to office wants, if he is worth his salt, to be returned. . . . And how can he be returned? He looks upon an inert mass of constituents, who care little for themselves as citizens at large, but very much for this measure or that, which affects them in their livelihood. . . . To promote their special interests they form groups with inconveniently long memories The common will as the official sees it, is not common at all; it is a complex of opposing forces, whose resultant has no relation to the common good, but which will nevertheless decide whether he goes back or not. . . . The more compact, determined and relentless the groups with which he must deal, the more they have to say in his fate. He must pick his way nicely, must learn to placate though not to yield too much, to have the art of honeyed words but not to seem neutral, and above all to keep constantly audible, visible, likeable, even kissable.¹⁶

13. *Id.* at 109.

14. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

15. GUNTHER, *supra* note 3, at 233–37.

16. LEARNED HAND, *DEMOCRACY: ITS PRESUMPTIONS AND REALITIES* (1932), reprinted in *THE SPIRIT OF LIBERTY*, *supra* note 5, at 90, 96–97. For similar comments, see Hand’s address to the American Law Institute, *LEARNED HAND, IS THERE A COMMON WILL?* (1929), reprinted in *THE SPIRIT OF LIBERTY* *supra* note 5, at 47, 53–54.

This brutal realism about the legislative process could have been written by George Stigler, or Judge Frank Easterbrook.¹⁷

So we have something of a paradox. Hand's starting point in thinking about statutory interpretation—his normative premise—was that the judge must always act as the faithful agent of the legislature. But the legislature, as he perceived it, was filled with chameleons eager for reelection who respond, if at all, to the most powerful self-serving interest groups. How to square the premise with the perception?

I submit that the tension between premise and perception was precisely what gave rise to Hand's commitment to interpretation as imaginative reconstruction. The judge's duty and office are to respect the compromise that the legislative body reached, in all its particularity and, even, venality. The only way to do this is for the judge to imaginatively project himself back into the legislative body at the time of enactment, in an effort to grasp the "deal" that was reached. Armed with this insight, the judge can then interpret the statute to reach the result the enacting legislature would have reached, if it had anticipated the question.

Hand never wavered in his commitment to imaginative reconstruction as the appropriate approach to statutory interpretation, at least in his extrajudicial statements. He repeated the idea in 1942 in a speech commemorating the 250th anniversary of the Supreme Judicial Court of Massachusetts;¹⁸ again in 1947 in an article celebrating Judge Thomas Swan's twentieth year of service on the Second Circuit;¹⁹ again in a speech on continuing legal education delivered in 1958;²⁰ and finally in his Holmes Lectures at Harvard.²¹

It may be helpful to consider a concrete example of what Hand understood by imaginative reconstruction. I will take as my illustration a case called *Fishgold v. Sullivan Drydock & Repair Corp.*,²² a decision Judge Posner, during his brief embrace of Hand's theory, called a "masterpiece" in statutory interpretation.²³

17. See, e.g., Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328 (1994). Judge Easterbrook's essay includes multiple citations to the political economy writings of George Stigler. *Id.* at 1332 n.15, 1334 n.23, 1336 n.27, 1336 n.29.

18. See generally LEARNED HAND, THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION (1942), reprinted in THE SPIRIT OF LIBERTY, *supra* note 5, at 155.

19. See generally LEARNED HAND, THOMAS WALTER SWAN (1947), reprinted in THE SPIRIT OF LIBERTY, *supra* note 5, at 209.

20. See generally LEARNED HAND, A PERSONAL CONFESSION (1959), reprinted in THE SPIRIT OF LIBERTY, *supra* note 5, at 302.

21. See generally HAND, *supra* note 4.

22. 154 F.2d 785 (2d Cir. 1946). For other cases in which Hand restated his theory, and arguably applied it, see *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring) (stating "[a]s nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation") and *Borella v. Borden Co.*, 145 F.2d 63, 64–65 (2d Cir. 1944) (construing the meaning of covered employees under the Fair Labor Standards Act), *aff'd*, 325 U.S. 679 (1945).

23. Posner, *supra* note 14, at 804.

This was the issue. In 1940, well before the United States entered World War II, Congress passed a Selective Service Act,²⁴ reinstating the draft. Congress was concerned about the impact on men who were working in jobs governed by seniority systems. The 1940 act accordingly included a provision that said such employees, after their military service was over, were entitled to be reinstated in their previous jobs (provided they were still available), without any loss in seniority. This directive, it turned out, was ambiguous. Did no loss in seniority mean that the workers were entitled to go back to their job with *the same* seniority they had when they were drafted? Or did it mean that they were entitled to their old job with *additional seniority* tacked on as if they had not been drafted?

Hand concluded for the Second Circuit that no loss in seniority meant the draftees were to be reinstated with the seniority they had when they were drafted, but no more. In a critical paragraph, this is how he explained his conclusion:

When we consider the situation at the time the Act was passed—September, 1940—it is extremely improbable that Congress should have meant to grant any broader privilege than as we are measuring it. It is true that the nation had become deeply disturbed at its defenseless position, and had begun to make ready; but it was not at war, and the issue still hung in the balance whether it ever would be at war. If we carry ourselves back to that summer and autumn, we shall recall that the presidential campaigns of both parties avoided commitment upon that question, and that each candidate particularly insisted that no troops should be sent overseas. The original act limited service to one year, and it was most improbable that within that time we should be called upon to fight . . . Congress was calling young men to the colors to give them an adequate preparation for our defence [sic], but with no forecast of the appalling experiences which they were later to undergo. Against that background it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties or fifties, who had wives and children dependent upon them. Today, in the light of what has happened, the privilege then granted may appear an altogether inadequate equivalent for their services; but we have not to decide what is now proper; we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which [the Act was] cast.²⁵

Several brief comments about Hand's use of imaginative reconstruction in this case. Note that the approach is relentlessly originalist. The ambiguity is to be resolved the way it would have been had Congress attended to it in 1940, not the way Congress might resolve it in 1946, when the case was decided. Also, the reconstruction of the values and attitudes of Congress in 1940 is based on well-known public events, like the presidential campaign of 1940 and public sentiment about the prospects for war; there is no reference to legislative history. Finally, and perhaps most strikingly, there is a steely

24. Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885.

25. *Fishgold*, 154 F.2d at 788–89.

resolve to ignore the enormous moral claims of the soldiers and sailors who were drafted under the 1940 act and the great hardship and disruption to their lives they endured, often for many years, in the service of their country. The task of the judge, as Hand saw it, is to project the purposes of the legislature that enacted the law into the future, not to perfect the law by making it more just or equitable in light of subsequent events.

As Hand continued to reflect on the proper approach to statutory interpretation over the years, he became increasingly aware of the extraordinary demands his theory put on the interpreter. The most obvious problem, to use a fancy term, is epistemic. It is one thing to ask the interpreter to unpack the legislative deal in considering a recent enactment by a legislature with which the interpreter has significant familiarity. It is quite another to require the interpreter to imaginatively reconstruct a complex statute adopted many years ago—or even a recent statute enacted by a legislature with which the interpreter has no familiarity.

Hand acknowledged the problem some years later in his commemoration of the judicial service of Judge Thomas Swan.²⁶ He spoke of the great difficulty of engaging in imaginative reconstruction. In his words, the judge “must have the historical capacity to reconstruct the whole setting which evoked the law; the contentions which it resolved; the objects which it sought; the events which led up to it.”²⁷ This was an especially daunting task in dealing with an enactment like the Internal Revenue Code. Speaking specifically about that law, Hand confessed to considerable difficulty in giving meaning to the words. As he said:

[T]he words . . . merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leav[ing] in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.²⁸

Hand praised Judge Swan for his superior skills in finding “his way through thickets of verbiage in statutes . . . with more ease than any other judge of my personal acquaintance.”²⁹ But if imaginative reconstruction of the Revenue Code is possible only for a talent like Judge Swan, and pushes even a Learned Hand to the limits of his ability, how is it possible that this approach could be recommended for use by more ordinary mortals?

Hand further acknowledged that the capacity to imaginatively reconstruct the context of a historical enactment is only the beginning of the demands on the judge. In addition, the judge must also have the capacity to project the historical understanding onto a future when an issue emerges which the enactors did not contemplate. This, he said, requires the judge to have the “the far more exceptional power of divination which can peer into the

26. *See generally* HAND, *supra* note 19.

27. *Id.* at 217.

28. *Id.* at 213.

29. *Id.* at 212–13.

purpose beyond its expression, and bring to fruition that which lay only in flower.”³⁰ Perhaps even more importantly, it requires great power of self-restraint. The judge

must purge his mind and will of those personal presuppositions and prejudices which almost inevitably invade all human judgments; he must approach his problems with as little preconception of what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity for detachment.³¹

One is reminded of Ronald Dworkin’s conception of the judge as Hercules,³² only for Hand the Herculean judge is not one who discerns and enforces true morality; he is the one who can steel himself again yielding to his sense of true morality.

In one of his last public statements on the subject, Hand acknowledged that imaginative reconstruction would strike many people as having “a fantastic unreality.”³³ But he insisted that there was no other choice: “[Y]ou really must ask what they would have said.”³⁴ In these remarks, Hand also offered, in an offhanded way, a qualification. He noted that

[t]here are, indeed, occasions when a statute which I like to call an open-ended statute will say to you: “You do what *you* think best about that,” just as we do with juries in the case of negligence. . . . But in other cases, when the legislators have not handed over the authority to us to make our own choices, we have to assume that they did mean to impose some choice of their own.³⁵

Hand did not elaborate on how judges are to discern when the legislators have “impose[d] some choice of their own,” and when it has delegated authority to the judiciary to “do what *you* think [is] best.”³⁶

Why did Hand conceive of imaginative reconstruction as a jurisprudential imperative, at least when the legislators have made “some choice of their own,”³⁷ in the face of his implied but grudging concession that imaginative reconstruction is beyond the capacities of most judges? The closest he came to an answer was in his speech commemorating the anniversary of the Supreme Court of Massachusetts.³⁸ Its theme was the need for an independent judiciary. He said there that statutes

do not indeed represent permanent principles of jurisprudence—assuming that there are any such—but they can be relatively stable; and, provided that the opportunity always exists to supplant them when there is a new shift in political power, it is of critical consequence that they should be loyally enforced until they are amended by the same process which made

30. *Id.* at 217.

31. *Id.* at 217–18.

32. *See, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* 239 (1986).

33. HAND, *supra* note 20, at 305.

34. *Id.*

35. *Id.* at 305–06.

36. *Id.* at 306.

37. *Id.*

38. *See generally* HAND, *supra* note 18.

them. That is the presupposition upon which the compromises were originally accepted; to disturb them by surreptitious, irresponsible and anonymous intervention imperils the possibility of any future settlements and pro tanto upsets the whole system.³⁹

In other words, faithful reconstruction of the legislative bargain, and skillful projection of that bargain in resolving future controversies, is a necessary condition of achieving change through elections and the process of translating electoral success into enacted law. This was the only means, Hand thought, by which government by the people “can become articulate and be made effective.”⁴⁰

In the end, Hand’s original premise grounded in separation of powers—that the legislature must reign supreme in matters of policy and that courts must act as faithful agents of the legislature—drove him to embrace imaginative reconstruction. The premise prevailed, even in the face of his deeply pessimistic perception about the reality of the legislative process. And it prevailed even in the face of his growing awareness that imaginative reconstruction was beyond the capacity of most judges.

In assessing Judge Hand’s theory of statutory interpretation, I thought it would be instructive to compare theory to practice, to ask how Judge Hand actually proceeded in resolving questions of statutory interpretation. Hand probably sat on thousands of cases involving statutory interpretation during his long judicial career. It would be beyond the limits of human endurance—mine at least—to read all of these decisions. To make the exercise more manageable, I decided to concentrate on Hand’s opinions in one area of statutory interpretation—federal copyright law.

Copyright is a natural choice for several reasons. First, the number of decisions is about right—thirty-five written opinions by Learned Hand arising under the Copyright Act.⁴¹ Second, the Copyright Act he construed was adopted in 1909,⁴² the same year Hand was appointed to the bench, and it remained largely unchanged throughout his tenure as a judge. Thus, there is good reason to think that Hand would be familiar with the values and objectives of the legislature that adopted the Act, and that this understanding would not be complicated by later amendments. Third, Hand is justly famous for his copyright decisions, several of which were pathbreaking and some of which continue to be cited and quoted today. Not all of these decisions involved questions of great magnitude.⁴³ But a good number required the

39. *Id.* at 156–57.

40. *Id.* at 157.

41. I derived the database of published Hand opinions from a list provided by Ronald Cracas. See generally *Judge Learned Hand and the Law of Copyright*, 7 COPYRIGHT L. SYMP. 55 (1954). Cracas lists forty-one “Copyright Opinions of Judge Learned Hand.” *Id.* at 89–90. Five of the listed opinions were cases in which Judge Hand participated but did not write; a sixth was evidently unpublished.

42. The Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

43. Early in Hand’s career, for example, he was asked to decide whether the defendant had infringed that old familiar tune, “I Think I Hear a Woodpecker Knocking on My Family Tree.” *Hein v. Harris*, 175 F. 875, 877 (C.C.S.D.N.Y. 1910).

resolution of questions of legal interpretation—enough to give us a fair sample.

In these decisions, one thing stands out: *not once* did Hand seek to resolve a question about the meaning of the Copyright Act by asking how the Congress of 1909 would have resolved the matter if it had thought about it. Thus, we can say, at a minimum, that although Hand repeatedly stated in extrajudicial writing that judges must engage in imaginative reconstruction in construing statutes, he did not adopt that approach, at least not explicitly, in interpreting the Copyright Act.

Consider one of Hand's most important contributions to copyright law—his development of the idea-expression dichotomy and the understanding that abstract ideas are not eligible for copyright protection. He first set forth this understanding in *Nichols v. Universal Pictures Corp.*⁴⁴ in 1930. The question was whether the copyright of a play, *Abie's Irish Rose*, which involved a Jewish boy who falls in love with and secretly marries an Irish girl, was infringed by a movie, *The Cohens and Kellys*, which involved a Jewish girl who falls in love with and secretly marries an Irish boy. There was no claim that the movie had plagiarized the dialogue of the play. The question was whether the similarities in the plot constituted an infringement. Hand held that although the plotline of a play is eligible for copyright protection, here the similarity was too general, too abstract, to constitute an infringement. In reaching this conclusion, Hand advanced one of the first articulations of the understanding that ideas, at least abstract ideas, are not subject to copyright protection.⁴⁵

For present purposes, the primary significance of the decision is that, in adopting the idea-expression distinction, Hand made no reference to the Copyright Act of 1909. The only authorities he mentioned in his opinion were earlier decisions, including decisions construing copyright statutes in effect prior to 1909.⁴⁶

One possible explanation for Hand's failure to reference how the legislature of 1909 would have decided the legal question in *Nichols* is that he had not yet formulated his theory of imaginative reconstruction. Yet in 1936, after Hand released his thoughts about statutory interpretation in his CBS broadcast, he returned to the issue. *Sheldon v. Metro-Goldwyn Pictures Corp.*⁴⁷ again presented the question whether a movie infringed the copyright in the plotline of a play. Hand reaffirmed the importance of the idea-expression dichotomy and reaffirmed that it was necessarily a distinction without a sharp boundary. This time, Hand held that the defendants were guilty of infringement, given the substantial similarity in the characters, the setting, and the sequence of events depicted. Again, however, Hand relied

44. 45 F.2d 119 (2d Cir. 1930).

45. *Id.* at 121.

46. *See, e.g., id.* at 121–22.

47. 81 F.2d 49 (2d Cir. 1936).

exclusively on precedent, including his prior decision in *Nichols*, in developing the dichotomy and applying it to the facts presented.⁴⁸

It should not be thought that Hand ignored questions about the proper division of roles between the legislature and the courts in all matters involving copyright. Two important decisions involving the scope of copyrightable material reveal that Hand was highly sensitive to what I have called the separation-of-powers question in this context. In *Cheney Bros. v. Doris Silk Corp.*,⁴⁹ decided in 1929, Hand confronted the question whether the design of fabric used in producing clothing is eligible for copyright protection. Although photographs were explicitly covered by the 1909 act, and courts had extended this to moving pictures, Hand held that any decision to make fabric designs eligible for copyright would have to be taken by Congress. The case before him involved blatant copying, and Hand acknowledged that some sort of redress or remedy would seem appropriate. But he said

there are larger issues at stake Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice. An omission in such cases must be taken to have been as deliberate as though it were express, certainly after long-standing action on the subject-matter. Indeed, we are not in any position to pass on the questions involved We must judge upon records prepared by litigants, which do not contain all that may be relevant to the issues, for they cannot disclose the conditions of this industry, or of the others which may be involved. . . . Our vision is inevitably contracted, and the whole horizon may contain much which will compose a very different picture.⁵⁰

Here, too, we see no reference to imaginative reconstruction. Congress did not decide the question; but instead of treating silence as an invitation to consider what they would have decided had they attended to the issue, Hand treats silence as a denial of copyright eligibility.

Again, it is not likely that Hand proceeded this way because he had not yet developed his theory of statutory interpretation. A similar question arose before Hand in 1940. This time, the question was whether the holder of a copyright in a phonograph record could prevent persons who purchase a record from using it in a radio broadcast. Hand ruled in *RCA Manufacturing Co. v. Whiteman*⁵¹ that the question was again a novel one about the scope of eligibility for copyright protection, and that such a question had to be resolved by Congress, not the courts.

One last copyright decision authored by Judge Hand. In 1939, *Sheldon v. Metro-Goldwyn Pictures Corp. (Sheldon II)*⁵²—the second Hand decision involving the idea-expression dichotomy—came back before the court on the

48. *See id.* at 54–56.

49. 35 F.2d 279 (2d Cir. 1929).

50. *Id.* at 281.

51. 114 F.2d 86 (2d Cir. 1940).

52. 106 F.2d 45 (2d Cir. 1939).

question of remedy.⁵³ Recall that the first time around, Hand concluded that the movie was guilty of infringing portions of the plot of the play. The plaintiff argued that this meant it was entitled to recover all the profits from the infringing movie. The defendants argued that the profits should be apportioned, and the plaintiff was entitled only to the portion attributable to the infringement. Hand agreed with the defendants. In justifying this conclusion, Hand briefly mentioned the language of the 1909 Copyright Act, which empowered courts to award damages “in lieu of actual damages and profits.”⁵⁴ But the ultimate basis for his decision was an amendment to the Patent Act adopted by Congress in 1922.⁵⁵

As Hand explained, Congress in 1922 amended the Patent Act to allow “opinion or expert testimony” on the question of apportionment.⁵⁶ Hand reasoned that “we ought not to disregard the progress of the law in a field so close to that before us.”⁵⁷ On this basis, a previous decision of the Second Circuit disapproving apportionment in copyright was overruled, Hand writing that “[a] court is justified in basing its decrees upon practices common in other human affairs.”⁵⁸ The decision proved to be of enormous and lasting significance.

The second *Sheldon* case can no more be considered an exercise in imaginative reconstruction than the other copyright decisions I have mentioned. If anything, *Sheldon II* would have to be regarded as an example of what Professor Bill Eskridge calls dynamic statutory interpretation.⁵⁹ Hand did not ask what the Congress of 1909 would have thought about the matter; he relied on what Congress did thirteen years later under another statute to resolve an analogous question.⁶⁰

What are we to make of this admittedly limited excursion into Learned Hand’s practice of statutory interpretation? When he addressed the theory of statutory interpretation in extrajudicial writing, Hand never wavered from his position that imaginative reconstruction was imperative. When called upon to engage in statutory interpretation in practice, at least under the Copyright Act, Hand never relied specifically on what he insisted was required in theory. One lesson, I think, is that the theory was incomplete.

53. *Id.* at 48.

54. *Id.* at 49.

55. *Id.* at 49–50.

56. *Id.* at 49.

57. *Id.*

58. *Id.* at 50.

59. See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

60. Hand made a similar argument in his dissenting opinion in *De Acosta v. Brown*, 146 F.2d 408, 414 (2d Cir. 1944), where he reasoned from one section of the Copyright Act (dealing with liability of persons who copy works that have omitted notice of copyright) to a question from a second section of the Copyright Act (dealing with persons who copy from copies that they mistakenly believe to be originals). This type of intratextual analogy could be advanced to support a conclusion based on imaginative reconstruction, but Hand did not present it in those terms.

Certainly if we consider Hand's decisions about the types of expression eligible for copyright protection, there was no contradiction between the underlying premises of the theory and practice. When confronted with claims for protection of fabric designs or broadcasts of phonograph records, Hand forthrightly concluded that it was impossible to say how Congress would have resolved the issue in 1909.⁶¹ There were simply too many imponderables and too many conflicting interests for a court to make a reasoned guess. This seems to me to be fully consistent with his philosophical commitment to legislative supremacy and his understanding of the legislative process as a set of compromises between competing interests.

The decision in *Sheldon II* about remedies for copyright infringement can also be reconciled with Hand's primary commitments. Recall that he acknowledged, in one of his last reflections on statutory interpretation, that in some cases Congress will signal that it is leaving a question for the courts to decide. It does so primarily in adopting an open-ended statute, saying in effect: "You do what *you* think best about that."⁶² The question whether copyright infringers must disgorge all profits or could be allowed to show that profits should be apportioned, it seems to me, falls comfortably within this class of cases. Congress in 1909 said that courts could award damages other than "actual damages and profits," suggesting broad judicial discretion in matters of setting compensation.⁶³ And courts have traditionally exercised greater autonomy in determining remedies than in identifying primary obligations. Also, Hand may have regarded the legislative judgment about the possibility of apportionment in patent cases, rendered in 1922, to be a reasonably reliable guidepost about what Congress would have decided in 1909, if it had it expressly considered the issue. To be sure, Hand did not attempt to justify his decision about apportionment in terms of either delegated lawmaking or imaginative reconstruction. But the justifications were there, if he had seen fit to make them.

The most difficult decisions to square with Hand's underlying commitments were the ones adopting the idea-expression dichotomy. The most notable feature of these decisions is that they do not read like statutory interpretation opinions.⁶⁴ There is no reference to the language of the statute at all. They read like common law decisions, or perhaps decisions based on general principles common to all copyright regimes.

My view is that Hand did not seek to reconcile the idea-expression dichotomy with his basic commitment to legislative supremacy because it did not occur to him that the dichotomy was a potentially contestable proposition. It was, in his mind, a simple truth about the nature of any copyright regime. As he put it, protection would be meaningless if limited to the actual words used because this would be susceptible of easy evasion.⁶⁵

61. *See supra* notes 44–60 and accompanying text.

62. HAND, *supra* note 20, at 306.

63. *See* Copyright Act of 1909, Pub. L. No. 60-349 § 25(b), 35 Stat. 1075, 1081.

64. *See supra* notes 44–60 and accompanying text.

65. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

But there must be some limit to how far one abstracts from the words used, or else the first person to copyright a play could prevent anyone else from writing a play.⁶⁶ Hand also regarded the process of deciding when the boundary has been crossed between expression and abstract idea to be an intensely particularized inquiry, depending on the totality of the factual circumstances. It was not the kind of thing that can be captured by a legislative judgment or reduced to a verbal formulation.

Perhaps if Hand were writing today, he would attempt to ground the idea-expression dichotomy in constitutional concerns. The Constitution authorizes the creation of copyright laws to promote “the Progress of Science and useful Arts,” not to suppress such progress.⁶⁷ And the First Amendment, which protects the freedom of speech, presumably imposes some limit on what can be protected with a monopoly right in the nature of a copyright.⁶⁸ But it was not the fashion of the day, and certainly was not Hand’s style, to support particular interpretations of statutes with reference to avoiding constitutional concerns. Still, the fact that Hand regarded the dichotomy as an incontestable proposition and hence one that did not require any justification in terms of what Congress would have said about it is an interesting piece of data and suggests the need for a further qualification to his theory of statutory interpretation.

In sum, Hand’s performance in resolving cases arising under the Copyright Act suggests three limitations, or qualifications, on his theory of imaginative reconstruction. One is that the theory applies only when the court encounters a contestable proposition about which it can be reasonably confident how the enacting legislature would have resolved it. A second is that there may be issues as to which the legislature has impliedly delegated authority to the courts to resolve the issue in light of accumulated experience. A third is that there may be issues which are not legitimately contestable, as to which one would not expect to find an answer by asking what the legislature would have said.

Even with these amendments, there is still the epistemic problem and the problem of preventing the importation of the judge’s own values in reconstructing what the enacting legislature would have done. And I have not even mentioned other complications recognized by Hand outside the copyright context, such as how much weight to give to the views of an administrative agency charged with enforcement of a statute, or how strictly to adhere to prior judicial precedents interpreting the statute.

When all is said and done, it is fair to ask how large a set of cases remains in which the judge should deploy the technique of imaginative reconstruction. As we have seen, Hand did occasionally employ imaginative reconstruction in resolving statutory interpretation questions—the *Fishgold*

66. *Id.*

67. U.S. CONST. art. I, § 8, cl. 8.

68. *See id.* amend. I.

case is a striking example.⁶⁹ But considering Judge Hand's performance in interpreting the Copyright Act, the set was not very large.⁷⁰

What, if anything, is the contemporary relevance of all this? Perhaps, at a minimum, one can say that Judge Posner, who embraced imaginative reconstruction shortly after joining the bench in 1983, showed good sense in abandoning it. What I have called the epistemic difficulties unquestionably loom much larger today than they did in Hand's time. More and more legislation has come to resemble the Internal Revenue Code, and less and less the Selective Service Act of 1940. Perhaps one can identify some prominent controversies that could be resolved using imaginative reconstruction. For example, the Supreme Court's decision in *King v. Burwell*,⁷¹ holding that Affordable Care Act subsidies are available on federally run health care exchanges even though the statute speaks of exchanges "established by a state,"⁷² could perhaps be justified by asking what the legislators who voted for the Act would have decided if they had paid attention to the issue. Chief Justice Roberts's opinion for the Court did not proceed this way, but perhaps it is the best justification for the decision. For most run-of-the-mill statutory interpretation problems, however, it will be impossible to say with any confidence what the Congress would have decided if it had attended to the issue.

One thought that has occurred to me is that if Hand were alive today perhaps he would be a textualist. I say this because his two primary commitments—to a conception of separation of powers in which courts defer to legislative judgments about policy, and to a perception of the legislative process as one that produces messy compromises that may often clash with the judge's own views of what is just or fair or even common sense—are similar to the primary commitments that seem to drive today's textualists. Certainly Justice Scalia, the leading judicial advocate of textualism in statutory interpretation, embraced similar commitments. He consistently reprimanded judges whom he thought were guilty of substituting their own preferences for those of the enacting legislature. Yet he also painted a picture of the legislature as a body of self-serving manipulators, eager to fool their colleagues and judges with potted legislative history.⁷³ Judge Easterbrook, another prominent textualist, shares similar views.⁷⁴

Yet even if his premises were similar to those of today's textualists, I doubt that Hand would ever be a full-fledged convert to textualism. He clearly would have rejected one feature of textualism—an approach to interpretation that relies heavily on dictionary definitions and canons of interpretation. His

69. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 788–89 (2d Cir. 1946); see also cases cited *supra* note 22.

70. See *supra* notes 44–60.

71. 135 S. Ct. 2480 (2015).

72. *Id.* at 2497.

73. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 30–37 (Amy Guttmann ed., 1997).

74. See generally Easterbrook, *supra* note 17.

touchstone, from beginning to end, was to extract and enforce the purpose of the legislature that enacted the law,⁷⁵ and he rejected these sorts of interpretative aids because he thought they were a very inadequate way of capturing the legislative purpose.

What would Hand think about another central tenet of textualism—forswearing all reliance on using legislative history to interpret statutes? We do not know, since the practice of consulting official legislative history was not common in his day and did not begin to gain momentum until late in his judicial career. As far as I can tell, Hand did not cite legislative history materials very often, certainly never in copyright cases.⁷⁶ Given that his touchstone was always to extract the legislative purpose,⁷⁷ I doubt that he would have endorsed a blanket prohibition on referencing legislative history, provided that history sheds important light on how the balance of interests came to rest in the legislature.

But of course, we cannot know for sure. Learned Hand was also the author of the “Hand formula” in the law of torts, which essentially seeks to define reasonable behavior as that which produces benefits in excess of costs.⁷⁸ Perhaps he would have concluded that a general practice of requiring lawyers to research and debate legislative history in every case of statutory interpretation flunks the Hand formula, and he would have joined the call for a general prohibition on that basis.⁷⁹

A deeper question is whether my story suggests that any unitary theory of statutory interpretation is doomed to failure. The picture I have drawn is one in which Learned Hand—a very smart man and supremely able judge—tenaciously embraced a theory of statutory interpretation in extrajudicial writing that he was either unable or unwilling to follow in practice, at least on a consistent basis. Does this mean that any unitary theory of interpretation—be it textualism, purposivism, integrity theory, pragmatism,

75. See, e.g., *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (“[Statutes] should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.”).

76. I am aware of two opinions in which Hand relied on legislative history, both of which involved challenges to action by administrative agencies created during the New Deal. See *Guisseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring); *SEC v. Robert Collier & Co.*, 76 F.2d 939, 940–41 (2d Cir. 1935). As Nicholas Parrillo has documented, citation to legislative history first became a routine practice in briefs filed by lawyers representing New Deal agencies. See generally Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 *YALE L.J.* 266 (2013).

77. See, e.g., *supra* notes 44–60.

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

79. A student note argues that Hand would reject legislative history on the ground that, once courts start to consult legislative history, legislators have an incentive to manipulate that history in an effort to influence how the statute is interpreted. See generally Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 *HARV. L. REV.* 1005 (1992). My view is that the danger of manipulation is a less serious objection than is the cost-benefit objection, namely, that the costs of having lawyers and judges routinely research legislative history greatly exceed the benefits, in terms of producing greater interpretational confidence. See Panel, *Text Over Intent and the Demise of Legislative History*, 43 *U. DAYTON L. REV.* 1, 108–09 (2018) (remarks of Professor Thomas W. Merrill).

you name it—is doomed to failure when it runs up against the messy world of real controversies? Perhaps it does.

Still, I do not think Hand's effort to derive a unitary theory of statutory interpretation, or for that matter any other attempt to derive such a theory, is a waste of time or that it is without consequences in resolving real world disputes. As an academic, I cannot help but be deeply impressed by Hand's struggle, throughout most of his career, to translate his normative premises and empirical perceptions into a coherent theory about how to interpret statutes. As I have suggested in discussing Hand's copyright decisions, he may not have been able to use the full-blown version of his theory very often. But there are clear echoes of that theory in his decisions declining to extend copyright protection to matters where it is utterly unknowable how Congress would reconcile the conflicting interests, as well as in his sense of the kind of issues that Congress would regard as being given to courts to decide, as opposed to waiting for legislative guidance. The theory was the outgrowth of a broader philosophy of government and judging. Hand's effort to work out and defend his theory, in extrajudicial writing, undoubtedly shaped his general attitude about how to resolve the issues presented to him for resolution as a judge, even if the theory in its express formulation asked too much, and it was not feasible to use it very often.

In any event, I hope I have conveyed enough of the flavor of Judge Hand's thoughts about, and his performance in, the practice of statutory interpretation to show that he was both an exceptional thinker and an extraordinary man. Although his time has passed and questions of the day are different, his thoughts and his performance are very much worth engaging with today. He was a great judge in the truest sense of the word, one whom the Second Circuit should be unreservedly proud. He also has a lot to teach us, if we only take time to listen and learn.